APPROVED

[2024] IEHC 54

THE HIGH COURT

Record No. 2022 632 JR

BETWEEN:

C

Applicant

-and-

P

Respondents

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 31st day of January 2024

INTRODUCTION

Preliminary

1. This is a preliminary application on behalf of the Applicant who seeks directions from the court as to the manner in which the substantive judicial review application should be heard.

2. Ms. Eileen Barrington SC and Mr. Eoghan Cole SC appeared for the Applicant and Mr. Remy Farrell SC and Mr. Eoghan O'Sullivan BL appeared for the Respondents.[1] The application was moved by Ms. Barrington SC and Mr. Farrell SC adopted a neutral position.

3. The substantive application for judicial review seeks to challenge a decision made by a panel of the Respondents dated 21st June 2022, which found that as a part of its disciplinary process, certain disputed and contested evidence, would be deemed admissible.

4. In summary, this related to the admissibility of screenshots of information allegedly procured unlawfully from a mobile messaging application.

5. The consequential issue which arises in the context of the substantive judicial review application is whether or not this constituted information which suggested that the

[1] The parties are referred to as the Applicant and the Respondents and/or counsel for the Applicant and counsel for the Respondents.

Applicant had been in communication over a defined period of time with a third-party adult person (with whom the Applicant states they had one consensual sexual encounter) and was such as to constitute evidence of the existence of an alleged relationship, or whether this information was fake.

6. At a preliminary hearing on 1st February 2022 an inquiry panel of the Respondents decided *inter alia* that the inquiry would proceed as an oral hearing in public and that there would be full anonymity in relation to (a) any publication relating to the inquiry in respect of the Applicant, (b) all witnesses who would be called to give evidence, (c) any person referred to at the inquiry, (d) the institution involved and (e) any person, place or thing or matter which may identify or enable identification of the aforesaid.

7. The issue in relation to the admissibility of the information referred to in paragraphs 3 and 4 above was the subject of a further preliminary hearing held on 31st May 2022 and a decision in favour of its admissibility was made on 21st June 2022. As mentioned, it is this decision which is the subject of the substantive judicial review application.

8. When the application for leave to apply for judicial was initially moved *ex parte* before the court (Meenan J.) on 24th October 2022,[2] in addition to granting 'leave', the court made an anonymisation order directing that the publication or broadcast of any matter relating to the proceedings which would or could identify the Applicant be prohibited and the title of the proceedings be amended for the same reason. The court gave the

[2] When the application, the subject of these proceedings was moved before the court on 19th December 2023, it was submitted that the reference to section 45 of the Courts (Supplemental Provisions) Act 1961 (as amended) in the Order of the Court dated 24th October 2022 was in error.

Applicant liberty to apply for an order directing that the proceedings be heard *in camera*[3] which represents the gravamen of the application before me.

LEGAL PRINCIPLES

The decision in Gilchrist

9. Albeit in a very different factual context, the court's *common law* power to direct an *in camera* hearing was the subject of detailed analysis by the Supreme Court (O'Donnell J.)[4] in the seminal decision of *Gilchrist & Rogers v Sunday Newspapers Ltd* [2017] IESC 18 [2017]; 2 I.R. 284 ("*Gilchrist*").

10. The Supreme Court in *Gilchrist* considered *inter alia* Article 34.1 of the Constitution which provides that "*[j]ustice 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.*"

11. In summary, the decision of the Supreme Court in *Gilchrist* made it clear that Article 34.1 of the Constitution mandated a restrictive, exceptional and proportionate curial approach (*i.e.*, one which should be "*closely and jealously scrutinised*"[5] and "*strictly construed and applied*")[6] to the exercise of *the common law power* of the court to direct

[3] When the matter came before the court (Simons J.) on 16th November 2023, the court directed that legal submissions be furnished addressing the anonymisation and *in camera* issues.

[4] As he then was.

[5] *Gilchrist & Rogers v Sunday Newspapers Ltd* [2017] IESC 18 per O'Donnell J. at paragraph 39

[6] *Gilchrist & Rogers v Sunday Newspapers Ltd* [2017] IESC 18 per O'Donnell J. at paragraph 39.

a trial *in camera* where it was required (for example, when constitutional values were engaged), because the requirement that justice be administered in public pursuant to Article 34.1 was a fundamental constitutional value of great importance.

12. There are examples of decisions, both prior, and subsequent to, the judgment in *Gilchrist* where the courts have directed reporting restrictions (in terms of the names of the persons and the locations concerned) because of the nature of the allegations and the circumstances of the regulatory and disciplinary process involved and without necessarily elaborating upon any further basis for so doing: *T v The Medical Council* [2011] IEHC 352; *H.H. v The Medical Council* [2012] IEHC 527; *T v The Nursing Board* [2020] IEHC 491; *B.M. v Fitness to Practice Committee of the Medical Council* [2019] IEHC 106.

The application of the decision in Gilchrist

13. The application before me does not involve a statutory power to consider an application for an *in camera* hearing but rather seeks to invoke the application of the court's common law power to direct an *in camera* hearing and thus go further than the anonymisation orders granted heretofore. The raising of this question in other regulatory contexts, similar to the one which is before me, has been the subject of a number of decisions of the Superior Courts and was discussed, for example, by the High Court (Kelly P.) in *Medical Council v Anonymous* [2019] IEHC 109 and by the High Court (O'Moore J.) in *The Medical Council v A Medical Practitioner* [2020] IEHC 245.

14. In *The Medical Council v A Medical Practitioner* [2020] IEHC 245 the High Court (O'Moore J.) at paragraph 3 of its judgment adopted the following approach of Kelly

P. in *Medical Council v Anonymous* [2019] IEHC 109 (at paragraphs 26 and 27 of the Court's judgment) where after adumbrating the principles set out by the Supreme Court (O'Donnell J.) in *Gilchrist* (at paragraph 25 of his judgment), Kelly P. stated, in the context of an application by the Medical Council pursuant to section 76 of the Medical Council Act 2007, as follows:

> "… *26. [t]his application for an in camera hearing must be viewed in the light of those comments. I must also take into account that the legislature gave consideration in the Act to hearings being conducted by this court otherwise than in public but expressly confined such an ability to applications to suspend under s.60 of the Act. It is thus not unreasonable to conclude that the intention of the legislature by implication was in favour of applications under s.76 being heard in public.*
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> *27. In the light of these considerations I now consider the Council's application. I must approach the application with resolute scepticism of its claim which seeks to have me depart from a full hearing in public. I must be sure that the interests involved are very clear and that the circumstances are pressing. I must be satisfied that there is no other measure sufficient to protect the legitimate interests involved. The interests involved are those of the public, the patients of the doctor and the doctor himself. Nothing more should be permitted than is demonstrated to be necessary to avoid damage to the interests involved.*"

15. The High Court (Kelly P.) in *Medical Council v Anonymous* [2019] IEHC 109 (at paragraphs 22 and 23) described the decision of the Supreme Court in *Gilchrist & Rogers v Sunday Newspapers Ltd* [2017] IESC 18 as reanimating "… *a common law power which was regarded as having been rendered defunct by the decision of the Supreme Court in* Re R Ltd *[1989] I.R. 126. (23) The current state of the law is that there is such a common law power and it falls to be exercised within the parameters identified in the judgment of O'Donnell J. in Gilchrist's case. As he said:- 'There is a continuing common law power to direct a trial in camera where it is required, and that such a course could be particularly justified when constitutional values are engaged.'*"[7]

ASSESSMENT & DECISION

16. In considering this matter I am obliged to adopt and apply a strict construction and sceptical perspective to the claim of exceptionality to the principle of trial in public which is raised in this application.

17. I am of the view that the facts and circumstances of this case, in the context of the net issue concerning the question of the admissibility of the contested evidence, are exceptional and pressing.

18. The claimed interests of the Applicant include the constitutional rights of privacy, good name and reputation and the right to earn a livelihood.

[7] *Medical Council v Anonymous* [2019] IEHC 109 per Kelly P. at paragraphs 22 and 23; see also the decision of Kelly P. in *Medical Council v TM* [2017] IEHC 548.

19. Further, in terms of the future hearing of the substantive judicial review application, I do not consider that an order short of a hearing *in camera*, including an order directing anonymity – even one applied in the most extensive way to the identity of the parties, of witnesses, of institutions and of location – is sufficiently proportionate to guarantee the countervailing interests in the protection of the aforesaid constitutional rights which the Applicant submits are engaged. I, of course, express no view whatsoever on the merits or otherwise of the claim made in the substantive application for judicial review.

20. Accordingly, for the following reasons, I am of the view that the Applicant has shown in this application that there is a risk that justice cannot be done unless the hearing of the substantive judicial review application is conducted otherwise than in public, by an order directing that the substantive application be heard *in camera*.

21. First, whilst I have taken judicial notice of the fact that there are relatively few inquiries before the Respondents because of the requirement that its internal processes be exhausted, that fact (of very few cases arising), combined with the particular context applicable in this case concerning the question of the admissibility of the particular evidence, means that there is a risk of identification of the Applicant and other parties, and, therefore, potential prejudice to the Applicant in the future disciplinary hearing, notwithstanding that the persons, institutions and locations are already anonymised.[8]

[8] By analogy in *The Medical Council v A Medical Practitioner* [2020] IEHC 245 the High Court (O'Moore J.) observed at paragraph 8 that: "… *[i]t is clear from the authorities opened to me that the Court should depart from a full hearing in public only to the extent necessary to avoid damage to the countervailing interests, in this case the privacy of the witnesses (inasmuch as this arises) and the compromising of any criminal prosecution.*"

22. Second, the relevant institution, and persons involved in its governance structure, sought anonymisation for *inter alia* general reputational, trust and confidence reasons and, as set out at the beginning of this judgment, the Respondents had already decided that anonymisation was warranted in respect of the parties and witnesses to the hearing. Consistent with this approach, the Respondents in paragraph 6 of their Statement of Opposition state that they will "… *take a neutral position with respect to the Applicant's application to depart from the default position that these proceedings should be heard in public pursuant to Article 34 of the Constitution*." Accordingly, there appears to be a general consensus on the holding of a hearing otherwise than in public (i.e., anonymisation) and the gravamen of this application is whether the further step (albeit one of great constitutional significance) of directing an *in camera* hearing is justified on the facts of this case, with the Respondents adopting a neutral position on that issue.

23. Third, the Applicant continues to be in employment, unrestricted by any measure, is in good standing and, since the time of the allegations, works in a different location. Further, the Applicant's current employers are not aware of the allegations.

24. Fourth, the Applicant has never been the subject of an application to have their registration suspended in the public interest.

25. Fifth, identification of the parties/persons, institutions or locations involved could have consequential negative effects for those parties, and for third parties and institutions.

26. Sixth, as mentioned earlier, the decision of the High Court (Kelly P.) in *Medical Council v Anonymous* [2019] IEHC 109 concerned an application by the Medical Council to have an intended application to be made by the Medical Council pursuant to section 76 of the Medical Practitioners Act 2007 to held *in camera*. The approach of the court, relying on its common law power, was to hold the hearing of the initial application (to have the section 76 application heard *in camera*) *in camera*, where Kelly P. clearly found that if he did not accede to the application, judgment would be delivered in open court, which is what occurred, with the court refusing to direct an *in camera* hearing but fashioning its own order to protect the anonymity of those involved, or as submitted on behalf of the Applicant in this case, calibrating an order to the facts of the case.

27. When this matter came before me, the orders of this court, heretofore, had been to continue the anonymisation orders directed at the initial leave application while granting the Applicant liberty to apply for an *in camera* hearing.

28. As with the first reason (referred to at paragraph 21 above), a direction of anonymisation in relation to parties/persons, institutions or locations, in and of itself, at the substantive hearing may be insufficient to prevent the publication of the central issue concerning the details of what is alleged in general terms in the context of the collation of unlawful evidence. This could mean that a panel of the Respondents hearing the matter could potentially become aware of the detail of this alleged issue, irrespective

of any decision of the court as to its admissibility and accordingly, any decision of the court in respect of the exclusion of this evidence may be potentially undermined, if not indeed, rendered moot.

29. By analogy, in *G v DPP* [2023] IEHC 134, this court (Simons J.) addressed the circumstances where the applicant in that case applied to have criminal proceedings which were listed before the District Court anonymised and the District Court refused the application. In granting leave, Simons J. observed at paragraph 28 of the judgment that he had previously directed that reporting restrictions apply to the judicial review proceedings *pro tempore* as it "*would render the proceedings nugatory if such an order were not imposed because the identity of the parties, which is the very thing that the applicant seeks to protect, would have been disclosed*."

30. Ms. Barrington SC argued that if the Applicant's application for judicial review was reported on, even on an anonymised basis, it remained capable of ultimately causing the Applicant damage and prejudice at a future hearing before the Respondent where the limited pool of persons necessarily involved will know and be aware of the circumstances and persons involved in the case concerning the admissibility or otherwise of alleged screenshots of information allegedly procured unlawfully from a mobile messaging application.

31. Indeed, while it may very well be the case that the reporting of the court applications to date, for example the leave application made on 24th October 2022, in accordance with the anonymisation orders of the court, have already referred to this central issue concerning the admissibility or otherwise of alleged screenshots of information

allegedly procured unlawfully from a mobile messaging application, the anonymisation orders, however, remain in place and notwithstanding the fact of any previous publication of the central allegation in accordance with court orders, the current application is being maintained, and argued for, on behalf of the Applicant, as the necessary protection for the Applicant in the particular circumstances of this case.

32. In this regard, during the application before me, it was submitted on behalf of the Applicant, having regard to the decision of Kelly P. in *Medical Council v Anonymous* [2019] IEHC 109, the hearing of this application on 19th December 2023 could be considered, on a *pro tempore* basis, to be an *in camera* hearing, pending the consideration of the application and the delivering of this reserved judgment. In the circumstances, I acceded to that application.

33. As stated above, in terms of the application before me, I consider that there is a risk of prejudice to the Applicant if the future substantive proceedings are the subject of publication, even on anonymised basis, in particular having regard to the very few cases involving the Respondents which are litigated and the nature of substantive issue concerning the admissibility or otherwise of the information referred to, which was allegedly procured unlawfully from a mobile messaging application.

PROPOSED ORDERS

34. In the circumstance of this case, I will therefore make an Order directing that the hearing of this application for judicial review proceed *in camera* and shall be listed accordingly.

35. I have, in the first instance, furnished this judgment to the legal representatives of the Applicant and the Respondent only to allow for their and their respective clients' consideration of the judgment and any further or other consequential or ancillary matters, including further redactions, which may arise. In this regard, I have anonymised further the names of the parties to "the Applicant" and "the Respondents" in this judgment and have sought to generalise matters, where possible.

36. Subject to hearing from the parties, I propose to make no order as to the costs of this application to have the substantive application heard *in camera*.

37. When this matter came before me on Wednesday 31st January 2024, the title of the proceedings was adopted as C (applicant) v P (respondents), a date was given for the substantive hearing, and after hearing from the parties, the costs of this application were reserved.