



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 54

P275/23

OPINION OF LORD ERICHT

in the Petition of

THE GENERAL MEDICAL COUNCIL

Petitioner

for

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

respect of B

Petitioner: Lindsay KC; Anderson Strathern LLP

Respondent: Party

6 July 2023

Introduction

[1] In this petition the General Medical Council (“GMC”) seeks a 12 month extension, in terms of the Medical Act 1983, section 41A(6) and (7), to 25 April 2024 of an interim order suspending the respondent’s registration. The extension is opposed by the respondent, who appeared in person. The petition called before me on 6 July 2023 for a substantive hearing on the petition and answers.

[2] The period of the interim order expired on the day of the hearing. At the end of the hearing I indicated that I would give my decision that day and issue reasons in writing in due course in the form of a written opinion. I granted the prayer of the petition, extended

the period of the interim order until 25 April 2024 and reserved all questions of expenses in the meantime. I now set out my reasons in this opinion.

Procedural history

[3] On 26 October 2020 the Interim Orders Tribunal (“IOT”) made an interim order of suspension of the respondent’s registration for a period of 18 months arising from the respondent’s arrest and subsequent detention on remand in relation to allegations that he was involved in preparatory terrorist activities. That the interim order was reviewed and maintained as an interim order of suspension on 14 April 2021 and on 4 October 2021. At the hearing on 4 October 2021 the IOT took into account that the respondent had been charged with the following criminal offences: (i) preparation of terrorist acts contrary to section 5 (1) of the Terrorism Act 2006; and (ii) addressing a meeting for the purpose of encouraging terrorism, contrary to section 12 (3) of the Terrorism Act 2000. The respondent was released on bail on 10 December 2021 and returned to his home in Edinburgh. The IOT reviewed the interim order again on 23 March 2022 and determined that it was necessary to maintain the existing interim order of suspension on the respondent’s registration, which would expire on 25 April 2022. The GMC petitioned the court for an extension to 25 April 2023, under sections 41A(6) and (7) of the 1983 Act. The Lord Ordinary granted the extension and the respondent reclaimed. On 24 August 2022 the Second Division recalled the Lord Ordinary’s interlocutor dated 11 July 2022 and, having considered the cause of new, granted the prayer of the petition and extended the interim order until 25 April 2023 (*B v GMC* [2022] CSIH 38).

[4] In the meantime the respondent had brought judicial review proceedings against the petitioner seeking to quash the IOT’s order of 23 March 2022. Permission to proceed was

refused by the Lord Ordinary 10 August 2022 on the basis that the decision challenged had expired and the petition was academic. A reclaiming motion was refused by the Inner House on 13 June 2023.

[5] In this petition the petitioner seeks a further extension of the interim order from 25 April 2023 until 25 April 2024. By interlocutor of 25 April 2023 the Lord Ordinary, on an interim basis, granted an extension until 13 June 2023. A further interim extension was granted on 7 June 2023 extending the interim order until 6 July 2023, being the date of the substantive hearing in this petition.

The decision of the Inner House in respect of the previous extension in respect of the respondent

[6] As certain of the issues raised by parties in their submissions have already been considered by the Second Division in respect of the previous application for extension in respect of this respondent, it is helpful to set out the decision of the Inner House in some detail.

[7] In *B v GMC* the Inner House set out (paragraph 8) the correct approach for a court in considering an application for extension of a suspension order, approving the following principles drawn from *General Medical Council v Hiew* [2007] 1 WLR 2007:

“(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."

[8] The Inner House went on to say:

"[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 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.’”

[9] The Inner House went on to apply these principles to the particular circumstances of the particular doctor in that case, who is also the respondent in this case:

“[15] 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.

...

[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.

...

[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 claimer 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 reclamer, 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.”

Submissions for the petitioner

[10] Senior counsel for the petitioner submitted that the maintenance of the existing interim order is necessary in the public interest. The petitioner could not commence its investigations until the criminal proceedings against the respondent had concluded. The task of deciding whether or not to extend the interim order was not to assess the veracity of the allegations, but to assess potential risk based on the information. Serious concerns were raised involving a police investigation into allegations that the respondent may have been involved in preparatory terrorist activities. 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 he was under investigation and the subject of criminal proceedings in respect of serious charges of alleged preparatory acts of terrorism. Public confidence in the profession would be seriously undermined if no order were made. After balancing the respondent’s interests and the interests of the public, an interim order remained necessary to guard against such a risk. The respondent’s bail conditions, for all practical purposes, render the respondent unemployable. Whilst the interim order removes the respondent’s ability to practise medicine and the bar is set high for an interim order of suspension to be imposed on the grounds of public interest only, in this case this high bar is met, given the seriousness of the allegations and the strong and damaging impact they may have on public confidence in the profession. Conditions could not be formulated to address the risks identified in this case. Once the criminal proceedings have been completed the petitioner

will complete its investigations, it will inform the respondent of the allegations, stating the matters which appear to raise a question as to whether his fitness to practise is impaired, in accordance with rule 7 of the General Medical Council (Fitness to Practise) Rules 2004.

[11] Counsel further submitted that the petitioner had carried out an assessment of proportionality including a balancing exercise between the likelihood of damage to public confidence on the one hand, and the impact on or prejudice to the respondent on the other. The petitioner acknowledged that the suspension will continue to prevent the respondent practising medicine and will continue to give rise to significant financial and reputational prejudice to the respondent. The petitioner has had regard to the fact that the respondent has now been suspended from medical practice since 26 October 2020 and that a further period of suspension will extend that period. The petitioner has considered that if the case was to proceed past a committal hearing it is likely to be 2024 before the trial will be heard and this would, in effect mean an end to the respondent's career. The petitioner considers that a further period of suspension of 12 months would not be disproportionate at the present time when balanced against the seriousness and nature of the allegations.

Submissions for the respondent

[12] The respondent submitted that he was in total disagreement with the majority of the decision of the Inner House. He opposed the extension of the order for the following reasons:

- (a) The first instance determination on 26 October 2020 and all the subsequent reviews and renewals of that determination, and to include current application, all were wrong in substance and the application of the correct tests stipulated in the

GMC own Guidance on imposing Interim Orders on Medical Practitioner's and adopted by the courts in this country.

(b) The GMC and IOT failed to consider the particular facts about the respondent's case. He had been dragged to a meeting by a state agent in an entrapment operation orchestrated and engineered by the UK security services.

(c) The petitioner always applied the wrong tests stipulated by the GMC guidance in imposing interim orders to include necessity, proportionality and appropriateness tests. (*GMC v MM* [2022] CSOH 25).

(d) The petitioner failed to reason in a clear precise way his reasons for imposition of the order or in his current application to extend it further for 12 months as required by the guidance. The IOT failed to explain how the respondent posed a real risk to public confidence in the profession. It failed to explain how public confidence would be damaged during the period when the respondent was in prison. It ignored that the stringent bail conditions were more than enough to guard against any risk to the public or to the public confidence.

(e) The petitioner in assessing the nature and seriousness of the alleged allegations against the respondent, incorrectly and unlawfully equated his alleged allegations with allegations of a sexual nature, which is not only wrong and demoralising but may amount to a crime of defamation. While the nature of sexually motivated crimes are the same, terrorist allegations vary in nature and seriousness.

(f) The applicant failed to balance the interests of the respondent which are more far reaching than just of their financial and reputational aspect, but also familial, political and national interest among others versus the interest of the public.

(g) The petitioner was wrong that the respondent's bail conditions render him unemployable.

(h) The petitioner, and IOT in their long history of the case committed wrong doings which may impinge on the respondent universal right of fair trial and fair legal proceedings enshrined in article 6 of human rights convention. The IOT had failed to notify him in prison of the first hearing on 26 October 2020, and instead posted the notice to his registered address. At that first hearing, the IOT refused an adjournment application made by the respondent's lawyer.

For these reasons the respondent invited me to:

- (a) Refuse to extend the interim order as sought by the petitioner.
- (b) To declare all previous IOT determinations as being taken illegally and unlawfully by implication of using the wrong public confidence test among other wrongly applied tests.
- (c) To quash all previous expenses awarded to the petitioner regarding these proceedings.
- (d) To declare all previous determinations regarding the respondent's case as been taken illegally, including the determinations concerning the expenses awarded to the petitioner.

Decision

[13] The Inner House has already decided that a reasonable and properly informed member of the public would be surprised and offended to learn that this particular respondent had been permitted to practise whilst under investigation and the subject of these criminal proceedings (*B v GMC* para [27]).

[14] The question for me is 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 the case has not concluded (*B v GMC* para [17]).

[15] The Inner House has conducted that exercise in respect of the previous extension sought in relation to this respondent and found that the previous extension was proportionate (para [27]).

[16] In conducting this proportionality exercise, I am required to reach my conclusion on the basis of the evidence on the application (*Hiew* paragraph 29). That involves a consideration of the position as it is today. It is not simply a matter of automatically applying the same result as the Inner House came to on the proportionality exercise on the previous application. If there has been a material change of circumstance, then a different result may be appropriate. Conversely, if there has not been a material change of circumstance, then the reasoning of the Inner House will remain applicable and may lead to the conclusion that the proposed extension is proportionate.

[17] Much emphasis was put by the respondent on explaining that he was the victim of entrapment by an agent of the British state and in criticising the Police Service of Northern Ireland. It is not appropriate for me to consider these matters: it is not for me to go behind the charges and or make any findings in fact about them (*B v GMC* para [15]).

[18] The Inner House considered the nature of the charges against this particular respondent and concluded that the charges were extremely serious ones (paras [15], [27]). The respondent now challenges that conclusion. He argues that the charges he faces are not as serious as sexual offences: a terrorist is not going into hospital to rape patients. He further submitted that there is a range of seriousness within terrorism offences, so that

speaking to a meeting (as he did) is not as serious as other terrorist activities. I do not agree.

Firstly, this is a case which goes to the general public interest, not to the risk to patients.

Secondly, I am in complete agreement (for the reasons given by the Inner House) with their finding in para [27] that the particular charges against this particular respondent are “of the most serious kind.”

[19] The Inner House recognised that suspension would have an adverse effect on the respondent’s ability to work, although his bail conditions would also be likely to restrict to an extent his ability to do so (para [20]). There has been no change of factual circumstance in this regard.

[20] I accept, for the reasons set out by the Inner House in para [20], that this is not a case in which the risk may be ameliorated by conditions.

[21] I turn now to the passage of time before proceedings may be concluded and thus before the GMC’s investigation may be concluded and the respondent’s ultimate fate determined.

[22] I was updated by parties on the current situation with regard to the criminal proceedings in Northern Ireland. The proceedings are in two stages. Firstly, there is a committal hearing, the purpose of which is for a magistrate in the Magistrates Court to decide whether there is sufficient evidence to send the respondent for trial. If the magistrate decides that there is not, that will be the end of the case against the respondent. If the magistrate decides that there is, then the case will be sent for trial in the Crown Court. The decision to prosecute was taken on 12 August 2021. The committal proceedings against the respondent and others are taking place in the Magistrate’s Court in Dungannon. A number of the accused have exercised their right to call witnesses to give oral evidence in the committal proceedings. Hearings on preliminary matters took place in the week

commencing 27 June 2022. The hearing of witness evidence commenced in October 2022. A timetable has been set for a hearing of applications on the inadmissibility of evidence which is proposed to be heard in the week commencing 28 August 2023. The respondent is also making an abuse of process application on a number of grounds, and this will likely be determined at the same time as the admissibility applications. If the abuse of process application is successful, that will be the end of the case against the respondent. If not, the Magistrate's Court will require to determine the substantive issues in committal, and will most likely timetable written submissions from parties to be followed by an oral hearing, which is likely to take place in the next court term.

[23] So the situation with the criminal proceedings is that the Magistrates Court may bring proceedings against the respondent to an end after the abuse hearing in August 2023, or after the committal proceedings are concluded sometime in 2023 or possibly into 2024. If it does not bring the criminal proceedings to an end, then the case will proceed to trial in the Crown Court, in which case it is not possible to say at this stage when the trial will be concluded.

[24] The extension sought is to April 2024. It is expected that the committal proceedings will come to a conclusion within that time. The interim order will be reviewed by the IOT within 3 months and again in 6 months, in accordance with section 41A(9)(b) of the 1983 Act. The petitioner's position is that if the Magistrates Court discharges the respondent, bringing the criminal proceedings to an end, the petitioner will invite the IOT to revoke the interim order. If the Magistrate commits the respondent for trial, the situation can be reviewed by the IOT.

[25] The suspension is causing the respondent hardship. He is living on state benefits and due to his age may have difficulty in resuming his career after a lengthy suspension.

However in my view the length of the suspension has not yet reached the stage where it makes it disproportionate for the suspension to continue. In finding that the previous extension was proportionate, the Inner House expected that it was unlikely that the trial would take place until at least some time in 2024 (para [5]). The extension currently sought is only to April 2024. During the period of the extension now sought, substantial progress is expected to be made in the criminal proceedings and it is expected that the respondent will either be discharged or committed for trial. If he is discharged, the petitioner will invite the IOT to revoke the interim order. If he is committed for trial, a more realistic estimate can be made of when the trial will take place and the length of time it will take to conclude the criminal proceedings, and that estimate can inform a new proportionality exercise in due course.

[26] In all the circumstances of the case, I find 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 is proportionate to the nature of the offences and the risk to public confidence in the profession. I am satisfied that it is in the public interest for the suspension order to be extended as sought.

[27] That is all that is required to deal with the motion for extension but I shall deal briefly with two particular matters raised by the respondent.

[28] Firstly, the respondent criticised the prior conduct of the GMC, in writing to him at his home rather than his prison address, and in not adjourning a hearing on 26 October 2020, which he maintained were a breach of the right to a fair trial under article 6 of the European Convention on Human Rights. He also criticised the IOT for applying the wrong test. He invited me to grant a declarator that all previous IOT determinations were illegal and

unlawful. All of these criticisms are unfounded. Writing to the home address was of no prejudice as it did not prevent the respondent from instructing legal representatives and defending the IOT proceedings. The decision as to whether or not to adjourn was an exercise of the discretion of the IOT. The respondent has not shown that any prejudice has resulted from the decision not to adjourn. The respondent's argument on the wrong test was founded on *GMC v MM*. In that case the Lord Ordinary found that the wrong test had been applied: the GMC had applied a test of impairment of fitness to practise which may adversely affect the public interest, whereas the correct test was whether the public confidence in the medical profession was likely to be seriously damaged if the doctor continued to hold unrestricted registration (para [11]). However that is of no relevance to the current case, as the IOT applied the correct test (paragraph 32 of its determination of 23 March 2022).

[29] Finally, the respondent alleges that he has been defamed by the petitioner. That allegation was made in the Judicial Review petition (which of course was not given permission to proceed):

“The Analogy made by the Council and IOT between the allegations of [the Respondent] and sexual assault offences to include sexual assaulting patients and children is unlawful and amount to Libel Defamation”.

The allegation was also referred to in oral submissions at the hearing in the current petition. The respondent's position is that the petitioner has implied that he has committed a sexual offence, and he submitted orally that his community, friends and children had been asking him if it was true that he had committed rape. There is no basis at all for this false allegation of defamation. The respondent has constructed it from a perverse misreading of the petitioner's Guidance on Imposing Interim Orders. The Guidance gives particular guidance on provision for sexual criminal cases in paragraphs 29 and 30, guidance on non-sexual

criminal cases in paragraph 31, and general guidance on serious criminal cases in paragraphs 43 and 44. The respondent has conflated these provisions and come to the inexplicable and entirely false conclusion that the GMC and IOT have accused him of a criminal sexual offence.