

Neutral Citation No: [2020] NIQB 43

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: MAG11255

Delivered: 21/04/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

2019/44384

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 31(8)
OF THE NURSING AND MIDWIFERY ORDER 2001
TO EXTEND AN INTERIM ORDER**

Between:

THE NURSING AND MIDWIFERY COUNCIL

Applicant

and

STEPHEN ANDREW HOLDER

Respondent

MAGUIRE J

Introduction

[1] The applicant in this application is the Nursing and Midwifery Council ("the NMC"). The respondent is a Mr Holder ("the respondent"). The respondent is a man aged 58/59 years and is a registered nurse. He has worked in this capacity for a considerable period of time. His registration as a nurse remains live, though he is currently not at work and not in employment.

[2] The events which give rise to this application have been considered by the court but for reasons which will become clear it is unnecessary for the court to discuss these in detail. In essence, the following can, however, be stated:

- (a) At all material times, for present purposes, the respondent had been employed by the Northern Health and Social Care Trust ("the Trust"). He worked as a nurse therapist and his work brought him into contact professionally with young persons.

- (b) In or about 2016 and then thereafter a number of allegations in respect of the respondent's behaviour in relation to young girls came to the attention of the Trust. As a result, an investigation was begun by the Trust in relation to these. The nature of these allegations is evidenced in the papers before the court. It would not, in the court's judgment, serve a useful purpose to set them out here.
- (c) The investigation did not, however, run to completion, as the respondent resigned from his employment in June 2017. Since then the respondent has not been in employment and he maintains that he no longer wishes to be employed as a nurse.
- (d) The Trust made (in 2017) a referral of the respondent's case to the NMC and as a result the NMC has been concerned about the respondent's suitability to continue to be registered as a therapist nurse and as to whether there has been impairment of his fitness to practice.
- (e) On 14 December 2017 a Committee of the applicant considered the respondent's case. The Committee decided that it should put in place an interim order of suspension ("ISO") suspending the respondent's registration as a step necessary to protect members of the public and a step otherwise in the public interest. The suspension was pending the investigation of the matter by the NMC and a decision about whether the respondent had a case to answer at a Fitness to Practice hearing.
- (f) The above order was initially for a period of 18 months and was made subject to the usual regime of regular reviews.
- (g) On 20 May 2019 this court was requested by the NMC to extend the ISO in respect of the respondent and did so for a period of 5 months, subject to the usual regime of reviews.
- (h) An important milestone was reached in September 2019 when a decision was made by case examiners that the respondent had a case to answer ("the case examiners' decision"). This followed a detailed consideration of the case which resulted in a reasoned decision which had the effect that only certain of the allegations made against the respondent would go to a full hearing before the Fitness to Practice Committee ("FTPC"). While there had been four complainants hitherto, the number of complainants was reduced to one.
- (i) On 7 November 2019 this court was requested by the NMC to extend the ISO further. The court agreed to do this and extended the period by four months. This was on the basis that the court had been told that a substantive hearing of the respondent's case was to take place before a FTPC in January 2020. At this stage it therefore appeared to the court that matters were coming to a head and that the FTPC should be able to resolve all issues – one way or the

other - within the timescale which the court had granted. It seemed logical to extend the ISO until this process completed, especially in view of the fact that there had been a detailed review of the respondent's case carried out in July 2019. On that occasion, the respondent had participated fully in the proceedings and the committee provided a fully reasoned decision.

- (j) In fact, the proposed hearing of January 2020 did not take place and had to be adjourned. This came about principally because an issue in respect of discovery had been raised by the respondent and also because an issue had arisen about the availability of one of the applicant's witnesses to attend the hearing. The adjournment was agreed between the parties.
- (k) In the above circumstances, in February 2020, the NMC filed the application which is now before the court for a further extension of time. Initially, it had been hoped by them that a hearing before the FTPC would be able to take place in May 2020 but this now appears unlikely due to the pressures which have arisen in recent times arising out of the spread of the Corona-virus. Any hearing therefore, it appears, may have to be put back further.

Events before the Court

[3] The application before the court was initially listed on 6 March 2020. However, while counsel for the NMC and Mr Holder were present on the day of listing it became clear following discussion that Mr Holder wished some time to prepare his approach to the NMC's application. In these circumstances the continuation of the hearing was adjourned to 1 April 2020. In the interim, the court sought written submissions from the parties, which later were received. However, due to the advent of the Corona-virus emergency it became clear that an oral hearing could not take place on 1 April. The court, accordingly, adjourned the proceedings further to enable the court to consider all of the written material before it and make a decision on the applicant's application.

[4] Following the court overcoming certain logistical problems which emerged thereafter, again related to the present emergency, the court will now by this judgment provide its decision on the application, taking into account that the NMC has recently indicated that it will have to seek an extension of seven months' duration to take account of the present difficulties resulting from the progress of the Corona-virus pandemic. At the moment, there is no date for the proposed final hearing before the FTPC.

The written submissions of the parties

The Applicant

[5] The NMC accepts that there has been delay engendered by the adjournment of the hearing which had been scheduled for January of this year. In respect of the

discovery issue, the NMC maintained that all of the material which is available to it has been disclosed to the respondent but it also has indicated that the respondent seeks documents which belong to the Trust which have not been provided to the NMC by the Trust. It appears that in respect of these documents the Trust claim they are not disclosable and have offered the opinion that to disclose them would be a breach of the Data Protection Act. The NMC appear to accept the Trust's position and it has asserted that it cannot compel disclosure of Trust material that is protected under the Act. Specifically, the NMC in its written submission has stated that:

“... any dispute that the respondent may have in relation to disclosure can be aired before the Fitness to Practice Committee at the substantive hearing.”

[6] Overall, the NMC submitted that the concerns which fall to be considered by the Fitness to Practice Committee are of a level of gravity which require the continued imposition of an ISO. It was argued on its behalf that there have been recent reviews of the ISO conducted in July 2019 and in December 2019 and that the court had the benefit of the reasoned decision provided by the committee on the former date when it agreed to the extension of four months in November 2019. Nothing new had occurred in the period between the July and the December reviews, save for the court's extension. Unsurprisingly, therefore, it was submitted, the outcome of the December review had been to maintain the ISO.

[7] The NMC also pointed out that while it was correct that the respondent claimed that he has retired as a nurse and had no intention of returning to practice, his registration technically had not lapsed. In these circumstances, the respondent's statement about not wishing to return to practice should the ISO not be extended, could not be taken at face value, as there would be no legal impediment to such a return which, the NMC claimed, would create an unsatisfactory position.

[8] In summary, therefore, the concerns about the risk the respondent represented had not dissipated and continued to apply. The court, consequently, it was argued, should extend the order as sought.

The Respondent

[9] The respondent strenuously objected to an extension of the order.

[10] Among the arguments the respondent raised in his written submission was that the ISO infringed his human rights as an innocent individual who has committed no offence. In particular, the respondent relied on alleged breaches of: Article 7 (no punishment without law); Article 6 (his right to a fair trial); and Article 5 (his right to liberty and security) of the ECHR.

[11] Underlying these submissions were the respondent's concerns about: the delay in enabling him to clear his name; his concern that he does not represent any

risk to the public; and his plea that, after several years of retirement, he had no intention of returning to work as a nurse.

[12] The respondent also offered some commentary on some of the facts in respect of the issues which will have to be determined by the FTPC. He commented that his life has been a living hell since these various matters arose. At one point, he claimed that the actions of the NMC have involved attempts by them to conceal highly important information from him and from the court. He refers to this information as “exculpatory evidence”. The respondent also maintained that he will not obtain a fair hearing before the NMC. As he puts it: “there is absolutely no chance the verdict is not already fixed and there is nothing I can do to stop it.”

The Court’s Assessment

[13] The court has considered all of the material put before it.

[14] Its role in respect of an application of this sort is discussed in such authorities as *General Medical Council v Hiew* in England and Wales¹ and *General Medical Council v Obasi*² in Northern Ireland. It need not cite from these authorities in this case. The court will have regard to the work of the Committee whose job it has been to decide whether it is appropriate or not on an interim basis to impose an ISO pending a final decision being taken. It will also consider the need to protect the public, as well as the public interest and the practitioner’s own interests. In coming to a conclusion in a particular case, the court will normally *inter alia* look to such matters as the gravity of the allegation or allegations made, the nature of the evidence, the seriousness of the risk of harm to patients or clients, the reasons why the case has not been concluded and the prejudice to the practitioner if the interim order is continued.

[15] However, the court will generally not be concerned in a fact finding exercise about the events which have led to the suspension. If the court can clearly see that, for example, the case has little merit or that in an important respect the professional body is acting in a wholly unjustifiable way, it can take these matters into account in weighing up its decision. It will often ask whether the allegations made justify the prolongation of the suspension.

[16] The court reminds itself that the onus in an application of this sort rests on the professional body and not the respondent.

[17] In the present case, it is inescapable that the court itself granted an extension of some four months duration on 7 November 2019. This is of importance because at that time the court carried out an assessment of how matters stood and of the factors relevant to this sort of extension. In so doing, its approach was that it was necessary for the purpose of protecting the public and was in the public interest for the ISO to

¹ [2007] 4 AER 473

² [2019] NIQB 27

be maintained. In the court's view at that time, the process as a whole should run its course to completion. In considering the issues before it, the court had the benefit of the careful review of July 2019 carried out in respect of the ISO. When making its decision in November 2019, the court's expectation was that a hearing before the FTPC could be dealt with and a decision reached within the four month period of extension which the court granted. It was therefore the court's expectation that the matter would shortly be coming to an end.

[18] Unfortunately, the January hearing, with the consent of the parties, had to be adjourned because of the issues referred to above. It is concerning that one of the reasons for the adjournment appears to have been that an NMC witness was unavailable to appear in January. The precise reasons for this are not clear and the court considers it should resist the temptation to speculate as to why this was so. But it is surprising on the face of events that this situation was allowed to develop at a time when this court was being told in November 2019 by the NMC that the hearing was set to be conducted in January 2020. Of course, as the court knows, any number of circumstances can develop and lead to a hearing properly having to be adjourned.

[19] The second reason for the adjournment related to the respondent's requests for discovery of documents from the Trust and the apparent refusal of the Trust to supply documents which the respondent has sought on the basis already described.

[20] It goes without saying that the hearing to be conducted by the FTPC has to be a fair hearing and that it will be for the Committee to ensure this occurs. The Committee, it seems to the court, should not allow an issue of this sort to fester or derail its ability to perform its functions with reasonable efficiency.

[21] In respect of the issue of discovery, this court is not in a position to judge the strengths or otherwise of the respondent's claim to discovery or to measure the impact there might be on the integrity of the proceedings if, in fact, the materials being sought by the respondent were withheld from him on the basis of the terms of the Data Protection Act or on some other basis.

[22] The court finds it *prima facie* surprising that it is the Trust, the original referrer of the matter to the NMC, which is taking the Data Protection Act point. It might have been thought that the referrer in referring the matter to the NMC, is by this action expressly or impliedly consenting to their making disclosure to the NMC of all relevant documents in their possession in respect of the matter so as to enable the matter properly to be considered by the NMC and action taken if necessary following that consideration. That action would encompass providing a fair hearing if charges are brought.

[23] At all events, this is an issue which it seems to the court should be dealt with by the FTPC speedily and preferably in advance of the substantive proceedings beginning.

[24] Notwithstanding the difficulties which have occurred and the loss of the January 2020 hearing date, the court considers that it should not alter the position it adopted in November 2019. While the events which have occurred are disappointing, the court does not consider they are of sufficient weight to persuade it not to provide a further extension of time and this is the course the court will take.

[25] At the moment, it appears that the possibility of a May 2020 hearing – mooted at an earlier stage – has been extinguished because of the disruption resulting from the Corona-virus outbreak. This outbreak is beyond the control of all of those involved in this application. The court has in these circumstances little choice at this stage but to recognise this reality.

[26] Overall, the court remains of the opinion that the matter has properly been brought to hearing. Having regard to the case examiners' decision of September 2019, there appears to be a case to answer, as they found, in respect of matters which are of sufficient seriousness to have resulted in an ISO being imposed at the onset and maintained subsequently. This, however, is not to say that the matters under investigation necessarily are at the very highest level of seriousness. It is right to say that the court can envisage graver cases than this one. The respondent makes the case that he has been suffering a great deal since these issues arose. This points strongly to the need to bring the matter to a final conclusion as soon as this can reasonably be done. On the basis of the respondent's own assessment of his position, he has abandoned any desire to continue in his career as a nurse therapist. If this is correct, it is unlikely that the existence of the suspension *per se* will be responsible for significant financial hardship or prejudice. It should be possible for the final hearing to be conducted in the near future.

[27] In all the circumstances, the court's view is that it should grant a seven month extension beginning on the date when this judgment is issued to the parties.

[28] The court, in reaching its conclusion above, has not ignored the points made by the respondent and referred to above. But it is unable to accept that at this time an extension of the ISO in this case would amount to a breach of the respondent's human rights. In the court's judgment, neither Article 7 nor Article 5 are in point in this case. While a breach of Article 6 (or indeed common law fairness) could possibly arise at some time in the future, the respondent's claim in respect of Article 6, in the court's judgment, is premature at this time. The court sees no reason to believe that the respondent will be unable to obtain a fair hearing before the FTPC and does not consider that his fears in this regard are grounded in evidence.

Decision

[29] Without expressing any view about the merits of the charges against the respondent, which will be a matter for the judgment of the FTPC, it is the conclusion of the court that the ISO in this case should be extended for a period of seven months

from the date of this judgment. It is the court's earnest hope that this ought to be sufficient time in which to bring the substantive decision making process to completion.