



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 25

P732/21

OPINION BY LORD BRAILSFORD

In the Petition of

THE GENERAL MEDICAL COUNCIL

Petitioner

for

Extension in terms of the Medical Act 1983, section 41A(6) and (7), of an interim order in respect of MM

**Petitioner: Lindsay QC; Anderson Strathern LLP**  
**Respondent: Paterson; MDDUS**

10 March 2022

[1] The petitioner is the General Medical Council (hereinafter referred to as “the GMC”). The respondent is MM (hereinafter referred to as “the respondent”). The petitioner invites the court to extend further, by a period of 12 months, the period of the interim order of conditions imposed by the Interim Orders Tribunal hereinafter referred to as the “IOT”) on 16 April 2019. The petitioner’s application proceeds in terms of section 41A(6) and (7) of the Medical Act 1983 (“the Act”).

[2] Section 41A of the Act provides as follows:

“(A1) Where a matter is referred under section 35C(8) to the MPTS, (‘Medical Practitioners Tribunal Service’) the MPTS must arrange for an Interim Orders

Tribunal or a Medical Practitioners Tribunal to decide whether to make an order as mentioned in that provision.

- (1) Where an Interim Orders Tribunal or a Medical Practitioners Tribunal in arrangements made under subsection (A1), or a Medical Practitioners Tribunal on their consideration of a matter, are satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of a fully registered person, for the registration of that person to be suspended or to be made subject to conditions, the Tribunal may make an order —
  - (a) that his registration in the register shall be suspended (that is to say, shall not have effect) during such period not exceeding eighteen months as may be specified in the order (an ‘interim suspension order’); or
  - (b) that his registration shall be conditional on his compliance, during such period not exceeding eighteen months as may be specified in the order, with such requirements so specified as the Tribunal think fit to impose (an ‘order for interim conditional registration’).
- (2) Subject to subsection (9) below, where an Interim Orders Tribunal or a Medical Practitioners Tribunal have made an order under subsection (1) above, an Interim Orders Tribunal or a Medical Practitioners Tribunal —
  - (a) shall review it within the period of six months beginning on the date on which the order was made, and shall thereafter, for so long as the order continues in force, further review it —
    - (i) before the end of the period of six months beginning on the date of the decision of the immediately preceding review; or
    - (ii) if after the end of the period of three months beginning on the date of the decision of the immediately preceding review the person concerned requests an earlier review, as soon as practicable after that request; and
  - (b) may review it where new evidence relevant to the order has become available after the making of the order.
- (3) Where an interim suspension order or an order for interim conditional registration has been made in relation to any person under any provision of this section (including this subsection), an Interim Orders Tribunal or a Medical Practitioners Tribunal may, subject to subsection (4) below —
  - (a) revoke the order or revoke any condition imposed by the order;
  - (b) vary any condition imposed by the order;
  - (c) if satisfied that to do so is necessary for the protection of members of the public or is otherwise in the public interest, or is in the interests of the person concerned, replace an order for interim conditional registration with an interim suspension order having effect for the remainder of the term of the former; or
  - (d) if satisfied that to do so is necessary for the protection of members of the public, or is otherwise in the public interest, or is in the interests of the person concerned, replace an interim suspension order with an order for interim conditional registration having effect for the remainder of the term of the former.

- (3A) Where an Interim Orders Tribunal or a Medical Practitioners Tribunal have yet to hold a hearing to consider a case in which they would have the power to make an order under subsection (3) above, but the person concerned and the General Council have already agreed in writing to the terms of such an order —
- (a) the Tribunal, on considering the matter on the papers, or the chair of the Tribunal, on doing so instead of the Tribunal, may make an order on the agreed terms; or
  - (b) if the Tribunal or chair (as the case may be) acting under paragraph (a) determines that the Tribunal should hold a hearing to consider the matter, the MPTS must arrange for a hearing of the Tribunal for that purpose.
- (3B) An order made under subsection (3A)(a) by a Tribunal or the chair of a Tribunal is to be treated for the purposes of this Act as if it had been made by the Tribunal under subsection (3).
- (4) No order under subsection (1) or (3)(b) to (d) above shall be made by a Tribunal in respect of any person unless he has been afforded an opportunity of appearing before the Tribunal and being heard on the question of whether such an order should be made in his case.
- (5) If an order is made under any provision of this section, the MPTS shall without delay serve a notification of the order on the person to whose registration it relates.
- (6) The General Council may apply to the relevant court for an order made by an Interim Orders Tribunal or a Medical Practitioners Tribunal under subsection (1) or (3) above to be extended, and may apply again for further extensions.
- (7) On such an application the relevant court may extend (or further extend) for up to 12 months the period for which the order has effect.
- (8) Any reference in this section to an interim suspension order, or to an order for interim conditional registration, includes a reference to such an order as so extended.
- (9) For the purposes of subsection (2) above the first review after the relevant court's extension of an order made by [an Interim Orders Tribunal or a Medical Practitioners Tribunal or after a replacement order made by an Interim Orders Tribunal or a Medical Practitioners Tribunal under subsection (3)(c) or (d) above shall take place —
- (a) if the order (or the order which has been replaced) had not been reviewed at all under subsection (2), within the period of six months beginning on the date on which the relevant court ordered the extension or on which a replacement order under subsection (3)(c) or (d) was made; and
  - (b) if it had been reviewed under the provision, within the period of three months beginning on that date.
- (10) Where an order has effect under any provision of this section, the relevant court may —
- (a) in the case of an interim suspension order, terminate the suspension;
  - (b) in the case of an order for interim conditional registration, revoke or vary any condition imposed by the order;

- (c) in either case, substitute for the period specified in the order (or in the order extending it) some other period which could have been specified in the order when it was made (or in the order extending it), and the decision of the relevant court under any application under this subsection shall be final.
- (11) Except as provided in subsection (12) below, while a person's registration in the register is suspended by virtue of an interim suspension order under this section he shall be treated as not being registered in the register notwithstanding that his name still appears in the register.
- (12) Notwithstanding subsection (11) above, sections 31A, 35C to 35E and 39 above shall continue to apply to a person whose registration in the register is suspended.
- (13) This section applies to a provisionally registered person whether or not the circumstances are such that he falls within the meaning in this Act of the expression 'fully registered person'.
- (14) In this section 'the relevant court' has the same meaning as in section 40(5) above."

[3] Under section 41A(1) of the 1983 Act, the IOT can, where it is satisfied that it is necessary for the protection of members of the public or is otherwise in the public interest or the medical practitioner's own interest, make an order for the medical practitioner's registration to be suspended or restricted by way of conditions. In the present case the IOT imposed the maximum period permitted for an interim order, 18 months (section 41(1)(b)). The reason given for this was "because of the time required for completion of the GMC investigation and refer to a Medical Practitioners Tribunal, if it is decided this is appropriate".<sup>1</sup> In 2020 the petitioner sought an extension from the court for the maximum period that the court is empowered to grant, 12 months (section 41A(7)). That was granted by interlocutor of this court on 9 September 2020. In the present petition the petitioner again seeks from the court the maximum extension permissible.

[4] The reason advanced by senior counsel for the petitioner in justification of the orders sought in the petition were as a matter of pleading to be found in paragraph 9 of the

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<sup>1</sup> See Number 6/1/5 of process

petition.<sup>2</sup> These were adhered to, essentially without elaboration, in submission. It was said that there may be impairment of the respondent's fitness to practise which may adversely affect the public interest. It was submitted that balancing the respondent's interests and the interests of the public, an interim conditions order remained necessary. A reasonable and properly informed member of the public would, in the light of the concerns, be surprised and offended were they to learn that the respondent had been permitted to return to unrestricted practice whilst the regulatory proceedings remain on-going. Public confidence in the profession may be seriously undermined if the respondent was allowed to return to unrestricted practice before the conclusion of the regulatory proceedings. While the interim order restricted the respondent's ability to practice medicine, the interim conditions order was a proportionate response because making no order would fail to maintain public confidence in the profession and the current conditions were a measurable, workable and an enforceable means of addressing the risks identified. In that regard no issue had been identified as regards the effective operation of the conditions presently imposed. In the circumstances the council sought an extension of the interim conditions order for a period of 12 months, from 15 October 2021 to 15 October 2022.

[5] Counsel for the respondent, in answer, initially informed the court that there was no reported Scottish authority dealing with an application under section 47A(7) of the Act, but that applicable principles were authoritatively determined by the Court of Appeal of England and Wales in the judgement of Arden LJ (as she then was) in *GMC v Hiew*.<sup>3</sup> I interject to record that senior counsel for the petitioners took no issue with the immediately foregoing propositions.

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<sup>2</sup> Petition as adjusted 22/10/2021

<sup>3</sup> [2007] 1 WLR 2007 at paras [26]-[33]

[6] Counsel then advanced on the foregoing authority five propositions he submitted were derived from the decision of the English court and said to be equally applicable in a Scots court determining an application under section 47A(7) of the Act. These were: (a) The court is not exercising a review function but rather acts as a primary decision maker; (b) The criteria for the exercise by the court of its power is the same as for the original interim order, namely the protection of the public interest; (c) The onus of satisfying the court that the criteria are met falls on the petitioner; (d) The court requires to reach its decision on the basis of the evidence on the application, which will include evidence as to the opinion of the petitioner as to the need for an interim order; (e) The court is not bound to follow that opinion, nor defer to it, but rather should give such weight to it as in the circumstances of the case it thinks fit.

[7] Applying these propositions counsel's submission was that the petitioner had produced no evidence of the kind required (see paras [29] and [32] of *Hiew (supra)*) notwithstanding an onus resting on the petitioner to demonstrate the necessity and proportionality of the conditions which it seeks to have imposed upon the respondent for a further period of 12 months. The petitioner's articulation of those issues was said to be restricted to matters averred in paragraph 9 of the petition, and solely on that basis the petitioner's application ought to fail. On this chapter of his submission counsel further observed that the petitioner failed to set forth clear and cogent reasons justifying the imposition of conditions upon the respondent for a further 12 months.

[8] Developing this further counsel observed that as a matter of pleading the petitioners' position was that "Public confidence in the profession may be seriously undermined if the respondent was allowed to return to unrestricted practice before the conclusion of the

regulatory proceedings.....".<sup>4</sup> In its own guidance the petitioners describe an issue for consideration for the imposition of an interim order as follows: "Whether public confidence in the medical profession is likely to be seriously damaged if the doctor continues to hold unrestricted registration during the relevant period."<sup>5</sup> It followed that the petitioners had applied the wrong test when considering the issue of extension of restrictions on practice.

[9] In relation to proportionality the submission was that it was necessary for the petitioners to carry out a balancing exercise between the likelihood of damage to public confidence on the one hand, and the impact on or prejudice to the practitioner on the other. The petition, it was said, failed to carry out this exercise. Whilst the petitioners acknowledged that the conditions imposed affected the respondent's ability to practice medicine, the financial and reputational prejudice to the respondent, details of which were set forth in an affidavit by the respondent,<sup>6</sup> were not explored in the petitioners' case. An assessment of proportionality could not have been carried out without the petitioners identifying and taking those matters into account.

[10] The last part of the substantive argument for the respondent related to delay in advancing the petitioners case. Delay was used both as a factor in relation to the argument advanced relative to the proportionality exercise and as a standalone argument. It was submitted that on the petitioners own time estimate it would take 3½ years to conclude investigation and complete any tribunal hearing following therefrom. There was said to be an absence of any cogent evidence explaining and justifying such delay. Further, there was said to be an obligation incumbent upon the petitioners to provide all information relative

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<sup>4</sup> Petition (as adjusted 22.10.21) at paragraph 9

<sup>5</sup> Paragraph 24b of GMC Guidance

<sup>6</sup> Number 7/16 of process

to the delay whether or not that information was supportive of the case for an extension of restrictions.

## **Conclusions**

[11] The basis upon which the petitioners seek an extension of the period during which the respondent is subject to restrictions in his practice is set forth in paragraph 9 of the petition. The opening sentence of that paragraph is as follows: "That there may be impairment of the respondent's fitness to practice which may adversely affect the public interest." Thereafter there are averments, albeit stated relatively briefly and in general terms which purport to identify reasons which might cause concerns to the general public if the restrictions imposed upon the respondent did not remain in place. The primary problem is that in the first sentence which I have quoted the petitioners set forth the wrong test which requires to be applied when considering the issue of the need for restrictions on a medical practitioner's licence to practice. As was identified and advanced by counsel for the respondent the petitioners' own guidance in relation to the appropriate test is; "Whether public confidence in the medical profession is likely to be seriously damaged if the doctor continues to hold unrestricted registration during the relevant period." In my view it is tolerably clear as a simple matter of language that the test in the petitioners' guidelines has a higher threshold than that which they stated in their pleadings to be appropriate and which, the court must assume, was applied in consideration of the application to extend the period of restriction. The submission on behalf of the respondent was because of that error the petitioners' application "must fail". I agree with that submission.

[12] My above finding is sufficient to determine the present application in favour of the respondent. I should however, simply as a matter of completeness, indicate that I



considered there was merit in the remainder of the respondent's submissions, with the exception of delay which I will deal with briefly subsequently.

[13] I am satisfied that no clear and cogent reasons for the petitioners' decision were advanced. Counsel for the respondent in his written submission described the reasons provided in the petition as amounting "... to little more than a recital or parroting of general formula." I am bound to state that I recognise some force in that categorisation. In the pleadings I can determine no attempt to relate any of the factual material arising out of the respondent's case to the test, albeit the test they advanced was the incorrect one, with which it was necessary to engage in determining the question of whether or not an extension of time was justified. An inevitable result of such failure to engage was that there was no real attempt to properly evaluate as to whether or not the extension sought was proportionate. The averments and supporting submission amounted, in my view, to no more than an assertion that an extension of the period of restriction was a necessary and proportionate step to take.

[14] The one area where, had it remained a live issue, I would not have preferred the respondent's position was in relation to delay. It is correct that in chronological terms the investigation into the respondent has been lengthy, counsel for the respondent put forward a period of 3½ years and I did not understand that to be challenged by senior counsel for the petitioner. I do however consider that the period must be placed in context. That context is, first, the fact that a significant proportion of the whole period has been during the Covid pandemic. Whilst I accept that it is difficult to determine how much of a given delay was a direct result of restrictions necessitated by regulatory provision enforced during the Covid pandemic I am prepared to accept even as a matter of generality that this feature occasioned some delay. The second factor is that there has been a police investigation into the

respondent in relation to his medical practice. During the currency of that investigation the petitioners' position was that they could not progress their own enquiries. Whilst it is again difficult to determine exactly how much delay this occasioned, primarily because the police were under similar problems in relation to the Covid pandemic, I am again prepared to accept that it is a legitimate reason for considering that the petitioners' enquiries might have been lengthier than would have occurred in a period when there was no national pandemic. For these reasons I am not satisfied that the case in relation to delay has been made out.

[15] As I have already indicated my first finding, the petitioners' proceeding on an erroneous understanding of their own guidelines is sufficient to determine this application in favour of the respondent. I refuse that application.