



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 44  
P408/22

Lord Justice Clerk  
Lord Turnbull  
Lord Tyre

OPINION OF THE COURT

delivered by LORD TYRE

in the Reclaiming Motion

by

K

Reclaimer

against

THE GENERAL MEDICAL COUNCIL

Respondent

**Reclaimer: P Reid, D Blair; Medical and Dental Defence Union of Scotland, Glasgow**  
**Respondent: M Lindsay, KC; Anderson Strathern LLP**

27 September 2022

**Introduction**

[1] The reclaimer is a doctor who is subject to a fitness to practise investigation by the respondent (“the GMC”). On 25 November 2019 he was arrested and charged with the crime of rape under section 1 of the Sexual Offences (Scotland) Act 2009. On 29 November 2019 he reported this to the GMC, which referred the matter to its Interim Orders Tribunal (“IOT”).

[2] The IOT determined that it was necessary in the public interest to impose an interim suspension order on the claimer's registration for a period of 18 months. The interim order was reviewed and maintained by the IOT on various dates in 2020 and 2021. As a result of delays in criminal procedure caused by the Covid-19 pandemic, it was necessary for the GMC to apply to this court for an extension of the interim order for a further period of 12 months in order to allow for the outcome of the prosecution, before the GMC could embark upon its own fitness to practise investigation. An extension to 19 June 2022 was granted.

[3] On 25 October 2021, following trial, a jury found the case against the claimer not proven and he was acquitted. At the next review by the IOT on 19 November 2021, the interim order was varied from suspension to the imposition of conditions.

[4] By 19 June 2022 the GMC had not completed its investigation into the claimer's fitness to practise. It accordingly brought the present petition to seek a 12 month extension of the conditions order to 19 June 2023 to allow its investigations to conclude. Following a substantive hearing, on 26 July 2022 the Lord Ordinary granted the prayer of the petition but restricted the extension to a period of six months to 26 January 2023. The claimer invites the court to recall the Lord Ordinary's interlocutor and to refuse the prayer of the petition.

### **Statutory framework**

[5] In terms of section 41A of the Medical Act 1983, the IOT may, where *inter alia* it is satisfied that it is necessary in the public interest, make an order suspending a practitioner's registration or making his registration conditional on compliance with such requirements as it may think fit to impose. 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 or an order for *interim* conditional registration has been made, the GMC may apply to the court under section 41A(6) for the order to be extended, and may apply again for further extensions. In terms of section 41A(7), any such extension may be granted for a period of up to 12 months.

[6] It is common ground that when deciding whether to grant an extension, the court should proceed in accordance with the following principles enunciated in *General Medical Council v Hiew* [2007] 1 WLR 2007 and applied by this court in *B v General Medical Council* 2022 SLT 961 at paragraph 9:

- “(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.”

These principles apply *mutatis mutandis* to an order for *interim* conditional registration as they do to an *interim* suspension order. The court’s task is not to determine whether the making of the order by the IOT was legally justified but rather to decide for itself whether the statutory test for extending the order has been met.

### **GMC guidance**

[7] The GMC has published guidance entitled “Imposing interim orders: Guidance for the Interim Orders Tribunal, Tribunal Chair and the Medical Practitioners Tribunal” which has been approved and followed by the courts when considering whether to grant an order under section 41A(6) and (7). Paragraphs 23 and 24 of the guidance set out the test to be applied when considering whether to grant or extend an *interim* order on the ground of public interest. If the IOT is satisfied in all the circumstances that there may be impairment of the doctor’s fitness to practise which may adversely affect the public interest and, after balancing the interests of the doctor and the interests of the public, that an *interim* order is necessary to guard against such risk, the appropriate order should be made. In reaching its decision the IOT should consider 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 conditions imposed by the IOT**

[8] The conditions imposed on the claimer’s registration by the IOT on 19 November 2021 were as follows:

- “1. He must personally ensure that the GMC is notified of the following information within seven calendar days of the date these conditions become effective:
- a. of the details of his current post, including:
    - i. his job title
    - ii. his job location
    - iii. his responsible officer (or their nominated deputy)
  - b. the contact details for his employer and any contracting body, including his direct line manager
  - c. of any organisation where he has practising privileges and/or admitting rights
  - d. of any training programmes he is in
  - e. of the organisation on whose medical performers list he is included
  - f. of the contact details of any locum agency or out-of-hours service he is registered with.
2. He must personally ensure the GMC is notified:
- a. of any post he accepts, before starting it
  - b. that all relevant people have been notified of his conditions, in accordance with condition 4
  - c. if any formal disciplinary proceedings against him are started by his employer and/or contracting body, within seven calendar days of being formally notified of such proceedings
  - d. if any of his posts, practising privileges or admitting rights have been suspended or terminated by his employer before the agreed date within seven calendar days of being notified of the termination
  - e. if he applies for a post outside the UK.
3. He must allow the GMC to exchange information with his employer and/or any contracting body for which he provides medical services.
4. He must personally ensure that the following persons are notified of the conditions listed at 1 to 3:
- a. his responsible officer (or their nominated deputy)
  - b. the responsible officer of the following organisations:
    - i. his place(s) of work and any prospective place of work (at the time of application)
    - ii. all his contracting bodies and any prospective contracting body (prior to entering a contract)
    - iii. any organisation where he has, or has applied for, practising privileges and/or admitting rights (at the time of application)

- iv. any locum agency or out-of-hours service he is registered with
- v. If any organisation listed at (i to iv) does not have a responsible officer, he must notify the person with responsibility for overall clinical governance within the organisation. If he is unable to identify this person, he must contact the GMC for advice before working for that organisation.
- c. the responsible officer for the medical performers list on which he is included or seeking inclusion (at the time of application)
- d. the approval lead of his regional Section 12 approval tribunal (if applicable) or Scottish equivalent
- e. his immediate line manager and senior clinician (where there is one) at his place of work, at least 24 hours before starting work (for current and new posts, including locum posts)."

### **The Lord Ordinary's decision**

[9] In deciding to grant an extension of the order, the Lord Ordinary had regard to the terms of an affidavit by Ms Jenny McCourt, a solicitor and in-house legal adviser to the GMC. That affidavit details the steps taken by the GMC, following the claimer's acquittal, to gather information regarding the circumstances of the allegation. The Lord Ordinary concluded:

"[7] ... (I)t is necessary to have regard to the whole of Ms McCourt's affidavit in order to properly assimilate all the information she provides and put that into the context of the decisions made by the IOT. When that is done it is, again in my view plain that between paragraphs 6 and 41 Ms McCourt narrates in what I regard as considerable detail the whole process of information collection that was carried out after the respondents acquittal in October 2021 in order to provide the IOT with all relevant information necessary to enable them to reach a determination on the issue before them. I pause to observe that the process described appears to have been far from straightforward, involved a number of legal issues and a number of agencies and, having regard to those factors appears to have been conducted within a reasonable timescale. When all that was achieved, which I infer from paragraphs 40 and 41 of the affidavit was only in about late June 2022, the petitioner's, and I quote directly; that their legal team consider whether any further evidence is required and if not, they have been requested to prepare the allegations for disclosure to the respondent.' (sic)

[8] It is against that background and in that context that I consider the decision making of the IOT requires to be viewed and assessed. On that basis I am satisfied

that the relevant statutory tests have been met and that the conditions imposed are both justified and proportionate.”

[10] The Lord Ordinary went on, however, to observe that although he did not challenge Ms McCourt’s estimate of the time required to complete the investigation, he considered that there was likely to be a degree of flexibility in such an estimate and that more expeditious progress might be possible. He accepted a submission by counsel for the claimer that the court might wish to exercise some degree of control, and granted an extension of the conditions for a period of six months.

### **Argument for the claimer**

[11] In an affidavit to the court, the claimer denied the allegation made against him and emphasised that he had been acquitted after trial. His reputation had been damaged. On the advice of his responsible officer he had applied to join the Retainer Scheme with NES (NHS Education for Scotland) to allow him to resume general practice. It was not normally possible to do so if conditions were attached to registration, but NHS Greater Glasgow & Clyde had granted him an exemption. However because his PVG (protection of vulnerable groups) certificate indicated that he remained under investigation by the GMC, he was excluded from the Retainer Scheme. His opportunity to work had been severely restricted, which continued to have a significant financial impact on him and on the members of his family who relied on him for financial support. His mental health had suffered.

[12] On behalf of the claimer it was submitted that the Lord Ordinary, by focusing on the information in Ms McCourt’s affidavit as to the investigations that had been conducted by the GMC, had failed to engage with the question whether the statutory threshold test for an extension had been met. It therefore fell to the court to determine this issue.

[13] The GMC had failed to demonstrate that public confidence in the medical profession would be likely to be seriously damaged if the claimer was not subject to an order for conditional registration. A reasonable and properly informed member of the public would understand that a criminal investigation had taken place and that the evidence had been presented to a jury who had acquitted him. Such a member of the public would not be concerned that a doctor who had never been said to pose any risk to patients was allowed to resume his career without the imposition of conditions. On the contrary, such a member of the public would be concerned if such a doctor could not return to work after acquittal. The claimer did not dispute that he remained answerable to his regulator in respect of the allegations, but that was a different issue from whether an *interim* order ought to be imposed while the investigation took place. The case of *General Medical Council v Srinivas* [2012] EWHC 2513 relied upon by the GMC was distinguishable on its facts. The fact that a substantial sanction may be imposed at the end of the investigation was not sufficient to justify the maintenance of an *interim* order.

[14] Moreover, the imposition of an order for *interim* conditional registration failed the proportionality test. In the first place, it was a fundamental aspect of that test that any intrusion into a party's rights had to be rationally connected to the reasons said to justify the intrusion (*Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at paragraph 74). The conditions imposed on the claimer did not address or regulate the issues which gave rise to his referral; they were little more than a black mark against his name on the register. The allegation against him had no connection to his clinical practice, and it was not suggested by the GMC that there was any clinical risk. In the second place, they had an excessively damaging effect on his reputation and on his ability to pursue remunerative employment.



### Argument for the GMC

[15] On behalf of the GMC it was submitted that the Lord Ordinary had correctly applied the statutory test and the guidance to the circumstances of the case. He had decided the matter for himself and had not restricted himself to reviewing the decision of the IOT. His reasoning made clear that he had addressed the issues of whether the conditions were both justified and proportionate. If however the court considered it necessary to consider *de novo* the merits of the GMC's application, it should grant the prayer of the petition and extend the *interim* order until 19 June 2023 or for whatever shorter period appeared to the court to be appropriate.

[16] If no conditions were maintained upon the claimer's registration pending the outcome of the investigation, public confidence in the medical profession would be seriously damaged. The allegation was a serious one which could affect the claimer's fitness to practise and, in turn, the public interest. The claimer's acquittal had been recognised by the substitution of an order for conditional registration for the previous suspension order. While it was accepted that the allegation had not been found to be proved to the criminal standard of proof, the standard to be applied in the GMC's investigations was the lower civil standard of balance of probabilities. An investigation and assessment of risk was required. As the court in *Srinivas* (above) had observed, an acquittal in the criminal court did not mean that the claimer no longer had to answer allegations relating to sexual misconduct.

[17] The conditions were proportionate. They served a practical purpose because the GMC would not necessarily know where the claimer was working. While his current employer might be aware and supportive, if he started to work in another environment it was important that the GMC was aware of this, so that it could promptly inform any new employer of its investigation and ensure that it complied with its obligations under the 1983

Act. That would allow the new employer to take any local action it deemed relevant and be particularly mindful of any similar allegations. The new employer might otherwise conclude that information presented to it did not raise a fitness to practise concern requiring prompt referral to the GMC, or might delay in referring until the conclusion of a local investigation. Such information would be relevant to risk to the public and also to the claimer's remediation and insight. For these reasons there was a rational connection between the conditions imposed and the risk that they sought to address. The conditions were not unduly onerous or disproportionate. They did not prevent the claimer from working. As he acknowledged in his affidavit, his difficulty in obtaining employment derived not from the imposition of conditions but from his PVG status pending conclusion of the investigation.

[18] It was estimated that the investigation would take a further nine months to conclude, ie that the likely date for a hearing would be around June 2023. If the GMC's investigation were to conclude prior to the end of a 12 month extension (or whatever shorter period appeared to the court to be appropriate), the GMC would invite the IOT to revoke the *interim* order.

### **Decision**

[19] Although the Lord Ordinary narrated the correct legal test at paragraph 1 of his note, he failed to apply it to the circumstances of the case. His conclusion is set out at paragraph 8 (above). It addresses the decision-making process of the IOT and does not contain any independent assessment of whether the statutory tests are met in relation to an extension of the *interim* order. It was submitted on behalf of the GMC that the second sentence in paragraph 8 demonstrated that the Lord Ordinary had made the requisite assessment. We

are unable to accept that submission. Read in context, the “basis” on which the Lord Ordinary was satisfied that the relevant tests were met can only have been the adequacy of the IOT’s decision making. Neither the affidavit of Ms McCourt nor the decision of the IOT imposing the order for *interim* conditional registration contains any analysis of why such imposition satisfies the relevant tests. It follows, for much the same reasons as explained in *B v General Medical Council* at paragraphs 10 and 12, that the Lord Ordinary erred in law and that it falls to this court to act as the decision maker on the application for an extension.

[20] Counsel for the appellant referred to the “threshold” test and the “proportionality” test, and submitted that both tests have to be satisfied. We agree that as decision maker the court must consider both whether the statutory test in relation to public interest is satisfied and also whether the order for extension sought by the GMC is proportionate, although the considerations applicable to both tests are likely to overlap. Among the facts of which the reasonable and properly informed member of the public would be aware is that the option of an order imposing conditions on registration is available as an alternative to *interim* suspension. We do, however, find it appropriate to address each of the tests separately.

[21] In a case such as this where only public interest is relied on, the threshold for making or extending an *interim* order is a high one. We agree with the observation of Davis J in *R (Shiekh) v General Dental Council* [2007] EWHC 2972 (Admin) at paragraph 16, in the context of a suspension order, that necessity will normally be the appropriate yardstick; the same applies in relation to the imposition of conditions. In the circumstances of the present case, we are not persuaded that the test of likelihood of serious damage to public confidence in the medical profession is met. The reasonable and properly informed member of the public would be aware that the allegation against the appellant has no connection to clinical practice and that the GMC has not sought to identify any clinical risk to the appellant’s

patients. He or she would be aware that the charge against the appellant has been the subject of a criminal trial and that the appellant has been acquitted by the verdict of a jury. He or she would be aware that the appellant is subject to an obligation to inform the GMC of details of his employment without the imposition of a condition to that effect, and it is not suggested that there is any history of non-compliance by the appellant with his obligations to the GMC. We note that he reported the charge against himself to the GMC.

[22] In the circumstances of this case, the question is whether a reasonable and properly informed member of the public would be concerned if the appellant was allowed to resume his career without an order imposing conditions which *inter alia* require him to report details of changes of employment to the GMC, and to disclose the existence of *interim* conditions to any new employer. We consider it more likely that such a member of the public would be concerned that a doctor who has been acquitted after trial of the charge against him, and against whom no allegation relating to clinical practice has been made, would be the subject of *interim* conditions which could render it difficult or even impossible for him to return to practice pending the outcome of the GMC's investigation.

[23] It was submitted on behalf of the GMC that the present case was on all fours with the case of *General Medical Council v Srinivas* (above), in which the court extended a suspension order despite the doctor under investigation having been acquitted of criminal charges after trial. There are significant factual distinctions between that case and the present one: the charges of sexual misconduct in *Srinivas* arose in a clinical context, and there was a further allegation of falsification of records. In the end we understood the GMC to rely on *Srinivas* only for the observation of HH Judge Gilbert QC (at paragraph 16) that acquittal did not mean that the doctor no longer had to answer allegations relating to sexual misconduct. That proposition is uncontroversial.

[24] Turning to the proportionality test, we find it difficult, in the absence of any connection between the allegation under investigation and the appellant's clinical practice, to see a rational connection between the conditions imposed and the reason for imposition of conditions, namely the public interest. The allegation under investigation is one of serious sexual misconduct outside the clinical context, and it has not been demonstrated that reporting and disclosure conditions related entirely to the appellant's clinical employment would address the concerns raised by that allegation in any way. In the absence of a clinical connection, there is no demonstrable risk to patients to be assessed in the context of an *interim* order. For these reasons the proportionality test is not met. That being so, it is unnecessary for us to consider whether the conditions imposed are disproportionate in the sense of being excessive or, in particular, whether the appellant will in any event be prevented from working because of PVG requirements even if extension of the order for *interim* conditional registration is refused.

### **Disposal**

[25] We shall allow the reclaiming motion, recall the Lord Ordinary's interlocutor dated 26 July 2022, and refuse the prayer of the petition.