THE HIGH COURT

[2017 No. 116SP]

IN THE MATTER OF SECTION 71 OF THE MEDICAL PRACTITIONERS ACT 2007 AND

IN THE MATTER OF A REGISTERED MEDICAL PRACTITIONER AND

ON THE APPLICATION OF THE MEDICAL COUNCIL

BETWEEN

MEDICAL COUNCIL

APPLICANT

AND

T.M.

RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 3rd day of October, 2017

The Question

1. The sole question which falls to be answered in this judgment is whether the High Court has power under the Medical Practitioners Act 2007 (the Act) to hear an application under s.76 of the Act otherwise than in public.

Background

2. The Medical Council ("The Council") seeks an order pursuant to s. 76 of the Act confirming its decision of December 2016 that the respondent's registration as a medical practitioner be cancelled.

3. The decision of the Council was made on foot of a finding of its Fitness to Practise Committee (FTPC) that the respondent was guilty of professional misconduct. The FTPC made a recommendation that his registration as a medical practitioner be cancelled. That recommendation was endorsed by the decision of the Council.

4. The hearing before the FTPC was in private. So also was the hearing by the Council on foot of its recommendation. The Council decided not to publish details of the sanction. It is in these circumstances that the respondent contends that the application to confirm the cancellation of his registration ought to be heard in private.

5. When the application first came before the court, the solicitor for the Council expressed concern as to the jurisdiction of the court to hear the matter otherwise than in public. He said *"the primary concern of the Council today is that it wouldn't be heard in camera unless there was express jurisdiction to do so".* I directed an exchange of written submissions and heard oral argument on the issue and this is my judgment on it.

The Constitutional Imperative

6. Article 34.1 of the Constitution provides:-

> *"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."*

7. The reason for this constitutional requirement was identified by Keane J. (as he than was) in *Irish Times v. Ireland* [1998] 1 I.R. 359 at p. 409 where he said:-

> *"Justice must be administered in public, not in order to satisfy the merely prurient or inquisitive, but because, if it were not, an essential feature of a truly democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by press, radio and television. The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy."*

8. Is an application under s. 76 of the Act one of the special and limited cases prescribed by law which may be heard otherwise than in public?

9. The search for an answer to that question must begin by an examination of the provisions of the Act since this is a statutory application arising from the discharge by the Council of a statutory function conferred on it by the Act.

The Act

10. Does the Act expressly authorise the court to hear an application under s. 76 otherwise than in public? The short answer to that question is that it does not.

11. Section 76 falls within Part 9 of the Act. That is the part which deals with the imposition of sanctions on registered medical practitioners following reports of the FTPC. Nowhere in Part 9 of the Act is to be found any express entitlement on the part of the court to hear applications under it (whether under s. 75 or s. 76) otherwise than in public.

12. Whilst the Act does not address such an entitlement on the part of the court under Part 9 of the Act, it does so expressly in s.60 which is contained in Part 7 of the Act. That section permits the Council to make an *ex parte* application to the court for an order to suspend the registration of a registered medical practitioner. Sub-section (2) of s. 60 provides:

> *"An application under subsection (1) shall be heard otherwise than in public unless the Court considers it appropriate to hear the application in public."*

It is clear that the legislature addressed its mind to the question of hearings in court otherwise than in public but limited such entitlement to an application brought under section 60.

13. The only express entitlement given to the court under the Act to hear an application otherwise than in public is confined to an application under section 60. The Act contains no express entitlement to hear an application under s. 76 otherwise than in public.

Implicit Authority
14. It was argued that notwithstanding the absence of an express statutory entitlement, it could be implied that the legislature intended the court to have the ability to hear the s.76 application in private, particularly in circumstances where both the FTPC and the Council dealt with it in that fashion.

15. Such an argument has its problems. First, there is the constitutional imperative of Article 34 of the Constitution which I have already reproduced. Second, it is difficult to contend that where the legislature clearly addressed its mind to the entitlement of the court to deal with matters *in camera* but confined such ability to applications under s. 60, that it should nonetheless be regarded as having implicitly authorised an application under s. 76 to be heard *in camera (Expressio unius est exclusio alterius).* Third, the argument for an implicit entitlement to hear the application *in camera* must be viewed in the light of the long title of the Act. The long title is as follows:

> *"An Act for the purpose of better protecting and informing the public in its dealings with medical practitioners and, for that purpose, to introduce measures, in addition to measures providing for the registration and control of medical practitioners, to better ensure the education, training and competence of medical practitioners, to amend the membership and functions of the Medical Council, to investigate complaints against medical practitioners and to increase the public accountability of the Medical Council; to give further effect to Council Directive 2005/36/EC; and for that purpose, to repeal and replace the Medical Practitioners Acts 1978-2002 and to provide for related matters". (My emphasis)*

16. Notwithstanding these matters, it is nonetheless argued that the court should hold that there is power conferred on it under the Act to conduct the s. 76 hearing in private. This involves a consideration of the structure of the Act.

The Statutory Structure
17. I have already reproduced the long title to the Act.

18. Section 3 repeals the Medical Practitioners Act 1978 and its amending Acts. Notwithstanding the repeal of the Act of 1978, the Medical Council, established by s.6 of that Act, is continued in being by s. 4 of the Act.

19. Section 6 of the Act provides that the object of the Council "*is to protect the public by promoting and better ensuring high standards of professional conduct and professional education, training and competence among registered medical practitioners*". The Council is required to perform its functions in the public interest (s.7 (1)(b)).

20. Section 20(2) of the Act requires the Council to establish a committee to be known as the Preliminary Proceedings Committee ("PPC") to give initial consideration to complaints and the FTPC to inquire into complaints.

21. If the PPC is of opinion that there is a *prima facie* case to warrant further action being taken in relation to a complaint, it is obliged to refer the complaint to the FTPC.

22. Part 8 of the Act deals with complaints referred to the FTPC.

23. Section 65 requires the FTPC to hear such complaint. Section 65(2) provides as follows:-

> *"A hearing before the Fitness to Practise Committee shall be heard in public unless –*
>
> *(a) following a notification under section 64, the registered medical practitioner or a witness who will be required to give evidence at the inquiry or about whom personal matters may be disclosed at the inquiry requests the Committee to hold all or part of the hearing otherwise than in public, and*
>
> *(b) the Committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing otherwise than in public."*

24. This provision obliges the FTPC to conduct its hearings in public unless the conditions identified in s. 65 (2)(a) and (b) are met. Thus, express statutory authority is given to the FTPC to depart in certain circumstances from the general obligation to conduct its hearings in public. This statutory entitlement was relied upon by the FTPC in the present case and the entire of the hearing concerning the respondent was heard otherwise than in public.

25. The FTPC is obliged on completing an inquiry into a complaint to submit to the Council a report in writing on its findings (s. 69(1)). The report from the FTPC is obliged to specify the nature of the complaint that resulted in the inquiry, the evidence presented to the FTPC and its findings as to whether any allegation was proved. The report may also include such other matters relating to the registered medical practitioner as the FTPC considers appropriate (s. 69(2)).

26. On receipt of the report from the FTPC the Council is, pursuant to s.70, obliged to dismiss the complaint if the FTPC finds that no allegation against the registered medical practitioner has been proved. If, however, the FTPC finds that any allegation against the practitioner is proved, the Council must then decide to apply one or more of the sanctions specified in section 71.

27. In the present case, the Council, when exercising its functions under s.70 and s.71 of the Act, did so otherwise than in public. It is to be noted that no express statutory authority is conferred on it to do so. Such statutory entitlement is conferred only on the FTPC.

28. The imposition of sanctions following a report from the FTPC is dealt with in Part 9 of the Act. Section 71 is the first section in that part of the Act.

29. Section 71 requires the Council to decide on the imposition of one or more of the sanctions specified in that section in circumstances where a report from the FTPC has found an allegation against a practitioner proved. Seven possible sanctions are identified in the section. They range from an advice, admonishment or a censure at the lower end, to the cancellation of the practitioner's registration at the upper. None of the sanctions take effect unless the decision of the Council is confirmed by this Court with the sole exception of the sanctions identified in s. 71(a) which are an advice or admonishment, or a censure in writing.

30. Confirmation of the Council's decision by this Court is brought about by means of an application under either s. 75 or section 76.

31. Section 75 provides a registered medical practitioner with a right of appeal to this Court from a decision of the Council. The section confers an entitlement on the court on such application to confirm the decision, cancel the decision and replace it with such other decision as the court considers appropriate which may be a decision to impose a different sanction or to impose no sanction at all. The court is also give power to give the Council such directions as it considers appropriate and to direct how the costs of the appeal are to be borne.

32. If the medical practitioner does not appeal a decision of the Council, the matter is brought before the court by the Council pursuant to section 76. In such event, the court "*shall confirm*" the decision of the Council unless the court sees good reason not to do so. Such an application is authorised to be made on an *ex parte* basis. (s.76(2))

33. Section 84(1) requires the Council to give notice in writing to the Minister for Health and Children and the Health Service Executive as soon is practicable after any of the measures specified in that section take effect. These include the cancellation, restoration, removal, suspension and attachment of conditions to a medical practitioner's registration. Also included are the censuring and fining of a registered medical practitioner. The Council is also obliged to give notice in writing to an employer where such measures have taken effect where the employer is not the Health Service Executive and where the name of the employer is known to the Council.

34. Section 85 obliges the Council, if it is satisfied that it is in the public interest to do so, to advise the public when any measure referred to in s. 84(1) takes effect in respect of a medical practitioner. It is also obliged to do so on the same basis in respect of a measure referred to in s. 84(2) coming to its knowledge. This deals with a situation where the Council acquires knowledge that under the law of another State, a measure corresponding to those specified in s. 84(1) has been taken in relation to a registered medical practitioner. Section 85 also obliges the Council, if satisfied that it is in the public interest do so and after consultation with the FTPC, to publish a transcript of all or any part of the proceedings of the FTPC at an inquiry, whether with or without any information which would enable all or any one or more than one of the parties to be identified. In the present case, the Council decided that it would not make publication to the public pursuant to section 85.

35. To summarise, therefore, the Act expressly confers a jurisdiction on the FTPC to conduct a hearing otherwise than in public. No such jurisdiction is expressly conferred on the Council when exercising its functions under sections 70 and 71. No jurisdiction is conferred on the court to deal with applications under Part 9 of the Act otherwise than in public. The only express jurisdiction to hear a matter otherwise than in public conferred on the court by the Act is confined to an application to suspend the registration of a practitioner under section 60. The Council, if it is satisfied that it is in the public interest, must advise the public of the cancellation of a practitioner's registration when such takes effect pursuant to an order of this Court.

The Respondent's Arguments

36. Having had the benefit of an *in camera* hearing before the FTPC and the Council, coupled with the decision of the Council not to advise the public of the outcome of the matter under s. 85, it would, it is said, be anomalous and make little sense that this hearing under s.76 should be heard in public.

37. The decision of the FTPC to hear the matter in private was arrived at as a result of representations made not merely by the respondent but also by the complainant who was a former patient of the respondent. The issue of privacy was raised again at the hearing before the Council which took place in December 2016 and the factual basis for the application was repeated. At the hearing before the Council no question appears to have been raised as to whether or not such hearing ought to have been in public. Submissions were made to the Council on the question of publicity but they appear to have been focused upon the exercise by the Council of its powers under section 85. In the event, it is common case that the Council decided not to advise the public of the outcome.

38. The argument runs that once the FTPC decided to hold its hearing *in camera*, then it follows that both the Council and this Court must do likewise so as to, *inter alia*, keep faith with the witnesses who gave evidence on the assurance that they would be doing so in a private hearing.

39. Under s. 64 of the Act which deals with the duty of the Chief Executive Officer of the Council to notify a medical practitioner and complainant or other witnesses of a referral of a complaint to the FTPC, the Chief Executive Officer is obliged to give notice to the medical practitioner that he will have the opportunity to request that some or all of the hearing be held otherwise than in public if reasonable and sufficient cause can be shown. Such notice was given in the present case and the medical practitioner succeeded in persuading the FTPC to hear the matter in private.

40. The CEO is also obliged to notify any witnesses who may be required to give evidence of the opportunity to request that some or all of the hearing be held otherwise than in public if reasonable and sufficient cause can be shown. The principal witness in this case was the complainant, a former patient of the respondent, and she, likewise, succeeded in having the matter dealt with by the FTPC in private. The argument runs that since the statutory test was met before the FTPC, everything thereafter, including the application to this Court should likewise be in private.

41. Fortification for this argument is also to be found, it is submitted, in the fact that the Council decided not to advise the public of the outcome pursuant to section 85. Section 85 is contained in Part 9 of the Act which is the very part in which the court finds its jurisdiction under s. 75 and section 76. If the confirmation hearing is to be heard in public, then the Council decision under s.85 serves no purpose since everything before the court will be publicly available. For s.85 to make any sense, the legislative intent for a case like this must be that the *in camera* nature of the process is to continue once decided upon by the FTPC.

42. It is also argued that in the absence of any express statutory exception providing for the lifting of the *in camera* ruling made by the FTPC and in the absence of a court order to lift such ruling it continues and binds the court. In this regard reliance is placed upon decisions such as *M.P. v. A.P* [1996] 1 I.R. 144 and *R.M. v. D.M*. [2000] 3 I.R. 373.

43. Reliance is also placed upon s.5 of the Interpretation Act 2005 since it is said that a rejection of the arguments already outlined would give rise to an absurd result.

44. The final argument which is made on behalf of the respondent is that quite apart from the statutory provisions express or implied there is in any event an inherent jurisdiction in the court to hear the matter otherwise than in public. In this regard heavy reliance is placed upon the recent decision of the Supreme Court in *Sunday Newspapers Ltd. v. Gilchrist and Rogers* [2017] IESC 18. In so far as this point is concerned it is to be noted that the applicant accepts the correctness of the submission made by the respondent. The

Council accepts there is indeed an inherent power in the court to deal with the matter in suit otherwise than in public. Notwithstanding that concession argument was addressed to me by the applicant on the position which obtains under the Act.

The Applicant's arguments
45. The first part of the applicant's submission involved a consideration of the Medical Practitioner's Act 1978 and a number of decisions on foot of it. In particular reliance was placed upon the decision of the Supreme Court in *Barry v. Medical Council* [1998] 3 I.R. 368. I did not find these decisions to be of great assistance in circumstances where the 1978 Act was repealed in its totality by the Act. Not merely was there a total repeal of the earlier legislation but there was also a considerable shift in emphasis. I have already quoted the long title and have called attention to the provisions of s.65(2) of the Act which requires that inquiries before the FTPC be heard in public unless the FTPC is satisfied of the existence of the two statutory conditions prescribed in subs. (a) and (b) of section 65(2). This is very different to the position that obtained under the 1978 legislation. Whilst there are certain similarities in the statutory structure there are major differences which in my view render decisions on this topic arrived at under the 1978 Act to be of very limited relevance.

46. The applicant accepts that there is no express statutory entitlement given to the court to hear the application in suit in private. This is undoubtedly correct.

47. The Council argues (correctly in my view) that there is no implicit statutory entitlement to hear this s.76 application in private. My attention was drawn to a note of a decision given under the 1978 Act called *Whelan v. Medical Council*. This was an *ex tempore* decision of Finnegan P. given on 14th January, 2002 and all that is available is counsel's note of it. However, although decided under the 1978 Act, it does have a relevance to this case in that Finnegan P. took the view that whatever may have been the position before the FTPC and the Council, once a report from the Council is made and the Council has made a determination "*it enters into the domain of this court, in which justice must be administered in public*". He was of opinion that if this court were to deal with the matter otherwise than in public it would require express statutory entitlement so to do.

48. The remaining parts of the applicant's submission took issue with the respondent's contentions pointing out in particular that in so far as the s.85 point was concerned that it could hardly be suggested that this court, when deciding whether to confirm a decision as to sanction, would be bound by a determination made by the FTPC when exercising its jurisdiction or to have to seek some form of permission from the FTPC to depart from its ruling.

Conclusions on the statutory position
49. As I have already pointed out, there is no express statutory authority given to the court to hear this application otherwise than in public.

50. I have also pointed out the formidable obstacles which lie in the way of the argument for an implicit statutory authority (see para. 15).

51. The only entity that is given express authority by the Act to hear a complaint against a registered medical practitioner otherwise than in public is the FTPC. I do not accept the argument that once it determines that a matter should be heard *in camera* that its decision is binding upon either the Council or this court. No statutory authority is given to the Council to exercise its powers under ss. 70 and 71, in private. It cannot be bound by the decision taken by the FTPC to do so. Still less could a decision of the FTPC have a binding effect upon this court in the exercise of its jurisdiction. In this regard the decision of Finnegan P. in *Whelan's* case is of relevance.

52. I am also unable to accede to the argument that in order to keep faith with witnesses who gave evidence on an assurance that they would be doing so in a private hearing, it is necessary that such privacy continue when the FTPC has completed its business. In this regard it is to be noted that the only assurance which can be given by the Chief Executive Officer of the Council under s.64 to either a registered medical practitioner or a witness is that they will have the opportunity to request that the hearing before the FTPC will be conducted in private. No warranty can be given by the Chief Executive Officer that such a request will be granted. If granted by the FTPC, it can only direct such a hearing in private in respect of the matters before it. It has no authority to bind the Council or this court. Thus I am unable to accept that there is some failure to keep faith with the witness or practitioner who succeeded in persuading the FTPC to have its hearing in private if subsequent hearings by other entities are not conducted in private.

53. The Council is given a discretion to take the steps which are prescribed in s.85 if it is satisfied that it is in the public interest to do so. Having decided in this case that it is not in the public interest so to do the argument is made that that determination of the Council is effectively rendered nugatory should the court hear the application in public. Thus, it is said the court ought to hear the matter in private. I am unable to accede to this argument. The Council is certainly within its rights in deciding as it did but its decision in that regard cannot create an implicit statutory obligation or even entitlement on this court to hear this matter in private given its constitutional mandate. The argument made in support of such a view is not sufficient to overcome the obstacles which I identified at para. 15 of this judgment.

54. Neither am I persuaded by the argument that the absence of express or implied authority to hold this hearing in camera will give rise to an absurd result. The FTPC in granting a private hearing acted within its statutory entitlement. At that stage the respondent was facing allegations of wrongdoing and presumed to be innocent of them. It is understandable why in an appropriate case such matter should be dealt with in private. Following the findings made against him the presumption of innocence in his favour disappeared. The fact that the Council decided the matter in private and did not exercise its discretion to take the steps prescribed under s.85 cannot affect the obligation of this court to proceed on foot of its constitutional obligation to render justice in public with all that flows from it. Nor can the result be regarded as being absurd. Even if it could, I am satisfied that the argument addressed to me by reference to s.5 of the Interpretation Act 2005 is ineffective. That section provides:

> *"5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—*
>
> *(a) that is obscure or ambiguous, or*
>
> *(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—*
>
> > *(i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or*

(ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole." (My emphasis)

56. I am not satisfied that the provisions of s.5 have any application to the court's construction of the relevant provisions of the Act. No ambiguity exists and no absurdity results. But even if such were the case the section by its terms has no application in a case of the imposition of a sanction. This is such a case.

57. For these reasons I am of opinion that there is neither express nor implicit authority to be found in the Act for this application to be heard otherwise than in public.

Common law power

58. Is there a common law power to hear the application in camera? If this question fell to be considered prior to the decision of the Supreme Court in *Gilchrist and Rogers v. Sunday Newspapers Ltd*. [2017] IESC 18 there can be little doubt but that the court would be obliged to find that there is no common law power to hear this s.76 application otherwise than in public. That is so having regard to the decision of the Supreme Court in *In Re R Ltd.* [1989] I.R. 126. In that case the majority in the Supreme Court (Walsh, Griffin and Hederman JJ.) took the view that the Constitution of 1937 removed any judicial discretion to hear proceedings other than in public save where such power was expressly conferred by statute. The principal judgment was delivered by Walsh J. He referred specifically to Article 34 and to other human rights instruments which have provisions similar to it. They included Article 6.1 of the European Convention on Human Rights. He took the view that the Constitution of 1937 removed any judicial discretion to hear proceedings other than in public save where expressly conferred by statute. Any such jurisdiction had to be conferred by statute. He also considered that it was well established that a phrase such as "*save in such special and limited cases as may be prescribed by law*" related only to a post 1937 law, that is law as enacted or re-enacted or applied by the Oireachtas subsequent to the coming into force of the Constitution.

59. The decision of the Supreme Court as enunciated by O'Donnell J. in *Gilchrist's* case represents a departure from the decision in *In Re R*. The decision in *Re R* was described as arguably amounting to "*something of an over correction*". Later in the judgment the judge speaks of "*an over rigid approach derived from the decision in In Re R Ltd*.". In Gilchrist's case it was recognised that "*there is a continuing common law power to direct a trial in camera where it is required, and that such a course could be particularly justified when constitutional values are engaged". A claim for an in camera hearing "can only be determined by the courts and must be closely and jealously scrutinised*".

60. O'Donnell J. went on to say:-

"However this approach has the benefit that any departure from the principle of open justice under Article 34.1 is and must be exceptional, and therefore be strictly construed and applied. There must be no other measure sufficient to protect the legitimate interest involved. One benefit of this approach may be that it will be necessary to consider steps short of a hearing in camera such as directing the requesting (sic) the parties are not identified."

61. The judgment concludes with a summary of the principles enunciated as follows:-

"(i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.

(ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule;

(iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public;

(iv) Any such exception may be provided for by statute but also under the common law power of the court to regulate its own proceedings;

(v) Where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power and in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing. ….

(vi) While if it can be shown that justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. Where constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case if satisfied that it is a case which presents those features which justify a hearing other than in public.

(vii) The requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that the court must be resolutely sceptical of any claim to depart from any aspect of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, but is necessary and welcome. In particular this will mean that even after concluding that case (sic) warrants a departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted in camera."

62. In the light of this decision the applicant accepted that the respondent was correct in arguing for the existence of this common law power.

Conclusion

63. I conclude that there is no express or implied power conferred by the Act for a s.76 application to be heard otherwise than in public.

64. In accordance with the decision of the Supreme Court in the *Gilchrist* case there is a common law power vested in the court to conduct such a hearing otherwise than in public provided that the circumstances are appropriate and that the conditions identified by the Supreme Court are met.

65. Following consideration of this judgment by the parties I will hear submissions as to whether the facts of this case make it an appropriate one for an *in camera* hearing.