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THE HIGH COURT

1983 No. 8953 P

IN THE MATTER OF THE MEDICAL PRACTITIONERS ACT, 1978

AND

IN THE MATTER OF JAMES MAGILL, A MEDICAL PRACTITIONER

AND

IN THE MATTER OF A PURPORTED DECISION OF THE MEDICAL COUNCIL IN RELATION TO THE SAID JAMES MAGILL

AND

IN THE MATTER OF SECTIONS 45 AND 46 OF THE SAID ACT

BETWEEN:-

JAMES MAGILL

Petitioner

-and-

THE MEDICAL COUNCIL

Judgment of Finlay, P., delivered on the 8th day of March 1984.

This is a preliminary issue arising in a Petition brought by Doctor James Magill, a Medical Practitioner (hereinafter called the Applicant) seeking an Order pursuant to Section 46 of the Medical Practitioners Act, 1978 cancelling a decision made on the 14th of December, 1983 by the Medical Council (hereinafter called the Council) that the name of the Applicant should be erased from the Register of General Medical Practitioners.

It is an issue tried without Pleadings and without evidence on an agreed set of facts which are as follows.

By Notice dated the 22nd of September 1983 and served shortly thereafter on the Applicant the Council informed him of their intention to hold an enquiry under Section 45, sub-section 3 of the Act of 1978 on the 7th of October, 1983.

The enquiry was duly held and the Applicant attended and was represented by Counsel and Solicitor. The enquiry was adjourned and concluded on the 4th of November, 1983. The Fitness to Practice Committee which held the enquiry then duly reported to the Council and the Council considered that report on the 14th of December, 1983 and on that date the Registrar wrote on its behalf informing the Applicant that it had decided that

his name should be erased from the General Register of Medical Practitioners, stating the reasons for that decision and informing him of his right under Section 46 to apply within 21 days for the cancellation of the decisions. The Applicant on the 22nd of December, 1983 sought a cancellation of the decision by Petition filed in The High Court.

I have already ruled notwithstanding an assertion to the contrary in the Petition that reasons for the decision of the Council were adequately given in the letter of the 14th of December, 1983. The Applicant, however, further contends that although he was heard and represented at the enquiry held by the Fitness to Practice Committee he was not afforded an opportunity to be heard by the Council prior to its decision made on the 14th of December, 1983 and that therefore the procedures so far had under the Act were wanting in natural justice and lack a fair and due procedure and should be held as a preliminary matter and before any enquiry by The High Court into the merits of this case to be invalid and of no effect.

That is the preliminary issue which was argued before me on Friday the 2nd of March, 1984.

In order to examine this issue it is necessary to consider the scheme and provisions of Part V of the Act of 1978 which deals with disciplinary proceedings under the title, Fitness to Practice, in so far as they are relevant to the case before me.

They may be thus summarised:

(1) Under Section 45 either the Council or any person may seek from the Fitness to Practice Committee (hereinafter referred to as the Committee) an enquiry into the conduct of a registered medical practitioner on the grounds of his alleged professional misconduct.

(2) The Committee on receiving such an application may either decide that there is not a prima facie case and so report to the Council. In that event the Council may either proceed no further or direct notwithstanding that view the holding of an enquiry.

If the Committee itself has decided there is a prima facie case or if it has been so directed by the Council it holds an enquiry

upon due notice to the registered Medical Practitioner including the nature of the evidence proposed to be considered at the enquiry and he has an opportunity of being represented and appearing at the hearing.

(3) In carrying out the enquiry the Committee have the powers, rights and privilege vested in The High Court or a Judge thereof on the hearing of an Action in respect of the enforcement of witnesses and the compelling of the production of documents and witnesses appearing before it have the same immunities and privileges as witnesses before The High Court.

(4) Upon the completion of the enquiry the Committee reports to the Council who consider that report. If the Committee has found the practitioner to be guilty of professional misconduct then the Council may do any of the following things;

(a) Under Section 46 decide that the name of such person should be erased from the Register.

(b) Under the same Section decide that during a specified period the registration of the name of that person in the Register should have no effect.

(c) Under Section 47 may decide to attach such conditions as it thinks fit to the retention in any register of a person whose name is entered there. and,

(d) May in addition to or in substitution for any of its other powers advise, admonish or censure such person in relation to his professional conduct.

(5) In the event of the decision of the Council being either of the two decisions under Section 46, namely, erasure from the Register or suspension from the Register, or in the event of it being a decision under Section 47 to attach conditions to the retention of

the name of the person in the Register the Medical Practitioner concerned has a right to apply within 21 days from the date of the decision to The High Court for cancellation of the decision. Upon the hearing of such Application The High Court has, in the case of a decision by the Council under Section 46 got three alternative orders it can make. It can,

i. cancel the decision,

ii. confirm the decision and direct the erasure of the name from the Register, or

iii. confirm the decision and suspend the registration of the practitioner.

In the case of a decision made by the Council under Section 47 The High Court may,

i. cancel the decision,

ii. as I interpret the Section, attach the same conditions as those decided to be imposed by the Council to the retention of the registration, or

iii. attach any other conditions it may see fit to the retention of the name in the Register.

If the Medical Practitioner does not in the event of a decision made under Section 46 or Section 47 apply for cancellation within 21 days of the decision the Council may apply ex parte for confirmation of the decision to The High Court and The High Court shall unless it sees good reason to the contrary, confirm the decision and in effect make the direction decided upon by the Council.

The High Court has no function in a case where the only Action taken by the Council is to advise, admonish or censure.

It is clear from these provisions that no penalty other than admonition or censure can be imposed on the machinery provided in these Sections unless

and until it is directed to be imposed by The High Court.

The Act of 1978 contains certain other provisions concerning interim or interlocutory Orders which are not relevant to the issues before me.

On the interpretation of these Sections I am satisfied that if the Council decides under Section 46 to erase the name of the practitioner or under the same Section to suspend the effect of his registration that The High Court has not got any power to substitute for either of those two decisions a decision to attach conditions to the retention of his name in the Register. It would appear to me to follow from this necessary interpretation that if the Court were satisfied that erasure or suspension was not an appropriate penalty to apply notwithstanding the existence of a valid finding of misconduct that it would be obliged to cancel the decision made under Section 46.

The contention made by Counsel on behalf of the Applicant with regard to the issue at present before me is that whilst he concedes that the Applicant had an ample opportunity of being heard, represented and presentin evidence before the Committee that the absence of an opportunity to make representations of the nature of a plea for leniency to the Council was a lack of natural justice in that a situation could well arise whereby if such plea were successful, either the lesser penalty of retention on the Register with conditions under Section 47, or the minimal penalty of admonition, advice or censure under Section 48, would have been decided on by the Council and could be acceptable to the practitioner concerned, whereas to achieve the same result by application to The High Court it is necessary for him to go through a public hearing of the complaint against him. The injustice of this situation, it is submitted, is compounded by the practical difficulty of making at the one time a case against the finding of misconduct before the Committee and at the same time making a plea for leniency before the same tribunal, where the Committee does not announce its decision on the issue of misconduct or no misconduct at the hearing, but only in its report to the Council. Counsel on behalf of the Council, on the other hand,

submits that the entire scheme and framework of the Act makes it clear that no penalty other than an admonition or censure, can or may be imposed, except by The High Court; that upon the true interpretation of the Act The High Court can be said to be in a case where conviction and a penalty is imposed the convicting and sentencing body and that accordingly the requirements of natural justice are that it is before that tribunal that the practitioner must not only have the opportunity of being heard and making his case with regard to a finding of professional misconduct, but must be heard on a plea for leniency as well.

In considering these submissions I have come to the conclusion that since the Act does not set down procedures in relation to the Application of the practitioner to The High Court and on the hearing of that Application I am obliged to do so and to make them consistent with natural justice, and that I must assume that that is what is intended by the legislature.

For these reasons I have come to the following conclusions:-

1. Upon the making by a practitioner of an Application to The High Court under either Section 46 or Section 47, to cancel a decision of the Council, the onus of proving the alleged misconduct of the practitioner rests on the Council as does the onus of establishing that the decision made by the Council with regard to the appropriate penalty is correct. Notwithstanding the use of the expression cancelling the decision of the Council in Sections 46 and 47 I am satisfied that the procedure does not constitute a mere appeal from the combined decisions of the Committee and of the Council, but is rather an entire trial of the issues involved.

   Interpreting the Sections and the procedure in this way, as I do, I have come to the conclusion that the absence of a right

on the part of the practitioner to be heard by the Council before they have reached a decision on the report of the Committee does not constitute any unfair procedure or want of natural justice. I am therefore satisfied that the proceedings so far had in this case are valid and that I must now enter upon the hearing of the merits of the case.

Having regard to my decision involved in this Ruling with regard to the onus of proof and in the absence at present of any rules of Court dealing with the proceedings herein I have come to the conclusion that it is necessary for me to give the following directions.

The Council must now deliver to the Applicant a copy of the report of the Committee upon which they based their decision.

The Applicant must within a period of 14 days by notice in writing indicate to the Council what, if any, of the findings of fact made by the Committee he disputes.

Upon the delivery of that notice the Council must present to the Court, such evidence as it may see fit, to discharge the onus which is upon it of firstly, establishing the facts on which it alleges misconduct has been proved and secondly, that such facts do constitute misconduct and thirdly, such evidence, if any, as may be considered necessary to support the decision it has made.

The Applicant must, of course, be entitled to present such evidence on all these topics as he shall see fit.

The Court must then, it seems to me, proceed to reach a conclusion as to whether professional misconduct has been proved. If it has not then the proceedings are then terminated and the decision of the Council must be cancelled.

In the event of the finding being that professional misconduct has been proved, the Court should it seems to me, give a further

opportunity to the Applicant, and if necessary, to the Council to be heard and present evidence on the appropriate penalty to be imposed in the light of such finding of misconduct.

Agreed
I. A. Findlay
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