Neutral Citation Number: [2008] IEHC 31

THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 837 J.R.]

BETWEEN

W.F.

APPLICANT

AND
THE FITNESS TO PRACTISE COMMITTEE OF THE MEDICAL COUNCIL
AND
THE MEDICAL COUNCIL

RESPONDENTS

Judgment of Mr. Justice Gilligan delivered on the 15th day of February, 2008

1. Pursuant to order of this Court (Peart J.) as made on the 9th day of July, 2007 the applicant was given leave to apply for judicial review for the following reliefs:

> (i) An Order of *Certiorari* quashing the decision of the first named Respondent dated the 8th day of May, 2007 wherein the first named Respondent decided to proceed with an Inquiry under Part V of the Medical Practitioners Act, 1978 regarding alleged complaints against the Applicant.
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> (ii) An Order of *Certiorari* quashing the decision of the first named Respondent dated the 19th of January, 1996 wherein the first named Respondent decided that all applications pursuant to Section 45 of the Medical Practitioners Act, 1978 are to be deemed applications of the second named Respondent.
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> (iii) An Order of Prohibition restraining the first named Respondent from taking any further steps by proceeding with the aforementioned Inquiry pursuant to Section 45 of the Medical Practitioners Act, 1978
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> (iv) An Injunction restraining the first named Respondent from proceeding to hold an Inquiry in relation to the Applicant pursuant to Section 45 of the Medical Practitioners Act, 1978.

2. The background circumstances are that the applicant is a medical doctor. The first named respondent issued a notice of intention to hold an inquiry into alleged professional misconduct against the applicant. The notice being dated the 18th day of December, 2006.

3. The alleged professional misconduct involves a number of alleged sexual assaults. The applicant has at all times denied the substance of all the allegations against him, and the matters were investigated by an Garda Siochana, and the applicant was informed by letter dated the 22nd day of March, 2006 that the Director of Public Prosecutions did not intend to prosecute him in respect of any of the allegations set out against him.

4. The applicant previously sought leave for judicial review against the respondents herein, and in proceedings bearing Record No. 2007 456 J.R., and involving the same parties this Court (McKechnie J.) refused the applicant leave to apply for judicial review and on appeal the Supreme Court on the 4th day of May, 2007 dismissed the appeal.

5. In these proceedings there are two points that arise and I shall refer to them as "(1) the *inter alia* point and (2) the deemed applicant point".

6. Section 45(1) of the Medical Practitioners Act, 1978 provides that:-

> "The Council or any person may apply to the Fitness to Practise Committee for an inquiry into the conduct of a registered medical practitioner on the grounds of –
>
> (a) his alleged professional misconduct, or
>
> (b) his fitness to engage in the practise of medicine by reason of physical or mental disability.
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> (c) and the application shall subject to the provisions of this Act be considered by the Fitness to Practise Committee.

7. An application was made to the Fitness to Practise Committee in 2003 concerning the applicant, and on the proposal of the Vice President seconded by a member of the Council it was decided to apply to the Fitness to Practise Committee for an inquiry into the conduct of the applicant in accordance with the provision of s. 45 of the Medical Practitioners Act, 1978

8. Subsequently, on the 29th day of June, 2006 the Fitness to Practise Committee comprising *inter alia* Mr. Brendan Healy as Chairman, Mr. Hugh Bredin a medical doctor and Ms. Mary Rose Carroll a lay representative, came to the conclusion that "there is a *prima facie* case for the holding of an inquiry under part V of the Act regarding the following complaints on the grounds *inter alia* of the practitioners alleged professional misconduct and or unfitness to engage in the practise of medicine by reason of a physical or mental disability and accordingly directed that the provisions of s. 45 for the holding of an inquiry be complied with."

9. The nature of the complaints concerning the allegations fully were set out.

10. A notice for particulars was then raised on the applicants behalf on the 29th day of March, 2007 and Question 1 asked "who applied to the Fitness to Practise Committee for an enquiry" and the reply to this particular as furnished in a letter as dated the 4th day of April, 2007 was "as confirmed in the notice of enquiry, the Medical Council is the applicant for this and indeed every inquiry which is held by the Fitness to Practise Committee. In this regard please see attached copy resolution of the Medical Council dated the 18th day of January, 1996."

11. The Fitness to Practise Committee Memorandum of the 18th day of January, 1996 sets out at para. 4.2 thereof that:

> "The Committee having taken legal advice on s. 45(1) of the Act, decided all complaints would be deemed applications by the Medical Council for an inquiry into the conduct of a registered medical practitioner. The Committee then directed the

registrar to deal with all complaints including those presently under consideration accordingly."

12. The applicant then moved to apply to this Court for orders of *certiorari* and prohibition in respect of the decision of the first named respondents as made on the 29th day of June, 2006, to the effect that there was a *prima facie* case for the holding of an inquiry pursuant to part V. of the Medical Practitioners Act, 1978, regarding alleged complaints against the applicant and directing that the provisions of s. 45 of the Act for the holding of an inquiry be complied with.

13. In essence the case being made out on the applicant's behalf was that the first named respondent had taken into account matters other than matters which the first named respondent was entitled to take into account, by reason of the reference to "*inter alia*". The applicant made out the case that the decision was unfair to the applicant in that it was effectively purported to have been made on inter alia unspecified grounds.

14. The inquiry was due to proceed on the 8th day of May, 2007 and the application for leave to apply for judicial review was made on the 30th day of April, 2007, before McKechnie J. who refused the application, but in doing so he made certain observations as follows:-

> 1. On the 29th of June, 2006 the Fitness to Practise Committee held a meeting. In relation to (its written decision of the that date), the applicant relies on the words *inter alia* as submitting that the Committee acting *ultra vires* Section 45 of the 1978 Act in taking into account irrelevant matters. It is submitted that irrelevant matters were taken into consideration.
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> 2. On the 19th December, 2006 the applicant got notice of intention to hold an inquiry. All of the allegations therein set out come within the powers of the Fitness to Practise Committee under section 45 (of the Medical Practitioners Act, 1978). It is accepted by the applicant that all of those allegations refer to alleged professional misconduct.
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> 3. Under Order 84.21.1 of the Rules of the Superior Courts, the first threshold for the applicant is to prove that a prompt application was made. The court is of the view that there is no good reason to extend the time in the present case. There is no reference to extending the time in the Statement of Grounds. There was a failure to satisfy me that the time should be extended. The application was not made promptly. No good reason to extend the time is set out in paragraphs 25 or 26 of the applicant's grounding affidavit. Briefs were sent to Counsel on the 12th February, 2007 and this is not sufficient reason to extend time.
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> 4. There is second reason. The case of *G. v. D.P.P.* applies. The essential point relates to inter alia – it is alleged that it must be inferred that the Fitness to Practise Committee considered other ground and irrelevant grounds from the use of those words. I do not accept that. The notice of 18.12.07 set out allegations – there is no ambiguity – those are the charges which the applicant must contest.
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> 5. I do not accept that there were difficulties for the applicant. The Fitness to Practise Committee would have jurisdiction to nullify any unfair consequences which might follow. I refuse the application.

15. It is of significance that McKechnie J., took the view that he did not accept that the essential point relating to the use of the term "*inter alia*" provided any grounds for the application. He was satisfied that there was no ambiguity in the nature of the charges which the applicant would have to contest before the enquiry.

16. The applicant appealed the matter to the Supreme Court and in an extempore judgment delivered on the 4th day of May, 2007 Denham J. recited in full the findings of McKechnie J., and having considered the submissions of counsel on behalf of the applicant stated at para. 11 of the judgment:-

> "The substantive issue in the application for judicial review is the "*inter alia*" point, in other words the submission that the Committee took into account matters other than those permitted under the law. This relates to a decision made by the Fitness to Practise Committee last June. It is a matter which the applicant is not precluded from raising at the hearing on the 8th day of May, 2007. I remain unimpressed by this point, at this time, and do not consider that it meets the light onus as described in *G. v. Director of Public Prosecutions* [1994] 1 I.R. 374. I am bolstered in this view by the detail in the letter to the applicant of the 18th day of December, 2006 setting out the detail of the complaints."

17. Denham J. further took the view that while the application was not literally an eve of trial application because of the proximity of the date of the Committee hearing it fell within that category of applications.

18. The court took the view that there was delay in making the application to the High Court and in the circumstances of the case, the court saw no reason to extend the time and the appeal was dismissed.

19. In the affidavit of the applicant for the purpose of the application to the High Court as sworn on the 30th day of April, 2007 a very distinct reference was made to the position pertaining to Mary Rose Carroll, and a distinct complaint was raised that Mary Rose Carroll was one of those persons who was present at the meeting as held on the 29th day of June, 2006, to decide whether there was a *prima facie* case for the holding of an enquiry, and the applicant was on notice that she was also going to sit as a member of the Inquiry Committee for the substantive hearing. The applicant in particular averred as follows:-

> "My understanding is that Mary Rose Carroll was at the meeting of the 26th day of January, and which appears on the face of it to have decided that there was *prima facie* case for the holding of an enquiry. Further my understanding is that it is intended that this particular individual will be present and will form part of the committee which it is intended will hear the substantive enquiry".

20. Further at para. 17 of the grounding affidavit the applicant averred:-

> "I am also concerned that the said Mary Rose Carroll was one of the persons who on the 29th day of June, 2006 when deciding that there was a *prima facie* case to hold an inquiry into your deponents alleged professional misconduct had regard to one or more grounds other than those expressly provided for under s. 45(1)."

21. Further in the grounding affidavit the applicant refers explicitly to a contention that the Medical Council cannot be a "deemed applicant" for the purpose of s. 45(1) and raising an issue that in effect there has been no application for an inquiry by anybody pursuant to 2. 45(1). The applicant goes so far as to state "in this case it appears that no person or body has in fact applied for the

inquiry which it is proposed to hold herein starting on the 8th day of May, 2007."

22. The applicant avers that it is a matter of fundamental fairness that he is entitled to be informed in clear and precise terms of the identity of the complainant and/or applicant for the purposes of the holding of an inquiry which potentially has such far reaching consequences for him, not only professionally but also personally.

23. At the hearing on the 8th day of May, 2007 the applicant was represented by, Patrick Keane Senior Counsel.

24. The Committee members comprised of Mr H. Bredin, Dr. J.A. Hilary, Ms M.R. Carroll and were assisted by a legal assessor.

25. It is clear from reading the transcript of the application as made by Mr. Keane to the committee of inquiry that a very substantial period of time was spent on the deemed applicant point and as to whether or not there was an application for an inquiry by an appropriate person or body in accordance with the provisions of s. 45 of the Act.

26. Mr. Keane then turned to the "*inter alia*" point and his application can be summarised by a reference to p. 32 of the transcript wherein he stated:-

> "Now before I go any further, without wishing, of course, to make this in any way personal, it does seem to me that when we are examining what occurred in the meeting of the Fitness to Practise Committee on the 29th of June, 2006, this is something which should be looked into with equality from the point of view of the registrar on the one hand and the registered practitioner on the other hand, and without insight from any person who sat on that Committee into what was or was not considered at that Committee meeting. It does seem to me that in the present case, without of course as I say making anything personal about this, we asked the solicitors for the registrar some time ago to let us know whether there would be anyone sitting today who also sat on the Committee of the Fitness to Practise on the 29th June. We were told that Ms. Mary Rose Carroll sat on the 29th June, 2006 at the meeting of the Fitness to Practise Committee. Now we are told that Mr. Hugh Bredin was also intended to be a member of the Inquiry today, but we were told about Ms. Carroll by a telephone call I think on the 26th April. But it now in fact transpires that two people, two thirds of this Committee actually did sit on the 29th June, 2006."

27. Mr. Keane on the applicant's behalf goes on at p. 33 of the transcript to the discreet point which he makes in the following terms:-

> "What I, the point that I am making is that what is being inquired into is not simply whether the same people sat on both Committees but rather whether the first Committee acted contrary to the provision of the Act? The new would be disadvantaged in relation to that matter, by members who sat on the 29th June, 2006 deciding whether the decision made on that date was or was not in accordance with the Act?"

28. The legal assessor on behalf of the Committee indicated that the Committee had considered the application by Mr. Keane and ruled against the application in relation to the Fitness to Practise Committee having no power to deem all applications made from whatever source to be Medical Council applications.

29. Further the Committee took the view that the Fitness to Practise Committee is as is known made up of members of the Medical Council and there is clearly always an overlap of personnel.

30. Further the Committee took the view that they would have the obligation and the duty to rule out any question of injustice or unfairness or prejudice, but it did not appear to the Committee that any such issues had been raised or were available to Mr. Keane on behalf of the applicant.

31. As regards the use of the words *inter alia* the Committee took the view that the use of the words did not suggest that *ultra vires* matters were considered by the Committee in making their decision.

32. The applicant as has been previously indicated herein was given leave by this Court, (Peart J.) on the 9th day of July, 2007 to bring this application for judicial review.

33. Mr. Keane on the applicant's behalf submits that there may be an issue whereby in fact the original Committee took into account inter alia some other matter which is *ultra vires* the provisions of s. 45 of the Act, and the situation that presented itself to the applicant on the 8th day of May, 2007 was that Dr. Bredin and Ms. Carroll were both persons who were involved in taking the original decision involving the *inter alia* point, and they were also two of the three persons who were sitting on the Committee of Inquiry as constituted on the 8th day of May, 2007. Mr. Keane incidences that he may wish to cross-examine both Ms. Carroll and Dr. Bredin to clarify the inter alia aspect, and he relies, distinguishing *O'Callaghan v. Disciplinary Tribunal Ireland and the Attorney General* [2002] I.R. 1 on the ditca of Kenny J. in *O'Donoghue v. The Veterinary Council* [1975] I.R. 398 and in particular at p. 405 wherein Kenny J., states:

> "The test to be applied in determining whether a Tribunal (be a Judge or Jury or Disciplinary Committee) is impartial, is that a member is not impartial if his own interests might be affected by the verdict, or he is so connected with the complainant that a reasonable man would think that he would come to the case with prior knowledge of the facts, or that he might not be impartial."

34. Mr. Keane on the applicant's behalf refers to a letter of the 15th May, 2007 from the respondents solicitors wherein it is indicated that if the applicant so wishes, Mr. Hugh Bredin would withdraw from the Fitness to Practise Committee and that the registrar would endeavour to arrange effectively for a substitute to sit in his place. Mr. Keane submits that this offer comes too late, but in this regard I am satisfied as is indicated in the letter that this is a reference to the fact that Mr. Hugh Bredin knows the applicant, had previously withdrawn from a meeting of the Medical Council on the 10th day of September, 2003, which meeting considered the applicant's situation and that the applicant knowing Mr. Bredin never raised such an issue, either prior to or at the hearing of the 8th day of May, 2007, and I am satisfied that this letter is written in a totally different context to the case which Mr. Keane makes out on behalf of the applicant involving Mr. Bredin and Ms. Carroll, and in my view nothing turns on the content of this letter.

35. In respect of the deemed applicant point Mr. Keane submits that in the particular circumstances of this case there is no proof sufficient to satisfy the court that an application was made to the Fitness to Practise Committee by an appropriate person, and that there is no provision as such in the Act of 1978 to cover the decision of the Fitness to Practise Committee of Thursday 18th June, 1996 to deem all applications in respect of complaints be applications by the Medical Council for an inquiry into the conduct of a

registered medical practitioner. Furthermore, Mr. Keane complains that he never had access to the further document of the Medical Council referring to meeting No. 1 of 1996, which was held on Thursday 7th March, 1996, which approved the earlier decision of the Committee. Mr. Keane submits that there should be no difficulty if the applicant is "deemed" in the Council giving the appropriate information as regards whether the application was made in writing or orally, and the respondent have failed to satisfactorily explain the situation, other than by their reply to the particulars as raised to the effect "…The Medical Council is the applicant for this, and indeed every inquiry which is held by the Fitness to Practise Committee."

36. Mr. McCullough on the respondents behalf submits that the various arguments as advanced on the respondents behalf are without substance and that the grounds were either advanced in the first set of judicial review proceedings, or alternatively, could have been advanced at that time and that this Court in the exercise of its discretion should decline to grant the reliefs as sought by way of judicial review.

37. With regard to the issue of bias involving Ms. Carroll and Mr. Bredin, Mr McCullough submits that it is clear from the decision of *O'Callaghan v. Disciplinary Tribunal, Ireland, and the Attorney General* [2002] 2 I.R. 1, that there can be no objection to those persons who formed a view that there were *prima facie* grounds for the holding of an inquiry to hear the inquiry itself, and that further from the very wording of the Act of 1978, it is clear that it will often be impossible to avoid an overlap between those members of the Committee who consider the matter at *prima facie* stage and those members who sit at the hearing of the inquiry itself.

38. It is not accepted by Mr. McCullough on the respondents behalf that the Supreme Court or the High Court has stated that the applicant is entitled, and has a right to have the Committee enter into a determination as to whether the decision of the 29th June, 2006 was valid. Mr. McCullough asserts that what occurred is that the applicant waited not until the eve of the hearing, but until the actual hearing itself and then asked the Committee to embark on a judicial review type application of its own decision leading Mr. Keane on the applicant's behalf to indicate that Mr. Bredin and Ms. Carroll should not consider the matter as he may wish to cross-examine them as to the matters which they took into account on the 29th day of June, 2006 in deciding that there was a *prima facie* case for an inquiry. Mr. McCullough submits on the respondents behalf that the only form in which members of the Fitness to Practise Committee could be properly examined on such a matter would be in judicial review proceedings on the inter alia point. However, it is clear that the *inter alia* point was refused both in the High Court and on appeal to the Supreme Court.

39. Further, Mr. McCullough refers to the affidavit of the Chairman of the Fitness to Practise Committee, Mr. Brendan Healy, Consultant Orthopaedic Surgeon, and in particular to para. 43 of his affidavit as sworn on the 28th day of September, 2007 wherein he avers:-

> "I have been advised that there has been criticism of the Fitness to Practise Committee for the manner in which the minute of the meeting in question records the decision of the Fitness to Practise Committee, and in particular, of the use of the words *'inter alia'*. I can confirm that there were no other grounds for the decision of the Fitness to Practise Committee other than those set out above, and that the words 'inter alia' are not intended to mean otherwise. This is a standard format which is used in minuting the decisions of Fitness to Practise Committee and it is not intended by the use of these words to infer that the Committee made its decision on what be other extraneous or impermissible grounds."

40. In respect of the deemed applicant, Mr. McCullough submits that it is clear that on the 10th day of September, 2003 the Medical Council decided to apply to the Fitness to Practise Committee for an inquiry into the conduct of the applicant in accordance with the provision of s. 45 of the Act of 1978, and this is self evident from exhibit BH3 as attached to the affidavit of Mr. Healy which document states:-

> "On the proposal of the Vice President, seconded by Mr. Buckley the Council decided to apply to the Fitness to Practise Committee for an inquiry into the conduct of Dr. F. in accordance with the provisions of s. 45 of the Medical Practitioners Act, 1978. In essence Mr. McCullough submits that the Medical Council applied for the inquiry in the particular circumstances of this case as is provided for in s. 45(1) of the Act."

41. It is quite clear from the averment of Mr. Brendan Healy, Consultant Orthopaedic Surgeon, that notwithstanding the use of the words "*inter alia*" it is confirmed that there were no other grounds for the decision of the Fitness to Practise Committee, other than those as were set out and that in the circumstances the words as used "inter alia" were not intended to mean otherwise, or to infer that the Committee made its decision on what might be extraneous or impermissible grounds.

42. I take the view that there is no substance to the applicants argument on the *inter alia* point and no justification for granting judicial review.

43. There is no substance to any intended suggestion of bias on the part of Dr. Bredin or Ms. Carroll the lay representative, and clearly the Act of 1978 provides for a procedure where there necessarily has to be an overlap between members deciding as to whether or not there is a *prima facie* case and members actually conducting an inquiry. I do not consider that *O'Donoghue v. Veterinary Council* [1975] I.R. 398, has any particular applicability in the circumstances of the instant case, which in my view is governed by the findings in *O'Callaghan v. Disciplinary Tribunal Ireland and the Attorney General*.

44. Furthermore, the applicant at all times was aware that Ms. Carroll was going to be the lay representative on the Committee of Inquiry, and no steps were taken prior to the actual commencement of the hearing to ask her to recluse herself. There is some dispute as to when precisely the applicant was aware that Dr. Hugh Bredin was going to be a member of the Committee, but in this regard I am satisfied that the applicant was aware some days prior to the sitting on the 8th day of May, 2007, and yet no step was taken to ask him to recluse himself.

45. In effect the applicant waited for the actual hearing to commence before asking Ms. Carroll and Dr. Bredin to stand aside so that they could be in effect possibly cross-examined, on the basis of the "inter alia" point, and that there may have been some other matter taken into account to form the basis of the decision taken which would be *ultra vires* the provisions of s. 45 of the Act.

46. I take the view that there is no substance to the deemed applicant point because on 10th September, 2003 the decision was taken to apply to the Fitness to Practise Committee for an inquiry into the conduct of the applicant in accordance with the provisions of s. 45 of the Medical Practitioners Act, 1978.

47. The Fitness to Practise Committee then on Thursday, 29th June, 2006 took a decision that there was a *prima facie* case for the holding of an inquiry under Part V of the Act regarding certain specified complaints. Mr. John Lamont, Registrar, on the18th day of December, 2006, specifically sets out in a signed notice of intention to hold an inquiry under Part V of the Act that the Fitness to

Practise Committee having received an application from the Medical Council for an inquiry into the conduct of the applicant being a registered medical practitioner on the grounds of his alleged professional misconduct. All the relevant documentation is to the effect that the Medical Council applied to the Fitness to Practise Committee for an inquiry into the conduct of a registered medical practitioner. I do accept that there have been references to a deemed applicant but in the particular circumstances that pertain, the applicant is the Medical Council and they are a body who may apply to the Fitness to Practise Committee for an inquiry into the conduct of a registered medical practitioner.

48. I am satisfied that, in respect of the *inter alia* point, it is to all intents and purposes that same point that was raised in the earlier proceedings, even though I accept that in this application the reference is to an order of *certiorari* quashing the decision of the first respondent as dated the 8th day of May, 2007 wherein the first respondent decided to proceed with an inquiry under Part V of the Medical Practitioners Act, 1978 regarding complaints alleged against the applicant.

49. Furthermore, it is clear on the affidavit as sworn by the applicant in the first set of proceedings that there was extensive reference to Ms. Carroll and the same bias point applied to Dr. Bredin and, even if as such no specific relief was sought, it was open to the applicant to have raised the issue at that point in time.

50. The deemed applicant point was raised extensively and is specifically referred to in the affidavit of the applicant in the first set of proceedings.

51. The alleged bias issue was not raised prior to the May, 2007 hearing and the applicant making no objection either to Ms. Carroll or Mr. Hugh Bredin sitting on the Committee, specifically chose to wait until the Committee actually sat so that this was not an eve of the hearing application but in fact a "during the hearing" application of matters that clearly were known and prepared for by the applicant.

52. I am satisfied that in effect the applicant was attempting to actually ask the Committee to judicially review itself by reason of the very nature of the application that was made by Mr. Keane on the applicant's behalf and this quite simply is an impossibility.

53. I take the view in the exercise of my discretion that the applicant has not made out a case for judicial review in respect of the reliefs as sought and I dismiss the application.