



**COURT OF APPEAL**

Neutral Citation Number: [2017] 228

**[2016 No. 304]**

**The President**

**Peart J.**

**Irvine J.**

**BETWEEN**

**RAS MEDICAL LIMITED, TRADING AS PARK WEST CLINIC**

**APPELLANT**

**AND**

**THE ROYAL COLLEGE OF SURGEONS IN IRELAND**

**RESPONDENT**

**JUDGMENT of The President delivered on 31st July 2017**

1. RAS Medical Ltd. operates Park West Clinic which is a private medical facility specialising in cosmetic surgery, including breast implantation and reduction. The medical director of the clinic is Dr. Ahmed Salman who performs the surgery. He is not a specialist plastic surgeon and not on the Specialist Register of the Medical Council, but he claims to be highly experienced and competent in this field and says that he has done a large number of successful operations. The appeal with which we are concerned is from the judgment of Noonan J. in the High Court refusing judicial review of the refusal by RCSI of accreditation of a one-day course that Dr. Salman and the clinic were organising in respect of breast implant cosmetic surgery.

2. The Royal College of Surgeons in Ireland is the body approved by the Medical Council for the purpose of certifying continuing professional development courses for doctors in the specific area which we are dealing with here. The delegation is laid out in the Medical Practitioners Act 2007 which reads:

“91. — (1) It shall be the duty of the Council to satisfy itself as to the ongoing maintenance of the professional competence of registered medical practitioners...

(4) The Council may, with the consent of the Minister and in accordance with the relevant criteria specified in rules made under section 11 —

(a) recognise subject to conditions attached to the recognition of, amend or remove conditions attached to the recognition of, or withdraw the recognition of, a body approved under section 88 (2)(a)(i)(II) or 89 (3)(a)(ii) with which the Council may make and carry out an arrangement with for the purposes of assisting the Council to perform its duty under subsection (1), or

(b) refuse to recognise a body approved under section 88 (2)(a)(i)(II) or 89 (3)(a)(ii) as a body with which the Council may make and carry out an arrangement with for those purposes.

(5) The Council shall monitor and assess the performance of bodies recognised under subsection (4) based on the criteria referred to in that subsection.” [Emphasis added]

3. RAS Medical planned to run a one-day course during which three live surgeries would be performed. The ‘One-Day Master Class on the Polyurethane Breast Implants and Cosmetic Surgery’ was scheduled for 27th July 2013 and Dr. Salman sent in his application by email on 20th June 2013. He sought approval for this event and he made his application in accordance with Guidelines issued by the College. These contained general instructions for organisers of events for which RCSI approval for CPD purposes was being sought. Dr. Salman and his clinic had organised a similar event previously in 2011 and had obtained College approval for CPD purposes for attendance at that event. The Guidelines did say, however, that approval of an event on a previous occasion did not mean that it would be forthcoming for another one; in each case, a new application had to be made.

4. The Professional Development and Practice Committee of RCSI, through its Secretary, Ms. Marie O’Boyle, emailed Dr. Salman on 28th June 2013 seeking additional information: a list of sponsors; a list of speakers/facilitators with details about them; the name of a consultant on the Medical Council Specialist Division of the Register in Plastic Surgery who supported the course. In relation to the latter, there was no such consultant, although Dr. Salman was satisfied that all the experts involved in the event were distinguished in their field. On 8th July 2013, RAS submitted the CVs of three of the five speakers. Dr. Jawad was presented as being on the Irish Medical Council Register, but this was not in fact the case. Dr. Salman did not claim that Dr. Jawad was on the Specialist Register, which was the reference in the College email, but he did say that he was on the Irish Register. He wrongly assumed that Dr. Jawad’s CV was correct and accurate. In fact, it would appear that Dr. Jawad had previously been on the Irish Register. However, the fact is that while he was no longer on the Irish Medical Council Register of General Practitioners, he was a Fellow of the RCSI. None of that is particularly relevant at present, but it has some materiality at a later stage.

5. On 9th July 2013, Professor Sean Tierney, Dean of Professional Development and Practice of the RCSI emailed RAS saying that the event could not be approved for CPD accreditation as it was a requirement of the Professional Development Committee that the Chief

Organiser of the event put forward for accreditation should be on the Specialist Register in Plastic Surgery and this was not the case. Dr. Salman responded the next day, 10th July 2013, asking for a copy of the published requirements that included the reason given in the email of the previous day. In a further email, he asked for a reply before close of business on 11th July because the event was organised for 27th July. The reply came on 15th July 2013 from Professor Tierney who sent a copy of "the latest version" of the Guidelines for the approval of educational events for CPD accreditation which, he said, had been approved at a recent meeting of the Professional Development and Practice Committee. Dr. Salman's IT consultant said that the new Guidelines were uploaded to the RCSI website only at 11.15am on 15th July 2013, the very day of Professor Tierney's reply.

6. The importance of the new Guidelines is that they include under the heading 'Criteria for Approval of CPD Events' an entirely new enumerated requirement as follows:

"8. The Clinical Lead/Chief Organiser who is responsible for the application should be on the Specialist Division of the Medical Council Register."

7. The essential period with which we are concerned is from 20th June 2013 to 15th July 2013. The applicant's primary complaint is that the College, through its Professional Development and Practice Committee and the Dean, Professor Tierney, changed the rules contained in the Guidelines for the purpose of refusing his application. While the query letter of 28th June 2013 asked for the name of a consultant on the Specialist Division of the Register in Plastic Surgery who supported the course, that was a different thing from the actual requirement as specified in the new Guidelines. That requirement was not contained in the old Guidelines in any shape or form. Indeed, the query letter of 28th June did not actually say that having a specialist plastic surgeon who supported the course was a necessary precondition of approval. However that may be, the point that is made on Dr. Salman's behalf and that of RAS is that the specific requirement contained in the new Guidelines of 15th July 2013 and the stated reason for refusal of CPD sanction, was not in the previous Guidelines according to which the application was made.

8. The RCSI maintains that it was entitled under the original guidelines to impose this condition in the interest *inter alia* of patient safety which is a proper matter for the committee to take into account and which is not only legitimate, but is a requirement on the RCSI in its role as delegated by the Medical Council. Safety of patients was not raised with RAS or Dr. Salman prior to rejection of their application but it was mentioned when the prospect of litigation arose. The College in its affidavits by Professor Tierney does not question Dr. Salman's own expertise. It is clear from the affidavits that if issue had been joined on the matter he would have been in a position to offer reassurance based on the expertise that he himself possesses as the person who was going to carry out the procedures, and also that his colleague visitors were amply qualified as medical experts in other countries. In a word, there could be no doubting their qualifications, even if they were not actually registered, which was the case, on the Medical Council Specialist Register in Ireland. Obviously, it is not a matter for this court to make any comment on this question but it is relevant to identify the positions of the parties.

9. The case, therefore, is that the Professional Development Committee of RCSI changed the rules following receipt of the RAS application so that it could have a basis for refusing accreditation of the course. It is scarcely necessary to say that a body charged with carrying out a statutory function, whether delegated by another entity or not, is required to operate in a fair and reasonable manner. If the committee changed the Guidelines after RAS applied for approval, it is strongly suggestive of a failure to observe fair procedures. One would not go so far as to say that it could never happen because nobody knows what crisis events may occur that will cause an approving body to hesitate or even to abandon previous rules in the interest of some important consideration. But nothing of that kind is really suggested here as Dr. Salman contends.

10. In rejecting the application for judicial review, Noonan J accepted the RCSI submission that guidelines were not rules. The committee was entitled to seek more information and there was no automatic right to accreditation. He also held that the application did not fail because of the new Guidelines. The judge held that the committee was entitled to consider that best practice and high standards of patient safety required that surgery be done by or under the supervision of a person on the Irish Specialist Register. He held that the College, through the committee, had from the outset maintained a requirement that a person on the Specialist Register be associated with the event and that the various terms used to identify such person were really descriptions of the same thing. The difference was not significant. The essential requirement was the involvement of a person on the Specialist Register. He held that the previous approval in 2011 was not relevant. It is not however entirely immaterial that the same kind of event was previously approved because it is evidence that the application by RAS was not for some outlandish experimental and dangerous event. Finally, he held that there was an appeal available to RAS which militated against the entitlement, if it had otherwise existed, to obtain an order of judicial review. However, this does appear to be a little unreal. In the first place, the appeal was to the very same committee that had refused the application. Secondly, there was not going to be a meeting of the committee for a period of time that would be much later than the date of the event.

11. The information about the application by RAS and the refusal by RCSI through its Professional Development Committee over this short period of time is contained in the emails that were exchanged between the parties. On this basis, RAS initially made its case for judicial review. Following discovery, internal documents of the Professional Development Committee of the College became available to the applicant and it relied on them in submissions in the High Court and in the appeal to this court. Those materials are the subject of objection by counsel for RCSI, Mr. Cush SC and the question of admissibility has to be addressed as a preliminary issue. The case proceeded on the appeal with Ms. Stack SC for RAS referring to the materials in written submissions and oral argument whereas Mr. Cush confined himself to his objection and eschewed reference to the content of the discovered documents.

12. Mr. Cush SC on behalf of the College and the committee argued that while the documents were discovered by the respondent they were not actually evidence because they were not formally proved before the High Court. Ms. Stack SC for the applicants countered by asserting that the material was indeed evidence because it was exhibited in one of Dr. Salman's affidavits. It would not be of any assistance for the applicant to serve notice to cross-examine because these documents are not referred to in the affidavits of Professor Tierney. He simply ignores them and he does that for the purpose of avoiding being challenged on them or cross-examined about them.

13. In my view the discovered documents were admissible in evidence on the application and on this appeal. They were discovered for the purpose of this judicial review application by RCSI, the deciding body that was in exclusive possession of almost all of the relevant materials for the decision on the application. Privilege was not claimed in respect of the documents in question. There is no question about the authenticity of the documents. The authors are available and were available to swear affidavits explaining or commenting on the contents. The documents are exhibited in the affidavit of Dr. Salman on behalf of the applicant RAS. They were referred to and relied upon in the application for the High Court and in the submissions and arguments in this court by counsel for RAS. It was open to RCSI to comment, explain or dismiss the material or any part of that as it chose, and it decided, as it was entitled to do, to ignore the material. The documents are manifestly relevant beyond any dispute and they go far towards explaining the process of consideration of the application and the adoption of the new Guidelines. They are the records of the persons involved in the decision

making process. It seems to me that the court should adopt the practical and just approach of Lynch J. in the case of *Hughes v. Staunton* where he held that medical records maintained by nursing and other staff, such as doctors, recording events that happened in a hospital in regard to a particular patient, were admissible without having each nurse or doctor come to court to swear and give evidence that he or she made the particular record which was in his or her or their handwriting. Another less subtle judicial approach was to inquire of counsel whether the defendant client was denying its own records.

14. It is perhaps surprising to find the respondent College taking this position in respect of documents that are clearly relevant and that are known to the other party and available to the court. I simply do not understand how a court could consider this case without reference to this material since it is actually referred to in Dr. Salman's affidavit and in the submissions made on his and his company's behalf. The fact that one party decides to ignore the material is rather undermined by the argument of the other party that is expressly based on the contents of the material. Just how a court would be able to un-know the information that is provided is difficult to see.

15. It would appear that RCSI contemplates that in order to meet the objection it would be necessary for the applicant to apply to court to have the case heard on oral evidence simply for the purpose of proving the discovery documents that were produced by the respondent. That would be an absurdly inappropriate and clumsy procedure and not consistent with the interest of justice. In all the circumstances, it seems to me quite clear that this material must be looked at. The RCSI and Professor Tierney cannot quarantine documents that are central to the case simply by not referring to them.

16. The central question on this appeal is whether the Professional Development Committee made its decision to refuse sanction for the RAS event in breach of fair procedures as required by law. If the matter were to be decided otherwise than by reference to the discovery made by the respondent the decision would be a more difficult one, but on balance I think that the applicant would be entitled to succeed. However, when one takes into account the contents of the emails obtained on discovery, it is quite clear that changes took place and that they were in response to the application made by Dr. Salman and that they demonstrate that the procedures adopted by the committee were seriously flawed and unfair. The Court cannot ignore the contents of the discovery material. In the circumstances, therefore, I am satisfied that the applicant has established its case.

17. I do not ignore the fact that Dr. Salman provided incorrect information in response to the query email from Ms. O'Boyle, but in the circumstances of the case it is not sufficient to disentitle his company to relief. The committee was not misled in any way as it happened and was at all times in a position to verify the information, which it did. The High Court did not consider this matter to be a reason for rejecting the application. For my part, I would not want to minimise the importance of full and candid disclosure, but I do not think it sufficient to defeat the claim of the applicant in this case.

18. This judgment explains why I reach these conclusions. In regard to the grounds of appeal and written submissions concerning alleged breaches of European Union law in respect of freedom to provide services and to receive them, I do not find it necessary to embark on a discussion of these issues. It is questionable whether the case gives rise to them in the circumstances of the application that was made by Dr. Salman on behalf of his clinic. No issue was raised in correspondence as to the validity of a requirement that a doctor be on the Irish Specialist Register as opposed to a qualified specialist on the register of another Member State.

## **(I) Chronology**

19. The relevant facts appear from the following chronology of emails exchanged between the parties and also the internal messages of the Professional Development and Practice Committee. The correspondents must be identified: Professor Sean Tierney, Dean of Professional Development and Practice; Ms. Marie O'Boyle, secretary to the committee; Professor Sean Carroll, consultant Plastic Surgeon whose opinion was sought on the application; Dr. Ahmed Salman is the doctor in charge of the clinic operated by RAS.

20. In the following table, *inter partes* emails appear in normal font whereas those that are internal to the committee and its communications otherwise than to RAS are italicised. The committee's minutes are also italicised.

- 20th June 2013:

Application for CPD approval submitted by RAS (Dr Salman) Prof Sean Tierney, Dean of Professional Development and Practice

- 21st June 2013 12:35:

Ms O'Boyle sought advice from Dr/Professor Sean Carroll as to what she should do with the application – "approve or not approve for CPD."

She informed him: "I note that Mr Salman who is leading this course is on the General Register with the Medical Council..."

- 21st June 2013 11:56:

- Professor Carroll replied:

"I do not think we should approve this course.

A specialised course such as this should be run by someone trained and specialised in the field. This doctor is not. It will help legitimise the very type of person who the College and the legitimate specialists should not be condoning. Thank you for asking me for an opinion. Please let me know if you require anything else."

- 21st June 2013 11:56:

Ms O'Boyle thanked Professor Carroll for his prompt reply: "I will let Sean Tierney know and the decision not [sic] approve will come from the RCSI Professional Development & Practice Committee meeting which is being held next week."

- 26th June 2013 5pm RCSI PDPC met:

Minutes of Meeting:

"The Criteria for the approval of Educational Events for Continuing Professional Development (CPD) was discussed. It was recommended that the sponsor of a surgical event should be on the Specialist Register of the Irish Medical Council in

order for the event to be approved. It was agreed to amend the Guidelines."

Under the heading Summary of Actions:

"Ms O'Boyle/Professor Tierney to inform the applicant who sought approval for a master class in a Plastic Surgery procedure that the Committee agreed that a surgical event can only be approved if the sponsor is on the Specialist Register of the Irish Medical Council.

...Ms O'Boyle/Professor Tierney to draft criteria for the approval of activities/events for the next meeting."

• 27th June 12: 10:

Ms O'Boyle emailed Professor Tierney with a draft letter to be sent to the applicant –

"Hi Sean

Below is draft text – not sure if it is too much... The first two items are listed on our Guidelines re-: approval... Although one is as discussed last night... Sometimes we get information on speakers etc... Other times we don't... I have not asked for this level of detail before... What do you think?"

• 27th June 2013 12:32:

Professor Tierney approved the draft.

• 28th June 2013:

Prof Sean Tierney, Dean of Professional Development and Practice emailed RAS seeking additional information: a list of sponsors; a list of speakers/facilitators with details about them; the name of a consultant on the Medical Council Specialist Division of the Register in Plastic Surgery "who supports" the course.

• 8th July 2013 09:17:

"Please find the CVs for our three of our speakers, Dr Ahmed Salman, Dr Constatine Stan and Dr Mohammed Jawad attached. I am waiting for our other two speakers Dr Shiva Singh and Dr Garrick Georgeu to forward their documents to me.

We have only one sponsor, Eurosurgical. The first form of sponsorship from them is providing the polyurethane implants for the 3 cases of life surgery. The second form of sponsorship is stationary materials for the day including pens, notepads etc.

• 8th July 2013 11: 05:

"Please find the details of our other two speakers, Dr Garrick Georgeu and Dr Shiva Singh attached.

The conference has two world-renowned plastic surgeons on the faculty, Dr. Mohammed Jawad and Dr. Constatine Stan. Dr Jawad is on the medical council register and supports this master class."

• 8th July 2013 12:45:

Ms. O'Boyle emailed Professor Carroll: –

"Further to my previous email in relation to the approval of this meeting for CPD credits, your response and the application for approval was discussed at the Professional Development & Practice Committee meeting. It was agreed to write to the organiser of this meeting for further details, (listed below). One of the requirements was to provide:

a name of a consultant who was on the Medical Council Specialist Division of the Register in Plastic Surgery who supports this course

Below is the response from the organiser. The doctor they outline who supports this is Dr Jawad however when I look up his name, he is on the General Register both on the MC register and GMC. We believe that as they have not met the criteria to provide a name of a consultant who was on the Specialist Register who supports this course, we are unable to approve this course for CPD. I would be grateful if you could review the information provided by the organiser and let me have your comments."

• 8th July 2013 13:22

Professor Carroll responded:

"I agree that the specific criteria have not been met.

I would not recommend recognition for CPD

Best"

• 8th July 2013 14:09

Ms O'Boyle emailed Professor Tierney attaching the message from Professor Carroll and asking for approval of a draft letter to be sent out the next day with the decision. The relevant paragraph in the draft is as follows: –

□ "This information together with your application form has now been reviewed. I wish to advise you that unfortunately, we are unable to approve this meeting for CPD credits as you were unable to provide a name of a Consultant on the Medical Council's register who is on the Specialist Division in Plastic Surgery who supports this course."

- 8th July 2013 14:22

Professor Tierney replied.

"I would change 'supports' to something beefier – i.e. the chief organiser who was responsible for the application should be on the specialist register. Secondly I would state that the organisers may choose to issue a certificate of attendance which individuals may use for the purpose of meeting their CPD requirement but such certificates may not state that the course is approved by or CSI for CPD purposes????"

- 9th July 2013 09:47:

Mr Tangney of RCSI emailed Ms O'Boyle firstly agreeing with Prof Tierney and then suggesting: "Maybe the term 'clinical lead' for the event or something along that vein would be to the point."

- 9th July 2013:

Prof Tierney emailed RAS saying that the event could not be approved for CPD accreditation, as it was a requirement of the Respondent's Professional Development Committee that the Chief Organiser of the event put forward for accreditation should be on the Specialist Register in Plastic Surgery and this was not the case.

- 10th July 2013:

Dr. Salman responded asking for a copy of the published requirements which included the reason given in the email of the previous day. In a further email he asked for a reply before close of business on 11 July 2013 because the event was organised for 27 July 2013.

- 15th July 2013: 11:15 :

Dr. Salman's IT consultant said that the new guidelines were uploaded to the RCSI site at this time.

- 15th July 2013:

Dr. Salman received a copy of "the latest version" of the Guidelines for the Approval of Educational Events for CPD accreditation which he was informed were approved at a recent meeting of the Professional Development and Practice Committee. Under the heading 'Criteria for Approval of CPD Events' a new enumerated requirement appeared as follows:

- o "8. The Clinical Lead/Chief Organiser who is responsible for the application should be on the Specialist Division of the Medical Council Register."

## **(II) Judgment of Noonan J.**

21. Noonan J. held that under the guidelines the College reserved the right to seek further information before according accreditation, a fact which would be inconsistent with an automatic right to accreditation. *Phillips v The Medical Council* [1991] 2 IR 115 did not assist the applicant's case because the application did not in fact fail as a result of the subsequent adoption of new guidelines but rather because it was currently considered best practice by reputable bodies that surgery be performed or supervised and/or monitored by a medical professional listed on the Specialist Register. The judge said that that was the uncontroverted evidence of Professor Tierney. In his affidavit, he referred to concerns in the medical profession regarding safety particularly in cosmetic surgery, which is largely unregulated by legislation. The RCSI requires any person teaching surgery to be on the Specialist Division for the area being taught. In those circumstances, the judge held that it would be surprising, to say the least, if the College should be required to endorse an event including live surgery that did not involve anybody on the Specialist Register.

22. The trial judge found that the College indicated from the outset that there was going to be a requirement for a person associated with the event to be on the Specialist Register. The various expressions such as "supports the event", "chief organiser" and "lead clinician/clinical lead" were used somewhat interchangeably but the essential requirement was the involvement of a person on the Specialist Register. This was understood by Dr Salman and none of those involved were so registered despite the fact that the applicant had suggested to the contrary on two separate occasions.

23. Moreover, the High Court noted that the applicant never suggested that it did not understand or was confused by the requirement. The fact that some years previously the applicant had received accreditation for a similar event without this requirement was not material. Medical standards evolve and even if the College had at one time adopted such a policy that could not mean that the policy could never change in future. As regards the argument concerning EU law, insofar as the applicant complained about the rights of speakers at the event being affected, that was not a case it could make, but was a matter for the individuals to consider. Notwithstanding that several of the speakers were on the specialist register in another Member State and thus entitled as of right to be registered as specialists in this jurisdiction the RCSI was entitled to have verification of the authenticity of their qualifications to be provided in the manner specified.

24. It was held that the applicant had an appeal available and as a matter of discretion the judge would in any event refuse the application.

## **(III) Submissions and Arguments**

### **Appellant's Submissions**

#### **Breach of Fair Procedures**

25. RCSI did not deal with RAS Medical's application under the Original Guidelines, but instead changed them for the purposes of addressing their application. Fair procedures require the Guidelines as they stood on the date of the application to be applied. Whether or not the extra criterion is desirable is irrelevant.

26. The trial judge erred in failing to refer to the internal emails in the discovered documentation, which clarified the basis for the refusal. RCSI argue that the "Chief Organiser" requirement was always implicit in the Original Guidelines and the RAC Medical would

have been well-aware of that but the affidavits of discovery indicate the opposite was in fact the case. They reveal that RCSI was aware that they were not codifying an existing provision, but creating a new criterion. The relevance of these documents was never disputed. The Court should have assessed this documentation in order to understand the mentality of those involved in changing the guidelines.

27. There was no requirement in the Original Guidelines that the "Chief Organiser" must be on the Specialist Register. The "Domains of Good Professional Practice" relate to topics of events rather than criteria for approval. The Guidelines were changed multiple times between the date of the initial application (20th June 2013) and the publication of the Amended Guidelines (15th July 2013). These Amended Guidelines included a new criterion that was used as a basis for refusal i.e. those relating to the status of the "Chief Organiser". The only relevant materials for examination are the Original Guidelines. RCSI argued that this criterion was implicit in the Original Guidelines; however, their own documentation indicated otherwise. They were accordingly in breach of fair procedures in making the decision in suit.

28. The learned trial judge erred in law in holding that RCSI did not have to notify the Appellant of changes to the Guidelines. If changes were proposed, RAS should have been notified and given an opportunity of meeting the new requirements. RAS had at very least a legitimate expectation that RCSI would adhere to its own published guidelines: see *Phillips v. Medical Council and Fakh v. Minister for Justice*. While it is accepted that RAS Medical were notified of one changed requirement, that relating to someone who "supports this course" being on the Specialist Register, no such notification occurred regarding the "Chief Organiser" element.

29. The learned trial judge erred in law in holding that the various drafts of the new criterion ("sponsor", "person who supports this course", "chief organiser", and "clinical lead/chief organiser") were not materially different. RCSI suggest that a supporter of the course and the "Chief Organiser" are one and the same, but RAS Medical emphasises that this is not the case. Contrary to the finding of the trial judge, there is a material difference. Moreover, RCSI documents accept an ambiguity as to what the phrase "supports this course" entails. Indeed, RCSI recognises the distinction in its Statement of Opposition by identifying Dr. Salman as the "Chief Organiser". Moreover, the "supports this course" element was not the actual reason for refusal, but rather Dr. Salman's status. As such, no proper notification was given to RAS Medical.

30. The rules of fair procedure apply to established and published guidelines as well as to rules. A deciding body may not abandon its own procedures or amend them without notice and in order to deal with a case presented under the existing process.

31. Section 91(3) of the 2007 Act allows the Medical Council to reviewing the operation of professional competence schemes and making recommendations to the Minister accordingly. This process has not be fully delegated to RCSI, but they assist the Medical Council in performing their duties. No other powers or functions have been delegated to RCSI that would allow them to alter guidelines in the manner undertaken. The standard sought to be imposed, that only a person on the Specialist Register can perform live surgery, is contrary to ss. 37 and 38 of the 2007 Act. Under those provisions any registered person may practice. RCSI's attempts to distinguish the guidelines from the rules envisaged under the 2007 Act are misguided.

#### **Whether the Available Appeal was an Adequate Remedy**

32. The trial judge erred in law in finding that the availability of an appeal to the same Committee as had refused the application, and which furthermore would include the participation of the member of the Committee who apparently changed the criterion acting alone and outside what was authorised by the Committee, was such as to justify refusing relief; in addition there was no scheduled meeting before the date of the proposed event.

33. The court also erred in law in finding that the original Guidelines, and not the Amended Guidelines, would apply to an appeal.

#### **Abuse of Discretionary Powers**

34. The trial judge erred in law in determining (a) that patient safety was a relevant consideration and (b) that registration on the Irish Specialist Register was proportionate and necessary.

35. There was in fact no basis for concern as to safety of the event because Dr Salman was the Chief Organiser who was carrying out the surgery and to was legally permitted to do so by the Medical Council and the RCSI accepted that it had no specific concern about his ability to do so.

36. The "Chief Organiser" requirement was objectively not an assurance of safety because that functionary might be performing the role remotely and not taking part in the event and yet be in compliance with the new requirement. Dr. Salman's record of excellence is recognised by RCSI. There has been no consideration of public safety, but rather slavish devotion to a technical criterion drafted to purposely result in a refusal.

37. RCSI failed to engage in an assessment of the educational merits of the event by asserting only the presence of a "Chief Organiser" on the Specialist Register would suffice.

#### **Breach of Union Law and the Freedom to Provide and Receive Services**

38. The refusal was also in breach of EU law.

#### **Respondent's Submissions**

##### **The Guidelines**

39. The new Guidelines published on 15th July 2013 are irrelevant to the appeal at hand. Only those guidelines existing at the time of decision would have been the basis for any internal appeal given that they form the basis for the refusal of the certification.

40. The Guidelines are generic in nature and apply to all CPD events irrespective of medical discipline. Accordingly, they do not set out substantive requirements and do not represent an exhaustive or prescriptive list. The face of the Guidelines on page 7 indicated that other requirements may be considered namely the Domain of Good Professional Practice. They exist to assist those seeking CPD approval. RCSI retains the discretion to grant or refuse an application having considered it as a whole. Adherence with the Guidelines merely ensures that the application will be considered. Moreover, prior success is no guarantee of future success. No issue of legitimate expectation arises.

41. It is noteworthy that RAS Medical specified "Patient Safety and Quality of Care" as the Domain of Good Professional Practice underpinning the event to be accredited. Those seeking to be placed on the Medical Council's Specialist Register must not only demonstrate their formal training, but obtain the necessary experience to "interperently direct patient care" in their chosen field. It is not disputed that RAS Medical did not provide such a person. RCSI was entitled to require such a person in circumstances where

there exercised their functions under s.6 of the 2007 Act to promote the highest standards of professional conduct.

### **Patient Safety/Best Practice**

42. RCSI did not act *ultra vires* in relying on patient safety in its decision to refuse accreditation. Best practice in this jurisdiction requires that surgery be supervised or monitored by someone on the Specialist Register. It is not extraordinary to require that a CPD event featuring live surgery would adhere to this.

### **Legitimate Expectation**

43. Contrary to the submissions of RAS Medical, the published Guidelines were followed. They were notified of the requirement in good time and given the opportunity to rectify their application. This is, of course, assuming that the requirement was a change in policy which RCSI denies. It is their position that RAS Medical simply did not wish to comply. Clarke J noted in *Glenkerrin* that there was no legitimate expectation that the policy of a body exercising statutory functions wouldn't be change. However, the Court did note that reasonable notice should be given of such changes in policy. The notice given on 28th June 2013 would have been sufficient to procure the support of a person on the Specialist Register. Instead, RAS Medical misrepresented the qualifications of another.

44. The principles in *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] IR 84 do not apply as there was no representation of the kind considered. The Guidelines contain a provision allowing for more information to be sought. The fact that there was no explicit requirement vis-à-vis the surgery being performed by someone on the Specialist Register does not in and of itself amount to a representation. The Guidelines also preclude reliance on past accreditation for similar events. This has contextual importance given that CPD accreditation became mandatory for such events in 2011.

45. The discretion pertaining to educational merit prevents legitimate expectation arising. The application of RCSI's discretion is in line with *Eogan v. UCD* [1996] IR 390 in that RAS Medical would have been aware of the industry's understanding of the need to improve procedures concerning patient safety, they were offered the opportunity to reply to the decision, and there were rational grounds having regard to patient care, best practices and educational standards.

### **Non-Interference**

46. An order mandamus directing the grant of accreditation should be rejected considering that the principle of *Abrahamson v. Law Society of Ireland* [1996] IR 403 emphasises that courts should not interfere with the exercise of a discretionary power.

### **Fair Procedures/Natural and Constitutional Justice/Fixed Policy**

47. Contrary to the submissions of RAS Medical, RCSI did not "shut its ears" to their application. There is no fixed policy in place, rather having considered the application as a whole it determined that the live surgery element required further information. In this context, misrepresentations were made about the qualifications of the event's speakers. RCSI decided that the event required the support of a person on the Specialist Register. Even if a policy was in existence, there is no bad faith present that would justify the Court's intervention.

### **Right to make Representations**

48. RCSI requested further information and noted its willingness to prove clarification if necessary. The right to make representations need not be vindicated by a full hearing; informal procedures/observations may suffice. This informal process applied in the instant case given that adequate notice of given in conjunction with an opportunity to respond.

49. RCSI sought the name of someone on the Specialist Register on 28th June 2013 for the purposes of granting accreditation. This was timely and proper notice of a requirement that would have allowed for the event to be accredited.

### **Irrationality/Fixed Policy and Fettered Discretion**

50. RCSI did not slavishly follow any policy in coming to its decision. They had regard for patient safety and professional standards when exercising their discretion. The only speaker ever purported to fulfil the requirement was Mr. Jawad and even then his qualifications were misrepresented. Having determined that someone on the Specialist Register should have been involved in the event, they were entitled to verify the relevant qualifications. RCSI considered RAS Medical application on its merits and found it lacking.

51. The only possible challenge is that the decision was irrational as understood in *O'Keeffe v. An Bord Pleanála* i.e. it is at variance with common sense, indefensible in light of same and that the decision-maker has an obligation to have regard to fundamental reason in exercising their function. It is perfectly rationale to require that the event follow best practices in having a person on the Specialist Register support an event featuring live surgeries. Patient safety is a core element in considering an event's education merit. It is common sense that training should adhere to professional best practices.

### **EU Law**

52. There is no emphasis or clarity to RAS Medical's arguments in this regard. The only discreet reference to EU law relations to the criterion published on 15th July 2017, but this is not relevant to the current proceedings as it post-dates the determination of the application in issue.

### **The Failure to Exhaust Alternative Remedies and Appeal**

53. RAS Medical did not explore the range of options open to it appeal-wise. It is not open to them to challenge a finding of fact by the trial judge that the original Guidelines would apply to any internal appeal process. They choose to seek legal redress first rather than engaging in the appropriate appeal process and their justifications are merely speculative. The principle that refusal or failure to exercise a pre-existing appeal process before seeking the aid of the court will deprive them of judicial review is long-established [See: *State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] IR 381].

54. The internal appeal process would have allowed for the reconsideration of the original decision. The judicial review sought would have quashed the decision outright. An order mandamus is not an appropriate remedy in such proceedings.

55. The appeal allowed by RCSI would have been adequate in terms of time as the Professional Practices and Development Committee could have sat earlier than normal to facilitate it. It is particularly favourable when compared to judicial review proceedings. The suggestion that RAS Medical would not have been able to comply with the requirement in any case presupposes the outcome and does not support their application. The claim that the internal appeal process was not a proper appeal is unsupported by caselaw and remains a mere allegation. The inclusion of Professor Tiernay in the body conducting the appeal is not fatal as in that it would be a joint decision between him and the Professional Practices and Development Committee.

56. The error under review is the imposition of a requirement and the internal process was more than capable of resolving this issue.

Fair procedures were upheld at first instance and RAS Medical was given an opportunity to respond which it did. The failure to even explore the option means that RAS Medical by its conduct has locked itself out of the judicial review procedure.

#### **Discovery**

57. Contrary to RAS Medical's suggestion, the trial judge considered and made explicit reference to discovery documentation including the minutes of the Professional Practices and Development Committee which considered whether to grant accreditation to the event. RAS Medical was aware of what was required of them and simply did not meet this standard. Nothing in the case turns on the interpretation of terms which may have been considered interchangeable.

#### **(IV) Discussion**

##### **Fair Procedures**

58. There can be no room for debate as to the requirement of fair procedures. In *East Donegal Co-Operative v Attorney General* [1970] IR 317 at 341 Walsh J said that the presumption of constitutionality of legislation carried with it the presumption that the Oireachtas intended that all procedures which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice and that any departure from those principles would be restrained and corrected by the Courts. Similarly as the same judge declared in *Glover v. BLN Ltd* [1973] IR 388 at 425, 'statutes, regulations or agreements setting up machinery for taking decisions which may affect rights or impose liabilities should be construed as providing for fair procedures.' A person affected has a corresponding personal right under Article 40.3 of the Constitution.

59. As Fennelly J noted in *Re Eurofood IFSC Ltd* [2004] 4 IR 370:

"The principle of fair procedures in all judicial and administrative proceedings is, in Irish law, a principle of public policy of cardinal importance. It derives both from the rules of natural justice of the common law and from constitutional guarantees of personal and individual rights."

*Audi alteram partem*, as articulated as recently by the Supreme Court in *Dellway Investments Ltd v. NAMA* [2011] 4 IR 1, includes not only the right to be heard in defence of one's rights or interests but also to be apprised of the case that the person has to meet, that is, the material that is under consideration which is in favour of the deprivation or interference with rights.

60. The practical application of the requirement for fair procedures depends on the circumstances of the case. The formalities, notices and procedures involved depend on the statutory or regulatory context – what particular provisions are applicable? The nature of the decision being taken is obviously material, that is, how serious or important it is for the parties involved; the urgency of the situation; relevant rights of the parties; practical questions may also come into play such as the opportunities that exist for convenient consultation or whether communication is difficult. It is impossible to lay down precise regimes of procedure that will apply to every case.

61. In this case, the RCSI was carrying out an important delegated function of approving CPD events. This was an important matter for the applicant, RAS. Endorsement by the College would enhance the reputation of the clinic and Dr. Salman. The application was made in accordance with the RCSI guidelines. The relevant committee was comprised of medical experts whose function it was to evaluate the application and to grant or refuse it. In doing so, the committee had to employ fair procedures. What did that require? It seems to me that the first point is that the criteria that the committee was going to apply had to be clear. The committee could not make up criteria as they went along, whether they were described as rules or guidelines. If there was a specific matter of concern to the committee it was obliged to notify the applicant and invite its response. An obvious point is safety; the committee was clearly entitled to consider the safety of the patients who would be involved in the surgery proposed to be carried out in the course of the teaching event. There could be many other matters that arose for consideration, but safety is obviously a most important one. In order to comply with fair procedures, the committee had to give the applicant an opportunity of satisfying the reasonable concerns raised.

62. Judicial review is principally concerned with the process of decision-making rather than the validity of the actual decision. The exception is where the decision is challenged on the ground that it is irrational in that no reasonable decision-maker could have arrived at the conclusion in question. That does not arise here. The College and the committee had a responsibility to discharge under the delegated functions from the Medical Council. The committee was obliged to employ fair procedures and the primary question in this case is whether it did so. I do not think it makes any difference to this case whether the committee was applying rules or guidelines, although it is quite clear that it was dealing with the latter. The guidelines were couched in general terms as one would expect, and the committee had considerable discretion in dealing with an application. It is scarcely necessary in a legal judgment to say that changing the guidelines as one went along, and for the very purpose of dealing with an application that was submitted in accordance with the existing guidelines, would not normally accord with good administration or fair procedures.

63. Fair procedures do not dictate the outcome of a process. The principle is that decisions are better made when they are fairly made, when the deciding body considers relevant matters and discounts irrelevant things, when an applicant is notified of the scheme of rules or principles – or guidelines – that will be used to make the decision. If there are legitimate concerns, the deciding body will make those known to the applicant so that he or she has an opportunity to answer the concern. There are of course no absolutes in law or in life and there are occasions when the rules of fair procedures have to give way because of pressing exigencies to less considered or reflective processes. But those occasions have to be justified by necessity or emergency or urgency or some other valid reason. No such exceptional circumstance is present in this case.

64. It is also true that good administration implies, *inter alia*, a consistent and reasonable approach. A legitimate criticism would be that similar applications were decided in a different manner. An applicant who had an event approved in a previous year would not have any right to assume that a new proposal would be approved. But it would be open to the party to enquire of the deciding body why it was now refusing an application that it had previously granted. Things might have changed, new developments might have taken place, research might have revealed something relevant. In a word, there might be any number of reasons for a change of attitude. One would tend to look for some explanation for a volte-face in a policy. In this case, it strikes me that it was not unrealistic or presumptuous of the organisers of the event to make plans and then to apply for approval for CPD purposes. I think it is significant that the first mention of live surgery being relevant or of concern appears in the College's solicitors' response to the initiating letter from the solicitors for the applicant.

65. It did not follow that the committee was obliged to approve this application. That is not a matter that this court has to decide. It would be quite wrong to suggest that simple compliance with the guidelines left the committee no discretion in considering the application. But it had to consider the application in accordance with fair procedures.



66. Before considering any factual questions that arise in the appeal, it is worth recalling that the hearing in the High Court was conducted entirely on affidavit. It follows that this court is in as good a position as the trial judge to draw inferences and reach conclusions as appropriate, bearing in mind the respect with which an appeal court approaches the inferences and conclusions of the court of trial. There is however another element available to this court which may not have been prominent or as prominent in the High Court. That is the email chain of the internal communications of the RCSI which is valuable material as to the consideration of the application by the committee and how the guidelines came to be amended. As I have held above, that correspondence cannot be ignored. One of the complaints made by RAS is that the trial judge did not refer in his judgment to the discovered material, which is not entirely correct because he did cite the minutes of the Committee's meeting of 26th June 2013. The judge did not however analyse the internal emails which it seems to me is a valuable source. It is possible of course that the High Court took that correspondence into account in reaching its conclusions but if it did so, this Court does not have the benefit of the judge's analysis. If the High Court did not have regard to that material, it seems to me that this Court is in a superior position in respect of the circumstances of the decision and the alteration of the guidelines. In any event, this Court is in at least as good a position to consider those emails.

67. What actually happened in the consideration of the application for CPD approval? The sequence of events appears first from the minutes of the committee's meeting of 26th June 2013; secondly from the exchange of internal emails between the various persons concerned in the RCSI, namely Professor Tierney, Ms O'Boyle, Professor Carroll and Mr Tangney; and thirdly from the correspondence with RAS.

68. The High Court held that the committee applied the existing Guidelines and not the newly minted version that followed the committee meeting. I cannot agree with that interpretation. It is true that the trial judge thought that the applicant had been misled into a mistaken belief that the College had changed the guidelines for the purpose of dealing with the application but I do not think that was a mistaken belief, a fact which I think is clear from an analysis of the email chain that is set out above. Since the hearing in the High Court was on affidavit, this Court is in as good a position to draw inferences from the facts as was the High Court.

69. A consideration of the communications suggests strongly to me that the committee did not make its decision on the basis of the existing guidelines. It had Professor Carroll's recommendation that the application should be refused. That independent advice requires some mention in its own right as a separate matter. The decision that there should be a specialist sponsor and that the guidelines should be amended to provide for that and that the applicant should be notified make it abundantly clear that the committee was not satisfied with the existing provisions. The College makes the case that the committee made its decision on the basis of the previous guidelines and that it was entitled to impose the requirement as to the involvement of a specialist. In my view, it might be possible to make that argument if one did not have the discovered emails but they demonstrate otherwise. The committee was entitled under the old guidelines to make any reasonable requirements of an applicant for approval; that is not in question. If it had concerns about safety or expertise on the part of the person carrying out the surgery proposed or of the teachers attending, it was quite entitled to make appropriate enquiries. But that is not what happened. The committee was evidently of the view that it needed to change the guidelines in order to impose this new requirement and indeed to refuse the application. It is not in my view a matter of analysing the committee's powers but of examining how it dealt with the request for approval that was before it.

70. Was the judge correct in holding that the person who "supports the event", the "Chief organiser" and the "lead clinician/clinical lead" were interchangeable terms? I do not think that this conclusion can withstand analysis. In the first place, it is clear that the person most involved, namely, the chairman of the committee Professor Tierney thought that there was a significant difference. The committee itself had decided in response to the application that there should be a requirement of a sponsor specialist and that the Guidelines should be changed to embody that. The letter seeking details referred to a specialist who supported the event. Professor Tierney thought that the requirement needed to be beefed up, a comment that seems to me to be an unmistakable acknowledgement that the change proposed was significant. Moreover, I find it impossible to accept that what he came up with for the purpose of strengthening the requirement was simply the same thing. As for clinical lead, that is something else again. We are left with four terms that say different things. It is a matter of understanding and interpreting the words used. But if there was any doubt about the matter, the email exchanges make it clear that the authors of the various terms recognised the differences and consciously changed from one to another.

71. Obviously, patient safety is a legitimate concern for any medical or indeed other body that is asked to certify an event in which surgical techniques are going to be taught using live demonstrations of procedures being carried out. There was no suggestion here however of any lack of patient protection. If there had been it would have been perfectly reasonable for the committee to have sought reassurance and to have applied very strict standards. It is fair to acknowledge that the College in this judicial review application has not suggested that Dr Salman has any lack of surgical expertise in carrying out the particular procedures that he does. It is also relevant in this connection that a similar event to the one proposed for 27th July 2013 had been approved by the College in 2011. It is, of course, the case that approval of a course on one occasion or in one year does not mean that the same decision will be given on another application. That very point is expressly made in the Guidelines and it would I think be implicit in any case. On this I agree with the trial judge who pointed out that standards change and that there are medical developments happening all the time. Having said that, the relatively recent previous approval of a similar event to the one proposed is relevant in showing that the programme did not involve anything extraordinary or experimental or dangerous.

72. The trial judge also held that he would refuse relief as sought because there was an appeal available to the applicant. However, the appeal was to the same committee that refused the application and there was not a scheduled meeting before the date of the event in question. These two reasons seem to me to undermine the value of the available review.

73. The High Court held that the committee was entitled to be concerned at the response by RAS to the enquiries that it raised in the email of 28th June 2013 from Professor Tierney. This matter is discussed in detail in the affidavits that were before the trial court but it is unnecessary to come to any conclusion on any issue of lack of candour by the applicant. In the first place, it did provide the names of all the speakers scheduled to attend the event. There was it appears some genuine confusion over the registration of Dr. Jawad and there may indeed have been an attempt by the applicant to cloud the issue in order to give the impression that one of the attendees was on the specialist register. The fact is, however, that the committee carried out its own checks and was in the best position to do so. The committee did not decide to refuse the application on any ground related to candour; the decision had been made previously in fact. Neither did it justify its position in regard to the application on that ground. Clearly, any failure of full disclosure in an application to the committee is a serious matter and it might provide a justification in itself for refusal of an otherwise deserving request. So the committee did not make its decision on this basis and neither did the High Court. In which circumstances I think it is sufficient to note this point and to acknowledge its potential importance in another case.

74. I should say that I think that the function that was entrusted to the College on the Committee by the Medical Council required a more considered approach than is evident in Professor Carroll's rapid response and extremely brief email. It is open to a number of interpretations but it is clear that there is not a detailed consideration of the application, which the applicant was entitled to expect

of a respected body that was entrusted with an important delegated function. He simply said that the proposed course should be run by someone trained and specialised in the field and that Dr. Salman was not such a person. He did not ask for any details of the other participants and it is not clear whether he was aware of Dr. Salman's experience in performing these operations or of the fact that the College had previously in 2011 approved a similar course for CPD purposes. It may be reasonable for the College to disapprove of surgery carried out by doctors who are not on the specialist register of the Medical Council and to oppose them as far as they can, but simple disapproval is not sufficient when it has a delegated function to carry out. There has to be a basis in reason for withholding a permit of this kind. In this case the College seems to have taken a view inspired by Professor Carroll's disapproval of Dr. Salman's clinic and then sought to find a reason to refuse. It is an unjustifiable exercise in *ex post facto* rationalisation.

75. In my view, having considered all the circumstances, the High Court was in error in rejecting the judicial review application and I would allow the appeal.