THE HIGH COURT

[2023] IEHC 171

APPROVED

[2022 No. 248 MCA]

REDACTED

IN THE MATTER OF SECTION 60 OF THE MEDICAL PRACTITIONERS ACT 2007
AND IN THE MATTER OF A REGISTERED MEDICAL PRACTITIONER
AND ON THE APPLICATION OF THE MEDICAL COUNCIL

BETWEEN

MEDICAL COUNCIL

APPLICANT

AND

A MEDICAL PRACTITIONER

RESPONDENT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 28th February, 2023

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1. Introduction

1. This is my judgment on an application brought by the Medical Council (the "Council") for an order pursuant to s. 60 of the Medical Practitioners Act 2007 (the "2007 Act") directing that the respondent doctor's name in the Register of Medical Practitioners maintained by the Council under the 2007 Act, be suspended until steps or further steps are taken under Part 7 and, if applicable, Parts 8 and 9 of the 2007 Act. The Council also seeks orders that the respondent be prohibited from engaging in the practice of medicine until such steps or further steps have been taken, an order that the Council be at liberty to communicate the terms of the order to certain persons or bodies, an order directing that the Council be at liberty to respond accurately to any request from any individual or body regarding the respondent's registration status and an order that the Council be at liberty to reflect any order granted on the Council's public-facing register.

2. The Council's application first came before the court on 7th October, 2022, on an *ex parte* basis. However, the respondent was represented by solicitors and counsel on that date who confirmed that the respondent was prepared to provide an undertaking to the court in identical terms to the undertaking given by the respondent to the Council at its meeting on 11th August, 2022 and confirmed by him in writing on 17th August, 2022. The undertaking given by the respondent to the Council (orally at the meeting on 11th August, 2022 and then in writing on 17th August, 2022), was that the respondent would not examine female patients in the absence of a chaperone pending the matter being further considered by the Council in the context of s. 60 of the 2007 Act. When the matter first came before the court on 7th October, 2022, the respondent confirmed, through his solicitors and counsel, that he was prepared to give the same

undertaking to the court pending the determination of the Council's s. 60 application and, thereafter, pending the determination of any fitness to practise proceedings brought against him. The respondent has confirmed that undertaking to the court on the subsequent occasions the matter was before the court and it remains in place as of the date of this judgment.

3. Following the exchange of affidavits, the Council's application was heard over the course of a number of days in November 2022, and judgment was reserved. The Council pressed for an order under s. 60 of the 2007 Act suspending the respondent's registration and for the other orders summarised at para. 1 above. The respondent opposed that application and indicated that he was prepared to continue the undertaking previously given to the court until any fitness to practise proceedings were determined. In response, the Council submitted that, for various reasons, an undertaking would not be appropriate for the protection of the public but that if the court was disposed, as a matter of principle, to deal with the Council's application by accepting an undertaking or undertakings from the respondent, the Council wished to be heard further on the terms of such undertakings.

4. Having carefully considered all of the relevant evidence and the helpful submissions made on behalf of the Council and on behalf of the respondent, I have concluded that on balance, as a matter of principle, I am disposed to accepting undertakings from the respondent instead of suspending his registration under s. 60 and prohibiting him from engaging in the practice of medicine until any fitness to practise proceedings are concluded. I will hear the Council and the respondent as to the precise terms of the undertakings which I will require to be given by the respondent to the court. They will, however, include, at the very least: undertakings not to examine female patients in the absence of a chaperone; adherence to a strict examination consent policy

requiring an initial general consent to treatment by the patient together with specific consent to a specific examination being carried out; a commitment to provide to the Council and any relevant committee of the Council a regular update in relation to the pending criminal proceedings against the respondent; and a commitment to immediately inform the Council of any further allegations made against him and of the nature of such allegations. Having heard from the Council and from the respondent, I may require additional undertakings.

5. I will also permit the Council to inform the various persons and bodies referred to at para. 3 of the originating notice of motion of the fact and terms of the undertakings to be given to the court, as well as various other consequential orders including orders permitting the Council to respond accurately to any request from any individual or body regarding the respondent's registration status as well as permitting the Council to reflect the fact of the undertakings on its public facing register.

6. I set out in this judgment in some detail the reasons for my decision to accept, as a matter of principle, undertakings from the respondent as opposed to making an order under s. 60 of the 2007 Act suspending the respondent and an order prohibiting him from engaging in the practice of medicine pending the determination of the fitness to practise proceedings.

2. Factual Background and History

7. The Council is a statutory body established under Part II of the Medical Practitioners Act 1978 and continued in being by s. 4(1) of the 2007 Act (as amended). It establishes and maintains a register of medical practitioners (the "register"). The respondent qualified as a doctor in [redacted] and having worked abroad and in Ireland has

worked as a consultant in his particular specialism in Ireland since the mid-1990s. [redacted] He remains registered in the specialist division of the register and continues to do private work in his field at a private clinic (the "clinic"). The facts which have led to the Council's application are not in dispute.

8. On 21st May, 2021, the respondent submitted his Annual Retention of Registration Form ("ARAF") to the Council. In answer to question 7 of the form, which asked whether he had *"ever been convicted of any criminal offences in or outside the State"* or whether he was *"aware of any criminal investigations in process against* [him]*?"*, the respondent answered *"no"*. However, on 8th June, 2021, the respondent wrote to the Council's Professional Standard Section stating that he had *"inadvertently answered Q. 7 incorrectly"*. He wrote:

> *"I* [redacted] *."*

9. By letter dated 16th June, 2021, the Council acknowledged receipt of that letter and informed the respondent that the Council would consider at a meeting on 7th July, 2021, whether it would make a complaint against the respondent pursuant to s. 57 of the 2007 Act. The respondent was invited to make a further submission, if he wished, for consideration at that meeting. Following a query from the respondent's then solicitors as to what aspect of s. 57 was to be considered by the Council, the Council confirmed in a letter dated 22nd June, 2021, that the Council would consider at its meeting on 7th July, 2021, whether or not to make a complaint to the Council's Preliminary Proceedings Committee ("PPC") in relation to the respondent under s.

57(1) of the 2007 Act. The respondent was asked to provide any relevant information in relation to the information he disclosed to the Council on 8th June, 2021, which he felt should be considered by the Council at that meeting.

10. The respondent's then solicitors wrote to the Council on 1st July, 2021. In that letter, they stated that complaints had been made to An Garda Síochána [redacted] and that the respondent had been interviewed and cooperated fully in relation to those complaints which the respondent *"strenuously denied"*. They stated that no charges had been brought against the respondent or were pending in relation to those complaints at that stage and that there were no complaints before the Council relating to the respondent. They contended that there were no grounds for a complaint to be initiated by the Council under s. 57. They maintained that consideration by the Council to making a complaint against the respondent under s. 57 would be *"entirely premature, prejudicial and damaging"* to the respondent's professional standing and good name and might adversely affect his right to earn a livelihood.

11. The Council considered the matter at its meeting on 7th July, 2021, and decided to make a complaint concerning the respondent to the PPC pursuant to s. 57(1) of the 2007 Act. A case officer in the Council's Professional Standard Department informed the respondent's then solicitors of that decision on 28th July, 2021. That letter also stated that the PPC would review the complaint at its next meeting on 14th or 15th September, 2021 and that the respondent could provide further information to be considered at that meeting by 18th August, 2021, although he was under no obligation to do so. There followed further correspondence between the case officer and the respondent's then solicitors concerning the nature of the complaint referred to the PPC.

12. The PPC met on 14th September, 2021, and directed that the case officer carry out certain investigations and prepare a case report. The case officer was requested to invite the respondent to provide the PPC with any information he believed should be considered by it pursuant to s. 59(6) of the 2007 Act. He was requested to obtain from the respondent a statement of his work history, including his curriculum vitae. He was also requested to issue production summonses pursuant to s. 59(11) and 61(1)(c) of the 2007 Act to An Garda Síochána or the Chief State Solicitor seeking to obtain *"* [redacted] *"* and to the respondent's current and former employers to obtain a copy of *"all or any documentation in relation to all/any complaints, investigations, and/or issues of concern (clinical and non-clinical) regarding* [the respondent]*...for the relevant time period"*. The case officer wrote to the respondent's solicitors on 27th September, 2021, informing them of the directions given by the PPC at its meeting on 14th September, 2021. The information sought from the respondent was requested to be provided by 11th November, 2021.

13. An extension of time was sought and granted to 25th October, 2021, for the respondent to provide the requested information. In mid to late October 2021, another firm of solicitors commenced corresponding with the case officer on behalf of the respondent, on the instructions of the respondent's insurers. They furnished a copy of the respondent's work history/CV on 17th November, 2021. However, they indicated that the respondent was not in a position to respond substantively to the complaint [redacted] and contended that any investigation by the Council should not proceed pending the completion of those proceedings. As directed by the PPC, the case officer had written to the Chief State Solicitor's Office (the "CSSO") on 28th October, 2021, seeking to

obtain a copy of the file held by An Garda Síochána in relation to its investigation in respect of the respondent. The case officer requested the CSSO to confirm whether the investigation file was held by the CSSO and indicated that if that confirmation was provided, a statutory summons would be issued seeking the production of the file. A response was requested from the CSSO by 11th November, 2021. There was no reply from the CSSO by that date.

14. On 23rd November, 2021, the case officer informed the respondent's solicitors that their letter of 17th November, 2021, would be considered by the PPC at its meeting on 14th or 15th December, 2021, and if the respondent wished, he could submit any further information to the PPC by 7th December, 2021. Further information was not provided on behalf of the respondent in advance of that meeting.

15. The PPC met on 15th December, 2021. It noted that the Garda investigation into the respondent was ongoing and that the respondent had indicated that he was not in a position to respond substantively [redacted]. The PPC directed that the investigations in relation to the respondent should continue save that a notice would not be issued to the respondent pursuant to s. 59(7) of the 2007 Act, requiring him to provide information in relation to the complaint to the PPC [redacted]. The case officer so informed the respondent's solicitors in a letter dated 5th January, 2022. He also sought confirmation that the respondent's only employers since the mid-1990s were the HSE hospital and the clinic and sought confirmation as to whether the clinic was solely run and managed by the respondent or whether he was employed by the clinic as a consultant.

16. In the meantime, the case officer wrote again to the CSSO on 27th January, 2022, seeking a response by 10th February, 2022 to the information previously requested on

28th October, 2021. The CSSO sought further information in relation to the request on 27th January, 2022, and that information was provided by the case officer on 3rd February, 2022.

17. On 31st January, 2022, the case officer wrote to the HSE enclosing a production summons addressed to the hospital and issued by the PPC pursuant to ss. 59(11) and 66(1)(c) of the 2007 Act seeking *"a copy of all or any documentation in relation to all/any complaints, investigations, and/or issues of concern (clinical and non-clinical) regarding* [the respondent] *for the period 1 January 1997 to present"*. Following further correspondence, a response was sent on behalf of the HSE confirming that the hospital had no such documentation.

18. On 7th March, 2022, the respondent's solicitors replied to the case officer's letter of 5th January, 2022, confirming that the respondent's sole employer since the mid-1990s was the HSE hospital and that the respondent was a sole practitioner at the clinic.

19. On 10th March, 2022, the Case Officer sent a production summons issued by the PPC to the clinic pursuant to s. 59(11) and s. 66(1)(c) of the 1997 Act, requesting production of *"all or any documentation in relation to all/any complaints, investigations, and/or issues of concern (clinical and non-clinical) regarding* [the respondent] *for the period 1 January 1997 to present"*.

20. On 14th April, 2022, an administrator in the clinic responded to the case officer indicating that the clinic was aware of a previous complaint in 2011 (which is entirely irrelevant to the issues the subject of this application). The administrator enclosed a character reference (from 2021). She concluded her response by stating that the respondent [redacted]

21. Following further correspondence from the case officer to the CSSO, the CSSO informed the case officer on 9th May, 2022, that it was unable to respond to the case officer's request without further details. Following further correspondence seeking an update in relation to the status of the investigation by An Garda Síochána relating to the respondent, the solicitor dealing with the matter in the CSSO sent an email to the case officer on 5th July, 2022, [redacted]

22. On 11th July, 2022, the case officer requested the CSSO to provide an update on the proceedings against the respondent and a timeframe for the conclusion of those proceedings. Further correspondence was exchanged between the Council and the CSSO in late July 2022.

23. [redacted].

24. It appears that, in the meantime, on 13th July, 2022, the PPC served a s. 59(7) notice on the respondent seeking certain information. A copy of that notice was not provided to the court but the information sought can be gleaned from the respondent's reply dated 2nd August, 2022.

25. The respondent was asked to provide an update on the current status of the Garda investigation. [redacted]

26. In response to a request that he provide an update every three months in relation to the status of the investigation [redacted]

27. [redacted]

28. [redacted]

29. The Council met (remotely) on 11th August, 2022. The respondent attended that meeting and was represented by solicitors and counsel. Following submissions on behalf of the Council's CEO and on behalf of the respondent and, having received advice from its legal assessor, the Council decided to adjourn the meeting [redacted] s. Having referred to the delay in the matter coming before the Council (the respondent having first brought the matter to the attention of the Council in the first place in June 2021, more than a year previously), the respondent offered to provide an undertaking that he would ensure that a chaperone was present for all consultations pending completion of the Council's inquiries. The Council requested the respondent to provide a more limited undertaking not to examine female patients in the absence of a chaperone for the period of the adjournment and that details of the respondent's chaperone policy be provided to the Council by 15th August, 2022. The respondent agreed to provide that undertaking.

30. On 17th August, 2022, the respondent signed a written undertaking to the Council not to examine female patients in the absence of a chaperone pending the matter being further considered by the Council in the context of s. 60 of the 2007 Act.

31. [redacted]

(9) [redacted]

32. The Council stated that it was seeking the detail of what was being alleged against the respondent and that the respondent was not being asked to give an account of what happened but to state what the allegations against him were. The respondent was informed that the Council would reconvene to consider the matter on 27th September, 2022.

33. The respondent initially, and subsequently his solicitors, sought to adjourn the Council meeting scheduled for 27th September, 2022. Reliance was placed on some medical issues and also on the fact that the respondent had recently engaged a new firm of solicitors to represent him [redacted].

34. In a letter dated 23rd September, 2022, solicitors for the Council's CEO responded to the request for the adjournment by pointing out that, while it was ultimately a matter for the Council to decide on the respondent's application, the CEO would not be consenting to the application.

35. In a letter dated 26th September, 2022 (bearing the respondent's solicitor's letterhead but sent in the name of the respondent), the respondent replied to the Council's letter of 23rd August, 2022. [redacted]

[redacted]

[redacted].”

[redacted]

(5) [redacted]

[redacted]

36. The Council meeting proceeded remotely on 27th September, 2022. The respondent was again represented by solicitors and by senior and junior counsel. An application was made by the respondent to adjourn the meeting for similar reasons to those which had been set out in correspondence prior to the meeting. The Council refused the application for an adjournment. Having heard submissions on behalf of the CEO and on behalf of the respondent and having obtained advice from its legal assessor, the Council decided to make an application to the High Court for an order pursuant to s. 60 of the 2007 Act suspending the respondent's registration.

37. During the course of the hearing, it was confirmed to the Council on behalf of the respondent that the respondent was prepared to continue the undertaking given by him on 11th August, 2022 (and confirmed in writing on 17th August, 2022), for such future

period as was necessary and until such time as it was no longer required by the Council. The CEO disputed the appropriateness of the undertaking offered by the respondent in light of the seriousness of the issue and the risk to the public. Among the matters raised on behalf of the CEO was the difficulty of enforcing an undertaking given to the Council when compared to one given to the High Court. The CEO also relied on the Council's document *"Immediate Suspension Orders: Guidance for the Medical Council"* and in particular, the matter set out in paras. 7.6, 7.7 and 7.8 (which are referred to below). In the course of his submissions on behalf of the respondent, counsel repeated the respondent's willingness to provide whatever assurances were required concerning the operation and robustness of the respondent's chaperone policy.

38. Having adjourned to consider the matter, the Council decided to make an application to the High Court under s. 60 with respect to the respondent. It gave a number of reasons for that decision. The Council was satisfied that the matter was sufficiently serious to justify a decision to make the application to the High Court and that such a step was necessary in the public interest. The Council noted that in reaching its decision it had given very careful consideration to the criteria set out *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54, as approved in subsequent judgments. It had also given careful consideration to the recent judgment in *Medical Council v. B.* [2022] IEHC 503.

39. The Council was satisfied that the nature of the complaint was *"extremely serious"*,

[redacted]”.

40. The Council then addressed the undertaking offered by the respondent. It was not satisfied that undertaking was sufficient to protect the public in all of the circumstances of the case. It was concerned as to how the undertaking could be adequately monitored to fully protect the public. The Council also pointed to the distinction between an undertaking given to the Council and one given to the court. The former type of undertaking does not have the same effect as an order of the High Court. The latter undertaking, which is given to the High Court, is enforceable as an order of the court. However, it noted that no such enforceability attaches to an undertaking given to the Council. The Council noted the comments in that regard of Kelly P. in *Teaching Council v. M.P.* [2017] IEHC 755.

41. While noting that it was *“extremely cognisant”* of the potential hardship on the respondent and the potential effect on his patients, based on all of the material before it and, in particular, the seriousness of the allegations and the likely sanction if found proven, the Council was satisfied that an application to the High Court for an order pursuant to s. 60 was necessary in the public interest and to protect the public.

3. The Council's Section 60 Application

42. Following the decision made by the Council at its meeting on 27th September, 2022, the Council made an *ex parte* application to me on 7th October, 2022, for interim orders including an interim suspension order pursuant to s. 60 of the 2007 Act and ancillary orders including an order prohibiting the respondent from engaging in the practice of medicine until the s. 60 suspension application was determined. The application was made on foot of an originating motion *ex parte* dated 3rd October, 2022, and was grounded on an affidavit sworn by Dr. Suzanne Crowe, President of the Council, on the same date. Dr. Crowe's affidavit set out the factual matters outlined by me in the previous section of this judgment (about which there is no dispute between the parties). Dr. Crowe asserted that, before arriving at its decision to bring the application, the Council had regard to the legal advice of its legal assessor in respect of the matters to be considered by the Council when determining whether an application should be made to the High Court for an interim suspension order, including the considerations identified by the Supreme Court in *O'Ceallaigh*. She explained that having regard to the serious concerns raised in respect of the respondent, the Council was contending that the respondent's registration should be suspended and that he should be prohibited from engaging in the practice of medicine pending the determination of the s. 60 application.

43. Although the application was nominally *ex parte*, counsel for the respondent appeared on 7th October, 2022, and gave an undertaking to the court on behalf of the respondent in similar terms to that given to the Council at its meetings of 11th August, 2022 and 27th September, 2022. It was indicated to the court on behalf of the respondent that the respondent would be opposing the Council's application and an adjournment was sought to enable a replying affidavit to be filed. I adjourned the Council's application

to 28th October, 2022 on the basis of the undertaking given on behalf of the respondent and on the basis that the respondent would provide a replying affidavit in advance of that date.

44. The respondent swore a replying affidavit on 21st October, 2022. In that affidavit, he informed the court t[redacted].

45. Before referring to some of the details contained in that statement, I will mention a number of other matters addressed in the respondent's affidavit.

46. The respondent referred to his academic and professional qualifications as well as his work experience in Ireland and outside the jurisdiction, including his public work as a consultant in a HSE hospital in the [redacted] of the country up to the end of July 2022, as well as his private practice at the clinic where he has approximately 500 patients (250 of whom are on significant immuno-suppressant drugs). [redacted]). The respondent pointed out that the Council waited for in excess of a year before convening a meeting to consider whether to apply to the court for an order suspending his registration. In the intervening period, he was continuing to practice and to treat his patients without any complaints being made. He also pointed out that, in response to a request from the Council, the hospital had confirmed that it had no documents in relation to any complaints, investigations or issues of concern relating to the respondent for the

period 1st January, 1997, to date. Similar documentation had been sought from the clinic. It too had no relevant material apart from a historic unrelated complaint which the PPC had decided in March 2013 should not proceed any further. The respondent also pointed out that the administrator of the clinic had provided a character reference which confirmed that in thirteen years of working at the clinic, [redacted]. The respondent contended that the absence of any such complaints or issues of concern with respect to the respondent's behaviour towards his patients over such a long period of time (several decades) was relevant, particularly where the respondent was regularly treating and providing ongoing care to 500 patients for particular conditions within his area of expertise (and at the time of his affidavit, was seeing about 30 patients per week).

47. With respect to the respondent's patients and the effect on them of a suspension of the respondent's registration, the respondent referred to the limited number of consultants in his field in the region. He provided evidence of the lack of capacity of the other consultants to take on his patients. He exhibited material in support of his evidence in that regard. He explained that there would be a very serious impact on his patients were he to be suspended from practice and that that was another significant matter to which the court should have regard.

48. The respondent contended that it was a central consideration for the Council in deciding to bring this suspension application that there were three separate complaints made against the respondent to An Garda Síochána and that, at the time of the Council's decision in September 2022, [redacted]

[redacted]

49. The respondent contended that in all the circumstances it would be wholly disproportionate and unfair to make an order suspending his registration for such a protracted period of time. He referred to the clear detriment to his good name and to his personal and professional standing in the community as well as to the devastating effect on his livelihood in the event that he was suspended. He explained that the sole source of his income is his specialist practice in the clinic and that he does not have a partner or anyone who would be able to support him for the duration of any orders suspending his registration or preventing him from practicing medicine. He also asked the court to have regard to his health (and referred to certain medical complications experienced by him over the summer of 2022). Notwithstanding those complications, he was able to continue to work and to treat his patients. However, he stated that the stress of the whole process and, in particular, the Council's decision to apply for the suspension order was having a negative effect on his physical and mental health and that an order suspending him would hugely aggravate that negative effect.

50. The respondent stated that while he had every confidence that he would successfully defend the criminal prosecution and any fitness to practise inquiry which may take place, he understood clearly the Council's role in regulating the profession and in protecting patient safety and accepted that the Council had to take an allegation of sexual misconduct seriously. It was for that reason that he offered the undertaking to the Council at its meeting on 11th August, 2022, not to treat *any* patients in the absence of a chaperone and gave the narrower undertaking ultimately requested by the Council at that meeting, namely, that he would not examine any *female* patient in the absence of a chaperone. He noted that he provided the undertaking to the court on 7th October, 2022, as mentioned earlier.

51. With respect to his chaperone policy, the respondent exhibited statements from two of the women who had been acting as chaperones since provision of his undertaking to the Council in August, 2022. He also referred to the formal chaperone policy which he drew up and furnished to the Council and which is displayed prominently in the clinic. He mentioned also the fact that he had introduced a two-stage consent process whereby patients provide an initial general consent to treatment followed by a particular consent to the specific examination to be carried out (and he exhibited statements from the two chaperones, a copy of the chaperone policy and of the examination consent policy). He noted that the undertaking and chaperone policy had been in place for approximately ten weeks (at the time of swearing his affidavit) without any untoward incidents arising and that the new examination consent form had also been working well (since 1st October, 2022).

52. The respondent asserted that it appeared from the Council's decision that the Council had two concerns regarding the undertaking he provided to the Council. The first concerned supervision and the second concerned enforceability. With respect to

enforceability, the respondent had given and was prepared to continue in force the undertaking which he gave to the court on 7th October, 2022. With respect to supervision, he contended that the Council's concern was hypothetical in that it had not put any material before the court to show that he had breached or would in all likelihood breach the undertaking and he asked the court to proceed on the assumption that he would at all times comply with his undertaking to the court. He felt that a continuation of the undertaking and the chaperone policy until the process before the Council was concluded would be a proportionate and fair means of dealing with the Council's concerns. He also felt that that approach would minimise the detrimental effects for him in terms of his reputation, his financial position and his health and would also create the least amount of disruption for his patients. He confirmed that he was prepared to continue the undertaking and the chaperone policy for such period as was required by the court.

53. [redacted]. In order to properly and fairly determine the Council's application, it is necessary that I make some reference to what the respondent said in that statement, while making clear that these are ultimately matters which may have to be decided by a jury at the criminal trial and that nothing which I say in this judgment is intended in any way to cut across the fundamental role of the judge and the jury at that criminal trial.

54. [redacted]

proceedings, in accordance with the legal principles applicable to this type of application.

55. [redacted]

[redacted]

[redacted]

59. [redacted].

60. [redacted] of [redacted]. [redacted] It is not in dispute, therefore, that if the respondent is to be suspended, the suspension is likely to last, at least, into the end of 2024, and probably some considerable time thereafter to enable the criminal proceedings and any fitness to practise proceedings which follow to be concluded. The Council does not dispute the

respondent's evidence that he has no other source of income apart from what he earns from the practice of medicine. Nor does the Council dispute the respondent's evidence as to the impact of any suspension of the respondent on his patients. It maintains that the protection of the public outweighs all of these various factors.

4. Section 60 of the 2007 Act

61. The Council has brought this application under s. 60 of the 2007 Act. That section provides as follows:

"(1) The Council may make an ex parte application to the Court for an order to suspend the registration of a registered medical practitioner, whether or not the practitioner is the subject of a complaint, if the Council considers that the suspension is necessary to protect the public until steps or further steps are taken under this Part and, if applicable, Parts 8 and 9.

(1) An application under subsection (1) shall be heard otherwise than in public unless the Court considers it appropriate to hear the application in public.

(2) The Court may determine an application under subsection (1) by—

(a) making any order it considers appropriate, including an order directing the Council to suspend the registration of the registered medical practitioner the subject of the application for the period specified in the order, and

(b) giving to the Council any direction that the Court considers appropriate.

(4) …"

5. Legal Principles Applicable to Section 60 Applications

62. The legal principles applicable to applications for interim suspension orders under s. 60 of the 2007 Act were recently considered by me in *Medical Council v. Bukhari* [2021] IEHC 503[1]. The principles were not greatly in dispute between the Council and the respondent doctor in this case although they did differ on the relevance or otherwise to this application of the presumption of innocence, which the respondent undoubtedly enjoys in the context of the criminal prosecution against him, and on the significance of the question of delay. The factors which the Medical Council had to consider in determining whether to bring an application for an interim suspension order under s. 60 were identified by Barron J. in the Supreme Court in *O'Ceallaigh v. An Bord Altranais* [2000] 4 I.R. 54 (in the context of an application under s. 44 of the Nurses Act 1985). Adapting what was said there by Barron J. in the context of the Nursing Board, the matters which the Council had to consider when determining whether to bring an application for an interim suspension order in this case were:

(i) the nature of the complaint on which the application for the fitness to practise inquiry was based, in terms of the seriousness of the conduct complained of;

(ii) the apparent strength of the case against the medical practitioner concerned; and

(iii) whether, in the event of an adverse finding, the appropriate sanction would be to *"strike off"* the practitioner either permanently or for a definite period (although it was made clear by Kelly P. in *Medical Council v. FCM* [2018] IEHC 616 that, even if the ultimate outcome of a hearing before the fitness to

[1] While the name of the respondent doctor in that application was initially anonymised, his identity was subsequently disclosed and the judgment was reissued naming the respondent doctor for reasons set out in a subsequent judgment delivered by me in *Medical Council v. Bukhari* [2022] IEHC 723.

practise Committee resulted in a conditional registration and cessation from practice until certain conditions were fulfilled rather than a *"strike off"*, the public interest might nonetheless require that an interim suspension order be made under s. 60 pending the determination of that inquiry).

63. The Council and the respondent made submissions on whether the Council had properly considered those matters in deciding whether to bring this application and whether the court could be satisfied that a proper consideration of them should lead to the making of the orders sought by the Council. I consider what the parties had to say about those matters in the next section of this judgment.

64. I must at this point, however, stress that that the High Court has a wide jurisdiction in dealing with an application such as this. The court is not faced with the simple binary choice of deciding whether to grant the interim suspension and related orders sought by the Council or to make no order at all. Under s. 60(3)(a) of the 2007 Act, the court may determine a s. 60 application by making *"any order it considers appropriate"*, including an interim suspension order and may, under s. 60(3)(b), give to the Council *"any direction that the court considers appropriate"*. The court, therefore, has a very wide discretion and a broad jurisdiction in terms of the possible orders it may make on an application such as this.

65. It is clear from the case law that, in considering such an application, the court must have to the forefront of its consideration, the protection of the public. In *O'Ceallaigh*, Geoghegan J. stated in the Supreme Court (in the context of s. 44 of the Nurses Act 1985) that the *"paramount consideration"* in a determination as to whether to bring such an application is the need to prevent *"immediate danger to the public"* (at 133).

66. However, because of the significant adverse consequences for the medical practitioner of an interim suspension order, in terms of his or her constitutional rights to a good

name and reputation and to earn a livelihood, the courts have repeatedly stressed that such an order should only be made *"when no other order will serve to protect the community"* (as stated by Morris J. in *Medical Council v. Whelan* (Unreported, High Court, Morris J., 20th February, 2001), as applied in numerous subsequent cases including *Medical Council v. Bukhari*). That is why in a number of cases the courts have accepted undertakings from the medical practitioner instead of granting interim suspension orders, as was the case in *Whelan* and *Bukhari*.

67. The courts have also made clear that interim suspension orders should be reserved for *"exceptional cases where a doctor has to be suspended from practice because it is in the public interest that he should be"* (as stated by Kelly J. in *Casey v. Medical Council* [1999] 2 I.R. 534, at 549).

68. In each case, the court is engaged in a balancing exercise between the public interest which is said to be served by the interim suspension order sought and the various constitutional rights of the medical practitioner. The court must decide in each case and on the particular facts of the case where the balance should be drawn: see, for example, the comments of Keane C.J. in the Supreme Court in *Medical Council v. P.C.* [2003] 3 I.R. 600, where (at 602), the former Chief Justice made clear that the High Court is obliged to weigh up the different and competing interests in deciding where the balance should rest.

69. The sort of balancing exercise which the court must conduct was well described by Irvine P. in *Medical Council v. Waters* [2021] IEHC 252, where (at para. 21), the former President, noting what Morris J. had said in *Whelan*, explained that the question which the court had to ask itself on such an application is whether, on the particular facts, the public interest (in terms of the need to protect the public) outweighs the constitutional rights of the medical practitioner to carry on his or her

practice and to earn his or her livelihood as a doctor and to avoid the reputational damage which would undoubtedly arise in the event of an interim suspension order being made.

70. A significant factor which must be weighed in the balance, as part of the court's consideration of the constitutional rights of the medical practitioner, in the case of a practitioner who is facing a criminal prosecution which, at least, in part, is relied on by the Council as part of the basis for the interim suspension order sought, is the presumption of innocence which the practitioner enjoys in our system of laws. That presumption has recently been described by O'Malley J. in the Supreme Court as *"a bedrock principle of our criminal justice system"*: *DPP v. Heffernan* [2017] IESC 5 (at para. 60), [2017] I.R. 82 (at 116). The presumption of innocence serves also to protect the constitutional right of the accused person to his or her good name and livelihood, as stated by Gannon J. in *The State (O'Rourke & White) v. Martin* [1984] ILRM 333 at 338.

71. Understandably, the respondent urged the court to place great weight on the fact that he enjoys the presumption of innocence and is strenuously denying the allegations made against him, [redacted]. While the Council acknowledged that the presumption of innocence properly formed part of the court's consideration of the respondent's rights to his good name, reputation and livelihood, it submitted that it was not a standalone factor to be considered as such. The Council submitted that the presumption of innocence had little significance for its application in this case and could not be a bar to the application. I agree with the Council that the presumption of innocence does not amount to a legal or jurisdictional bar to an application for an interim suspension order being made where the medical practitioner concerned is the

subject of a criminal prosecution and where the medical practitioner has made it clear that he or she strenuously denies the allegations and intends fully to contest the charges at the trial. However, the presumption of innocence is, in my view, an important factor to be weighed in the balance as part of the constitutional rights of the practitioner which must be considered by the court. Ultimately, however, the court must determine whether the protection of the public trumps all of the other rights engaged, including the presumption of innocence. It is not, therefore, an absolute bar to the making of an interim suspension order but it is an important factor for the court to take into account.

72. The Council has prepared a Guidance Note on *"immediate suspension orders"* (the "Guidance"). It is stressed, correctly, at para. 5.3 of the Guidance that *"the paramount consideration for the Council is the prevention of immediate danger to the public"* (citing the statement of Geoghegan J. in *O'Ceallaigh,* referred to earlier). The Guidance then sets out the three matters to be considered by the Council when deciding whether to apply for an immediate (or as it is sometimes called an interim) suspension order. The three matters referred to by Barron J. in *O'Ceallaigh* are set out at para. 5.4 of the Guidance. The Guidance again correctly stresses that when considering the apparent strength of the case against the doctor (if proven to be true), the role of the Council when deciding whether to make the application for the suspension order is not to make findings of fact or to resolve conflicts of evidence (para. 5.5). That is also the approach which the court must take when considering whether to grant an interim suspension order. It is not the role of the court to make findings of fact or to resolve conflicts of evidence on such an application. That is particularly so where the application for the interim suspension order is made on the basis of allegations which have given rise to criminal proceedings.

73. The Guidance contains specific provisions dealing with allegations of sexual misconduct and cases where there are criminal charges or investigations. Para. 7.6 describes cases relating to sexual misconduct as involving:

"a. Allegations concerning inappropriate sexual behaviour towards a patient, for example, the carrying out of inappropriate examinations.

b. A criminal investigation against a doctor for a sexual criminal offence e.g., rape, sexual assault, sexual abuse of children or offences relating to child pornography.

c. Allegations that a doctor has pursued or established an inappropriate relationship with a patient.

d. Allegations of a pattern of inappropriate sexual behaviour towards patients."

74. Para. 7.7 of the Guidance stresses that the Council must consider the particular facts of each case that comes before it.

75. Para. 7.8 deals with allegations which lead to criminal charges or investigations. It states:

> *"Where allegations relate to criminal charges or investigations, the Council in considering the necessity to protect the public will need to consider the nature and seriousness of the criminal investigations/charge(s). In doing so, the Council must consider the particular facts of each case and the criminal investigations/charge(s)."*

76. It seems to me that these paragraphs of the Guidance correctly identify the role of the Council in deciding whether to make an application for an interim suspension order against a medical practitioner. They also provide a useful reminder to the court that where the allegation giving rise to the application for the interim suspension order is one of alleged sexual misconduct (such as an allegation of alleged inappropriate

sexual behaviour when carrying out a medical examination) or where the allegation has given rise to criminal proceedings, [redacted] the court must consider the need to protect the public and, in that context, must consider the particular facts of the case and the nature and seriousness of the charges.

77. The fact that a criminal prosecution has been brought does not, in and of itself, mean that an interim suspension order should be made against the medical practitioner. While it is not the function of the court to make findings of fact or resolve conflicts of evidence on an application such as this, the court can form a view as to whether the allegations are such that an interim suspension order should be made in order to protect the public. [redacted]). In considering whether the nature and seriousness of the allegation and, where applicable, the ensuing criminal charge or charges are such as to give rise to a need to protect the public, the court must consider whether some alternative course of action short of a suspension order would achieve the same objective.

78. That is where the possibility of the medical practitioner providing appropriate undertakings to the court arises. Since an interim suspension order should only be made when no other order or measure will serve to protect the public and since such an order should only be granted in exceptional cases, consideration must be given in each case to whether or not appropriate undertakings should be accepted by the court in place of the interim suspension and other orders. Undertakings may be offered by the medical practitioner to the Council itself or to the court. As Kelly P. noted in *Teaching Council of Ireland v. M.P.* [2017] IEHC 755, [2018] 3 I.R. 249 (at para. 60),

there is no obligation on the Council to accept such an undertaking. In deciding whether or not to accept an undertaking, the Council must take into account the fact that an undertaking offered to the Council does not have the same effect as one offered to the court. An undertaking offered to the court is, of course, enforceable as if it were an order of the court. An undertaking offered to the Council is not enforceable in that way and, if breached, would require the Council to bring an application to the court for orders including an interim suspension order. That point was also adverted to by Humphreys J. in *Council of the Pharmaceutical Society of Ireland v. A.B.* [2020] IEHC 481.

79. In this case, the respondent offered undertakings to the Council at its meetings on 11th August, 2022, and 27th September, 2022, and has offered those undertakings to the court. For reasons summarised in the next section of this judgment, the Council strongly believe that the undertakings offered are insufficient and would not adequately protect the public.

6. Brief Summary of Parties' Submissions

(A) The Council

80. The Council contends that no other order apart from an interim suspension order would adequately protect the public and that the undertakings offered by the respondent to the court fall short of what is necessary to protect the public. The Council relies on the nature and seriousness of the criminal charge brought against the respondent [redacted]. The Council contends that the seriousness of that allegation was downplayed and understated by the respondent in correspondence sent by him and on his behalf to the Council and in the statement which he exhibited to his affidavit. The Council contrasted what was said by the

respondent [redacted]

81. The Council took the court through the three matters referred to by Barron J. in *O'Ceallaigh* which the Council had to consider in deciding whether to bring the application and which the court has to consider in determining the application.

82. [redacted] up

[redacted]

83. With respect to (b), the apparent strength of the case made against the respondent, while accepting that the respondent strenuously denies the allegations made against him and will be defending the criminal proceedings as well as the fact that much of the information in relation to the allegations came from the respondent himself, the [redacted]

84. With respect to (c) the likely sanction at the conclusion of any fitness to practise inquiry, the Council contends that if the complaint or complaints against the respondent are upheld, the sanction which would be imposed on the respondent would likely be at the very high end of the scale because of the seriousness of the conduct involved.

85. The Council argues that nothing short of an interim suspension and the ancillary orders sought would be sufficient to protect the public interest and further submits that the undertakings offered by the respondent to the court would not be sufficient. While accepting that an undertaking to the court can be enforced as if it were a court

order, the respondent points to what it considers to be the difficulty in supervising the respondent's compliance with the undertaking offered. It notes that the respondent is now a sole practitioner working in the clinic. He has no medical professional colleagues and, therefore, no colleagues who might be in a position to supervise him during the currency of the undertaking. The Council also notes that the chaperone policy would be difficult to supervise and to enforce as well as pointing out that the chaperones engaged by the respondent are not medical professionals. The Council maintains that enforcement of the undertaking and the efficacy of the chaperone policy would depend on the patient or the chaperone having to disclose any untoward conduct by the respondent.

86. With respect to the respondent's position, while acknowledging that the respondent has the benefit of the presumption of innocence, as noted earlier, it maintains that that does not prevent the court from granting the orders sought. The Council contends that the balancing of the various rights and interests involved must lead inevitably to the conclusion that the orders should be granted. That is so even though a lengthy period of suspension, pending the conclusion of the trial in mid-late 2024 and any fitness to practise inquiry, thereafter, may discommode his patients. The Council says that the protection of the public nonetheless requires the granting of the orders sought and maintains that should the court have a discretion in the matter, all of the discretionary factors lie in favour of granting the orders.

(B) The Respondent

87. The respondent relies on the matters set out in his replying affidavit (which I have summarised earlier). He points to his long and distinguished career in Ireland and abroad. He notes the patients involved did not make any complaint to the Council and that he himself disclosed the relevant information to the Council back in June 2021.

He denies the allegations and is defending the criminal proceedings. He notes that notwithstanding that the Council sought documentation in relation to any complaints or issues of concern against the respondent for a lengthy period of time from the hospital and from the clinic, there were no relevant documents at all.

88. [redacted] That is why he first offered the relevant undertakings to the Council in August and September 2022 and subsequently to the court. He relies on the presumption of innocence and on the fact that he is strenuously denying the allegations and defending the criminal proceedings. [redacted] On the contrary, he says that he is treating the matter with utmost seriousness and has not sought in any way to downplay the allegations made against him. [redacted].

89. While not disputing the legal principles to be applied on this application, the respondent stresses that it is only in exceptional cases where no other order would protect the public that an interim suspension order should be granted. The respondent further relies on (a) the presumption of innocence (to which I have already referred) and (b) the delay on the part of the Council in bringing the application, bearing in mind that he first brought the matter to the Council's attention back in June 2021, and the application to the court was only made by the Council in October 2022.

90. The respondent referred on the affidavit to the adverse effects of a suspension order on him and on his patients. [redacted]. He would be unable to earn his livelihood during the period of any suspension when precluded from practising medicine and would be unable to provide care to his many patients. I have referred earlier to the respondent's evidence as to the impact upon his patients and the lack of capacity of colleagues to take over the care of those patients. The respondent also relies on the adverse impact which a suspension would have on his physical and mental health.

91. While the respondent maintains that the undertakings he has offered adequately meets the Council's concerns, he notes that he offered more extensive undertakings to the Council than the Council required back in August 2022. The then undertakings are now offered to the court, which he maintains, adequately address any concerns the Council might have had in relation to the enforceability of those undertakings. He maintains that the chaperone policy he has put in place provides sufficient protection for his patients. He refers to the statements of two women who have worked as chaperones for the respondent since the commencement of the chaperone policy in

late August 2022. One of them stated that she found the respondent *"extremely efficient and thorough with his patients and absolutely professional and appropriate in his approach to examinations and treatments"*. She found *"patients very secure and satisfied in consultations and* [had] *no reason to believe that would ever change in the future, with or without the presence of a chaperone"*. The other chaperone stated that she found the respondent's interactions with his patients to be *"detailed, informed and considered"* and that the respondent was able to put his patients *"at their ease"* and the appointments which she witnessed appeared to be positive experiences from the patient's perspective. She also noted that *"all patients appeared happy to continue their appointments into the future"*. The respondent confirmed that the two women who had provided those references were happy to continue to act as his chaperones. In addition, the respondent relied on the introduction of the two stage consent policy which I referred to earlier which requires the general consent to an examination and then specific consent to particular types of examination.

92. The respondent contends that these undertakings are sufficient and that there is no issue in relation to their enforceability. Nor should there be any concern in relation to the supervision of his compliance with those undertakings. The chaperone policy has been in operation since late August 2022 and has given rise to no issue. There is no evidence that it is not working or that the respondent would otherwise breach his undertakings. He points to the fact that notwithstanding that the Council had the opportunity of putting in further affidavit evidence, it did not take up that opportunity. There is, therefore, no evidence that he has not complied with the undertakings given to the court or that there is any issue in relation to the operation of the chaperone and consent policies.

93. In addition to making these arguments, the respondent's counsel informed the court that the respondent had instructed him to make a number of further submissions. I set them out briefly below as I find that there is no substance whatsoever to any of them. First, the respondent submitted that his constitutional right to natural and constitutional justice and to a fair procedures has been infringed as s. 60 of the 2007 Act provides for the possibility of the Council making an *ex parte* application to suspend his registration. Second, the respondent submitted that s. 60 is invalid as there is no express provision for any appeal from an order of the court made under that section. Third, the respondent submitted that his right to a fair trial under Article 6 of the European Convention on Human Rights (the "Convention") would be infringed by any order made under s. 60 of the 2007 Act, in circumstances where, as a person who is facing a criminal prosecution, his presumption of innocence must be respected and given effect to and no order could be made in those circumstances under that section. He relied in that regard on a judgment of the European Court of Human Rights in *Micallef v. Malta* (Application No. 17056/06) [1909] ECHR 1571 (15th October, 2009). The Council disputed all of these submissions and, for reasons I set out briefly in the next section of this judgment, I find they have no merit whatsoever and are completely unstateable in the context of this case.

7. Decision on Application

94. I must now apply the legal principles discussed earlier to the particular facts of this case. As I indicated earlier, and as is expressly stated in the Council's Guidance document, applications such as this are very fact specific and close attention must be paid to the particular facts of the case.

95. In my view, the Council had no alternative but to bring this application for the interim suspension order and for the ancillary orders sought. [redacted]

96. While the respondent has made it clear that he denies the allegation and is strenuously defending the proceedings, the Council was obliged to act by bringing this application and was not required to accept the undertakings offered by the respondent at the meetings on 11th August, 2022 (as subsequently confirmed in writing on 17th August, 2022) and 27th September, 2022. The Council was certainly entitled to take the view that the difficulty in enforcing an undertaking given to it as opposed to the court

meant that the undertaking would not afford sufficient protection to the public and that this application was necessary.

97. [redacted]. As indicated earlier, it is not appropriate for me to seek to resolve that conflict on this application. That is a matter to be dealt with in the criminal trial. I am concerned with what is to happen between now and the date, not only of the trial but of the conclusion of any fitness to practise inquiry thereafter. That will involve a period of about another two years having regard to the time it will take for the trial to be heard and determined in the Circuit Court and for any fitness to practise proceedings to be pursued and concluded thereafter.

98. The fact of the criminal prosecution does not of itself lead inevitably to the conclusion that the respondent's registration should be suspended and that he should be prevented from engaging in the practice of medicine until any fitness to practise proceedings are determined. The court is required to engage in a more nuanced analysis than that. Whether or not it is appropriate to make the order sought by the Council will depend on various factors, as is clear from the discussion of the applicable legal principles set out earlier in this judgment.

99. Recognising that the protection of the public is the paramount consideration of the court on an application such as this, there are many different and conflicting rights and interests involved, including the respondent's constitutional rights to his livelihood and his good name and reputation. In that context, the presumption of

innocence which he enjoys must also be weighed significantly in the balance. The court has to consider all of these various rights and interests in light of the ultimate requirement in s. 60 of the 2007 Act to protect the public.

100. The matters which the Council had to take into account in deciding to bring the application and which the court has to consider in determining the application are those identified by Barron J. in the Supreme Court in *O'Ceallaigh*. I will now take each of them in turn.

101. As to (a) the nature and seriousness of the conduct alleged, there is no doubt but that the allegation against the respondent [redacted] in particular, which has led to the criminal proceedings, is extremely serious if true. [redacted]

102. As regards (b), the strength of the case against the respondent, [redacted]

[redacted] It is simply not possible that for me at this stage to say any more than that the DPP was satisfied that the case was of sufficient strength to merit a prosecution against the respondent.

103. As regards (c), whether in the event that adverse findings are ultimately made against the respondent in any fitness to practise proceedings he is likely to be subjected to serious sanctions such as cancellation of his registration, it seems to me that it is clear that would be the most likely outcome in such circumstances.

104. As I have indicated, the Council had no alternative but to bring the application based on these three matters. It was entitled to take the view that the protection of the public required the orders which are sought in this application. However, I am obviously not bound by the Council's view in that regard and I must consider whether the interim suspension order and ancillary orders sought are necessary to protect the public or whether some lesser form of order or undertaking would achieve that objective.

105. It might be easy to think that in circumstances where the respondent is being prosecuted [redacted] that his registration should be suspended. However, that would be wrong. I must carry out the balancing exercise required by the caselaw. I must bear in mind the respondent's lengthy career extending over almost four decades with no allegations against him [redacted]

[redacted]. In my view, the timeframe involved supports the contention by the respondent's counsel that any suspension made would be likely to bring the respondent's career to an end having regard to his age and the likely time period involved. In addition to the adverse impact on the respondent's career, the uncontested evidence is that the respondent has no source of income other than the income from his medical practice at the clinic. If the interim suspension order is made and if he is prohibited from engaging in the practice of medicine, he will have no income for the period of his suspension and, as it is likely to be career ending even after that. I must also consider the impact of a suspension of the presumption of innocence enjoyed by the respondent in circumstances where he denies the allegation made against him and is defending the criminal proceedings. These adverse effects on the respondent's constitutional rights to his livelihood and to his good name and reputation are all factors which I must include in the balance.

106. I also attach some (but not great) weight in the balance on the potential impact of the respondent's patients, were he to be suspended. The respondent has said on affidavit that his 500 patients (250 of those being significantly immunocompromised) will have to go elsewhere for their treatment and care. The respondent has provided evidence that other specialists in the field do not have capacity to take on his patients. None of that evidence has been disputed by the Council. Indeed, the Council accepts that, at least, some of the respondent's patients will be inconvenienced as a result of the respondent's registration being suspended. However, while this is a factor I must weigh in the balance, if the protection of the public otherwise required that the

respondent's registration be suspended, this factor would not tilt the balance the other way.

107. Nor do I attach great weight to what the respondent says will be the impact on his mental and physical health of any suspension. His evidence is vague and general in that respect and while he has given evidence of the effects of an illness he suffered in the summer of 2022, that evidence does not support the assertions he has made to the effect that a suspension would aggravate the stress which he has already suffered as a result of the *"Medical Council process"*, as he calls it, or otherwise exacerbate the effects on his physical and mental health. The respondent has offered no specific or independent evidence in support of those assertions. It would be difficult in any event to separate out of such alleged effects from those that may be said to rise from the fact that he is the subject of a criminal prosecution [redacted].

108. Having noted the approach which I am required to take on an application such as this and having weighed in the balance these various competing rights and interests, I am satisfied that it is necessary that certain measures be put in place in respect of the respondent to ensure the protection of the public. However, I am not satisfied that it is necessary to go so far as to grant an interim suspension order in respect of the respondent and to prevent him from engaging in the practice of medicine until any fitness to practise proceedings are determined. I believe that it is possible to address the Council's appropriate concerns to ensure the public are protected by measures short of a suspension order, namely, by means of undertakings given by the respondent to the court. The respondent has already given certain undertakings to the court.

109. Having decided that, as a matter of principle, it is possible to address the Council's concerns to ensure the protection of the public by means of undertakings to be given

to the court by the respondent, it is appropriate that I would hear further submissions from the Council and from the respondent as to the precise terms of any such undertakings. As I have indicated at the outset of this judgment, those undertakings would have to include, at the very least, undertakings not to examine female patients in the absence of a chaperone, regular notification to the Council of the identities and details of the chaperones engaged by him, adherence by the respondent to a strict examination consent policy requiring an initial general consent to treatment by the patient together with specific consent to a specific examination being carried out and a commitment by the respondent to provide to the Council and any relevant committee of the Council, regular updates in relation to the pending criminal proceedings against the respondent and a commitment to immediately inform the Council of any further allegations made against him and of the nature of those allegations. A provision for liberty to apply at short notice would also have to be included in any order of the court recording the undertakings required to be given by the respondent.

110. I am also satisfied also that the protection of the public requires that the Council be permitted to inform the various persons and bodies referred to in the Council's notice of motion of the fact and terms of the undertakings to be given by the respondent to the court. Those persons and bodies are (a) the Minister for Health, (b) the Chief Executive Officer of the HSE, (c) the Chief Executive Officer of the General Medical Council in the United Kingdom, and (d) the DPP.

111. It is, in my view, also necessary for the protection of the public that the Council be permitted to respond accurately to any request from any individual or body for information regarding the respondent's registration status, as well as permitting the Council to reflect the fact of the undertakings on its public facing register.

112. It seems to me that if undertakings along the lines I have mentioned are given on oath to the Court by the respondent (with further detail to be determined having further

heard from the Council and from the respondent) that should fully and adequately address the concerns which the Council have to ensure the protection of the public.

113. I have also considered the respondent's contention that the Council has delayed unreasonably in bringing this application and that that should be a reason in and of itself to refuse the Council's application. I do not accept that the Council has been guilty of unreasonable delay in bringing the application. I accept that on an application such as this, it is imperative that the Council moves as quickly as possible and brings any application for an interim suspension order and for ancillary orders on an expedited basis. [redacted]. However, that would ignore the fact that the Council was attempting to obtain further information in relation to the allegations [redacted]

[redacted]

114. It is difficult to see how, having sought adjournments of the two relevant Council meetings and having only provided details in relation to the criminal proceedings and the other allegations to the Council on 26th September, 2022, the respondent can really complain that the Council unreasonably delayed in bringing the application. In any event, I agree with what Irvine P. said in *Medical Council v. Waters* [2021] IEHC 252, that the Council must consider the risk which the relevant medical practitioner's conduct poses to the public when determining the urgency of the application (see the observations of Irvine P. at para. 39 of her judgment). While I agree, therefore, that the Council must act with speed and urgency, it can only do so when armed with all of the relevant information and it must consider, in light of that information, whether there is a significant potential risk to the public. I do not believe that the Council can be faulted in terms of the timing of this application. Therefore, I do not believe, for the reasons just outlined, that the Council unreasonably delayed in bringing its application.

115. Before concluding, I must deal briefly with the additional legal arguments which the respondent instructed his counsel to make at the end of his submissions. I have set them out earlier. I can deal with them very briefly now.

116. His first submission was that because s. 60 of the 2007 Act provides for the Council to make an application for an interim suspension order on an *ex parte* basis, the respondent's rights to natural and constitutional justice in terms of his right to be heard have been infringed. That submission bears no reality to the facts of this case. The Council made its application to the High Court on 7th October, 2022. While the application was stated to be an *ex parte* application, the respondent was represented by solicitors and counsel in court at the time of that application and gave certain undertakings to the court. His rights to constitutional and natural justice and fair procedures were not infringed.

117. The second submission advanced on his behalf was that s. 60 of the 2007 Act was invalid in that it did not expressly provide for any appeal. However, there is nothing in the 2007 Act which seeks to interfere with the normal constitutional right of a party under Article 34.4 of the Constitution to appeal from any decision of the High Court to the Court of Appeal or under Article 34.5 of the Constitution to appeal, in exceptional circumstances, directly to the Supreme Court. It is open to the respondent to appeal as of right to the Court of Appeal from any decision I make on the Council's application. This submission is, therefore, plainly wrong.

118. The third submission advanced on behalf of the respondent was that, as a person facing a criminal trial and entitled to the presumption of innocence, the respondent's rights to a fair trial under Article 6 of the Convention would be infringed by an order made under s. 60 of the 2007 Act. He relied in support of that submission on the judgment of the European Court of Human Rights in the *Micallef* case. There are a number of problems with this submission.

119. The first is that, as an accused person, the respondent does, of course, have a right to a fair trial under Article 38 of the Constitution and is entitled in that context to the

presumption of innocence. I have expressly found that the fact that the respondent enjoys the presumption of innocence is a factor to be considered as part of the balancing exercise which the court has to undertake on an application such as this. The applicant's rights are further protected by the fact that this application has been heard otherwise than in public in accordance with the provisions of s. 60(2) of the 2007 Act.

120. Further, the judgment in *Micallef* is of no assistance to the respondent. It was concerned with the issue as to whether the right to a fair hearing as provided for in Article 6 of the Convention applied in the context of an application for an interim or interlocutory injunction in civil proceedings in Malta. The Court held that where applications for interim measures (including applications for interim or interlocutory injunctions) determined rights and obligations, Article 6 rights may be engaged. The issue in that case was whether the principle of objective bias applied in the context of an interlocutory injunction application. The Court held that it did. However, none of that has any relevance whatsoever to the present case. There is no issue as to the respondent's entitlement to fair procedures on this application. The respondent has been afforded the opportunity of providing evidence in response to the Council's application and has been represented by solicitors and counsel in the application. The respondent's submissions have been considered by the court and he has ultimately prevailed in his contention that, as a matter of principle, the court should accept undertakings given to the court instead of making the interim suspension order and other ancillary orders sought by the Council. There is, in my view, therefore, no basis for this submission.

8. Summary of Conclusions

121. In summary, I have concluded that the Council was perfectly entitled, and indeed obliged, to bring this application under s. 60 of the 2007 Act for an interim suspension order and for other ancillary orders in order to protect the public. However, applying the relevant principles to the particular facts of this case, I am satisfied that the protection of the public can be adequately served by the respondent giving certain undertakings to the court. I have set out broad parameters of the undertakings which I would require the respondent to give to the court. I have expressly left over finalising the detail of those undertakings until I hear further from the Council and from the respondent.

122. I am satisfied that if undertakings along those lines are given by the respondent to the court, the public interest will be adequately protected and that is the paramount consideration for the court under s. 60 of the 2007 Act. I have reached that conclusion having considered the necessity to protect the public and also the various constitutional rights and entitlements of the respondent, including his right to earn a livelihood and his rights to his good name and reputation as well as the presumption of innocence which the respondent enjoys as a person who is the subject of criminal proceedings which he is defending.

123. I will list the matter for such further submissions as may be necessary after this judgment has been delivered in the presence of the parties for the purpose of finalising the terms of the order to be made.