Neutral Citation [2012] IEHC 38

THE HIGH COURT

JUDICIAL REVIEW

[2012 No. 269 JR]

BETWEEN

ANTHONY ENOBO AKPEKPE

APPLICANT

AND

THE MEDICAL COUNCIL, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 1st day of February, 2013

These proceedings arise from the finding and decision of the Fitness to Practise Committee of the Medical Council made in relation to the applicant following an inquiry held pursuant to Part 8 of the Medical Practitioners Act 2007 (hereinafter referred to as "the Act of 2007"). At the conclusion of that hearing which took place in February, 2012 the Committee found that of several complaints against the applicant only one had been proven as to fact which amounted to poor professional performance. The Committee then decided that the appropriate penalty under s. 71 of the Act of 2007 was to apply the sanction of "advice" contained in s. 71(a) of the Act which provides for the sanctions of "an advice or admonishment, or a censure, in writing". The Committee thus recommended to the Council that the applicant be 'advised' as to his performance on the basis that it was at the lower end of poor professional performance. The Medical Council considered the report of the Fitness to Practise Committee and decided to advise both the applicant and the public of the finding made in relation to his professional conduct, the reason being stated as the seriousness of the finding of poor professional performance made against him.

The present proceedings were commenced by leave of the High Court (Peart J.) granted on 26th March, 2012, in which the applicant seeks an order of *certiorari* quashing the finding and decision of the Fitness to Practise Committee and a further order quashing the decision of the Medical Council made subsequently thereto. In the proceedings the applicant seeks a declaration that the provisions of Part 8 and Part 9 of the Medical Practitioners Act 2007, insofar as they deny the applicant a right of appeal from a decision or finding of the Fitness to Practise Committee into the guilt of the applicant of an allegation of poor professional performance, constitutes a denial of fair procedures, a breach of the applicant's constitutional rights, a breach of the applicant's rights enshrined in the European Convention on Human Rights and Fundamental Freedoms and is contrary to the principles of constitutional and natural justice. The applicant also seeks a declaration that the provisions of s. 75(1) of the Medical Practitioners Act 2007 insofar as it denies the applicant a right to appeal against the imposition of a sanction and/or against the making of a finding by the Medical Council and/or the Fitness to Practise Committee of the Medical Council is repugnant to the provisions of Bunreacht na hÉireann and is void. Section 71(a) of the Act of 2007 is the only disciplinary provision of the section which does not admit of an appeal and the applicant contends that his equality rights are thereby infringed in that he lacks a range of remedies available to other medical practitioners who suffer more grievous findings and sanctions imposed under other limbs of the section. He contends that even the relatively modest findings made against him in this case have nonetheless extremely serious adverse consequences in terms of his professional reputation which warrant the existence and availability to him of some form of appeal mechanism.

No complaint was made at the hearing about the fairness of the hearing conducted by the Fitness to Practise Committee.

The statement of opposition delivered on behalf of the Medical Council denies that the non-existence of an appeal on being sanctioned pursuant to s. 71(a) constitutes an invidious or unjustifiable discrimination against the applicant or that aggrieved professionals in other professional regulatory systems enjoy a right of appeal from any finding made against them in relation to their professional performance or that all other professional persons have a right of appeal in similar circumstances. The applicant's right to fair procedures does not mandate or require the existence of an appeal. Further, in circumstances where no sanction was imposed on the applicant, there was no determination of the civil rights and obligations of the applicant (the relevant civil right being the right to practise medicine) and in the premises the applicant is not entitled to the relief sought. It is further denied that the legislative regime in question infringes the applicant's rights as guaranteed by Article 40 of the Constitution. On the contrary, the common good requires the publication of facts concerning persons such as the applicant which may affect the public. Any interference with his good name or professional reputation was upon grounds of legitimate public interest, was proportionate, without discrimination and reasonable.

Similar denials appear in the statement of opposition filed on behalf of the State respondents who contend that the Oireachtas is entitled to regulate the manner in which medical practitioners operate and to discipline its practitioners for breaches of the profession's rules and standards of conduct. The Act of 2007 established an elaborate tiered structure for the investigation, determination and conclusion of complaints against medical practitioners. This process involves three separate bodies: a Preliminary Proceedings Committee to investigate a complaint in the preliminary and to determine whether a *prima facie* case has arisen under s. 59 of the Act, a Fitness to Practise Committee to hear the complaint in a full inquiry under s. 65 of the Act and the Medical Council to determine sanction under s. 71 of the Act. In this context it is submitted that a doctor's rights are, and the applicant's rights were, fully protected.

BACKGROUND FACTS

The applicant is a medical practitioner and fellow of the Royal College of Surgeons who in September, 2010 was employed by Mediserve Ireland, an "out of hours" medical service for general practitioners operating in Dublin.

On that date, the applicant received a call to attend at the home of Mr. Patrick Lowe of 50 Ashtown Park, Monkstown in the County of Dublin. Mr. Lowe was a 74 year old man with multiple physical and sensory disabilities who lived in the care of his sister, Ms. Elizabeth Lowe. Mr. Lowe was blind, cognitively impaired and with limited mobility and poor balance. These disabilities followed a fall down steps resulting in the head injury which occurred in 1999. Prior to that the plaintiff had epilepsy since childhood with a past

history of alcohol dependency.

The applicant arrived at the home of the patient shortly after mid-day and was met at the front door by his carer. Following a discussion with the carer, who informed the applicant of the patient's disabilities, the applicant conducted an examination of the patient, focussing particularly on an examination of the patient's abdomen. He did this because he had been informed that the patient had stomach cramp and had previously vomited. The applicant carried out the examination by placing his hand on the patient's abdomen and by using his stethoscope and an automatic sphygmomanometer. As far as the applicant was concerned, this abdominal examination revealed a mildly distended abdomen which was non-tender. The applicant noticed no evidence of peritonitis or no localised swelling to suggest a hernia. Auscultation was also normal. He thus was of the view that the patient had a viral gastrointestinal upset and advised that he be commenced on anti-emetics and oral dioralyte. He provided the carer with a prescription and felt satisfied that the carer understood his advices. He thereafter made his report as required by his employer to the relevant channels.

Subsequently, however, some two days following the examination of the patient by the applicant the said Patrick Lowe died at home and the *post mortem* report diagnosed an acute small bowel obstruction secondary to incarcerated para-umbilical hernia with aspiration of bowel contents. The post mortem concluded that death resulted from aspiration of bowel contents into the major airways consequent upon unrelieved small bowel obstruction due to an incarcerated para-umbilical hernia.

By letter dated 14th April, 2011, Ms. Elizabeth Lowe, the patient's carer, made a complaint to the Medical Council about the conduct of the applicant in relation to the care of Mr. Patrick Lowe at his home on 13th September, 2010. The applicant was duly notified of the complaint and by letter dated 30th May, 2011, denied the allegations made by the complainant. By letter dated 8th September, 2011, the Medical Council advised the applicant that the Preliminary Proceeding Committee considered the matter set out in the complainant's correspondence, together with the applicant's correspondence, and had formed the view that there was a *prima facie* case to warrant further action being taken in relation to the complaint pursuant to s. 63(a) of the Medical Practitioners Act 2007 and had decided to refer the matter to the Fitness to Practise Committee.

Thereafter the applicant was furnished with a notice of intention to hold an inquiry under Part 8 of the Act and the said notice listed seven allegations of poor professional performance against him, as follows:

> (a) failed to obtain an adequate medical history in respect of Mr. Lowe; and/or
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> (b) failed to carry out adequate examinations or carry out or arrange investigations in respect of Mr. Lowe; and/or
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> (c) failed to communicate adequately to Mr. Lowe's sister, Ms. Elizabeth Lowe, that if Mr. Lowe's condition deteriorated or did not improve, Mr. Lowe would require immediate follow-up treatment by a medical practitioner and/or a review in hospital; and/or
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> (d) provided to the Medical Council, by letter dated 26th June, 2011, a record of the treatment afforded by him to Mr. Lowe which differed from the record which he had previously furnished to Dr. Donald Brookes, general practitioner and/or doctor on duty; and/or
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> (e) failed to maintain any adequate records in respect of his attendance on Mr. Lowe;
>
> (f) failed to adequately identify himself by:
>
> > (i) failing to confirm his full name to Ms. Elisabeth Lowe; and/or
> >
> > (ii) writing a prescription and/or a record, which prescription and/or record:
> >
> > > (a) did not contain his Medical Council registration number; and/or
> > >
> > > (b) contained an illegible signature; and/or
>
> (g) such further allegations as might be notified to the applicant in advance of the inquiry.

The applicant was furnished with particulars of evidence, which included a report of Dr. Peter Wahlrab which contained a professional opinion on the allegations of poor professional performance made against the applicant.

The Fitness to Practise Committee proceeded to hear the complaint pursuant to s. 65 of the Medical Practitioners Act 2007 in February, 2012. It heard evidence from Ms. Elizabeth Lowe and Dr. Wahlrab on behalf of the Chief Executive Officer and the applicant gave evidence on his own behalf. At the conclusion of the hearing the Fitness to Practise Committee drew up its report and found that four of the allegations were not proven as to fact. The first allegation was proven as to fact and did amount to poor professional performance. The fourth allegation was proven as to fact but did not amount to poor professional performance.

The Committee recommended to the Medical Council that the applicant be advised as to his performance on the basis that it considered his performance to be at the lower end of poor professional performance. Pursuant to the provisions of s. 71 of the Act, the Medical Council considered the report of the Fitness to Practise Committee and decided under the provision of s. 71(a) of the Act of 2007 to "advise" the applicant in relation to his professional conduct the reasons stated as being the seriousness of the finding of poor professional performance made against the applicant.

Before considering the nature of the submissions made by the respective parties at the hearing, it is necessary to turn now to consider the statutory framework on foot of which the particular finding and sanction was imposed.

STATUTORY REGIME

The Medical Practitioners Act 2007 (hereinafter referred to as "the Act of 2007") replaced the Medical Practitioners Act 1978 and provided for a range of measures in relation to medical practitioners, including the investigation of complaints brought against them. Parts 7 and 8 of the Act of 2007 relate to complaints made to the Preliminary Proceedings Committee concerning registered medical practitioners and Part 8 then deals with complaints which are thereafter referred to the Fitness to Practise Committee. Part 9 of the Act relates to the imposition of sanctions on registered medical practitioners following reports of the Fitness to Practise Committee.

Section 57 of the Act provides, *inter alia*, that a person may make a complaint to the Preliminary Proceedings Committee concerning a registered medical practitioner on the grounds of poor professional performance. In the interpretation section of the Act of 2007, "poor professional performance" in relation to a medical practitioner is stated to mean:-

> "A failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of medical practitioners practising medicine of the kind practised by the practitioner."

A matter coming before the Preliminary Proceedings Committee shall under s. 63 of the Act, refer the complaint to the Fitness to Practise Committee where it is of the opinion that there is a *prima facie* case to warrant further action being taken in relation to a complaint. That is what occurred in the present case.

Section 65 (3)(b) of the Act provides that:-

> "at the hearing of a complaint before the Fitness to Practise Committee the Chief Executive Officer shall present the evidence in support of the complaint and the testimony of witnesses attending the hearing shall be given on oath".

Section 65 (3)(c) provides that:-

> "there shall be a "full right to cross examine witnesses and call evidence in defence and reply".

Section 67 of the Act provides that a medical practitioner may at this juncture consent to being censured by the Council. The Committee under the same section may also request the practitioner to undertake not to repeat the conduct the subject matter of the complaint or undertake to be referred to a professional competence scheme or to undertake any requirements relating to the improvement of his competence and performance which may be imposed. None of those things occurred in this case.

The Committee thus conducted and completed its inquiry and made findings as outlined above. It then submitted a report in writing on its findings to the Medical Council for the imposition of sanction by the Council under s. 71 of the Act.

As the constitutional validity of Part 9 of the Act is challenged in these proceedings, it becomes necessary to consider the relevant sections in some detail. Section 71 provides:-

> "71.-Subject to sections 57(6)(a) and 72, the Council shall, as soon as is practicable after receiving and considering the report referred to in section 69(1) of the Fitness to Practise Committee in relation to a complaint concerning a registered medical practitioner where section 70(b) is applicable, decide that one or more than one of the following sanctions be imposed on the practitioner:
>
> (a) an advice or admonishment, or a censure, in writing;
>
> (b) a censure in writing and a fine not exceeding €5,000;
>
> (c) the attachment of conditions to the practitioner's registration, including restrictions on the practice of medicine that may be engaged in by the practitioner;
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> (d) the transfer of the practitioner's registration to another division of the register;
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> (e) the suspension of the practitioner's registration for a specified period;
>
> (f) the cancellation of the practitioner's registration;
>
> (g) a prohibition from applying for a specified period for the restoration of the practitioner's registration."

It will be apparent from the foregoing schedule of sanctions that they are in ascending order of gravity. In the instant case, the Court is concerned only with the first of the sanctions imposed under s. 71 (a) because a practitioners remedies by way of appeal are quite different under that subsection than under the remaining subsections of section 71.

The Act of 2007 then provides:-

> "74.- A decision under section 71 to impose a sanction (other than a sanction referred to in section 71(a)) on a registered medical practitioner shall not take effect unless the decision is confirmed by the Court on an application under section 75 or 76.
>
> 75.-(1) A registered medical practitioner the subject of a decision under section 71 to impose a sanction (other than a sanction referred to in section 71 (a)) may, not later than 21 days after the practitioner received the notice under section 73 (1) of the decision, appeal to the Court against the decision.
>
> (2) The Court may, on the hearing of an appeal under subsection (1) by a medical practitioner, consider any evidence adduced or argument made, whether or not adduced or made to the Fitness to Practise Committee.
>
> (3) The Court may, on the hearing of an appeal under subsection (1) by a medical practitioner –
>
> (a) either –
>
> (i) confirm the decision the subject of the application, or
>
> (ii) cancel that decision and replace it with such other decision as the Court considers appropriate, which may be a decision –
>
> (I) to impose a different sanction on the practitioner, or

(II) to impose no sanction on the practitioner,

and

(b) give the Council such directions as the Court considers appropriate and direct how the costs of the appeal are to be borne."

The critical point insofar as the applicant is concerned, being the recipient of a sanction under s. 71(a), is that he enjoys no rights of appeal such as those enjoyed by practitioners found guilty and in respect of whom any of the sanctions described at s. 71 (b) – (g) are imposed.

By contrast, it is pointed out that, under the Medical Practitioners Act 1978, such a right of appeal was held to exist under and by virtue of s. 13(7) thereof, albeit that such right of appeal was limited to an appeal to the Council only and did not provide for an appeal to the Court.

SUBMISSIONS OF THE APPLICANT
Counsel for the applicant pointed out that while a clear appeal system is set out for sanctions listed in s. 71(b)–(f), there is no appeal mechanism in respect of the sanctions set out in section 71(a). Although the sanctions outlined in s. 71 (a) are more lenient than those set out in s. 71(b)–(f) the effect of such a sanction nonetheless has an irreversible impact on the applicant's professional career and his livelihood.

Adverting to the disparity of appeal remedies as between s. 71(a) and s. 71(b)–(f), counsel on behalf of the applicant argued that the constitutional guarantee under Article 40.1 of the Constitution that all citizens shall be held equal before the law was thereby breached. In the absence of any legitimate rationale for the failure to provide an appeal mechanism for those medical practitioners affected by s. 71(a) of the Act of 2007, the said section must be seen as repugnant to the provisions of Article 40.1 of the Constitution. Ironically, under the current statutory regime a medical practitioner sanctioned more severely by the Medical Council is at an advantage over the applicant in that such person, having been more severely sanctioned, may appeal and the High Court on hearing the appeal can remove the sanction altogether.

Another aspect of equality before the law is the principle of equal access to the courts. The applicant had been denied this right also. The disparity of remedies could also be seen as a violation of the applicant's personal rights under Article 40.3 of the Constitution, given that under that particular provision the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen". In the present circumstances, the plaintiff's right to work and earn his livelihood had been substantially impacted by the findings made by the Fitness to Practise Committee. The decision of the Council to impose a sanction to advise the applicant of his professional conduct will remain on his employment record and permanently damage his name and reputation as a medical practitioner.

It is accepted that constitutional justice does not create an absolute right of appeal from any decision, but where there is a determination involving a civil right in a disciplinary hearing, it is necessary to provide an appeal on the merits of the case. This was clear under Article 6 of the European Convention on Human Rights which specifically states:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

When determining a civil right or obligation there must be the necessary mechanism whereby a right of appeal on the merits of the case is provided. In *Ghosh v. General Medical Council* [2001] UKPC 29 [2001] 1 WLR 1915, the proceedings of the Medical Council were held to be in compliance with Article 6 given the availability of a rehearing on appeal to the Privy Council. In that case it was stated at p.1922-1923:-

> "Counsel's principal contentions were directed to support a submission that erasure was an excessive and inappropriate penalty, and that the Board should substitute a lesser penalty such as a further period of conditional registration. He sought to persuade their Lordships to adopt a less restrictive approach to their jurisdiction than may sometimes have been adopted in the past. With this in view he reminded their Lordships that proceedings against a registered practitioner for professional misconduct involve a determination of his or her civil rights and obligations and accordingly attract the protection of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such protection requires either that the decision-making body (in this case the committee) constitute an independent and impartial tribunal or, if not, that its processes be subject to control by an appellate body with full jurisdiction."

In the applicant's particular circumstances there was a further difficulty, namely, that the applicant's legal advisers were placed in an invidious position because if they had advocated for a minimum penalty the net outcome became that their client would not be in a position to appeal this penalty. On the other hand had they advocated for a higher penalty they would have been advocating against the interests of their own client.

While, of course, the remedy of judicial review had been invoked by the respondents as indicative of a remedy available to the applicant, the applicant submitted that judicial review was not an adequate replacement for an appeal on merits. There are substantial differences between the two remedies, given that judicial review examines the legality and procedural conduct of an inquiry whereas an appeal is an examination based primarily on merits. In summary, the absence of a mechanism to appeal the decision leaves the applicant without any recourse to the courts.

Finally, while the applicant acknowledged that the Supreme Court in *M.D. (A Minor) v. Ireland, AG & DPP* [2012] IESC 10 [2012] 2 I.L.R.M. 305 confirmed that equality rights must be seen in context and that there may be objective reasons to justify differentiation, no such requirement arose in the instant case.

SUBMISSIONS OF THE FIRST RESPONDENT
Counsel on behalf of the first respondent, first pointed out that no case was now being advanced to suggest that the ruling or sanction imposed on the applicant should be quashed on judicial review grounds of irrationality or want of fair procedures. The case had become purely a constitutional challenge to the validity of the section only.

In this regard Parts 8 and 9 of the Act of 2007 enjoyed a presumption of constitutionality.

In terms of any proportionality test applied to the validity of s. 71 (a) it had to be borne in mind that this was the mildest of all the sanctions provided for under the disciplinary code, being less than either an admonishment or censure of the applicant.

As had been acknowledge on behalf of the applicant, no automatic right of appeal necessarily arises as a matter of constitutional justice. Nor, he argued, does Article 6 of the European Convention on Human Rights and Fundamental Freedoms have relevance or application, not least because the determination in the instant case was not a determination of civil rights. Article 6 of the Convention in any event does not require a right of appeal in all cases.

Insofar as the equality argument is concerned, the decision in *M.D. (A Minor) v. Ireland, AG & DPP* [2012] IESC 10 [2012] 2 I.L.R.M. 305 [2012] I.E.S.C. 1 only outlaws invidious discrimination. There was no question of any such discrimination arising in the instant case, nor did the sanction imposed deprive the applicant of his employment or his ability to earn his livelihood.

SUBMISSIONS ON BEHALF OF THE SECOND RESPONDENT
Counsel on behalf of the second respondent argued that it was clear from the decision in *M. v. The Medical Council & AG* [1984] 1 I.R. 485 (at p. 498) that there was no basis for contending that there must be a right of appeal available to the applicant. As was apparent from the judgment in that case, the court had adopted the "Huddart Parker test" as the appropriate test in that regard. *M. v. The Medical Council & AG* (supra) was clear authority for the proposition that no right of appeal to the courts arises in the case of a minor censure or sanction which does not affect a citizen's civil rights. In this regard a distinction must be drawn between major and minor sanctions. No civil right was affected in the process in which the applicant was involved.

Contrary to contentions advanced on behalf of the applicant, the Act of 1978 provided no appeal to the court for admonishment and the Nurses Acts and Dentists Acts had followed this regime in that none provide for a right of appeal for minor sanctions.

The structure of the Act of 2007 provides for two bodies to look at complaints. There is a preliminary screening body which assesses the complaint before the matter is considered by the Fitness to Practise Committee which must then hold a full hearing. Throughout its proceedings that committee has the benefit and assistance of advice from senior counsel. Any allegations must be proved beyond reasonable doubt.

In all these circumstances no real complaint could be made that there had been any procedural unfairness or that the disciplinary regime was disproportionately severe having regard to the public interest in upholding the highest standards of medical practice.

Insofar as the equality argument was concerned, equality was not to be equated with uniformity. As the case of *M.D. (A Minor) v. Ireland, AG & DPP* [2012] IESC 10 [2012] 2. I.L.R.M. 305 had made clear; the relevant question is to enquire whether any distinction is unjust, unreasonable or arbitrary.

Any distinctions arising in the instant case were fully justified in the sense that without such differentiation, every offender could challenge a sanction imposed if that sanction differed from that imposed on some other offender. The requirement was to look at the facts which gave rise to the imposition of the sanction and in this context one set of circumstances could be considerably more serious than another. While accepting that rights could be affected by the imposition of major sanctions imposed in relation to offences at the top end of the scale, this particular offence is at the very lowest end of the scale and involved a minor sanction only.

In reply to the submissions of both respondents, counsel for the applicant, emphasised that his client, if not entitled to a full right of appeal to the courts was at least entitled to an internal appeal which would admit of a fresh consideration of the merits. Kelly J. in *Prenderville v. Medical Council* [2008] 3 I.R. 122 had interpreted s. 13(7) of the 1978 Act as requiring interpretation in that manner. That right was taken away by the Act of 2007.

DECISION
Under both the Act of 1978 and the Act of 2007 the High Court is required to confirm particular sanctions of cancellation, suspension and conditions and the statutory scheme allows for a full appeal against decisions of the Council to impose such sanctions.

That said, it is clear from *M. v. The Medical Council* [1984] 1 I.R. 485 that the sanctions of advice, admonishment or censure may be characterised as minor sanctions only and of those three forms of sanction that of "advice" is at the very lowest end of the scale. In that case Finlay P. stated (at p. 499):-

> "I am of the opinion that the powers conferred on either the Council or the Committee under the Act of 1978 are not judicial powers and that the functions being exercised by them are not the administration of justice. Apart from the right and obligation to hold the inquiry itself, the only power of the Committee or the Council which could be said to be final and, in a sense, binding are the publication of a finding by the Committee of misconduct or unfitness to practise and the Council's power to advise, admonish or censure a practitioner. … these would be functions so clearly limited in their effect and consequence that they would be within the exception provided by Article 37 of the Constitution even if (contrary to what I believe to be the true legal situation) they constituted the administration of justice."

Although *M. v. The Medical Council* was determined against the background of The Medical Practitioners Act 1978, the ambit of appeal under that Act was identical to that in the Act of 2007.

In that landmark case, Finlay P. expressly adopted the "Huddart Parker principles", derived from the decision of Griffith C.J. in *Huddart, Parker & Co. Proprietary v. Moorehead* [1909] 8 C.L.R. 330 when he stated:-

> "I am of opinion that the words "judicial power" as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversy between its subjects, or between itself and its subjects, whether the right relates to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

In the Solicitors Act case (*In Re the Solicitors Act*, 1954 [1960] I.R. 239), the Supreme Court adopted this test and accepted as correct the words of Holmes J. in *Purtis v. Atlantic Coastline* 211 U.S. 210 at. P227:-

> "The nature of the final act determines the nature of the previous inquiry"

and further accepted as correct the criterion laid down by Palles C.B. in *R. (Wexford County Council) v. Local Government Board* [1902] 2 I.R. 349 at p.374:-

> "To erect a tribunal into a "Court" or "jurisdiction", so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact … But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial."

Both sides to this case accept that a right of appeal does not necessarily arise as a matter of constitutional justice in every case where a disciplinary body imposes a sanction.

Thus *in Quinn v. The Honorable Society of Kings Inns* [2004] IEHC 220 [2004] 4 I.R. 344 Smyth J. held that, even in circumstances where an application was viewed as a public law matter, the requirements of natural justice as regards a right of appeal would vary with the circumstances of the case. In that particular case the requirements of natural justice would not give rise to a right of independent appeal as the examiner and external examiner had reconsidered their decision and reviewed the applicant's script. Thus it may be said that the nature of the finding and sanction is the critical factor which decides whether Article 34 of the Constitution (which requires that justice be administered by courts) is engaged. There must be a distinction drawn between major and minor sanctions, and the less the sanction may be said to affect an individual's rights, the less it may be argued that a right of appeal to the courts must necessarily exist as a matter of natural or constitutional justice.

In *Carroll v. Minister for Agriculture and Food* [1991] 1 I.R. 230, a case which concerned the compulsory testing of cattle herds for reactors, the applicant complained, *inter alia*, that the test had not been carried out in a fair and proper manner and that the procedures adopted were not in accordance with constitutional and natural justice. In refusing the application, Blayney J. held that the fact that tests were carried out by independent veterinary surgeons with minimal risk of error involved in the test procedures, the absence of a right of appeal or a right to require an independent re-testing of a reactor was not a breach of the constitutional guarantees of basic fairness of procedures.

In effect, the only authority which the applicant could invoke in furtherance of his case that the absence of a right of appeal rendered the Act of 2007 unconstitutional was an interpretation given to s. 13(7) of the Act of 1978, given by the High Court (Kelly J.) in *Prendeville v. Medical Council* [2007] IEHC 427 [2008] 3 I.R. 122.

Section 13(7) of the Act of 1978 provided that the Acts of the Fitness to Practise Committee "shall be subject to confirmation by the Council unless the Council at any time dispenses with the necessity for such confirmation". Kelly J. held that under that particular terminology a medical practitioner charged and found guilty of professional misconduct by the Fitness to Practise Committee should not be deprived of having his case and the decision considered afresh by the Council, which was the body charged by the Act with the control of persons engaged in the practice of medicine. He had also held that any alternative construction of the provisions of the Act of 1978 would render the Council impotent to consider and, if appropriate, refuse to confirm, a decision of the Fitness to Practise Committee on the most important decision affecting a medical practitioner's career. The court had to consider the Act in a manner which was consistent with constitutional norms and conducive to enjoyment of the rights conferred under the Constitution and the Convention. He thus concluded that a decision of the Fitness to Practise Committee ought to be capable of independent reconsideration by the Council and held that the Act so ordained (at p. 153). It has to be said however, that the door that Mr. Justice Kelly saw opened to deem this Act constitutional was firmly closed by the coming into force of the 2007 Act which did not contain a provision similar to s.13(7) of the Act of 1978. There is thus no capacity now for the Medical Council to do anything other than accept the finding of the Fitness to Practise Committee as to guilt and proceed then to impose sanction. If they impose a sanction under s. 71(a) that ends the matter.

However, the central thrust of the submissions made on behalf of the applicant is that his right to equality before the law is compromised because he is treated differently from other medical practitioners found guilty of professional misconduct. It was contended that in the absence of any legitimate rationale being advanced by the Oireachtas for failing to provide an appeal mechanism for those medical practitioners affected by s. 70(a) of the Act, the section is repugnant to Article 40.1 of the Constitution which provides:-

> "All citizens shall, as human persons, be held equal before the law."

In *M.D. (A Minor) v. Ireland, AG & DPP* [2012] IESC 10 [2012] 2 I.L.R.M. 305 the Supreme Court stressed that the principle of equal treatment of all human persons is implicit in the free and democratic nature of the State. Strict equality is the norm laid down by Article 40.1 of the Constitution. However, the Article recognises that perfectly equal treatment is not always achievable or desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves. Putting it another way, this case may be seen as the most authoritative up-to-date decision of our highest court which upholds equality rights but which nonetheless makes it clear that only invidious discrimination offends the constitutional provision. As Denham C.J. pointed out at p. 320:-

> "Thus strict equality is the norm laid down by Article 40.1. However, the Article recognises that perfectly equal treatment is not always achievable, rather the Article recognises that applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves.
>
> The second sentence of Article 40.1 recognises that human persons have or may be perceived by the Oireachtas to have 'differences of capacity, physical and moral, and of social function.' …. It is not correct to look at a law to see if it offends against the first sentence before turning to the second sentence to seek justification. The second sentence is concerned with what the first sentence means."

Thus, to use the phrase from the judgments of Walsh J. in *O'B. v. S.* [1984] I.R. 316 and of Herbert J. in *Redmond v. Minister for the Environment* [2001] 4 I.R. 61, the test is to enquire if the distinction of which the applicant complains "unjust, unreasonable and arbitrary".

I am satisfied that the provisions contained in s. 70(a) of the Act have not breached the applicant's rights to equality before the law. The rights which he asserts are not absolute and may be qualified in appropriate circumstances in the common good. The Medical Council in particular is enjoined not only to safeguard the rights of medical practitioners but also the rights of patients and members of the public against risks posed to their life or safety. The Court must necessarily extend a broad margin of appreciation to the various disciplinary bodies established under the Act in calibrating these different rights and interests. The ability of the Medical Council to impose a sanction which does not directly impinge on the doctor's registered status but which may usefully disseminate and publish information – as advice, admonishment, or censure – on the requisite standards which doctors must follow in the interests of patient

safety should not be lightly set aside. It must be possible to draw factual distinctions as between different cases even though the same offence is alleged against a medical practitioner, and one set of circumstances may be more serious than others.

In *R. (Nicolaides) v. General Medical Council* [2001] E.W.H.C. Admin 625, the claimant had been found guilty by the Professional Conduct Committee of the General Medical Council of serious professional misconduct. According to the judgment of Sir Richard Tucker at para. 9:-

> "As to penalty, the panel said they did not consider that it would be in the overall public interest to deny access to the claimant's services to patients. But they issued what they described as the severest of reprimands. The panel recognised that this would have profound implications on the claimant on his standing with in the profession and have a devastating effect on him personally. Nevertheless, it is important to note that the claimant's registration, and therefore his right to practise, was not affected."

At the outset of the hearing before the Professional Conduct Committee, the doctor had objected to the hearing and alleged there had been a breach of the rules of natural justice and a failure to comply with the provisions of Article 6 of the ECHR. The applicant said there was a lack of independence and impartiality in the specific circumstances of the case. Having rejected the doctor's complaints concerning the Professional Conduct Committee's impartiality and independence, the High Court went on to consider the issue of Article 6 of the ECHR and held at paras. 28-32:-

> "So far as Article 6 is concerned, I consider that it adds nothing to the common law requirements of natural justice. In any event Article 6 is not, in my opinion, engaged in the present case. The reason is that the PCC did not make a determination of the claimant's civil rights because the claimant was only reprimanded. The civil right in question is the right to practise medicine, and this was unaffected by the decision …. The effect of a reprimand as opposed to a suspension or erasure is that it also prevents the claimant from exercising any right of appeal to the Privy Council. Section 40(1) of the Medical Act 1983 provides that the following decisions are appealable…(a) a decision of the PCC giving a direction for erasure, or for conditional registration or varying the conditions imposed by a direction for conditional registration. Thus, there is no appeal against a finding of professional misconduct accompanied by a reprimand."

Subsequently, the issue was revisited by the Court of Appeal in the United Kingdom in the case of *R. (Thompson) v. The Law Society* [2004] EWCA Civ 167 [2004] I W.L.R. in which, having conducted an exhaustive review of decisions of the European Court of Human Rights, Lord Justice Clarke stated at para 84:-

> "At any rate in a case where the court is considering the position after the tribunal had made its decision, as in the instant case, a decision to reprimand or severely to reprimand the person concerned (here the claimant) does not amount to a determination of his civil rights because the right to continue to practise his profession is not at stake."

Thus, where a minor sanction only is imposed, there is ample authority for the proposition that not only does no right of appeal exist when referenced to the provisions of Article 6 of the European Convention on Human Rights, but equally assertions that the applicant's livelihood and good name have been impermissibly affected under Article 40.3 of the Constitution must equally be seen as misplaced.

According to Hogan & Whyte*, JM Kelly: The Irish Constitution*, 4th Ed., at para 7.2.81:-

> "Equality does not mean uniformity; laws may legitimately differentiate, and in some situations justice requires that they must do so. The courts have several times said that Article 40.1 does not mean that any legislative scheme must present identical features to all citizens; such a mechanical uniformity, in failing to appreciate the existence of categories naturally different (in the senses relevant to the purpose of the legislation) would work inequality in its result, rather than equality."

In this case, the right of appeal is inserted in order to render the statutory scheme constitutional, not otherwise. That right of appeal exists where the sanction may be considered as serious. The sanction in the instant case is at the very lowest end of the scale and is not such as to warrant the existence or creation of a right of appeal. In The *State (Hunt) v. O'Donovan* [1975] I.R. 39, the High Court considered the suggestion that a restriction on the right to appeal against sentence constituted a breach of the applicant's constitutional rights to equality. Finlay J. indicated that a court faced with an allegation of a breach of the right to equality must consider whether the different treatment:-

> ".. constitutes either an invidious discrimination or a failure to protect adequately the rights of the individual."

I am satisfied that no invidious discrimination may be said to arise in the instant case. For legitimate reasons, only persons who are subject to the lesser sanction set forth in the Act have no appeal. Thus there is no failure to protect the rights of the individual as there is a carefully constructed statutory scheme which vindicates the rights of doctors to fair procedures at each stage. I therefore see no reason to hold that the scheme must provide for some form of internal appeal.

I am satisfied that the impugned section of the Act, which, of course, is presumed to be constitutional has not been shown to be unconstitutional on the basis of any alleged infringement of the applicant's rights under Article 40.

I am further satisfied that publication of the fact that a sanction has been imposed on the applicant does not violate his right to his good name or reputation. As Finlay P. pointed out in *M. v. The Medical Council* [1984] 1 I.R. 485 at p. 500:-

> "Article 40.3.2 of the Constitution does not, and cannot, constitute an obligation on the State by its laws to protect a person from every statement or publication which may damage his good name. Quite clearly, the common good can, and does, require the publication of facts (including, it would seem to me, the opinion of his colleagues) concerning a person who carries out duties or follows professions which may affect the public. In the case of a person practising medicine, the public have a clear and identifiable interest to be informed of a responsible view reached by his colleagues with regard to his standard of conduct or fitness."

The applicant did not in his application papers specify the breach of any particular rights under the European Convention of Human Rights and specifically did not seek a declaration of incompatibility of the Act of 2007 under the European Convention on Human Rights Act 2003 (hereinafter referred to as " the Act of 2003") and I am satisfied it would be inappropriate to permit the applicant to enlarge his claim by now arguing that Part 9 of the Act or certain provisions thereof are incompatible with Article 6 of the Convention. Further, as was made clear in *M.D. (A Minor) v. Ireland, Attorney General & Director of Public Prosecutions* [2012] IESC 10 [2012] 2

I.L.R.M. 305, provisions of the Convention do not apply in a free-standing manner and, as pointed out by Denham C.J. at p. 324-5:-

> "In reality the Convention claim has been presented as subsidiary to the constitutional claim. The claim, as pleaded, is simply that s.3 is 'in breach of' the Convention. That formulation is not acceptable. It treats the Convention as if it had direct effect and presumes that the court has the power to grant a declaration that a section is in breach of the Convention ….the appellant has not formulated any acceptable legal basis upon which these Convention principles could enable this court to grant the declarations sought."

It is not suggested by the applicant that the provisions of Part 8 and Part 9 of the Act can be interpreted in such a way as to grant the applicant a right of appeal against the finding of poor professional performance or the decision on sanction of advice. No declaration of incompatibility has been sought pursuant to s. 5 of the Act of 2003 and the applicant is simply not entitled to seek declarations that statutory provisions themselves deny the applicant tights enshrined in the Convention in circumstances where that Convention has no direct effect in national law.

For all these reasons I refuse to grant to the applicant any of the reliefs sought.