

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 776
Record No. 2020/773JR

BETWEEN:

JAMES HYLAND

APPLICANT

-AND-

THE MEDICAL COUNCIL OF IRELAND

RESPONDENT

-AND-

FREDERIK VERNIMMEN

NOTICE PARTY

Judgment of Mr Justice Cian Ferriter delivered this 9th day of December, 2021

Introduction

1. Can a registered medical practitioner voluntarily come off the Register at a time when the Medical Council is actively considering whether to re-open a complaint against that practitioner which the Council had previously dismissed as not showing sufficient cause? That is the question presented by the facts of this case and its resolution depends on the proper interpretation of the provisions of Section 52 of the Medical Practitioners Act, 2007.

Background

2. The material background to the matter is as follows. The Applicant is the son of Eileen Hyland (Deceased) who died in Cork University Hospital on 5th May, 2017. The late Ms. Hyland had been diagnosed with thyroid cancer in July 2016 and was under the care of a number of practitioners in Cork University Hospital including the Notice Party, Dr. Frederik Vernimmen, Consultant Radiotherapy Oncologist ("the Notice Party"), and Dr. Derek Power, Consultant Oncologist ("the other consultant").
3. Following her death, Ms. Hyland's family were concerned about the medical care received by Ms. Hyland at the end of her life and instructed solicitors to investigate whether or not any of the medical treatment she received was negligent. The family obtained expert reports in that regard and instructed their solicitors to issue proceedings in the High Court on 1st August, 2018 against the Notice Party and the other consultant. Those proceedings were settled, with the settlement in question ruled by Mr. Justice Cross in the High Court on 21st January, 2020.
4. On 27th July, 2018, the Applicant submitted a complaint to the Medical Council ("the Council") alleging failings in the treatment and care on the part of the Notice Party and the other consultant, alleging that the late Ms. Hyland "*needlessly passed away as the treatment she needed was not offered or provided at CUH*". It was alleged, in short, that the late Ms. Hyland was wrongly treated with external beam radiation for her thyroid cancer as opposed to Radioactive Iodine treatment, which treatment could have been obtained abroad for her. The late Ms. Hyland was a dialysis patient and her siblings made the case that the fact that she was a dialysis patient was no bar to her being provided with Radioactive Iodine treatment (and information in relation to the option of same).

5. The Council's Case Officer ("the Case Officer") assigned complaint reference C229/2018 to the Applicant's complaint and wrote to the Notice Party and the other consultant on 8th August, 2018 notifying them of the complaint. The Preliminary Proceedings Committee ("the PPC") of the Council met on 10th October, 2018 and directed the Case Officer to carry out various investigation steps in respect of the complaint including, *inter alia*, inviting the Notice Party to provide the PPC with any information he believed should be considered pursuant to s.59(6) of the Medical Practitioners Act, 2007 ("the 2007 Act"), and on receipt of any information from the Notice Party, to send a copy of that information to the Applicant for his comments.
6. The Notice Party responded to the complaint by a submission of 19th February, 2019 and this response was furnished to the Applicant.
7. On 8th March, 2019, the Applicant filed a ten page response to the Notice Party's submission which was, in turn, furnished to the Notice Party, who provided comments on same on 25th April, 2019.
8. The PPC met on 30th April, 2019. The PPC decided as follows (as reflected in the minutes of that meeting):-

"The Committee carefully considered the case report and all relevant documentation in relation to this matter including but not limited to; the email of complaint from Mr James Hyland dated 27 July 2018, the letter of complaint from Mr James Hyland received 30 July 2018, the email and attachments from Mr James Hyland received 01 August 2018, the letter from Dr Frederik Vernimmen dated 19 February 2019, the letter from Dr Derek Power dated 29 February 2019, the letter of response from Mr James Hyland dated 03 March 2019, the letter of response from Mr James Hyland dated 11 March 2019, the email from Dr Frederik Vernimmen dated 25 April 2019.

The Committee formed the opinion pursuant to section 61(1)(a) of the Medical Practitioners Act 2007, that there was not sufficient cause to warrant further action being taken in relation to the complaint as there was no prima facie evidence of professional misconduct or poor professional performance on the part of Dr Frederik Vernimmen or Dr Derek Power.

In forming their opinion, the Committee noted that appropriate care was given to a patient in circumstances where there was an interaction of a number of complex medical conditions, and a diagnosis of thyroid cancer which was advanced in stage at the time of presentation".

9. Following this meeting and decision, the PPC wrote to the Applicant on 3rd May, 2019 informing him of its decision and of the fact that it would inform the Council of its opinion. This letter also set out the options available to the Council in light of that opinion, pursuant to s.61(2) of the 2007 Act, including the entitlement of the Council to decide that no further action be taken in relation to the complaint.

10. The Council met on 16th May, 2019 to consider the PPC's opinion. Having considered the PPC's opinion, the Council decided that no further action should be taken in relation to the complaint. This was communicated to the Applicant's solicitors by letter of 21st May, 2019.
11. The Applicant then e-mailed the Case Officer, on 7th June, 2019 confirming receipt of the correspondence from the PPC and Council in relation to the decision to take no further action in respect of the complaint. This e-mail noted that "*we have completed the requested standardised feedback questionnaire, however this does not correctly reflect our dealings with the Medical Council. So we would like the following concerns and feedback sent to the PPC as we believe at the very least we deserve to know how they came to the conclusion the following was not an appalling lack of professionalism*". The e-mail went on to then summarise the core elements of the complaint which had been made by the Applicant in the original complaint.
12. The Case Officer replied to the Applicant's e-mail of 7th June, by letter of 12th June, 2019, indicating that a copy of the e-mail would be brought before the PPC at its meeting on 26th June, 2019 and that he would write to the Applicant following that meeting.
13. The PPC meeting proceeded on 26th June, 2019. The Applicant's e-mail was considered by the PPC at this meeting and the PPC decided as follows (as is recorded in its minutes for that meeting):-

"Having carefully reviewed the additional correspondence from Mr. James Hyland, the Committee agreed that his correspondence did not contain any new information or evidence which would warrant reconsideration of its opinion and re-affirm the opinion formed at its meeting on 30th April, 2019".
14. (It might be noted that in light of the PPC's decision on that date, the matter was not brought back before the Council itself).
15. The Case Officer wrote to the Applicant on 9th July, 2019 advising him of the outcome of the PPC meeting of 26th June, 2019.
16. Matters rested with that letter of 9th July, 2019, until an e-mail from the Applicant to the Council of 30th January, 2020. (This e-mail was sent a short time after the High Court negligence proceedings had been settled, the settlement being ruled by the High Court on 20th January, 2020).
17. In his e-mail of 30th January, 2020, the Applicant referred to the original complaint, noted that "*as previously stated, we are extremely unsatisfied with the decision made by the PPC on April 30th, 2019*" [i.e. the decision that the PPC was of the opinion that the complaint did not show "*sufficient cause*" to warrant the matter being taken further] and stated that [we] "*would now like you to reopen this investigation based on the additional information below*".

18. The e-mail then set out more fleshed out terms of complaint and enclosed "*in addition to the previous information supplied to you*" additional medical records and additional information (including additional locations which would have been able or willing to do the Radioactive Iodine treatment on the late Ms. Hyland). The additional reports and information extended to some 75 pages.

19. The e-mail concluded by stating as follows:-

"We now ask the Medical Council of Ireland to take all of the above additional findings and evidence into consideration and to re-open your investigation in relation to our Mum's untimely death (as confirmed and identified by the CEO of Cork University Hospital in the attached letter)".

20. This correspondence was acknowledged by the Council on 5th February, 2020.

21. On 27th May, 2020, the Case Officer advised the Applicant that the matter would be considered by the PPC at its meeting scheduled for June 2020.

22. The PPC met on 25th June, 2020 and, as recorded by the minutes of that meeting, having considered the additional correspondence submitted by the Applicant (accurately described as "*the e-mail from Mr. James Hyland dated 31 January, 2020, the expert opinions obtained by Mr. James Hyland, the presentation on safely dialysing a patient undergoing I-131 ablative therapy, the letter from Cork University Hospital to Mr. James Hyland dated 22 January, 2020, the e-mail from Dr. Michael Clarkson dated 3 November, 2016, and the presentation on 'Iodine-131 therapy and the dialysis patient'*"), decided that the Case Officer should write to the Notice Party (and the other consultant):

"enclosing a copy of the additional correspondence and documentation received from Mr. James Hyland on 31 January, 2020, confirming that the PPC will consider whether or not to reopen Mr. Hyland's complaint, based on the additional information submitted by Mr. Hyland, at its next available meeting. Outline in the said letter to Dr. Vernimmen that, in the event that Dr. Vernimmen wishes to make submissions to the PPC in respect of the additional correspondence submitted by Mr. Hyland, it is open to him to do so".

23. It will be noted that the terms of the decision involved directing the Case Officer to write to the Notice Party enclosing a copy of the additional correspondence and documentation received from the Applicant on 31st January, 2020 "*confirming that the PPC will consider whether or not to re-open Mr. Hyland's complaint, based on the additional information submitted by Mr. Hyland, at its next available meeting*".

24. Accordingly, as at 25th June, 2020, the PPC was considering whether or not it would reopen the Applicant's complaint based on the additional information submitted by him.

25. The Applicant was informed of this decision by letter from the Case Officer of 7th July, 2020.

26. The Notice Party's solicitors were written to by the Case Officer on 13th July, 2020 notifying him of the PPC's decision of 25th June, 2020 and inviting his response by 23rd July, 2020.
27. On 24th July, 2020, the Notice Party wrote to the Registration Department of the Council in a letter headed "*voluntary withdrawal of my name from the Register*" stating that he confirmed that he had had "*some communication with the Medical Council in November last informing you that I retired from Cork University Hospital on 07/09/2018 and have subsequently not practiced in Ireland. I moved to Belgium on 01/01/2019. I am not practising in Belgium either. I would now like to formally withdraw my name from the Register and exercise my right under Section 52 of the Medical Practitioners Act, 2007 to voluntarily withdraw from the Register with immediate effect*" ("the voluntary withdrawal letter").
28. The reference in the voluntary withdrawal letter to the Notice Party's communication with the Council the previous November is explained by the Notice Party in his affidavit in these proceedings as follows. By email of 26th November, 2019, the Notice Party informed the Medical Council that he was no longer practising in Ireland and had moved to Belgium to retire. He stated that he was "*also not practising here in Belgium*". In that email, he asked the Medical Council to contact him if there was any further administration required in the matter. He received an email in response from the Medical Council on 27th November, 2019 which stated:
- "If you were to voluntarily withdraw from the Register you would not be entitled to practice in Ireland until you restored to the Register. Doctors who are restoring their registration do not have to provide the same level of documentation as doctors who apply for the first time..."*
29. The email referenced the fact that there was information about the withdrawal/restoral process on the Medical Council website and concluded by stating "*you can voluntarily withdraw online, in which case you would need to let us know that you have done so before 29th November so we can remove you from the list*".
30. The Notice Party says that he followed up that email with two calls to the Medical Council to which he did not receive a response. He says that while he omitted to formally complete the online withdrawal form, he understood that his communication was sufficient for him to come off the Register especially since he had not paid his registration fees for the year or fulfilled his CPD requirements. He further says that he was unaware that the Applicant had sought to reopen the complaint in January, 2020 until he received a copy of the Council's letter of 13th July, 2020.
31. The voluntary withdrawal letter was followed up by a letter from the Notice Party's solicitors to the Case Officer of 31st July, 2020 expressing surprise at the contents of his letter to the Notice Party of 13th July, 2020 "*in circumstances where Dr. Vernimmen's comprehensive response (12 pages) to the complaint was carefully considered, determined and concluded by the PPC over a year ago on 30 April, 2019 and thereafter*

ratified by the Medical Council on 16 May, 2019. Notwithstanding same, we wish to inform you that Dr. Frederik Vernimmen retired on 7 September, 2018 and has informed the Medical Council Registration Department of his voluntary withdrawal of the Register”, and enclosing a copy of the letter to the Registration Department of 24th July, 2020.

32. The PPC met on 9th September, 2020. The PPC decided (as recorded in the minutes of that meeting) as follows:-

"The Committee carefully considered the email from Mr James Hyland dated 31 January 2020, the expert opinions obtained by Mr James Hyland received 31 January 2020, the presentation on safely dialysing a patient in undergoing I-131 Ablative Therapy, the letter from Cork University Hospital to Mr Jim Hyland dated 22 January 2020, the email from Dr Michael Clarkson dated 03 November 2016, the presentation on Iodine-131 therapy and dialysing the patient, the email and attachments from Mr James Hyland dated 07 July 2020, the email from Hayes Solicitors dated 31 July 2020, the letter from Dr Frederick Vernimmen dated 24 July 2020, the email from Matheson Solicitors dated 07 August 2020, the letter from Matheson Solicitors dated 07 August 2020, the email from Mr James Hyland dated 25 August 2020, and the emails from Mr James Hyland dated 27 August 2020."

33. Having set out the material it considered, the Committee:

"noted that Dr. Frederik Vernimmen has voluntarily withdrawn from the Register of Medical Practitioners and as such, the complaint against him cannot be reopened as he is no longer a registered medical practitioner as defined in the Medical Practitioners Act, 2007".

34. The Applicant's solicitors were notified of this decision of the PPC by letter of 28th September, 2020.

These proceedings

35. These judicial review proceedings were launched on on 27th October, 2020 when the Applicant's judicial review leave application came before Meenan J. There was some question at the hearing before me as to whether leave to apply for judicial review had formally been granted on that date. In any event, the parties agreed that I should deal with the matter on the basis that the substantive judicial review was being heard for determination by me.
36. The Applicant seeks the following reliefs by way of judicial review in these proceedings:
- (1) A declaration that the Applicant's complaint to the Medical Council with reference C229/2018 has not been disposed of or otherwise dealt with under Part 7 of the Medical Practitioners' Act, 2007.
 - (2) In the alternative, a Declaration that the Applicant's complaint to the Medical Council, reference C229/2018, has been reopened by virtue of the Respondent's

investigations into same since receipt of additional information from the Applicant in January, 2020.

- (3) An order of *certiorari* quashing the Respondent's decision either pursuant to s. 52(3)(a) of the Medical Practitioners' Act, 2007 in respect of the application of Dr. Frederik Vernimmen to voluntarily have his registration removed from the Register of Medical Practitioners – that Dr. Frederik Vernimmen was subject of a complaint which had not been disposed of or otherwise dealt with under Part 7 of the Medical Practitioners' Act, 2007.
- (4) A Declaration that the Respondent shall not consider the application of Dr. Frederik Vernimmen to have his registration removed from the Register of Medical Practitioners until such time as the Respondent has decided whether or not Dr. Frederik Vernimmen's registration should be removed pursuant to the provisions of the Medical Practitioners' Act, 2007.
- (5) An order of *mandamus* directing the Respondent to continue the investigation of complaint reference C229/2018 in relation to Dr. Frederik Vernimmen.

Relevant legal provisions

37. As this case raises an issue of the proper statutory interpretation of Section 52 of the 2007 Act, it is useful to set out the various potentially relevant provisions of the 2007 Act at this juncture.
38. As its long title reveals, the 2007 Act was enacted 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 of the Medical Council, to investigate complaints against medical practitioners and to increase the public accountability of the Medical Council*".
39. The 2007 Act is divided into some thirteen parts and two schedules. Part 6 is headed "*Registration of medical practitioners*" and provides a series of provisions relating to the registration of medical practitioners, the general rule being established under the Act that only medical practitioners who are registered under the Act are entitled to practice medicine in this jurisdiction.
40. Section 43(1) provides that the Council shall establish and maintain a register to be known as the "*Register of Medical Practitioners*". Section 43(4) provides for a certificate to be issued by the Council to a registered medical practitioner certifying the specified days during a specified period when the person named in the certificate was a registered medical practitioner (or, as the case may be, was suspended or subject to relevant conditions). By Section 43(7), the registered medical practitioner is required to display this certificate at the principal place where the practitioner practices medicine, and all times during which the practitioner's registration continues and at no other time.

41. Part 6 further addresses various requirements as to the manner in which medical practitioners can become registered.
42. Under Section 56, the Council is obliged to ensure that the Register is made publicly available.
43. Part 6 also contains Section 52 which is described in its marginal note as "*application to have registration removed, etc.*".
44. Given its centrality to the issues in these proceeding, I will set out Section 52 (as amended) in full:

52.— (1) A registered medical practitioner may make an application to the Council to have the practitioner’s registration removed.

(2) Subject to subsection (3), the Council shall determine an application under subsection (1) from a registered medical practitioner by removing the practitioner’s registration.

(3) Where the Council receives an application under subsection (1) from a registered medical practitioner and—

(a) the practitioner is the subject of —

(i) an application for an inquiry under section 45 of the Act of 1978 which has not been considered or, if appropriate, an inquiry has not been completed under Part V of that Act, or

(ii) a complaint which has not been disposed of or otherwise dealt with under Part 7 and, if appropriate, Parts 8 and 9 , or

(b) the practitioner has been convicted in the State of an offence triable on indictment or has been convicted outside the State of an offence consisting of acts or omissions which would constitute an offence triable on indictment if done or made in the State,

then the Council shall not consider the application until such time as the Council has decided whether or not the practitioner’s registration should be removed (including cancelled) pursuant to another provision of this Act.

(4) A medical practitioner whose registration has been removed pursuant to subsection (2) may make an application, accompanied by the appropriate fee, to the Council to have the practitioner’s registration restored.

(5) The Council shall determine an application under subsection (4) from a medical practitioner by restoring the practitioner’s registration.

(5A) Subsections (4) and (5) do not apply to a medical practitioner registered in the Supervised Division.

(6) *Where the Council is satisfied by medical evidence that a registered medical practitioner is suffering from an illness or condition of a permanent or terminal nature which, due to the nature of the condition, renders it impossible for the practitioner—*

(a) *to practise medicine in a safe and competent manner, and*

(b) *to notify the Council of the practitioner's illness or condition, as the case may be,*

then the Council may remove the practitioner's registration.

45. As we shall see, in this case, in short, the Applicant contends that the Notice Party was, at the time of his application to the Council to be removed from the Register (i.e. 24th July, 2020), a practitioner who was, in accordance with Section 52(3)(a)(ii), the subject of "a complaint which has not been disposed of or otherwise dealt with under Part 7 and, if appropriate, Parts 8 and 9" and therefore should not have been removed.
46. It is common case that Parts 8 and 9 of the 2007 Act (which deal, respectively, with complaints referred to the Fitness to Practise Committee, and imposition of sanctions on registered medical practitioners following reports of the Fitness to Practise Committee) have no application to this case. The question that arises, rather, is whether, in circumstances where the Applicant had written to the Council by e-mail on 30th January, 2020 seeking to have the original complaint of 27th July, 2018 reopened in light of a body of newly available material (including independent expert reports, additional medical records and other information), the correct interpretation of Section 52(3)(a)(ii) (for ease, "the relevant provision") is that the Applicant's complaint had "not been disposed of or otherwise dealt with under Part 7" such as to oblige the Council to refuse the Notice Party's request to be removed from the Register.
47. It is useful at this point to consider a number of other provisions of the 2007 Act.
48. Section 2 of the 2007 Act deals with interpretation. "Registered medical practitioner" is defined in Section 2 as "subject to Section 56A, means a medical practitioner whose name is for the time being entered in the Register".
49. "Complainant" is defined in Section 2 as "in relation to a complaint, means the person (including the Council) who made the complaint". Section 2 defines a "complaint" as "a complaint under Section 57(1)". (It is common case that any person, including the Council, can make a complaint).
50. Section 57 is found in Part 7 (Part 7 being headed "Complaints to Preliminary Proceedings Committee concerning registered medical practitioners"). The marginal note of Section 57 reads "complaints concerning registered medical practitioners".
51. Section 57(1) provides as follows:-

"A person (including the Council) may make a complaint to the Preliminary Proceedings Committee concerning a registered medical practitioner on one or more than one of the grounds of –

- (a) Professional misconduct;*
- (b) Poor professional performance;*

[(c) to (g) address other matters which may be the subject of a complaint but which are not relevant to the facts of this case]

52. Section 58 provides that the Council may appoint persons to assist the PPC (which assistance may involve, e.g., interviewing persons for the purposes of assessing the relevance or evidential value of information or documents they wish to give to the PPC).
53. Section 59 deals with the consideration of complaints by the PPC. Section 59(1) provides that:-

"The Preliminary Proceedings Committee shall, as soon as is practicable after receiving a complaint, consider whether there is sufficient cause to warrant further action being taken in relation to the complaint".

54. It is clear from the terms of Section 59 that the PPC can undertake an investigation for the purposes of considering whether there is sufficient cause to warrant further action being taken in relation to a complaint. The PPC has been described as fulfilling a form of "filtering" or "gateway" function to weed out unmeritorious or vexatious complaints.
55. In that regard, Section 59(9) provides that:-

"The Preliminary Proceedings Committee shall, before forming an opinion on whether there is sufficient cause to warrant further action being taken in relation to a complaint, or whether the complaint should be referred to another body or authority, consider –

- (a) Any information supplied under this section concerning the complaint, and*
- (b) Whether the complaint is trivial or vexatious or without substance or made in bad faith".*

56. It is clear, therefore, that the PPC has the statutory power to "throw out" a complaint on the basis that the complaint is, *inter alia*, vexatious or without substance or made in bad faith before forming an opinion on whether there is sufficient cause to warrant further action being taken i.e. without the need, in those circumstances, to forward the complaint on to the Council.
57. As an indication of the overriding "public protection" purpose of the statutory scheme, Section 59(10) empowers the PPC, with the Council's agreement, to proceed as if a complaint had not been withdrawn even where it is withdrawn by the complainant. This

is consistent with the Council's own power to bring and prosecute complaints under the Act.

58. The established authorities in respect of the "*registration professions*" (such as *Law Society v Walker* [2007] 3 IR 581) demonstrate that "complaint-screening" bodies such as the PPC operate on the basis that there is a presumption in favour of sending forward a complaint unless there is no *prima facie* evidence to support same. This is borne out by the provisions of Section 63 of the 2007 Act (which is the last section in Part 7 of the Act).

59. Section 63 provides as follows:-

"Where –

- (a) The Preliminary Proceedings Committee is of the opinion that there is a prima facie case to warrant further action being taken in relation to a complaint, or*
- (b) The Council directs under Section 61(2)(e) that further action be taken under this section in relation to a complaint,*

the Preliminary Proceedings Committee shall refer the complaint to the Fitness to Practise Committee".

60. Section 61 is described as follows in its marginal note:-

"No further action or a referral of complaint to another body or authority or to a professional competence scheme".

61. Section 61 provides as follows:-

"61.— (1) Where the Preliminary Proceedings Committee is, in respect of a complaint, of the opinion that—

- (a) there is not sufficient cause to warrant further action being taken in relation to the complaint,*
- (b) the complaint should be referred to another body or authority or to a professional competence scheme, or*
- (c) the complaint is one that could be resolved by mediation or other informal means pursuant to guidelines prepared under section 62 (1),*

it shall inform the Council of that opinion.

(2) The Council may, after considering an opinion referred to in subsection (1) in respect of a complaint—

- (a) decide that no further action is to be taken in relation to the complaint,*

- (b) *direct the Preliminary Proceedings Committee to refer the complainant to another body or authority,*
 - (c) *refer the complaint to a professional competence scheme,*
 - (d) *refer the complaint for resolution by mediation or other informal means, or*
 - (e) *if it considers it necessary to do so, direct that further action be taken under section 63.*
- (3) *Where the Council, in respect of a complaint, makes a decision referred to in subsection (2)(a) or a referral referred to in subsection (2)(b) or (d), the Council shall give notice in writing of the decision or referral, as the case may be, to—*
- (a) *the registered medical practitioner the subject of the complaint, and*
 - (b) *the complainant in any case where the Council is not the complainant.”.*

The Applicant’s submissions

62. In summary, the Applicant submits that it could not be said that the Applicant’s complaint, from 30th January 2020 onwards, had *“been disposed of or otherwise dealt with under Part 7”* within the meaning of Section 52(3)(a)(ii) where he had lodged fresh material in support of the complaint and formally requested the Council to re-open its investigation into the matter. He submits that once the PPC was exercising what appears to be an implied statutory power to consider re-opening a complaint which the Council had previously dismissed as being without sufficient cause, the matter must be treated as no longer disposed of but *“live”* again for the purposes of Part 7.
63. He submitted that the Council could not, in effect, have it both ways: on the one hand, actively (and properly) considering whether a complaint should be formally re-opened while on the other hand maintaining that the matter had been disposed of. This was all the more so when the consequences that might ensue from a decision to re-open the investigation could include the matter being referred to the Fitness to Practise Committee and that Committee then having all of the powers available to it at that point, including the ultimate sanction of strike off the Register. It was submitted that the effect of permitting the Notice Party to come off the Register here was to ensure that the investigation could never be re-opened in circumstances where the Applicant says that the material before the PPC/Council would, at that point, have shown sufficient cause.
64. It was submitted that to permit such an inconsistent state of affairs was to run counter to the statutory purpose of the protection of the public embodied in the provisions of Section 52(3), and that where there is any live matter relating to a complaint under active consideration by the PPC or the Council, the statutory objective behind Section 52(3) would be frustrated by interpreting the provision in a way that would result in the exception to voluntarily withdrawal from the Register being avoided by a registered medical practitioner coming off the Register at a time when the Council was considering

whether a complaint against that practitioner should be the subject of a fresh investigation.

65. The Applicant submitted that the concept of "*complaint*" was very broad under the Act and that all that was required was that there was an "*utterance*" or "*grievance*" (to adopt the ordinary dictionary definition of "*complaint*") which went to one of the matters in Section 57(1), i.e. once there was the communication of a grievance in relation to, e.g., professional misconduct or poor professional performance, and that complaint had not been finally dealt with, the provisions of Section 52(3)(a)(ii) must apply. Here, it was said that the Applicant's email and submission of 30th January, 2020 came within the wide statutory definition of "*complaint*" such as to clearly engage the relevant provisions of section 52.

The Respondent's submissions

66. The Council for its part submitted that the interpretation advanced on behalf of the Applicant contained a charter for uncertainty in that it effectively sought to ignore or disregard the critical qualifying words in Section 52(3)(a)(ii) i.e. whether a complaint had been "*disposed of or otherwise dealt with under Part 7*". It submitted that it was indisputable but that the original complaint had been disposed of by 16th May, 2019 when the Council decided that no further action was to be taken in relation to the complaint (on foot of the PPC's opinion of 30 April, 2019 that the original complaint did not show "*sufficient cause*" such as to warrant any further action).
67. It was submitted that it would undermine the certainty required of the statutory scheme, in the public interest, if Section 52(3)(a)(ii) could be said to be met simply by the subjective assertion on behalf of an aggrieved complainant to the effect that the complainant was not happy that their complaint had been properly rejected and that they wanted the investigation into their complaint re-opened.
68. As regards the proper interpretation to be given to the phrase "*disposed of or otherwise dealt with under Part 7*" in Section 52(3)(a)(ii), the Council submitted that a complaint can be considered "*disposed of*" under Part 7, for the purposes of Section 52(3)(a)(ii), where the PPC has formed the opinion under Section 61(1)(a) that there is "*not sufficient cause to warrant further action being taken in relation to the complaint*", the PPC has informed the Council of that opinion and the Council has decided, after considering that opinion, pursuant to Section 61(2)(a), that no further action is to be taken in relation to the complaint. (This is what happened here, it says, with the Council's decision of 16th May 2019). The Council submitted that a complaint can be considered "*otherwise dealt with under Part 7*" for the purposes of Section 52(3)(a)(ii) where it is dealt with by one of the "*diversion*" options in Section 61(1)(b) or (c), such as referral to another body or to mediation.
69. In discussion with the Court, counsel for the Respondent fairly accepted that where the PPC and Council were made aware of matters which warranted a revisiting of a decision to reject a complaint, and if in those circumstances the Council accepted an opinion of the PPC that a complaint did now show sufficient cause such as to warrant further action

being taken, that a complaint could be said at that point not to have been disposed of (or otherwise dealt with) under Part 7 for the purposes of Section 52(3)(a)(ii) i.e. the complaint's status as having been disposed of would have changed to one which was formally live again. This approach, he submitted, was consistent with the public protection objective of the statutory scheme. However, until that point (i.e. the point at which the Council decided that there was sufficient cause to let the matter go forward, effectively replacing its earlier decision), even where the PPC was minded to consider whether it would re-open a complaint, as a matter of law the complaint sought to be re-opened stood "disposed of" for the purposes of Section 52(3)(a)(ii) such that a registered medical practitioner the subject of the complaint could voluntarily withdraw from the Register.

70. An analogy was drawn in this regard with a judgment or order of a court (e.g. on an interlocutory application in civil court proceedings) which was the subject of an application to be revisited in light of new evidence or materially changed circumstances; the Court's original order clearly had the legal effect of disposing of the application unless and until the Court decided to revisit its original order and replace or overtake it with a new order.
71. The Notice Party adopted the Council's submissions and made a separate submission to the effect that even if the Applicant was correct in his view as to the proper interpretation of the relevant statutory provisions, it would be futile to grant any relief in circumstances where the Notice Party was retired from practice, living abroad (where he is caring for his ill wife) and where he never intended to practice medicine again.

Discussion

72. The question of statutory interpretation that arises in this case stems principally from the fact that the Council takes the view that it has a power to re-open an investigation into a previously rejected complaint where circumstances warrant such a re-opening e.g. new evidence coming to light which demonstrates that there is in fact sufficient cause to proceed with referring a complaint to the Fitness to Practise Committee. There is no express provision in the 2007 Act entitling the Council to re-open investigations into closed complaint files. The absence of such an express statutory provision renders more difficult the statutory interpretation task facing the Court on this application.
73. If it was the case, for example, that the Council took the view that it had no power to re-open investigations into previously rejected complaints, it seems to me that it would be beyond dispute that the Applicant's complaint would be properly said to have been "disposed of" for the purposes of the relevant provision by the Council's decision of 16th May, 2020 deciding to take no further action in respect of the Applicant's complaint on the basis that sufficient cause was not shown by the complaint.
74. No issue is taken by the Applicant with the Council's power to re-open a previously closed complaint in appropriate circumstances; indeed, the Applicant expressly requested the Council to re-open the investigation into his complaint here and has proceeded at all times on the basis that the Council has the power to do so.

75. Accordingly, I will proceed to address the statutory interpretation question arising in this case on the basis that the Council is correct to take the view that its statutory mandate under the 2007 Act to protect the public interest is such that there must be an implied power vested in the Council under the Act to revisit decisions relating to rejected complaints if new evidence or material comes to light which demonstrates that a different decision should now be arrived at. It could clearly operate against the public interest if material came to light subsequent to an initial rejection of a complaint for insufficient cause which demonstrated likely professional misconduct but where the Council took the view it could not act simply because that material was not available when it first looked at the matter.
76. How then is the phrase "*disposed of or otherwise deal with under Part 7*" in Section 52(3)(a)(ii) to be interpreted where the Council can re-visit matters previously regarded by it as not disclosing sufficient cause?
77. On the one hand, it could be said that the clock timing the period during which a registered medical practitioner is prohibited from coming off the register should start when the renewed complaint application is made; after all, the time at which a complaint is made is the time when the clock stops in respect of a first-time complaint. On this view, if the Council is going to consider whether or not it will allow the renewed complaint be investigated, the policy in favour of protecting the public interest suggests that the practitioner should not be allowed to come off the register until if and when the Council decides there is no sufficient cause shown by the renewed complaint.
78. On the other hand, it can be said that there is a fundamental difference between an original complaint which has been rejected and a renewed complaint, in that the Council has in the meantime determined that the original complaint did not show sufficient cause such that the practitioner stands vindicated of wrongdoing and free to come off the register and that it would be unfair to allow that status be changed by the mere lodging of a renewed complaint, where the complainant has already had "one bite of the cherry" and has been unsuccessful. On this argument, if the Council does ultimately determine that the renewed complaint reveals sufficient cause, the status of the original (rejected) complaint would then have been fundamentally altered such the prohibition on coming off the register would properly and fairly kick in at that point, but not before.
79. In my view, the analogy drawn in the course of submissions with the status of a court order which is the subject of an application to the court to be revisited or set aside is a good one, and is helpful to the statutory interpretation question in issue in this case. It seems to me that the proper characterisation of the Council's implied power to revisit a complaint previously disposed of for not showing sufficient cause is that the complaint remains "*disposed of*" for the purposes of Section 52(3)(a)(ii) unless and until the Council replaces or overtakes that decision with a fresh decision that there is now sufficient cause under the Act to send the complaint forward. In that case, the Council, in effect, replaces the earlier "*rejection*" decision with a fresh "*acceptance*" decision such that the status of the complaint then changes from "*disposed of*" to no longer "*disposed of*" by virtue of the

Council determining that there is sufficient cause shown to warrant the renewed complaint now being sent forward.

80. While I am sympathetic to the Applicant's position, and do not doubt for a moment his *bona fides*, I need to have regard to the wider implications of the interpretation contended for by him. In my view, to adopt the construction urged on his behalf would be to create undue uncertainty and would allow complainants to unilaterally force a practitioner who wishes to come off the register to remain on the register by the mere expedient of lodging an application (and potentially multiple such applications) for the re-opening of a complaint investigation notwithstanding that the PPC and Council have determined that the original complaint was unmeritorious.
81. On the facts here, at the time the Notice Party made an application to the Council to have his registration removed (i.e. 24th July, 2020), the Council's decision of 16th May, 2019 remained operative and effective in law i.e. the original complaint stood rejected and therefore "disposed of" for the purposes of Section 52(3)(a)(ii). The Council had not at the date of the Notice Party's application to be removed from the register reversed or replaced the earlier decision with a fresh decision to the effect that the complaint now showed sufficient cause to warrant it being sent forward for further action. The fact that the PPC, at the time of the application to re-open the investigation into the complaint, was considering whether or not the matter might be re-opened and had written to the Notice Party inviting his views on the question of re-opening the investigation did not mean, as a matter of the proper interpretation of Section 52(3)(a)(ii), that the complaint was no longer "disposed of" at that point.
82. As regards the alternative submission advanced on behalf of the Applicant that his submission of 30th January 2020 constituted a fresh "complaint" for the purposes of the relevant provision, I do not believe that this communication can be truly regarded as a fresh, self-standing "complaint" for the purposes of Section 52(3) such that it could be said that that complaint was not disposed of in July 2020 at the time of the Notice Party's application to be removed from the register. The submission of 30th January, 2020 on behalf of the Applicant did not relate to a new or fresh complaint; rather, a body of further material and evidence was tendered in support of the original complaint. The Applicant's original complaint related to alleged failures in the treatment, and management of treatment, of his late mother by the Notice Party and the other consultant, particularly during the latter stages of her life. The communication of 30th January, 2020 also fundamentally concerned these matters, albeit with an additional body of evidence and material tendered to support same.
83. It does not seem to me that it would be correct, as a matter of statutory interpretation, to hold that the concept of "*complaint*" as used in section 61 and Section 52(3) (in the context of the statutory architecture as a whole) can be taken to mean any "*utterance*" or "*grievance*" subsequent to an original complaint which arises out of the same underlying facts and circumstances and the same substantive allegation of professional misconduct or poor professional performance.

84. While I accept the Applicant's point that the labels applied by the parties in their correspondence as to the applications being made cannot and should not be dispositive of the legal questions arising, in my view on the facts here that there was no separate, self-standing complaint within the meaning of the 2007 Act lodged by the Applicant on 30 January 2020. Rather, the Applicant - as he was entitled to seek to do - invited the Council to re-open its investigation into the substantive complaint in light of new evidence and information which had been assembled by him.
85. In relation to the contention that any registered medical practitioner could seek to frustrate the operation of the investigation provisions of the 2007 Act by seeking to apply to come off the Register after an application has been made to re-open a rejected complaint but before the Council has ruled on whether or not the complaint should be re-opened, in my view, it needs to be borne in mind that it is a very serious step for a registered medical practitioner to seek to come off the Register as, from that point onwards, he or she is not entitled to practice medicine. It is difficult to imagine that being becoming a likely or regular step in response to applications to re-open rejected complaints for the purpose of avoiding any potential re-opened investigation that might ensue.
86. Accordingly, it does not seem to me that it can be said on a correct interpretation of Section 52(3)(a)(ii) that the Council acted unlawfully in acceding to the Notice Party's application under s.52(1) to have his registration removed.
87. While I appreciate the Applicant's upset at, as he and his siblings see it, not being in a position to get a regulatory determination from the Council in respect of their complaint in circumstances where they believe they had assembled sufficient material to warrant the complaint being re-opened, the Applicant is bound by the provisions of the statutory scheme as they currently are. It is ultimately a matter for the Oireachtas as to whether it wishes to legislate (one way or another) for the type of circumstance that arose in this case.

Conclusion

88. In the circumstances, I will refuse the reliefs sought.