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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DR STEPHAN DAX FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
AND
IN THE MATTER OF A DECISION OF THE MENTAL HEALTH COMMISSION DATED 31 MAY 2007

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GILLEN J

Application

[1] This is an application pursuant to Order 53 Rule 3 of the RSC (NI) 1980 for leave to be granted for a judicial review of a decision of the Mental Health Commission ("MHC") refusing the application of the applicant for appointment as a Part II Doctor under the Mental Health (Northern Ireland) Order 1986 ("the 1986 Order")("Part II approval ") on 31 May 2007 ("the decision").

[2] The relief sought by the applicant is declaratory in nature that the decision was unlawful and ultra vires, Wednesbury irrational, procedurally unfair and in breach of the applicant's substantive legitimate expectation. Further, damages are sought.

Background

[3] The applicant is a German national having qualified as a medical doctor in Germany. In August 2003 the specialist training authority of the Medical Royal Colleges in London held his qualifications in old age psychiatry to be equivalent to the award of a Certificate of Completion of Specialist Training (CCST). Following that he was entered onto the General Medical Council Specialist Register for Old Age Psychiatry from 2 September 2003. It was his submission that since February 2004 the London health

authorities had approved him under Section 12(2) of the Mental Health Act 1983 thereby entitling him to make medico-legal recommendations under that Act, detain patients and release patients from detention. That approval was granted for a period of five years. He submitted that that was the equivalent of Part II status.

[4] In December 2004 the Sperrin Lakeland Health and Social Care Trust had given him employment as a psychiatrist in the Tyrone and Fermanagh Hospital. He was given Part II approval under the 1986 Order for a limited period. That approval was further extended until 31 March 2006 and thereafter until 20 October 2006. In January 2007 Dr Dax moved to work in Hampshire, returning to Northern Ireland later in 2007 to take up a position with the Mater Hospital in Belfast on 16 April 2007.

[5] On 20th May 2007, he wrote to the MHC advising of his appointment at the Mater Hospital and asking that he be re-appointed under Part II of the 1986 Order. He sought retrospective appointment from April 2007 when he had commenced his post. On 21 May 2007 Dr McGarry, the lead clinician in psychiatry at the Mater Hospital wrote on behalf of the Belfast Health and Social Care Trust ("the Trust") to the MHC asking that Dr Dax's Part II status be confirmed.

[6] The MHC has drawn up a guidance note headed "Appointment of Substantive or Locum Part II Doctors" ("the guidance") dealing with the procedures for such appointment which were last updated 22nd March 2007. Inter alia, it describes the main criteria as follows:

> "Specialism of mental illness or learning disability
>
> A copy of the Certificate of Completion of Special Training is one of the above specialisms,
>
> or
>
> a letter from the General Medical Council (GMC) confirming the Doctor's status on the Specialist Register established by the GMC under the European Specialist Medical Qualifications Order 1995
>
> - When this information is received, the information is forwarded to all medical members with a covering letter … for consideration and immediate return (this letter is signed by the Chief Executive). A proforma is also provided so that the member can indicate whether they agree or disagree to the

proposed appointment. This letter should be issued within one working day of receiving request …..

- When responses are received from all members, the majority decision is used to decide whether or not the appointment should be granted

….

- A standard letter .. is sent to the doctor confirming his appointment …

……

- A standard letter is issued to the Trust confirming the Doctor's appointment and period of appointment. The Chief Executive signs this letter. If appointment is not agreed, a letter is issued to the Trust advising that the request has been considered but not approved, usually based on the information supplied."

[7] Accordingly on 28 May 2007 Ms Peden the Chief Executive of the MHC wrote to three doctors asking that they complete the attached proforma indicating whether or not they agreed or disagreed to Dr Dax's appointment as a Part II doctor. In addition on 29 May 2007 Ms Peden wrote to the Trust indicating that an order to process the application the MHC required a copy of the CCST demonstrating specialism in either mental illness or learning disability or a letter from the GMC confirming the doctor's status on the specialist register required by the GMC under the European Special Medical Qualification Order 1995.

[8] I am satisfied that thereafter there was a genuine dispute between the applicant and the MHC as to whether or not the majority of the medical members had decided the appointment should be granted. It is clear that one doctor disagreed with the appointment as the information provided was said to be out of date. Another doctor had agreed that the appointment should be made. The issue arose as to the third doctor. It was MHC's interpretation of that third doctor's response that Dr Dax did require to furnish an up-to-date GMC certificate (the original certificate having been dated 2003) to enable the Commission to process the request. The applicant's interpretation of what she said was that this doctor had looked at the GMC website and confirmed that Dr Dax was currently registered appropriately although the Trust needed to be reminded to supply a current certificate. He interpreted that as a confirmation of the appointment. MHC did not. I pause

to observe that I am satisfied that this amounted to a purely factual dispute between the parties as to whether or not the majority had approved the request and that there was no dispute of principle between the applicant or the proposed respondent. It was clearly accepted by the Trust that the guidance was to be followed and that the majority decision would be used to decide whether or not the appointment should be granted. The delay therefore in the MHC making a decision was occasioned by the belief of Ms Peden that the Trust had not provided up-do-date evidence of suitability of appointment in the absence of up-to-date evidence of suitability of employment.

[9] Thereafter on 24 July the applicant filed a number of complaints against Ms Peden and HMC to the Minister of Health alleging, inter alia, that their failure to appoint him as Part II doctor was unlawful and discriminatory.

[10] Further correspondence ensued. Jones & Cassidy solicitors came on record for the HMC and wrote to the solicitors acting on behalf of the applicant on 15 August 2007 indicating that HMC "simply requires an up-to-date letter from GMC confirming Dr Dax's status on the specialist register as established by the GMC. "Thereafter the HMC would proceed to grant the Part II status.

[11] The matter was finally resolved in a letter of 7 September 2007 from MHC advising that Dr Dax had been appointed as a Part II doctor from 5 September 2007 to 31 March 2008.

[12] Subsequently the solicitors acting on behalf of the applicant wrote to Jones & Cassidy indicating that they were still "at a loss to understand why it has taken so long to grant same" and indicating that judicial review proceedings would be issued if a prompt response was not provided. In essence the applicant's solicitors required to know why there had been a delay in granting the Part II status, why an up-to-date letter from the GMC confirming his status on the specialists register was required when that information could have been obtained by a simple search of the GMC website, and a number of other ancillary queries.

[13] By correspondence of 28 September 2007 Jones & Cassidy replied referring to the criteria set out in the guidance. It was again asserted that two of the three doctors on the medical panel had required an up-to-date certificate and that the MHC had written to Dr Dax's employer the Trust on 15 August 2007 referring to the standard requirements namely the up-to-date letter from the GMC and details of the period to which Dr Dax's status was to apply. The correspondence declared that it received correspondence on 24 August 2007 from the Trust attaching what was described as "a letter" from the GMC confirming Dr Dax's status on the specialist register and that the

Part II status would be up to 31 March 2008. In fact what had been provided by the Trust was a print out from the GMC's website. MHC contacted the GMC regarding the point and was advised by the GMC that it did not issue letters and confirmed that the print out was "live". Accordingly Dr Dax was granted Part II status and advised by letter dated 7 September 2007 from the MHC. That letter attached a copy of the record of the decisions of the three medical doctors of the interpretation of whose decision was in dispute.

[14] Further correspondence ensued between the applicant's solicitors and Jones & Cassidy. On 18 October 2007 the applicant's solicitor wrote to Jones & Cassidy indicating that Dr Dax intended to issue judicial review proceedings without further notice unless the MHC accepted that it had acted "illegally, irrationally and in a procedurally unfair way on the basis that they failed, inter alia, to appoint Dr Dax Part II status despite the fact that the medical members had reached the majority decision in favour of Dr Dax by 30 May 2007." The letter went on to require satisfactory responses to the following questions:

> "1. Why was Dr Dax refused appointment when a majority decision was made in favour of his appointment as a Part II doctor?
>
> 2. Why was a letter requested from Dr Dax when clearly he could not provide same as the GMC do not issue letters as the relevant information is to be found on their on-line directory?
>
> 3. Why did the MHC not verify Dr Dax's registration by checking this on-line directory especially after they had been notified of the existence of this service through Dr Donnelly?
>
> 4. Why was the MHC not aware of this on-line service before Dr Donnelly alerted them to same?"

That letter finally sought proposals from the MHC as to compensation for the financial loss suffered by Dr Dax.

[15] By correspondence dated 23 October 2007 Jones & Cassidy replied indicating that the letter of 18 October 2007 had been only received on Tuesday 23 October 2007 and requesting a further seven days to respond.

[16] On 26 October 2007 Jones & Cassidy did respond setting out their answers to the questions raised as follows:

> "1. The Commission does not accept that it 'refused to appoint' Dr Dax. As set out in our letter of 28 September 2007, when the Medical Panel first considered Dr Dax's application, the majority of the doctors on the Medical Panel were of the view that Dr Dax should furnish an up-to-date certificate to enable the Commission to process his application.
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> 2. A letter from GMC confirming the doctor's status on the Specialist Register was requested from Dr Dax in accordance with the Commission's shortlisting criteria. This criteria was drafted prior to the Commission being subsequently advised by the GMC that it did not issue such letters. Upon being advised of the position by the GMC, Dr Dax's Part II status was confirmed on the basis of the documentation provided by Mr Mullan of the Trust by letter dated 24 August 2007.
>
> 3. The Commission dealt with Dr Dax's application in accordance with its shortlisting criteria. When the Commission became aware from the GMC that it did not issue letters as per the Commission's shortlisting criteria, Dr Dax's Part II status was confirmed on the basis of the documentation provided by Mr Mullan of the Trust by letter dated 24 August 2007, namely the up-to-date print out from the GMC website.
>
> 4. See (3) above."

The Commission denied that it had acted unlawfully, unreasonably, irrationally, and/or unfairly.

[17] Thereafter on the 29 October 2007, the present proceedings were issued.

Legal principles

[18] It is well settled that in order to be permitted to present a judicial review application the applicant must raise an arguable case on each of the grounds on which he seeks to challenge the impugned decision (see In the Matter of an Application by John Hill for Leave to Apply for Judicial Review (unreported KERF5718 12 January 2007).

[19] R v Secretary of State for Home Department ex parte Salem (1999) AC 450 ("Salem") is the leading authority on the exercise of the court's discretion to deal with issues which have become academic. Lord Slyn in a well known passage said as follows:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties ….. The discretion to hear disputes, even in the area of public law, must however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[20] I am also conscious of the views expressed by Munby J in R (Smeaton) v Secretary of State for Health (2002) 2 FLR 146 at paragraph 22 where he said that the constitutional function of courts is to:

> "Resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires."

Conclusions

[21] I have come to the conclusion that the applicant in this case has failed to establish that there is an arguable case to be made in this matter for the following reasons.

(i) First, I am satisfied that the Salem principle should apply. Now that the Part II has been granted, the alleged failure on the part of the proposed respondent to confer this status is purely academic. The dispute that existed

was a purely factual one ie. whether or not the third doctor making up the medical members consulted had been in favour of conferring the status. This does not involve any interpretation of the procedural guidance because it is common case that a majority decision will be used to decide whether or not the appointment should be granted. It has often been observed that judicial review is unsuitable for resolving disputes of fact. Although it may well be appropriate in certain instances, in essence judicial review is not a fact finding exercise. It is an extremely unsatisfactory tool by which to determine matters of dispute such as have arisen in this case. (See In the Matter of an Application by Zhanje for Judicial Review (2007) NIQB 14 at paragraph 8.) The factual dispute in the instant case was unsuitable to be determined in judicial review and unlikely to be capable of resolution on affidavit evidence. In any event, resolution would have made no contribution to interpretation of the guidance notes in this or in any other case.

(ii) It is conceded by Mr McQuitty on behalf of the applicant that whilst the delay in granting this status on 7 September 2007 did compromise the applicant's ability to sign off or release patients under his care in the event no public mischief arose. That fact further renders the application academic.

(iii) It is clear from the correspondence that the MHC now recognise the position of the GMC that it does not issue letters confirming a doctor's status on the specialist register and accordingly that impediment is unlikely ever to surface again. No point of principle or matter of public interest therefore arises.

[22] In any event, judicial review is generally regarded as a last resort. The existence of an alternative remedy can be a strong reason to refuse leave at the beginning of a case or a remedy at the end of it. The court will look at all the circumstances, including the nature of the issue and the suitability of the alternative remedy for resolving it. (See Lord Woolf CJ in R (Cowl) v Plymouth City Council (2002) 1 WLR 803). I believe there is substance in the submission by Mr McGleenan, who appeared on behalf of the proposed respondent, that there a series of potential alternative remedies for this applicant now that his status has been confirmed. Declaratory relief together with damages was the limit of the relief sought in this case. The applicant is in a position to consider an action by writ, application to the Ombudsman, remedies under the Race Relations legislation or reference to an unfair employment tribunal to address the issues which he has raised of concern in this matter if there is any substance to them. The presence of alternative remedies is therefore another factor which has persuaded me that leave should be refused in this case.

[23] I consider that there is also strength in the submission of Mr McGleenan that this application was in any event misconceived because, whatever the delay in dealing with the matter, in the event no decision had

been taken to refuse the application for appointment as a Part II doctor under the 1986 legislation. It is significant that paragraph 2 of the Order 53 statement refers to the MHC "de facto refusing" his application. The correspondence from MHC in my view made it clear that it was seeking further and up-to-date confirmation of the status of the applicant before coming to a final decision. Confirmation of the status under the guidance is to be issued to the Trust albeit that a standard letter will also be sent to the doctor confirming his appointment. By correspondence of 5 June 2007 Ms Peden had written to the Trust outlining what she considered to be the impediments to granting the application of Dr Dax requesting that the Trust considered the steps that could be taken to "alleviate the situation". The letter made it clear that the onus was on the employing Trust to provide up-to-date evidence of suitability for appointment. I do not consider this amounted to a refusal but rather an indication that further information was required if the application was to be granted. In the event it appears that the Trust did not directly respond to this letter of 5 June 2007 until 25 August 2007 albeit there had been correspondence in the interim directly with Dr Dax. In these circumstances therefore I have concluded that the application by the applicant was premature and launched before a genuine lis had been joined between the applicant and the proposed respondent.

[24] Whilst it is unnecessary for me to determine the matter, for the sake of completeness I conclude by indicating that I was not persuaded by Mr McGleenan's argument that the applicant was in breach of the obligation to bring the judicial review proceedings promptly and in any event within three months from the date when the grounds for the application first arose unless the court consider there is good reason . Applying the principles set out in R v Secretary of State for Trade and Industry, ex parte Greenpeace Limited (2000) Env LR 221 I concluded that there was reasonable objective excuse for applying late given the nature of the correspondence that had been entered into between the parties in an attempt to resolve the matter. No damage or prejudice to third party rights or detriment to good administration would have occurred by the case progressing had there been arguable grounds for so doing.

[25] In all the circumstances therefore I dismiss this application.