



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 38
P277/22

Lord Justice Clerk
Lord Turnbull
Lord Tyre

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

IB

Reclaimer

against

THE GENERAL MEDICAL COUNCIL

Respondent

Reclaimer: Party Litigant

Respondent: M Lindsay, QC; Anderson Strathern LLP

24 August 2022

Introduction

[1] The reclaimer, a party litigant, is a doctor subject to a fitness to practise investigation by the respondent, which referred his case to the Medical Practitioners Tribunal Service. On 26 October 2020 an Interim Orders Tribunal made an *interim* order for suspension of the reclaimer's registration for a period of 18 months. The *interim* order was imposed following serious concerns arising from the reclaimer's arrest and subsequent detention on remand in

relation to allegations that he was involved in preparatory terrorist activities. The claimer had been remanded in custody as part of a police investigation into the New IRA.

[2] As required by the statute the order was reviewed at subsequent hearings of the tribunal. After hearing submissions, including submissions as to the potential length of the criminal proceedings, the unlikelihood of any trial prior to 2024, and the potential effect on the claimer's career, the tribunal maintained the order, on the basis that it remained necessary in the public interest.

[3] In terms of the relevant rules an order for *interim* suspension may be made where *inter alia* the appropriate tribunal is satisfied that it is necessary in the public interest. Such an order may be made for a period not exceeding 18 months and must be the subject of periodic review by the tribunal. Where an *interim* suspension order has been made, the GMC may apply to the court for the order to be extended, and may apply again for further extensions. Any such extensions may be granted for a period of up to 12 months.

[4] On the respondent's application, the court on 25 April 2022 extended the *interim* order, first until 20 May 2022 and then, on 20 May 2022 to 10 June 2022. On that date the Lord Ordinary heard submissions on the respondent's motion seeking an extension of the *interim* order until 25 April 2023 in terms of sections 41A(6) and (7) of the Medical Act 1983. The Lord Ordinary granted that motion, which is the decision challenged by the claimer.

Background

[5] The claimer was detained at Heathrow Airport following a surveillance operation, targeting terrorist activities. He was arrested on suspicion of preparatory acts of terrorism and appeared by video link at Belfast Magistrates' Court, following which he was remanded in custody. The claimer was released on bail on 10 December 2021 and returned to his

home in Edinburgh, the bail conditions including that he must continue to reside there, any change of address even for one night requiring express approval of police or a court order; that he must sign in twice a day at a nearby police station (since changed to signing on once a day three times a week); that he abide by a curfew between 2200 hrs and 0700 hrs, and present himself at his door during curfew hours if required to do so by police; that he surrender all passports/travel documents and may not apply for new travel documents; that he is not permitted to leave Scotland without express permission of the Court save to Northern Ireland for any court appearance or consultation with his solicitor, in respect of which he must give 24 hours advance notice of his travel arrangements; and during any travel must be accompanied by his surety and report to police immediately on arrival.

Additional conditions limit his use of electronic devices: he may only have use of one mobile phone, which may have internet access, but the make, model, IMEI number, telephone number and access code of this phone must be provided to police and he may not use any other internet enabled communications device. Neither the internet search history nor any communications may be deleted and any automated deletion functionality must be inactivated. The device must not be solely accessible by fingerprint or facial recognition technology, and if requested he must provide any PIN or lock code for the purposes of examination/download. Location settings must remain enabled on the device at all times. He is allowed an internet enabled laptop subject to equivalent restrictions.

[5] A committal hearing is due to take place at Belfast Magistrates Court in September 2022, and any trial is unlikely to take place until at least some time in 2024.

[6] The IOT heard submissions from both parties. Given the very serious nature of the concerns raised, the tribunal considered that a reasonable and well informed member of the public would be offended and surprised were the claimer permitted to remain in

unrestricted clinical practice, pending the conclusion of the police and GMC investigations. It considered that public confidence in the profession would be seriously undermined if no order were made. It was therefore necessary in the public interest to make an *interim* suspension order, given the seriousness of the allegations and the strong and damaging impact they may have on public confidence in the profession. Suspension was also proportionate to the risk, there being no conditions which would be sufficient and appropriate as a workable, measurable or enforceable means of addressing the risks posed.

[7] In the application for extension of the order, the Lord Ordinary was satisfied that he should grant the prayer of the petition and extend the order. The claimant challenged that decision

Analysis of the Lord Ordinary's reasons

[8] The Lord Ordinary at para [8] identified the correct approach for a court in considering an application for extension of a suspension order, enumerating a number of principles which were drawn from the case of *General Medical Council v Hiew* [2007] 1 WLR 2007. These were:

“(i) The criteria for the exercise by the court of its power to extend an interim order under section 41A(7) of the 1983 Act are the same as for the making of the original interim order under section 41A(1), namely the protection of the public, the public interest or the practitioner's own interests;

(ii) The court can take into account the gravity of the allegations, the nature of the evidence, the seriousness of the risk of harm to patients, the reasons why the case has not been concluded and the prejudice to the practitioner if an interim order is continued;

(iii) The onus of satisfying the court that the criteria are met falls on the petitioner, as it is the applicant for the extension, and the standard of proof is on a balance of probabilities;

(iv) It is not the function of the court to make findings of primary fact about the events which had led to the suspension or to consider the merits of the case for suspension;

(v) Rather, it is the function of the court to ascertain whether the allegations made against the practitioner justify the extension of the suspension, rather than their truth or falsity;

(vi) If the practitioner contends that the allegations are unfounded, he should challenge by judicial review the original order for suspension or the IOT's failure to review it under section 41A(2) of the 1983 Act;

(vii) The court has to reach its decision on the basis of the evidence on the application, which includes evidence as to the opinion of the *General Medical Council* and the IOT as to the need for an interim order;

(viii) The court is not bound to follow or defer to these opinions, but should give it such weight as in the circumstances of the case it thinks fit."

[9] However, when one comes to look at the reasons given by the Lord Ordinary for reaching his decision it is apparent that he did not apply these principles. His reasoning, which is very limited in scope, is focused not on the question of whether an extension has been justified, but on whether the IOT made the correct inquiries and were legally entitled to make the interim order in the first place. These proceedings are not a judicial review, in which the validity of the making of the original order is under consideration. Clearly, if it were apparent that the IOT had not been entitled to make a suspension order the court would not extend the order, but the reason would be because the court could not justify extending such an order, not purely because of a view taken as to the merits of the making of an order in the first place. As was noted in *Hiew*, it is not the function of the court to consider the merits of the case for suspension (point (iv) above).

[10] The Lord Ordinary's ultimate conclusion is expressed in these terms (para 25):

"In light of these considerations I am satisfied that the petitioner has acted, in reaching his determination in relation to the respondent, in a manner which is in accordance with and fulfils the statutory duties incumbent upon them. I am satisfied that the conclusions they reached were correct both in fact and law. In these

circumstances I will dismiss the respondent's plea-in-law and grant the prayer of the petition."

[11] This does not grapple with the issue which the court requires to address, namely, to decide for itself whether the statutory test for extending the order has been met. We note that the Lord Ordinary's decision in the case of *GMC v MM* [2022] CSOH 25 appears to show the same lack of focus on the role of the court as the decision maker. In the present case the Lord Ordinary may be right to say the IOT had material to justify the order, that the investigation complied with the legislation and that it was entitled to make the original order, but the Lord Ordinary's task is not simply to rubber stamp the decision of the tribunal. It is to decide whether to grant an extension of the period of *interim* suspension by examining the matter afresh as the primary decision maker, applying the statutory test and considering the issue of proportionality. The Lord Ordinary did not address his mind to any of these issues, and his decision cannot stand. The result is that it falls to this court to act as the primary decision maker on the application.

Determination of the application

[12] The respondent must satisfy the court that it is in the public interest for the suspension order to be extended as sought (section 41A(1) of the 1983 Act). The following may be taken from the MPTS Guidance in relation to interim suspension orders: In an application which relates to the general public interest, it is necessary to ask 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. The decision maker must ask whether an order is desirable to maintain public confidence and uphold proper standards of behaviour. The proportionality of any action must be weighed together with the risk to public interest, and the potential adverse consequences for the doctor, in respect

of which the seriousness of the charges should be considered, as should the potential public response to any decision should the doctor ultimately be convicted or acquitted. The decision maker should consider whether there are workable conditions short of suspension which would meet the public interest concerns.

[13] Specifically on the issue of public confidence, it is necessary (para 40) to consider whether, if allegations are later proved, it will damage public confidence to learn the doctor continued working with patients while the matter was investigated. Para 41 goes on to state:

“With this in mind, the presence of one or more of the following factors are a strong indicator that conditions may not be adequate to maintain public confidence in the profession or the medical regulator.

a Information that a doctor has been charged by police in connection to serious offences..”

[14] The court, in considering the issue of whether to grant an extension to an order should bear this guidance in mind, and should have specific regard to the principles identified in *GMC v Hiew* and listed at para [8] above. In particular, the court is not concerned with the validity or otherwise of the allegations. Where the allegations consist in criminal charges the seriousness of the charges must be considered. Although para 44 of the guidance states that “It is incumbent on the Tribunal to consider the individual features of each case and the particular facts of the criminal charges.”, we do not read this as meaning that we must subject the charges, or any information bearing on the basis upon which they were preferred, to an evidential analysis: it is enough to look at the terms of the charges themselves and form a view as to their apparent severity. As the court noted in *Hiew* (p2017) “In general, it need not look beyond the allegations.”

[15] The claimer submitted that the charges made against him were in somewhat general terms, and that a lack of a particularisation made it difficult to assess how serious they were. We reject that submission: it is apparent on the face of them that the charges are extremely serious ones. It is not for us to go behind the charges or make any findings in fact about them. Similarly, when the court in *Hiew* (point (ii) above) refers to taking account of the gravity of the allegations and the nature of evidence, in a case such as this it is enough to rely on the serious nature of the charges which have been made. It would be impossible for the court properly or adequately to examine the evidence upon which the charges were based. As is noted at point (v) from *Hiew*, the court's task is to ascertain whether the allegations made against the practitioner justify the extension of the suspension, rather than their truth or falsity.

[16] Further, when it comes to point (vii) which refers to taking account of the evidence as to the opinion of the GMC and the IOT as to the need for an interim order, this again will have little bearing on the issue when the question is one going to the general public interest. The matter will be different in cases where a potential risk to patients has been identified.

[17] In essence in a case based upon the general public interest in maintaining confidence in the medical profession, and the existence of serious criminal charges against the practitioner, the question comes down to one of the proportionality of the extension sought, having regard to these factors as well as the interests of the practitioner and the reasons the case has not been concluded.

[18] Senior counsel for the GMC highlighted the serious nature of the charges and the need to maintain public confidence in the medical profession. The charges are so serious that public confidence in the medical profession would be seriously damaged if the claimer were not suspended pending the conclusion of proceedings. He highlighted the

stringent nature of the bail conditions and suggested that these were such as would prevent the claimer from working in any event. The length of time for the proceedings to come to a conclusion was a matter beyond the powers of the respondent: it was not open to them to make inquiries into the allegations, and they required to be scrupulous to avoid prejudice to the criminal proceedings. Were the extension granted it would require to be reviewed by the tribunal within 3 months, and again within a further 6 months. There were no conditions which would adequately meet the situation in a case such as this: where the issue related to risk to patients there may be conditions which could be imposed to ameliorate the risk. There were no conditions which would be capable of ameliorating the risk to public confidence in the medical profession.

[19] The claimer submitted that the bail conditions would not necessarily prevent him from working. He had been offered a job which consisted of reviewing material online, without seeing patients either in person or virtually; and the conditions would not prevent his being able to attend certain hospitals or carry out certain types of work.

[20] We recognise the force in the claimer's submissions that it might be possible for him to carry out certain types of work. He also submitted that should suitable work be found he would be entitled to seek to have his bail conditions revised. To that extent the submissions for the GMC as to the impact of the bail conditions were somewhat, though not entirely, weakened. We recognise therefore that the suspension will have an adverse effect on the claimer's ability to work, even though we consider that the stringent bail conditions will also be likely to restrict to an extent his ability to do so. Moreover, we accept the submissions for the GMC that this is not a case in which the risk may be ameliorated by any conditions: the risk is not to patient safety but to the integrity and reputation of the medical profession. We bear in mind para 41 of the guidance that serious criminal charges are a

strong indicator that conditions may not be adequate to maintain public confidence in the profession or the medical regulator.

[21] The passage of time before proceedings may be concluded and thus before the GMC investigation may be concluded and the claimer's ultimate fate determined, is clearly a relevant factor for us to take into account. Nevertheless, the proceedings against him are under a system whereby he is guaranteed the right to a fair trial within a reasonable period of time. Moreover, any extension granted by the court must be for a limited period of no more than one year. Any further requests for extension would require to be addressed afresh on their own merits. As required by the 1983 Act, any extension granted by the court would require to be brought under review at least twice during that time, and at such review hearings new evidence or changed circumstances could be addressed.

[22] It is important to note the precise nature of the charges against him. The charges relate to

“Alleged conduct in preparation for giving effect to his intention of committing acts of terrorism or assisting another to commit such acts, contrary to section 5(1) of the Terrorism Act 2006; and addressing a meeting for the purposes of encouraging terrorism, contrary to s12(3) Terrorism Act 2000.”

The former charge carries a potential maximum sentence of life imprisonment; the latter carries a potential maximum of 14 years imprisonment.

[23] Section 5(1) of the Terrorism Act 2006 provides:

“A person commits an offence if, with the intention of (a) committing acts of terrorism, or (b) assisting another to commit such acts, he engages in any conduct in preparation for giving effect to his intention.”

[24] Section 20 provides that:

“*act of terrorism*” includes anything constituting an action taken for the purposes of terrorism, within the meaning of the Terrorism Act 2000;”

[25] Section 1 of the Terrorism Act 2000 provides

“(1) In this Act “*terrorism*” means the use or threat of action where–

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.

(2) Action falls within this subsection if it–

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

....

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.”

[26] Section 12(3) of the 2000 provides:

“A person commits an offence if he addresses a meeting and the purpose of his address is to encourage support for a proscribed organisation or to further its activities.”

[27] In addressing whether public confidence in the profession would be seriously damaged without an extension order, the court must ask itself whether a reasonable and properly informed member of the public would be surprised and offended to learn that the

reclaimer had been permitted to practise whilst under investigation and the subject of criminal proceedings in respect of serious charges of this kind. Having regard to the nature of the offences and the definitions we have noted, it will be apparent that the charges are of the most serious kind, and in our view the only answer to that question is an affirmative one. An extension to the order for *interim* suspension, notwithstanding the effect on the reclaimer, is proportionate to the nature of the offences and the risk to public confidence in the profession. The matter will be under review as required by statute. We will therefore grant the order sought.