Neutral Citation No: [2021] NIQB 58 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **ROO11496** *ICOS No:* **20/070940** *Delivered:* **04/05/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPEAL UNDER SECTION 40 OF THE MEDICAL ACT 1983 (AS AMENDED) AGAINST A DECISION MADE BY A MEDICAL PRACTITIONERS TRIBUNAL

BETWEEN:

Dr CHRISTOPHER OBASI

Appellant

and

THE GENERAL MEDICAL COUNCIL

Respondent

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The Appellant is a Personal Litigant represented by his wife and daughter as McKenzie Friends
Mr Philip McAteer BL instructed by Cleaver Fulton Rankin Solicitors for the Respondent

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ROONEY J

Issue for Determination

[1] Whether the court in the exercise of its discretion should make a Protective Costs Order ("PCO") in favour of the appellant.

Introduction

[2] The appellant seeks to appeal a decision of the Medical Practitioners Tribunal ('MPT') dated 1 June 2020 which imposed an extension to a previous 2019 suspension of the appellant's registration pursuant to Section 35D and Section 38 of the Medical Act 1983.

[3] The respondent states that the Medical Practitioners Tribunal ('MPT') sent notification of the 1 June 2020 decision to the appellant by letter dated 2 June 2020.

The letter was sent by special delivery post. The letter dated 2 June 2020 included the following paragraph:

> "***Your Right of Appeal***
>
> *I enclose a note explaining your right of appeal. Any appeal must be lodged at the relevant Court within 28 days of the date on which notification of this decision is deemed to have been served upon you. Notification will be deemed to have been served on 6 June 2020 and therefore any appeal must be lodged on or before 4 July 2020 ('the last date to appeal')."*

[4] The said letter dated 2 June 2020 also contained a paragraph that, if no appeal was made, the decision of the MPT will come into effect and the period of suspension will be extended until 4 July 2020.

[5] Pursuant to Section 40 of the Medical Act 1983, an appeal against a decision of the MPT must be made to the relevant court before the end of the period of 28 days beginning with the date on which the notification of the decision was served. Section 40(5)(b) provides that, in the case of a person whose address in the register is (or if he were registered would be) in Northern Ireland, the relevant court "*means the High Court of Justice in Northern Ireland.*"

[6] The respondent claims that the notification of the appeal was not served on the High Court of Justice in Northern Ireland until 27 October 2020. Accordingly, it is argued that the appeal was lodged outside the statutory time limit of 28 days. Furthermore, it is claimed that there is no statutory discretion to extend the time limit unless, in exceptional circumstances, it is necessary to do so to ensure compliance with Article 6 of the European Convention on Human Rights ("ECHR"). The respondent alleges that no application to extend time has been made and, in any event, any exceptional circumstances for extending the time limit do not exist in this case.

[7] The appellant is described as a "specialty doctor in anaesthetics". The court was informed that the appellant was medically unwell and suffers from ill health. An application was made to appoint his wife and daughter as McKenzie Friends. At a previous hearing, Maguire J (as he was then) permitted the McKenzie Friends to have rights of audience and rights to conduct litigation.

[8] The appellant argues that, *inter alia*, the determinations/decisions of the MPT on 27, 28 March 2019, 16 May 2019 and 1 June 2020 were unlawful. It is contended that the decision to suspend the appellant's registration on 16 May 2019 expired on 15 May 2020 and could not lawfully be extended. The appellant also argues that in making the said determinations/decisions, the MPTs infringed the appellant's Article 6 rights. Furthermore, the appellant claims that the appeal in respect of the June 2020 decision was lodged in time, or, if not, the court has the discretion to extend time to appeal.

[9] The respondent argues that the only issue for the court is whether the appeal is out of time and if so, whether the court should exercise its discretion to extend time.

[10] At a previous review hearing, I invited the appellant to seek legal representation. Unfortunately, due to financial constraints, I was informed that the appellant could not afford legal representation. It remains unclear whether the appellant is eligible for legal aid. I was advised at the hearing that no application for legal aid had been made.

[11] Contained within the Notice of Appeal dated 7 October 2020, the appellant has made an application for a Protective Costs Order ('PCO'). The appellant's application for a PCO was supported by a written submission dated 15 April 2021. No formal written submissions were made on behalf of the respondent. However, at the hearing, Mr McAteer, BL, Counsel for the respondent, provided comprehensive oral submissions. I am grateful to both Mrs Renata Obasi and her daughter, Dr Claudia Obasi, and to Mr McAteer for their most helpful submissions.

Appellants' Application for a Protective Cost Order

[12] With regard to costs, the general principles expressed in Order 62, Rule (3)(3) of the Rules of the Court of Judicature (NI) 1980 is that, if the court in the exercise of its discretion decides to make any order as to costs, the normal order is that costs follow the event, except when it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

[13] In *Bolton Metropolitan District Council v Secretary of State for the Environment (Practice Note)* [1995] 1WLR 1176, 1178 Lord Lloyd of Berwick said:

> *"As in all questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the Court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule."*

[14] A PCO is designed to ensure that a matter giving rise to an issue of general public interest can be litigated by an applicant of limited financial means who cannot afford to shoulder the costs risk of losing the case. Since the general principle is that costs normally follow the event, the circumstances in which a PCO will be granted are likely to be extremely limited.

[15] In *Eweida v British Airways PLC* [2009] EWCA Civ 1025, the Court of Appeal considered the distinction between private litigation and public law litigation and the effect that this has on the court's ability to make a PCO. The claim involved an employee who alleged unlawful discrimination in respect of her religious beliefs. British Airway PLC's uniform policy did not permit her to wear a cross that was visible. The discrimination claim failed in the Employment Tribunal and the EAT.

The plaintiff made an application for a PCO following a further appeal to the Court of Appeal due to the risk of an adverse costs order. The Court of Appeal held that notwithstanding the general importance of the issue raised, the appeal involved a private claim by a single employee against her employer. Accordingly, a PCO could not be made in private litigation.

[16] The appellant highlights the fact that the GMC is a public body which is designed, among other things, to regulate the medical profession. With regard to the circumstances of this case, it is argued that the appeal does not involve private litigation and that due to an alleged public interest in the issues raised by the appeal, there is no bar to a PCO.

[17] Mr McAteer, on behalf of the respondent, argues that this appeal does not raise public law issues. Nor can it be viewed as public law litigation. He states that the issues involved relate solely to private litigation. However, he argues that, if the court's view is to the contrary, it will be necessary for the court to consider the application in light of the principles stated in *R (Corner House) v Trade and Industry Secretary* [2005] EWCA Civ 192.

[18] The appellant has made general allegations against the respondent, to include an abuse of power by a public body and also an allegation that this public body has failed to perform its duties. The respondent, for its part, claims that an investigation of potentially serious allegations made against the appellant was necessary, not least to ensure patient safety. Therefore, there is merit in the argument that the allegations are pertinent in relation to public safety and public interest grounds. It must be emphasised that, for the purpose of this application, I make no determination as to whether the respective allegations are well founded or baseless. Accordingly, at this stage, I am not prepared to dismiss this application solely on the basis, as alleged by the respondent, that it is concerned with private litigation and the protection of private interests. It is therefore necessary to make an assessment of the merits of the application based on the *Corner House* principles stated below.

[19] In *Corner House* at paragraph 74, the Court of Appeal emphasised the following governing principles:

> *"1. A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:*
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> *(i) the issues raised are of general public importance;*
>
> *(ii) the public interest requires that those issues should be resolved;*
>
> *(iii) the applicant has no private interest in the outcome of the case;*

(iv) having regard to the financial sources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;

(v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

2. If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

3. It is for the court, in its discretion to decide whether it is fair and just to make the order in light of the considerations set out above."

Application of the Corner House Principles

[20] The first two principles, namely, whether the issues raised in these proceedings are of general public importance and whether the public interest requires that the issues raised should be resolved, are often linked and difficult to separate. In this regard, I agree with the view taken by William Trower QC in *Maugham QC v Uber London* [2019] EWHC 391 (CH) at paragraph [53].

[21] In his submission, the appellant argues that the GMC is a public body concerned with setting standards for doctors as their regulatory body. It is fundamental, the appellant claims, that the medical profession maintains its trust in the GMC and, if that trust is breached, it will have a negative impact not only on doctors and their patients, but also the public at large. The argument is made that it must be in the public interest that the GMC and its processes are transparent and in accordance with the law. The appellant further argues that issues raised in the appeal are *"purely out of a concern for justice"* and to ensure that the GMC remains fully compliant with their statutory obligations.

[22] Mr McAteer, on behalf of the respondent, argues strenuously against the proposition that the issues raised in this appeal are of general public importance and that the public interest requires those issues to be resolved. He argues that the processes adopted by the respondent are open and transparent and that the relevant legal authorities are not controversial. No other case depends upon the outcome of this appeal and the issues do not involve a discrete point of statutory construction.

[23] Having considered the written and oral submissions, I do not accept the arguments put forward by the appellant. The issues raised by this appeal are, in effect, relevant to the appellant and plainly do not give rise to matters of public importance which require resolution. The proceedings do not involve a consideration of a point of law of general public importance. I do not accept that the

primary motivation of the appellant is a desire to make the public body do its job properly. Any challenges made to the proprietary or lawfulness of the acts, omissions or decisions of the MPT are not, in my view, raised as matters of general public importance but rather private interests. A mere hint of a public interest awareness is simply not sufficient.

[24] The third *Corner House* principle is that the applicant has to demonstrate he has no private interest in the outcome of the case.

[25] In *Re McHugh's Application for Judicial Review* [2007] NICA 26, Campbell, LJ stated that a claim which, if successful, leads to direct personal benefit of the applicant, will not invariably bar the making of a PCO. Rather, the focus will be whether the issues raised are of real public importance. In that case the applicant suffered from multiple sclerosis. She applied for a judicial review of a decision of the Health Trust that had failed to make arrangements to provide her with assistance for adaptation of her home. The applicant was ineligible for legal aid and made an application for a PCO. The applicant asserted that while her appeal was very important to her personal circumstances, it also raised issues which would impact on vulnerable members of society in general. The Court of Appeal disagreed. At paragraph [18], the court stated:

> *"A statement that the issues will impact on vulnerable members of society is insufficient to provide the basis for the private interest of the appellant in the outcome to be disregarded as being incidental to an issue of general public interest."*

[26] The more flexible test with regard to the third *Corner House* principle was reflected in the following passage of the Court of Appeal in *Austin v Miller Argent (South Wales) Limited* [2014] EWCA Civ 1012 at paragraph [44]:

> *"Accordingly, we would accept that the mere fact that the claimant has a personal interest in the litigation does not of itself bar her from obtaining a PCO."*

[27] For the purposes of the present case, it is clear from the above authorities that having a private interest in the outcome of the case is a factor to be considered, but it is not an absolute bar to the making of a PCO. For example, in *Maugham QC v Uber London* [2019] EWHC 391 (CH) the learned judge held that on the facts that Mr Maugham was able to satisfy the third *Corner House* principle, however rigidly it might be applied. The benefit that Mr Maugham stood to gain from the case was trivial. Rather, the court took into consideration Mr Maugham's motivation, namely, a strong commitment in litigating issues with a public interest. Nevertheless, it is noteworthy that the court refused to make a PCO in this case.

[28] Returning to the facts of this case, the appellant alleges that he has no personal or financial interest in a successful outcome to this case. Rather, it is argued that his motivation is to obtain a decision that the GMC acted unlawfully and to

raise general public awareness. I am not convinced. I have not been provided with any compelling evidence that others are likely to be directly affected if relief is granted. A successful outcome will plainly only be of relevance and significance to the appellant.

[29] With regard to the fourth and fifth *Corner House* principles, I am prepared to accept that due to the appellant's limited financial resources and to the amount of costs that are likely to be involved, it would be fair and just to make a PCO provided the remaining criteria are satisfied. I also accept that if a PCO is not made, the appellant is likely to consider discontinuing the proceedings and will be acting reasonably in so doing.

Conclusion

[30] It is only in exceptional circumstances that Protective Cost Orders are made. For example, Protective Cost Orders were made in *R (CND) v Prime Minister* [2002] EWHC 2777 where the issue was the legality of the war in Iraq and in *R v Refuge Legal Centre v Secretary of State for the Home Department* [2004] EWCA Civ 1296 where the issue was the fairness of arrangements for processing asylum-seekers' claims. Also, in *R (Compton) v Wiltshire Primary Care Trust* [2009] 1WLR 1436, the court held that the closure of a local hospital raised an issue of general public importance.

[31] However, this case does not fall within the exceptional category of cases. For the reasons given above, I am not satisfied that the issues raised in this appeal are of a general public importance and that the public interest requires a resolution of those issues. I am also not satisfied that the appellant has no private interest in the proceedings. Having considered all the Corner House principles, it is not appropriate to make a Protective Costs Order.

[32] The appellant's application for a PCO is dismissed.