SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 4
P275/23

Lord Justice Clerk
Lord Tyre
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD BOYD OF DUNCANSBY

in the Reclaiming Motion

by

IB

Reclaimer

against

THE GENERAL MEDICAL COUNCIL

Respondent

Reclaimer: Party
Respondent: Lindsay KC, Byrne KC; Anderson Strathern LLP

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1 February 2024

Introduction

[1] The reclaimer is a doctor who is subject to a fitness to practice investigation by the respondent, the General Medical Council. In August 2020 he was arrested and charged with offences under anti-terrorism legislation. On 26 October 2020 an Interim Orders Tribunal of the Council made an order for suspension of his registration for a period of 18 months. That

order was extended by this court for a year until 25 April 2023 (see *B* v *General Medical Council* 2022 SLT 961). The Council subsequently applied to the court for a further extension to 25 April 2024. By interlocutor dated 6 July 2023, the Lord Ordinary (Lord Ericht) granted the extension. In this reclaiming motion (appeal), the reclaimer asks the court to recall that interlocutor and to refuse the extension.

The regulatory framework

[2] The Council has responsibility for keeping a register of medical practitioners registered under the Medical Act 1983 and for supervision and regulation of fitness to practise of persons so registered. An allegation concerning the fitness of a registered medical practitioner to practise may be referred to an IOT to consider whether an interim order should be made. If 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 to do so, the IOT may make an order for the medical practitioner's registration to be suspended or restricted by way of conditions. In each case, the IOT must specify the period, not exceeding 18 months, during which the order is to remain in force. The order is reviewed within 6 months of the date when it was made and thereafter every 6 months. The respondent may apply to the court for an order made by an IOT to be extended, and may apply again for further extensions. The court may extend (or further extend) the period of the interim order for up to 12 months.

[3] The Medical Practitioners Tribunal Service has published guidance entitled "Imposing interim orders Guidance for the Interim Orders Tribunal, Tribunal Chair and the Medical Practitioners Tribunal". In terms of paragraphs 23-25 of the Guidance, if the IOT is satisfied that: (a) in all the circumstances that there may be impairment of the doctor's

fitness to practise which poses a real risk to members of the public, or may adversely affect the public interest or the interests of the practitioner; and (b) 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 assessing whether or not it is appropriate to impose an interim order, the IOT should consider, inter alia, 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. When weighing up these factors, the IOT must carefully consider the proportionality of their response in dealing with the risk to the public interest (including patient safety and public confidence) and the adverse consequences of any action on the doctor's own interests.

[4] In relation to public confidence, the Guidance notes at paragraph 40:

> "The public has a right to know about a doctor's fitness to practise history to enable them to make an informed choice about where to seek treatment. To balance this with fairness to the doctor, allegations leading to the imposition of interim conditions are not published or disclosed to general enquirers. It is therefore the responsibility of the IOT 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."

At paragraphs 43 and 44, the Guidance addresses the situation where the allegations made against the practitioner involve "serious criminal charges", and states that "it is incumbent on the Tribunal to consider the individual features of each case and the particular facts of the criminal charges".

The criminal proceedings against the reclaimer

[5] The charges against the reclaimer are, firstly, of engaging in 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 of the Terrorism Act 2000; and, secondly, of

addressing a meeting for the purposes of encouraging support for terrorism, contrary to section 12(3) of that Act. The former charge carries a maximum sentence of life imprisonment; the latter carries a maximum sentence of 14 years' imprisonment.

[6] At paragraph 5 of its decision on the 2022 application for extension, the court recorded that the reclaimer had been detained at Heathrow Airport following a surveillance operation targeting terrorist activities. He was arrested and appeared by video link at Belfast Magistrates' Court, following which he was remanded in custody. He 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.

The Lord Ordinary's opinion

[7] The Lord Ordinary acknowledged that this court had already decided that 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 these criminal proceedings. He considered that the question for him was the proportionality of the extension sought, having regard to the general public interest in maintaining confidence in the medical profession, the existence of the criminal charges, the interests of the practitioner and the reasons why the criminal proceedings had not concluded. He recognised that in conducting the proportionality exercise, he was required to reach his conclusion on the basis of the evidence on the application in the light of the current position. It was not simply a matter of automatically applying the court's decision on proportionality in the previous application: if there had been a material change of circumstance, then a different result might be appropriate. Conversely, if there had not been a material change of circumstance, then the reasoning of the court would remain applicable and might lead to the conclusion that the proposed extension was proportionate.

[8] The Lord Ordinary declined to consider the reclaimer's argument that he was a victim of entrapment by an agent of the British state; it was not for him to go behind the charges and make findings in fact about them. He rejected the reclaimer's contention that the charges that he faced were not extremely serious ones. He found no change of factual circumstances in relation to the adverse impact of the suspension on the reclaimer's ability

to work, having regard to his bail conditions. He then addressed the passage of time before the criminal proceedings may end, and thus before the Council's investigation may proceed to completion. He noted that the suspension was causing the reclaimer hardship: he was living on state benefits and due to his age might have difficulty in resuming his career after a lengthy suspension.

[9] The Lord Ordinary nevertheless concluded that the length of the suspension had not yet reached the stage where it was disproportionate for it to continue. During the period of the extension now sought, substantial progress was expected to be made in the criminal proceedings, and it was expected that the reclaimer would either be discharged or committed for trial. If the former, the Council would invite the IOT to revoke the interim order. If the latter, a more realistic estimate could be made of the length of time it would take to conclude the criminal proceedings, which estimate could inform a new proportionality exercise in due course. In all the circumstances of the case, the Lord Ordinary found that a reasonable and properly informed member of the public would be surprised and offended to learn that the respondent had been permitted to practise whilst under investigation and the subject of these criminal proceedings, and that an extension to the order was proportionate to the nature of the offences and the risk to public confidence in the profession. He was satisfied that it was in the public interest for the suspension order to be extended as sought by the Council.

Timescale of the criminal proceedings

[10] In the course of its decision on the 2022 application for extension, this court noted that a committal hearing was due to take place at Belfast Magistrates Court in September 2022, and that any trial was unlikely to take place until at least some time in 2024. In his

opinion in the present application, the Lord Ordinary narrated his understanding of the then current position as follows. A committal hearing, the purpose of which was for a District Judge in the Magistrates Court to decide whether there is sufficient evidence to send the respondent for trial, was taking place in Dungannon. Hearings on preliminary matters took place in the week commencing 27 June 2022. The hearing of witness evidence commenced in October 2022. A hearing of applications on admissibility of evidence was due to take place during the week commencing 28 August 2023. The reclaimer was also making an abuse of process application on a number of grounds; it was likely that this would be determined at the same time as the admissibility applications. If any of the preliminary or abuse of process applications were successful, that would be the end of the case against him. If not, the District Judge would require to determine the substantive issues in the committal proceedings, and would probably timetable written submissions from parties to be followed by an oral hearing in the next court term. If the committal proceedings did not bring the criminal proceedings to an end, the case would proceed to trial in the Crown Court. It was expected that the committal proceedings would have come to an end by April 2024 but it was not possible to say when any trial would be concluded.

[11] At an oral hearing in this reclaiming motion on 18 October, the reclaimer updated the court on events since the hearing before the Lord Ordinary. His abuse of process application had been refused. A final hearing in the committal proceedings had been set down to take place on 30 and 31 October 2023, following which it was anticipated that the District Judge would decide whether to send the charges against the reclaimer to the Crown Court for trial. In view of the importance of that decision in the context of these proceedings, the court continued the case to call by order when the decision became available.

[12] When the case called again on 19 December 2023, the reclaimer informed the court that the outcome of the committal proceedings was that the charges against him had been sent to the Crown Court for trial, along with charges against nine co-accused persons. A review hearing is to take place in the Crown Court in January 2024; there are likely to be challenges in relation to disclosure and admissibility of evidence. There is as yet no timetable in place for a trial. IB's legal advisers consider that the proceedings are unlikely to conclude within 1-2 years.

Argument for the reclaimer

[13] In his grounds of appeal the reclaimer made allegations of bias and discrimination by the Lord Ordinary and also referred to seeking a protective expenses order in respect of the reclaiming motion. Neither of these matters was pursued in the reclaimer's written note of argument or in his oral submissions, and we need not address them.

[14] The reclaimer emphasised that he was not asking the court to assess the veracity of the allegations made against him. However, in its determination of the 2022 extension application, the court had intentionally confused veracity with the seriousness of the allegations actually made against him by the police. The reclaimer founded upon a letter sent to the respondents on 3 May 2022 by the Police Service of Northern Ireland, in response to a formal request for information concerning the degree of the reclaimer's involvement in the alleged offences. When one took into account the PSNI's acceptance that the reclaimer had not attended one of the two New IRA meetings to which the PSNI attached particular importance, and that during the meeting which he did attend he was asked to wait in a side room before being invited to address the main group on the topic of "internationalism" and strengthening "international links", it was clear that the allegations did not include any

word, action, intention or engagement in issues related to terrorism. The court's characterisation of the charges as being of the most serious kind had therefore been without foundation. Contrary to the approach taken by the court in 2022, it was not sufficient to look only at the terms of the charges and form a view as to their apparent severity; the Guidance required consideration of the particular factual allegation that had been made. Moreover, the court's reference to maximum sentences reinforced the exaggeration of seriousness: English sentencing guidelines indicated that even if convicted of these offences, the reclaimer would receive a short custodial or a non-custodial sentence.

[15] When the particular facts of the charges made against the reclaimer were considered, it was clear that a reasonable and properly informed member of the public would be surprised and offended to discover that the reclaimer had been suspended on those grounds. Statements to this effect by persons who knew the reclaimer well had been lodged. The court ought to attach weight to these views.

[16] As regards proportionality, the reclaimer submitted that the order for further extension was disproportionate when regard was had to the particulars of the allegation. It was unnecessary in order to maintain public confidence: any risk to the public was addressed by the reclaimer's bail conditions and had no connection with his professional practice. The suspension had already been in force for more than three years, and it remained unclear when the criminal proceedings would conclude. If the suspension were to be continued, it was likely that that would end his career in the UK and abroad, where the value of his voluntary and charitable medical services was well recognised. The Council and the court had failed to take proper account of the severe impact of the order on himself, his family and those who benefited from his professional services.

Argument for the Council

[17] On behalf of the Council it was submitted that there was no merit in any of the grounds of appeal. The Lord Ordinary had identified and applied the correct approach to be taken by the court when considering an application for extension of an interim order. He did not err in law when he held that it was 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, but rather to ascertain whether the allegations made against the practitioner justified the extension of the suspension, rather than their truth or falsity.

[18] As regards proportionality, it was submitted that the Lord Ordinary's assessment of the proportionality of an extension of the interim order disclosed no material error of law. Having regard to the evidence which was before him at the date of the hearing, his conclusions on proportionality were reasonably open to him.

Decision

Seriousness of the charges

[19] We recognise that in assessing the seriousness of the criminal charges against the reclaimer, the Guidance requires consideration of "the individual features of each case and the particular facts of the criminal charges". We are not, however, persuaded that the Lord Ordinary, or indeed this court in its previous decision, has erred by failing properly to apply that guidance. The reclaimer's argument invites the court to assess the seriousness of the charges solely on the basis of the factual narrative in the PSNI letter. In our view that would be an unwise approach to adopt. It would amount to the court reaching a view on the substance of the case against the reclaimer based upon an assumption that the letter sets out the entirety of that case. Such an assumption would be wholly unfounded. It would also, in

light of current information, be factually incorrect. In the course of the hearing our attention was drawn to a decision of the Northern Ireland Divisional Court dated 30 January 2023 ([2023] NIKB 8) in an application by the reclaimer for judicial review of certain rulings made by the District Judge in the criminal proceedings. Delivering the judgment of the court, Keegan LCJ noted in relation to the first charge against the reclaimer that the alleged acts by him included (i) attending the meeting referred to in the letter, said to be a meeting of the executive of the IRA; (ii) meeting the chair of the IRA in Edinburgh on a number of occasions; (iii) meeting the chair and chief of staff of the IRA in Brussels; and (iv) meeting the chair and chief of staff of the IRA in Lebanon. The second charge related to the meeting referred to in the letter. The evidence against him comprised material gathered from a search of his home, evidence of meetings with persons said to be in the IRA, and covert recordings of meetings. It is apparent that the case against the reclaimer does not consist solely of the matters narrated in the letter.

[20] In its previous decision, this court referred to the principles identified by the Court of Appeal in *General Medical Council* v *Hiew* [2007] 1 WLR 2007, and the observation (at page 2017) that in general it was unnecessary to look beyond the allegations. We remain of the view that in assessing the seriousness of the allegations, it is appropriate to have regard to the terms of the charges themselves. Any attempt by the court in this case to look behind the charges would amount in effect to an assessment of the strength of the case against the reclaimer, which is no more part of the function of this court (or of the IOT) than assessment of its veracity. For these reasons we reject the reclaimer's contention that the Lord Ordinary erred in law in his characterisation of the charges as being of the most serious kind; for our part we entirely agree with it. Terrorism and the threat of terrorism has plagued the United Kingdom for a number of decades, nowhere more so than in Northern Ireland. Despite the

Good Friday agreement, and all that has flowed from that, there remains a real and present danger from a number of dissident groups including the new IRA. Terrorism remains a matter of grave public concern both in Northern Ireland and the rest of the UK.

Proportionality

[21] As already noted, the Guidance requires the IOT – and this court – carefully to consider the proportionality of its response in dealing with the risk to the public interest (including patient safety and public confidence) and the adverse consequences of any action on the doctor's own interests. In the circumstances of the present case, where no issue of patient safety is raised by the Council, the critical element is public confidence: specifically, whether if the reclaimer is later convicted of the charges against him, it will damage public confidence to learn that he has continued working with patients while awaiting trial.

[22] In assessing proportionality in the context of public confidence, we bear in mind the observations of Sir Thomas Bingham MR in *Bolton* v *Law Society* [1994] 1 WLR 512 at page 519, cited and applied *inter alia* in *Gupta* v *GMC* [2002] 1 WLR 1691 (Lord Rodger of Earlsferry at paragraph 21) and *Patel* v *GMC* [2013] 1 WLR 2694 (Eady J at paragraph 9):

> "… It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any

> individual member. Membership of a profession brings many benefits, but that is a part of the price."

[23] The same obviously applies to the importance of maintaining public confidence in members of the medical profession.

[24] That involves a fine balancing exercise and, while we are satisfied that there is no error of law in the Lord Ordinary's assessment, the continued passage of time and the information as to the prospects for a trial date have caused us to look again at whether the reclaimer's continued suspension from the practice of medicine is proportionate. As the reclaimer points out there are long waiting lists for cataract surgery in Scotland and if so employed his skill and expertise could help tackle the backlog. He has presented testimonials from other medical practitioners and those with whom he has campaigned on the issue of Palestinian rights. By the time of a trial five or six years, perhaps more, may have passed since the suspension of his registration. We accept that it is highly unlikely, given his present age and the length of time that he would have been out of practice, that if the appellant were acquitted he would be able to resume his medical career. It cannot be emphasised strongly enough that not only does the appellant deny the charges he faces but he is presumed to be innocent, a presumption that will remain with him unless and until the jury convict him of the charges.

[25] The Lord Ordinary addressed the issue of passage of time and the various stages of the criminal proceedings in Northern Ireland in paragraphs 22 and 23 of his opinion. At paragraph 23 he noted that the committal proceedings would conclude sometime in 2023 "or possibly into 2024". As to the prospects for a trial date in the Crown Court he said "it is not possible to say at this stage when the trial will be concluded."

[26] On one view the information which was provided to the court at the hearing on 19 December does not advance that position. It is still not possible to say when a trial may be concluded, though the fact that ten were committed for trial suggests that a trial is still some way off and almost certainly will not be held in 2024 and perhaps not 2025. As it was for the Lord Ordinary, the length of time before a trial can be completed is a matter of grave concern and weighs heavily in the reclaimer's favour in balancing the public interest with the rights of the reclaimer. The question for us is where that balance falls.

[27] Any assessment as to whether or not an interim order should be granted, or maintained, will be highly fact specific. Accordingly other cases in which the court have considered whether to continue a suspension of a practitioner's registration can only be illustrative. In *Patel* v *GMC* [213] 1 WLR 2694 the claimant was a general practitioner who had been charged with conspiracy to defraud in relation to payments of £1.8 million under the staff bonus scheme of a school of which he was a governor. The court terminated the suspension.

[28] In *D* v *GMC* [2015] EWHC 847 (Admin) the claimant was again a general practitioner who had been charged with blackmail. The allegation was that he had threatened to send naked photographs of his ex-girlfriend to her family and future in-laws unless she paid him £94,000. The judge (Lang J) quoted with approval cases in which blackmail is described as "one of the ugliest and most vicious crimes" regarded by the public "with loathing and contempt" and as "a very nasty offence". In reaching her decision it is clear that she had regard to the strength of the prosecution case including certain admissions from the accused. She described it as one of these rare cases in which the serious nature of the allegations means that there is a real likelihood of serious damage to the public confidence in the

profession if the claimant was allowed to continue practice pending trial even although he may be acquitted; para 44. The court refused to terminate the interim order.

[29] We have not found this to be an easy decision and we have considerable sympathy with the reclaimer. If he is acquitted there is little doubt that the damage to him is substantial. He will as a result of the suspension of his registration have been deprived of his profession and his livelihood for a substantial period of time. It is likely that these effects would last into the future as well if as seems likely he is unable to rebuild his career.

[30] Nevertheless we consider that the balance falls firmly in maintaining the interim order.

[31] One matter that has been confirmed since the hearing in October is that the appellant has been committed for trial, following protracted committal proceedings, in which the prosecution case was examined in detail. The District Judge heard evidence from 28 witnesses, examined witness statements and heard audio and visual recordings, some of which were said to involve the appellant. That independent and apparently rigorous examination of the prosecution case is significant, confirming as it does that the prosecution case against the reclaimer is sufficient to justify sending him for trial.

[32] In our opinion, if the reclaimer is subsequently convicted of the offences which he presently faces, the public would be concerned to know that during his time on bail he had been allowed to continue practice as a medical practitioner. Involvement in terrorism is the very antithesis of what is expected of a doctor, whose professional obligation, is to protect and save lives. The public would of course know that the reclaimer enjoyed the presumption of innocence but they might balance that with the knowledge that not only had prosecution lawyers considered that there was a sufficiency of evidence but that had been

tested in committal proceedings before a District Judge. In our opinion the potential damage to public confidence in the reputation of the profession would be substantial.

[33] For these reasons the reclaiming motion is refused.