UNAPPROVED

THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 214
Record No.: 2018/145

Donnelly J.
Faherty J.
Ní Raifeartaigh J.

BETWEEN/

SAQIB AHMED

APPELLANT

-and-

THE FITNESS TO PRACTISE COMMITTEE OF THE MEDICAL COUNCIL, THE MEDICAL COUNCIL, AND, (BY ORDER) THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Ms. Justice Donnelly delivered on the 28th day of July, 2021

INTRODUCTION

1. The origin of this appeal is an inquiry in connection with the appellant, a registered medical practitioner (hereinafter "doctor"), held in accordance with the Medical Practitioners Act, 2007, (hereinafter, "the 2007 Act"). Nine allegations had been included in the notice of inquiry; some of these allegations were further subdivided. One sub-divided allegation led to a finding by the Fitness to Practise Committee (hereinafter, "the Committee") of poor professional performance by the appellant. On consideration of that finding, the Medical Council (hereinafter, "the Council") imposed the sanction of "advice" upon the appellant and did not impose conditions on his registration. A doctor upon whom such a sanction is imposed without any conditions does not have an entitlement to appeal against the finding and sanction

to the High Court. The absence of an appeal is one of the matters of which he complains in these proceedings.

2. At the relevant time, the appellant was employed as a registrar in medical oncology at a regional hospital in the State. The sub-allegations upon which the finding was made were contained in allegation 7(b) in the following terms:

> "*On or around 6 November 2012 in respect of Patient BK who was transferred from [ ], [ ], County [], [Dr. Ahmed]: […]*
>
> *b. Failed to request the following basic tests to include, but not limited to:*
>
> *i. Blood test(s); and/or*
>
> *ii. Urine test(s); and/or*
>
> *iii. Kidney function test(s)*".

3. The patient, BK was a 28 year old man who had been transferred from a district hospital. He had a CT scan in the district hospital which showed a large abdominal mass apparently rapidly growing with a length of history for 6-8 weeks of abdominal and back pain and weight loss.

4. On allegation 7(b), the Committee found as follows:-

> "Allegation 7(b) was proven as to fact. The reason: The totality of the evidence established this beyond a reasonable doubt. Finding: This amounted to poor professional performance. Reason: The evidence of Dr. Henry established that this was a very serious failure to meet standards of competence that can reasonably be expected of an oncology registrar."

Dr. Henry was an expert witness, called by the Chief Executive Officer ("CEO") of the Council, who gave evidence on oath at the hearing subsequent to the provision by him of a report concerning his opinion as to whether the facts at issue (if proven) would amount to misconduct or poor professional performance.

5. The appellant challenged by way of judicial review, the findings and report of the Committee and the decision of the Council to impose the said sanction. In the light of the absence of an appeal against the finding of a sanction of "advice", the appellant also challenged the constitutional validity of sections 71 and 75 of the 2007 Act and the compatibility of those provisions with the European Convention on Human Rights (the "Convention"). The third, fourth and fifth respondents ("the State respondents") were joined by Order of the High Court in respect of the constitutional and Convention claims.

JUDGMENT OF THE HIGH COURT

6. In a judgment dated the 16th February, 2018, the High Court (Meenan J.) concluded that there was no basis for granting any of the reliefs sought and dismissed the proceedings

7. In dismissing the application for *certiorari* of the findings of the Committee and the Council, Meenan J. applied the principles set out by the Supreme Court in *Sweeney v. Fahy* [2014] IESC 50. He held at para. 29:-

> *"[b]earing in mind the clear distinction between an application for judicial review and an appeal and given the evidence before the [Committee] it could not be stated that the finding made by the [Committee] was irrational or unreasonable. There was clearly evidence before the Committee upon which it could reach the decision it did. It follows the applicant is not entitled to an order of certiorari quashing the report of the [Committee] herein."*

8. In refusing the application for a declaration of repugnancy to the Constitution, Meenan J. followed the decision of Kearns P. in *Akpekpe v. Medical Council* [2014] 3 I.R. 420 (hereinafter, *"Akpekpe"*). From the authorities referred to him, and in the light of the wording of Article 6 of the Convention, Meenan J. refused the application for a declaration of incompatibility within the meaning of s. 5 of the European Convention on Human Rights Act, 2003 (hereinafter, "the 2003 Act").

ISSUES

9. Having regard to the reliefs claimed and the grounds upon which they were sought, the issues which arise in the appeal can be summarised as follows:

(i) whether the appellant was out of time for the bringing of this judicial review;

(ii) whether there is any basis for granting any of the reliefs sought in connection with the said findings of the Committee and/or the said decision of the Council;

(iii) whether :-

(a) sections 71 and 75 of the 2007 Act breach the Constitution insofar as they deprive the appellant of an asserted right of appeal in circumstances where a finding of poor professional performance was made against the appellant, but the sanction imposed is not amenable to appeal to the High Court, and

(b) the extent of the grounds upon which it was pleaded that the said sections breached the Constitution; and

(iv) whether sections 71 and 75 of the 2007 Act are compatible with Article 6 of the Convention.

THE LEGAL PROVISIONS

10. Section 57 of the 2007 Act provides for a complaint relating to a doctor to be made to a Preliminary Proceedings Committee ("the PPC"). There are a number of grounds upon which a complaint may be made. The ground at issue in these proceedings is that related to "poor professional performance" set out in s. 57(1)(b). At the hearing before the Committee, the appellant also faced complaints related to "professional misconduct" set out in s. 57(1)(a). He was found not to be guilty of professional misconduct.

11. There is a screening process for complaints. A complaint is sent to the doctor concerned with an invitation to make observations/comments. The PPC then appoints a case officer to investigate and process the complaint. In essence, the PPC determines whether there is a *prima*

facie case to warrant the holding of an inquiry. If the PPC determines that there is such a *prima facie* case, the PPC refers the complaint to the Committee.

12. Before the Committee, the CEO of the Council must present evidence. The doctor is entitled to cross examine and to present his or her own evidence.

13. There are various inbuilt safeguards for a doctor. The standard of proof is the standard of beyond reasonable doubt that is found in criminal law. A legal assessor (usually a member of the Inner Bar as was the position for this appellant's hearing) is appointed to advise the members on matters such as rules of evidence, the appropriateness of cross-examination and other matters that might affect the fairness of the hearing.

14. In order to reach a decision on an allegation of poor professional conduct, the Committee must be satisfied that the facts are proved, and that those facts amount to poor professional conduct.

15. An important change from earlier legislation is that enquiries take place in public by default. This was a public inquiry.

16. The Committee is not a committee of doctors. Under the 2007 Act, it must have a lay majority.

17. Pursuant to s. 69(1) of the 2007 Act, the Committee must send a report in writing to the Council. On the basis of a finding by the Committee of a breach, the Council must impose a sanction.

18. Section 70(b) of the 2007 Act provides that "[t]he Council shall, on receiving the report referred to in section 69(1) of the Fitness to Practise Committee in relation to a complaint […] if the Committee finds that any allegation against the practitioner is proved, decide under section 71 or 71A, as may be appropriate, one or more than one sanction to be imposed on the practitioner."

19. The provisions as to sanctions are set out in s. 71 of the 2007 Act. The appellant challenges the constitutionality of that section. The section provides as follows:

> "Subject to sections 57(6)(a) and 72, the Council shall, as soon as is practicable after receiving and considering the report referred to in section 69(1) of the Fitness to Practise Committee in relation to a complaint concerning a registered medical practitioner where section 70(b) is applicable, decide that one or more than one of the following sanctions be imposed on the practitioner:
>
> (a) an advice or admonishment, or a censure, in writing;
>
> (b) a censure in writing and a fine not exceeding €5,000;
>
> (c) the attachment of conditions to the practitioner's registration, including restrictions on the practise of medicine that may be engaged in by the practitioner;
>
> (d) the transfer of the practitioner's registration to another division of the register;
>
> (e) the suspension of the practitioner's registration for a specified period;
>
> (f) the cancellation of the practitioner's registration;
>
> (g) a prohibition from applying for a specified period for the restoration of the practitioner's registration."

Section 57(6)(a) mandates the imposition of the sanction at paragraph (f) in particular circumstances. Section 72 relates to the imposition of a sanction referred to in section 71(b), (c), (d), (e), or (g).

20. The doctor is entitled to attend the meeting of the Council at which the appropriate sanction is considered and to make representations to the Council.

21. Section 75 of the 2007 Act – which is also the subject of challenge by the appellant – provides for an appeal to the High Court in relation to most of the sanctions imposed.

Importantly it does not provide for an appeal where the sanction is advice or admonishment or censure in writing. The relevant part of the section provides as follows:

> "A registered medical practitioner the subject of a decision under section 71 or 71A to impose a sanction (other than a sanction referred to in section 71(a) or 71A(a)) may, not later than 21 days after the practitioner received the notice under section 73(1) of the decision, appeal to the Court against the decision." (Emphasis added).

22. The powers of the High Court on review are set out in s. 75. The appeal is against both the findings and the sanction imposed. It can include a decision to order a full rehearing of the evidence.

The definition of Poor Professional Performance

23. Poor Professional Performance was introduced as a concept for the first time in the 2007 Act. Section 2 of the 2007 Act defines it as follows:

> "a failure by the practitioner to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that can reasonably be expected of medical practitioners practising medicine of the kind practised by the practitioner".

24. The courts had held that professional misconduct under the Medical Practitioners Act, 1977 included *"[c]onduct which could not properly be characterised as infamous or disgraceful, and which does not involve any degree of moral turpitude, fraud or dishonesty, may still constitute 'professional misconduct' if it is conduct connected with his profession in which the medical practitioner concerned has seriously fallen short, by omission or commission, of the standards of conduct expected amongst medical practitioners."* This inclusive definition of professional misconduct was identified by Keane J. in the High Court in *O'Laoire v. Medical Council* (Unreported, High Court, Keane J., 27th January, 1995).

25. The correct statutory interpretation of the definition of poor professional performance in s. 2 of the 2007 Act was at the heart of the decision by the High Court and Supreme Court in the case of *Corbally v. Medical Council and Ors* [2015] 2 I.R. 304 (hereinafter, "*Corbally").* The High Court (Kearns P.) in *Corbally* held that for a single incidence of error to amount to poor professional performance it must be *"very serious"*.

26. In the Supreme Court in *Corbally,* it was held by Hardiman J. at para. 41 that :-

> *"only conduct which represents a serious falling short of the expected standards of the profession could justify a finding by the professional colleagues of a doctor of poor professional performance on his part, having regard in particular to the gravity of the mere ventilation of such an allegation and the potential gravity of the consequences of the upholding of such an allegation."* (Emphasis added).

27. It is a curious feature of this case that, despite the conclusion of the Supreme Court that a *serious falling short* of professional standards was required to justify the finding of poor professional misconduct, the Committee proceeded on the basis that a *very serious falling short* of standards was required. This was because at the time the proceedings were first brought to the Committee, the High Court standard in *Corbally* was the standard in operation. Despite the clarification of the correct legal position by the Supreme Court prior to the hearing before the Committee, all relevant actors agreed to proceed on the basis of the former, higher, standard. This inured to the benefit of the appellant. It is nonetheless worthy of note that a procedure which was set up for the protection of the public was permitted to operate on a standard that could have resulted in an outcome that was less protective of the public, despite the law having been clarified to the knowledge of all actors.

The sanctions

28. There is no definition of advice, admonishment or censure in the 2007 Act. It may well be that the ordinary meaning of those words connotes a rising scale of approbation. There is

however no distinction between those sanctions when it comes to the non-availability of an appeal. It is only if such a sanction is combined with another sanction such as a censure with a fine or advice or admonishment with a condition is such a decision amenable to appeal.

29. The findings of the Committee are not time limited but are always "on the record" of a doctor.

30. The Supreme Court in *Corbally* noted that *all sanctions* were open to the Council in relation to findings of either misconduct *or* poor professional performance.

31. Other professional bodies permit appeals to the High Court in relation to sanctions of advice or censure (*e.g.* s. 80 and s. 81 of the Veterinary Practice Act, 2005).

32. The Regulated Professions (Health and Social Care) (Amendment) Act, 2020 now permits an appeal to the High Court where sanctions of advice, admonishment or censure alone are imposed. This does not have retrospective effect to enable this appellant to appeal.

THE CLAIM FOR CERTIORARI RELIEF

Is the applicant out of time in bringing Judicial Review proceedings?

33. Most unusually in this appeal, counsel who appeared for both the Committee and Council invited the Court to decide that the appellant is not entitled to any relief in connection with the findings and/or report of the Committee by reason of his failure to comply with the time limits set out in Order 84, Rule 21(1) of the Rules of the Superior Courts, 1986 (as amended) ("RSC") *insofar as necessary*. The Committee and Council were therefore quite willing to have the Court engage with the substantive points in this appeal and it was only if they were in danger of losing on those, that the Court was invited to address the issue of delay. That is quite an idiosyncratic invitation to the Court. In order to save valuable court and judicial time, a court should always be invited to deal with a preliminary point as a preliminary point. The court will then be in a better position to rule on whether it should, in the particular circumstances, decide the substantive issue.

34. The unusual nature of the invitation to the Court is only matched by the unusual brevity of the submissions on delay. They amount to four lines simply stating their contention that the appellant breached the rules and the High Court erred.

35. It is worth reciting the finding of Meenan J. in this regard. He dealt with this point in three succinct paragraphs as follows:

> *"17. The respondents maintain that, under O. 84, r. 21 of the Rules of the Superior Courts, time for the purposes of applying for leave to review the report of the first named respondent started on 29th July, 2015, when the applicant was first on notice of the contents of the report. Application for leave was not made until 16th December, 2015, and thus is out of time.*
>
> *18. As against this, the applicant submits that the procedure under the Act of 2007 was not completed until the meeting of the second named respondent on 17th September, 2015. If a sanction other than one provided for in s. 71(a) of the Act of 2007 had been imposed the applicant would under s. 75 of the Act of 2007 have had a full right of appeal to the High Court against the decision, in which case no judicial review proceedings would have commenced.*
>
> *19. I accept the submission of the applicant on this point. Clearly, a central element of the application before this Court is that, because of the nature of the sanction that was imposed, there is no right of appeal allowed by the Act of 2007. This situation did not come about until the meeting of the second named respondent on the 17th September, 2015. Therefore, in my view, these judicial proceedings were commenced within the time allowed by O. 84, r. 21 of the Rules of the Superior Court."*

36. In oral submissions, counsel for the Committee and Council drew the Court's attention to his clients' respective functions. He submitted that there was a distinct difference between

the stages in the process *i.e.* findings and sanction. He submitted that in circumstances where the Council cannot alter the finding of the Committee, for the purpose of O.84, r.21, time began to run from the time the appellant was on notice of the Committee's report. I do not accept that the distinction that is sought to be drawn between the processes of the Council and Committee is meaningful. There is a unity of process at issue here; a sanction must follow an adverse finding. But the sanction imposed determines whether a person has an appeal. Judicial review will almost never be required where the nature of the sanction permits the appellant to appeal to the High Court. Requiring a person to commence judicial review proceedings because of a possibility that they might not be entitled to a full appeal, would in all the circumstances negate the public interest in the efficient administration of justice. It would be an extra step that would take up valuable court time and incur legal costs unnecessarily.

37. In the circumstances, I conclude that there is no error in the trial judge's approach. I therefore dismiss this preliminary objection.

The Substantive Claim to Certiorari Relief

(i). The evidence before the Committee

38. The evidence before the Committee was given orally. Prior to the hearing the witnesses had made statements and medical records of the patients had been obtained. In order to give context to this appeal, it is necessary to record that the evidence given to the Committee related to a series of allegations against Dr. Ahmed from the period of July 2012 to November 2012. Apart from some reference to the evidence referring to allegation 7 in its totality, it is not necessary to outline in any detail the other evidence that was given because those allegations were found not proven against the appellant. The fact that the hearing concerned other allegations is, however, part of the factual context in which the relevant evidence for the purpose of this appeal came about. Nearly all the witnesses called to give evidence before the Committee were witnesses as to the facts which formed the basis of the allegations. Dr. Henry

was in a different category as he was engaged as an expert witness by the Council. In compiling his report, and when giving oral testimony, Dr. Henry drew on the factual allegations and sub-allegations contained in the notice of inquiry, and the oral testimony of the various witnesses of fact to the Committee hearing. Dr. Henry then provided his opinion on whether or not the actions of Dr. Ahmed amounted to poor professional performance or professional misconduct. He gave oral evidence to the Committee as an expert witness as to whether certain facts, if found by the Committee, amounted to poor professional performance (or indeed professional misconduct). The Committee then had to base its decisions upon the evidence provided by the witnesses *i.e.* by the witnesses as to facts and the expert witness.

39. Allegation 7 in so far as relevant alleges:

"On or around 6 November 2012 in respect of Patient BK who was transferred from [Hospital], you

a) Failed to report one or more of the following in patient BK's medical records:-

i) An assessment of patient BK's condition; and/or

ii) A medical history in respect of patient BK; and/or

iii) An examination of patient BK; and/or

iv) A plan for treatment of patient BK; and/or

b) (See para 2 above).

c) Prescribed 100 milligrams of Allopurinol for Patient BK when you ought to have known that 300 milligrams was a more appropriate does; and/or

d) Demonstrated poor clinical judgement and/or a lack of empathy for patient BK"

40. I will refer briefly to the more salient features of the evidence regarding allegation 7; later in the judgment I will deal more extensively with specific aspects of the evidence which are the most relevant to the matters arising on this appeal. Part of the factual evidence which underpinned the findings of the Committee in respect of allegation 7, and upon which Dr.

Henry drew in giving his expert evidence, was that of Dr. G, consultant medical oncologist and Dr. O'K, consultant haematologist.

41. Dr. G. gave evidence that he had been informed by Dr. O'K that, upon the admission of BK to hospital on the 6th November, Dr. Ahmed had not written anything in BK's records notwithstanding the fact that prior to BK's admission, Dr. Ahmed had been requested that once BK was admitted he was to take a history, examine the patient, ensure the carrying out of blood tests and prescribe appropriate medication. However, a prescription chart that was duly drawn up on the 6th November showed that the requested blood test had not been done and that BK had been prescribed morphine. Dr. G. himself became aware of these events on the morning of 7 November when he was approached by Dr. O'K (who was already in conversation with Dr. Ahmed) who expressed his concerns that what had been requested of Dr. Ahmed the previous evening had not been done by Dr. Ahmed. Moreover, there had been an argument between Dr. Ahmed and Dr. F, the locum haematology consultant on call on the 6th November. Dr. G testified that both he and Dr. O'K spoke to Dr. Ahmed about the events of the 6th November. The discussion became fraught and ultimately Dr. G advised Dr. Ahmed to go home. Dr. G said that it was disappointing that Dr. Ahmed did not ensure that BK's renal function was assessed.

42. Dr. G confirmed that he had written to the cancer services manager which referred to the notes compiled by Dr. F, which confirmed his concerns about Dr. Ahmed. Dr. F's notes highlighted that BK was prescribed 100mg of allopurinol which is a renal dose notwithstanding that there was no evidence of renal impairment. Dr. F was of the view that BK was not being managed properly. Dr. O'K gave evidence to the effect that when a patient such as BK is transferred from the district hospital to the regional hospital for admission, the patient is to be medically reviewed. This review will be recorded and thereby provide a history and

examination of the patient in order to make a decision on the state of the patient. This history would include basic blood tests. None of these were recorded by Dr. Ahmed.

43. Dr. Henry gave oral evidence and did so having confirmed that he had read the transcript of the hearing/directly heard the evidence presented. As indicated further below he incorporated his report into his evidence; except with regard to another allegation with which we are not concerned. He said that practitioners should repeat the blood, urine and kidney function tests upon the arrival of a patient at a new hospital upon being transferred from another hospital. This, he noted was "vital on the evening of arrival." The blood tests Dr. Ahmed referred to were perhaps as much as a week out of date and therefore amounted to a "gross failure of competence" according to Dr. Henry. In his oral evidence he stated that he did not know whether it was a week previously or a day previously but "regardless, of that, it's important that it's checked on arrival at [ ], along with the other full blood counts and liver function." Further, the dosage of allopurinol was too low in his opinion and that 300mgs was more appropriate. Dr. Henry stated in his report that Dr. Ahmed displayed poor clinical judgement and a lack of empathy for BK. The report stated that while no one appeared to have suffered damage as a result of his actions or omissions, the potential was "clearly there for serious damage" in relation to this allegation.

44. Dr. Ahmed did not avail of his entitlement to give evidence at the Committee hearing.

(ii). The appellant's submissions

45. Counsel for the appellant acknowledged that the Court was engaging in a judicial review of the decision and not an appeal. He submitted that he was challenging the manner in which the decision was reached; he was asking the court to quash the decision because it is irrational and not underpinned by any factual basis. In answer to criticism of his approach by the Committee and Council, who relied upon the decision in *Sweeney v. Fahy* to the effect that an issue concerning adequacy of evidence does not of itself render a decision unlawful, counsel

submitted that he was not asking the court to enter into a minute examination; he was simply pointing to what he termed limited evidence that could not amount to a finding of a very serious failing relating to medical standards. He distinguished *Sweeney* and also pointed to the reference in that judgment to the availability of an appeal whereas here there was none. Counsel pointed out that in similar circumstances in *Corbally*, the High Court and Supreme Court had reviewed the evidence.

46. Counsel submitted that there was no evidence in the case that allegation 7(b) on its own could amount to poor professional performance.

47. In counsel's submission, Dr. Henry's evidence fell far short of what was required to sustain allegation 7(b) as amounting to poor professional performance. It was an irrational inference to draw that what had occurred was a very serious falling short of professional standards.

48. The appellant also rejected the reliance by the Committee and Council on the evidence of other witnesses. It was submitted by the appellant that these did not fill the evidential deficit and were not part of the evidence considered by the first respondent to amount to poor professional performance; only the evidence of Dr. Henry could be relied upon as expert evidence in that regard.

49. Counsel also referred to the fact that Dr. Henry's own view of the absence of a blood test having been carried out by the appellant had changed. In his report he had referred to the carrying out of such tests on admission as "vital" yet in his evidence he had downgraded the necessity of doing such a test to it being "important" (in oral examination) or "more preferable" (in cross-examination) to do so.

50. Counsel also submitted that there was no expert evidence regarding the failure to do a urine test.

51. Counsel submitted that he was inviting the court to conclude that a significant erroneous conclusion had been drawn by the Committee. In doing so he relied upon *Orange Communications v. Director of Telecoms (No. 2)* [2000] 4 I.R. 159 and *M..J. Gleeson Company v. Competition Authority* [1999] 1 I.L.R.M. 401.

52. He also submitted that proportionality had a role to play in the assessment of poor professional performance. The findings reached by the Committee and Council were, he submitted, disproportionate conclusions.

(iii). The submissions of the Committee and Council

53. Counsel for the Committee and Council relied on the decision in *Sweeney v. Fahy*. Counsel's principal submission was that there was ample evidence to support the Committee's finding. He submitted that the appellant was prevaricating between a submission that there was no evidence and a submission that there was evidence but that it did not reach a sufficient threshold.

54. The Committee's finding was based upon the evidence before it. Counsel further submitted by reference to the transcript, that there was both expert and factual evidence regarding the failure to carry out a urine test. He submitted that the relevance of the other witnesses was that their evidence was evidence that Dr. Henry took into account in reaching his conclusions.

55. He submitted, *inter alia*, there was no question that Dr. Henry's report had been overtaken by the oral evidence at the hearing. Subject to amendments thereto that he made at the hearing, Dr. Henry's report was adopted by him in evidence and clearly formed part of his evidence to the Committee. Counsel submitted it was not tenable to say that there was no evidence upon which they could make the finding. On the contrary, there was an abundance of evidence.

56. Applying the test in *Sweeney v. Fahy* in this case meant that as there was evidence on which to make a finding, the threshold for judicial review has not been met. Counsel submitted that in any event, even if one engages with the evidence, there was sufficient evidence to support the finding.

(iv). Analysis and Determination

a) The Extent of the Issues

57. The appellant's written submissions to this Court on the issue of *certiorari* make sweeping claims that the decisions of the Committee and Council unlawfully and unconstitutionally negated his rights under the Constitution and under the Convention. He referred to the obligation that justice be administered by the Courts pursuant to Article 34.1, equality before the law, access to justice, the right to his good name and reputation and the freedom to seek work as well as referencing his right to an effective remedy. As regards the lawfulness of the decisions made by the Committee and Council under these headings, the appellant's arguments were not expanded upon in written or oral submissions.

58. At para. 14 and para 15, the judgment of the High Court sets out the detail of the application for leave to apply for judicial review. At para. 16, Meenan J. observes with respect to the finding on allegation 7(b) that the appellant is alleging that it *"is irrational and/or unreasonable, having regard to the evidence given at the hearing before the [Committee]."*

59. Acting irrationally and unreasonably was mentioned in 7 out of the 9 grounds in the statement of grounds that concern the finding of the Committee. Of the two remaining grounds, one claimed that in finding the appellant guilty of poor professional performance, the Committee and Council failed to observe his entitlement to natural justice, while the other ground claimed that the Committee misdirected itself in fact or in law in its decision to reach a finding of poor professional performance on the basis of the expert evidence.

60. The claimed grounds of irrationality or unreasonableness were:

a) In finding the appellant guilty of poor professional performance;

b) In the assessment/application/interpretation of the expert evidence;

c) In finding that a single allegation could in the circumstances amount to a finding of poor professional performance;

d) In failing to have regard to the fact that the expert witness did not give any oral evidence to the effect that the allegation was *in isolation* capable of amounting to poor professional performance;

e) In concluding, contrary to expert evidence, that allegation 7(b) was, in isolation and in the context of the facts, capable of amounting to poor professional performance;

f) In substituting its own view or interpretation for the view of the expert witness; and

g) In reaching a finding that was not based upon the evidence of the expert witness.

61. It appears from the High Court judgment that broad claims of a breach of the appellant's constitutional or Convention rights to fair procedures in respect of the decision-making function did not form part of the submissions to that court. Meenan J. expressly stated in the first line of his judgment dealing with the issue of *certiorari* that *"the applicant is seeking to impugn the decision of the [Committee] on the basis of a lack of evidence rather than any failure on the part of the [Committee] to follow fair procedures".*

62. At no point in his notice of appeal did the appellant take issue with that characterisation of his claim by the trial judge. The notice of appeal focuses on irrationality/unreasonableness; those concepts are developed in the notice of appeal by reference to a claimed lack of evidence to sustain the Committee's finding. The Committee and Council submitted, correctly in my view, that the appellant's submissions on the constitutional and Convention issues were made contrary to the fundamental legal principle that the order of the High Court granting leave

determines the parameters of the grounds upon which the application for judicial review proceeds (per Denham J. in *A.P. v. DPP* [2011] 1 I.R. 729). I am satisfied that no leave had been sought by the appellant to challenge the decisions of the Committee and Council on broad constitutional or Convention grounds. In reality, this was not a claim about the decisions being invalid on specific grounds of a breach of fair procedures or other constitutional rights. Where natural justice was referred to it was in the context of the finding of guilt based upon the claimed lack of evidence. This was therefore a claim made primarily on grounds of unreasonableness/irrationality.

b) The burden of proof

63. As the High Court also noted, many cases were cited in submissions in respect of the appropriate test for judicial review. The trial judge relied primarily on the decision of the Supreme Court in the case of *Sweeney v. Fahy* as being authoritative in the context of a judicial review on the basis of absence or insufficiency of evidence. In written submissions, the appellant did not address the *Sweeney v. Fahy* decision or the trial judge's reliance upon it. Instead, he referred to cases such as *State (Lynch) v Cooney* [1982] I.R. 337; *State (Keegan & Lysaght) v. Stardust Tribunal* [1986] I.R. 642 and *Meadows v. Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 in submitting that the Committee and Council "are required…to demonstrate…that the factual basis for the decision was, in its material respects, soundly-based and that the reasons for the conclusions reached were accordingly justifiable and that the decisions which affected the Appellant's rights were proportionate".

64. In so far as the above submission appears to imply that the burden of proof in a judicial review is reversed when an allegation of unreasonableness is made, I reject that submission. In *Meadows v. Minister for Justice, Equality and Law Reform*, which followed *State (Lynch) v. Cooney* and the decision in *O'Keefe v. An Bord Pleanála and O'Brien* [1993] 1 I.R. 39, the Supreme Court judgments were clear that that burden was on an applicant to prove his or her

case in judicial review (see *Meadows v. Minister for Justice, Equality and Law Reform* para. 69 of the Murray C.J.'s judgment regarding the burden regarding proportionality, principle 3 at para. 144 of the judgment of Denham J. and para 461 of the judgment of Fennelly J.). *Meadows v. Minister for Justice, Equality and Law Reform* requires the incorporation of a proportionality test in situations where fundamental rights are at issue. As Fennelly J. stated at the end of his judgment:-

> *"[i]t will be for the High Court to decide whether the applicant has provided sufficient evidence to discharge the burden which rests on her to show that the decision of the first respondent was, recalling once more the words of Henchy J. 'fundamentally at variance with reason and common sense.'"*

The onus is therefore on the appellant to establish irrationality or unreasonableness.

c) Consideration of the evidence before the Committee

65. At this point it is important to state that these proceedings concern a decision taken by an expert decision-making body after a full and considered hearing. Although the Committee was, by law, made up of a majority of lay people, this did not take away from the specialised nature of the body. It must act upon medical evidence to make its decisions. It does so while having the assistance of a legal assessor to ensure adherence to the law, including abiding by concepts of fair procedure as required under the Constitution. There is no real suggestion, let alone evidence, that any of those basic constitutional rights to fair procedures were violated by the Committee. I am satisfied that in truth this is a claim by the appellant that the decision of the Committee (*i.e.* the decision on poor professional performance) ought to be quashed because there was no evidence to support the findings or, alternatively, that there was so little evidence that the principle of proportionality required it to be quashed.

66. In *Sweeney v. Fahy,* the Supreme Court stated that:-

> "*there are very significant limitations on the extent to which it is appropriate for the superior courts to exercise their judicial review jurisdiction arising out of allegations that the evidence before a lower court or other decision maker was insufficient to justify the conclusions reached rather than insufficient to establish that the decision maker had any lawful capability to make the relevant decision in the first place*".

The Court went on to state that *"[s]ave in an extreme case, absence of sufficient evidence as to the merits would only render the decision incorrect and, thus, not amenable to judicial review".* The relevant principles were summarised as follows:

> "*First, judicial review is concerned with the lawfulness rather than the correctness of the decision sought to be challenged. Second, where the jurisdiction of the relevant decision maker to embark on the process of making the relevant decision is either not challenged or is established, an error by the decision maker in reaching the necessary conclusions to determine the appropriate decision to be made does not, of itself, necessarily render the decision unlawful. At a minimum, it requires a fundamental error to raise the prospect that the decision is not merely incorrect but also unlawful. It is unnecessary, for the purposes of this case, to attempt any exhaustive examination of what might be said to be the type of error which is sufficiently fundamental to render a decision unlawful in all types of cases. For present purposes, it can at least be said that issues concerning the adequacy of evidence before a decision maker (as opposed to a complete absence of evidence of a necessary matter) will not render a decision unlawful*."

67. Counsel for the appellant's principal submission on *Sweeney v. Fahy* was that it could be distinguished on the basis that it was a criminal case and that there was an appeal available as an alternative remedy. In my view, the fact that it was a criminal case does not affect the

authoritative nature of the decision in so far as it relates to a judicial review based upon an assessment of evidence before a decision-making tribunal (see the final sentence quoted in the preceding paragraph). Therefore, the principles set out in *Sweeney v. Fahy* also apply to any decision-making authority. As for the issue with regard to the availability of an appeal, *Sweeney v. Fahy* is directed towards the desirability of availing of the remedy of an appeal *where that is available*. As Clarke J., stated at para 3.15:-

> *"Where, however, a person has had a constitutionally fair first instance hearing and where their complaint is that the decision maker was wrong, then there are strong grounds for suggesting that an appeal, if it be available, is the appropriate remedy*" (emphasis added).

The absence of an appeal therefore does not affect the role of the court in a judicial review. Nor does it somehow require the court to broaden the scope of the review such that it, in effect, becomes an appeal. The court must carry out its functions on judicial review mindful of the fact that it is a review and not an appeal. The point that judicial review is a review and not an appeal, was made in *Sweeney v. Fahy* and in all relevant authorities. Indeed, it was a point repeated in *Corbally*, upon which the appellant places much weight in the context of his argument concerning the lack of any such appeal.

68. The appellant submitted that the backdrop to his entire case, whether on pure judicial review grounds or on constitutional grounds, is the decision in *Corbally*. In counsel's submission, *Corbally* highlighted the importance of the *finding* of poor professional performance. The sanction imposed was not more important than the finding. He referred to particular passages in the various judgments in *Corbally* to that effect.

69. *Corbally* concerned a doctor who had made a once-off error in a handwritten description of a proposed surgical procedure but argued that the error was not "serious" nor did it have any overly adverse consequences and could not therefore be the subject of a finding of

"poor professional performance" within the meaning of the 2007 Act. The Council argued that actual damage was not needed to be proven nor was any threshold of seriousness to be met. The Supreme Court held that a threshold of "seriousness" applied to a finding of poor professional performance as well as to professional misconduct. In the course of their judgments, various members of the Supreme Court referred to the consequences for a doctor of a finding of poor professional performance. For example, O'Donnell J. says at para. 58 of judgment at p. 339:-

> *"I agree in particular that given the fact that these hearings are conducted in public, and findings are made public, that even the lowest sanction of admonishment can have devastating consequences for the career and livelihood of the individual concerned. It follows in my view, for reasoning essentially similar to that set out in the judgment of Keane J. in O'Laoire v. The Medical Council (Unreported, High Court, Keane J., 27th January, 1995), that it was intended that such consequences should not be visited upon a practitioner other than in cases which passed a threshold of seriousness."*

70. In counsel's submission, in the wake of the decision in *Corbally*, any finding of poor professional performance is a very serious matter indeed. Not only was this relevant to the absence of an appeal, but the decision demonstrated that any finding of poor professional performance must be taken with extreme care by the Committee and similar extreme care must be exercised by the court on review. I consider that these submissions are well - grounded in *Corbally* but they have limited relevance to the *manner* in which this Court (and the High Court) must carry out the review. Apart from seeking to review the basis for the decision, as I have observed above, there is no suggestion, still less evidence, that the Committee approached its task in anything other than a careful manner. A professional practice committee's decision-making process *and* a court's review of it must be approached in a serious and cautious manner.

The salient issue before this Court however is whether the High Court was justified in its conclusions that there was evidence before the Committee on which it could reach the decision that the appellant was guilty of poor professional performance.

d) The evidence in respect of allegation 7(b)

71. The appellant's primary submission is that there was no basis for isolating allegation 7(b) and finding that it amounted to poor professional performance. The Court was referred to the transcript which records Dr. Henry stating: "I see allegation 7 as the critical allegation and the most serious and it qualifies both as misconduct and poor professional performance".

72. Counsel submitted that there were problems with the evidence before the Committee. It had never been presented to Dr. Henry that he was to consider each of the sub-sets individually. He therefore never gave that evidence but rather expressed a global view. In the circumstances it was submitted by the appellant that it was irrational to find him guilty of allegation 7(b) but not allegation 7(a).

73. It is important to note that the appellant is not claiming that the Committee had no jurisdiction *per se* to make a finding of poor professional performance based upon each sub-allegation. Indeed, it would not appear open to him to make such an argument as the notice of intention to hold an inquiry had stated specifically that poor professional performance related to "one or more of the factual allegations and/or sub allegations listed" in the notice. Instead, the appellant asks the court to consider whether the evidence could substantiate such a finding in isolation from a consideration of the evidence and findings in relation to the other sub-allegations. Counsel's submission was that, the abstraction of 7(b) from the evidence and the view that it amounted to a very serious failing, was irrational and not reasonable.

74. Counsel pointed out that this was not a committee of doctors. In this case the allegation of poor professional performance was a judgement regarding medical standards. Therefore, it was a matter of medical evidence and in the absence of evidence, the Committee could not

"join the dots". The absence of skill or knowledge was an issue of medical standards and evidence of that was required. In response to this point, counsel for the Committee and Council submitted that the applicable test was not whether an expert had given his or her evidence in a particular manner; it was up to the Committee to make its decision based upon their assessment of the evidence and not based upon a formula. Although an expert gives his or her evidence on the ultimate issue, it remains the role of the Committee to decide if that evidence has reached the standard of proof required for a finding of poor professional performance.

75. In written submissions, counsel for the appellant relied upon the following exchange between counsel for the Committee and Dr. Henry to demonstrate that there was no evidence in the case that 7(b) *on its own* could amount to poor professional performance:

> "Q. ….Sorry, I should have asked you, just before we left allegation 7, I think your opinion in relation to that allegation, the treatment afforded to patient BK was that that constituted both poor professional performance and misconduct?
>
> A. Yes, very much so. I see allegation 7 as the critical allegation and the most serious and it qualifies both as misconduct and poor professional performance."

Counsel for the appellant then relied upon the cross-examination of Dr. Henry by the appellant, who represented himself at the hearing before the Committee, as follows

> "Q. How does it qualify as a very serious when I was contacted by the nurses all night and no complaints were made about the patient? How does it constitute as a very serious matter?
>
> A. The overall management is very serious…you didn't make any entry in the notes, you didn't examine the patient properly, you didn't order any blood tests, which were very - would have been very appropriate at that time, and you didn't describe any management plan in the notes, which of course were non-existent."

76. The Committee and Council placed emphasis upon the written evidence in the form of Dr. Henry's report, but counsel for the appellant submitted this was overtaken by the facts of the case, pointing to the evidence about the length of time between blood tests. This referred to the fact that Dr. Henry's report had been written at a time when it was believed that the blood tests on the patient had been taken a week before he was admitted into the regional hospital whereas at the hearing the evidence pointed to the tests having been taken the day before. He pointed to the transcript and said that Dr. Henry's earlier observations as set out in his report were "watered down" by his oral evidence.

77. In counsel for the appellant's submission, Dr. Henry's evidence fell far short of what was required, thus it was an irrational inference to draw that the appellant's failure to request the basic tests was a very serious falling short of professional standards

78. Turning to the Committee's report of its findings; the report lists the witnesses from whom evidence had been heard and the documentary exhibits before the Committee. Included in that documentation was the report of Dr. Henry. The appellant relied on *McManus v. The Fitness to Practise Committee of the Medical Council & Anor* [2012] IEHC 350 as authority for the proposition that the Committee could only act on *expert* evidence for the finding of poor professional performance and that the evidence of other medical witnesses as to facts could not constitute expert evidence of poor professional performance. I accept that the import of *McManus v. The Fitness to Practise Committee of the Medical Council & Anor* is that where a witness is being proffered as an expert, it would not be consistent with fair procedures to elevate the evidence of a separate witness as to fact to the level of an expert evidence without prior warning to a doctor. In this case however, the Committee did not so elevate a witness of fact to the level of an expert witness in its report. Nor did it seek to do so in answer to this judicial review. The Committee is entitled however, to point to the factual evidence before the hearing

for the purpose of justifying its reliance in its findings on the evidence of the expert witness, Dr. Henry.

79. The Committee is entitled to rely on the factual evidence because Dr. Henry based his oral testimony on his understanding of the facts before the Committee. He confirmed that he had read the daily transcripts prior to giving evidence. In other words, Dr. Henry's report was based upon the facts alleged in the notice of complaint, whereas his oral evidence was based upon the facts outlined in the hearing. I consider that Dr. Henry did not resile from his report (although he modified it regarding the blood tests) and that the report formed part of his evidence. It remains the case however that the facts upon which he was basing his opinion were all subject to the Committee being satisfied that those facts were proven beyond a reasonable doubt.

80. Dr. Henry's written report, having set out allegation 7(b), stated:-

> "in my opinion, as in most practitioners who have considered this matter the repeating of these tests was vital on the evening of arrival. Dr Ahmed's submission and evidence on this point is completely mistaken. A patient with a large retroperitoneal mass growing rapidly can very easily obstruct both your ureters leading to renal failure and this would have to be attended to with immediate effect. My understanding is that the blood tests which Dr Ahmed referred to from the [ ] Hospital were perhaps as much as a week out of date. Again, as in part a, this is a gross failure of competence."

81. At the end of his report Dr. Henry made specific reference to the guidance given by the High Court regarding poor professional performance which he said was highly relevant especially in relation to allegation 7. He noted the guidance letter he had been provided with, itself derived from *dicta* of the High Court, that a single "act or omission" may amount to poor professional performance once it met the threshold of "very serious". He then stated "I would

content (sic) that Dr Ahmed's performance in relation to patient BK, this being the subject of allegation 7 would be an omission which could be construed as a valid such case". He went on to say there was clearly the potential for serious damage especially in regard to allegation 7.

82. Mr Hogan SC, who appeared for the CEO at the Committee hearing, and for the Committee and Council at this appeal, brought Dr. Henry through his evidence in chief before the Committee. In answer to Mr. Hogan, Dr. Henry agreed that he had prepared a report on the basis of the documentation he received, he also read the transcripts of the first day of the hearing and he was present for the evidence that had been given the day prior to his giving evidence. He was asked whether, having heard the evidence, his view had changed in any way or substantially changed from the view he had expressed in his report in relation to the various allegations. Dr Henry answered: "not substantially except that allegation five I would…". Therefore, he was standing over what he had said in his report about allegation 7.

83. Dr. Henry was asked to explain the importance of carrying out the tests in question at 7(b) and why they are carried out routinely. He answered:

> "Well, I wouldn't actually use the word routine, but -- because this -- this is a rare, one-off case. This is an acutely ill patient arriving from […], a man of 28, he's had a CT scan which shows a large abdominal mass and there's a differential diagnosis for these patients but it includes things like high grade lymphoma and testicular germ cell tumour and certainly in my experience, over 30 years, these illnesses are -- they're frighteningly rapid. You can see patients go from being completely well to dead in 10 to 14 days, so the doubling time of these tumours is incredibly short and if you look through the records that came from Tralee, this man's medical history went back for only six to eight weeks, so it was a typical, very short history, so he clearly had something very nasty growing rapidly and the

> importance of the blood test is that, with a large abdominal mass, it's potentially going to obstruct both ureters and it's important to check the blood test to see that the kidney function remained normal. I don't know when exactly the previous blood tests were done at […], whether it was a day previously, or a week previously, as Dr. Ahmed said on one occasion, but regardless of that, it's important that it's checked on arrival at […], along with the other full blood counts and liver function". (Emphasis added).

84. I consider that the express reference by Dr. Henry to the time period in which the prior blood tests may actually have been taken, especially when viewed against the backdrop where he had expressly stated that the evidence he had heard had not changed his expert views on the issues before the Committee, answers the contention of the appellant that Dr. Henry's professional opinion as to the requirement for tests to be carried out on the patient upon admission had somehow been overtaken the issue of when exactly the blood tests may have been taken before the patient's arrival.

85. Moreover, the fact that Dr. Henry used words such as "important" or "appropriate" or "more preferable" on occasion to describe his views on the necessity for treatment cannot be read as to negate his views that these were "vital" tests as he outlined in his report. His answers arose in the context of explaining just why these tests were so vital, but it is stretching comprehension beyond breaking point to suggest that they amounted to Dr. Henry resiling from his position that these were vital tests. Examples of his explanations also include the following:

(i) The first example is that which is set out at para. 75 above (and relied upon by the appellant). I consider that it was nonetheless significant that Dr. Henry indicated that the failure to take blood test was "very serious". The reference to "very appropriate" did not diminish the reference to the failure

to take the tests as "very serious" in the context of the overall management of BK.

(ii) The appellant asked Dr. Henry what he meant by his description of BK as being "*acutely ill*". In responding, Dr. Henry stated:

"Acutely ill, by that I mean a 28-year old man who has a large retroperitoneal mass as demonstrated by his CT scan, his length of history as described from the […] notes for 6-8 weeks. So, he obviously had – I'll leave aside any words which were used yesterday of aggressive because that's fundamentally not possible without a pathology report but the clinical history of a man with a short history of rapidly increasing abdominal and back pain with weight loss over 6 – 8 weeks, that to me is a critical patient who needs urgent assessment, especially when –".

(iii) The appellant then interrupted the evidence of Dr. Henry and questioned the view of Dr. Henry that patient BK was critically ill. In responding, Dr. Henry stated:

"I would say so. I have been in this business a long time, Dr. Ahmed, and I have seen patients like this go from being acutely ill to being dead within 10-14 days".

(iv) When asked by the appellant asked to explain how the blood tests would have changed the management of patient BK, Dr. Henry responded:

"The blood test could have shown renal impairment. That would be the main reason. Furthermore, if this had had been a lymphoma it could develop rapidly into a leukemic phase and there might be abnormalities in the full blood count".

(v) When asked by the appellant to clarify the difference between blood tests

and kidney tests, Dr. Henry stated:

> "It's the same thing, Dr. Ahmed. It's just words. Blood test to my mind includes full blood count, liver function, renal function, inflammatory markers. That type of thing."

86. In relation to the contention that there was no evidence that allegation 7(b), in isolation and in the context of the facts established by the Committee, amounted to poor professional performance, I am satisfied that the trial judge did not err in rejecting that contention. There was evidence before the Committee that, in isolation, allegation 7(b), if proven to the requisite standard, amounted to poor professional performance. Dr. Henry's report was incorporated into evidence by the express evidence of Dr. Henry in that regard. The further explanations he gave did not detract from his conclusions but instead placed them in the context of the importance of those tests for patient BK who was very seriously ill with the potential to deteriorate rapidly. The evidence that the Committee had to consider was the totality of Dr. Henry's evidence, including his report. There was evidence, indeed sufficient evidence, from which the first respondent could conclude that there was poor professional performance on the basis of allegation 7(b) alone. I reject the appellant's contention that there was no oral evidence upon which to base these findings. The oral testimony clearly incorporated the written report.

87. In so far as the appellant has relied upon the fact that, in his evidence, Dr. Henry only used the word "very serious" in the context of referring to the *overall management* of BK, I do not consider that this point is well founded. In his report, which formed part of his evidence, Dr. Henry was clear that single acts or omissions had to be very serious indeed to amount to poor professional performance. He had said that allegation 7(b) amounted to a gross failure of competence (as distinct from conduct).

88. Counsel for the appellant would have the Court conclude that there was no evidential basis upon which a finding of poor professional performance could be made. This is in the

teeth of the evidence given by Dr. Henry to the Committee, including his view that the omissions of the appellant amounted to "a gross failure of competency" (as distinct from conduct). In those circumstances the suggestion that there was *no* evidence (or insufficient evidence) before the Committee for it to conclude that there was a very serious failure to meet the standards of competence that could reasonably be expected of the appellant can only be described as an affront to logic and language. Indeed, I consider it would fly in the face of common sense and reason to hold that evidence of a gross failure of competence could not amount to evidence of a very serious failure of competence. The Committee was composed of a lay member of the Council (a HSE Quality and Patient Safety Manager), a doctor with long standing experience on the Committee and another lay person highly experienced in the area of human resources. Individually and collectively, the members of the Committee must be taken to have sufficient critical faculties to be able to assess the evidence and reach a conclusion based on the totality of the evidence as to whether the standard of proof had been reached. There does not have to be a formulaic recital by an expert witness so long as his or her evidence, taken as a whole, leaves no doubt that there was a (very) serious failure of competence.

e) Irrationality of not making a cumulative finding in respect of allegations 7(a) and (b)

89. In another aspect of his argument on irrationality, counsel for the appellant noted that the facts were proven as regards allegation 7(a), but that it had not amounted to a finding of poor professional performance. Allegation 7(a) related to a failure to record one or more of the following in BK's records a) an assessment of his condition b) a medical history of BK c) an examination of BK and d) a plan for treatment. It was difficult, counsel submitted, to see how those facts were held by the first respondent not to amount to poor professional performance when viewed in conjunction with the findings on poor professional performance in relation to allegation 7(b). When asked for his opinion regarding all the allegations

cumulatively, Dr. Henry stated that, "[i]n terms of performance, I would say that for allegations 6 and 7, that poor performance is proved beyond a doubt".

90. This argument was not advanced on the basis that allegation 7(a) should, in isolation, have been viewed by the first respondent as poor professional performance but rather that in light of the evidence, it was irrational that the finding of poor professional performance did not encompass the cumulative allegations. In my view, that argument fails to take into account a number of crucial factors. A significant factor is that it is the responsibility of the Committee to assess the expert evidence before it in light of all the evidence and the submissions. The Committee reached the conclusion on allegation 7(a) that although the facts were proven, poor professional performance was not proven *beyond a reasonable doubt*. The appellant has not made the case, nor pointed to any argument why the finding that it did not reach the level of seriousness on its own to amount to poor professional performance, was not open to the Committee on the evidence or why the Committee's conclusion was therefore irrational in and of itself. Even if the Court was to accept that there was evidence which *might* have permitted the Committee to reach a contrary conclusion, it has not been demonstrated that such a conclusion was the only rational finding open to the Committee. Indeed, the appellant's case in documentary form, in cross-examination and in submissions before the Committee was that this allegation was not a very serious matter. If the finding on 7(a) was not irrational, then it is difficult to see how it must be irrational for the Committee to refuse to find that both allegations 7(a) and 7(b), when taken cumulatively, amounted to poor professional performance. Again, while there was evidence from Dr. Henry of the cumulative effect of the breaches which *might* have founded such a finding, I am not satisfied that it can be said that it was irrational for the Committee not to uphold his opinion. As stated before, it was a matter for the Committee to reach its conclusion on the evidence based on its full assessment of all the evidence before it.

f) The allegation regarding failure to carry out a urine test

91. The appellant also contended that there was no evidence of a failure to carry out a urine test. He submitted that this was a significant factual error in the findings and on that basis the finding of the Committee had to be set aside. I reject that submission for a number of reasons. The way in which the appellant described this ground in his affidavit was as follows: "Furthermore, no mention at all is made in the evidence of the failure to do "urine tests", also set out in allegation 7(b)(ii). All that is stated is that it would have been "important" to carry out the specific test referred to at Allegation 7(b) (iii) [*i.e.* the kidney tests]".

92. I am not satisfied that there was no evidence in this regard. In the first place, there was factual evidence that the appellant had failed to order this test. This is apparent from the evidence of Dr. G when he made reference to having to ask Dr. O'K for a urine pregnancy test the next day. It was not contested by the appellant that he had not ordered a urine test. Indeed, Dr. G was asked directly by the appellant in cross-examination if he thought doing a urine test would have changed the management and he said yes, explaining that a positive pregnancy test along with other matters confirmed the patient's diagnosis of "metastatic germ cell cancer".

93. I accept the appellant's submission, relying on *McManus v. The Fitness to Practise Committee of the Medical Council & Anor*, that the requirement of fair procedures demanded that the evidence as to whether the failure amounted to poor professional performance had to come from the independent expert called by the CEO of the Council for the purpose of proving the allegation.

94. I have referred at paras. 38 to 43 above to sections of the evidence that Dr. Henry gave, both in his report (incorporated into his oral evidence) and orally at the hearing. He confirmed he had based his conclusions on the evidence he heard. That included the evidence of Dr. G. In addition to the evidence referred to above, Dr. Henry, the expert witness, in cross-examination said that if the appellant had carried out an examination correctly there were features, including the patient's abnormal left testes, that strongly pointed to a diagnosis of

metastatic germ cell tumour that could have been confirmed with an urgent pregnancy test (*i.e.* a urine test). That the appellant understood that this was an allegation of misconduct (and by extension poor professional performance) is clear from his next question where, with reference to another doctor, he said "[s]o, he's also connected to the misconduct, right? For the misconduct he's in the examining occupation?" In other words, the appellant was questioning why a doctor (in another specialty) who had also examined the patient, was not also involved in misconduct for his failure to examine the testes and by extension the failure to carry out a urine test. I consider that this aspect of the presentation of the patient and the failure to carry out the pregnancy (urine) test were addressed explicitly in the oral evidence of Dr. Henry. While the written report from Dr. Henry had made a more generalised reference to the "tests", in the giving of his opinion of allegation 7(b), I am satisfied that there was evidence and sufficient expert evidence from Dr. Henry, from which the Committee was entitled to conclude that the failure to carry out a urine test in the particular circumstances of the presentation of patient BK amounted to poor professional performance.

95. I am satisfied therefore that the decision made by the Committee was factually sustainable and was rational.

g) Proportionality

96. The final issue that I should deal with is the more general one of proportionality as raised by the appellant as part of his claim of unreasonableness. Claims relating to proportionality are often made in judicial review claims. It is important to consider what is meant by a claim of disproportionality. An identification of the elements which are to be measured against each other must be made. In the context of the judicial review test of reasonableness, the question may be whether the decision is a proportionate one in the context of the protection of constitutional rights. In this case, the appellant raised the following constitutional rights; the right to work, the right to a good name and the right of access to the

courts. Those claims were raised in the context of the lack of an appeal afforded to this appellant by virtue of the sanction imposed upon him.

97. In this appeal, the appellant sought to make a more general point, namely that the decision of the Committee, in particular, was disproportionate to him. This was not an issue that was directly raised in the grounds for which leave to apply for judicial review was granted. The claim that the trial judge erred in failing to hold that the finding of the Committee was disproportionate is made in both the notice of appeal and in the written submissions in a simple, stark manner. The appellant contended in his written submissions that the findings *and* sanction were disproportionate have regard to (a) the gravity of the case and (b) the absence of any right of appeal. It was also claimed that the Committee failed to consider proportionality. The submissions then go on to deal with the issue of reasons in submitting that the very specific reason given for the finding of poor professional performance was not borne out by the evidence. In oral submissions, the issue of proportionality concerning the decision-making aspect of the proceedings turned upon the finding of poor professional performance being, as O'Donnell J. stated in *Corbally, "devastating"* for a doctor.

98. I consider that the appellant is not on this appeal (or indeed in this claim) seeking relief on the grounds of inadequate reasons; his claim was that there was a lack of evidence before the Committee from which it could lawfully reach a factually sustainable and rational conclusion. I have dealt with that aspect of his claim above.

99. His claim as to proportionality is lacking in any detail that might assist in determining the issue of proportionality. It is unusual for example that he claims that the finding *and* sanction are disproportionate. It cannot be that the sanction itself was disproportionate because the lowest level of sanction was actually imposed. His submissions on their face could be read as suggesting that because of the lack of appeal and overall gravity of the offence there should have been a higher sanction imposed because then he would have a right of appeal. I do not

think this is what was meant. There would simply be no lawful basis for the Council to increase a sanction not otherwise merited merely to enable a doctor to appeal his findings to the High Court. I think the issue regarding the absence of an appeal falls more properly for consideration under his constitutional and Convention claim.

100. It is difficult also to understand the appellant's reliance on *Corbally* as supporting the view that the finding of poor professional performance was disproportionate. Hardiman J., with whom Denham C.J. and Dunne J. agreed, having pointed to the availability of all sanctions to findings of professional misconduct as well as poor professional performance, said that there was no sense in which poor professional performance can be viewed as intrinsically less serious than professional misconduct. The Supreme Court was unanimous however in holding that a) a finding of poor professional performance or professional misconduct did not depend on conduct that impaired a practitioner's fitness to practise, or which called into question his registration, though such findings may have that effect and b) that the same threshold of "seriousness" applied whether the allegation was a singularity or involved more than one incident or activity. Therefore, there is nothing inherently disproportionate in a finding of poor professional performance based upon a single incident or in such a finding where the sanction would not impact upon a doctor's registration. Moreover, in the present case, given that the Committee based its findings on the threshold of "*very serious* falling short of the expected standards of the profession" which was higher than the law required, I cannot see how the finding itself could be said to be disproportionate to the facts as found.

101. I do not understand the appellant to advance the case that there could be no finding of poor professional performance because the disputed failing did not cause any injury to the patient. It is relevant to note that in the context of a claim that there was no proportionality having regard to the gravity of the offence, the Chair of the Committee asked a direct question of Dr. Henry about how many of the allegations relating to the appellant could be described as

"near misses" *i.e.* had been averted due to "luck or timely intervention of others". Dr. Henry made reference to three allegations including number 7. Dr. Henry's earlier testimony, to the effect that the differential diagnoses for patients with abdominal masses that can be "frighteningly rapid" required that tests be administered on admission, underpinned the gravity of the appellant's failures and thus sustained the Committee's finding of poor professional performance. I am thus satisfied that the finding was not disproportionate to the gravity of the allegation. In no sense could it be said that the decision was unreasonable or irrational because it was disproportionate.

h) Conclusion on the substantive claim for certiorari

102. On the basis of the foregoing, having considered the appellant's arguments and for the reasons set out above, I reject the appellant's appeal against the trial judge's refusal to grant *certiorari* of the decision of the first respondent to find him guilty of poor professional performance.

THE CLAIM REGARDING THE ABSENCE OF A RIGHT OF APPEAL TO THE HIGH COURT

(i). Outline of the appellant's contention

103. The appellant's argument that the absence of an appeal to the High Court is a violation of his constitutional and Convention rights turns on a simple proposition; that it is an error to focus on the sanction (minor in nature) rather than the finding (serious in nature). He submitted that a finding of poor professional performance is a serious finding which may have devastating consequences for a doctor. He refers to Hardiman and O'Donnell JJ. in *Corbally* who refer to a finding as being *"life and career changing".*

104. Counsel acknowledged that the decision of the High Court in the case of *Akpekpe*, on which the trial judge relied, was against him. His argument was that this decision should not be followed by this Court. He submitted that the observations of Kelly J. in *Prendiville v. The*

Medical Council, Ireland and the Attorney General [2008] 3 I.R. 122 regarding the lack of an appeal under the earlier 1978 Act were correct. In that case, Kelly J. although not deciding the constitutional issue, said, *obiter*, that *"it seems to me that such a result is certainly open to challenge by reference to the provisions of Article 40 of the Constitution and article 6 of the Convention".*

105. The appellant submitted that it was obvious that the finding of poor professional performance affected his right to work and he relied upon the Supreme Court decision in *N. V. H. v. The Minister for Justice and Equality* [2018] 1 I.R. 246 in which it was held that unlimited barring of an asylum seeker from working was unconstitutional. It also affected good name and reputation.

106. Counsel submitted that there was a denial of his right of appeal and that there was discrimination because those doctors who were also guilty of poor professional performance but who had a fine or a censure added to any of the sanctions imposed under s. 71(a) were entitled to appeal.

(ii). The extent of the claim as pleaded by the appellant

107. An issue arises as to the scope of the case in respect of which leave was granted and whether the appellant is/was entitled to raise certain matters, including an equality argument under Article 40.1 of the Constitution, and the constitutional rights to good name and to work. The order granting leave to apply for judicial review permitted the appellant to apply for the following reliefs:-

i. A declaration that the decision of the Committee and/or the Council to find the appellant guilty of an allegation of poor professional performance and/or the decision of the Council to impose a sanction upon the appellant, without the appellant having the right to appeal the said finding and/or sanction is contrary to

the appellant's rights pursuant to the Constitution and/or pursuant to the Convention;

ii. A declaration that sections 71 and 75 of 2007 Act are repugnant to the Constitution insofar as they deprive the appellant of the right of appeal in circumstances where finding of poor professional performance was made against the appellant where the sanction imposed on the appellant by the Council is not amenable to appeal to the High Court.

108. Leave to apply for judicial review was granted on the following grounds:

(i) in recommending the sanction of admonishment and/or in opposing the sanction of advice, the Committee and the Council, respectively, failed to observe the appellant's entitlement to natural justice, insofar as such sanction deprive the appellant of the right to appeal the finding of poor professional performance

(ii) the provisions of section 71 and 75 of the Act of 2007 are repugnant to the Constitution insofar as they deprive the appellant of the right of appeal in circumstances where a finding of poor professional performance was made against the appellant but where the sanction imposed on the appellant by the Council is not amenable to appeal to the High Court;

(iii) sections 71 and/or 75 of the 2007 Act are incompatible with the state's obligations under the provisions of the Convention, including but not limited to Article 6 thereof;

(iv) the decision of the Committee and/or the Council is bad at law and/or infringes the constitutional and or Convention rights of the appellant and ought to be quashed.

109. In their statement of opposition, the Committee and the Council take specific objection to the manner in which the grounding statement was pleaded. The statement of opposition contains pleas that the appellant's claims lacked clarity, lacked particulars and were vague, general and imprecise. In particular, the Committee and the Council asserted that the appellant's plea regarding sections 71 and 75 of the 2007 as repugnant to the Constitution lacked clarity. It was specifically denied that the appellant had an alleged or any right to appeal the finding pursuant to the Constitution. It was also pleaded that if the impugned provisions impinged on his constitutional rights they did so in a manner which was proportionate, in accordance with the exigencies of the common good and valid having regard to the provisions of the Constitution and the rights of other persons which are protected thereby.

110. On the statement of opposition on behalf of the State respondents, there was a preliminary objection that the proceedings were inadmissible because the claim had not been properly particularised. The balance of the statement of opposition addressed the issue of the lack of appeal to the High Court.

111. In his judgment, Meenan J. stated as follows:-

> *"[33] In the notice of motion before this Court, the constitutional aspect of the application referred only to the absence of a right of appeal. In the course of submissions and arguments, this was broadened to encompass a claim by the applicant that his right to equality before the law, his right to a good name and his right to freedom to seek work had been breached."*

His judgment does not make any further reference to any objection to that course but simply addresses each complaint in turn while rejecting them.

112. The appellant's notice of appeal contained 33 grounds of appeal. These grounds go beyond merely claiming that he had a right to appeal the findings of the Committee and the Council to the High Court. They also claim that the 2007 Act breached his right to equality

before the law and his right to work under Article 40 and his right to a good name. The Committee and the Council's notice of response makes clear objection to those pleas in so far as they extended beyond those on which the appellant was granted leave to apply for judicial review. Indeed, the Committee and the Council cross-appealed stating that the High Court erred in concluding that the appellant was entitled to broaden his constitutional complaint beyond the complaint relating to the absence of a right of appeal in the absence of an application for leave to amend the statement of grounds and without an order granting such leave having been made. The State respondents' notice of appeal did not contain such objection and it addressed each of the pleas made by the appellant.

113. The submissions of the Committee and the Council expanded upon the objections to this Court dealing with anything other than a right of appeal ground. The submissions of the State respondents did not make those preliminary objections. At the oral hearing, counsel for the Committee/Council and counsel for the State respondents divided the legal arguments between them. Counsel for the Committee and the Council addressed the straightforward judicial review argument while counsel for the State respondents addressed the claims under the Constitution and Convention. Counsel for the State respondents included in his submissions the objection to this Court hearing matters not pleaded.

114. Counsel for the State respondents relied upon the decision of the Supreme Court in *A.P. v. DPP* in which Denham J. observed in addressing the ambit of judicial proceedings *"the order of the High Court [granting leave] determines the parameters of the grounds upon which the application [for judicial review] proceeds".*

115. In *A.P. v. DPP*, Denham J. emphasised the fundamental nature of these limitations on the scope of review when she said at para. 19:-

> *"in the analysis by the High Court judge he addressed issues outside the grounds granted for the judicial review, in the absence of any order, or consent, to*

amend the statement of grounds. In this he fell into error. A court, including this court, is limited in a judicial review to the grounds ordered for the review on the initial application, unless the grounds of been amended."

116. Order 84, rule 23(1) RSC expressly states that "subject to sub-rule (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement". Sub-rule (2) permits amendment to the statement of grounds in accordance with the procedure set out therein. No such application was made in the present case.

117. The Supreme Court in *A.P. v. DPP* confirmed the basis upon which the High Court proceeds to hear an application for judicial review. It is an application defined by the scope of the Order granting leave. *A.P. v. DPP* concerned a challenge to the DPP's decision to put A.P. on trial for a fourth time. A.P.'s only claim in the judicial review proceedings was that it was "inherently unfair" to put him on trial for a fourth time. He did not raise the issue of delay or a letter demanding money with menaces in his grounding affidavit or in his statement of grounds. Four judgments were delivered in the Supreme Court and each judge concurred in the view that applications for judicial review are based upon the Order granting leave. Murray C.J. in his judgment decried the situation where in a not insignificant number of appeals there was a lack of clarity and even confusion as to the precise issues before the High Court. Having discussed the issues arising, Murray C.J. stated at para. 10:-

"In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained".

118. I have carefully considered the order granting leave in this case. There is no doubt that the thrust of the reliefs claimed referred to the absence of a "right of appeal". The only reason

or particular pleaded as to why it was claimed to be unconstitutional was by reference to the appellant's "entitlement to natural justice". There is no reference to any particular Article of the Constitution or to phrases like equality, the right to work or right to a good name. Such a lack of particularity is not appropriate in any Court pleading, but it is particularly inappropriate in a statement grounding an application for judicial review where the relief claimed is a declaration of repugnancy of legislation under the Constitution. The making of such a declaration by a court pursuant to the provisions of Article 34 of the Constitution is a matter of considerable import. No court should embark upon the consideration of such a step without the matter being properly before it. Moreover, a respondent is entitled to know the case it has to meet so as to marshal an appropriate response. This is particularly important in a case where a challenge to the constitutionality of legislation is being made as the State must have an opportunity to put forward evidence if it deems it appropriate to do so for the purpose of putting the legislation in context or to address arguments as to proportionality, for example.

119. It is incumbent therefore on an applicant to identify clearly the relief sought and the basis for that relief. At a minimum, the Article of the Constitution upon which an applicant relies ought to be identified. This was not done in this case. Even more importantly, claims regarding the right to work, the right to a good a name and equality were not mentioned in the relief claimed or in the grounds upon which the particular reliefs were sought. In his grounding affidavit, the appellant referred in four brief paragraphs to the "lack of appeal". He said that s. 75(1) of the 2007 Act deprived him of his right of appeal "notwithstanding that a significant finding has been made against me, namely that I am guilty of Poor Professional Performance". He went on to say that "by reason of the sanction imposed upon me (which sanction I cannot appeal and/or which sanction was imposed irrationally and in the absence of supporting evidence)" he was "significantly disadvantaged" in his capacity to *apply for employment* and in terms of *his personal and professional reputation*. He said he was exposed to the

opprobrium of an adverse finding and of a sanction both of which he had to declare when applying to be registered or licensed in other jurisdictions and/or in applying for employment. At no point was there any mention of equality.

120. It appears that the trial judge was alert to the failure to plead the grounds contended for, but he did not give any reason as to why he was proceeding to hear them. I have considered whether it could be correctly argued that the "lack of a right to appeal" encompasses issues such as equality, the right to work and the right to a good name. The only ground referred to was that of natural justice *i.e.* that a right of appeal was a matter of fair procedures and a right contained in the Constitution. That is a type of access to justice argument. I consider that it was also incorporating the type of argument that could be made under Article 6 of the Convention *i.e.* concerning his rights when his civil rights and obligations were at issue. I note that although his claim under the ECHR was a general one, he expressly mentioned Article 6, which was the only Article mentioned in argument before this Court and, apparently, in the High Court. Having regard to the foregoing, I am of the view that even though there was no express reference to the particular Article of the Constitution under which his claim for repugnancy was made, there was a sufficient plea before the High Court for the Court to proceed to adjudication on the issue of the failure to provide him with a right of appeal.

121. The equality claim is at the other end of the clarity spectrum. There was no reference to a breach of equality in the relief claimed, the grounds upon which that relief was claimed, or in the affidavit grounding the claim. A breach of equality does arise *per se* from a claim of a lack of a right of appeal. It is a very specific plea that required an identification of that right. It was not made expressly. It was not made even by implication; neither the statement nor the affidavit made reference to the position of other doctors who could appeal. I therefore conclude that there is no reasonable construction on which a claim based on a breach of the equality provisions of Article 40.1 of the Constitution can be said to have been incorporated in the Order

granting leave. Indeed, I would perhaps go further and add that in all cases where an applicant/plaintiff wishes to rely upon a breach of the equality principle set out in the Constitution this should be made expressly in the pleadings.

122. The claims regarding good name and right to work are not so easily categorised as having been pleaded or not having been pleaded. While there is no express reference to the Article upon which that claim is made, both are referred to in the affidavit of the appellant. Moreover, the appellant's claim regarding the lack of a right of appeal is entirely bound up with the impact that a finding of poor professional performance has on a doctor regardless of the actual sanction imposed. In other words, the impact of the finding is said to be as important as the sanction imposed. The propriety of proceeding to deal with this aspect of the pleadings is marginal at best, based upon the clear statements of principle set out in *A.P. v. DPP* above. It does appear however that the appellant's claim has been litigated as based upon the impact the finding has on him and in reliance on the decision in *Corbally*. In so far as these arguments appear to be bound up with his reliance on the *dicta* in *Corbally* concerning the impact on his good name and his right to work, I consider it appropriate to consider those issues in the context of the appeal despite the failure to plead an Article of the Constitution or make specific reference in the grounds of appeal to the impact on rights going beyond the blanket references to fair procedures/access to justice.

(iii). The Constitutional Claim

a) The right to appeal: Access to justice and vindication of rights

123. The appellant accepted that the decision in *Akpekpe* was against him but submitted that since the decision in *Corbally*, he was supported in his view that the decision in *Akpekpe* was wrong as a matter of principle. I will look at that case in more detail below but central to the appellant's contention is that Kearns P. erred, as did Meenan J. in following him, *"in reasoning from the sanction, rather than the finding*", in order to measure seriousness. The appellant

submitted that this is simply not a correct proposition. He submitted that the High Court failed to attach sufficient weight to the seriousness of the finding of poor professional performance against a registered medical practitioner, placing excessive (if not exclusive) weight on the nature of the sanction imposed on the registered medical practitioner as determinative of the rights arising from the decision.

124. In advancing that submission, counsel for the appellant relied on the *dicta* of Kelly J. in *Prendiville v. The Medical Council, Ireland and the Attorney General* in which there was also no right of appeal because no sanction had been imposed on the doctor. Dr. Prendiville won his judicial review on other grounds and therefore the issue of whether the appeal was a breach of his constitutional rights did not have to be addressed. Nevertheless, Kelly J. went on to make the observations quoted above at para. 104 to the effect that the lack of an appellate jurisdiction for a doctor in the same circumstances as this appellant was open to challenge by reference to the provisions of Article 40 of the Constitution and Article 6 of the Convention.

125. The appellant also relied upon *Corbally,* where although the Supreme Court did not have to deal with the constitutional point, Hardiman J., in particular, lay stress on the fact that the doctor in that case had no right of appeal. The appellant points to the judgment of Hardiman J. at para. 10 where, in recounting how Prof. Corbally was obliged to have recourse to the relatively technical remedy of judicial review "*because there was no appeal on the merits available to him,"* he placed stress on the point regarding the lack of appeal by the use of italics.

126. The *dicta* of O'Donnell J. has been referred to above at para. 69 of this judgment.

127. McKechnie J., having pointed to *"some striking features"* of the statutory regime, including the failure under the 2007 Act to distinguish between sanctions that may be imposed for either professional misconduct or poor professional performance and the unavailability of an appeal in respect of certain sanctions, indicated at para. 155 that:-

> *"[t]hese matters last mentioned can only be seen as reflecting a view that admonishment or censure should be regarded (by a practitioner) as almost meaningless. As the evidence discloses in the case this is far from the reality".*

128. The appellant points to the effect on work which he says is entirely obvious and uncontroversial (referring to Hardiman J. in *Corbally*). He also submitted that the decision in *Akpekpe* fails to have any regard to the fact that the right of appeal hinges on a marginal decision that may or may not be made by a particular division of the Committee or the Council.

129. The Committee and the Council reject the contention that there is a constitutional right to appeal in every case. They also submit that the appellant has failed to engage with the facts. His reliance on a right to work is merely speculative as the High Court judge stated but that even if it was engaged it was not an absolute one. Whether it was infringed *"must depend upon the particular circumstances of any given case"* (per Walsh J. in *Murphy v. Stewart* [1973] I.R. 97). So too was the position regarding a good name; there was no merit in his submissions as the appellant had in fact obtained employment. Furthermore, even if the right were engaged, the right was not affected in any serious and material way such that the appellant would be entitled to seek the vindication of that reputation in accordance with a statutory scheme of appeal. In so far as there was a difference between one group and another, this was justified by the different situations of the groups.

b) Discussion

130. In *Akpekpe*, the applicant doctor was in a similar position to the present appellant. A finding of poor professional performance had been made against him by the Committee and the Council imposed the sanction of "advice" upon him. Dr. Akpekpe claimed that the relevant provisions of the 2007 Act, which did not provide for an appeal in relation to the sanction of "advice", constituted a denial of fair procedures, a breach of his constitutional rights, a breach of Convention rights and was contrary to the principles of constitutional and natural justice.

He sought declarations of repugnancy to the Constitution on the grounds that his equality rights were thereby infringed as he lacked the range of remedies available to other medical practitioners who had suffered more grievous findings and sanctions. He contended that notwithstanding the relatively modest findings made against him, they had extremely serious adverse consequences in terms of his professional reputation which warranted the existence and availability to him of some form of appeal mechanism.

131. In refusing the applicant the relief claimed, Kearns P. relied upon the decision of Finlay P. in *M v. The Medical Council* [1984] I.R. 485. He also characterised the sanctions of advice, admonishment or censure as minor sanctions only. Kearns P. then relied upon the *dicta* of Finlay P. in holding that the powers conferred on the Committee or the Council are not judicial powers and that the functions being exercised by those bodies were not the administration of justice. Even if the powers to advise, admonish or censure could be said to be the administration of justice they were functions so clearly limited in their effect and consequence that they would be within the exception provided by Article 37 of the Constitution.

132. Kearns P. also referred to the Supreme Court decision in *Re Solicitors Act, 1954* [1960] I.R. 239, which accepted as correct the words of Holmes J. in *Prentis v. Atlantic Coast Line Co*. (1908) 211 US 210 where it was stated that *"the nature of the final act determines the nature of the previous inquiry"* and also to the criterion laid down by Palles C.B. in *Reg (Wexford Co. Council) v. Local Government Board for Ireland* [1902] 2 I.R. 349 that to *"erect a tribunal into a 'Court' or 'jurisdiction,' so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights."*

133. In *Akpekpe*, both sides accepted that a right of appeal does not necessarily arise as a matter of constitutional justice in every case where a disciplinary body imposes a sanction. Kearns P. relied upon *Quinn v. The Honourable Society of King's Inns* [2004] 4 I.R. 344 in

which it was said that even in circumstances where an application was viewed as a public law matter, the requirements of natural justice as regards a right of appeal would vary with the circumstances of the case. Kearns P. said at para. 88:-

> *"[t]hus it may be said that the nature of the finding and sanction is the critical factor which decides whether article 34 of the Constitution (which requires that justice be administered by courts) is engaged. There must be a distinction drawn between major and minor sanctions, and the less the sanction may be said to affect an individual's rights, the less it may be argued that a right of appeal to the courts must necessarily exist as a matter of natural or constitutional justice."*

134. Kearns P. also relied upon *Carroll v. Minister for Agriculture and Food* [1991] 1 I.R. 230. That case concerned compulsory testing of cattle herds for reactors being carried out by independent veterinary surgeons for the purpose of assisting in the eradication of bovine tuberculosis which was of great significance to Irish agriculture and the agri-food sector. The tests that were carried out by the independent veterinary surgeons where, as described in the judgment, "the risk of errors appeared to be slight". There was an urgent practical context for the testing and there was however no right of appeal or right to require independent re-testing. Blayney J. held this was not a breach of the constitutional guarantees of basic fairness of procedures.

135. In oral argument, with reference to the decision in *Carroll v. Minister for Agriculture and Food*, the appellant accepted as an uncontroversial proposition that there was no right to appeal in every circumstance where a person's constitutional rights were impacted upon. Instead, he said that this was a situation where the Oireachtas had not provided any rational basis for excluding an appeal in his circumstance. With respect to the *Quinn* decision, he submitted that he was not looking for an entire hearing *de novo* but the same form of appeal as that which applied to other doctors who had received a disciplinary sanction. In *Quinn* there

had been an internal automatic review process in any event but there was none here. Counsel submitted that the distinction between certain doctors was unsustainable.

136. It is necessary to deal with a particular point the appellant makes; he submitted that Kearns P. in *Akpekpe* and Meenan J. in the High Court wrongly conflated a question of whether the Council was exercising judicial power in the imposition of the sanction of admonishment with the question of whether persons such as the appellant should be entitled to contest such a finding in the courts and have access to justice. Both of those judgments had referred to *M v. The Medical Council*. In that case the challenge to the constitutionality of the relevant sections of the 1978 Act had been challenged *inter alia* on the grounds that the powers of the Committee and the Council were powers to administer justice, which having regard to their consequences, could not be considered to be limited functions and, as such, were inconsistent with Article 34.1 of the Constitution and were not saved by the proviso contained in Article 37 of the Constitution. While all issues regarding what is or what is not an administration of justice by a tribunal may now be subject to reassessment by a court pursuant to the decision of the Supreme Court in *Zalewski v. The Workplace Relations Commission, an Adjudication Officer, Ireland and the Attorney General* [2021] IESC 24 such an issue is not before the Court. It does not mean however that *M v. The Medical Council* is irrelevant to the consideration of how to assess the claimed "right to appeal".

137. Kearns P. referred to *M v. The Medical Council* in the terms set out in the previous paragraphs. In so doing he was locating the claim to a right to an appeal to the courts in the specific context in which it may arise; that context was whether there was an administration of justice involved and if so, whether an appeal to the courts was necessary for the disciplinary proceedings as set up by the Act to be constitutional. This has a relevance to whether access to the courts demands a right of appeal on the merits and not merely a right to judicial review findings.

138. It is perhaps worth commenting on the right to appeal within the court system itself. When looking at the right of appeal from the High Court, it is necessary to consider the constitutional provisions. Prior to the amendment of the Constitution to provide for the establishment of the Court of Appeal, Article 34.4.3 expressly provided that "the Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decision of the High Court…". In its decision in *Re the Illegal Immigrants (Trafficking) Bill, 1999* [2000] IESC 19, the Supreme Court accepted that as this was an express power provided to the legislature, to be exercised for policy reasons within its own area of discretion, the principle of proportionality has no application, although considerations of equal treatment might have to be considered. As McKechnie J. stated in *O'Sullivan v. Chief Executive of the Irish Prison Service* [2011] I.L.R.M. 350, the decision clarified *"that the right to appeal cannot be viewed in isolation. It should not be considered, from a constitutional point of view, as a stand-alone right per se."*

139. The facts here are different. This is a challenge to a provision which limits the right of appeal from a disciplinary body. There is no express constitutional provision which limits the ability to appeal. This is a question of whether the denial of a right of appeal from a disciplinary body is itself a violation of the right of access to the courts. The appellant submitted that the question of an appeal must be subjected to a proportionality test. He submitted that the effect on his work was so obvious it did not require demonstration, relying on Hardiman J. in *Corbally*. He submitted that Kearns P. in *Akpekpe* had not considered the issue of work. He relied upon the decision of the Supreme Court in relation to recognition of the right to work of asylum seekers in *N.V.H v. Justice and Equality.*

140. In my view, the starting point for this analysis is the nature and status within our legal system of the claimed "right of appeal" by the appellant. The appellant has in essence accepted that there is "no right of appeal" in every circumstance in disciplinary proceedings. It is not

surprising that he has done so, as he had provided to us no authority establishing such a proposition. When transposed to a question of whether there is a right of appeal to the courts, the appellant's main claim has been on a right of access to the courts. The difficulty for the appellant is that for such a stark proposition there is also no authority to assist him. Indeed, if there is no general right of appeal in disciplinary matters, it is difficult to see how there could be a right of appeal *per se* to the courts from an adverse finding in a disciplinary hearing.

141. The appellant has sought to make his claim of access to the courts a more nuanced one. This may explain why much of his argument relies in particular on the right to equality and the difference between his lack of a right of appeal and the right to appeal of those doctors who had the same finding of poor professional performance against them but had a different sanction imposed. Leaving aside the issue of whether those doctors are truly in a similar position to the appellant, the problem for him is that in the absence of pleading reliance on the equality provisions of Article 40.1, it is impossible to find any authority to support the proposition that a lack of appeal *per se* violates his right of access to the courts.

142. The appellant submitted that in relation to the right of access to the courts, the decision in *Donegan v. Dublin City Council and Ors.* [2018] 2 I.L.R.M. 233 was helpful. He did so by relying upon the distinction drawn in that judgment between judicial review and an appeal. I do not consider however that the *Donegan* decision assists the appellant. In *Donegan v. Dublin City Council and Ors.*, the applicant was a local authority housing tenant whose tenancy, at that point 25 years long, was terminated on the basis of disputed facts (whether his son was a drug addict or a drug dealer). The local authority had to apply to the District Court for a warrant of possession having made a demand for possession of the tenant. The District Court was not entitled to examine the factual dispute upon which the local authority had made the demand. The only issue for the District Court was whether the demand had been made in accordance with the legal provisions. The central issue in the case was the compatibility of the relevant

section of the Housing Act, 1966 with the State's obligations under the provisions of the Convention; in particular the right to respect for one's home in Article 8.

143. In giving judgment, McKechnie J. reached the conclusion that the District Court hearing was confined to considering the formal proofs relating to the termination of the tenancy. He held that Article 8 requires a determination as to whether the interference with the right was *inter alia*, necessary and proportionate. He highlighted the importance of assessing the regulatory framework to ensure that it was sufficient to afford true respect to the interests safeguarded by Article 8 and set out a list of questions that must be answered in that regard. Ultimately, he held that in the particular circumstances *where the applicant had no opportunity of having his argument as to his son's condition aired or determined before an independent body*, the existing provisions did not constitute an adequate safeguard for his Article 8 rights. In the course of so deciding, McKechnie J. held that judicial review was an inadequate remedy because judicial review could not operate as a fact-finding system. Therefore, in that particular case, there had been no independent fact-finding machinery in place to decide the central issue at odds between the local authority and the applicant.

144. I do not accept that the *Donegan v. Dublin City Council and Ors.* decision assists the appellant in the case he advances. The point there was that the applicant's right to respect of his home required a determination by an independent fact-finding body and that judicial review could not be relied upon by the State/local authority as providing such an independent forum. That is entirely different to the present situation. Here there is an independent fact-finding body which has made a fair and independent finding on the facts and a fair and independent body which has made a finding on the sanction. Judicial review is not being relied upon as providing an independent review mechanism upon which a doctor's fitness to practise may be assessed. Instead, the ability to judicially review the decision-making bodies *i.e.* the

Committee and Council, is a mechanism to ensure that those bodies comply with the requirements of natural and constitutional justice.

145. The appellant has also relied upon the well-known observations of Kenny J. in *Macauley v. Minister for Posts & Telegraphs* [1966] I.R. 345 in which he held that citizens must have a right of recourse to the High Court for *"the purpose of asserting or defending a right given by the Constitution for if it did not exist, the guarantees and rights in the Constitution would be worthless."* The appellant submitted that this was not a partial curtailment of appeal it was a denial of a right. He also relied upon the *dicta* of Clarke J. in *Persona Digital Telephony Ltd. v. Minister for Public Enterprise, Ireland* [2017] IESC 27 that *"the constitutional right of access to the court may include an entitlement that that right be effective, not just as a matter of law and form, but also in practise."*

146. The appellant submitted that the vindication of his reputation and his good name, in the face of a serious finding against him, requires an equal right to appeal regarding of the sanction imposed. He submitted that the correct starting point is the finding and not the sanction and that the authorities which state that a minor sanction extinguishes the right of appeal are incorrectly decided.

147. The decision in *Macauley v. Minister for Posts & Telegraphs* was made in the context of a requirement that any person who wished to bring proceedings against a Minister of State had to obtain the fiat of the Attorney General to do so. The finding of Kenny J. was broad in its ambit and is rightly seen as the foundation stone of the recognition of the constitutional right of access to the courts. I do not see it as providing support for any general proposition that every finding of a disciplinary body must be followed by a full right of appeal to the courts. What is guaranteed is access to the courts for the purpose of protecting rights. The decision does not address itself to a right of appeal. It is a right of access for the purpose of asserting or defending a right. The judicial review mechanism is available to, and has been availed of by,

this appellant. That provides access to the courts to ensure that the process under which the decision-making Committee reached its finding of fact has been carried out in a manner which respects the appellant's natural and constitutional rights and that the decision arrived at is rational. From the perspective of ensuring that those rights have been protected, I am satisfied that judicial review in these circumstances are sufficient protection. He has had a fair hearing before an independent and impartial body in which his rights were fully respected. He had the right to challenge that before the courts.

148. It is important also to refer to the decision of the Court of Appeal in *N.M (DRC) v. Minister for Justice, Equality and Law Reform* [2018] 2 I.R. 591 in which the provisions of Article 39 of the Procedures Directive (Council Directive 2005/85/EC) concerning the right to an effective remedy before a court or tribunal in relation to subsequent applications for asylum were at issue. In that case the Court of Appeal held, that *"what might be termed modern, post-Meadows-style judicial review will satisfy the effective remedy requirements of Article 39.1".* In so holding, Hogan J. recognised that *"judicial review cannot be equated with an appeal simpliciter"* but nonetheless held that it was an effective remedy within the meaning of Article 39. He did not see that limitations such as a court having no power to substitute findings of facts for those of the decision-maker, as otherwise depriving judicial review of its character as an effective remedy. What was critical was that the judicial review court can subject the reasons of the decision maker to thorough review. Hogan J. repeated what he had said in *Efe v. Minister for Justice* [2011] 2 I.R. 798 that:-

> *"it is clear that, post-Meadows v. Minister for Justice [2010] IESC 3, [2010] 2 I.R. 701 at any rate, it can no longer be said that the courts are constrained to apply some artificially restricted test for review of administrative decisions affecting fundamental rights on reasonableness and rationality grounds. This test is broad enough to ensure that the substance and essence of constitutional rights will always be*

protect against unfair attack, if necessary through the application of a Meadows v. Minister for Justice [2010] IESC 3 style proportionality analysis […]

Against that background, it is clear that the common law rules of judicial review satisfy the constitutional requires of Article 40.3.1 and Article 40.3.2 in that they must in particular provide an adequate remedy to vindicate constitutional rights."

149. The appellant's claim that the absence of an appeal on the merits interferes with his right of access to the courts to protect his good name and his right to work is unsupported by the weight of the case-law. This is not a situation, like in *Donegan v. Dublin City Council and Ors.*, where he had no fair, impartial and independent fact-finding body open to him. It was not a situation, like in *McAuley v. Minister for Posts & Telegraphs*, where he had to receive permission from a non-judicial person to challenge the decision-making bodies. It is also a situation, like *N.M (DRC) v. Minister for Justice, Equality and Law Reform*, where if he wishes to challenge the decision-making he has full grounds to do so in a manner which will vindicate his constitutional rights. Having been provided with an impartial decision-making process, the appellant had a right to challenge the findings in a manner which went beyond a merely technical approach to whether the law had been complied with. He could (and did) challenge the process of reasoning of the decision makers. He challenged to the extent set out above the proportionality of the process.

150. That is sufficient to deal with the claims that the lack of an appeal violated his right to work and to a good name. There is simply no authority that supports the argument that the scheme which was provided for the investigation of, the determination of, and the imposition of, a sanction in respect of professional practice matters in respect of doctors must contain within it a right of appeal to the courts. For the avoidance of any doubt however I will deal individually with each of his claims in respect of right to work and right to a good name.

151. The trial judge held with regard to the right to work that the effects of the finding and sanction on his ability to practise medicine were merely speculative. That may be so, but the appellant has made his case by reference to what he says are generally accepted views about how adverse disciplinary hearings can affect a doctor's career thereby impacting a doctor's right to work. He referred to the general observations made in *Corbally* on the effect on a doctor's career. He also referred to the findings of the Court of Appeal (Hogan J.) in *Dillon v. The Board of Management of Catholic University School* [2018] IECA 292 in which he overturned the High Court's finding that the sending of a final written warning to a teacher, which did not remain on his personnel file, rendered the case moot. Hogan J. said that one did not:-

> *"need to have any great knowledge of the education system or the labour market for secondary teachers to appreciate that a final warning of this kind, referring as it does to inappropriate contact with a pupil, is likely to have the gravest implications for the good name, reputation and employment prospects of the appellant. By virtue of Article 40.3.2 and Article 40.3.1 respectively these are constitutionally protected rights and the courts are obliged in particular to ensure that the constitutional right to good name in both a professional and employment context is adequately vindicated: see, e.g. Corbally v Medical Council [2015] IESC 9, [2015] 1 ILRM 395, 413 per Hardiman J. and, indeed, my own judgment for this Court in ACC Loan Management Ltd v. Barry [2015] IECA 224, [2016] 1 I.L.R.M. 436."*

152. I accept therefore that the right to work may be engaged by the finding of poor professional performance even where the sanction imposed has not affected his registration as a doctor. I do not accept that this necessarily means that the State must provide a right of appeal to the High Court in every case where State action has caused an effect on working life. What the State must do is provide the machinery which protects and vindicates that right. The

State has done so by setting up the mechanisms in the 2007 Act described above. There is no general challenge to the constitutionality of that mechanism, but a discrete challenge based upon the absence of a right of appeal to the courts. The absence of a right of appeal is not a failure to vindicate the right to work. That right is protected by the provision of a fair mechanism for the determination of the complaint together with the access to judicial review by which the fairness of the initial disciplinary hearing can be challenged.

153. The same is also true of the right to a good name. I adopt the findings of Finlay P. in *M v. The Medical Council* in which he held that the publication of the fact that a sanction had been imposed on a doctor did not violate his right to his good name or reputation. In that case, Finlay P. referred to the judgement of "colleagues" because the committee was made up predominantly of medical professionals. I do not consider that was a vital aspect of his reasoning. In any event, this is a body which includes a member of the medical profession which performs its duties in a legally robust manner. Finlay P. held at p. 500 that:-

> *"Article 40, s.3, sub-s. 2, of the Constitution does not, and cannot, constitute an obligation on the State by its laws to protect a person from every statement or publication which may damage his good name. Quite clearly, the common good can, and does, require the publication of facts (including, it would seem to me, the opinion of his colleagues) concerned a person who carries out duties or follows professions which may affect the public. In the case of a person practising medicine, the public have a clear and identifiable interest to be informed of a responsible view reached by his colleagues with regard to his standard of conduct or fitness. In these circumstances, I cannot see that the absence from the statute of a prohibition on the publication of an adverse finding of the Committee (where they have made a finding of misconduct or of unfitness) can be a failure to protect the good name of the practitioner from an unjust attack. This is particularly true having regard to the fact that neither the finding of the*

Committee nor any decision made by the Council thereafter can impose any prohibition or suspension on the right of the practitioner to continue practising."

154. The appellant submitted that the Committee and the Council's reliance on *M v. The Medical Council* is misguided on the basis that the whole point in that case was that right to a good name were respected precisely because there was a right of appeal. While the applicant in that case had been subjected to the sanction by the Council of striking off the register of medical practitioners, I do not understand that the *dicta* of Finlay P. was limited to the situation where an appeal to a court existed. This is because having stated the above, Finlay P. went on to say *"Furthermore, in the event of the Council deciding that …"* (emphasis added) to erase a name from the register, to suspend registration or to impose condition on registration, there was a right of appeal to the High Court in which, if successful, the verdict will necessarily and completely vindicate good name and reputation. In my view, the reference to "furthermore" was not meant to indicate that but for the addition of the right of appeal, his earlier observations would mean little. I consider that in this circumstance Finlay P. was indicating that the present case was one in which even if he had not the previous observations the right to appeal meant that this argument was closed off for that applicant.

155. In this case the logic of the appellant's position is that, in every case where the State through its agencies has made a determination that reflects in any way on the right to work or the good name and reputation of any person, there must be an appeal pathway as distinct from the right to apply for judicial review of the decision. There is nothing in any case law in this jurisdiction or indeed in the case law of the European Court of Human Rights, as will be discussed below, to support that proposition. I consider that the appellant's argument, which if successful would be an entirely radical departure from the norm, has not addressed at the level of fundamental principle why it should be accepted by this Court as a correct one. There is no reality to the argument that under the Constitution the State was obliged to provide the

appellant *a right of appeal* no matter what sanction was imposed upon him. His constitutional (and Convention) rights have been protected by the mechanism provided by means of the independent decision-making body with regard to the facts and the independent decision-making body with regard to the sanction with a right to access the High Court by way of judicial review to ensure that the process protected his rights. A separate right of appeal on the merits is not a requirement to vindicate the rights of the appellant to work and to his good name/reputation in the context of the machinery provided.

156. Finally, I refer to the reliance placed by the appellant on the recently enacted Regulated Professions (Health and Social Care) (Amendment) Act, 2020 which amended the legislation to provide for a right of appeal where the sanction imposed was advice, admonishment or censure *simpliciter*. The appellant did so not for the purpose of interpreting the Act but for the purpose of what he said was important context. He said the debates highlighted what appeared to be an acceptance, advanced by the Government and with the ostensible support of the Health Regulators, that the unfairness created by the 2007 Act is no longer right (if it ever was). He submitted that there was no objection voiced by or on behalf of the Council to the reconfiguration of the appeal framework. The reason for the amendment was, according to the appellant, to address the current injustice that arises by virtue of a blanket prohibition on appealing minor sanctions.

157. In my view, the reliance on the debate and even the amendment of the Act is of marginal relevance. The legislative and executive branches of government are entitled to change policy. The mere fact that the legislation has been amended, and the fact that the Minister or other members of the Oireachtas, expressed certain views as to why they were doing so, is not persuasive as to the correct interpretation of the Constitution, which is a matter for the courts. In that regard I note the following comment of the Minister, relied upon by the appellant, in which he said of the amendment:-

> *"This provision is considered appropriate in light of evolving case law which is increasingly concluding that it is the adverse finding arising from a fitness to practise proceeding than the specific sanction which often has the most significance for registrants. It is appropriate, therefore, that such a finding goes before a court before a sanction is applied on a registrant".*

To give any weight to that comment would be to abdicate the responsibility placed by the Constitution on the judiciary to administer justice which includes the interpretation of the law including case-law. Any references to "inequality" are irrelevant having regard to my earlier finding made in respect of the issues properly before the Court.

158. Matters of policy are for the Oireachtas and there may be good reason for the Oireachtas to consider that it is preferable for doctors in the position of the appellant to now have a right of appeal.

159. I therefore conclude that the absence of a right of appeal to the High Court is not a denial of the constitutional right of access to the courts nor does it amount to a failure to vindicate the appellant's good name and reputation or his right to work pursuant to Article 40.3 of the Constitution.

(iv). The Claim under Article 6 of the Convention (Section 5 of the 2003 Act)

160. The appellant claimed that he was entitled to a declaration pursuant to s. 5 of the 2003 Act. As per the decision in *Carmody v. Minister for Justice, Equality and Law Reform* and *Ors*. [2010] 1 I.R. 635, it is necessary to consider his entitlement under this heading subsequent to reaching a conclusion that the section is constitutional.

161. Counsel for the appellant relied upon the Privy Council decision in *Ghosh v. General Medical Council* [2001] 1 W.L.R. 1915 in submitting that the absolute, blanket prohibition on an appeal amounted to the State's failure to provide a necessary appeals mechanism. He submitted that the right of appeal to the courts was not absolute but may be subject to

limitations (*Golder v. The United Kingdom* [1975] 1 EHRR 524). He submitted that the limitation cannot restrict the access of the individual in such a way that the very essence of the right was impaired. If there was a limitation, in order to be compatible with Article 6.1, it had to pursue a *"legitimate aim"* and have *"a reasonable relationship of proportionality between the means employed and the aim sought to be achieved"* (relying on *Ashingdale v. The United Kingdom* [1985] EHRR 528 amongst others). He submitted there was no such legitimate aim here in denying some doctors a right of appeal but denying it to others. Even if there was such a legitimate aim it was disproportionate.

162. Counsel for the State respondents argue that Article 6 does not provide for a right of access to a court or for a right of appeal in a civil case falling within its ambit.

163. In my view it is important to recall that Article 6 provides that:-

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 6 does not provide for a right of access to a "court" but to a fair and public hearing before an independent and impartial tribunal established by law. The appellant has had a fair and public hearing before an independent and impartial hearing *i.e.* the hearing before the Committee.

164. Nor does Article 6 provide for a right of appeal arising out of a finding by an independent and impartial tribunal established by law. Indeed, arguably it does not do so even in criminal proceedings, as the express right of appeal in criminal cases is only to be found in Article 2, Protocol 7. Lester and Pannick, the authors of "*The European Convention on Human Rights"*, state at para 4.6.22: *"Article 6(1) does not guarantee a right of appeal from a decision of a court, whether in a criminal or non-criminal case, which complies with the requirements of that article".* Simor and Emmerson, the authors of "*Human Rights Practice"*, say the same

thing at para 6.1.60. Although both text books refer to court, Article 6(1) refers to an independent and impartial tribunal.

165. The case-law of the European Court of Human Rights establishes that disciplinary proceedings in which *the right to continue to practise a profession* is in issue, engage "civil rights" within the meaning of Article 6.1. However, Article 6(1) does not require *every stage* in the determination of "civil rights and obligations" to be conducted before a tribunal that itself meets Article 6 standards (*Le Compte, Van Leuven and de Meyere v. Belgium* (1982) 4 EHRR 1). In the case of *A v. Finland* (ECLI: CE: ECHR: 2017: 0323JUD005325113), a Finnish lawyer received *a private warning* after the disciplinary body concluded he had acted in violation of the code of conduct. The European Court of Human Rights held his claim was manifestly ill-founded even though he did not have an oral hearing or an appeal, as the concrete outcome of the proceedings was not directly decisive for the applicant's right to continue to exercise his profession. If, however, he could have had a "public warning or disbarment" he would have had a right of appeal before a Court which satisfied the procedural rights under Article 6.

166. In the present case, there was a fair and independent hearing concerning the finding of poor professional performance sufficient to satisfy Article 6 rights. The sanction imposed was on foot of that finding. The sanction did not involve an infringement of his right to continue to practise his profession. The European Court of Human Rights jurisprudence on Article 6 does not support the appellant's contention that his rights thereunder have been breached.

167. That interpretation of the European Court of Human Rights jurisprudence found favour with Meenan J. when he referred approvingly to the decision of Tucker J. of the High Court of England and Wales in *R v. General Medical Council, Ex Parte Kypros Nicolaides* [2001] EWHC Admin 625. A reprimand was given to Dr. Nicolaides, but this did not deny him access to patients. He had no right of appeal however, unlike the situation where a sanction of

suspension or erasure had been imposed. He complained that his Article 6 rights were violated. The following *dicta* of Tucker J. was cited approvingly by Meenan J.:

> *"So far as Art. 6 is concerned, I consider that it adds nothing to the common-law requirements of natural justice. In any event article 6 is not, in my opinion, engaged in the present case. The reason is that the [Professional Conduct Committee] did not make a determination of the claimant's civil rights because the claimant was only reprimanded. The civil right in question is the right to practise medicine, and this was unaffected by the decision."*

168. The trial judge also referred to the subsequent decision in *R (Thompson) v. The Law Society* [2004] EWCA Civ. 167 another decision from England and Wales. The trial judge also referred to the *Ghosh* decision, relied upon by the appellant, and said *"[i]t does not appear to me that this case is an authority for the submission that an appeal ought to lie in a situation where the sanction imposed is 'advice'"*. He went on to say that he was satisfied on the authorities referred to and the wording of Article 6 itself, that the appellant was not entitled to the declaration sought.

169. I agree with the finding of the trial judge. There is nothing in the authorities or in the wording of Article 6 that confers a right of appeal in the present circumstances. Indeed, counsel for the appellant came close to accepting that unless he could demonstrate a right to appeal on the basis that the finding of poor professional performance even with a sanction of "advice" *simpliciter* affected his civil rights then he had no claim under Article 6. That really was the same argument he was making on the basis of Irish constitutional law. It is striking however, that the appellant has not pointed to any legal authority from either the European Court of Human Rights or from the UK courts (or elsewhere) that supports him in finding that a fair and public disciplinary hearing conducted by an independent and impartial tribunal which results in a finding/sanction, nonetheless requires an appeal hearing in order for it to be Article 6-

compliant. Still less is there authority for holding that where such a finding has been made and which does not affect registration, he must be entitled to an appeal. The appellant has not established that Article 6 requires a right of appeal where a finding may interfere with the good name or reputation of a person following a full hearing in which the procedural rights under Article 6 have been respected.

170. I consider the appeal under this heading must be dismissed.

CONCLUSION

171. I have concluded that there was sufficient evidence before the Committee for it to reach a factually sustainable conclusion that the facts on allegation 7(b) were proven against the appellant and that they amounted to poor professional performance. The decision was rational, reasonable and proportionate. The imposition of the sanction was also proportionate.

172. I have also concluded that the appellant was not granted leave to apply for judicial review on the basis of breach of his right to equality before the law pursuant to Article 40.1 of the Constitution.

173. I have concluded that ss. 71 and 75 of the Medical Practitioners Act, 2007 are not repugnant to the Constitution on the ground that the appellant was not afforded a right to appeal where the sanction imposed on him in respect of the Committee's finding of poor professional performance was one of advice only.

174. I have also concluded that the lack of a right to appeal in those circumstances was not a violation of Article 6.1 of the Convention.

175. I would therefore dismiss this appeal in its entirety.

176. As regards costs, given that the appellant's appeal has failed, it would appear to follow that the respondents are entitled to their costs of the appeal, to be adjudicated in default of agreement.

177. If either side wishes to contend for a different form of order on this appeal (including the order for costs), they will have liberty to apply to the Court of Appeal Office within 21 days for a brief supplemental hearing. If such hearing is requested and results in an order in the terms I have provisionally indicated above, the party that requested the hearing may be liable for the additional costs of such hearing. In default of receipt of such application, an order in the terms proposed will be made.

In circumstances where this judgment is being delivered electronically, Faherty and Ní Raifeartaigh JJ. have authorised me to record their agreement with it.