THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 692 J.R.]

BETWEEN

SAQIB AHMED

APPLICANT

AND

THE FITNESS TO PRACTICE COMMITTEE OF THE MEDICAL COUNCIL

FIRST NAMED RESPONDENT

AND

THE MEDICAL COUNCIL

SECOND NAMED RESPONDENT

AND

(BY ORDER) THE MINISTER FOR JUSTICE AND EQUITY, IRELAND THE ATTORNEY GENERAL

THIRD, FORTH AND FIFTH NAMED RESPONDENTS

JUDGMENT of Mr. Justice Meenan delivered on the 16th day of February, 2018.

Background:
1. The applicant in these proceedings is a registered medical practitioner within the meaning of the Medical Practitioners Act 2007 ("the Act of 2007"). At the relevant time, the applicant was employed as a medical oncology registrar in the Mid-Western Regional Hospital, Dooradoyle, County Limerick.

2. The applicant was the subject of a fitness to practice inquiry, held before the first named respondent under Part 8 of the Act of 2007. This inquiry arose from a letter of complaint sent to the second named respondent, dated 26th November, 2012.

3. A notice of inquiry was served on the applicant. This notice listed some nine separate allegations which, in turn, were subdivided into further allegations. In all, the applicant was facing some 30 separate allegations. The notice alleged that one or more of the factual allegations and/or sub allegations amounted to poor professional performance and/or professional misconduct. The particulars of the evidence to be considered at the inquiry were attached to the notice. Included in this was an expert report to be prepared by Dr. Paul Henry, consultant clinical oncologist, Belfast City Hospital, in respect of the allegations of poor professional performance and/or professional misconduct.

4. The inquiry took place before the first named respondent between 9th - 11th March, 2015, 29th June - 1st July, 2015 and on 29th July, 2015. It was agreed at the outset of the inquiry that the standard of proof to be applied would be the criminal standard.

Hearing before the first named respondent
5. Following the conclusion of the hearing, there was only one finding of poor professional performance made against the applicant, arising from allegation 7(b) of the notice of inquiry, all other allegations having been not proven or withdrawn. I will set out in its entirety allegation 7, as it appeared in the notice of inquiry:-

> "7. On or around 6th November, 2012, in respect of patient B.K. who was transferred from Bon Secours Hospital, Tralee, County Kerry, you:
>
> a) Failed to record one of more of the following in Patient B.K's medical records:
> i. An assessment of patient B.K's condition; and/or
>
> ii. A medical history in respect of patient B.K.; and/or
>
> iii. An examination of B.K.; and/or
>
> iv. A plan for treatment B.K.; and/or
>
> b) Failed to request the following basic tests to include but not limited to:
> i. Blood test(s); and/or
>
> ii. Urine test(s); and /or
>
> iii. Kidney function test(s); and/or
>
> c) Prescribed 100 milligrams of allopurinol for patient B. K. when you ought to have known that 300 milligrams was a more appropriate dose and/or
>
> d) Demonstrated poor clinical judgment and/or a lack of empathy for patient B.K…"

6. At the hearing, evidence was heard from Professor Rajnish Gupta (who made the complaint), Dr. Denis O'Keffe, Dr. Kamal Fadalla and Dr. Paul Henry. The applicant represented himself at the hearing.

7. Following the conclusion of the hearing, the first named respondent issued a report. This report listed, *inter alia*, the allegations that were either proven or not proven or withdrawn, the names of those who gave evidence and the various documents considered.

In respect of allegation 7(b) the report stated as follows:-

> "Allegation 7(b) was proven as to fact. The reason: The totality of the evidence established this beyond a reasonable doubt. Finding: This amounted to poor professional performance. Reason: The evidence of Dr. Henry established that this was a very serious failure to meet standards of competence that can reasonably be expected of an oncology registrar."

Further,

> "In relation to the cumulative allegation of poor professional performance, this was in relation to the factual suballegations listed at 7(a) and 7(b) the committee found the cumulative allegation of poor professional performance was not proven.
>
> Reason: Not proven beyond a reasonable doubt..."

Having made the aforesaid findings, the first named respondent recommended to the second named respondent, in respect of the sanction to be imposed, that the applicant be admonished.

Proceedings before the second named respondent

8. Section 69 of the Act of 2007 provides that the first named respondent shall, on completing its inquiry, submit to the second named respondent a report in writing on its findings. This report shall specify the nature of the complaint that resulted in the inquiry, the evidence presented, findings as to whether any allegation is proved and such other matters related to the medical practitioner, the subject of the complaint, as considered appropriate by the first named respondent.

9. Section 70 of the Act of 2007 provides that the second named respondent shall, on receiving the report referred to in s. 69, if any allegation is proven, impose one or more than one sanction on the practitioner.

10. The sanctions set out in s. 71 of the Act of 2007 are as follows:-

> "(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;
>
> (d) the transfer of the practitioner's registration to another division of the register;
>
> (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."

11. Section 75 of the Act of 2007 provides that 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 appeal to the High Court against the decision.

12. The report of the first named respondent concerning the applicant came before the second named respondent for the purposes of imposing a sanction on 17th September, 2015. Following submissions, which the applicant made on his own behalf, and questions put to the applicant, the second named respondent imposed the sanction of "advice" as is provided for in s. 71(a) of the Act of 2007.

13. The Act of 2007 does not provide for any appeal where a sanction under s. 71(a) is imposed.

Judicial review proceedings

14. By order of the High Court, 14th December, 2015, the applicant was granted leave to apply by way of an application for judicial review for the followings reliefs:-

> i. An order of *certiorari* quashing the report of the first named respondent herein, which report was considered and adopted by the second named respondent on 17th September, 2015, and which report found that the applicant was guilty of one count of poor professional performance, pursuant to an inquiry held under the Act of 2007,
>
> ii. An order of *certiorari* quashing the decision of the second named respondent made on 17th September, 2015, wherein the second named respondent imposed a sanction of advice upon the applicant pursuant to s. 71. of the Act of 2007,
>
> iii. A declaration that the decision of the first and/or second named respondent to find the applicant guilty of an allegation of poor professional performance and/or the decision of the second named respondent to impose a sanction upon the applicant, without the applicant having the right to appeal the said finding and/or sanction is contrary to the applicant's rights pursuant to the Constitution and/or pursuant to the European Convention on Human Rights.

15. In his statement to ground the application for judicial review, the applicant set out the basis on which he sought to have the decision of the first named respondent finding him guilty of poor professional performance in respect of allegation 7(b) in the notice of inquiry quashed:-

> "iv. the first respondent misdirected itself in fact or in law in its decision to reach a finding of poor professional performance on the basis of the expert evidence;
>
> v. in failing to have any or any adequate regard for the fact that the expert witness called on behalf of the chief executive officer for the second respondent did not give any oral evidence to the effect that the allegation in question was, in isolation, capable of amounting to poor professional performance the first respondent acted irrationally and/or unreasonably and/or failed to observe the applicant's entitlement to natural justice by finding the applicant guilty of poor professional performance in relation to the isolated allegation.
>
> vi. the first respondent acted irrationally and/or unreasonably and/or contrary to the expert evidence in concluding that

allegation 7(b) was in isolation and in the context of the facts established at the inquiry, of such a nature as to be capable of amounting to poor professional performance."

16. Essentially, the applicant is alleging that the finding against him in respect of allegation 7(b) is irrational and/or unreasonable, having regard to the evidence given at the hearing before the first named respondent.

Preliminary objection
17. The respondents maintain that, under O. 84, r. 21 of the Rules of the Superior Courts, time for the purposes of applying for leave to review the report of the first named respondent started on 29th July, 2015, when the applicant was first on notice of the contents of the report. Application for leave was not made until 16th December, 2015, and thus is out of time.

18. As against this, the applicant submits that the procedure under the Act of 2007 was not completed until the meeting of the second named respondent on 17th September, 2015. If a sanction other than one provided for in s. 71(a) of the Act of 2007 had been imposed the applicant would under s. 75 of the Act of 2007 have had a full right of appeal to the High Court against the decision, in which case no judicial review proceedings would have commenced.

19. I accept the submission of the applicant on this point. Clearly, a central element of the application before this Court is that, because of the nature of the sanction that was imposed, there is no right of appeal allowed by the Act of 2007. This situation did not come about until the meeting of the second named respondent on the 17th September, 2015. Therefore, in my view, these judicial proceedings were commenced within the time allowed by O. 84, r. 21 of the Rules of the Superior Court.

Grounds for judicial review
20. It is clear that the applicant is seeking to impugn the decision of the first named respondent on the basis of a lack of evidence rather than any failure on the part of the first named respondent to follow fair procedures. These are judicial review proceedings not an appeal. It is necessary to look at this distinction which has been the subject of many decisions. In general, the distinction is that judicial review is concerned not with the decision but rather with the decision making process.

21. Where, as in this case, the court is being asked to look at the evidence upon which a decision is reached and the submission is being made that the decision is neither rational nor reasonable based on such evidence the boundary between judicial review and an appeal can become blurred. However, the authorities are clear on the approach that should be taken by the court.

22. Though the court was referred to numerous authorities on the nature and extent of judicial review proceedings, I will rely on the Supreme Court decision in *Michael Sweeney v. District Judge Fahey and the DPP* [2014] IESC 50. In my view, the decision in this case sets out clearly the principles which a court should apply in dealing with an application such as this. Clarke J. (as he then was) stated:-

> "3. Is Judicial Review appropriate?
>
> 3.1 As the authors of Hogan and Gwynn Morgan, "*Administrative Law in Ireland"* (4th Edition, 2010) point out, at para. 10 - 151, it has been frequently stated in judicial review proceedings that the High Court does not act as a court of appeal from decisions of other tribunals. The authors cite, in that context, *Lennon v. Clifford* [1992] 1 I.R. 382, at p. 386 per O'Hanlon J. and the express approval of that statement of O'Hanlon J. by this Court on appeal in the same case, *Lennon v. Clifford* [1996] 2 I.R. 590 at p. 593 per Murphy J. Various other comments to like effect are also cited."
>
> "3.6 It is important, therefore, to emphasise that judicial review is fundamentally concerned with the lawfulness of decisions taken affecting legal rights whether by persons, bodies, or courts having statutory jurisdiction. Judicial review is not concerned with the correctness of those decisions. There may be some legitimate debate as to the type of error which can lead to a decision being regarded as unlawful rather than simply incorrect. However, the fundamental distinction between unlawfulness, which can give rise to a decision being quashed on judicial review, and incorrectness, which cannot, remains.
>
> 3.7 It is in that context that the issue arises as to the extent to which it is ever appropriate to grant judicial review quashing a decision because of an alleged absence or inadequacy of evidence. It is clear that the absence of evidence of a fact which must exist for the court or tribunal to have jurisdiction in the first place may well provide a ground for judicial review (see for example *State (Holland) v. Kennedy* [1977] I.R. 193). But there is a clear logic in treating such a case as being one where judicial review lies. As already noted, judicial review is concerned with the lawfulness of a decision affecting legal rights. If the decision maker did not have jurisdiction to make the decision in the first place, then clearly the decision was unlawful. If a certain set of facts are necessary in order to establish that jurisdiction exists, then the absence of any evidence of the existence of those facts demonstrates that the decision maker has not been shown to have jurisdiction at all. There is, thus, a clear distinction between evidence of facts which are a necessary pre-condition to the exercise of any jurisdiction at all, on the one hand, and evidence of facts which are relevant to the way in which the decision maker exercises a jurisdiction which has been shown to exist, on the other. In a case such as this, where an accused is tried before the District Court on a charge of driving under the influence of a drug, the relevant District Judge clearly has jurisdiction in the narrow sense provided that the accused is properly summonsed to appear before the Court. Whether the accused is guilty is a question of fact (or, in many cases, a mixed question of law and fact) to be decided by the District Judge on the evidence. Save in an extreme case, it is not a matter for the High Court (or this Court on appeal), in considering whether to quash a conviction thus arising, to, to use the language of Keane C.J. in *D.P.P. v. Kelliher* [2000] IESC 60, inquire '… into the merits into the decision and inquiring whether on the facts before him the District Judge was right or wrong in the course that he took. That is not a course which is open to the Superior Courts to take in judicial review proceedings. It is tantamount to affording the Director a right of appeal in such a case and of course it must inevitably follow that such a right of appeal would have to exist also in the case of an accused person who conversely took exception to an order returning him or her for trial'.
>
> 3.8 Thus, there are very significant limitations on the extent to which it is appropriate for the superior courts to exercise their judicial review jurisdiction arising out of allegations that the evidence before a lower court or other decision maker was insufficient to justify the conclusions reached rather than insufficient to establish that the decision maker had any lawful capability to make the relevant decision in the first place. Absence of a lawful power to make the decision would render the decision unlawful. Save in an extreme case, absence of sufficient evidence as to the merits would only render the decision incorrect and, thus, not amenable to judicial review…"

23. In giving his judgment McKechnie J. stated:-

> "68. …Once there was sufficient evidence to sustain the conviction, it was entirely a matter for her to reach a decision on it. The issue, which confronted the judge, and one which the appellant wishes to re-litigate in these proceedings, is therefore clearly "an assessment of evidence" issue. That being so, I am quite satisfied that judicial review is an inappropriate remedy to address any such grievance which the appellant may have in that regard.
>
> 69. The case law fully supports this viewpoint. The High Court, when exercising its judicial review jurisdiction, is not a court of appeal, save as provided by statute, and should not lend this jurisdiction to second guessing the adequacy or sufficiency of the evidence given at trial: Murphy J. in *Roche v. District Judge Martin* [1993] I.L.R. M. 651 described the making of such a case 'as virtually impossible'. Nor should the Court minutely comb the evidence as given to test the conclusions reached: *Truloc Ltd. v. District Judge Liam McMenamin and Donegal County Council (Notice Party)* [1994] 1 I.L.R.M. 151…"

24. At the risk of doing exactly what McKechnie J. stated the High Court in judicial review proceedings should not do, i.e. "comb the evidence as given to test the conclusions reached..." I will examine the evidence.

25. The relevant allegation here is allegation 7(b), set out at para. 5 above. Evidence was given by Dr. Paul Henry, consultant clinical oncologist on behalf of the Chief Executive Officer, of the second named respondent. The applicant maintains that the evidence given by Dr. Henry related only to the totality of allegation 7 and no evidence was given concerning whether allegation 7(b) on its own was capable of amounting to poor professional performance. Reference is made to the following:-

> "Q. Mr. Hogan (on behalf of the CEO) Why are those – the allegation relates to the failure to carry out blood tests, urine tests and kidney function tests, this is allegation 7B. What's the importance of carrying out those tests? Why are they carried out routinely?
>
> A. Well, I wouldn't actually use the word routine, but – because this is – this is a rare, one off case. This is an acutely ill patient arriving from Tralee, a man of 28, he's had a CT scan which shows a large abdominal mass and bears a differential diagnosis for these patients but it includes things like high grade lymphoma and testicular germ cell tumour and certainly in my experience, over 30 years, these illnesses are – they're frighteningly rapid. You can see patients going from being completely well to being dead in 10 to 14 days, so the doubling time of these tumours is incredibly short and if you look through the records that came from Tralee, this man's medical history went back for only six to eight weeks, so it was typical, very short history, so he clearly had something very nasty growing rapidly and the importance of the blood test is that, with a large abdominal mass, it's potentially going to obstruct both ureters and it's important to check the blood test to see that the kidney function has remained normal. I don't know when exactly the previous blood tests were done at Tralee, whether it was a day previously, or a week previously, as Dr. Ahmed said on one occasion, but regardless of that, it's important that it's checked on arrival in Limerick along with the other full blood counts and liver function..."

It was submitted by the applicant that the height of the criticism in respect of allegation 7(b) was that it would have been "important" or "more preferable" (as stated in another passage of evidence) to have such test carried out.

26. As against this, the first named respondent drew the attention of the Court to other evidence given in respect of allegation 7(b). It was pointed out that the evidence from Dr. Henry comprised not only his oral evidence but also the contents of a written report which was he had prepared previously. In the course of this written report, Dr. Henry stated:-

> "The repeating of these tests (the tests the subject of allegation 7 (b) was vital on the evening of arrival…(a) patient with a large retroperitoneal mass growing rapidly can very easily obstruct both ureters leading to renal failure and this would have to be attended to with immediate effect..."

27. The first and second named respondents relied on the evidence quoted above highlighting Dr. Henry's description of the tests as "vital". Further, when Dr. Henry was cross examined by the applicant he stated as follows:-

> "The overall management is very serious that you didn't make any entry in the notes, you didn't examine the patient properly, you didn't order any blood tests, which were very – would have been very appropriate at that time, and you didn't describe any management plan in the notes which of course were non existent..."

28. In my view, the wording of allegation 7(b) is also important. It should be noted that the allegation refers to a failure "to request the following basic tests…" It is not simply a failure to carry out tests.

29. It was not contested by the applicant that he had not carried out the tests but what was in issue was the importance of the tests. The first named respondent concluded, having heard the evidence, that as regards allegation 7(b) the applicant was guilty of poor professional performance, that is he was guilty of a failure 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 practicing medicine of the kind practiced by the practitioner. Bearing in mind the clear distinction between an application for judicial review and an appeal and given the evidence before the first named respondent it could not be stated that the finding made by the first named respondent was irrational or unreasonable. There was clearly evidence before the first named respondent upon which it could reach the decision it did. It follows the applicant is not entitled to an order of *certiorari* quashing the report of the first named respondent herein.

No Appeal

30. The applicant seeks a declaration that ss. 71 and 75 of the Act of 2007 are repugnant to the Constitution insofar as they deprive the applicant of a right of appeal where a finding of poor professional performance is made and the sanction imposed is an "advice".

31. In his affidavit of March 2017, the applicant states the following:-

> "13. I say and believe that, by reason of the adverse finding against me, my vocational options are now more limited than they would otherwise be.
>
> 14. I currently practice in the United States of America. Where I am applying for work I am required to disclose this adverse finding – namely the finding of poor professional performance – against me, which I say and believe necessarily limits my capacity to be successful against other job applicants who have not been subjected to similar findings."

and

> "18. I say and believe that these obligations limit me (or in the alternative have the capacity to limit me in the future) in earning a livelihood or in the alternative pursuing a full range of career options that would otherwise be open to me by reason of the findings that I say is irrational or otherwise unreasonable in all of the circumstances and/or a finding which I say I should have – as a matter of fairness and principle – be entitled to appeal.."

32. I believe the following observations can be made on the foregoing:

> (i) The sanction that was imposed on the applicant was "advice" for poor professional performance. This is the lowest sanction available under the Act of 2007. It does not limit or restrict the applicant's ability to practice medicine as would, for example, the imposition of conditions on his registration.
>
> (ii) The alleged consequences of the finding by the first name respondent and the sanction imposed on the applicant's employment prospects are of a general nature and no particular incidences of adverse consequences have been shown to the Court since the imposition of the sanction in September 2015.
>
> (iii) It is correct that the applicant will have to inform future employers of the finding and sanction. However, it may not be unreasonable to assume that future employers would be capable of distinguishing between the implications of the lowest sanction permissible compared with the imposition of more serious sanctions.

33. In the notice of motion before this Court, the constitutional aspect of the application referred only to the absence of a right of appeal. In the course of submissions and arguments, this was broadened to encompass a claim by the applicant that his right to equality before the law, his right to a good name and his right to freedom to seek work had been breached.

34. It was submitted by the applicant, as evidence of his right to equality and right to a good name, that he would have been in a better position had a condition been attached to his registration, in addition to the advice, as he would then have been permitted to appeal under s. 75 of the Act of 2007. I find such a proposition very difficult to accept. The attachment of a condition to a registration is a serious matter in that it makes a medical practitioner's ability to practice medicine conditional. The seriousness of such is recognised by the Act of 2007 in that before a condition can be attached to a registration it must be confirmed by the High Court, as per s. 74 of the Act of 2007.

35. Issues concerning a medical practitioner's absence of a right to appeal, equality before the law and right to a good name were considered in *Akpekpe v. Medical Council* [2014] 3 I.R. 420. In this case, the applicant was the subject of a finding of poor professional performance by the first named applicant and the second named applicant imposed on him the sanction of "advice". The applicant sought an order of *certiorari* quashing the finding and decision and, as in these proceedings, sought a declaration that certain provisions of the Act of 2007 were unconstitutional, insofar as they denied the applicant a right of appeal as per s. 75.

36. The judgment in the High Court was delivered by Kearns P. On the issue of an absence of appeal, Kearns P. stated:

> "[48] That said, it is clear from *M. v. The Medical Council* [1984] 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 enquiry itself, the only powers 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.'
>
> [49] Although *M. v. The Medical Council* [1984] I.R. 485 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."
>
> [51]…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.
>
> [52] Thus in *Quinn v. Honourable Society of King's 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."

As to the applicant's right to equality before the law, Kearns P. stated:

> "[59] 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 first respondent 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 first respondent 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."

On the issue of the applicant's good name, Kearns P. stated:

"[68] 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] I.R. 485 at p. 500:-

> 'Article 40, s.3, sub-s. 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.'"

Finally, in a more general statement on the applicant's constitutional rights, Kearns P. stated:

"[67] 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."

37. The statement of the law by Kearns P. in *Akpekpe v. Medical Council* is comprehensive and, in my view, determines the constitutional aspects of the applicant's claim in the proceedings before this Court. Further, I refer to in *Re Worldport Ireland Ltd* [2005] IEHC 189 where Clarke J. (as he then was) stated:

"It is well established that, as a matter of judicial comity, a judge of first instance ought usually follow the decision of another judge of the same court unless there are substantial reasons for believing that the initial judgment was wrong. *Huddersfield Police Authority v- Watson* [1947] K.B. 842 at 848, *Re Howard's Will Trusts, Leven & Bradley* [1961] Ch. 507 at 523. Amongst the circumstances where it may be appropriate for a court to come to a different view would be where it was clear that the initial decision was not based upon a review of significant relevant authority, where there is a clear error in the judgment, or where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period. In the absence of such additional circumstances it seems to me that the virtue of consistency requires that a judge of this court should not seek to second guess a recent determination of the court which was clearly arrived at after a thorough review of all of the relevant authorities and which was, as was noted by Kearns J., based on forming a judgment between evenly balanced argument. If each time such a point were to arise again a judge were free to form his or her own view without proper regard to the fact that the point had already been determined, the level of uncertainty that would be introduced would be disproportionate to any perceived advantage in the matter being reconsidered."

In regard to the foregoing, no basis has been established for me to depart from the decision of Kearns P. in *Akpekpe v. Medical Council*.

38. In the course of submissions, it was argued that *Akpekpe* did not address the issue of the applicant's right of freedom to seek work and it was argued that this would constitute a ground upon which this Court could distinguish the instant case from the *Akpekpe* case. On the issue of "right to work", reliance was placed on the Supreme Court decision in *NHV v. Minister for Justice and Equality and Others* [2017] IESC 35. In his judgment, O'Donnell J. stated:

"**The Right to Work**

12 As Hogan J. observed, there is a relatively impressive line of authority recognising that the Constitution Article 40.3, at least, guarantees what has been described as a right to work. That was established in cases such as *Landers v. The Attorney General* (1975) 109 I.L.T.R. 1 , *Murtagh Properties v. Cleary* [1972] I.R. 330, *Murphy v. Stewart* [1973] I.R. 97 and *Cafolla v. O'Malley* [1985] 1 I.R. 486. I share however Hogan J.'s view that if the right was not so well established, I would have wished to consider afresh whether such a right was one of the unenumerated rights protected by Article 40.3 and in any event if it could be accurately described as an enforceable right to work.."

And

"17 Accordingly I have concluded that a right to work at least in the sense of a freedom to work or seek employment is a part of the human personality and accordingly the Article 40.1 requirement that individuals as human persons are required be held equal before the law, means that those aspects of the right which are part of human personality cannot be withheld absolutely from non-citizens.."

39. I am not satisfied that the applicant's argument in respect of a breach of his right to work advances his claim that the relevant sections of the Act of 2007 are unconstitutional for the following reasons:

(i) I have already cited a passage from the judgment of Kearns P. in Akpekpe where he states that he is satisfied the Act of 2007 has not been shown to be unconstitutional owing to "any alleged infringement of the applicant's rights under Article 40". This would encompass a "right to work".

(ii) In the context of this case, the Court is concerned with the effects of a finding and sanction. The applicant claims damage to his professional reputation which may limit his ability to work. As such, I cannot see any real distinction between a "right to a good name" and a "right to work".

(iii) In any event, as stated in para. 32 above, the effects of the finding and sanction on the applicant's ability to practice medicine are speculative.

40. By reason of the foregoing, the applicant is not entitled to a declaration that ss. 71 and 75 of the Act of 2007 are repugnant to the Constitution.

European Convention on Human Rights: -

41. The applicant seeks a declaration of incompatibility, within the meaning of s. 5 of the European Convention on Human Rights Act, 2003 that s. 71 and/or s. 75 of the Act of 2007 are incompatible with the State's obligations under the provisions of the Convention including, but not limited, to Article 6.

42. Article 6 provides: -

"Right to a fair trial:

> 1. 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…"

The applicant does not dispute that during his hearing before the first named defendant, he was afforded anything other than fair procedures. Nor does he dispute that the first named respondent and the second named respondent are "an independent and impartial tribunal established by law". Thus, there is no breach of Article 6.

43. As to whether the absence of an appeal in circumstances where the sanction of an advice has been imposed is in breach of the Convention, this has been considered by the English courts in *R. v. General Medical Council, Ex Parte, Kypros Nicolaides* [2001)] EWHC Admin 625. In this case, the applicant was a doctor who had been found guilty of professional misconduct. In the judgment, Tucker J. states: -

> "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 within 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 practice, was not affected"

and

> "28. So far as Art. 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 is the professional conduct committee 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 practice medicine, and this was unaffected by the decision…"

and

> "32. 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… Thus, there is no appeal against a finding of professional misconduct accompanied by a reprimand."

44. This issue was considered again by the Court of Appeal of England and Wales in the case of *R (Thompson) v. The Law Society* [2004] EWCA Civ. 167, (2004) 1 WLR 2522 where Clarke L.J. stated: -

> "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 reprimand the person concerned (here the claimant) does not amount to a determination of his civil rights because the right to continue to practice his profession is not at all at stake"

45. Both of these decisions were referred to by Kearns P. in *Akpekepe* wherein he stated : -

> "[63] 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."

46. In the course of submissions, the applicant relied on *Ghosh v. General Medical Council* [2001] 1 WLR 1915. In this case, Dr. Ghosh was found guilty of serious professional misconduct by the Professional Conduct Committee of the General Medical Council. The committee directed that the name of the doctor be erased from the register. The doctor appealed to the Privy Council who held that appeals are by way of a rehearing and though an appropriate measure of respect would be given to the committee's professional judgment, the Privy Council itself would decide whether the doctor's failings amounted to serious professional misconduct and whether the sanction of erasure was necessary in the public interest. It does not appear to me that this case is an authority for the submission that an appeal ought to lie in a situation where the sanction imposed is "advice".

47. Though in the *Akpepke* case, the applicant did not specify the breach of any particular rights under the Convention and did not seek a declaration of incompatibility of the Act of 2007 under the European Convention on Human Rights Act, 2003, I am satisfied, on the authorities referred to and on the wording of Article 6 itself, that the applicant in this case is not entitled to the declarations sought.

Conclusion

48. By reason of the foregoing, the applicant is not entitled to the reliefs sought in the notice of motion before the Court.