

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE FULL COURT

BEFORE: MALCOLM, BINGHAM, HARRISON, JJ.

SUIT NO. M-50 OF 1987

REGINA vs. MEDICAL COUNCIL

EX PARTE DR. MOHAMMED N. BAZA

Dr. L. Barnett and Mrs. Janet Morgan for Applicant.

Mr. D. Morrison for Respondent.

HEARD: November 2, 3 and 6, 1987

This is an application by Dr. Mohammed N. Baza for an order of certiorari to bring up and quash a decision of the Medical Council on the 9th day of June, 1987, refusing an application for the special registration of the applicant under section 8 of the Medical Act and for an order of mandamus to issue to the said Council directing it to grant the said application.

Relief is sought on the grounds that the Medical Council;

- (1) took into account in refusing the applicant's said application matters which were irrelevant and could not be properly considered by them and/or in determining the said application the said Medical Council was activated by extraneous considerations.
- (2) acted in excess of Jurisdiction in that it took into consideration in refusing the applicant's said application matters which are extraneous or outside its jurisdiction.
- (3) was activated by bias, in that it took into consideration circumstances in which the applicant came to have been appointed.
- (4) took into consideration allegations against him without disclosing them or the evidence relating to them, to him or giving him a fair opportunity to meet or challenge them and, consequently, there

was a denial to the applicant of natural justice.

- (5) had no valid reason or good and sufficient cause for the refusal of the applicant's application and sufficient and satisfactory material in support thereof was submitted to the Medical Council.

These are the relevant facts.

The applicant, a British citizen of Egyptian birth, holds the degrees of M.B., Ch.B. from Ain-Shams University, Cairo Egypt and the diploma of Medical Radiology Therapy from the University of Liverpool, England, and is, in addition, a qualified physician and surgeon, specialising in Radiotherapy and Oncology.

On the 14th November, 1978, he was granted special registration under section 8 of the Medical Act by the Medical Council for a period of three years and appointed as a consultant radiation oncologist and assigned to the Cornwall Regional Hospital.

On the 4th day of May, 1984, he was again granted special registration by the said Council for the said period of time, appointed as consultant radiation oncologist and assigned to the Kingston Public Hospital. This application was at first refused by the Council for the reason that, as stated by Dr. Barbara Johnson, Chairman of the said Council,,

"..... during his initial period of special registration to work at the Cornwall Regional Hospital numerous complaints and adverse reports had been made to the Council of his standards of ethical conduct and professional competence and, bearing in mind the unique nature of special registration, the Council were then of the view that it would not be in the interests of the medical profession and the standards of patient care in Jamaica to grant him a further period of special registration."

The Council then reconsidered the application, after the intervention of the Honourable Minister of Health, and granted the registration, on condition that the applicant practice radiology under the supervision of a Dr. Vernon Spence.

During the second period of special registration the Council continued to receive "adverse reports from members of the medical profession concerning the applicant's standards of professional practice."

By a letter dated the 28th day of January, 1987, the Council wrote to the said Honourable Minister, referred to the deterioration "in the relationship with the (Radiotherapy) Department because of the attitude of Dr. Baza" and remarked that "one contributing factor to the serious problems in the Radiotherapy Department might be the chronic shortage of therapeutic radiographers."

On the 5th day of February, 1987, the Council wrote to the Chief Medical Officer stating that it would not grant the applicant special registration; the applicant's then existing licence had not then expired. The Chief Medical Officer wrote to the Council in protest of the Council's intention and applied on the 13th April, 1987, that the applicant be specially registered at the end of the then current term of three years.

Further reports "adverse to the applicant in his professional capacity" reached the Council at its meetings in March and April, 1987. At its meeting on 5th May, 1987, the Council considered the request for the special registration of the applicant for a further period, discussed it and refused to register the said applicant.

The applicant's attorneys-at-law made representations to the Council which on 9th June, 1987, again discussed the said application and again refused to specially register the applicant.

The applicant has exhibited several letters of commendation from outstanding members of the medical profession, including the Honourable Minister, certifying to the applicant's

professional competence and compatibility.

The reports adverse to the applicant were never shown to him.

Briefly put the submissions of Dr. Barnett were: -

- (1) That the applicant had previously been granted special registration and so clearly satisfied the qualifications for registration.
- (2) Refusal of his application for registration must be dependent on some factor relating to his competence or conduct displayed during the period of his previous registrations. During this period no disciplinary charges were preferred against him.
- (3) The Medical Council under section 8 of the Medical Act is given the power to approve special registration of Medical Practitioners which is a discretionary power to be exercised rationally and fairly and to have regard to relevant considerations only.
- (4) In the instant case the Council acted on extraneous consideration, failed to observe principles of natural justice and did not arrive at its decision on the basis of any proper enquiry into the adverse reports which constituted the basis for their refusal.
- (5) The decision of the Council having been unlawfully arrived at must be set aside with the result that the only practicable remedy is the grant of the order of mandamus since the Council had prejudged the matter by stating its point of view before the application was made, adjudicated on the matter and then reviewed the matter and adhered firmly to their decision. Even if they had gone through the procedures of an enquiry and notified the applicant of the charges against the background of the case, a decision arrived at in the subsequent enquiry would inevitably be set aside by the Court on the grounds that the Council had shown evidence of bias, all the applicant would need to show the court in those circumstances was a real likelihood of bias, hence the Court would now act in vain if it required the applicant to go back before the same persons to go through an ostensible procedure of being accorded a fair trial.
- (6) Since the Court has the jurisdiction and there is a likelihood that he would not have a fair hearing and the only grounds for the refusal of the grant are the invalid grounds the order for mandamus is appropriate in the special circumstances of this case.

Dr. Barnett cited authorities in support of his submissions.

Mr. Morrison's submissions were as follows:-

- (1) The applicant is a person aggrieved by the refusal of the Medical Council to register him as a medical practitioner and in those circumstances the Act provides a method of appeal and in accordance with well established and well known principles, the applicant ought to have exhausted his statutory right of Appeal before moving the Court for prerogative relief. In this case the avenue of appeal provided by section 13 of the Medical Act is the proper course.
- (2) He argued alternatively that if this submission did not find favour with the Court, then the Court should examine whether or not there was a breach of natural justice.
- (3) This is not a forfeiture case in which on the material before the Court there would have been a duty to afford the applicant an opportunity of hearing the charges against him and that duty has not been discharged. The applicant's period of special registration had come to an end and both he and the Ministry recognised, as does the statute, the necessity for him to apply again to be specially registered. It is therefore in the nature of an application case - in respect of which the Court will only import the audi alteram partem principle if the applicant can be said to have had a legitimate expectation that his application would be granted. He further submitted that because of the statutory provision of the Medical Act, it is by definition an "application" case and there would be nothing to lead the applicant to have a legitimate expectation. If this submission is untenable and the audi alteram partem rule applies to respondent concedes that the applicant was not afforded a hearing and therefore mandamus would go to direct the Council to hear and determine the issues surrounding the applicant's application for special registration and that mandamus would not be available to direct the Council to exercise its statutory discretion in a particular way, i.e. to grant the application for special registration. This would be tantamount to usurping the statutory powers given to the Council.
- (3) The cases established the availability of the remedy of mandamus to direct the tribunal to hear and determine save in cases where it is patent that wholly extraneous matters were taken into

consideration. On the basis of Dr. Johnson's affidavit, the Court cannot say that on acting upon reports received over an extended period of time a responsible body such as the Medical Council acted upon extraneous considerations. He noted that the submission is that the Medical Council has sat and formed a view in respect of the applicant and so an order for it to hear and determine will not meet the justice of the case, but that it is not suggested that the Medical Council acted in bad faith in coming to its decision although bias is alleged. He submitted further that this Court should say that on the material before it, the Court is not qualified to exercise the statutory discretion given to the Medical Council and the proper order in these circumstances is an order of mandamus, directing the Council to hear and determine Dr. Baza's application. Mr. Morrison cited authorities in support of his submissions.

Section 8 of the Medical Act empowers the Medical Council established under section (3) to specially register medical practitioners. Section 8 subsection (1) reads: -

"Notwithstanding anything to the contrary, any medical practitioner not otherwise qualified to be registered under this Act but who comes within any category of medical practitioners specified in the Third Schedule and applies to the Council in the prescribed manner, may be specially registered for such time and on such conditions as the Council may with the approval of the Minister from time to time specify."

The Courts have always recognised that there is an implied duty on administrative tribunals to act fairly, i.e. to apply the rules of natural justice. The leading case of Ridge v. Baldwin [1964] A.C. P.40 is the authority for the principle that a person against whom charges were alleged should have prior notice of such charges and a proper opportunity of meeting them.

The Medical Council is the body that has been given the statutory responsibility to specially register Medical Practitioners. They are under no obligation to give reasons for their decision, however, if allegations or complaints are made against an applicant to the Council in respect of the applicant's professional competence or ethical conduct, such complaints or allegations should be brought

to the attention of the applicant and he should be given an opportunity to answer such charges. When the Medical Council, an Administrative body, embarked upon an enquiry into "reports adverse to the applicant in his professional capacity", the Council was then performing the duties of a quasi-judicial tribunal and as a consequence had a duty to act fairly.

In this case, although the contents of Dr. Johnson's affidavit disclosed numerous allegations and complaints against the applicant, yet no attempt was made by the Council to communicate them to the applicant.

On considering the application of the applicant for special registration on the 5th of May, 1987, when it was "fully discussed" without giving the applicant notice of such "several further reports adverse to the applicant in his professional capacity" and giving him an opportunity to appear before it and answer such charges, the Council was not acting fairly and was clearly in breach of natural justice.

A tribunal to hear appeals from the Medical Council was established by section (13) of the Act. We do not agree with the submission of Counsel for the respondent that the proper course should have been by way of appeal and not by way of the prerogative order. An applicant is not precluded from pursuing his relief in the alternative.

Reports "adverse to the applicant in his professional capacity" such as were received by the Council cannot be regarded as extraneous to the consideration and may be taken into account when the Council considers an application of this nature. It is true that the Council came to a decision on the 5th May, 1987, and on the 9th June, 1987, and on both occasions refused the applicant's application for special registration in so doing it did form a view

based on the matters before it albeit without the applicant being given an opportunity to be heard.

If the applicant is given an opportunity to hear the charges and make his defence to them, the Council is competent to properly adjudicate on an application of that nature. Section 13 of the Medical Act clearly contemplates that in certain circumstances the Medical Council having heard proceedings may be directed to reconduct the matter. In such a case it would be the same body having already formed a view of the proceedings being permitted to re-apply its mind once more to the said matter.

Section 13 (2)(b)(iii) reads:

"The Tribunal may -

- (a)
- (b) at the hearing of an appeal other than an appeal against refusal of registration -
 - (i)
 - (ii)
 - (iii) allow the appeal and direct that the disciplinary proceedings in respect of which the decision of the Council was made be reconducted by the Council.

We find that mandamus is the appropriate remedy to direct the Council to properly hear and determine the application giving to the applicant - details of allegations adverse to him thereby affording to him the opportunity to be heard in his defence.

We regard the Council as a properly constituted body and the best judges of the desirability of granting the application per Megarry V-C in McInnes v. Onslow-Fane /1978/1 W.L.R. at P.1520.

Judicial review is concerned not with the decision but with the decision making process Chief Constable of North Wales Police vs. Evans /1982/1 W.L.R. at P.1155. Accordingly certiorari shall go to quash the decision of the Medical Council made on the 9th June, 1987, refusing the application of the applicant and

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the order of mandamus is granted directing the Medical Council in the terms herein before set out.

Costs to the applicants to be agreed or taxed.