

**THE HIGH COURT  
JUDICIAL REVIEW**

**[2013 No. 714 J.R.]**

**RAS MEDICAL LIMITED, TRADING AS PARKWEST CLINIC**

**APPLICANT**

**AND**

**ROYAL COLLEGE OF SURGEONS IN IRELAND**

**RESPONDENT**

**JUDGMENT of Mr. Justice Noonan delivered the 19th day of April, 2016.**

1. The applicant is a private medical clinic which provides predominantly cosmetic surgery services. The respondent is a postgraduate medical training body to whom the Medical Council has delegated certain of the Council's functions pursuant to the Medical Practitioner's Act 2007 ("the Act"). These include the maintenance by medical doctors of their professional competence by various means including attendance at continuing professional development ("CPD") conferences and seminars. On the 20th of June, 2013, the applicant applied to the respondent for accreditation for CPD purposes of an event it was proposing to hold on the 27th of July, 2011, entitled "One Day Master Class on Polyurethane Breast Implants and Cosmetic Surgery."

2. On the 9th of July, 2013, the respondent refused to accredit the event. The applicant seeks an order of certiorari quashing that decision together with various ancillary reliefs including damages.

**CPD under the Medical Practitioner's Act 2007 ("the Act").**

3. Since the 1st of March, 2011, all registered medical practitioners in the State are required to maintain their professional competence pursuant to a scheme applicable to each registered medical practitioner. On the 2nd of March, 2011, the Medical Council, pursuant to its powers under s. 91 (4) of the Act, recognised 13 postgraduate training bodies to provide professional competence schemes and in the respondent's case, the area of professional competence with which it is concerned is surgery. The object and functions of the Medical Council are provided for in, inter alia, ss. 6 and 7 of the Act which provide:-

"6.— 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.

7.— (1) The Council shall—

(a) do all things necessary and reasonable to further its object, and

(b) perform its functions in the public interest.

(2) Without prejudice to the generality of subsection (1), the Council shall—

(a) establish and maintain the register,

(b) establish procedures and criteria for registration including the issue of certificates of registration and renewal of registration,

(c) approve programmes of education and further education necessary for the purposes of registration and continued registration,

(d) keep the programmes referred to in paragraph (c) under review,

(e) specify the standards required for the purposes of the maintenance of the professional competence of registered medical practitioners,

(f) keep the standards referred to in paragraph (e) under review..

(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..."

4. Section 11 provides for the Council's power to make rules which include:-

"(2) Without prejudice to the generality of subsection (1), the Council may make rules under this section in relation to—...

(w) the setting of criteria for the purposes of section 91 (4),

(x) any professional competence scheme..."

5. Part 11 of the Act is concerned with the maintenance of professional competence and provides at s. 91, inter alia:-

"91.— (1) It shall be the duty of the Council to satisfy itself as to the ongoing maintenance of the professional competence of registered medical practitioners...

(4) The Council may, with the consent of the Minister and in accordance with the relevant criteria specified in rules made

under section 11 —

(a) recognise, recognise subject to conditions attached to the recognition of, amend or remove conditions attached to the recognition of, or withdraw the recognition of, a body approved under section 88 (2)(a)(i)(II) or 89 (3)(a)(ii) with which the Council may make and carry out an arrangement with for the purposes of assisting the Council to perform its duty under subsection (1)..."

Section 88 provides that the Council shall approve the bodies which may deliver programmes of medical education and training.

6. Pursuant to its powers under s. 91, the Medical Council entered into a scheme of arrangement with the respondent to operate the professional competence scheme for surgery. Under the terms of the scheme, the respondent is required to operate it in line with the Council's domains of good professional practice, the first (of 8) of which concerns patient safety and quality of patient care.

#### **Facts.**

7. As noted above, the application for CPD accreditation was made by the applicant on the 20th of June, 2013, about five and a half weeks before the planned event. A form provided by the respondent was completed by the applicant which indicated that the teaching method to be employed at the event consisted of live surgery. A copy of the programme and a list of participants were furnished. Five doctors were identified as participants including Dr. Ahmad Salman, the medical director of the applicant. Dr. Salman describes himself as a surgeon specialising in breast augmentation and cosmetic surgery. He is registered on the General Register of medical practitioners in this jurisdiction but not on the Specialist Register. Registration on the Specialist Register is not a legal requirement for the practice of cosmetic surgery in this jurisdiction.

8. On the 26th of June, 2013, a meeting of the respondent's Professional Development and Practice Committee ("PDPC") took place when a number of matters were considered including approval of applications for educational activities including that of the applicant. The minutes of the meeting noted in that regard:-

"The Criteria for the approval of Educational Events for Continuing Professional Development (CPD) was discussed. It was recommended that the sponsor of a surgical event should be on the Specialist Register of the Irish Medical Council for the event to be approved. It was agreed to amend the Guidelines."

Attached to the minutes is a summary of actions to be undertaken which included:-

"Ms. O'Boyle/Professor Tierney to inform the applicant who sought approval for a master class in a Plastic Surgery procedure that the Committee agreed that a surgical event can only be approved if the sponsor is on the Specialist Register of the Irish Medical Council."

9. At the material time, Ms. O'Boyle was a member of the administrative staff of the respondent and Professor Tierney was the Dean of Professional Development and Practice. Following this meeting, on the 28th of June, 2013, Ms. O'Boyle emailed a letter from Professor Tierney to the applicant in the following terms:-

"Re: One Day Masterclass on Polyurethane Breast Implants and Cosmetic Surgery.

Dear Ms. Millea,

Thank you for submitting the above event, scheduled for Saturday 27th of July 2013 for CPD accreditation.

This application was discussed and reviewed at our recent Professional Development and Practice Committee. It was recommended that before we can approve this event for CPD credits, we would require the following information:

- A list of sponsors and how they are connected to the event e.g. unrestricted grant, sponsorship of prizes, breaks, meals.
- A list of speakers/facilitators which include details about the posts they hold, where they are based and what speaking experience they have in relation to the topic discussed.
- A name of a consultant who is on the Medical Council Specialist Division of the Register in Plastic Surgery who supports this course.

On receipt of this information we will process your application for CPD credits.

If you require any further clarification on the above, please don't hesitate to contact me.

Kind regards,

Yours sincerely,

Professor Sean Tierney

Dean of Professional Development and Practice"

10. The applicant responded by email on the 8th of July, 2013:-

"Good morning Marie,

I'm sorry that I'm only replying to you now, I'm only back from annual leave this morning. Please find the CVs for three of our speakers, Dr. Ahmad Salman, Dr. Constantine Stan and Dr. Mohammed Jawad attached. I'm waiting for our other two speakers Dr. Shiva Singh and Dr. Garrick Georgue to forward their documents to me.

We have only one sponsor, Eurosurgical. The first form of sponsorship from them is providing the polyurethane implants for the three cases of live surgery. The second form of sponsorship is stationary materials for the day including pens, notepads etc.

I will be back to you shortly with the other information you require.

Many thanks,

Sara."

11. Later on the same morning at 11.05, the applicant sent the two remaining CVs and said:-

"The conference has two world renowned plastic surgeons on the faculty, Dr. Mohammed Jawad and Dr. Constantine Stan. Dr. Jawad is on the Medical Council register and supports this masterclass."

12. Dr. Jawad was not in fact on the Specialist Register of the Irish Medical Council. However, his CV which was attached to this email indicated that he was. On receipt of this email, Ms. O'Boyle consulted the Medical Council Register and ascertained that Mr. Jawad was on the General Register but not the Specialist Register. She informed Professor Tierney accordingly.

13. On the next day, the 9th of July, 2013, Professor Tierney responded to the applicant by email:-

"Thank you for submitting the information requested in our email dated 28th of June 2013.

This information together with your application form has now been reviewed by the Professional Development Committee. I regret that we are unable to approve this meeting for CPD credits. It is a requirement of the Professional Development Committee that the Chief organiser of the event should be on the Specialist Register in Plastic Surgery and as this is not the case, we are unable to approve this event for CPD purposes.

As the organiser of the event, you may choose to issue certificates of attendance which individuals may use for the purposes of meeting their CPD requirement. These certificates may not state that the course is approved by RCSI for CPD purposes.

If you require any further clarification on the above, please don't hesitate to contact me."

14. Dr. Salman responded on the 10th of July:-

"Thank you for your email below, please forward me the published requirements for CPD points approval, that clearly state the reason you have given below.

The points are given for the information quality and the standards of the speaker. You have sanctioned CPD points for GP training organised by private hospital.

I would also wish to request a meeting with Prof. Tierney to further discuss the issue once I have received your reply for the requirements above."

15. Professor Tierney responded on the 15th of July, 2013:-

"Thank you for your email. As requested, please find attached the latest version of the Guidelines for the approval of Educational Events for CPD which were approved at a recent meeting of the Professional Development and Practice Committee.

If you wish to appeal the decision outlined in my email dated 9th of July 2013, you may appeal the decision in writing. Such appeals should be directed to:

The Chair, Professional Development Committee, RCSI, 123 St. Stephen's Green, D.2.

The appeal will be considered at the next meeting of the Committee."

16. The Guidelines attached to this email were in fact new Guidelines only published that day following the meeting of the PDPC on the 26th of June, 2013. A little over an hour later, Dr. Salman responded:-

"I would like to draw to your attention, that the new criteria was not published on the day we applied nor the date you have sent us your decision of refusal. These new guidelines only became public in the last twenty four hours. I would also like to draw to your attention that the chairman of this meeting is Dr. C. Stan who is a specialist plastic surgeon. Also Dr. Mohammed Jawad is also a plastic surgeon and on the Irish Medical Council specialist register. I am sure you are aware of these facts from their cvs. The organiser is Parkwest Clinic.

I have forwarded the matter to my legal team to deal with it."

17. Later that afternoon, the applicant's solicitors wrote to Professor Tierney and separately to the Medical Council. In this letter, the applicant's solicitors complained of the fact that the requirement that the chief organiser of the event should be on the Specialist Register in Plastic Surgery was not a published requirement and events organised by the applicant were accredited in previous years without such requirements. The letter went on to state that if the decision was not overturned by close of business on the 17th of July, proceedings would be instituted.

18. This letter was responded to by the respondent's legal counsel on the 19th of July, 2013, pointing out that it was a requirement recently agreed by the respondent's PDPC that the chief organiser be on the specialist register. The letter went on to state:-

"It was also noted that the proposed master class included three live surgery demonstrations. This reinforced the view of the Committee to refuse CPD accreditation in the interests of patient safety where none of the participants were admitted to the Specialist Register of the Medical Council."

19. The letter went on to conclude that the threat of litigation was premature in circumstances where the internal appeals mechanism of which the applicant had been advised had not been exhausted.

### **The Guidelines.**

20. In pursuance of the functions delegated by the Medical Council to the respondent, it published a document entitled "Guidelines for Approval of Educational Events for Continuing Professional Development (CPD) Accreditation". The Guidelines which were current at the time the applicant made its application for accreditation had been published some years previously. The Guidelines are not specific to any particular medical discipline but cover the entire spectrum of CPD events. In the explanatory section at the commencement of the Guidelines, it is stated:-

"This guide has been prepared to help individuals or organisations who are seeking CPD approval from the Royal College of Surgeons in Ireland for educational events and is based on questions asked by event organisers."

21. The Guidelines contain a list of criteria for the approval of CPD events and also advice on how the application for accreditation should be prepared. In this regard, the Guidelines as previously noted specify eight domains of good professional practice to be potentially reflected in the event under consideration and state:-

"The Medical Council has identified eight domains of good professional practice which must underpin the individual registered medical practitioner's programme of professional activities in continuing professional development. Please indicate on your application form the domains of good professional practice that relate to the event."

Six of these were identified in the application form submitted by the applicant including the first, patient safety and quality of patient care. The procedure for approval as described in the Guidelines note:-

"EVENTS WILL NOT BE CONSIDERED UNLESS ALL ABOVE ITEMS ARE SUBMITTED.

RCSI CPD administrator checks the applications and contacts the organiser for further information if required."

The Guidelines also include a list of frequently asked questions, one of which is:-

"Q. We organise the same event every year, can CPD approval be carried forward?

A. No. Approval must be sought for each event."

### **The Arguments.**

22. The essence of the applicant's case is that it complied with the published Guidelines for the purposes of CPD accreditation and were thus entitled to such accreditation. There was an attempt by the respondent to retrospectively impose new Guidelines after the event which was impermissible. Ms. Stack S.C. for the applicant also contended that as the applicant had received accreditation for essentially the same event in 2011 without this added requirement, the applicant had a legitimate expectation that the same criteria would be applied in this instance. It was further submitted that because two of the speakers at the event were registered on the specialist register of other EU countries, the effect of the respondent's requirement was to preclude medical practitioners from exercising their rights to practice in other member states of the EU pursuant to Article 56 of the Treaty on the Functioning of the European Union.

23. It was further said on behalf of the applicant that as the purported criterion relied upon to refuse accreditation was not notified to the applicant prior to such refusal, this was in breach of fair procedures and unlawful. It was further argued that the imposition of this additional requirement was for an improper purpose not rationally connected to the public interest for which s. 7 (2) of the Act was enacted. The applicant submitted further that the criterion imposed by the respondent with which it did not comply is indicative of a fixed policy which is ultra vires the Act since it is not rationally connected to the educational value of the event in issue.

24. For the respondent, Mr. Cush S.C. differentiated between rules on the one hand under s. 11 of the Act and guidelines of the kind in issue here under s. 12. The latter directed the manner of performing functions whereas the rules are concerned with criteria. The Guidelines were generic in nature and not specific to individual specialties such as plastic surgery. The Guidelines could never be regarded as exhaustive of every requirement for every case. The applicant was in effect saying that because something is not contained in the Guidelines, it cannot be imposed but it was clear both from the Act and the Guidelines themselves that the respondent retains a discretion in every case. The fact that the applicant's event involved live surgery, which was in itself rare, was a significant consideration insofar as patient safety was concerned.

25. The universally acknowledged recommended best practice for surgery is that it be overseen by someone on the Specialist Register. This was a well known and entirely predictable requirement which was specified by the respondent from the outset on the 28th of June, 2013. This requirement was well understood by the applicant although it sought to suggest otherwise. The applicant had twice misled the respondent as to the fact that Mr. Jawad was not on the specialist register and this was a cause for concern. Although the revised Guidelines had been furnished to the applicant, these were not being relied upon and should not have been introduced into the applicant's case. Further, the applicant had a right of appeal which had not been exhausted and the court ought refuse the application on this discretionary ground.

### **Discussion.**

26. The applicant's key contention is that it complied with the Guidelines and was thus entitled as of right to accreditation. On the applicant's case therefore, the respondent had no discretion in the matter. However, as the name implies, Guidelines are not rules. Although the word "criteria" is used in the Guidelines, it is clear that they do not in fact amount to criteria, compliance with which entitles the applicant to accreditation. It is clear from a reading of the Guidelines as a whole that the respondent reserves the right to seek further information before according accreditation. Such an entitlement on the part of the respondent would clearly be inconsistent with an automatic right to accreditation which would reduce the function of the respondent to little more than a rubber stamp.

27. Section 11 of the Act expressly provides for the making of rules for the setting of criteria for the purposes of s. 91 which is concerned with maintenance of professional competence of registered medical practitioners. This is clearly separate and distinct from the power of the Council, delegated to the respondent, to issue guidelines pursuant to s. 12. This point of distinction is important in the context of the applicant's reliance on *Phillips v. The Medical Council* [1991] 2 I.R. 115. In that case, the Medical Council had made rules under the Medical Practitioner's Act 1978 providing for the registration of doctors who were not graduates of Irish or European community medical schools. These rules set out criteria which an applicant for registration had to satisfy and one such set of rules was issued in September 1980. The applicant made a formal application for registration in 1987, having satisfied the criteria set out in

the 1980 rules. Subsequent to the date of his application, the Council adopted new rules in 1989 under which the applicant was ineligible for registration. His application was refused. Costello J. (as he then was) found this to be unlawful and that the Council were estopped from refusing registration on the basis of rules adopted subsequent to the date of the application.

28. It seems to me however, that *Phillips* does not assist the applicant's case here. As I have said, Guidelines are quite distinct from rules and although it has to be said that the applicant was somewhat misled by the respondent into believing that its application had failed as a result of the subsequent adoption of new Guidelines, that is not in fact what actually transpired. The uncontroverted evidence of Professor Tierney is that it is currently considered best practice by the Irish Medical Council and any professional body operating under its auspices in this jurisdiction that surgery be performed or supervised and/or monitored by a medical professional who appears on the Specialist Division of the Register in this jurisdiction.

29. This approach is also adopted by the HSE which requires that its patients who require both acute and elective surgery be managed by a person on the Specialist Register. It is also a requirement of one of the main medical indemnity providers, the Medical Protection Society. Professor Tierney avers further that there are and continue to be concerns in the medical profession regarding the practice of plastic surgery, and in particular cosmetic surgery, which is largely unregulated to date by legislation and the need to ensure patient safety is a concern. This has also been a matter of public comment by the Irish Association of Plastic Surgeons (the "IAPS") which has issued public statements urging patients to ensure that any surgeon performing cosmetic surgery on them is on the Plastic (Reconstructive and Aesthetic Surgery) Specialist Division of the Register. The HSE and the IAPS released a joint statement in July 2012, outlining these recommendations and IAPS reiterated this position in further public statements in November 2012, and May 2013. Professor Tierney also avers that insofar as the respondent's own internal educational training programmes are concerned, which are also used for CPD purposes, the respondent requires that any person teaching surgery holds a place on the Specialist Division for whatever area of expertise is being taught. It would be surprising, to say the least, if the respondent having publicly adopted such a position consistently over time should be required to endorse an event which included live surgery not involving anyone on the Specialist Register.

30. Having regard to the foregoing, it can have come as no surprise to the applicant when this requirement was raised, as it was, on the 28th of June, 2013, in response to the application. From the outset, the respondent indicated that there was going to be a requirement for a person associated with the event to be on the Specialist Register. Although the applicant has criticised the respondent for using various expressions such as "supports the event", "chief organiser" and "lead clinician/clinical lead", which expressions appear to have been used somewhat interchangeably, I do not think much turns on this. The essential requirement was the involvement of a person on the Specialist Register, a requirement clearly well understood by Dr. Salman, and none of those involved were, despite the fact that the applicant suggested to the contrary on two separate occasions. The applicant never at any time prior to commencement of the proceedings suggested that it did not understand or was confused by the requirement for the involvement of a person on the Specialist Register. The initial response on the 8th of July, from the applicant was to obtain the information requested and in fact to purport to comply with the request by confirming that Mr. Jawad was on the Specialist Register. The fact that this turned out to be incorrect was, not unreasonably in my view, regarded as being a matter of some concern by the respondent.

31. Although Dr. Salman in his affidavits initially appeared to suggest that the respondent's requirements had not been made clear before the decision to refuse was relayed to him, in his second affidavit he confirms that he understood the requirement for a person who "supports this course" to be on the Specialist Division to mean that provided one of the speakers at the event was on the Specialist Register, that would suffice. That was in fact correct.

32. I do not think that the fact that some years previously, the applicant had received accreditation for a similar event without a similar requirement is particularly material. Obviously medical standards evolve and even if the respondent had at one time adopted such a policy, that cannot mean that such policy could never change in the future – see in that regard the dicta of Clarke J. in *Glenkerrin Homes v Dun Laoghaire Rathdown County Council* [2011] 1 IR 417 at 426. As regards the applicant's argument concerning EU law, insofar as the applicant complains about the rights of speakers at the event being affected, that is not in my view an issue that can be litigated by the applicant but is rather one for the persons affected to ventilate if they wish to do so. However, even if that were not so, I can see nothing objectionable about the requirement that the relevant person be on the Specialist Register. While complaint is made by the applicant of the fact that several of the speakers were on the specialist register in their respective Member States, and thus entitled as of right to be registered on the Specialist Register in this jurisdiction, the applicant was in my opinion nonetheless entitled to verification of the authenticity of their qualifications to be provided in the manner specified.

33. Finally on the issue of an appeal, it is evident from the correspondence that within a matter of hours of being advised by Professor Tierney on the 15th of July, 2013, that Dr. Salman was entitled to bring an appeal against the Committee's decision, Dr. Salman consulted lawyers and set his face against pursuing an appeal in favour of legal redress. The availability of an appeal was again brought to the applicant's attention by the respondent's legal counsel on the 19th of July, 2013. Dr. Salman's response to this is that the next scheduled meeting of the Appeal Committee was not until the 25th of September, 2013, at which time it would have been too late, being after the date of the scheduled event. However, Dr. Salman clearly did not know that when he decided against appealing and furthermore, he made no request for an urgent sitting of the Appeals Committee to consider the matter which may or may not have been accommodated. The appeal would have been a full rehearing of the matter by reference to the earlier, not later, Guidelines. I am satisfied therefore that in failing to even explore the possibility of an appeal, the applicant has failed to exhaust its remedies and as a matter of discretion, I would in any event refuse this application.

34. However, for the reasons already given, I am satisfied that this application must fail.