THE HIGH COURT

[2016 No. 437SP]

BETWEEN

THE MEDICAL COUNCIL

APPLICANT

AND

M. A. G. A.

RESPONDENT

***Extempore* JUDGMENT of Mr. Justice Kelly, President of the High Court delivered on the 19th day of December, 2016**

1. This is the application of the Medical Council for an order pursuant to the provisions of s.76 (3) of the Medical Practitioners Act 2007.

2. Section 76 reads as follows:-

> "(1) Where a registered medical practitioner does not, within the period allowed under section 75 (1), appeal to the Court against a decision under section 71 to impose a sanction (other than a sanction referred to in section 71 (a)) on the practitioner, the Council shall, as soon as is practicable after the expiration of that period, make an application to the Court for the confirmation of the decision.
>
> (2) An application under subsection (1) may be made on an *ex parte* basis.
>
> (3) The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so."

3. The provisions of s.76 have been triggered in this case in that there has been a decision made by the Medical Council concerning the respondent which has not been the subject of an appeal by him. Consequently, the matter comes before the court today for confirmation of the decision which was made by the Council. The application has been made on an *ex parte* basis, as is permitted under subsection 2.

4. This is not the first day upon which this application comes before the court. It was before me previously and as a result of concerns which I expressed, the Medical Council made both written and oral submissions to me today. Furthermore the President of the Council, Professor Alfred Edward Wood has sworn a detailed affidavit on 9th December, 2016. I will come to a consideration of elements of that affidavit in due course.

5. The background to this matter was deposed to in an affidavit of William Prasifka sworn on 19th October this year. It was accompanied by voluminous exhibits but it is not necessary for the purposes of this ruling that I consider that affidavit in any great detail. I will instead be concentrating on the affidavit sworn by Professor Wood.

6. The respondent to the application is a registered medical practitioner. An inquiry was held by the Fitness to Practise Committee of the Council in respect of the respondent. That inquiry resulted in the respondent being found guilty of three factual allegations. Those proven allegations were held to be professional misconduct on his part. In fairness to the respondent, the allegations were admitted by him and he also accepted that they amounted to professional misconduct. Professor Wood in his affidavit recites the allegations at paragraph 3 of his affidavit as follows:-

> *"(i) That on or around 20 June, 2014, the respondent answered 'No' to the following question in his application form for registration in the Register of Medical Practitioners in circumstances where he knew or ought to have known that the said response was not true:*
>
> *'Has any Registration Authority ever refused to grant you registration to engage in the practice of medicine as a Registered Medical Practitioner?'*
>
> *(ii) That on or around 18th June, 2015, the respondent answered 'No' to the following question in his Annual Retention Application Form in circumstances where he knew or ought to have known that the said response was not true;*
>
> *'Has any Licensing or Registration Authority refused to grant you the registration or a practice licence or only granted conditional registration on a conditional licence?'*
>
> *(iii) That the respondent, being a registered medical practitioner, failed to give notice in writing to the applicant of the following material matter which was likely to affect the continuation of his registration within 30 days of him having knowledge thereof, namely that in or around 15 April, 2015, his application for registration with the General Medical Council was refused."*

7. Professor Wood correctly sets out in his affidavit that when this matter came before me on 7th November, 2016, I indicated that whilst I had no concluded view, I had reservations as to whether a censure with conditions attached, which was what was recommended to the court by the Council, was a sufficient sanction in light of the findings of fact made against the respondent. I then adjourned the matter for a period of two weeks to allow the Council to consider the position and at its request the matter was further adjourned until today so as to allow affidavit evidence and written submissions to be furnished to the court.

8. Professor Wood points out that he, as President of the Council, chaired the meeting of 9th September, 2016 which gave rise to the recommendation which is before the court today. His affidavit deals with a number of matters, only some of which I have to recite in detail. First, he deals with the training that is given to Council members and the documentation which is made available to them. It is not necessary that I should do other than note the detailed material that is put before the Council members to assist them in the discharge of their statutory functions. This material includes a considerable amount of matter dealing with the imposition of sanctions. Five factors are identified which may be considered prior to the imposition of sanctions namely proportionality, outcome, insight, evidence of adherence to an ethical guide in the consideration of testimonials and references.

9. Professor Wood then goes on to deal with particular considerations in this case and he says as follows:-

> *"When the applicant is considering matters of sanction, my approach as Chairman is to set out the relevant considerations to the other members. In matters concerning misdemeanours of the nature disclosed by the findings of the Committee in respect of the respondent, I have defined probity as containing the following elements: honesty, integrity, decency, truthfulness, honour, morality, fairness, justice, virtue and rectitude. At the same time, I have also indicated to the members that they themselves must demonstrate probity in reaching their decisions.*
>
> *In my guidance to the Council members at every meeting, cognisant of the decision of this court in Law Society v. Enright [2016] IEHC 151, I also remind the members of the need to maintain the reputation of the profession and to maintain public confidence in the integrity of the profession. Another essential condition is ensuring patient safety.*
>
> *In the discussions of the applicant in this particular case, I therefore say that the above guidance to the Council would have set out the relevant factors under consideration by its members. Other relevant factors which were considered included the fact that the actions of the respondent did not involve a threat to patient care and safety and it was noted from the evidence at the inquiry and submissions made at both the inquiry and before the applicant that there were no concerns about the respondent's ability to practise safely as a doctor. A further consideration was that the respondent was still at an early stage of his professional career. The applicant also considered it noteworthy that the respondent admitted the factual allegations at an early stage of the inquiry hearing before the Committee and also admitted that they amounted to professional misconduct."*

10. Professor Wood goes on to say that:-

> *"While the members of the applicant were conscious that the admitted professional conduct was serious and could be an indicator of possible future complaints, the view was taken that, in this instance, a sanction of censure and attaching conditions to registration was fair and proportionate. The possible alternative sanctions of suspension for a period, cancellation of registration and an application of a fine to a censure were all considered but overall, the applicant members were strongly of the view that the rehabilitation of the respondent should be the primary purpose of the sanction in all the circumstances of this particular case."*

11. Professor Wood points out that an ethics course (the completion of which is a condition to be attached to the respondent's registration) could cost anything from €800 up to €1,200 together with additional expenses. It was felt by the applicant that that cost was in itself equivalent to a fine. He also points out that the decision as to sanction which involved the acceptance of the recommendations of the Fitness to Practise Committee was unanimous. Thus all members of the Medical Council who were present at the meeting were unanimous in the view which they took.

12. Professor Wood then acknowledges comments which I had made in respect of the type of ethics course that might be suitable to address the behaviour of the respondent. This arose as a result of a question which I asked on that occasion as to what sort of ethics course would be required to teach a registered medical practitioner of the necessity of being truthful in seeking admittance to the Medical Register of this State. Professor Wood went on in that regard and said as follows:-

> *"As can be seen from the wording of the proposed condition, it is for the respondent to identify a course which would address the behaviour to the satisfaction of the applicant. If there is not such a course already available on the market, it is possible that a tailor made course which focuses on the respondent's form of misconduct will be designed in concert with an appropriate body."*

13. Professor Wood points out that the applicant takes compliance by registration with all conditions that are imposed very seriously. He avers that he is aware that a failure to comply with a condition imposed is itself a ground for the referral of the complaint to the Preliminary Proceedings Committee of the applicant pursuant to the relevant statutory provisions. His affidavit then treats of the way in which the Council ensures compliance with conditions attached to the retention of a doctor's name on the Register. It is not necessary for me to consider that in any detail but it is set forth comprehensively in Professor Wood's affidavit.

14. The professor then turns to a matter which caused me and indeed continues to cause me some concern. My concern arises on the apparent difference between the decision of the General Medical Council in the United Kingdom which refused the respondent's applications for entry onto its register with the sanction proposed by the applicant. In order to address this point Professor Wood goes into some detail as to the applications before the GMC as well as both the hearing before the Fitness to Practise Committee (the Committee) and the applicant which has given rise to these proceedings. Professor Wood says this:-

> *"I say that the Committee (and, in turn, the applicant) was aware of the respondent's various applications before the GMC as evidence was given to the Committee by Natalie Pattinson, the Registration Investigation Team Manager with the GMC. A copy of a document entitled 'Consideration by an Assistant Registrar of Matters Relating to an Application' was among the papers that were both before the Fitness to Practise Committee and the applicant at its meeting in September 2016. He goes on to say that insofar as the applications to the GMC were concerned the following was the position.*
>
> > *'The respondent's application for entry onto the Register administered by the GMC which was dated 28th August, 2014 had been referred to the assistant registrar there to consider whether the respondent had satisfied the registrar of the GMC that his fitness to practise was not impaired. The assistant registrar concluded in his decision of April of 2015 that the respondent had not satisfied him that his fitness to practise was not impaired and so his application should be refused.'"*

15. Professor Wood then says that it is important to consider some of the reasons for the decision which was reached by the GMC. This is what he says:-

"(i). The Assistant Registrar considered the original application of the respondent to the GMC of 18 October, 2012 where questions of the respondent's probity had been raised relating to the inputting of false International English Language Testing System (IELTS) test results on to the GMC system to enable him to book a Professional and Linguistic Assessments Board (PLAB) test.

(ii) When the discrepancies in the results were brought to his attention the respondent submitted fraudulent evidence to explain the differences in the scores. This involved the production of a letter purporting to be from the British Council which was submitted to vouch for the results. The British Council, when contacted, confirmed the scores on the certificate did not match their records of the scores actually obtained. The respondent denied responsibility and then accused IELTS, the British Council and the GMC of being at fault. Ultimately, that application was refused on the basis that the respondent had not satisfied the GMC that he had the required knowledge of English. The decision however, inter alia, also referred to the quote 'doubtful provenance' of the certificate as produced.

(iii) An application made on 11th September, 2013 was also considered by the Assistant Registrar, even though it was withdrawn by the respondent prior to a final determination being made. Issues with IELTS test results and discrepancies were again queried. The respondent provided a test certificate which appears to have been tampered with and entered into extensive correspondence which, the report notes, did not provide a logical explanation. The report remarks 'It is difficult on the basis of the evidence submitted to this point to conclude anything other than that the respondent has knowingly sought to provide fraudulent evidence of his English language competence on two separate occasions.'

(iv) While the respondent's IELTS results (which were independently verified) reached the required threshold at the time of his application in August 2014, the respondent was asked to provide further explanations for the previous discrepancies. The report notes that the respondent said that, in respect of his 2012 application, he was the victim of a fraud, however no verifiable evidence was provided. In respect of his 2013 application, he set out that an unnamed person entered the false scores onto the GMC system in order to assist the respondent, however no verifiable evidence was provided of this either.

(v) The report also noted that, in the period of the respondent's unsuccessful applications (there were seven in all, most of which were withdrawn before being determined), the respondent held himself out to be a registered and licensed practitioner to a number of NHS employers, obtaining offers of employment in some cases and moving into hospital accommodation. Once the necessary registration checks were carried out, these offers of employment were withdrawn. The report notes that the respondent 'has demonstrated a repeated pattern of dishonest behaviour with regards to his registration status and job applications'.

(vi) Given the serious implications of the decision to be reached by the Assistant Registrar, he referred the application to the GMC's registration panel (the Panel) for advice. The Panel advised that they could not be satisfied that the respondent's fitness to practise was not impaired. The Assistant Registrar recorded that the Panel's advice which was appended to his own decision, noted 'that there was no evidence of remorse, insight or remediation in the respondent's most recent application'."

16. Professor Wood then turns to the inquiry which was carried out by the Committee of the applicant and the transcript of that hearing. The transcript was available to the Medical Council at its meeting of 9th September. It is also available to me. Professor Wood says as follows:-

"The relevance of the above proceedings before the General Medical Council in England to the allegations before the Fitness to Practise Committee is as follows:-

• The failure of the respondent to disclose the GMC's refusal of the October 2012 application when he applied for entry onto the Register in June 2014 was the basis for allegation (i) before the Committee of the applicant.

• The failure of the respondent to disclose the rejected 2012 and 2014 applications to the GMC when he applied for retention on the Register in June 2015 was the basis for allegation (ii) before the Committee of the applicant."

17. His affidavit continues:-

"At the hearing of the allegations by the Fitness to Practise Committee on 4 August 2016 and before the CEO of the applicant went into evidence, counsel for the respondent confirmed that he accepted the factual allegations and that they amounted to professional misconduct. In addition to the evidence provided by Ms. Pattinson of the GMC the Committee also heard from Ann Curran of the applicant and expert evidence was provided to the Committee by Professor Stephen Lane. Professor Lane said that:-

> *'If each of these allegations are proven as correct, it is my view that they are very grave departures from what I would consider to be normal behaviour.'*

Under questioning from the Committee on the possibility of remediation Professor Lane stated:-

> *'I think there's always hope for remediation and, I mean, the fact that the doctor has admitted what he actually did, but there are certainly – there would need to be counselling.'"*

18. Professor Wood says:-

"The respondent gave direct evidence to the Committee to trace his academic and professional background and in the course of which he made a number of references to a mistake having been made. As a result of this, counsel for the CEO and the applicant sought to explore the nature of the admissions being made in the cross examination, to establish the true nature and extent of the respondent's admissions in the context of mitigation. Counsel for the respondent objected to this proposed course and submissions were made to the Committee. The legal assessor to the Committee, Charles Meenan, S.C. then gave advice that counsel for the CEO was '… entitled to cross examine the medical practitioner in relation to the matters on which he has given evidence but obviously that cross examination has to be somewhat circumscribed by the fact of the admissions that he has made.'

The Chairman of the Committee indicated that they would like to ascertain insight into the action of the respondent."

19. Professor Wood then points out that the respondent agreed with the proposition put to him that the mistake which the respondent had made was answering the questions on the application and renewal forms incorrectly and "*the effect of answering incorrectly was that the Medical Council was not made aware of these issues which he knew he'd had with the GMC*". Professor Wood goes on:-

> *"The respondent was asked by the Committee as to his reaction to the findings of the report as prepared by the Assistant Registrar of the GMC as referenced above. At this point, counsel for the respondent objected, saying that the discussion of insight should be restricted to the failings of 2014 and 2015 in his engagements with the applicant. He highlighted that the allegations in the notice of inquiry were framed as a non-disclosure issue and argued that it was not correct to seek to go beyond that."*

20. Professor Wood says:-

> *"The Legal Assessor, Mr. Meenan S.C. gave the Committee the following advice:-*
>
> > *'Obviously, insight is an important aspect in the committee's decision to give whatever recommendation it wishes to as regards sanction and, in that regard, firstly I think it does have to be emphasised that this is not an inquiry into the reasons why the GMC did or did not refuse the registration of the medical practitioner. So, in my view, the insight which the Committee has to concentrate upon is the insight which the doctor may or may not have in respect of the two application forms which he filled out to the Medical Council which he has admitted were filled out not correctly and I don't think that there's any great benefit and I don't think its probably entirely correct for the Committee to explore the insight which the doctor may or may not have had into matters which were before the GMC.'"*

21. Professor Wood then deals with the hearing before the Medical Council. That took place on 9th September following the recommendation from the Committee that the respondent be censured and that a condition be attached to his registration to the effect that he would be obliged to undertake a recognised course in ethics. This is what Professor Wood says:-

> *"The issue as to the nature of these issues investigated by the GMC and how they could be addressed in the context of these proceedings was again raised. J.P. McDowell, the solicitor for the CEO stated that the moral probity and trustworthiness issues arose in respect of both the false declarations themselves but also in the context of the circumstances before the GMC. Counsel for the respondent objected, highlighting that nothing had been charged in relation to the conduct of the respondent's application with the GMC. As a result, he said that the issue of moral probity in relation to the matters before the GMC did not arise and was not a matter for the applicant to consider….*
>
> *As President of the applicant and Chairman of the hearing, I referred the question to the applicant's legal assessor, Mr. David Holland S.C., who undertook a summary of the evidence that was before the Committee and the advice of Mr. Meenan S.C. to the Committee. In summing up his own advices to the applicant, Mr. Holland said:-*
>
> > *'In circumstances in which it is apparent, as I say, that this is a case of dishonesty based on a very simple and clear reading of the findings made against the doctor, it might perhaps be prudent on the Council's behalf to satisfy itself of a consideration of that dishonesty, rather than entering into the details of what happened before the GMC. In respect of which the Fitness to Practise Committee had been advised this is not an inquiry into what happened before the GMC…'*
>
> *Upon the delivery of this legal advice, the applicant retired to consider its sanction."*

22. Professor Wood then avers as follows:-

> *"In respect of the differences between the treatment of the respondent by the GMC and the applicant and as can be seen from the above, I would therefore say as follows:*
>
> *(i) The questions being asked of each body were different:*
>
> > *(a) The GMC considered allegations of falsifying exam results, submitting same to the GMC in order to gain registration when he was not entitled to be so registered given his actual exam results and submitting forged documentation when asked to clarify same. It also considered evidence that the respondent had misrepresented his status as a registered doctor in order to apply for and obtain offers of employment.*
> >
> > *(b) The Committee inquiry addressed allegations that the respondent failed to answer truthfully a question on two occasions. While the answer to that question was directly related to the issues before the GMC, the legal advice to both the Committee and the applicant was that the behaviour leading to the GMC's decision could not be factored into the nature of or seriousness of the allegations to be determined.*
>
> *(ii) The approach of the respondent to both bodies were different also:*
>
> > *(a) The report of the Assistant Registrar in the GMC noted the advice of the Registration panel which found there was no evidence of remorse, insight or remediation on behalf of the respondent in any of the papers he had submitted.*
> >
> > *(b) In contrast, the respondent admitted the factual allegations before the Committee and also agreed that they amounted to professional misconduct. In his evidence to the Committee, he indicated his regret and, also in respect of the possibility of remediation, indicated that he was 'fully prepared to do whatever possible'. In circumstances where the respondent did not appear before the applicant on 9th September, 2016, it was not possible to attach much weight to the issue of the respondent's insight.*

(iii) There was also a difference in respect of evidence in mitigation:

(a) As apparent from the report of the assistant registrar, there were few, if any, points to be considered in mitigation as a result of the manner in which the respondent engaged with the GMC.

(b) Detailed mitigation evidence was led before the committee of the applicant with references produced and direct evidence provided by a current colleague of the respondent. This evidence was also summarised at the hearing before the applicant."

23. I should say, although it is not dealt with in any detail in Professor Wood's affidavit, that the evidence which was produced by the respondent was favourable to him in respect of his current position and his working as a doctor in this jurisdiction. Professor Wood's affidavit concludes by him saying that the applicant was satisfied that the imposition of a sanction of censure with conditions attached was the appropriate sanction in this matter. He therefore asks the court to grant the relief in question.

24. That sets out by way of background what is said to be an answer to the concerns which I raised when the matter first came before me. The affidavit accurately summarises the concerns that I had as to whether this is an appropriate sanction given the findings of professional misconduct that were made and given the background to those findings as set forth in Professor Wood's affidavit.

25. As I pointed out at the outset this is an application under s.76(3) of the Act. I have already recited that. It says that the court shall on an application of this sort confirm the decision of the Medical Council unless the court sees good reason not to do so. The plain wording of the subsection obliges me to confirm the decision in this case unless I see good reason not to do so.

26. Mr. Butler S.C. on behalf of the applicant urges that when one comes to consider the meaning of "good reason" it should be given a limited meaning. It does not mean that this court sits as a sort of court of appeal to consider on the merits matters which are properly within the jurisdiction and purview of the Medical Council. Rather, he argues, it provides a mechanism whereby I can depart from the Medical Council decision if I am satisfied that there was a substantial procedural irregularity or a failure to comply with the norms of natural and constitutional justice or if I were to conclude that no reasonable medical council could come to the conclusion which it did. In other words, he says, the term "good reason" has to be given a restricted meaning and it does not mean that this court is an appellate tribunal on the merits.

27. The principal source for that argument is to be found not by reference to any case law because Mr. Butler was not in a position to produce such. Rather it is by reference to the internal structure created in the Medical Practitioners Act 2007.

28. His strongest line of argument is that to be drawn from s.6 of the Act which is in the following terms. It says:-

"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."

29. The effect of that, it is said, is to constitute the Medical Council as the body with the primary obligation of ensuring that the practice of medicine in this jurisdiction is conducted by competent practitioners in whom the public can repose trust. The President of the Medical Council himself in the course of his affidavit referred to a decision given earlier this year in the context of solicitors' disciplinary procedures. That was the case of *Law Society v. Enright* and he refers to that at para.13 of his affidavit. He said that he reminded the members of the Council of the need to maintain the reputation of the profession and to maintain public confidence in its integrity. "*Another essential consideration*", he said, "*is ensuring patient safety*". So clearly he and the Medical Council members were mindful of the obligation imposed upon them by reference to s.6 of the Act. That includes the obligation to maintain high standards and to be concerned that the public can have confidence in registered medical practitioners who are carrying on the practice of medicine in this country.

30. I accept the argument made by Mr. Butler that the jurisdiction which is conferred under s.76 (3) is not an unfettered one and it does not constitute the High Court as an appeal tribunal on the merits in respect of an application of this sort. Rather, the obligation of the court is to deal with the issues of the type identified, such as adherence to correct procedural norms, adherence to the requirements of natural and constitutional justice and the making of a decision by the Medical Council which is a reasonable one or to put it another way is one which cannot be said to be one which no reasonable council would come to. By the use of that expression, I am importing concepts of reasonableness which are well known to legal practitioners on the judicial review side of the court, namely "Wednesbury unreasonableness" or "Stardust" type unreasonableness. (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223; *State (Keegan & Lysaght) v. Stardust Victims' Compensation Tribunal* [1986] I.R. 642.)

31. The question that arises for consideration here, therefore, is can it be said that the decision of the Medical Council was one which was arrived at by a reasonable council behaving in a reasonable fashion? The fact that I might take a different view as to sanction does not at all enter into consideration. That is because I am not exercising an appellate jurisdiction on the merits. The questions I have to ask myself is has there been any procedural impropriety here and there clearly has not. Has there been any failure to adhere to the rules of natural and constitutional justice and clearly there has not. The third question, and this is the only pertinent one, is can it be said that the decision arrived at here is so unreasonable as to warrant the intervention of the court. If the court comes to the conclusion that the decision here is so unreasonable as to warrant its intervention then there is "good reason" to depart from it.

32. Having considered the detailed material sworn to by Professor Wood, I am unable to come to the conclusion that the Medical Council in this case has come to such an unreasonable conclusion as to amount to a good reason for this court to disturb it. The decision here is not an unreasonable one as that term is understood in the context of judicial review concepts.

33. Professor Wood has filed a very detailed affidavit. It has gone into a great amount of material touching upon not merely what happened on the occasion in question but also the training and instructions given to members of the Medical Council both generally and on this occasion itself.

34. It is the Medical Council that is charged with the maintenance of standards and competence among registered medical practitioners. It is the Medical Council which is primarily charged with ensuring the maintenance of public confidence in the medical profession. That is not a function of this court. The function of this court insofar as s.76 (3) is concerned is to intervene only in circumstances where there is good reason, as properly understood, to warrant the court's intervention.

35. In these circumstances having considered the detailed material that has been put before me I am of opinion that I ought to accede to the application which is made by the Council. I do so for the reasons which I have given. Consequently, I will confirm the

decision made by it which is to censure the respondent Dr. A. and to attach the conditions to his registration as are recommended to the court by the Medical Council and which in turn were recommended to it by the Committee. In so doing, I place emphasis on what Professor Wood pointed out, namely the element of engagement by the respondent with the medical registration authorities in this jurisdiction, something which was not apparent in his dealings with the General Medical Council in England. I also take into account the views that are expressed both by the Committee and by Professor Lane and also of the fact that the decision of the Medical Council in the instant case was a unanimous one.

36. I therefore make the order as sought under section 76 (3).