



## THE COURT OF APPEAL

**Finlay Geoghegan J.  
Irvine J.  
Hogan J.**

**Record No. 2015/287**

**Mohammad Shoaib**

**Appellant**

**- and -**

**Medical Council**

**Respondent**

### **Judgment of Ms. Justice Irvine delivered on the 4th day of October 2016**

1. This is an appeal against an order of the High Court (Noonan J.) dated 21st May, 2015, refusing the appellant ("Mr. Shoaib") an extension of time to issue and serve an originating notice of motion seeking judicial review in High Court proceedings bearing record no. 2014/568JR.

#### **Background facts and relevant chronology**

2. On 4th September, 2014, the High Court (MacEochaidh J.) refused Mr. Shoaib's application for an injunction to prohibit the Medical Council ("the Council") from conducting an inquiry into his fitness to practice medicine under Part 8 of the Medical Practitioners Act 2007 ("the 2007 Act"). The aforementioned inquiry commenced on 3rd September, 2014.

3. On 26th September, 2014, the President of the High Court made an order pursuant to s. 60 of the 2007 Act suspending Mr. Shoaib's registration pending the completion of the inquiry into his fitness to practice.

4. On 1st October, 2014, Mr. Shoaib brought an application to the High Court seeking leave to apply for judicial review. He was successful in obtaining an order from Cregan J. permitting him to pursue the following relief, summarised in the Council's written submissions, namely:-

1. A permanent injunction restraining the Council from investigating his fitness to practice through its Fitness to Practice Committee by reason of medical disability.
2. An order directing that certain evidence which the Fitness to Practice Committee intended to rely upon in the course of its inquiry be excluded from its considerations.
3. An order prohibiting the Council from applying to the High Court under s. 60 of the 2007 Act to suspend his registration pending completion of the inquiry.

5. It would appear from the terms of the order made by Cregan J. that he had not been advised of the fact that the inquiry had actually commenced on 3rd September, 2014, or that an order had already been obtained by the Council pursuant to s. 60 of the 2007 Act suspending Mr. Shoaib's registration.

6. The order made by Cregan J. directed Mr. Shoaib to serve an originating notice of motion returnable before the Court for 24th November, 2014.

#### **Confusion**

7. From the affidavit filed by Mr. Shoaib in support of his application to Noonan J. on the 21st May, 2015, and from his submission to this Court, it is clear that he is firmly of the belief that he complied with the High Court order of Cregan J. or that if he did not it was not his fault. On 3rd October, 2014, he served on the Council an unfiled and unissued notice of motion together with a copy of his statement of grounds, verifying affidavit and the order of Cregan J.. He also emailed these documents to Ms. Alice White in the Central Office of the High Court. On 6th October, 2014, Ms. White emailed Mr. Shoaib telling him that there was no provision in the Rules of the Superior Courts which permitted him to file his documents by email but stated that he could file his documents by post or could leave them in the "drop in box" at the entrance to the Central Office.

8. Mr. Shoaib has deposed to the fact that he dropped the relevant documents into the drop in box of the Central Office on 9th October, 2014. Later, by email of the 22nd October, 2014, he advised Ms. White that he would not be in Ireland on 24th November, 2014, that being the return date for the motion provided for in the order of Cregan J.. She replied, on 23rd October, stating that she would pass this information on to the relevant registrar. Mr. Shoaib complains that it was never explained to him that he had not actually issued the motion and that as a consequence his application would not appear in the High Court list on the 24th November. Thus he blames the staff in the Central Office for the fact that he did not comply with the order of Cregan J..

9. It is not disputed by the Council that it was served with the papers referred to at para. 7 above. Neither does it contest the fact that it was later informed by Mr. Shoaib that he would seek to have his motion adjourned for four months as he needed to travel to Bangladesh for personal reasons. However, the Council relies upon the fact that its solicitors, McDowell Purcell, emailed Mr. Shoaib on 5th November, 2014, notifying him that his motion had not been issued and as a consequence there would be no application listed before the Court on 24th November as had been directed by the High Court. It also relies upon the fact that in response to an earlier email from Mr. Shoaib which stated that he wanted his judicial review proceedings postponed for a period of four months, he was advised that the Council intended pressing on with its inquiry.

10. Mr. Shoaib maintains that he left the country on 1st November, 2014, and that as a result he did not receive the email from McDowell Purcell dated 5th November, 2014, notwithstanding the fact that it was sent to the email address used by him in all of his correspondence with the Council and the High Court. He left the country assuming that, having regard to his correspondence with Ms. White, his motion would be in the Court list for the 24th November, 2014, and it would be adjourned in his absence until he returned.

However, while he was out of the country the inquiry proceeded with the result that his registration as a medical practitioner was cancelled.

### **The Report of Fitness to Practice Committee**

11. It is common case that the inquiry into Mr. Shoaib's fitness to practice concluded on 26th January, 2015, and the report of the Fitness to Practice Committee issued on 28th January, 2015. In February, 2015 Mr. Shoaib was notified of the outcome of the inquiry and told that the sanction to be imposed would be considered by the Council at its meeting in March, 2015. That meeting was ultimately postponed until the 21st May, 2015, to facilitate Mr. Shoaib's attendance.

### **Mr Shoaib's application to the High Court**

12. Two days prior to the meeting scheduled for the 21st May 2015, Mr. Shoaib applied *ex parte* for a new return date for the notice of motion provided for in the order of Cregan J. of the 1st October, 2014. On the hearing of that application Mr. Shoaib was told to notify the Council of his intention to apply for an extension of time on the 21st May, 2015.

13. On 21st May, 2015, Noonan J. having considered the submissions made by the parties refused Mr. Shoaib the extension of time sought. From the transcript of the hearing the reasons given by the High Court judge for refusing his application were as follows:-

1. That the High Court did not have jurisdiction to engage upon an assessment of the validity of an order which had been made by the President of the High Court under s. 60 of the 2007 Act. The only remedy available to a party aggrieved by the making of such an order was to appeal that decision.
2. There appeared to be no valid reason why Mr. Shoaib had not served the originating notice of motion before he went to Bangladesh on 1st November, 2014.
3. Mr. Shoaib had been notified by the Medical Council on 5th November, 2014, that the Fitness to Practice inquiry would continue notwithstanding the fact that it had received papers concerning his application to Cregan J. for leave to apply for judicial review. The Council had specifically noted that no motion seeking relief in the terms of the leave which had been granted had been issued.
4. That the relief sought was moot in circumstances where the inquiry had concluded and sanction had been imposed.

14. It should be recorded that Mr. Shoaib has, pursuant to s. 75 of the 2007 Act, since appealed to the High Court against the findings of the Fitness to Practice Committee and the cancellation of his registration.

### **Appeal**

15. For the purposes of considering Mr. Shoaib's appeal, I have read and considered the extensive written submissions filed by the parties to this appeal. Further, in coming to my conclusions I have also taken into account the fulsome oral submissions made by Mr. Shoaib on his own behalf and those of Ms. Bird BL on behalf of the Council. For the reasons that I will now briefly outline, I am satisfied that this appeal must be dismissed

### **The Court's jurisdiction**

16. The first matter to be briefly addressed in the course of this ruling is the Court's jurisdiction on this appeal. This is an appeal against an order made by the High Court judge in the exercise of his discretion in relation to an interlocutory matter. This is not a re-hearing of that application and in such circumstances the Court must afford considerable weight to the manner in which this discretionary jurisdiction was in fact exercised by the High Court judge. Generally speaking, this Court would be reluctant to interfere with the exercise of such a discretionary jurisdiction absent clear error or where the interests of justice so required.

17. The Court is able to do this because it has available to it all of the affidavit evidence that was before the High Court at the time the original interlocutory decision was made. The role of the appellate court in this regard is set out in the decision of this Court in *Collins v. Minister for Justice, Equality and Law Reform* [2015] IECA 27 and by McMenamin J. in *Lismore Builders Ltd. v. Bank of Ireland Finance Ltd.* [2013] IESC 6.

### **Extension of time**

18. Regardless of who was responsible for the confusion earlier described, the fact of the matter is that Mr. Shoaib did not comply with the Court order of 1st October, 2014, in that he failed to issue his notice of motion seeking leave to apply for judicial review and then serve it for the appropriate return date. That being so, in May, 2015, he had no entitlement to pursue the issues in respect of which leave had been granted on 1st October, 2014, without an order of the Court extending the time within which he might issue and serve his notice of motion.

19. Crucial to the decision of the High Court judge to refuse Mr. Shoaib's application was his conclusion that, by reason of what had transpired since 1st October, 2014, the issues which he had been granted leave to litigate had been rendered moot.

20. In considering any application for an extension of time the court must be satisfied that the order is not sought for purely hypothetical or academic reasons: see to this effect the comments of Murray C.J. in *O'Brien v. Personal Injuries Assessment Board* [2006] IESC 62, [2007] 1 I.R. 328. In other words, the onus is on the applicant who seeks such an extension of time to demonstrate that there are live and meaningful issues to be resolved between the parties such as would justify granting the extension of time sought. This is what Clarke J. stated at p. 271 of his judgment in *P.V. v. The Courts Service* [2009] 4 I.R. 264, concerning such an application:-

"...the starting point of any consideration of mootness has to be a determination as to whether the issue sought to be litigated is still alive in any meaningful sense such that it can not, in the words of Murray C.J. in *O'Brien v. Personal Injuries Assessment Board* [2006] IESC 62, [2007] 1 I.R. 328, be "purely hypothetical or academic".

21. It is clear from the transcript of Mr. Shoaib's application to the High Court that Noonan J. concluded that there were no meaningful or live issues to be resolved between the parties such as might justify granting the extension of time sought and I am satisfied from the documentation before this Court and the submissions made on this appeal that he was correct as a matter of law and fact when he came to that conclusion.

22. The first relief which Mr. Shoaib was permitted to advance by way of judicial review pursuant to the order of Cregan J. was his entitlement to a permanent injunction restraining the Council from investigating his fitness to practice through its Fitness to Practice Committee by reason of medical disability. However, by the time he made his application for an extension of time to pursue the relief

permitted by the order of Cregan J. the inquiry into his fitness to practice under Part 8 of the 2007 Act had been completed. At that point it was too late to apply for an injunction restraining the inquiry.

23. The same considerations apply in relation to the second of the reliefs which Mr. Shoaib was granted leave to pursue, namely, an order directing that certain evidence which the Fitness to Practice Committee intended to rely upon in the course of its inquiry be excluded from its considerations. As already stated, the inquiry at the time of his application to Noonan J. had been concluded, the report of the Fitness to Practice Committee published and sanction imposed by the Council.

24. As to the final relief which Cregan J. granted leave to Mr. Shoaib to pursue, namely an order prohibiting the Council from applying to the High Court under s. 60 of the 2007 Act to suspend his registration pending completion of the inquiry, the fact of the matter is that such an order had already been made by the President of High Court before he made his initial application for leave to apply for judicial review. Further, it is beyond doubt that such an order is not susceptible to challenge by way of judicial review in the High Court. The only remedy available to an aggrieved party is to avail of an appeal and none such was brought by Mr. Shoaib. Further, as already stated, that order was no longer effective as of the date of his application to extend time his registration had in any event been cancelled with effect from the 21st May, 2015.

25. While it would be open to the Court on this appeal to embark upon a consideration as to whether there were good reasons for Mr. Shoaib's failure to actually issue his application for judicial review returnable for 24th November, 2014, and to consider whether he was or was not the author of his own misfortune as would appear to be the position adopted by the respondent, it is not necessary to engage with any of these issues for the reasons already stated. Even if all of those issues were resolved in his favour the fact of the matter remains that there are no live issues to be resolved between these parties such as might have justified the High Court judge in exercising his discretion in Mr. Shoaib's favour. All of the matters which he would wish to pursue on foot of the order of Cregan J. are now moot and that being so there is no good reason for the Court to allocate time and scarce resources to matters which at best can be viewed as academic or hypothetical.

26. Having considered all of the evidence before this Court on the appeal, I am not satisfied that Mr. Shoaib has demonstrated any reasons which would justify this Court interfering with the decision made by the High Court judge in the exercise of his discretion. From his decision it is clear that he applied the correct legal principles when he refused Mr. Shoaib's application. Further, Mr. Shoaib has not identified any circumstances which would warrant the interference by this Court with that decision.

27. In this regard it is to be noted that Mr. Shoaib has commenced proceedings by way of special summons wherein he seeks to appeal the findings of the Fitness to Practice Committee and the sanction later imposed upon him by the Council. Thus, regardless of Noonan J.'s refusal of his application to permit him pursue these judicial review proceeding, he has available to him a procedure whereby he may seek to remedy the wrongs allegedly perpetrated against him by the Council. Those proceedings were adjourned pending the outcome of the determination of the present appeal. Now that these present judicial review proceedings are effectively at an end, Mr. Shoaib will be in a position to pursue his appeal against the Council with all due dispatch.

### **Conclusions**

28. For the reasons already stated I would dismiss the appeal.