

**THE HIGH COURT**

[2021] IEHC 606  
[2021 No. 1028 P]

**BETWEEN**

**SAMUEL VAN EEDEN**

**PLAINTIFF**

**AND**

**THE MEDICAL COUNCIL, IRELAND AND THE ATTORNEY GENERAL**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Twomey delivered on the 24th day of September, 2021**

**SUMMARY**

1. This is a case in which the plaintiff, Dr. Van Eeden, was charged and acquitted in October 2014 with importing medicines without a licence into the State. In September 2016 the Medical Council proposed to open an inquiry before the Fitness to Practice Committee regarding, *inter alia*, whether he had prescribed an unauthorised medicine to a patient in his GP practice.
2. Dr. Van Eeden claims that he is being subject to disciplinary proceedings by his professional body in relation to matters for which he was acquitted by the District Court in October 2014 and so the disciplinary proceedings should not go ahead.
3. He also claims that the disciplinary proceedings amount to a breach of the equality provisions in the Constitution since a non-professional in his position e.g. a courier, waiter, tradesman etc., who had been acquitted of the charges as he was, would be able to return to work without any restriction or any risk of any restriction on his right to do so. Dr. Van Eeden claims that this difference of treatment between him as a doctor and a non-professional, amounts to unlawful discrimination.
4. For the reasons set out below, this Court concludes, firstly, that on the facts of this case there is in fact no overlap between the charges in the District Court of which Dr. Van Eeden was acquitted and the matters which are the subject of the disciplinary proceedings, and so there is no reason for the inquiry not to proceed on the principle that it had been previously decided (*res judicata*).
5. Secondly, even if the matter had been previously decided by the District Court, this Court also concludes that, not only is a difference in treatment between the plaintiff as a doctor and a person who is not a doctor, justified in the public interest, but such a difference in treatment is required to ensure that the public can have trust in the medical profession generally and doctors individually.

**BACKGROUND**

6. On 12th June, 2012, on a return trip from Bangladesh, the luggage of the plaintiff's wife was searched by Customs at Dublin Airport. Eight medical products were discovered therein. A criminal prosecution in the District Court was brought against the plaintiff by the Irish Medicines Board (now the Health Product Regulatory Authority) on the grounds that the plaintiff had procured a medicinal product that contained a prescription only substance contrary to, *inter alia*, the Medicinal Products (Control of Placing on the Market)

Regulations 2007 (SI 540/2007) and the Medicinal Products (Control of Manufacture) Regulations (SI 539/2007).

7. Following an *Irish Times* report regarding the above prosecution on 8th July, 2014, on 10th July, 2014, the Medical Council preferred a complaint to the Preliminary Proceedings Committee ("PPC") pursuant to s. 57 of the Medical Practitioners Act 2007. On 22nd October, 2014, the plaintiff was acquitted of the charges (16 charges in total) before the District Court.
8. On 6th October, 2015, the PPC determined that the matter required further inquiry. A Notice of Inquiry was furnished by the CEO of the Medical Council to the plaintiff on 22nd September, 2016 containing a number of allegations, including that the plaintiff had, in or after February 2012, administered a quantity of lidocaine imported from Bangladesh to one or more patients in his care.
9. During the course of the investigation in relation to the District Court charges, Dr. Van Eeden made certain statements to the Irish Medicines Board (now the Health Product Regulatory Authority) to the effect that he had, sometime in February 2012, imported lidocaine from Bangladesh. However, it is relevant to note that this admission did not form part of the District Court charges.

#### **Judicial Review and Fitness to Practices Committee adjournments**

10. On 7th April, 2017, the plaintiff sought leave to bring a judicial review against the Medical Council's decision to undertake an inquiry on the grounds, *inter alia*, that the proposed inquiry related to issues that were res judicata. That application was dismissed on 11th October, 2017 (*Van Eeden v. Fitness to Practice Committee and Medical Council* [2017] IEHC 632). An appeal of that refusal was brought by the plaintiff and that appeal was heard and dismissed in an *ex tempore* judgment delivered by the Court of Appeal on 3rd February, 2020.
11. The Fitness To Practice Committee (FTPC) inquiry was listed on 13th February, 2020, but was adjourned at the request of the plaintiff. The inquiry was scheduled but again adjourned on 25th May, 2020, 27th October, 2020, and 7th December, 2020. The most recent scheduled hearing was due to take place on 23rd February, 2021.
12. The within proceedings were issued on 19th February, 2021 – only four days before the rescheduled FTPC hearing was due to take place, thus leading to their adjournment.

#### **ANALYSIS**

13. In these proceedings Dr. Van Eeden is in substance challenging the decision of the CEO of the Medical Council to issue a Notice of Inquiry.
14. However, rather than judicially reviewing that decision (and bearing in mind that his initial judicial review was unsuccessful), he issued a plenary summons seeking various Declarations regarding the proposed holding of a disciplinary inquiry before the Fitness to Practice Committee ("FTPC") of the Medical Council.

15. It is relevant for this reason to refer to *Browne v. Minister for Agriculture* [2020] IECA 186. There, the plaintiff similarly issued a plenary summons seeking declarations regarding, in that case, the failure to reclassify his boat, the refusal of licences to fish for mackerel, and the non-allocation of quotas to him. In the High Court, whose decision was upheld by the Court of Appeal, Ní Raifeartaigh J. held that:

“what the plaintiff seeks to do in these proceedings is, in essence, to challenge certain decisions of public authorities of a kind typically and classically amenable to judicial review.” (at para. 16)

16. At para. 73 in the Court of Appeal’s judgment, Edwards J. concluded that:

“It seems to me that no matter how one views the plaintiff’s proceedings the essential nature of the subject matter is to do with administrative decisions/exercise of discretion about which the plaintiff is dissatisfied ...”

17. He quoted with approval the judgment of Clarke J. (as he then was) in *Shell E & P Ireland Ltd v. McGrath & Ors* [2013] 1 I.R. 247 at p. 262 *et seq.*:

“It would make a nonsense of the system of judicial review if the party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. [...] The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. [...] Either there is a binding time limit in place (subject to extension by the court) or there is not.”

18. In this case, it seems to this Court that, just as in *Browne*, no matter how one views the plaintiff’s proceedings, the essential nature of the subject matter is to do with administrative decisions/exercise of discretion of a public authority, in this case, the Medical Council, about which the plaintiff is dissatisfied, and for this reason, this Court concludes that the proceedings are judicial review in nature.

19. It is therefore against this background that this Court will consider the declaratory relief sought by Dr. Van Eeden.

20. The main issues he raises can be categorised as follows.

First, he claims that the proposed inquiry to be held by the Fitness to Practice Committee is *res judicata* because of the earlier acquittal of Dr. Van Eeden by the District Court on the charges of, *inter alia*, importing medicines without a manufacturer’s authorisation. Secondly, he claims that the *A.A. (No 1) (A.A. v. Medical Council (No 1))* [2002] 3 I.R. 1 case is erroneous insofar as it permits a disciplinary inquiry after a criminal acquittal. Thirdly, he claims the Medical Council has usurped the powers of a court contrary to Articles 34 and 37 of the Constitution as it is involved in the administration of justice.

Fourthly, he claims that Part 8 of the 2007 Act (which sets out the procedure to be adopted when a complaint is referred to the FTPC) and/or the practice adopted by the Medical Council amounts to a breach of the equality provisions in Article 40.1 on the basis that they amount to invidious discrimination of a professional in contrast to how a non-professional is treated, because a non-professional who is acquitted by the District Court is not subject to any inquiry regarding his licence or entitlement to continue working.

**1. Res judicata**

21. For the *res judicata* claim by the plaintiff against the Medical Council to be successful, it is clear that the Medical Council must be pursuing Dr. Van Eeden for the same offences for which he was acquitted by the District Court.
22. It is important therefore in considering this issue to first consider the offences in respect of which Dr. Van Eeden was acquitted by the District Court. These can be summarised as follows. The first was the offence of procuring eight separate medicinal products, otherwise than in accordance with a marketing authorisation, contrary to, *inter alia*, the Irish Medicines Board Act 1995 (as amended). The second was the offence of importing into the State the same medicinal products without being granted a manufacturer's authorisation by the Irish Medicines Board.
23. Secondly, it is important to consider the most recent version of the Notice of Intention to Hold an Inquiry dated April 2019. This states that the following matters are to be the subject of an Inquiry:

“That you, being a registered medical practitioner:

1. In or around February 2012, imported into this State a quantity of Lidocaine, a medicinal product as defined by section 1 of the Irish Medicines Board Act 1995, as amended, from Dhaka, Bangladesh, without the benefit of a manufacturer's authorisation, which conduct was prohibited by Regulation 4 (1) of the Medicinal Products (Control of Manufacture) Regulations 2007 S.I. 539/2007 Regulation, and or;
2. At some time during or after February 2012, administered a quantity of Lidocaine, imported from Dhaka, Bangladesh, to one or more patients within your care, in circumstances where you did not hold a manufacturer's authorisation for the said Lidocaine;
3. In or around 7 June 2012, wrote a prescription without identifying the patient(s) for whom it was written, as required by Regulation 7(1)(d) of the Medicinal Products (Prescription and Control of Supply) Regulations 2003 (S.I. 540/2003), and/or;
4. In or around June 2012, it was your intention to administer to one or more patients within your care the following medicinal products as defined by section 1 of the Irish Medicines Board Act 1995, as amended, which did not enjoy a manufacturer's authorisation within this State;

- a) Arixon 1g;
- b) Dormitol (midazolam) injection 15 mg;
- c) PPI20 (omeprazole 20 mg) tablets;
- d) Atova 10 (atorvastatin) tablets 10 mg;
- e) Hynofast (midazolam) injection 15 mg;
- f) Ultracaine (bupivacaine hydrochloride) injection 0.5% x 30 ml, and/or;

5. In or around June 2012, while a medical registered practitioner, you intended to supply the medicinal products, Retin-A (tretinoin cream 0.5%) 15 mg and Recur (finasteride) 1 mg tablets x 30 to one or more patients within your care, when you were not a registered pharmacist at the time and/or did not hold a dispensary contract with the Health Service Executive, which conduct is prohibited by Regulation 5(1) of the Medicinal Products (Prescription and Control of Supply) Amendment Regulations 2003 S.I. 540/2003, as amended, by Regulation 6 of the Medicinal Products (Prescription and Control of Supply) Amendment Regulations 2008 S.I. 512/2008
6. In your Annual Retention Application Form ("ARAF") for Registered Medical Practitioners in 2014, submitted on or around 30 June 2014, answered "No" to the following question:

*"Have you ever been convicted of any criminal offences in or outside this State or are you aware of any criminal investigations against you?"*

In circumstances where you knew or ought to have known that the response was not true, and/or;

7. Such further allegations as may be notified to you in advance of the Inquiry."
24. On any analysis of these two matters, it is clear that there is no overlap between the charges of which Dr. Van Eeden was acquitted by the District Court and the issues to be enquired into by the Fitness to Practice Committee.
25. Yet, it is a precondition of *res judicata* that there has been a previous judicial pronouncement on a matter, which is conclusive and therefore prevents a subsequent consideration of the matter (see *Townsend v. Bishop* [1939] 1 All E.R. 805). However, the District Court did not charge or acquit or determine whether Dr. Van Eeden was guilty of prescribing lidocaine to one or more patients, which is one of the matters to be enquired into by the Fitness to Practice Committee. A similar point can be made in relation to all the other issues for consideration by the Fitness to Practice Committee.
26. For this reason, *res judicata* can have no application to the proposed inquiry by the Fitness to Practice Committee and therefore what appears to be the core claim in these proceedings falls away. For this reason, there is no *res judicata* reason for the inquiry to be stopped, nor indeed any basis for any Declaration to that effect.

27. Finally in this regard, it is to be noted that in his oral submissions, counsel for Dr. Van Eeden sought to justify the stopping of the inquiry on the grounds that the products which form the basis of the charges that were brought against Dr. Van Eeden in the District Court appear to be the same products that form the basis of the inquiry before the Fitness to Practice Committee. This appears to be the height of Dr. Van Eeden's argument under the principle of *res judicata*. However *res judicata* applies where the same issue has been decided previously and not simply because there are similar facts involved in two completely separate issues. Thus, for example, a person who has been tried and acquitted in respect of say the unlawful importation of a gun is not prevented from being subsequently tried with murder using that same gun, simply because the same gun forms an element in two completely different offences. And so it is in this case, an acquittal in relation to the importation of Arixon (one of the eight medicinal products referred to above) is a very different issue from the alleged unlawful prescription of Arixon.
28. This is the key complaint Dr. Van Eeden has had, since September 2016, namely that he was being pursued for matters in relation to which he had been acquitted by the District Court. It should now be clear that this is not the case and so this is in substance the end of Dr Van Eeden's case. However, this Court will briefly deal with some of the other issues raised by him.

**2. A.A. (No 1) case**

29. One of the declarations which Dr. Van Eeden seeks is a Declaration that *A.A. v. The Medical Council (No 1)* [2002] 3 I.R. 1 is erroneous. Of course the only reason he is seeking such a declaration is because of his claim that he was being enquired into, in relation to matters for which he had been acquitted, which this Court has determined is not in fact the case. For this reason, the seeking of a Declaration regarding *A.A. (No 1)* is arguably moot.
30. The reason he was seeking such a Declaration is because *if* the matters before the District Court and the FTPC were the same, *A.A. (No 1)* establishes that the principle of *res judicata* would not assist Dr. Van Eeden because the parties to the two cases/inquiry were not the same, since there is not the same identity of the parties between the criminal process (by the Irish Medicines Board (now the HPRA) and the disciplinary process (by the Medical Council).
31. For this reason, Dr. Van Eeden sought a Declaration that *A.A. (No 1)* was erroneous.
32. In giving his judgment in *A.A. (No 1)*, Ó Caoimh J. at p. 32 stated that he was:
- "unclear as to what is the proposed onus or standard of proof proposed in the proceedings before the Fitness to Practice Committee in the instant case."
33. In making his claim that *A.A. (No 1)* is erroneous, Dr. Van Eeden claims that Ó Caoimh J. decided that case on the basis that the onus of proof in a hearing before the FTPC was on the basis of the 'balance of probabilities' test, when in fact a hearing before the FTPC proceeds on the basis of the 'beyond reasonable doubt' test. As is clear from the

foregoing quotation, this is not in fact the case since Ó Caoimh J. made his decision irrespective of which test applied before the FTPC as he was 'unclear' as to which onus of proof applied, but he was nonetheless happy to allow the hearing to proceed regardless in relation to some of the allegations.

34. Dr. Van Eeden also claims that the subsequent Supreme Court decision in *DPP v. J.C.* [2017] 1 I.R. 417, renders *A.A. (No 1)* bad law. However, a similar argument was made in the judicial review proceedings taken by Dr. Van Eeden against the Medical Council in 2017 and at para. 48 of her judgment rejecting that judicial review, Faherty J. stated:

"Thus, to return to the question of whether the applicant has put before the Court an arguable ground upon which leave should be given to judicially review the first named respondent's decision that it will apply the principles set out in *A.A.* when considering the applicant's application to have the notice of inquiry struck out. Having considered the arguments advanced by counsel for the applicant, I am of the view (even taking, at its height, counsel's contention that the first named respondent was obliged to have regard to the dissenting judgments in *DPP v. JC* as impacting on *A.A.*, or indeed in so much as counsel's arguments placed reliance on the majority decision in *DPP v. JC*) that at **no point in his submissions to the Court has he set out, with any semblance of clarity, how *DPP v. JC* impacts on the principles set out in *A.A.***, which presently comprise the law on *res judicata* as that doctrine is to be applied to disciplinary proceedings such as those in the present case. The height of the case made by counsel for the applicant is that *DPP v. JC* may be applicable or, on the other hand, it may be that it has no applicability to the ratio in *A.A.* Counsel says that the applicant's apprehension is that the first named respondent, having refused to consider *DPP v. JC*, will ultimately make a decision in the applicant's case in, effectively, a legal vacuum.

The Court must have some barometer against which to consider whether it is arguable that the first named respondent has erred in law, as is alleged here. However, counsel for the applicant has not identified which of the numerous judgments in *DPP v. JC* supports his thesis that the test set out in *A.A.* has been affected by *DPP v. JC*. To my mind, it is not sufficient merely to indicate, as counsel did, that *DPP v. JC* might affect the ratio in *A.A.*, or that all he is seeking is an opportunity to go through all of the judgments in *DPP v. JC* when the hearing before the first named respondent resumes in the hope, and these are my words, that some nugget might be unearthed such as might impact on the law on *res judicata* as presently enunciated in *A.A.*. Accordingly, as far as this application for leave is concerned, the applicant has not met the arguability threshold set by the Supreme Court in *G. v. DPP.*" (Emphasis added)

35. Just as in the case before Faherty J., counsel in this Court did not set out clearly why and how the decision in *DPP v. J.C.* renders the decision in *A.A. (No 1)* bad law.
36. Furthermore, uncontroverted submissions were made on behalf of the Medical Council that in rejecting the appeal by Dr. Van Eeden of Faherty J.'s judgment, the Court of

Appeal decided that appeal solely on the question of whether *A.A. (No 1)* was rendered bad law by *DPP v. J.C.* and the Court of Appeal also rejected this argument.

37. Accordingly it is clear to this Court that, even if there was an overlap between the FTPC issues and the District Court issues in Dr. Van Eeden's case (which there is not), it remains the case that *A.A. (No 1)* is still good law and therefore there is no basis for the granting of a Declaration that *A.A. (No 1)* is erroneous.

**3. Articles 34 and 37 of the Constitution**

38. Dr. Van Eeden also seeks Declarations that the 2007 Act and/or the manner in which it is operated by the Medical Council contravenes Articles 34 and 37 of the Constitution, insofar as proceedings before the FTPC amount to an administration of justice which is not limited in nature.
39. However, just as Dr. Van Eeden's claim regarding *A.A. (No 1)* flew in the face of the case law, so too does this claim fly in the face of existing and well settled case law and for this reason it is not necessary to consider that case law in any detail.
40. Before briefly referring to that case law, it is to be noted that the 2007 Act operates as follows. Following an inquiry by the FTPC, it is required under s. 69 of the 2007 Act to submit a report to the Medical Council including, *inter alia*, its findings on foot of the inquiry. If the report finds the allegations against the medical practitioner to be proven, then it is the duty of the Medical Council to impose one or more of the sanctions listed at s. 71 of the Act. In the case of all but one of these sanctions (an advice or admonishment, or a censure, in writing – see s. 71(a)) the sanction must be confirmed by the High Court. This requirement for confirmation by the court is set out in s. 74 of the Act. It is important to note therefore that the effect of this is that where a serious punishment is imposed by the Medical Council, for example, the transfer of the practitioner's registration to another division of the register (s. 71(d)) or the cancellation of the practitioner's registration (s. 71(f)), the sanction will not become legally effective until confirmed by the court. It is also important to note that the appeal mechanism provided for against the decision of the Medical Council under s. 75 of the Act is an appeal to the Court and an appeal can result in the imposition by the Court of a different sanction or indeed no sanction at all. Even where no appeal is lodged against a sanction, the Medical Council is still required under s. 76 of the 2007 Act to have the sanction confirmed by the court.
41. As regards the caselaw, in brief, in *M v. Medical Council* [1984] I.R. 485 a claim was made that the predecessor of the 2007 Act, the Medical Practitioners Act, 1978, was unconstitutional on the grounds that it gave the Medical Council judicial powers of a non-limited nature in relation to certain disciplinary matters. The Supreme Court rejected this argument and in *Akpekpe v. Medical Council* [2014] 3 I.R. 420, there was a challenge to the constitutionality of the 2007 Act on the grounds that it provided for unequal treatment by providing an appeal for serious sanctions, but not for minor sanctions. Before reaching his conclusion that the 2007 Act was unconstitutional Kearns P observed at p. 435 that:



“although *M. v. The Medical Council* [1984] I.R. 485 was determined against the background of the Medical Practitioners Act 1978, the ambit of appeal under that Act was identical to that in the Act of 2007.”

42. In this case, the ambit of the disciplinary proceedings under the 1978 Act are similar to those under the 2007 Act. It seems clear to this Court that the principles which were applied by the Supreme Court in *M v. Medical Council* to decide that the power vested in the Medical Council to impose minor sanctions and serious sanctions (if confirmed by the High Court) under the 1978 Act did not amount to an administration of justice, are also applicable to the disciplinary proceedings under the 2007 Act. Accordingly, it seems clear to this Court that the disciplinary provisions in the 2007 Act, like the disciplinary provisions in its predecessor (the Medical Practitioner’s Act 1978), do not amount to a breach of Article 34 or Article 37 of the Constitution.

**Zalewski v. WRC**

43. Counsel for Dr. Van Eeden appears to also have raised the question of whether the recent Supreme Court decision in *Zalewski v. WRC* [2021] IESC 24 has altered the position in relation to the constitutionality of the practice adopted by the FTPC and/or the 2007 Act. However it appears to this Court that this is not the case, since if anything *Zalewski* reinforces the Medical Council’s position, since at para. 47 of O’Donnell J.’s judgment he notes that a key aspect of the administration of justice is “*the ability to make binding determinations affecting rights and imposing liabilities*”. Similarly, at para. 55, he notes that it:

“includes the power to compel the appearance of persons before the tribunal in which it is vested to adjudicate between adverse parties as **to legal claims, rights, and obligations**, whatever their origin, and to order right to be done in the matter”. (Emphasis added) (as per Griffith CJ in *The Waterside Workers’ Federation of Australia v. J.W. Alexander Limited* (1918) 25 C.L.R. 434)

44. Yet, as noted above, in relation to serious sanctions such as suspension or removal from the Register of Medical Practitioners, this power, to make what are binding determinations which affect rights and impose liabilities, is reserved by s. 74 of the 2007 Act to the High Court.
45. In this regard, a key difference between *Zalewski* and Dr. Van Eeden’s case is that in *Zalewski*, the body whose actions were claimed to be unconstitutional, the Workplace Relations Commission (WRC), were binding in nature, and were not subject to confirmation by the High Court, since at para. 98 O’Donnell J. observes that in relation to the WRC a:

“jurisdiction is established to make binding determinations of legal disputes between private parties according to law.”

46. If anything therefore, *Zalewski* has reinforced the position that an administrative body such as the FTPC is not engaged in the administration of justice where its serious sanctions are subject to confirmation by the High Court.
47. Furthermore, O'Donnell J. placed reliance on the Supreme Court decision in *C.K. v. An Bord Altranais* [1990] 2 I.R. 396. That case established that a disciplinary mechanism operated by an administrative body (in that case involving a nurse) was constitutional, as it provided for serious punishment proposed by that body to be confirmed by the High Court. Furthermore, the C.K. case was itself relied upon by the Supreme Court in *M v. Medical Council*, to which reference has already been made, to support its conclusion that the disciplinary mechanism operated by the Medical Council under the Medical Practitioner's Act 1978 was constitutional. At para. 122, O'Donnell J. states:

"First, if it is correct that the adjudication officer and/or the Labour Court is engaged in the administration of justice when making decisions pursuant to the procedures of the 2015 Act in relation to questions of unfair dismissal and payment of wages (and I agree that it is), then, as already discussed, I doubt that the elaborate machinery of the 2015 Act could be rendered a non-judicial administrative function merely by providing for an appeal to a court. **Those cases in which recourse to a court has been found to have the effect of rescuing an adjudicatory function from unconstitutionality involve an application to court for a determination or confirmation of a determination with the full capacity of the court to come to its own conclusion on the merits so that, indeed, the court could be said to be the "effective decision-making tribunal" and making the "vital decisions" in a real sense, as explained by Finlay C.J. in *C.K. v. An Bord Altranais* [1990] 2 I.R. 396, 403.**" (Emphasis added)

48. Thus, if anything therefore, the *Zalewski* decision confirms the jurisprudence which forms the bedrock for the conclusion that administrative bodies such as the FTPC, where serious penalties are subject to confirmation by a court, are not engaged in the administration of justice.

#### **4. Article 40.1 of the Constitution**

49. Counsel for Dr. Van Eeden spent a considerable amount of time opening case law (including US case law) on invidious discrimination and breaches of equality provisions in Article 40.1 of the Constitution. In particular he claimed that Dr. Van Eeden was subject to invidious discrimination because he was a professional person, rather than a person in some other non-professional occupation.
50. Dr. Van Eeden claims that a non-professional (e.g. a delivery man, a waiter, a tradesman) who was acquitted for the offences of procuring medicinal products without a manufacturer's authorisation would, after such acquittal, be free to return to his job without any inquiries, restrictions, or threat of suspension/loss of licence. In alleged breach of the equality provisions of the Constitution, Dr. Van Eeden claims that, unlike such a person, after his acquittal from the District Court he was subject to disciplinary

proceedings which meant that he was subject to the risk of sanction along with the risk that he might not be free to return to his occupation.

51. On this basis, he claims that he is subject to invidious discrimination contrary to Article 40.1 of the Constitution.
52. In the *Akpekpe* case, to which reference has already been made, it was also claimed that the 2007 Act breached the equality provisions of the Constitution, in that case because it denied a right of appeal for doctors who were subject to a lesser sanction from the FPTC, while granting doctors who were subject to a greater sanction such an appeal.
53. Kearns P. rejected the claim that this amounted to invidious discrimination since he concluded that there were legitimate reasons for this distinction between different doctors appearing before the Medical Council for serious matters and less serious matters. At p. 6 of his judgment he states:

“I am satisfied that the provisions contained in s. 70(a) of the [Medical Practitioners Act, 2007] have not breached the applicant’s rights to equality before the law. **The rights which he asserts are not absolute and may be qualified in appropriate circumstances in the common good. The Medical Council in particular is enjoined not only to safeguard the rights of medical practitioners but also the rights of patients and members of the public against risks posed to their life or safety.** The Court must necessarily extend a broad margin of appreciation to the various disciplinary bodies established under the Act in calibrating these different rights and interests. The ability of the Medical Council to impose a sanction which does not directly impinge on the doctor’s registered status but which may usefully disseminate and publish information – as advice, admonishment, or censure – on the requisite standards which doctors must follow in the interests of patient safety should not be lightly set aside. It must be possible to draw factual distinctions as between different cases even though the same offence is alleged against a medical practitioner, and one set of circumstances may be more serious than others.” (Emphasis added)

54. It is well accepted that equality does not mean uniformity since laws may legitimately differentiate between persons (see paragraph 7.2.81 of *Kelly on the Constitution* (5th Ed., 2018)), so the key issue is whether discrimination between doctors and non-professionals (which in this context can be taken to mean workers who are not subject to discipline by a professional body) is illegitimate or ‘invidious’, as claimed by Dr. Van Eeden. The term ‘invidious’, according to Herbert J. in *Redmond v. Minister for the Environment* [2001] 4 I.R. 61 means unjust, unreasonable or arbitrary.
55. In essence therefore Dr. Van Eeden is asking this Court to conclude that it is unjust, unreasonable or arbitrary for him to be subject to a disciplinary inquiry regarding his right to work as a doctor, when, say, a delivery man who was acquitted by the District Court of procuring medicines without authorisation will have no concerns about his ability to continue his work as a delivery man.

56. However in this Court's opinion, the reason this distinction between Dr. Van Eeden and say a delivery man, is not unjust, unreasonable or arbitrary is because of the very different positions occupied by a doctor, on the one hand, and, say, a delivery man on the other hand.
57. To this Court it seems clear that it is perfectly legitimate for different standards to apply to a doctor on the one hand and a delivery man on the other hand because of the very different positions of trust which they occupy in their respective jobs.
58. Equality between these two occupations does not mean uniformity of treatment, since it is legitimate, in this Court's view, to treat a doctor to a higher standard regarding her work than a delivery man, because of the trust which individuals and society place in that doctor (and indeed in other professions such as nurses, pharmacists, dentists etc.) and the considerable harm which can be done to those individuals when that trust is misplaced.
59. Indeed, this Court would not only disagree with Dr. Van Eeden when he claims that the discrimination between him and, say, a delivery man is not permitted, but this Court would go further and conclude that the public interest (or common good to use the expression used by Kearns P.) not merely *permits* the application of different (and higher) standards to some professions, but rather that it *demand*s that such professions be treated differently from other workers. Indeed, it would, in this Court's view, be unjust, unreasonable and arbitrary if the public were faced with professionals in whose hands they were entrusting their lives if those professionals were not subject to a different (and higher) standard than non-professionals such as in this example, a delivery man.
60. It seems clear to this Court that it is in the interest of the public (which places its faith in the medical profession generally and individual doctors in particular) that Dr. Van Eeden has to answer allegations from the Medical Council that he prescribed unlawful medications. Indeed, he may well have an answer to these claims, but it is this Court's view that there is no basis for the Medical Council being prevented from putting this case to him. However, if he did not have to answer such an allegation (and instead to be treated the same as say a delivery man) then it is this Court's view that this would not be in the common good.

**5. Abuse of process**

61. For their part, the defendants have not only denied each of the claims made by Dr. Van Eeden but they have also alleged that these proceedings in which he seeks various Declarations amount to an abuse of process and contravene the rule in *Henderson v Henderson*, primarily because these claims should have been brought by Dr. Van Eeden in 2017 when he instituted his judicial review proceedings against the Medical Council.
62. It is clear to this Court that all the facts that support his claims in these proceedings (i.e. that the Inquiry is *res judicata*, that it amounts to a breach of Article 40.1, that it contravenes Articles 34 and 37) were all available to Dr. Van Eeden in September 2016 when he received the Notice of Intention to Inquire.

63. Accordingly, it seems clear that all of the claims which Dr. Van Eeden is now making in these proceedings, he could have made when he instituted the judicial review proceedings in 2017, but for some reason he chose not to do so.
64. The strongest reason that Dr. Van Eeden comes up with for failing to make these claims in or around September 2016 is that he claims that he agreed with the Medical Council at a hearing on the 31st March, 2017 that the Medical Council hearings would be adjourned to enable him to bring the judicial review proceedings (which he subsequently brought), preventing the Medical Council from conducting the Inquiry into Dr. Van Eeden until such time as it had been determined whether the case *DPP v. J.C.* has altered the test set down in the case of *A.A. v. Medical Council (No 1)*. However, this simple fact that the Medical Council agreed to adjourn the Inquiry to permit Dr. Van Eeden to challenge the holding of the Inquiry (on the grounds that *A.A. v. Medical Council (No 1)* was no longer good law) did not implicitly or explicitly prevent Dr. Van Eeden from challenging the Inquiry on other grounds, of which he was aware or should have been aware at that time.
65. In this regard, the law in relation to *Henderson v Henderson* abuse of process is well settled and it is not necessary to set it out in any detail. It is clear from the judgment of Lord Bingham in *Johnson v. Gore Wood* [2002] 2 AC 1 at para. 31 that:
- “The bringing of a claim or the raising of a defence in later proceedings may, without, more amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.”
66. It seems clear to this Court that there was nothing preventing Dr. Van Eeden raising the numerous claims he has made in these plenary proceedings in those judicial review proceedings but he chose not to do so. This is therefore a clear case of a breach of the rule in *Henderson v Henderson* and amounts to an abuse of process. On this basis, the proceedings should be struck out.
67. This is particularly so in the present case, where the proceedings are, as noted earlier, in substance judicial review proceedings. This is because, as is clear from the recent Supreme Court decision in *Casey v. Minister for Housing* [2021] IESC 42, there are very good reasons why the courts should take a strict approach to judicial review proceedings. As noted by Baker J. at para. 33:
- “The commencement of judicial review proceedings has a chilling effect on administrative activity until the issue is resolved one way or another.”
68. The same chilling effect obviously applies to the commencement of plenary proceedings that are judicial review in nature. Baker J. went on to note, in the context of restrictions on the taking of judicial review actions, that such restrictions aim to:
- “minimise the risk that the implementation of the decisions concerned will be delayed by involving the decision-maker in fending off spurious claims and to

introduce finality at the earliest opportunity” (quoting De Blacam in *Judicial Review* (2017) at paras. 53-01)

69. Dr. Van Eeden’s proceedings are a good example of that ‘*chilling effect on administrative activity*’ because it is now almost 5 years since the Notice of Inquiry was issued and in that time no Inquiry by the Fitness to Practice Committee has taken place due to Dr. Van Eeden’s initial judicial review proceedings and then these plenary proceedings, which were issued on the eve of the most recent attempt to hold the Inquiry in February 2021. In this regard, while one of the seven adjournments was because of Covid-19 and one was because of illness to a member of Dr. Van Eeden’s legal team, the other five adjournments of the FTPC hearings were at the behest of Dr. Van Eeden.
70. This case is therefore a good example of where it is appropriate to exercise the Court’s jurisdiction to strike out proceedings on the grounds of abuse of process and so to stop once and for all Dr. Van Eeden from using litigation, or more correctly, abusing it, for the sole purpose of having a chilling effect on the Inquiry into him. This ‘chilling effect’ is contrary to the public interest, not just because of the use of scarce court resources, but also because it has prevented clarification as to the professional competence of Dr. Van Eeden to practice as a doctor, which Dr. Van Eeden has managed to thwart for over five years and which is clearly in the public interest/common good.
71. Dr. Van Eeden has however claimed that he is not guilty of abuse of process since, as regards his claims that the 2007 Act were unconstitutional, this was not a claim that he could have made in the judicial review proceedings, as the Attorney General was not party to those judicial review proceedings, and it is necessary for the Attorney General to be party to proceedings in which such a claim is made.
72. On this basis, he claims that these claims of unconstitutionality which he makes in the plenary proceedings cannot be regarded as amounting to an abuse of process, since he could not have made them earlier.
73. However, it is clear from the Supreme Court decision in *A.A. v. Medical Council*(No 2) [2003] 4 I.R. 302 that simply because the Attorney General was not a party to the earlier proceedings does not mean that the litigant, who is accused of abuse of process, should not have raised the unconstitutionality point at that time.
74. In this regard, Dr. Van Eeden relies upon the decision of the Court of Appeal in *Kennedy v. DPP, Ireland and the Attorney General* [2020] IECA 360 in which it was held that it did not amount to an abuse of process for the subsequent claims of unconstitutionality not to have been brought in earlier proceedings. However, quite apart from the authority of the Supreme Court decision in *AA v. Medical Council (No 2)*, the Kennedy decision is clearly distinguishable from this case, since one of the factors in favour of the Court of Appeal’s rejection of the abuse of process claim in *Kennedy* was that the failure to bring the claim in the earlier proceedings did not materially prejudice the defendants.

75. In this case, it is the reverse situation, since there is a very clear prejudice to the Medical Council arising from Dr. Van Eeden's failure to raise the constitutional issues when he brought his judicial review proceedings. This is because the hearing of the Inquiry, which has been delayed by adjournment applications and previous judicial review proceedings for a number of years, is now being delayed further by these unconstitutionality claims. In addition, of course not only is there prejudice to the Medical Council but there is also a strong public interest in any such unconstitutionality claims being made at the earliest opportunity, rather than on the eve of the multiple-adjourned Inquiry, so that any doubts about the professional competence of practising doctors are dealt with as soon as possible.
76. Thus, this Court has little doubt in concluding that in relation to all the claims made by Dr. Van Eeden in these plenary proceedings they should be struck out as amounting to an abuse of process.

#### **6. HPRA Material**

77. Finally, it should be noted that in his plenary summons, Dr. Van Eeden seeks a Declaration that the Medical Council unlawfully failed to conduct their own investigation and take witness statements as the Health Products Regulatory Authority handed over to its investigation file in this matter to the Medical Council.
78. No written legal submissions were made by Dr. Van Eeden regarding this claim, nor were any oral submissions made on his behalf.
79. For this reason, counsel for the Medical Council did not make any legal submissions on this issue as it concluded that it was not being pursued by Dr. Van Eeden.
80. In reply, counsel for Dr. Van Eeden claimed that this issue was being pursued. However in any event, it is to be noted that, as with all the other claims set out in the plenary summons, the basis for this claim was known to Dr. Van Eeden in or around September 2016 and so should have been raised at the time he instituted the judicial review proceedings and so it is not open to him to make that point in these plenary proceedings.

#### **CONCLUSION**

81. For all these reasons, this Court concludes that there is no basis for the granting of any of the Declarations sought by Dr. Van Eeden. In particular, this Court concludes that his acquittal by the District Court on charges of importing medicines without a manufacturing or marketing authorisation is completely separate from the Inquiry into whether, *inter alia*, he prescribed to a patient a particular medicine which did not have a manufacturer's authorisation. Thus, his previous acquittal does not amount to sufficient grounds on the principles of *res judicata* (namely that the matter had been previously decided) so as to prevent the Inquiry proceedings.
82. In any event, these proceedings in seeking to thwart the holding of the Inquiry into his fitness to practice as a doctor, by raising issues which could have been raised years previously, amounts to the use of litigation, or more correctly its misuse, for the purpose

of delaying that Inquiry and so these proceedings should be struck out as an abuse of process.

83. Insofar as final orders are concerned, this Court would ask the parties to engage with each other to see if agreement can be reached regarding all outstanding matters without the need for further court time. If it is necessary for this Court to deal with final orders, this case will be put in for mention on 13th October, 2021 at 10.45 am.