Neutral Citation [2012] IEHC 527

THE HIGH COURT

JUDICIAL REVIEW

[2011 No. 376 J.R.]

BETWEEN

H.H

APPLICANT

AND

THE MEDICAL COUNCIL

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered on the 9th day of October, 2012

1. The applicant who is a consultant obstetrician and gynaecologist sought leave to bring judicial review proceedings on the 9th May, 2011 grounded on an affidavit sworn by him on that date and a statement required to ground the application.

2. The applicant sought an order of *certiorari* by way of an application for judicial review quashing the decision of the respondent made on the 18th day of January, 2011 and communicated to the applicant by letter of the 19th day of January, 2011 to advise the public of its decision made pursuant to Section 71(a) of the Medical Practitioners Act 2007 where it decided to advise the applicant in relation to his professional performance.

3. The applicant further sought an injunction restraining the respondent from publishing whether in writing or in electronic form on the worldwide web or by any other method details of its decision made on the 18th day of January, 2011 pursuant to Section 71(a) of the Medical Practitioners Act 2007.

4. The grounds relied on by the applicant in the statement were that:-

> "In deciding to advise the public of its decision to advise the applicant in relation to his professional performance the respondent acted unlawfully and ultra vires the powers conferred upon it pursuant to the provisions of the Medical Practitioners Act 2007 which act does not provide for, allow or permit the respondent to advise the public or any other party of the imposition of its sanction upon the Applicant pursuant to Section 71 (a) of the Act".

5. By Order of this Court on the 9th day of May, 2011, the applicant was granted leave to apply by way of an application for judicial review for the reliefs sought based on the Statement of Grounds of the 9th May, 2011. The substantive hearing was held before this Court on the 13th and 14th December, 2011 and judgement reserved.

6. In the course of considering its judgement, the court noted that in paragraph 4.21 of the written legal submissions submitted on behalf of the applicant, it was argued that in the circumstances of the particular case, it would be unfair, unduly harsh and disproportionate for the respondent to publish the sanction of advice even if allowed to do so by the Act of 2007, which the applicant submits it was not. This was not granted as a specific ground on the application for leave of the 9th May, 2011 nor was it argued before the court on the substantive hearing.

7. The court considered it appropriate to write to the solicitors for the parties on the 20th March, 2012 stating that the court required some further submissions in respect of paragraph 4.21 of the applicant's written submissions on the following matters:-

> 1. Does the court have jurisdiction, to decide if the decision of the respondents to publish to the world at large was unfair, unduly harsh and disproportionate even if allowed to do so by the Medical Practitioners Act 2007?
>
> 2. If the court has jurisdiction, how should it approach the resolution of this matter?

8. The parties were given time to put in supplemental written legal submissions on this issue and the court heard further argument on the 21st day of May 2012, and reserved its judgement.

Preliminary Complaint and Hearing Before the Fitness to Practice Committee of the Respondents

9. Four separate complaints were made to the respondents alleging professional misconduct and poor professional performance arising out of the treatment afforded by the applicant to three patients in a private hospital in the South West. Three of the complaints were made by consultant medical practitioners and a fourth complaint was made by a patient.

10. The preliminary proceedings committee of the respondent formed the opinion that further action was warranted and referred the matter to a fitness to practice committee for the purpose of holding an inquiry pursuant to Part 8 of the Medical Practitioners Act 2007.

11. That inquiry was held on the 10th, 11th and 12 March, 27th, 28th and 29th April and 27th and 28th September, 2010.

12. The fitness to practice committee issued their written findings on the 24th November, 2010.

13. The complaint of one of the consultant medical practitioners and the patient overlapped, and was considered as one complaint.

14. The complaints considered by the fitness to practice committee were firstly a complaint with 8 separate sub headings about the treatment of Miss E.R. prior to a surgical procedure in or around the 18th November, 2008.

15. The second complaint with 7 separate subheadings related to a diagnostic laparoscopy carried out in or around the 7th April, 2009 on Miss J.T.

16. The final complaint with 6 separate sub headings related to a diagnostic laparoscopy carried out on Miss C.R on the 22nd May, 2009.

17. The fitness to practice committee did not uphold the complaints about the treatment of Miss E.R. and Miss C.R.

18. In respect of the patient Miss J.T., out of the seven complaints, two were withdrawn, one was not proven as to fact and four others were upheld against the applicant. The finding at 2G of the report "failing to apply the standards of clinical judgement and/or competence that could reasonably be expected of a consultant gynaecologist" were based on findings of fact. In respect of 2C, 2E and 2F the substantive complaints thus upheld against the Applicant were as follows:-

> 2C. The applicant failed to make any or adequate enquiries as to the possibility of transfusing blood to J.T. before asking Dr. K.H. to receive the patient at the main hospital in the area. This allegation was proven as a fact, the reasons being that the applicant did not make adequate enquiries in the private hospital regarding the group and cross match of blood for possible transfusion. The committee found that it did not amount to professional misconduct but did amount to poor professional performance. The committee did not consider that there was a serious falling short of the standard of conduct expected among doctors but the failure of the applicant to make these enquiries was a failure to meet the standards of competence which could reasonably be expected of medical doctors practising medicine of the kind practised by the practitioner and the committee accepted the evidence of Dr. S in this regard.
>
> 2E. The applicant requested a transfer of Miss J.T. to the main hospital in circumstances where he knew or ought to have known that it was possible to provide blood to Miss J.T. in the private hospital. This allegation was proven as to fact, the reason being that the applicant ought to have known it was possible to provide blood in the private hospital. The committee found that the finding did not amount to professional misconduct but did amount to poor professional performance. The committee did not believe that there was a serious falling short of the standard of conduct expected among doctors however, while the patient was clinically stable there was a high risk of deterioration on route to the main hospital and in the circumstances there was a failure to meet the standards of competence that would be reasonably expected of medical practitioners practising the kind of practice of the applicant.
>
> 2F. It was alleged that the transfer of Miss J.T. from the private hospital to the main hospital was not in her best interests and this was proven as to fact, the reason being advanced while it may have been in the plaintiffs best interests to be transferred to the main hospital, the circumstances of the transfer were not appropriate as the patient was at high risk of deterioration on route and that this did not amount to professional misconduct but did amount to poor professional performance.

19. 2G as previously stated was a finding that the applicant failed to apply the standards of clinical judgement and/or competence that could reasonably be expected of a consultant gynaecologist based on the findings at 2C, E and F, the committee's view being that there was a serious falling short of the standard of conduct expected among doctors, however that given the findings at 2C, E and F that poor professional performance had been established.

20. The committee recommended that the applicant be advised in relation to his conduct pursuant to Section 71(a) of the Medical Practitioners Act 2007 and the committee further stated that it believed that the applicant was a competent practitioner.

21. Pursuant to Section 69 of the Act the fitness to practice committee submitted the report to the respondent, who pursuant to Section 70 and 71 of the Act considered what sanction to be imposed at a meeting held on Tuesday, 18th January, 2011. After submissions the respondent decided under the provisions of Section 71 (a) of the Medical Practitioners Act 2007 to advise the applicant in relation to his professional performance.

22. At the end of this decision further submissions were made to the respondent on the issue of publication. The council decided to advise the public of its decision. The respondent dismissed the complaints forming the basis of allegations 1 and 3 before the fitness to practice committee.

23. The matter was re-listed before the respondent on the 3rd March 2011, where a submission was made to it, by the solicitor on behalf of the applicant wherein the solicitor sought clarification, and requested the respondent to ratify an agreed proposal between the applicant and the CEO of the respondent subject to final ratification by the respondent, as to the extent of publication in this particular case which was suggested would be limited to the form of letters that had been circulated and the content of which had been agreed. The letters were three to the complainants in respect of the three complaints considered by the fitness to practice committee and two other letters, one to a firm of solicitors on behalf of one of the patients and another letter to Barrington's hospital where the applicant had previously practised.

24. Having considered the matter the respondent maintained its previous decision that it would advise the public of the outcome of the Inquiry.

25. The matter was again referred back to the respondent on the 14th April 2011, on the issue of publication and the respondent on that date accepted the advice of the legal assessor that it was *functus officio* and would not revisit the matter. Subsequently the applicant issued these proceedings.

The Legal Arguments of the Parties

26. The applicant submitted that the respondent in deciding to inform the public of its decision concerning his professional performance, acted unlawfully and contrary to the powers conferred upon it pursuant to the provisions of the Act of 2007, which does not provide for, allow or permit the respondent to inform the public or any party of the imposition of the sanction upon the applicant pursuant to Section 71(a) of the act. In the absence of any such specific power, the respondent cannot rely on a residual power under any other section of the act and the applicant rejects any suggestion by the respondent that the respondent has such a residual power to publish pursuant to Section 7(2) of the Act of2007, and it should also be noted that the Act of 2007 provides the Applicant with no right of appeal in respect of the sanction of advice or admonishment imposed pursuant to Section 71(a), while in respect of any other sanction there is an express right of appeal to the High Court.

27. The applicant also relies on the maxim *expressio unius exclusio alterius* which translates as meaning "that something which is expressed nullifies that which is unexpressed". Where the legislature in the text of an Act, deems it appropriate to expressly provide

for particular matters and could have included other matters but did not, the inference arises that such omissions are deliberate and that such matters are intended to be excluded from the provision in question.

28. The respondent argued that when considering statutory interpretation the act in total should be examined and that the position argued by the applicant is anomalous, illogical and absurd.

The Medical Practitioners Act 2007
29. The preamble to the Act states:-

> "An act for the purpose of better protecting and informing the public in its dealings with medical practitioners and, for that purpose, to introduce measures, in addition to measures providing for the registration and control of medical practitioners, to better ensure the education, training and competence of medical practitioners, to amend the membership and functions ofthe medical council, to investigate complaints against medical practitioners and to increase the public accountability of the medical council; to give further effect to council directive 2005/36/EC; and, for that purpose, to repeal and replace the medical practitioners acts 1978 to 2002 and to provide for related matters."

30. Pursuant to Section 84(1) of the Act the respondent shall give notice in writing to the Minister and the Health Service Executive as soon as practicable of certain measures that have taken effect under the Act. Under this section the respondent was not obliged to notify the Minister and the HSE of any decision to advise a medical Practitioner.

31. Section 85 does not refer to that part of the provisions of Section 71(a) of the Act that is an advice or admonishment. It does refer to the censuring of a registered Medical Practitioner which is contained in Section 71(a)(m).

32. Although the respondent did not set out any reasons in its decision of the 18th January, 2011 to advise publication, it was advised by its legal assessor on the day that it had a residual power pursuant to Section 7 of the Medical Practitioners Act 2007 to notify the public when the sanction it intended to impose was that of advice.

33. Section 7 (1) states:-

> (1) The Council shall-
>
> (a) do all things necessary and reasonable to further its object, and
>
> (b) perform its functions in the public interest.

Section 7 (2) (k) states

> (k) make decisions and give directions under *Part 9* relating to the imposition of sanctions on registered medical practitioners,

Section 7 (2) (l)

> (l) advise the public on all matters of general interest relating to the functions of the Council, its area of expertise and other matters of interest to the public relating to the practice of medicine and medical practitioners, including public advertisement of the object, functions and contact details of the Council from time to time, and

Section 7 (5) states

> (5) The Council has power to do anything that appears to it to be requisite, advantageous or incidental to, or to facilitate, the performance of its functions.

Decision on *Ultra Vires*

34. The issue is whether the impugned action is reasonably incidental to the express power and thus falls within the implied powers conferred by statute.

35. The general rule remains that stated by Lord Shelbourne in *Attorney General v. Great Eastern Railway Company* [1885] A.C. 31 at page 473:-

> "Whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*."

36. It is appropriate to interpret the act in accordance with well established canons of construction.

37. The authoritative text book on the matter in Ireland is *Statutory Interpretation in Ireland* by David Dodd B.L. first published in 2008. The parties have also opened a number of authoritative judgements.

38. The objective of statutory interpretation is to ascertain the intention of the Oireachtas. It is the intention that the court reasonably imputes to the legislature in respect of the text of an act adopted and promulgated as law in accordance with the constitution.

39. Legislative intention according to Dodd quoting Driedger on *Construction of Statutes* Second Edition Butterworths [1983] is composed of four elements:-

> (a) The expressed intention.
>
> (b) The implied intention.
>
> (c) The presumed intention.
>
> (d) The declared intention.

40. The declared intention is disregarded in Ireland, as the court rarely goes behind statute itself. In this case the court is not dealing with expressed intention but the implied and presumed intention, that the Oireachtas vested the power in the respondent to advise the public of a sanction placed on a medical practitioner, at the lowest grade which can be imposed, that of advice. The implied intention is the intention that may legitimately be implied from the enacted words and the presumed intention is the intention that the Courts will in the absence of any indication to the contrary, impute to the Oireachtas.

41. Legislative intention refers to the objective intention of the legislature.

42. In *Crilly v. Tv. J Farrington Limited* [2001] 3 I.R. 251 it was held:-

> *Per* Murray J: "That it was clear that the rule of construction as to ascertaining the intent of the legislature examined objective as opposed to subjective intent, in that the rule was not applied where the statute was clear and definite and open to only one interpretation in the context of the statue as a whole. To examine the subjective intent would be to examine the meaning of an Act despite it being clearly expressed, in order to ensure that this was the legislature's true intent. Therefore, the intent of the legislature was imputed to it on the basis of the text of the Act adopted and promulgated as law, in accordance with the Constitution."

EXPRESSIO UNIUS EXCLUSIO ALTERIUS

43. Dodd at Para 5.89 states:-

> "The maxim *expressio unius exclusio alterius* translates as to express one thing is to exclude another. It is itself an aspect of the principle *expressum facit cessare taciturn* which translates as something expressed nullifies that which unexpressed. Where the legislature in the text deems it appropriate to expressly cater for particular matters, and could have included other matters but did not, then the inference arises that such omissions are deliberate and that such matters are intended to be excluded from the provision. The maxim is at its strongest where the legislature enumerates certain matters connected by a common theme, class or category, as opposed to covering them by general words, but omits certain things from the list. The maxim operates by indicating the legislature's intention by implication or inference. Its usefulness has been doubted elsewhere".

44. In a judgement of this court *An Blascaod Mor Teoranta & Others v. Commissioner of Public Works in Ireland & others and by order Minister for the Arts, Culture & the Gaeltacht* (Unreported, Kelly J, 18th December 1996), he stated that the application of the maxim "*expressio unius exclusio alterius*" was a guide and not necessarily determinative of the issue he was considering. He stated that he must look at the act as a whole to see whether he ought to imply an intention on the part of the Oireachtas to permit the making of certain regulations.

45. These were regulations made pursuant to Statutory Instrument 340 of 1990 to compulsory acquire certain lands the property of the plaintiffs. While there were certain express powers vested in the Minister to make regulations under the Act, no such express power was conferred on him to make regulations of the type contained in the statutory instrument.

46. However in interpreting the act the court examined other provisions of the Act including its long title and schedules and having done this stated:-

> "It appears to me that it would be perverse to conclude that the Oireachtas did not intend to confer a power in the Minister to make regulations of the type which are being contested in these proceedings".

47. In *Director of Consumer Affairs v. Bank of Ireland* [2003] 2 I.R. 217 at p. 237 The court stated

> "The purpose of statutory interpretation is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. The intention, and therefore the meaning of the statute, is primarily to be sought in the words used in it.
>
> The plaintiff is a statutory officer and is therefore strictly confined to the functions and powers conferred upon her under the Act. She has no inherent power. But she may have powers which, although not expressly conferred, may be regarded as incidental to or consequential upon those which the legislature has expressly authorised."

48. This Court is of the opinion that in assessing the legal arguments of the applicant and in particular the reliance on *expressio unius exclusio alterius*, it is entitled to examine the entire provisions of the Act, to determine if the respondent had residual powers pursuant to Section 7 of the Act.

49. Another canon of construction which is useful to the Court in its analysis is that of "consequences".

50. The consequences that flow from alternative constructions of a statute are legitimate considerations in interpretation. It is presumed that the legislature does not intend its provisions to have absurd, inconvenient, anomalous, illogical, futile or pointless results. Dodd at Para 7.42 states:-

> "Judicial interpretation, where possible, is against anomalous and illogical results. An anomaly is a deviation or departure from the normal or common order, form or rule. It is something that is peculiar, irregular, abnormal and does not fit with clear expectations, well understood rules or logic. In the context of interpretation, anomalies typically arise where the consequences of a particular interpretation are examined in light of the enactment as a whole. Courts tend to seek the most logical legislative solution where there are alternative interpretations".

51. Taking the act as a whole the long title states that it is:-

> "An Act for the purpose of better protecting and informing the public in its dealing with medical practitioners".

52. Section 65 of the act provides that a hearing before the fitness to practice committee shall be in public except on application to it for particular reasons.

53. I do not believe that the omission from Section 85 (1) of the Act of the mandatory responsibility to publish a sanction of advice or admonishment, can limit the general objects functions and powers of the respondents which are set out in Section 7 of the Act.

54. Section 85 (b) of the act permits the respondent to publish a transcript of an inquiry and that particular subsection can be read separately from Section 85(a). An anomalous position could arise where an inquiry was heard in public, a transcript of same was ordered by the respondent, but if the outcome of the recommendation of the fitness to practice committee endorsed by the respondent was advice it could not be published.

55. Section 7 (2) (k) of the Act states:-

> "Make decisions and give directions under Part 9 relating to the imposition of sanctions on registered medical practitioners."

56. Analysing that subsection alone, without reference to the maxim *expression unius exclusio alterius*, it grants to the respondent powers to make decisions and give directions in respect of the imposition of sanctions on registered medical practitioners following reports of the fitness to practice committee pursuant to Part 9 of the Act.

57. Section 7 (2) (1) has no relevance in this application. It relates to the responsibility of the Respondents to advise the public on matters of general interest.

58. The general power pursuant to Section 7 (1) of the Act is wide that is that the Council shall:-

> (a) Do all things necessary and reasonable to further its object and
>
> (b) Perform its functions in the public interest.

59. Furthermore Section 7 (5) states:-

> "The Council has power to do anything that appears to it to be requisite, advantage or incidental to or to facilitate the performance of its functions."

60. The appropriate interpretation of the right of the respondent to advise the public is that Section 85(a) of the act imposes an obligation to publish when it is in the public interest to do so in respect of the measures set out at Section 84 (1) and (2) of the Act.

61. Section 7(1), (2)(k) and (5) of the Act vest in the respondents the discretion to publish a sanction of advice or admonishment if it is in the public interest to do so.

62. An issue has also arisen about the interpretation of Section 57 (3) ofthe Act which states:-

> "(3) The Preliminary Proceedings Committee shall make reasonable efforts to ensure that-
>
> (a) the complainant is kept informed of all decisions made under this Part and, if applicable, Parts 8 and 9 by the Committee, any other committee, or the Council, in relation to the complaint concerned,
>
> (b) the Committee acts expeditiously, and
>
> (c) complaints are processed in a timely manner.

63. The applicant contends that this subsection refers only to the proceedings of a complaint while before the Preliminary Proceedings Committee. That is not correct, subsection (a) states that the complainant is kept informed of all decisions made under this Part and if applicable Parts 8 and 9 by the committee, any other committee or the council in relation to the complaint concerned.

64. If a complaint is sent forward by the Preliminary Proceedings Committee to a Fitness to Practice Committee hearing, and if the outcome is a dismissal of that complainant, the Respondent is entitled to notify a Complainant of that result

65. The court draws a distinction between communication of decisions to the public at large, and notification to a third party who has a significant connection to the complaint and an interest in its outcome. It is permissible pursuant to the provisions of Section 7 (5) of the Act, even if the respondent had acceded to the applicant's submission and directed that the sanction of advice should not be communicated to the public, to communicate to the private hospital and the National Treatment Purchase Fund the outcome of the decision of the Fitness to Practice Committee and of the Council itself. This is not a communication to the public at large.

66. Pursuant to Section 73 the respondent has express powers to communicate a sanction to the Practitioner concerned and also the Complainant.

67. The letters written by the applicant to various parties subsequent to the final hearing before the respondent of the 14th April 2011, are irrelevant to the considerations of the court on the issues before it.

The Consideration of the Matters Set Out In The Written Legal Submissions At Paragraph 4.21 of the Applicant

68. The respondent has argued that while the court has jurisdiction to consider this matter it should not because of the strict rules which apply to the amendment of grounds relied upon for judicial review.

69. While referred to in the legal submissions of the applicant, it was not relied on to ground the application for leave to grant judicial review.

70. The matter is comprehensively dealt with in Civil Procedure in the Superior

Courts Second Edition Delany & McGrath Chapter 27 Judicial Review beginning at 27.92.

71. Paragraph 27.93 states:-

> "Order 84 Rule 23.1 provides that subject to Rules 23.2 no grounds shall be relied on or any relief sought at the hearing except the grounds and reliefs set out in the statement

72. Rule 23.2 then goes on to provide:-

> "the Cour may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise in such terms, if any as it thinks fit and may allow further Affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application."

73. Rule 23.3 provides:-

> "Where the applicant or respondent intends to apply for leave to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party."

74. The Respondent has relied on the dicta in *McCormack v. Garda Siochana Complaints Board* [1997] 2 I.R. 489 which states:-

> "4. That only in exceptional circumstances would liberty to amend a grounding statement be granted because the courts' jurisdiction to entertain the application is based on and limited by the order granting leave. But when facts came to light which could not be known at the time leave was obtained and when the amendment would not prejudice the respondents then it was a proper exercise of the courts' power of amendment to permit the amendment rather than require that the new grounds be litigated in fresh proceedings."

75. The issue at Paragraph 4.21 of the applicant's original written submissions is a materially different case to that relied on to seek judicial review and different to the one which was argued in the substantive hearing before this court on the 13th and 14th December, 2011.

76. I am bound by the dicta in McCormack as cited as no new facts have come to light since the application for judicial review, nor are there exceptional circumstances. It would not be appropriate to consider the argument, that it would be unfair and duly harsh and disproportionate for the Respondent to publish the sanction of advice even if allowed to do so by the Act of 2007.

77. The Court refuses the relief sought.