[2019] IEHC 109

THE HIGH COURT

IN THE MATTER OF INTENDED PROCEEDINGS

AND

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

AND

IN THE MATTER OF A REGISTERED MEDICAL PRACTITIONER

BETWEEN

MEDICAL COUNCIL

INTENDED APPLICANT

AND

ANONYMOUS

INTENDED RESPONDENT

JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 1st day of March, 2019

Introduction

1. This is an unusual application which is made by the Medical Council ("the Council") in anticipation of an application which it will be making to the court pursuant to the provisions of s.76 of the Medical Practitioners Act 2007 ("the Act").

2. The intended application pursuant to s.76 is in respect of a registered medical practitioner ("the doctor") who has been the subject of an investigation by the Council's Fitness to Practise Committee ("FTPC"). That investigation gave rise to adverse findings against the doctor. The FTPC recommended that the doctor be censured. It also recommended that the doctor's registration be subject to a series of conditions.

3. The report of the FTPC was, pursuant to s.69 of the Act, submitted to the Council for its consideration. The Chief Executive Officer of the Council submitted that the sanction recommended by the FTPC was inadequate and that the doctor's registration as a medical practitioner should be cancelled. The Council did not accept that proposition and decided that the appropriate sanction should be conditional registration.

4. The hearings before the FTPC and the Council were all conducted in private. The Council has requested this court to conduct its intended application under s.76 *in camera*. It has also made a request for "*the courts directions in relation to the extent to which the patients who form the subject of findings in this case, can now be appraised (sic) of the fact that findings have now been made in respect of care afforded to them by the intended respondent and the outcome of the inquiry, to include the applicant's decision on sanction*". None of the patients whose treatment by the doctor was considered by the FTPC were apprised of anything untoward having happened. They know nothing of the FTPC investigation or its findings.

This application

5. This application, made in anticipation of the application under s.76 of the Act, was heard on notice to the doctor who was represented by counsel. That hearing was held *in camera* but I made it clear that if I did not accede to the application, judgment would be delivered in open court. As I do not accept that this is a case in which an *in camera* hearing is warranted I am delivering this judgment in open court. For reasons which I will set out, I am of opinion that although the intended s.76 application should be heard in open court it will be subject to restrictions which will ensure the anonymity of the doctor and of the relevant patients. In order to understand how I have come to that conclusion it is necessary that I should set out, in suitably anonymised form, the facts relevant to the application.

Background

6. The events which form the subject matter of the complaints and, ultimately, the inquiry before the FTPC, occurred over a five-year period. During that time the doctor was suffering from an opioid addiction which had its origins in pain relief properly prescribed for him in respect of injuries which he sustained years beforehand. In order to feed his addiction, he was prescribing unnecessary opioids to patients, administering doses to them of part only of the dispensed opioids and administering the remainder to himself.

7. The inquiry in respect of the doctor was held on foot of two separate applications to the FTPC. One application was made by a complainant and the second was doctor's own self referral. The FTPC decided that the inquiry would proceed in private "*due to the relevant medical disability of the registrant and the nature of the evidence*".

The FTPC Inquiry

8. Twelve allegations were made against the doctor before the FTPC. No evidence was offered in respect of one of them. The doctor admitted all of the others. The allegations were as follows.

> *Allegation 1* was that the doctor administered opioids intra-muscularly and/or orally to one or more of 36 named patients on one or more of the dates specified in circumstances where he knew or ought to have known that it was inappropriate and/or not clinically warranted. This allegation was proven as to fact by virtue of the admission of the doctor.
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> *Allegation 2* was that the doctor prescribed to one or more of six named patients on one or more specified dates opioids in excessive quantities and/or strengths.
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> *Allegation 3* arose from allegation 2 and was to the effect that the doctor took some and/or all of the unused vials of

opioid medication which were not administered directly to one or more of the patients referred to in allegation 2, for self-administration, in circumstances where the doctor knew or ought to have known that this was inappropriate.

Allegation 4 was not proven as to fact because no evidence was offered in respect of it.

Allegation 5 was that on a specified date in the context of affording care to an identified patient the doctor failed to refer the patient to hospital in circumstances where he knew or ought to have known it was clinically warranted and/or appropriate having administered intravenous antibiotics to the patient.

Allegation 6 was that on one or more occasions during a three-year period the doctor took Tramadol samples from stock or from one or more representatives of pharmaceutical companies for the purpose of self-administering that medication in circumstances where he knew or ought to have known that this was inappropriate.

Allegation 7 was that on one or more occasions during a specified period he obtained and/or took Tramadol and/or Cyclimorph pursuant to one or more stock practice prescriptions and/or from practice stock supplies for the purpose of self-administering in circumstances where he knew or ought to have known that this was inappropriate.

Allegation 8 was that on one or more occasions during a specified period he obtained and/or took Pethidine and/or morphine sulphate, pursuant to one or more stock practice prescriptions and/or from practice stock supplies for the purposes of self-administering in circumstances where he knew or ought to have known that this was inappropriate.

Allegation 9 was that on a specified date he prescribed 10 vials of Cyclimorph for an identified patient and presented that prescription to a named pharmacy to be dispensed in circumstances where the doctor knew or ought to have known this was inappropriate.

Allegation 10 was that on one or more occasions during a specified period the doctor self-administered opioid medication including but not limited to morphine sulphate in circumstances where he knew or ought to have known that was inappropriate.

Allegation 11 was that on one or more occasions during a specified period he engaged in the practice of medicine while under the influence of opioid medication in circumstances where he knew or ought to have known that was inappropriate.

Allegation 12 was that the doctor suffered from an opiate addiction and/or a mixed anxiety and/or depressive state which may impair ability to practise medicine or a particular aspect thereof.

9. The FTPC found the doctor guilty of:-

(a) failing to meet the standards of competence that can reasonably be expected of a general practitioner,

(b) engaging in conduct connected with the profession in which the doctor seriously fell short by omission or commission of the standards of conduct expected among doctors, and

(c) engaging in conduct which doctors of experience, competence and good repute would consider disgraceful or dishonourable.

It also found that the doctor suffered and suffers from a relevant medical disability as described in allegation 12.

10. The FTPC, having considered expert evidence called by the Chief Executive Officer of the Council in respect of the allegations of poor professional performance and professional misconduct and the evidence of two psychiatrists, one of whom was called by the Chief Executive and the other by the intended respondent, concluded that the appropriate sanction was censure and conditional registration.

The Council hearing

11. Following the decision of the FTPC the Council's Chief Executive Officer indicated that he intended to submit to the Council that the appropriate sanction to be imposed by it should be cancellation of the doctor's name from the register. He made that submission in the context of the FTPC having concluded that the doctor's conduct was "*at the most serious end of the spectrum*". Submissions were exchanged between the parties and the Council convened to consider the appropriate sanction to be applied.

12. The Council agreed with the recommendation of the FTPC that the doctor be censured and that a series of conditions be attached to his registration. The Council gave its reasons for reaching this conclusion which I need not go into at this stage of the proceedings save to note that it acknowledged that in most cases a more serious sanction would be appropriate. However, it said "*In the exceptional circumstances of this case, the Council felt the case did not warrant cancellation or suspension on public safety grounds or to send any appropriate message to the doctor, the profession or the public at large*".

13. It went on:-

"The more severe sanctions will be punitive only in their nature, which the Council felt would be unfair in the context of admissions made, engaging in a disciplinary process and steps taken by the doctor to recover from his addiction and other mental health problems and to rehabilitate himself as a doctor.

Council had particular regard to the recovery process, involving a substantial period of time not in the practice of medicine. Council strongly believes that the patients affected by the doctor's professional misconduct and poor professional performance as set out in the findings of the Fitness to Practise Committee Report be aware of how they have been treated.

Having heard submissions and taken advice on the matter, including its powers of publication under s.85 of the Medical Practitioners Act 2007 and its powers under s.7 of the Act the Council is not satisfied it has the power to notify these patients. It will invite the court to consider its position in this regard and make such orders/directions as it considers appropriate …

The Council has also decided not to publish the findings under section 85 (a) or (b). The Council is not satisfied that it is

in the public interest to do so".

14. That was not the end of the matter. The Council reconvened on a later date to address the issue of whether it wished to ask this court to consider holding the hearing of the intended application to confirm sanction *in camera* or to anonymise relevant persons.

15. The decision of the Council is set forth in the affidavit grounding this application. It was that:-

> *"The court be invited to consider the appropriateness of hearing the application in private anonymising the patients and taking any other appropriate measure in this regard and, based on the submissions on behalf of the doctor, it is the Council's view that disclosure of any such material would be potentially detrimental to the doctor and potentially to the patients who have been named in the proceedings … therefore if possible it should be held in camera."*

16. That is the application which has been made to the court. The Council seeks an *in camera* hearing in order to adequately protect the interests and wellbeing of the doctor and the patients involved.

17. As I have already noted there is a second leg to the Council's application. It seeks the directions identified at para 4 of this judgment.

18. The doctor has been notified of the decision of the Council on sanction. The time fixed for an appeal to this court from that decision has expired. Thus, there is no doubt but that the application of the Council will be made exclusively by reference to s.76 of the Act.

The legal position

19. In *Medical Council v. T.M*. [2017] IEHC 548 I considered whether the legislature had conferred power on this court to hear an application under s.76 of the Act otherwise than in public. For the reasons which were set out in that judgment I concluded that there was no power express or implied conferred by the Act to hear such an application *in camera*.

20. In the course of that judgment I drew attention to the fact that the legislature had indeed considered the question of *in camera* hearings under the Act. In the case of the court, it conferred express statutory entitlement to hold such hearings *in camera* but only in respect of applications to suspend a registered medical practitioner pursuant to the provisions of s.60 of the Act. No such power has been conferred in respect of applications made under section 76.

21. Notwithstanding the lack of an express statutory provision I held that there was nonetheless a common law power to direct such a hearing. That is so having regard to the decision of the Supreme Court in *Gilchrist and Rogers v. Sunday Newspapers Ltd* [2017] IESC 18.

22. That decision re-animated a common law power which was regarded as having been rendered defunct by the decision of the Supreme Court in *Re R Ltd*. [1989] I.R. 126.

23. The current state of the law is that there is such a common law power and it falls to be exercised within the parameters identified in the judgment of O'Donnell J. in *Gilchrist's* case. As he said:-

> *"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".*

He also pointed out that the claim for an *in camera* hearing "*can only be determined by the courts and must be closely and jealously scrutinised*".

24. The reason for such a restrictive approach is clear. The requirement that justice be administered in public pursuant to Article 34.1 of the Constitution is a fundamental constitutional value of great importance. Any departure from that principle of open justice -

> *"… 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 parties are not identified".*

25. As I pointed out in *The Medical Council v. T.M*. the judgment of O'Donnell J. concludes with a summary of the principles which are enunciated as follows:-

> *"(i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.*
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> *(ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule;*
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> *(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;*
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> *(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. …*
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> *(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.*
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> *(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."

26. This application for an *in camera* hearing must be viewed in the light of those comments. I must also take into account that the legislature gave consideration in the Act to hearings being conducted by this court otherwise than in public but expressly confined such an ability to applications to suspend under s.60 of the Act. It is thus not unreasonable to conclude that the intention of the legislature by implication was in favour of applications under s.76 being heard in public.

27. In the light of these considerations I now consider the Council's application. I must approach the application with resolute scepticism of its claim which seeks to have me depart from a full hearing in public. I must be sure that the interests involved are very clear and that the circumstances are pressing. I must be satisfied that there is no other measure sufficient to protect the legitimate interests involved. The interests involved are those of the public, the patients of the doctor and the doctor himself. Nothing more should be permitted than is demonstrated to be necessary to avoid damage to the interests involved.

Decision on the *in camera* application

28. Insofar as the doctor is concerned, it is relevant that he self-reported to the health committee of the Council and has been found to have been suffering from a relevant medical disability during the time of his misconduct. He has since rehabilitated himself and will be back in practice subject to the conditions recommended by the Council should this court accede to the s.76 application. The Council had particular regard to the doctor's recovery process as do I. Disclosure of his identity would have very serious consequences for such recovery. Taking these matters into account I am satisfied that the doctor's identity should be protected but I do not believe that a full *in camera* hearing is necessary in order to do so.

29. I am greatly concerned at the fact that none of the patients who were inappropriately treated are aware of that fact. Some or all of them might have been called to give evidence before the FTPC but that was rendered unnecessary because the doctor, to his credit, admitted the allegations made against him. It is certainly right that the anonymity of these patients should be preserved since they are entirely innocent. It would be unfair to them to have their identity disclosed in court particularly since they are wholly unaware of any process against their former treating doctor or of the fact that they were inappropriately dealt with. Again, however, I conclude that a full *in camera* hearing is not necessary in order to ensure the preservation of their identities.

30. The public interest in having an open hearing is a strong one. It is open to me to fashion a form of hearing which will permit such a hearing whilst at the same time taking account of the rights and entitlements of both the patients and the doctor.

31. Accordingly, I direct that the s.76 hearing proceed in public but I prohibit the publication or broadcast of anything which would or might identify either the doctor or any of the patients involved. Their names will not be used during the hearing. Furthermore, the proceedings may issue and be processed without the doctor's name appearing in the title or in the Legal Diary. In order to ensure complete preservation of anonymity the initials used in the title to the proceedings to identify the respondent will not be the doctor's own initials. This form of hearing will, I am satisfied, accommodate in a balanced way the constitutional rights of all involved.

The Council's second request

32. The Council says that it "*strongly believes that the patients affected by the intended respondent's professional misconduct and poor professional performance as set out in the findings of the Fitness to Practise Committee Report be aware of how they have been treated*". I entirely agree.

33. The long title to the Act is that it is one "*for the purpose of better protecting and informing the public in its dealings with medical practitioners …*".

34. One aspect of that obligation to the public is to be found in s.85 of the Act. There the Council is given discretion, if 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. Most of those measures (including the attachment of conditions to a medical practitioner's registration) do not take effect until confirmed by this court.

35. In the present case the Council decided that it would not be in the public interest to advise the public of the doctor's conditional registration if approved of by this court.

36. Section 85(b) permits the Council, if satisfied that it is in the public interest to do so and after consultation with the FTPC, to publish a transcript of all or any part of the proceedings of that committee at an inquiry whether with or without any information which would enable all or any one or more than one of the parties to the proceedings to be identified. In the present case the Council took the view that it was not in the public interest to do this either. Thus, it was of opinion that the public interest did not warrant the public being informed of the conditional registration of the doctor or that a transcript of the proceedings before the FTPC should be published.

37. Notwithstanding that view it is clear that the Council was and is quite properly concerned that the patients affected by the doctor's professional misconduct and poor professional performance be made aware of how they were treated.

38. It is in these circumstances that I am invited to consider the Council's position and to make such orders or directions as are considered appropriate. As this invitation has been specifically extended to the court by the Council I propose to give it such assistance as I can.

39. Section 85 clearly gives a discretion to the Council to advise the public of the matters which I have identified at paras. 34 and 36. The Council exercised its discretion against such disclosure.

40. The term "public" is not defined in the Act.

41. It appears to me that if the Council is empowered to advise the public at large of the relevant material then it must follow that it is entitled to do so to a limited constituency of the public. The greater includes the less. In the present case there is an identified subset of the public, namely the doctor's patients, who may have been adversely affected by his behaviour and who to date are

entirely ignorant of that. In such circumstances it appears to me that the Council is authorised in the public interest to advise the doctor's patients. It is a matter for the Council in the exercise of its discretion to decide whether to limit its advice to the material identified at s.85(a) or (b) or both. It is also a matter for the Council in the exercise of its discretion as to how such advice should be given and any terms or conditions which should be attendant upon it. Needless to say, the advice will have to be given in a sensitive way since I am sure that it will come as a great shock to the patients.

42. My observations on this aspect of the matter are made because I have been invited to do so by the Council. I am not to be taken as deciding whether the court has any jurisdiction to give directions or guidance absent an invitation from the Council. That question is for another day.

43. I reiterate that whether and how this jurisdiction to make s.85 advice available to a limited part of the public falls to be exercised is entirely a matter for the Council.