THE HIGH COURT

[2022] IEHC 723
[2021 No. 318 MCA]

IN THE MATTER OF SECTION 60 OF THE MEDICAL PRACTITIONERS ACT 2007 AND IN THE MATTER OF A REGISTERED MEDICAL PRACTITIONER AND ON THE APPLICATION OF THE MEDICAL COUNCIL

BETWEEN

MEDICAL COUNCIL

APPLICANT

AND

SYED WAQAS ALI BUKHARI

RESPONDENT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 21st December, 2022

Introduction

1. This is my judgment on an application by Mediahuis Ireland Limited ("Mediahuis") for various orders in the context of these proceedings brought by the Medical Council (the "Council") against the respondent, Dr. Bukhari, pursuant to s. 60 of the Medical Practitioners Act 2007 (the "2007 Act").

2. Mediahuis seeks an order that the proceedings be heard in public pursuant to s. 60(2) of the 2007 Act as well as an order permitting Mediahuis to name and otherwise identify the respondent doctor.

Background to the Application

3. It is necessary briefly to summarise the circumstances in which Mediahuis have brought this application.

4. The Council brought an application for certain orders pursuant to s. 60 of the 2007 Act against the respondent in November 2021. Among the orders sought by the Council were orders directing that the registration of the respondent's name on the register of medical practitioners be suspended until further steps were taken pursuant to the provisions of Part 7

and, if applicable, Parts 8 and 9 of the 2007 Act. That application initially came before Irvine P. on 20th December, 2021. On that date, certain undertakings were agreed between the Council and the respondent. Those undertakings were accepted by Irvine P. She directed that the application be listed against before the Court on 1st July, 2022. When the application came before Irvine P. again on 1st July, 2022, certain disclosures were made to the Court on behalf of the respondent, including the fact that he had breached one of the undertakings given by him to the Court on 20th December, 2021. The respondent had been convicted by the District Court on 19th May, 2022, for driving without a licence and insurance on 14th February, 2022 (a matter of weeks after the undertakings had been given to the Court) and had received a sentence of five months imprisonment in respect of that offence, which the respondent was appealing. There was no dispute that that was a breach of one of the undertakings given by the respondent to the Court on 20th December, 2021. Irvine P. was also informed on that date that, since the matter was last before the Court, the respondent had been convicted by the District Court of the offence of driving while disqualified and driving without insurance on 19th July, 2021, for which he also received sentence of five months imprisonment and which he was also appealing. The respondent pleaded guilty to all of those offences.

5. The Council's application was ultimately heard by me on 27th July, 2022. I delivered an *ex tempore* judgment on 29th July, 2022 (the "July judgment"). That judgment was published, although the name of the respondent was anonymised and certain personal details were redacted from the judgment. Reference should be made to that judgment for a more detailed account of the s. 60 application.

6. During the course of the hearing of the Council's s. 60 application, it was indicated on behalf of the Council that, in the event that the Court was not prepared to make the orders sought by the Council on that application, the Council was prepared to accept certain further

undertakings from the respondent. The undertakings provided by the respondent to the Court on 20th December, 2021 are summarised at para. 31 of the July judgment. The further undertakings which the respondent was prepared to accept, as a fallback position and in the event that the Court was not prepared to grant the orders sought, are set out at para. 65 of the judgment. Essentially, they required that the respondent would, in summary:

(1)(a) Notify any prospective employer of the existence of the complaint against him under the 2007 Act and the details of the undertakings given by him, and

(b) Notify the Professional Standards Department of the Council in advance of taking up employment of the details of the employer and consent to the Council's Health Committee engaging with the employer regarding the respondent's undertakings;

(2) Consent to the Council reflecting on its public facing register the fact that the respondent had provided *"health-related voluntary undertakings to the High Court"* and stating that, if further information was sought, a request could be made to the Council's Professional Standards department; and

(3) The Council was at liberty to communicate the terms of the undertakings given to various bodies, namely, the Council's Health Committee, the Council Preliminary Proceedings Committee (the "PPC") and other committees within the Council.

7. As explained at paras. 67 – 74 of the July judgment, I was just about satisfied that the balance which had to be drawn between the competing interests involved *"just about and barely"* tilted in favour of accepting those undertakings, which were agreed to by the respondent at the hearing, in place of making the s. 60 suspension order sought. At para. 72, I stated that I was *"just about satisfied, and by the finest margin possible"* that I should exercise my discretion to accept the undertakings provided by the respondent to the Council.

I required those undertakings to be given on oath to the Court by the respondent. I also stated that it had to be clear to the respondent this was *"very much a last chance"* for him and that any breach of those undertakings would *"almost inevitably lead a court to grant the orders sought by the Council"* (para. 72).

8. Finally, at para. 74 of the July judgment, I stated that I was prepared to accept the undertakings, provided the respondent gave them on oath. I further directed the respondent to provide the information requested of him by the Council's Health Committee as a matter of urgency. I directed that the matter would be listed for review on 7th October, 2022. I gave the Council liberty to apply at short notice in the event of any failure to comply with the undertakings or any culpable failure to provide the outstanding information to the Council's Health Committee or to the PPC. I stated that, if it became necessary for the Council to apply to the Court in those circumstances, there was a *"very real risk"* that I would grant the s. 60 suspension order sought by the Council. I noted that I would, in any event, review the position on 7th October, 2022 and would consider whether any other orders were required at that stage.

9. The Council's application was listed for review on 7th October, 2022. In the meantime, the respondent had confirmed the undertakings referred to in the July judgment on oath. Shortly before the matter was listed for review at 2pm on 7th October, 2022, by way of a hybrid hearing, Mark Tighe, a Sunday Independent journalist, attempted to attend the hearing remotely. However, he was not permitted to attend in circumstances where s. 60(2) of the 2007 Act, provides for a s. 60 application to be heard *"otherwise than in public unless the Court considers it appropriate to hear the application in public"*. The Council's s. 60 application was heard otherwise than in public by Irvine P. and, subsequently, by me. There had, by that stage, been no application to the Court for the matter to be heard in public. In any event, on 7th October, 2022, the matter was adjourned until 11th November, 2022.

Directions were given, through the registrar, to Mediahuis that it should correspond with the parties notifying them of its intention to bring an application for the hearing of the s. 60 proceedings to be in public. I will come to that correspondence in a moment.

10. In the period between 7th October, 2022 and 11th November, 2022, the Council's PPC had decided that there was a *prima facie* case to warrant further action being taken in relation to the complaint against the respondent and referred the complaint to the Council's Fitness to Practise Committee (the "FPC"). It was further indicated that it was the intention of the FPC to complete its consideration of the complaint within six months.

Correspondence before the Application

11. Before bringing its application, Mediahuis wrote, through its in-house solicitors, to the Council's solicitors and to the respondent's solicitors informing them of its intended application to apply to the High Court for the further hearings in the s. 60 proceedings to be held in public. Those letters were sent on 19th October, 2022. It was contended in those letters that the future hearings of the s. 60 proceedings should be held in public on the grounds that that was appropriate *"in light of the nature of the complaint which is before the Medical Council, the respondent's sustained record of serious road traffic offences, and the respondent's continued offending since the s. 60 application has been before the Court"*.

12. The Council's solicitors replied on 25th October, 2022, stating that it was ultimately a matter for the Court to determine whether it was appropriate to hear any applications pursuant to s. 60 of the 2007 Act in public and that the Council intended adopting a neutral position in respect of Mediahuis's intended application. The respondent's solicitors did not reply.

Mediahuis's Application

13. Mediahuis issued a motion seeking the reliefs summarised earlier on 3rd November, 2022. That motion was returnable to be heard prior to the review listing of the proceedings at 2pm on 11th November, 2022. On that date, directions were given for the exchange of further

affidavits and submissions. Mediahuis's application was then listed for hearing on 7th December, 2022.

14. Mediahuis's application is grounded on an affidavit sworn by Alan English, the Editor of the Sunday Independent, on 3rd November, 2022. In his affidavit, Mr. English noted that the Sunday Independent was aware of the *ex tempore* judgment I delivered in the s. 60 proceedings on 29th July, 2022. He stated that, as Editor of the Sunday Independent, the proceedings, and the identity of the respondent are a matter of public interest. At para. 6 of his affidavit, he stated that, without limiting the grounds on which Mediahuis was contending that the proceedings are a matter of public interest, it was its position that *"whilst occupying a position of significant public responsibility the respondent appears to have been convicted of at least eight road traffic offences and received significant sentences and penalties (though some may be under appeal)"*. He continued:

> *"It is of further public interest that, while subject to undertakings intended to meet the statutory objective of protecting the public, the respondent appears to have been convicted of four distinct offences (again, subject to appeal) and has breached undertakings given to the Court."*

15. It is now accepted by Mediahuis that the respondent, in fact, breached only one of the undertakings given to the Court.

16. Mr. English went on to state that it appeared that many of the Council's concerns arose from or were related to criminal convictions which were *"entered in open court"* and *"have been the subject of previous reporting and public commentary by the respondent"*. Mr. English referred to that previous reporting at paras. 16 – 23 of his affidavit.

17. He noted that on 17th January, 2017, the Sligo Champion published an article entitled "*Speeding doctor was testing car*". The article was a report of a hearing before Sligo Circuit Court and contains certain information in relation to the offences involved and the ultimate

plea by the respondent. Much of that information was also continued in the July judgment. The relevant article remains online on www.independent.ie.

18. The second article to which Mr. English referred was an article published in the Sunday World on 4th September, 2022, entitled "*OFF THE ROAD: TOP DOC IS SERIAL MOTORING OFFENDER*". The article reported the respondent's criminal convictions and noted various matters including that:

(a) the respondent was sentenced to a prison sentence of five months;

(b) he is appealing his sentence;

(c) the respondent's offences include driving whilst under the influence of cannabis, drink driving, driving without insurance or licence and speeding;

(d) several of the offences occurred whilst he was already banned from driving;

(e) the respondent is highly respected by many of his colleagues, who have provided references saying his issues have never affected the quality of his work;

(f) the respondent's contract has ended and has not been renewed;

(g) the respondent has been stopped in his car whilst wearing hospital scrubs after smoking cannabis;

(h) the respondent's statement that he has never attended work under the influence of drink or drugs or put his patients at risk; and

(i) the respondent appeared in court again in June after he was caught driving with no licence or insurance on 14th February, 2022.

19. Almost all of that information was contained in the July judgment. In addition, the article also contained comments made by the respondent to the Sunday World reporter on his current convictions. I note here that, in the article, the respondent is reported as having

admitted that it was unusual for someone in his line of work to be convicted of such offences and that the respondent stated:

> *"It is. The judge thought that. I am not working any more.* ***They haven't suspended me or anything*** *but obviously with investigations going on it is hard to get work."* (emphasis added)

20. Later in the article, it was reported that, when asked what was going on when he committed the offences, the respondent said:

> *"I had a lot going on. I have been suffering through some medical illness and all that. Sh*t happens, you know."*

21. That article also remains available online on www.sundayworld.com.

22. While noting that there was no publication relating to the s. 60 proceedings, Mr. English stated that it was clear that the respondent's criminal convictions have been previously reported upon.

23. The Council did not file a replying affidavit in response to Mediahuis's application and took a neutral position on the application, although it did provide very helpful written submissions which have been of great assistance to me in determining this application.

24. The respondent swore a replying affidavit on 28th November, 2022. Having set out some of his background, qualifications and achievements, he stressed that he had never allowed the safety of his patients to become compromised in any way as a result of his consumption of alcohol or of any other substance and noted that the Council did not present any evidence to the contrary. He also referred to the fact that several references have been furnished on his behalf (to the Council and to the Court in the context of the s. 60 application) confirming that he had never compromised patient safety and that the Court appeared to accept that proposition in its July judgment. He acknowledged, however, that he had certain issues to address and was actively engaging with the Council, including with its Health

Committee, and that he had not consumed alcohol or any illegal substances since August 2021. He then provided some personal details before stating that he had made several attempts to secure employment in the months since July 2022, without success. He was due to commence a locum position on 6th September, 2022, through an agency to whom he had provided details of the proceedings and of the undertakings he had given. However, on the day after the publication of the Sunday World article on 4th September, 2022, the locum job was cancelled and he was informed that that was due to the publication of the article. He stated that the prospect of further articles about his case would compound his difficulties in terms of obtaining further employment. He explained that he was in *"dire financial straits"* and was intent on securing further employment. He was engaging fully with the Council and its relevant committees. He felt that, if the proceedings were held in public and reported upon, whatever limited prospects he had at securing employment would be ruined.

25. With respect to the Sunday World article, the respondent acknowledged that he made some brief remarks to the reporter about the matter being the subject of ongoing investigation and that it was difficult to get work. However, he did not accept that his replies were *"in any way as extensive as they are set out in the article"*. He did, however, accept that he made the remark *"sh*t happens"* to the reporter in an attempt to *"convey that our brief and unsolicited meeting was at an end"*.

26. I received very helpful written submissions from Mediahuis, the Council and the respondent for the purposes of the application. I heard the application on 7th December, 2022, and indicated at the conclusion of the hearing that I hoped to give my decision on 16th December, 2022. However, it came to my attention over the weekend of 10th -11th December, 2022, that another article appeared in the Sunday Independent newspaper concerning the respondent's criminal case. I directed that a further affidavit be sworn on behalf of Mediahuis and postponed the giving of my judgment until 21st December, 2022.

27. Mr. English swore a further affidavit on 15th December, 2022. In that affidavit, he explained that the Sunday Independent became aware that the respondent's appeal (from the sentences imposed by the District Court in respect of a number of the offences to which he pleaded) was due to be heard in Cavan Circuit Court on 8th December, 2022. Given the public interest in the appeal, he stated that Mr. Tighe attended the hearing and produced a court report of the hearing, which was published in the Sunday Independent on 11th December, 2022, under the headline "*Drug-driving doctor leaves the country on eve of legal appeal*". That article was published online on independent.ie in the same terms save that the headline was slightly longer and was in the following terms "*Drug-driving surgeon with string of convictions leaves the country on eve of court hearing*". That article has also been published verbatim on msn.com. Mr. English explained that the information contained in those articles was based on publicly available information, including the public appeal by the respondent in the criminal proceedings and on previous reporting on the respondent. He noted that no reference is made to the s. 60 proceedings in light of its ongoing private nature. I have read the articles in question and Mr. English is right about that.

Decision on Mediahuis's Application

28. Having carefully considered the affidavit evidence and the written and oral submissions made on behalf of Mediahuis, the Council and the respondent, I am now in a position to give my decision on Mediahuis's application. As I indicated at the conclusion of the hearing on 7th October, 2022, I am setting out the essential reasons for my decision in this judgment.

29. It is agreed by all of the parties that the default position in respect of proceedings under s. 60 of the 2007 Act is that those proceedings are heard otherwise than in public. Section 60(2) states that:

> *"An application under* [s. 60(1) or (1A)] *shall be heard otherwise than in public unless the Court considers it appropriate to hear the application in public."*

30. The Court can direct that the proceedings be heard in public if it considers that it is appropriate to do so. Neither s. 60 nor any other provision of the 2007 Act gives any indication as to the circumstances in which the Court might consider it appropriate to hear a s. 60 application in public or as to the factors to be taken into account in reaching a decision that it should.

31. It is accepted by Mediahuis that it bears the burden of persuading the Court to hear the application or any aspects of the application in public. There is no dispute about this.

32. When faced with an application to hear a s. 60 application in public, in other words to dislodge the default position, the Court must balance the different and, in some cases, competing Constitutional rights and interests and, where applicable, the different European Convention on Human Rights (the "Convention") rights and interests involved. Again, there was no dispute between the parties about that.

33. It is also accepted by the parties that a decision as to whether a s. 60 application should be heard in public involves a very fact specific assessment and will turn on the particular facts of the case.

34. The parties are in agreement that there are competing Constitutional and, potentially, Convention rights and interests involved which must be weighed in the balance. At all times, however, it must be borne in mind that the default position is that under s. 60(2) of the 2007 Act suspension applications are heard in private unless the Court orders otherwise.

35. On one side of the balance in terms of the balancing of the different Constitutional rights and interests involved is Article 34.1 of the Constitution. It provides:

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

36. Also relevant in the balance are Articles 40.3.1 and 40.3.2 of the Constitution. They provide as follows:-

"(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.

(2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

37. On the other side of the balance, in Constitutional terms, is Article 40.6.1 under which the State guarantees liberty for the exercise of certain rights, *"subject to public order and morality"*, including:

"i The right of the citizens to express freely their convictions and opinions."

38. As regards the Convention, there are a number of potentially applicable provisions which confer rights and impose obligations which may also need to be weighed in the balance, in an appropriate case. They include rights and obligations under Article 6.1 (the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law but with provision for the press and public to be excluded from all or part of a trial in certain circumstances), Article 8 (the right to respect for private and family life) and Article 10 (freedom of expression). However, having regard to the constitutional provisions engaged, it seems to me that the appropriate balance can be drawn in this case by reference to the various and competing constitutional rights and interests involved and it is unnecessary to consider the provisions of the Convention. The decision on this application can, therefore, be made on the basis of the constitutional rights and interests involved.

39. It is agreed by the parties that in determining this application by Mediahuis, the Court must balance the different constitutional rights and interests involved. Mediahuis argues that the balance should be drawn in favour of a full public hearing of the s. 60 application, or what remains of it, and that it is essentially an *"*all or nothing*"* situation. It maintains that if it can persuade the Court that the default position should be dislodged then the hearing should be fully in public with no restrictions.

40. With respect to Article 34, it relies on certain of the principles set out by O'Donnell J. in his judgment for the Supreme Court in *Gilchrist v. Sunday Newspapers Limited* [2017] 2 I.R. 284, at 316 – 317. In that case, however, the default position was a public hearing and the application was that the hearing should be in private. Mediahuis maintains that restrictions on a public hearing should be strictly construed, in accordance with the principles set out by O'Donnell J. in that case.

41. Mediahuis also maintains that Article 40.6.1 of the Constitution guarantees freedom of the press and it relies on dicta of Fennelly J. in the Supreme Court in *Mahon v. Post Publications* [2007] 3 I.R. 338 and on a number of other authorities. In *Mahon,* Fennelly J. observed that:

> *"The courts do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest. The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest."* (at 374)

42. As indicated earlier, Mediahuis also relies on a number of provisions of the Convention and, in particular, Article 6.1 and Article 10. However, as I have indicated, I am satisfied that I can decide this application on the basis of the balancing of the different constitutional rights and interests involved. I do not believe that the application of the

provisions of the Convention relied upon would lead to a different result as they are not materially different for present purposes.

43. On the other side of the balance, the respondent relies on Article 34 and on Articles 40.3.1 and 40.3.2 and, in particular, on his constitutional rights to his good name and reputation and on his right to earn a livelihood which he says would be infringed if the s. 60 proceedings were to be heard in public or if his identity were to be disclosed as being a respondent to the proceedings.

44. With respect to Article 34, the respondent argues that a s. 60 application does not involve the administration of justice "*in the traditional sense*". Neither Mediahuis nor the Council agrees with this. They are clearly right. In my view, the s. 60 application does involve the administration of justice in light of a whole line of authorities including *In Re Solicitors Act 1954* [1960] I.R. 239, *McDonald v. Bord na gCon (No. 2)* [1965] I.R. 217 and the recent decision of the Supreme Court in *Zalewski v. An Adjudication Officer* [2021] IESC 24. Without prejudice to that contention (which I reject), the respondent relies on the fact that s. 60(2) is a *"special and limited"* exception to the requirement under Article 34.1 that justice be administered in public. He is clearly right about that, although the section itself provides that the Court may order a public hearing of s. 60 proceedings if it considers it appropriate to do so. That is where the balancing exercise comes in.

45. The Council takes a neutral position on where the balance should be drawn in this case but has provided helpful written and oral submissions to the Court to assist it in determining where the balance should be drawn. The Council has also drawn attention to a number of relevant unreported decisions which I have found to be of considerable assistance in reaching my decision on this application.

46. The respondent makes a couple of other points in opposition to Mediahuis's application. Those points concern the timing of the application. He contends, first, that when

s. 60 refers to the application being "*heard*", it must mean that the application must be made before the hearing has been concluded. He contends that Mediahuis's application should have been made at the outset of the s. 60 application but not after judgment has been delivered. Second, the respondent maintains that it would be unfair and in breach of his right to fair procedures for the Court to grant the Mediahuis application when he had already committed material on affidavit in defending the claim on the basis that the hearing would be a private hearing.

47. Having considered all of the material and the helpful submissions of the parties, I am satisfied that it is appropriate for me to hear what remains of the Council's s. 60 application in public and that I should, therefore, depart from the default position contained in s. 60(2). I am also satisfied that I should permit Mediahuis to name and otherwise identify the respondent. Essentially, that means, therefore, that apart from the fact that any further hearing in the s. 60 proceedings will be in public, it will also be necessary for me to issue a revised version of the July judgment, which will name the respondent and may contain certain further information which was redacted from the original version of the judgment. It will, however, be necessary to continue to redact certain information, including the names of those persons who provided references for the respondent as I see no good reason or public interest for those persons to be named and certain information concerning his family situation or for that information to be made public. I set out briefly my reasons for my decision below.

48. I accept, as noted earlier, that the default position under s. 60(2) of the 2007 Act is that applications for orders under s. 60 are heard in private. However, the Court has jurisdiction to direct that those applications be heard in public if it considers that it is appropriate to do so. In reaching a decision as to whether it is appropriate to hear such applications in public, it is necessary for the Court to balance the different constitutional and, where appropriate, Convention rights and interests involved. As I explained earlier, I have

been able to decide this application on the basis of the constitutional rights and interests involved and, since they do not materially differ from the relevant provisions of the Convention, I do not consider it necessary to consider the provisions of the Convention in any detail. The balancing exercise which I have conducted is one which is very fact specific and is based solely on the facts of this case.

49. I have proceeded on the basis that the burden rests on Mediahuis to persuade the Court that it is appropriate to hear the s. 60 application in public and to make the other orders which it seeks. I am satisfied that it has discharged that burden. However, I disagree with the submission made by Mediahuis that the rationale for s. 60(2) is confined to cases where the s. 60 application is brought *ex parte* or where rights of patients or other third parties would be adversely affected by a public hearing. While that is certainly part of the rationale for the default position under s. 60(2), it is much wider than that. I agree with the Council that it will be necessary in most cases for the hearing of a s. 60 application to be in private because of the serious damage which could be caused to a doctor by a public ventilation of allegations against the doctor at a very early stage in the professional disciplinary process and before there has been any sifting of the complaint by the PPC to determine whether there is a *prima facie* case, and, obviously, before the complaint has gone to the FPC under Part 8 of the 2007 Act. It is in this context that it is relevant to note what Hardiman J. said in relation to the important role played by a committee such as the PPC in *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54 and *Corbally v. Medical Council* [2015] 2 I.R. 304. Those comments are reproduced in the Council's written submissions and it is unnecessary to repeat them here.

50. I also disagree that the principles in *Gilchrist* are directly applicable to the balancing exercise which I have to carry out here. In *Gilchrist*, the default position was that the hearing would be in public. In the present case, the default position is that the s. 60 application will

be heard in private. The Supreme Court in *Gilchrist* was dealing with the opposite situation to that which applies in the present case under s. 60(2). Nonetheless, the principles in *Gilchrist* are helpful in identifying some of the relevant considerations which must be borne in mind when construing the scope of a statutory restriction on the principle of a hearing or trial in public. The *Gilchrist* principles are obviously of direct relevance to the hearing of other proceedings under the 2007 Act including, for example, the hearing of a confirmation application under s. 76. Kelly P. made clear in *Medical Council v. T.M.* [2017] IEHC 548 that a confirmation application under s. 76 must be held in public unless a private hearing is warranted by reference to the *Gilchrist* principles. Irvine P. adopted the same approach in *A Social Worker v. CORU* [2021] IEHC 756, in the context of the hearing of an application pursuant to s. 69 of the Health and Social Care Professionals Act 2005 (as amended). She too applied the *Gilchrist* principles in that case in directing the names of the relevant witnesses in the inquiry concerned to be anonymised and that nothing be published which might lead to the witnesses being identified. While the *Gilchrist* principles are of assistance here in terms of the need to balance the requirement for a public hearing in Article 34 with the competing constitutional rights and interests asserted by the respondent, they approach the problem from a different position where the default position is a public hearing whereas here the default position is a private hearing.

51. I also disagree with the submission made by Mediahuis that it is an "all or nothing" situation, in that if I were satisfied that the hearing should be in public then it must be fully in public without any restrictions. In my view, the Court has a wide discretion and can do what has been done in other s. 60 applications. The Council gave examples of a number of decisions of Kelly P. on s. 60 applications where he heard the application in private but gave judgment in public, naming the doctor the subject of the application.

52. The first example given by the Council was a s. 60 application by the Council against *Dr. Patricia Selvarini Black*. In that case, Kelly P. heard the s. 60 application in private but gave his judgment in public on 17th December, 2018, in which he named the doctor. He stated that he had heard the application in private in accordance with the terms of s. 60(2) but delivered his judgment in open court because he was satisfied that it was *"necessary from the point of view of the protection of the public and for public safety that this ruling be given in open court"* and he explained why that was so.

53. The second example given by the Council concerned a s. 60 application brought by the Council against *Dr. Syed Harris Zubair*. In that case, again, Kelly P. heard the application under s. 60 in private but gave judgment in public. The doctor had obtained employment in Ireland at a time when he had provided an undertaking to the Council's Health Committee that he would not work in Ireland. He was also suspected of prescribing medicines on his previous employer's stationery and of making false declarations to the Council regarding his maintenance of professional competence obligations. Kelly P. decided that it was appropriate to deliver his judgment in public having regarding to the *"level of dishonesty shown by Dr. Zubair, the need to protect the public and the need to ensure that this suspension order is notified to anyone in the public or private sector who may be in contact with Dr. Zubair"*. While the judgment in that case was not given in writing, it was reported in the Irish Times on 29th November, 2019.

54. It is clear from the approach taken in these cases that the Court does have a wide discretion as to how it deals with applications under s. 60 and that it can conduct the hearing in private but deliver its judgment in public, naming the doctor and referring to evidence given at the hearing.

55. I agree with Mediahuis that the constitutional protection of the freedom of the press under Article 40.6.1 is a very important protection in a Constitutional democracy based on

the rule of law and is an important factor to be weighed in the balance on an application under s. 60(2) to have the hearing of such an application in public.

56. The respondent also has very important constitutional rights to his good name, reputation and his livelihood. Those rights must be protected from unjust attack. I have to consider whether future hearings of the s. 60 application (or what is left of it) and the publication of his name and identity would constitute an unjust attack on those Constitutional rights. I do not believe that they would.

57. With respect to the respondent's good name and reputation, I do not accept the submission advanced on behalf of the respondent that it is possible to separate out his right to a good name and reputation as a doctor from his right to a good name and reputation as a private citizen. That distinction is too nuanced for me and I do not believe that it is an appropriate one to make in the context of the respondent's constitutional right to a good name and reputation which I must weigh into the balance in deciding this application.

58. In drawing that balance, I must take into account the fact that the respondent committed and pleaded guilty to several serious road traffic offences and Misuse of Drugs Act offences for which he has received periods of disqualification and sentences of five months imprisonment in May 2022 and in April or June 2022, all of which are under appeal. All of those offences took place in public and the respondent pleaded guilty to them in open court. He has appealed his sentences to the Circuit Court which will also hear those appeals in open court. It is inevitable that these events have had a seriously adverse effect on the respondent's good name and reputation as well as on his right to earn a livelihood and to obtain employment. So too inevitably would the publicity arising from the publication of the press articles referred to by Mediahuis in this application. Those articles include the article in the Sligo Champion on 17th January, 2017 (which remains online on independent.ie), in the Sunday World on 4th September, 2022 (which remains online) and in the Sunday Independent

on 11th December, 2022 (which also remains online). The respondent accepts that it was the Sunday World article on 4th September, 2022, that caused him to lose his locum position which he had obtained and which was due to start on 6th September, 2022. I do not accept that the public hearing or identification of the respondent would have the damaging effect contended for by the respondent in circumstances where, on any view, significant damage will already have occurred as a result of the publication of the articles to which I have just referred.

59. That leads me to the main reasons why I believe that the balance clearly falls in favour of granting the public hearing sought by Mediahuis and permitting it to name and identify the respondent as a person involved in the proceedings.

60. There has already been a considerable amount of publicity about the respondent's conduct and about the offences to which he pleaded guilty and was sentenced in open court and which have been appealed by him to the Circuit Court. There has also been publicity concerning his appeal to the Circuit Court which has recently been before Cavan Circuit Court on 8th December, 2022. The Sunday Independent article on 11th December, 2022, which referred to that court appearance also referred to the Sligo Champion article in 2017, and the Sunday World article in September 2022. Even more significantly, the article referred, as it was perfectly entitled to do, to the fact that the Council's public register shows the respondent as having *"provided health-related voluntary undertakings to the High Court"* and that further information could be obtained from the Council's Professional Standards section. That entry in the register was expressly provided for and agreed to by the respondent in one of the additional undertakings given by him on oath on foot of the July judgment.

61. The public are, therefore, already aware from the Sunday Independent article and from the public register kept by the Council that the respondent is the subject of "*health-related voluntary undertakings to the High Court*".

62. The Sunday World article of 4th September, 2022 contains a lot of information concerning the respondent's driving offences and the convictions and sentences he has received for them. I have referred earlier to parts of the Sunday World article. I note again here that the respondent is reported as having volunteered to the reporter that the *"they haven't suspended me or anything but obviously with investigations going on it's hard to get work"*. That statement is in direct quotation marks in the Sunday World article. It is, in my view, misleading. The Council did apply to suspend the respondent and, as I explained in the July judgment, I was only just about and by *"the finest margin possible"* prepared to accept undertakings on oath from the respondent in lieu of making an order suspending his registration under s. 60 of the 2007 Act. It was only because of the very comprehensive undertakings that were agreed by the respondent that the orders sought by the Council were not made. The respondent did not volunteer that qualification in his comment to the reporter.

63. The material before the Court in the form of these newspaper articles (all of which it seems are still online) discloses that there is already a great deal of information out there in the public domain in relation to the respondent, including the offences he committed and the sentences imposed as well as, on the Council's public register, details of the respondent's qualifications and of the fact that he has provided "*health-related voluntary undertakings to the High Court*". That information was also reported in the Sunday Independent on 11th September, 2022. It seems to me that, in those circumstances, to continue to hear the s. 60 application in private and to continue to maintain anonymity in respect of the respondent in the July judgment, would be futile, ineffective and misleading. It would be futile and ineffective by reason of the fact that a great deal of the information set out in the judgment of

29th July, 2022, is already available to the public in the form of the newspaper articles and the Council's public register. It is also apt to mislead in that it is liable to create the impression that, despite all of the matters the subject of those newspaper articles, the Council and the Court have not taken steps in relation to the respondent when that is clearly not the case.

64. While not on all fours with this case, the situation here is somewhat similar to that which arose in *Irish Press plc v. Ingersoll Irish Publications Limited* [1993] ILRM 747. In that case, the Supreme Court refused to hear proceedings under s. 205 of the Companies Act 1963 *in camera*, as there was already a great deal of information concerning the company in the public domain. The Court was satisfied that the public was already aware of so much detail concerning the company's financial affairs by reason of newspaper articles and the publication of audited accounts that any additional disclosure concerning the company's affairs would not seriously prejudice the legitimate interests of the companies: see the judgment of Finlay C.J. at 755 – 756 and of Blayney J. at 763.

65. It seems to me that similar considerations apply here. It would, in my view, be a pointless exercise and would not effectively serve to protect any of the constitutional rights (or indeed the Convention rights) relied on by the respondent from unjust attack if I were to decide to continue to hear the s. 60 application in private and to maintain anonymity in respect of the July judgment.

66. There is another important consideration which has persuaded me to accede to Mediahuis's application and that is the respondent's engagement, such as it was, with the Sunday World reporter which opened the door to the Mediahuis application. The respondent volunteered that he was not suspended. He said *"they haven't suspended me or anything"*. That was only partially correct and was in fact misleading as the respondent failed to point out that the only reason why the Court did not suspend the respondent on the Council's

application was because of the very comprehensive undertakings given by him on oath which just about persuaded the Court not to make the s. 60 suspension orders sought.

67. While not on all fours, there are similarities between this case and what occurred in *Medical Council v. Watters* [2021] IEHC 252 ("*Watters")*. In that case, Irvine P. gave judgment suspending the doctor's registration pursuant to s. 60 of the 2007 Act, initially on the basis that the doctor would not be named. However, Irvine P. subsequently decided that the doctor should be named because he himself had subsequently published information in relation to the decision. While the facts of that case are different to the present case, the approach taken by Irvine P. does make clear that it is open to the Court, in the particular circumstances of the case and, where it considers it appropriate to do so, to vary the default position of a private hearing for a s. 60 application.

68. I regard those two features of the case, namely, the fact that much of the information is already in the public domain in the form of the newspaper articles referred to earlier and the reference in the Council's public register and the fact that the respondent decided to comment to the Sunday World reporter that he had not been suspended, as being very significant in terms of how I should determine Mediahuis's application. Those features, in particular, together with the other matters to which I have referred earlier in this judgment have persuaded me that it is appropriate that I accede to Mediahuis's application.

69. I must now deal with the respondent's further points about the timing of Mediahuis's application, which the respondent says has been brought too late. He says that it should have been brought at the outset of the application and that to accede to it at this stage would breach his right to fair procedures. I disagree.

70. I do agree that usually an application to dislodge the default position of a private hearing under s. 60 should be made at the start of the hearing. However, that will not always be possible. It is likely that in many (if not most) cases, people (including the media) will not

know about the application. They will not know that the Council has decided to bring the application. Nor will they know that the Court has decided to hear and grant the application until after the decision is made or the judgment is published. That is what happened here. It is clear on the evidence that Mediahuis did not know about the s. 60 application until the redacted judgment was published in August 2022. By that stage, the s. 60 application had been substantially heard and judgment given. However, the hearing was not complete and the application was not finally determined at that stage. As I made clear at para. 74 of the July judgment, it was necessary following the delivery of the judgment for the respondent to confirm the undertakings on oath. It was also necessary for the respondent to provide outstanding information to the Council's Health Committee as a matter of urgency. For those reasons, I listed the matter for review on 7th October, 2022 and gave liberty to the Council to apply to the Court in the event that there was any breach of the undertakings or any culpable failure to provide the outstanding information. I also noted that if it became necessary for the Council to apply, there would be a very real risk that I would grant the s. 60 suspension orders sought by the Council. For those reasons, the matter was listed for review on 7th October, 2022. It was put back again from that date to 11th November, 2022, to enable the PPC to complete its consideration of the complaint and, in the event that it was to send the complaint on to the FPC, to ascertain the likely timeline for the FPC to deal with the matter. In those circumstances, I cannot agree with the respondent that the s. 60 application was "heard" to conclusion at the time Mediahuis sought to bring this application. The s. 60 application is, in fact, ongoing and has not yet been struck out or made the subject of final orders.

71. Nor do I accept that an application for a public hearing of a s. 60 application must always be made before the hearing itself. The fact that the Court retains a wide discretion as to the circumstances in which it might be appropriate to direct a public hearing or to direct

that judgment be given in public is clear from the two decisions of Kelly P. which were referred to by the Council in its submissions, namely, the s. 60 applications involving *Dr. Black* and *Dr. Zubair*. Those judgments were given in public and the doctors were named notwithstanding that the hearing of the applications was in private. Similarly, in *Watters*, the hearing was in private, and the judgment was delivered on the basis that the doctor was not named and was published on that basis. However, subsequent to the delivery of the judgment, the judgment was re-issued naming the doctor in circumstances described earlier in this judgment. The application to name the doctor was not heard and determined at the commencement of the hearing of the s. 60 application but sometime after the judgment was initially delivered without naming the doctor. This clearly shows that an order of the type sought by Mediahuis can be made after the delivery of the judgment on a s. 60 application.

72. These cases also suggest that it is not a breach of fair procedures to determine the issues of publicity or the identification of the doctor after the substantive hearing has been held and judgment delivered, as here. I do not accept that there has been any breach of the respondent's right to fair procedures on the facts of this case. He must be taken to have been aware that the Court always retained the jurisdiction to direct a public hearing of the application and to permit the respondent to be named. I should also stress that in this case, the s. 60 application remained live at the time Mediahuis sought to access the hearing on 7th October, 2022, and continued to remain live when its application for a public hearing was made. The s. 60 application remains live as of the date of this decision and is listed for mention alongside the Mediahuis application today.

73. In those circumstances, I reject the submissions made on behalf of the respondent based on the timing of Mediahuis's application.

74. Finally, I reject the contention by the respondent that an application for a public hearing of a s. 60 application or for an order permitting the name or identity of the doctor to

be disclosed should not be acceded to where the Court has not granted a s. 60 suspension order. There may well have been good reasons why, in a particular application, the Court has decided not to grant a s. 60 suspension order. Among those reasons might be where extensive undertakings are given by the doctor in response to the application. That was the case here, where I made clear in the judgment that the balance was a very fine one and where I was just about persuaded that, in light of the undertakings offered by the respondent, the s. 60 suspension order should not be made. It can fairly be said in this case that the respondent avoided a suspension *"by the skin of his teeth"*. To adopt an *a priori* rule that the Court cannot consider directing a public hearing or naming the doctor in circumstances where it has not granted a s. 60 suspension order would, in my view, be inappropriate. It would be entirely contrary to the broad discretion which the Court has in s. 60(2) to direct a public hearing where it considers that it is appropriate to do so.

Conclusion

75. For all of these reasons, I am satisfied that it is appropriate to grant the reliefs sought by Mediahuis. For the avoidance of doubt, I intend to make the following orders:

(1) An order that the further hearings of these proceedings be conducted in public pursuant to s. 60(2) of the Medical Practitioners Act 2007;

(2) An order permitting Mediahuis Ireland Limited (and others) to name and otherwise identify the respondent.

76. As a consequence of these orders, it will be necessary for me to reissue the July judgment, so as to name the respondent doctor. It seems to me that I should continue to redact the names of the persons who provided references to the respondent as well as a reference to an aspect of the respondent's personal family circumstances. However, it is probably not necessary to redact any other parts of the judgment. I would intend, therefore, in the first instance, at least, reissuing the July judgment and naming the

respondent doctor with two changes. The first involves the naming of the respondent and the second involves redacting reference to an aspect of his personal family circumstances.