THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 250 J.R.]

BETWEEN

ELTAYEB ELMUBARK ABDEL GADIRL ELKHABIR

APPLICANT

AND

MEDICAL COUNCIL

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 12th day of February, 2016.

1. On 19th September, 2015, the Medical Council made the determination that the applicant be removed from the Register of Medical Practitioners in Ireland.

2. On 27th April, 2015 Noonan J. granted liberty to seek an order of *certiorari* with regard to that decisions, and a declaration that the procedure followed by the respondent in conducting the inquiry which lead to its decision was in breach of fair procedures and natural and constitutional justice.

3. The decision to remove the applicant from the Register and publication of the decision has been stayed pending the determination of the judicial review.

4. The application for leave to bring judicial review was grounded on the affidavit of the solicitor for the applicant Catherine Martin sworn on 6th May, 2015. Ms. Martin did not represent Dr. Elkhabir at any of the hearings before the Fitness to Practice Committee of the respondent.

5. This judgment is given in the application of the respondent to strike out the proceedings on the grounds that the applicant has failed to comply with an undertaking given at leave stage by counsel on his behalf, and with his authority, to provide an affidavit verifying the facts contained in the statement to ground the application.

6. Ms. Martin swore a supplemental affidavit on the 3rd February, 2016 for the purpose of explaining why her client had failed to comply with the undertaking given on his behalf at the *ex parte* application at which leave was granted. She advises that the applicant, who is of Sudanese birth but who is a citizen of Ireland, is currently not within the jurisdiction and she then goes on to say as follows:-

> "The applicant has indicated to me previously that he has religious difficulties with some of the terms indicated in the affidavit. In this regard there is correspondence passing between the applicant and myself, however privilege attaches to such correspondence and I have therefore not exhibited this correspondence herein. I say and believe that had he sworn the grounding affidavit it would have been on similar terms to the verifying affidavit sworn by the Deponent herein."

7. The respondent in the notice of opposition has expressly pleaded by way of preliminary objection that the applicant had failed to comply with O.84, r. 20(2) of the Rules of the Superior Courts, and in which was reserved the right of the applicant to seek to have the proceedings struck out on account of that failure.

8. The order granting leave to bring judicial review was expressly made on foot of an undertaking given on behalf of the applicant that he would personally swear an affidavit for purposes of the full hearing. Counsel agree that, while the giving of the undertaking is not noted in the written order reflecting the decision of Noonan J., that the undertaking was expressly given on behalf of the applicant, and that leave was granted subject to the personal affidavit of the applicant being before the court at the substantive hearing.

The jurisdiction of the court hearing an application for judicial review

9. The two stage procedure required under the Rules of the Superior Courts for bringing an application for judicial review requires that, at the leave or *ex parte* stage, that the applicant satisfies the High Court that he has a stateable case. The court may on such application grant leave subject to conditions or compliance with its directions or orders. Such power to grant leave subject to conditions arises from the fact that judicial review is a discretionary remedy, and the granting of leave subject to conditions is one way in which the court may engage the full extent of its discretion.

10. I consider the requirement imposed by Noonan J. to be a condition precedent to the applicant being entitled to proceed to seek substantive relief at a full hearing, and that, as leave was granted subject to the conditions imposed as a result of that undertaking, the order granting leave to bring judicial review must be regarded as containing an order that a personal affidavit of the applicant be sworn.

11. Further, while there is no absolute rule that an application for judicial review may not be grounded on an affidavit of a solicitor, the requirement in the Rules is that the statement of grounds be supported by an affidavit which verifies the fact on which the review is sought.

12. In *Probets v. Glackin* [1993] 3 I.R. 134, the Supreme Court regarded it as unsatisfactory that the application was grounded on an affidavit of a solicitor and not that of the applicant himself. There is no absolute rule, however, as is clear from *POC v. Director of Public Prosecutions* [2000] 3 I.R. 87, where the Supreme Court pointed to the requirement that the affidavit verify the facts, and any person who was in a position to so do may swear such grounding or verifying affidavit.

13. A peculiar factor in the present case is that the solicitor who swore the affidavit grounding the application for leave did not represent the applicant at the hearing before the administrative body, and she is not for that reason in the best position to give the evidence in question. I consider that the failure of Dr. Elkhabir to swear a grounding affidavit must be seen also in that context.

The order granting leave determines scope of jurisdiction
14. In *McCormack v. Garda Síochána Complaints Board & Ors* [1997] 2 I.R. 489, Costello P. considered whether the court had a jurisdiction to permit an amendment to a statement grounding an application for judicial review. At p. 503 of the judgment he explained the reasons why the application to amend be permitted:-

> *"It seems to me that only in exceptional circumstances would liberty to amend a grounding statement be made because the court's jurisdiction to entertain the application is based on unlimited by the order granting leave. But when fact came to light which could not be known at the time leave was obtained and when the amendment would not prejudice the respondents, then it seems a proper exercise of the courts power of amendment to permit the amendment rather than require that the new "grounds" be litigated in fresh proceedings. Accordingly, I purpose to allow the amendment."*

15. The decision of Costello J. is of importance in that it explains the role of the court in granting leave to bring judicial review, and that the jurisdiction of the court hearing the substantive review was based on and limited by the order granting leave. The order granting leave establishes the jurisdiction of the court hearing the substantive application, and this is clear from a number of decisions including the judgment of Laffoy J. in *Leilmo v. Minister for Justice, Equality and Law Reform* [2004] 2 I.R. 178, where she considered the question of whether the court hearing the substantive application could permit an amendment to include grounds rejected at the leave stage. At page 185 she said as follows, quoting from Collins and O'Reilly Civil Proceedings and the State (2nd ed., 2004):-

> *"…the better view must surely be the refusal to grant leave on certain grounds binds every other judge of the High Court, who is therefore deprived of jurisdiction to act in such a manner effectively set that refusal aside."*

16. While some relaxation can be noted in later decisions concerning the circumstance where leave to amend a statement of grounds will be granted, the first principles remain the same, namely that the order granting leave sets the parameters of the substantive hearing and outlines the questions to be determined, both as regards the relief and the grounds on which that relief may be granted.

17. Order 84, rule 23(1) is the statutory basis for such an approach and it provides that:-

> "no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement."

The matter has been definitively set out by McKechnie J. in *Fitzpatrick v. Board of Management of St. Mary's Touraneena National School* [2013] IESC 62, at para. 35 where he approved the principles identified in *McCormack v. An Garda Síochána Complaints Board & Ors*, referred to above, and noted that they had been subsequently repeated in several decisions of both the High Court and the Supreme Court. He held in that case that:-

> *"As no amendment to the leave order … has ever been sought, this legal ground of appeal cannot be established …. "*

18. I consider in the light of these authorities that the jurisdiction of the court hearing the substantive application for review in the present case is limited and identified by the condition that the applicant must swear a personal affidavit to ground or verify the facts contained in the statement of grounds. Accordingly, I consider, subject to what I say below, that I do not have jurisdiction to hear and determine the substantive application in the absence of such an affidavit.

19. Having regard to the discretionary nature of the remedy, and because the authorities establish that amendment can be made to the grounds on which leave was granted, I turn now to consider whether I have discretion to hear the application notwithstanding the failure of the applicant to satisfy the condition precedent, and if so, how such discretion should be exercised.

Judicial review as a discretionary remedy
20. Judicial review is a discretionary remedy, and the respondent argues that the failure of the applicant to comply with the undertaking given on his behalf to Noonan J. in the course of the application for leave must inform my approach, especially as the applicant has not denied any of the assertions made against him in the replying affidavits.

21. The discretion of the court may be exercised to refuse relief even when the court believes that certain of the arguments or grounds have been made out. The court also has a discretion on procedural matters, and the case law establishes that the court may make an order for the amendment of the statement of grounds, and the making of such an order is clearly one which invokes discretionary considerations, where the court considers questions such as the reason the amendment is sought, if the facts sought to be relied on were not available or reasonably available to an applicant at the leave stage, and whether prejudice is likely to be caused to the respondent by any amendment.

22. Counsel for the applicant argues that my discretion ought to be exercised in favour of the applicant, and that the elements which should inform my discretion include the fact that the order made by the respondent has a profound impact on his right and ability to work in his chosen profession in Ireland. He also argues that, as the claim made in the judicial review is that there was an egregious breach of natural and constitutional justice in the conduct of the inquiry, the application that the proceedings be struck out is an attempt to deflect from the seriousness of the breach of due process.

23. I consider that there is a difference in nature between my power to permit amendments to the statement of grounds, and the power of the court to forgive or vary the requirement imposed by Noonan J. This is especially so as the applicant has failed to honour the undertaking given on his behalf for the purposes of the leave application. I turn now to consider the nature of an undertaking and the effect on my decision of the breach of undertaking in the present case.

An undertaking given at leave stage
24. An undertaking is a solemn promise to the court that certain things will be done, or not be done, as the case may be. The undertaking in the present case was an undertaking in support of an application and which constituted a condition precedent to the

further prosecution of the substantive application for judicial review.

25. The court has an interest in the protection of the administration of justice and the honouring of an undertaking given to a court is a matter of the utmost solemnity. An undertaking has the same force in law as an injunction or an order of court. The court has some power to release a party from an undertaking, but that power must be seen in the context of the overriding principle that a court order be honoured and that the solemnity of the undertaking be respected. No application has been made by the applicant that he be released from his undertaking. Furthermore, no facts have been disclosed to me which would suggest that there is any basis upon which I might vary any order made by Noonan J.

26. Thus I consider that I ought to be slow to ignore the failure of the applicant to abide by his undertaking.

The reason given for the failure
27. The affidavit of Ms. Martin avers that the applicant has a reluctance to swear an affidavit for religious grounds, having regard to the jurat in the draft furnished to him. I am aware from the documentation before me that the applicant is a member of the Islamic faith and he did declare his evidence on the Quran at the hearing before the inquiry. Furthermore, I note that, before he was legally represented, the applicant sought by notice of motion dated 14th October, 2014, to appeal the decision of the respondent, and his application brought by notice of motion was grounded on an affidavit sworn by him before a Commissioner for Oaths on 14th October, 2014.

28. Counsel for the applicant informs me that Ms. Martin has since June, 2015 advised her client of the various means by which he may furnish affidavit evidence to the court in a way that does not offend his religious beliefs. It seems, however, that no instructions have been received from the applicant since June, 2015 with regard to how he may comply with the undertaking.

Decision
29. In my judgement, the failure on the part of the applicant to swear a personal verifying affidavit deprives me of jurisdiction to hear the substantive action in that he has failed to perform a condition precedent to the grant of leave. The matter thus regarded is one of jurisdiction.

30. Even if I were to decide that the matter fell to be regarded more as a matter of discretion, then I consider that I ought not exercise my discretion in favour of permitting the application to proceed notwithstanding the breach of the undertaking, as he has not offered any evidence on which I may vary or discharge him from his solemn undertaking. His failure to do so influences me in the exercise of my discretion, and the failure to abide by a solemn undertaking which has the force of an order of court is one that weighs heavily in my decision.

31. I therefore propose to strike out the application for judicial review.