Privacy in Disciplinary Proceedings: Is the High Court Bound by a Decision of the Fitness to Practice Committee to Carry out a Hearing in Private?

1. *Introduction*

Traditionally, statutory professional conduct and health hearings conducted by the inquiry committees of professional regulatory authorities, such as a Fitness to Practice Committee ("FTPC"), were held in private, with the caveat that there was no express statutory obstacle to them being heard in public.[1] However, increasingly the default legislative provision for inquiry committee hearings is that they should be held in public, unless, upon application from one of the parties or a witness in the matter, the inquiry committee decides otherwise. This change in the landscape has legal roots, such as the constitutional requirement that justice be administered in public and European Convention on Human Rights requirements. However, the move to predominantly public hearings also reflects a general trend towards increased transparency on the part of professional regulatory authorities.

However, a question that arises on foot of this growing trend to have matters held in public is whether a court is bound by a decision of an inquiry committee or professional regulatory authority to hold the hearing of a matter in private or whether the court even has the jurisdiction to hear an application that comes before it in a manner otherwise than in public. This subject matter was considered by Kelly P. in the case of *The Medical Council v. T.M.* [2017] IEHC 548. In this case, the sole question that the Court sought to address was whether the High Court has power under the Medical Practitioners Act 2007 ("the Act") to hear an application pursuant to s. 76 of the Act otherwise than in public.

2. *Background*

The background to the case is that the Medical Council were seeking an order pursuant to s. 76 of the Act confirming its decision of December 2016 to cancel the respondent's registration as a medical practitioner. This decision of the Medical Council was made on foot of a finding by the FTPC that the registrant was guilty of professional misconduct. The FTPC recommended that his registration as a medical professional be cancelled. This decision was endorsed by the Medical Council when they imposed said sanction. The hearing of the FTPC was in private. The hearing before the Medical Council was also held in private on foot of the recommendation

[1] Simon Mills, *Disciplinary Proceedings in the Statutory Professions* (Bloomsbury Professional, 2011) para 5.38

of the FTPC. Further, the Medical Council made the decision not to publish the details of the sanction as they had the authority to do under s. 85 of the Act.

When the matter came to be heard before the High Court pursuant to s. 76 of the Act, the respondent, Dr. T.M., argued that in the circumstances, the application to confirm the cancellation of his registration ought to be held in private. At the beginning of the application, the solicitor for the Medical Council raised a concern about whether the Court had jurisdiction to hear the matter otherwise than in public. Kelly P. directed that written submissions on the matter be exchanged and that there be oral submissions on the subject. Kelly P. gave a detailed written judgment on this point on 3rd October 2017.

3. The Legislation

Before dealing with the judgment of Kelly P., it may be useful to set out some of the aspects of the legislation in question that were being considered by the Court. Section 76 of the Act provides:

> 76.— (1) Where a registered medical practitioner does not, within the period allowed under section 75 (1), appeal to the Court against a decision under section 71 to impose a sanction (other than a sanction referred to in section 71 (a)) on the practitioner, the Council shall, as soon as is practicable after the expiration of that period, make an application to the Court for the confirmation of the decision.
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> (2) An application under subsection (1) may be made on an *ex parte* basis.
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> (3) The Court shall, on the hearing of an application under subsection (1), confirm the decision under section 71 the subject of the application unless the Court sees good reason not to do so.

Therefore in circumstances where the Council imposes a sanction other than an advice, an admonishment, or a censure in writing, the Council must apply to the High Court to confirm the decision. Similar provisions exists in the regulation of Nurses,[2] Health and Social Care Professionals[3], Pharmacists[4], Dentists[5] and Veterinarians[6].

[2] Nurses and Midwives Act 2011, s. 74.
[3] Health and Social Care Professionals Act 2005, s. 70.
[4] Pharmacy Act 2007, s. 52.
[5] Dentists Act 1985, s. 39(4).
[6] Veterinary Practice Act 2005, s. 80(5).

It is also useful to examine whether a hearing before the FTPC will normally be heard in public. Section 65(2) of the Act provides that:

> (2) A hearing before the Fitness to Practise Committee shall be held in public unless—
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> > (a) following a notification under section 64 , the registered medical practitioner or a witness who will be required to give evidence at the inquiry or about whom personal matters may be disclosed at the inquiry requests the Committee to hold all or part of the hearing otherwise than in public, and
> >
> > (b) the Committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing otherwise than in public.

Therefore the general position is that hearings before the FTPC should be dealt with in public. However the legislation does expressly allow in certain circumstances that a hearing be heard in private. Again, similar provisions exist to allow for hearings of the FTPC to be heard in private in relation to Nurses,[7] Health and Social Care Professionals[8] and Pharmacists[9]. In the case of the Dentists Act 1985 and Veterinary Practice Act 2005, the legislation is quiet on the question of whether a hearing should be held in public or private. In such circumstances, the courts have held that the regulation authority has the discretion to determine whether any given hearing should be heard in public or private.[10]

4. <u>Constitutional Requirement for the Matter to be Heard in Public</u>

The general position under the Constitution is that , subject to certain limitations, justice should be administered in public. Article 34.1 of the Constitution provides:

> "Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

The justification for the requirement that justice be conducted in public was enunciated clearly in the observations of Keane J. (as he then was) in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 at p. 409:-

> "Justice must be administered in public, not in order to satisfy the merely prurient or mindlessly inquisitive, but because, if it were not, an essential feature of a truly

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[7] Nurses and Midwives Act 2011, s. 63(3).
[8] Health and Social Care Professionals Act 2005, s. 58.
[9] Pharmacy Act 2007, s. 42.
[10] See for example *Barry v. The Medical Council* [1998] 3 I.R. 368.

> democratic society would be missing. Such a society could not tolerate the huge void that would be left if the public had to rely on what might be seen or heard by casual observers, rather than on a detailed daily commentary by press, radio and television. The most benign climate for the growth of corruption and abuse of powers, whether by the judiciary or members of the legal profession, is one of secrecy."

Therefore there is a clear constitutional requirement that justice should, subject to certain limitations, be administered in public. Therefore the question that faced the Court in *The Medical Council v. T.M.* was whether an application brought under s. 76 of the Act was one of the special and limited cases prescribed by law which may be heard otherwise than in public.

It is quite clear from the legislation that the Act does not expressly authorise the High Court to hear an application pursuant to s. 76 in a manner otherwise than in public. The legislation simply does not address this point. At no point did the Oireachtas provide an enabling provision to allow the Court to hear a matter pursuant to s.76 otherwise than in public.

Section 60 of the Act is the one section that makes such a provision. Section 60 deals with instances whereby the immediate suspension of a medical practitioners registration is necessary to protect the public. The section allows the Medical Council to make an *ex parte* application to the High Court for an order to suspend the registration of a registered medical practitioner, whether or not the practitioner is the subject of a complaint at that point, if the Council considers that the suspension is necessary to protect the public until further steps are taken pursuant to complaints to the Preliminary Proceedings Committee, the FTPC or the Medical Council prior to the imposition of a sanction.[11] Kelly P. noted that it was clear that the legislature had addressed its mind to the question of hearings in a manner otherwise than in public but had limited this entitlement to an application brought under s. 60 of the Act. It is quite clear that the learned trial judge was correct in coming to the conclusion that the Court had no express power to hear the matter in any other manner other than in public. Consequently the true question that the Court had to answer was whether the Court had an implicit authority to hear the matter in private.

[11] Similar provisions exist in relation to the other statutory professions, see: Section 29 of the Health (Miscellaneous Provisions) Act 2005, Section 58 of the Nurses and Midwives Act 2011, Section 45 of the Pharmacy Act and Section 44 of the Dentist Act 1985.

5. Submissions

Counsel on behalf of the respondent argued that having had the benefit of an *in camera* hearing before the FTPC and the Medical Council, coupled with the decision of the Council not to publicise the outcome of the matter, it would be anomalous and nonsensical that the hearing pursuant to s. 76 of the Act be heard in public. It was argued that to hold that there was no implicit power conferred to the Court to hear the matter *in camera* would fall foul of s. 5 of the Interpretation Act 2005 as it would lead to an absurd result. The respondent also drew attention to the fact that the reason for the initial hearing being conducted in private occurred not only based on representations by the respondent but also on behalf of the complainant, who was a former patient of the respondent. It was argued, therefore, that once the FTPC decided to have a private hearing, the Council and the Court were bound by this decision so as to keep faith with the complainant who had agreed to give evidence on the assurance that they would be doing so in private. Further, the respondent argued that in the absence of any statutory exception providing for the lifting of the *in camera* ruling made by the FTPC and in the absence of a court order lifting the ruling, the *in camera* ruling continues and binds the Court.[12]

The first part of the applicant's submission involved a detailed consideration of the predecessor to the 2007 Act, the Medical Practitioners Act 1978, and a number of decisions in relation to that piece of legislation, in particular *Barry v. The Medical Council* [1998] 3 I.R. 368. Kelly P. rejected these arguments almost immediately on the basis that not only had there been a total repeal of the 1978 Act, there "was also a considerable shift in emphasis" towards the hearing of inquiries in public. The applicant further submitted that there was no implicit statutory entitlement to hear a s. 76 application in private. Finally the applicant argued that the Court could not be bound by a previous decision of the FTPC to hear the matter in private nor would it have to seek the permission from the FTPC to depart from its decision to hold the matter in private.

6. Decision

The President of the High Court carried out an in depth analysis of the legislation. The first conclusion that the learned judge came to was that it is clear that the legislation provides no express power to hear a s. 76 application in a manner otherwise than in public. Kelly P. also noted that there were a number of problems with the argument that it could be implied that the legislature intended that the court would have the ability to hear a s. 76 application in private.

[12] The respondent relied on *M.P v. A.P* [1996] 1 I.R. 144 and *R.M v. D.M.* [2000] 3 I.R. 373 for this proposition.

The first problem that the learned judge noted was the constitutional imperative of Article 34 that justice be administered in public. The second difficulty that Kelly P. noted was that the legislature had addressed its mind to the entitlement of the court to hear matters in private and had limited this power to s. 60. A third problem identified by Kelly P. related to the long title of the Act. In particular, the Court drew attention to the opening line of the long title of the Act which states that the Act was "An Act for the purpose of better protecting and informing the public in its dealings with medical practitioners…". The Court said that this was a formidable obstacle to the contention that that there is an implicit power conferred to the court by virtue of the legislation. The purpose of the Act was to inform and protect the public. Consequently it was difficult to see how an implicit power to hear a matter in private could fit into this purpose.

The President of the High Court held that the applicant was correct in arguing that there was no implicit statutory entitlement given to the court to hear an application pursuant to s. 76 in private. Kelly P. roundly rejected the argument that once the FTPC made a decision to hold a hearing in private, the Council and much less the court could be bound by such a decision. Similarly the Court rejected the argument that in order to keep faith with a witness who gave evidence on the assurance that it would be done in private, it would be necessary that such privacy would continue once the FTPC had finished its business. Finally the Court was not persuaded by the argument that the absence of an express or implied authority to hear a s. 76 application privately would lead to an absurd result. The fact that the FTPC and the Council decided the matter in private cannot affect the Court's obligation to render justice in public and all that flows from that. The Court further stated that no absurdity or ambiguity would exist. Further, as s. 76 dealt with the imposition of a sanction, Kelly P. held that s. 5 of the Interpretation Act did not apply in the circumstances.

Therefore it is quite clear, there is no explicit or implicit power vested in the Court by virtue of the Act to hear the matter in any other manner than in public. Given the similar legislation that is in place for the majority of the other statutory professions, it is likely that a similar decision would be reached in relation to a similar application before the High Court.

7. *Common Law Power to Hear Matters in Camera*

The final argument made by the respondent was that regardless of whether there was an express or implied power conferred on the court by virtue of the statute, the court has an inherent jurisdiction to hear the matter otherwise than in public. In oral submissions, the Medical

Council accepted that this was a correct statement of the law. Therefore it is useful to examine whether the court has such an inherent power by virtue of the common law to hear a s. 76 application *in camera*.

Until recently, the position in Ireland was that a court had no power to hear a matter otherwise than in public unless such a power was expressly conferred by statute. This was a result of the decision in *In Re R Ltd* [1989] I.R. 126. In this case, the majority of the Supreme Court (Walsh, Griffin and Hederman JJ.) came to the conclusion that the 1937 Constitution removed any judicial discretion to hear proceedings other than in public save in circumstances where it was expressly conferred by statute. Walsh J. gave the judgment on behalf of the majority. In coming to his conclusion, the learned judge referred specifically to Article 34 of the Constitution as well as various other human rights instruments which had similar provisions, such as the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and Article 6.1 of the European Convention on Human Rights. Walsh J. took the view that the introduction of the 1937 Constitution removed the previous discretion that courts had to hear a matter in private if it was necessary to enable that justice be done. Walsh J. held that only where it was expressly provided for by statute could a court hear a matter *in camera.*

The situation changed in 2017 with the Supreme Court decision of *Gilchrist and Rogers v. Sunday Newspapers* [2017] 2 I.R. 284. This case arose in circumstances where the plaintiffs were officers of the State's witness protection programme. They brought proceedings alleging that articles published by the defendants, in addition to disclosing and publicising their identities, were defamatory in nature. The Garda Commissioner sought to be joined as a notice party and to have the matter heard *in camera* on the basis that there was a risk to the life of officers, members and persons in the witness protection programme and on the legitimate State interest in maintaining the secrecy of the programme. The defendants argued that the trial should be heard in public. At first instance, the High Court acceded to the application for joinder and made limited orders restricting access and delaying reporting of the cases but did not order a full *in camera* hearing. This decision was appealed to the Court of Appeal where the Court allowed the joinder of the Garda Commissioner and directed that the trial should be heard *in camera.* The matter eventually came before the Supreme Court.

O'Donnell J. gave the judgment on behalf of an unanimous Supreme Court and it marked a departure from the decision of *In Re R Ltd.* O'Donnell J. described the decision in *In Re R Ltd*

as "something of an overcorrection"[13]. O'Donnell J. noted that whilst *In Re R Ltd* held that a matter could be heard *in camera* only when there was a specific statutory provision conferring this power, this was at odds with the decision in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 where it was held that the courts retain power, not dependent on legislation, to limit the extent to which a case is heard in public. The Court took the view that much of the difficulty that arose in such circumstances is down to "to an over-rigid approach derived from the decision in *In Re R. Ltd*."[14] It was noted that the principles set down in *In Re R. Ltd* had the benefit of being simple and principled but the unfortunate consequence that it has been understood as imposing an almost blanket rule which precluded even minor adjustments of the obligation of a public trial such as permitting a litigant to use a pseudonym, or initials, or directions that parties not be identified. O'Donnell J. came to the conclusion at p. 312, para 40, that there "there is a continuing common law power to direct a trial *in camera* where it is required, and that such a course could be particularly justified when constitutional values are engaged...".[15] The Court held that any such claim "can only be determined by the courts and must be closely and jealously scrutinised." O'Donnell J. stated the benefit of such an approach was that any deviation from the principle of open justice would be exceptional and therefore strictly construed and applied.

Therefore it is clear that the courts possess a common law power to direct that a trial be heard otherwise than in public. O'Donnell J. said that the principles to be applied in determining whether there should be a departure from a public hearing could be summarised thus[16]:

> (i) The Article 34.1 requirement of administration of justice in public is a fundamental constitutional value of great importance.
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> (ii) Article 34.1 itself recognises however that there may be exceptions to that fundamental rule.
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> (iii) Any such exception to the general rule must be strictly construed, both as to the subject matter, and the manner in which the procedures depart from the standard of a full hearing in public.

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[13] *Gilchrist and Rogers v. Sunday Newspapers* [2017] 2 I.R. 284, p. 302 at para 23.
[14] *Gilchrist and Rogers v. Sunday Newspapers* , n 13, p. 311 at para 38.
[15] O'Donnell J. relied on the *dicta* of by Keane J. in *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359 and Lord Scarman in the *Att.-Gen. v. Leveller Magazine* [1979] A.C. 440 to come to this conclusion.
[16] *Gilchrist and Rogers v. Sunday Newspapers* , n. 13, p. 316 at para 46.

(iv) Any such exception may be provided for by statute but also falls under the common law power of the court to regulate its own proceedings.

(v) Where an exception from the principle of hearing in public is sought to be justified by reference only to the common law power and in the absence of legislation, then the interests involved must be very clear, and the circumstances pressing. Here that demanding test is capable of being met by the combination of the threat to the programme and the risk to lives of people in it or administering it. This is not a matter of speculation, but seems an unavoidable consequence of the existence of a witness protection programme.

(vi) If it can be shown that justice cannot be done unless a hearing is conducted other than in public, that will plainly justify the exception from the rule established by Article 34.1, but that is not the only criterion. Where constitutional interests and values of considerable weight may be damaged or destroyed by a hearing in public, it may be appropriate for the legislature to provide for the possibility of the hearing other than in public, (as it has done) and for the court to exercise that power in a particular case if satisfied that it is a case which presents those features which justify a hearing other than in public.

(vii) The requirement of strict construction of any exception to the principle of trial in public means that a court must be satisfied that each departure from that general rule is no more than is required to protect the countervailing interest. It also means that the court must be resolutely sceptical of any claim to depart from any aspect of a full hearing in public. Litigation is a robust business. The presence of the public is not just unavoidable, but is necessary and welcome. In particular this will mean that even after concluding that the case warrants a departure from that constitutional standard, the court must consider if any lesser steps are possible such as providing for witnesses not to be identified by name, or otherwise identified or for the provision of a redacted transcript for any portion of the hearing conducted in camera.

Kelly P. relied on the decision *Gilchrist and Rogers v. Sunday Newspapers* and held that it was clear that there was a common law power to hear s. 76 applications otherwise than in public vested in the court, so long as the circumstances are appropriate and the conditions laid down by the Supreme Court are met.

8. Conclusion

The vast majority of the statutory professions have a similar requirement that the more serious sanctions that can be imposed, such as a fine, conditions, suspension or erasure from the register, must be confirmed by the High Court. However it is clear from *The Medical Council v. T.M* that simply because the initial proceedings before the FTPC or the statutory authority were held in private, it does not mean that the High Court application shall be heard in private. The legislation that gives the FTPC or statutory authority the jurisdiction to hear a matter in private simply has not been extended to the High Court. Consequently, if a matter is to be heard in private, a subsequent application must be made by the registrant asking the court to use its common law power to hear the matter *in camera*.

In order to be successful in having the High Court application heard in private, the registrant will have to show that the circumstances are appropriate, and the conditions laid down by the Supreme Court in *Gilchrist and Rogers v. Sunday Newspapers* have been met. The Court in *The Medical Council v. T.M.* did not explore the weight of the factors that will be taken into account when determining whether to hear an application in private. However, it is clear from the judgment in *Gilchrist and Rogers v. Sunday Newspapers* that it will only be in exceptional circumstances that the court should hear a matter otherwise than in public. Perhaps of particular relevance is the *dicta* of O'Donnell J. when he stated,

> "Where the Oireachtas has not seen fit to legislate for the possibility of a hearing in camera, then the court should only exercise an inherent jurisdiction to depart from a full hearing in public where it is shown that the interests involved are particularly important, and the necessity is truly compelling."[17]

Whilst a court has a common law power to hear a matter in private, this should only happen in exceptional circumstances. For a matter to be heard in private, the interests involved must be very clear and there must be pressing circumstances that require it. As O'Donnell J. stated in *Gilchrist and Rogers v. Sunday Newspapers,* "the court must be resolutely sceptical of any claim to depart from any aspect of full hearing in public." The Court will therefore adopt a two-stage approach in determining whether to hear a matter in private: firstly determining

[17] *Gilchrist and Rogers v. Sunday Newspapers* , n. 13, p.313 at para 41.

whether it is necessary to depart from Article 34.1; and if affirmative, considering whether the requirements of justice can be met by implementing measures short of a full *in camera* hearing.