lay C.J.
:fin J.
erman J.

?/89)

THE SUPREME COURT

000032

BETWEEN/

MUHAMMOD MURAD BAKHT

Applicant

and

THE MEDICAL COUNCIL

Respondent

JUDGMENT delivered on the 6th day of April 1990 by

GRIFFIN J. [Nem Diss]

The above-named Muhammod Murad Bakht ("the applicant") qualified as a Bachelor of Medicine and Surgery at the University of Dacca, Bangladesh in July 1973. At the end of 1977 he came to Ireland and, on the 14th December 1977, he applied for and received a certificate of temporary registration from the Medical Registration Council pursuant to s. 3 of the Medical Practitioners Act, 1955. This permitted him to practise

medicine "in a hospital or other institution approved of by the Council" for the period of 6 months commencing on the 1st January 1978, the designated hospital being Peamount Hospital in County Dublin. S. 3(2) of the 1955 Act permitted that Council to extend the period of 6 months for such period or periods as it might determine. There was, under s. 3, no limitation on the period or periods for which the Council might extend the permitted period.

After the applicant took up his employment in Peamount Hospital, the Medical Practitioners Act, 1978, came into force. That Act provided for the establishment of the Medical Council ("the Council") to fulfil the functions assigned to it by the Act (s. 6) and it is required to hold at least 4 meetings per year. It was required by s. 26 to prepare and establish a register of medical practitioners, the register to indicate whether the person registered is fully registered, provisionally registered or temporarily registered.

S. 27 prescribes the persons entitled to be registered

in the register, and the material provisions for the purpose of this appeal are subsections (1) and (2) which are in the following terms:-

> "27(1) Subject to the provisions of this Act, every person whose name, at the date of the establishment of the register, is entered in the Register of Medical Practitioners maintained by the Medical Registration Council pursuant to the Medical Practitioners Acts, 1927 to 1961, shall be registered in the register.
>
> (2) Any person who-
>
> (a) immediately before the establishment of the register was entitled to be registered in accordance with the Medical Practitioners Acts, 1927 to 1961, and was not so registered, or
>
> (b) following the establishment of the register, is awarded any of the primary qualifications specified in the Fourth Schedule to this Act, or
>
> (c) is a national of a Member State and has been awarded a qualification in medicine by a competent body or authority designated for that purpose by a Member State, pursuant to any Directive adopted by the Council of the European Communities, or
>
> (d) satisfies the Council that he has

undergone such courses of training and passed such examinations as are specified for the purposes of this section in rules made by the Council, or

(e) any person entitled to be registered pursuant to an order made under section 26 of the Medical Practitioners Act, 1927,

shall, on making application in the form and manner determined by the Council and on payment of the appropriate fee, be registered in the register."

Subsection (2)(d) is the crucial one for the purpose of this appeal.

S. 28 provides for provisional registration. The effect of that section is that the holder of a primary qualification (i.e. a Bachelor of Medicine and Surgery of the National University of Ireland or of Trinity College, or a Licentiate of the Royal College of Physicians in Ireland or of the Royal College of Surgeons in Ireland) can be registered only by way of provisional registration until and unless he or she has been granted a certificate of experience. This certificate can only be obtained after a successful completion of employment

 000056

in a residential medical capacity in one or more hospitals approved by the Council for the period or periods prescribed by the Council.

S. 29 provides for temporary registration and is in the following terms:-

"29(1) Where the Council is satisfied -

(a) that a person, who is not otherwise entitled to registration, is or intends to be in the State temporarily for the purpose of employment in the practice of medicine in a hospital approved of by the Council for the purpose of this section, and

(b) that such person holds a degree, diploma or other qualification which in the opinion of the Council, affords sufficient guarantee that he has the requisite knowledge and skill for the efficient practice of medicine, has passed an examination appropriate for obtaining such degree, diploma or other qualification and possesses a certificate of experience considered by the Council to be equivalent to that required for formal qualification, the Council may, subject to subsection (2) of this section, and upon such

person's making application in the form and manner determined by the Council and on payment of the appropriate fee, temporarily register such person in the register for such period as the Council may determine.

(2) The Council may extend a period determined under subsection (1) of this section for such further period or periods as the Council may determine, provided that the aggregate of such periods shall not exceed five years."

Upon the termination of his first period of temporary registration, the applicant remained in this country, and between 1978 and 1984 worked in a number of hospitals in pursuance of certificates of temporary registration granted to him by the Council under s. 29. During that period he also attended a number of post-graduate courses and was awarded (inter alia) a diploma in tropical medicine and hygiene by the School of Tropical Medicine of the University of Liverpool, a diploma in child health by the National University of Ireland, and a Licentiate in midwifery by the Rotunda Maternity Hospital in Dublin. He also became an Irish

citizen on the 13th February 1984.

The certificate of temporary registration which he received in respect of the period from the 1st January 1984 to the 30th June 1984 exhausted the maximum period of five years prescribed by s. 29(2). On the 7th February 1984 the applicant wrote to the Council requesting a certificate of unlimited temporary registration. No such certificate could be granted to him, but his letter was treated by the Council as referring to full registration under the Act of 1978. On the 20th February 1984 the Registrar to the Council wrote to the applicant stating the requirements for full registration and stating that his medical qualification did not entitle him to apply for it. The applicant again wrote to the Registrar referring to the courses he had successfully completed and giving details of his medical record in the previous five years, and applied to the Council, in his special circumstances, to allow him registration under s. 27(2)(d). A reply was sent to the hospital at which the applicant worked, but in the meantime he had left the country and

taken up employment at a hospital in Saudi Arabia in or about the end of March 1984.

The applicant returned to Ireland in June 1987 and renewed correspondence with the Council. On the 8th June 1987 he wrote to the Registrar renewing his applicatio for registration and stating that he was prepared to underg or sit any examination required by the Council to satisfy itself that he was an appropriate person to be registered under s. 27. The Registrar sent to him a copy of rules which had been made under s. 27(2)(d) in August 1980, but these were designed for the purpose of granting registration to "distinguished" foreigners, and had no application to his case. At the same time, the Registrar sought further documentation from the applicant to enable him to put the application before the Council. The applicant had by then consulted a firm of solicitors. On the 21st September 1977 the Registrar wrote to the solicitors stating that the application of the applicant was "under active consideratio by the Council. This was repeated in letters of the 29th October 1987 and 19th November 1987. The applicant has

been unable to practise medicine in this country since the 29th January 1988.

The Council had, in October 1987, established a Committee for the purpose of drafting rules in pursuance of s. 27(2)(d). At the meeting of the Council on the 11th December 1987 rules as drafted by this Committee were presented to the Council, and the rules as drafted, subject to some alterations, were adopted by the Council. Some amendments to these draft rules were subsequently proposed. On the 29th January 1988 the Registrar wrote to the applicant's solicitors stating that the Council had made rules pursuant to s. 27(2)(d) and that a copy of the rules together with an application form would be sent to them "early in February". This information was erroneous, as the draft rules had at that time not been formally adopted and brought into force. Not surprisingly, however, in the case of rules drafted by a committee of lay persons, having regard to both the statutory requirements and the European Community Directives, difficulties were foreseen and a copy of the draft rules

was not sent to the solicitors. On the 2nd March 1988 the Council decided that the opinion of Senior Counsel on the draft rules should be obtained. Counsel advised that some of the arrangements provided for in the draft rules were such as to be outside the powers of the Council. The matter then took a somewhat unusual turn, as at the quarterly meeting of the Council on the 1st June 1988, when the item entitled "proposed rules pursuant to Section 27(2)(d) for adoption by the Council" arose for discussion, it was agreed that "the provision [of s. 27 (2)(d)] was in the nature of a reserve power, whereby the Council could make rules for considering application for full registration. The Council agreed that there was no obligation on it to make such rules". This was communicated to the applicant's solicitor.

On the 27th June 1988 the applicant applied ex parte to the High Court for leave to apply by way of application for Judicial Review for:

(1) an order of Mandamus directing the Council to register the applicant pursuant to s. 27(2)(d) of the

Act of 1978;

(2) an order of Mandamus directing the Council to make and issue rules pursuant to s. 27(2)(d) specifying the courses of training and examinations required for the purpose of satisfying the Council for the purposes of that sub-section;

(3) compensation for the loss of the applicant's livelihood by reason of the failure of the Council to register the applicant or alternatively by reason of its failure to make and issue rules under sub-section (2)(d).

Leave was granted by the High Court on that date, and on the 7th July 1988 a notice of motion of the intention of the applicant to apply for Judicial Review was issued on behalf of the applicant and was served on the Council.

A change of policy on the part of the Council seems to have taken place again, as in the beginning of September 1988 a sub-committee consisting of the President, Chairman and Professor MacGowan

 000063

was appointed to undertake the task of determining whether or not the Council should make rules under s. 27(2)(d); that sub-committee recommended that the Council should invoke its reserve power to prepare such rules, and drafted rules. These were later amended, revised and approved of by the Council's legal advisors, and were adopted by the Council on the 20th March 1989. Although they were not in force at the date of the hearing of these proceedings in the High Court, they have been in force since October 1989.

These rules are expressed to be made by the Council pursuant to s. 27(2)(d) of the Act of 1978 for the purpose of specifying the training and examination and the procedures of application leading to registration under that sub-section. They provide (inter alia) for the criteria which must be satisfied by an applicant for registration in respect of his undergraduate medical training leading to his primary medical qualification, and for the necessary post-graduate experience in the practice of medicine. They also provide that each

000064

applicant will be required to achieve a satisfactory standard in an examination conducted for or on behalf of the Council. Arrangements have been made by the Council for the holding of such an examination, and the first such examination was held in the autumn of 1989. The applicant did not sit for that examination.

The application for Judicial Review was heard by Gannon J. who, at the conclusion of the hearing, made an order declaring:

(1) that the Council is in default in failing to inform the applicant of its requirements for his becoming registered on the permanent register and that the applicant has been prejudiced by that default; and

(2) that the Council should take up Dr. Bakht's application to be registered without regard to the rules which the Council then proposed to bring in.

Counsel for the Council had submitted in the High Court, as they did in this Court, that the true construction of the provisions of the sub-section in question was that

the Council had a discretion as to whether or not to make rules for the purpose of the section, and that it was not therefore in default in failing to make any rules. Counsel for the applicant submitted that the provisions of the sub-section were mandatory and that, when the applicant applied to it for registration in the summer of 1987, the Council should then have set about preparing and making rules which would apply to all applicants under that sub-section and not just to the applicant. This was the substantial issue in this case, both in the High Court and in this Court.

In the course of his judgment, which was ex tempore, the learned trial Judge said that the Council, for whatever reason, had not addressed its obligations under the sub-section. Although he does not appear to have made an express finding (at least according to the note of his judgment) that the provisions of the sub-section are mandatory, he stated that he believed that it did not confer what he described as a "double discretion" on the Council, and that the Council, in making rules

and deciding on the content thereof, had discretion to cope with different situations which would arise. In relation to the appropriateness of the applicant's application for an order of Mandamus, the learned trial Judge stated, that in the light of the absence of a decision from the Council as to its requirements to enable the applicant to achieve full registration, he had to have regard to the fact that the absence of a decision had put the applicant in a difficult position and had caused him considerable hardship. He was satisfied that the matter of the proper operation of the sub-section had not been "fixed properly" (sic). There was no reason why a special meeting of the Council could not be convened for the purpose of considering the applicant's application as an individual application, a "special case". He was satisfied that there had been default on the part of the Council in not granting "this applicant" appropriate consideration promptly. He further believed that during the period of consideration of the application, he, the applicant, should have been granted a further extension

000067

of his period of temporary registration. Having regard to all the foregoing matters he was prepared to grant the declaration first set out in the order.

With regard to the future, the learned trial Judge stated that the case of the applicant should be given individual attention and that it would be a tragedy if he had to wait for rules. He would accordingly grant a declaration that the Council should take up the application of the applicant for full registration without waiting to make rules, and in considering the application should do so in whatever manner was most practical and fairest both to the applicant and the Council, and should have regard to the applicant's experience and practice in this country. He was satisfied that the applicant had suffered loss as a result of the unfair treatment meted out to him by the Council, and was entitled to be compensated for this loss, which should be measured by the Master of the High Court in default of agreement.

The Council appealed to this Court against the order and findings made by the learned trial Judge. The grounds argued on the appeal were:-

1. that the learned trial Judge erred in failing to hold that the provisions of s. 27(2)(d) were discretionary and not mandatory;
2. that he erred in holding that the Council could determine an application for full registration without regard to the rules made by it under the sub-section or in the absence of any such rules;
3. that he erred in holding that the Council could deal with the application of the applicant on an individual or ad hoc basis as if it were an application for temporary registration under s. 29;
4. that he erred in holding that the applicant had been unfairly treated by the Council in the manner in which his application had been dealt with.

In the Long Title to the Act of 1978, the Council is charged with the duty of providing for the registration and control of persons engaged in the practice of medicine in

 000069

the State. As such, it has a very important role to play in protecting the standards of medical practice in the State in the interests of the general public. Its functions as provided for in Chapter 1 of Part IV of the Act have both a national and a European Community dimension. It has the duty of overseeing and satisfying itself as to the suitability of the medical education and training provided by the medical schools in the State; as to the standards of theoretical and practical knowledge required for primary qualifications, and as to the clinical training and experience required for granting a certificate of experience under s. 28. It is required by s. 36 to ensure that the requirements relating to education and training for a general qualification shall satisfy the minimum standards specified in any Directive of the European Community. By reason of the objectives of the Treaty of Rome in the freedom to provide services and to exercise a profession within the European Community, it has a duty towards the other Member States of the Community to ensure that the criteria required by

it for registration are comparable with those required in the other Member States. The Council, and it alone, has the responsibility for ensuring that only fully qualified and experienced doctors are registered in the register so as to enable them to engage in medical practice in the State.

S. 27, the provisions of which have been set out hereinbefore, provides for what may be called full registration. The persons provided for in subsection 1, and subsections 2(a)(b)(c) and (e) are, for all practical purposes, automatically entitled to be registered on making the necessary application and paying the appropriate fee. Subsection (1) provides for those who were registered in the appropriate register at the time of the establishment of the register under s. 26. Ss. 2(a) gives a right to be registered to those who were entitled to be registered under the Acts of 1927-1961, but who had not in fact been registered; ss. 2(b) provides for the registration of the graduates of the National University of Ireland, Trinity College, The Royal College

000071

of Physicians, and the Royal College of Surgeons; ss. (2)(c makes provision for the registration of the nationals of Members States of the European Community who obtained the appropriate qualification in that Member State; and ss. (2)(e) provides for those who trained and qualified in specified countries and who were entitled as of right to be registered in the previous register under s. 26 of the Act of 1927.

All other doctors who sought to practise medicine in this country (unless temporarily under s. 29) could do so only in pursuance of ss. (2)(d). These would include Irish nationals who trained, studied and qualified abroad, other than in a Member State of the European Community; non-nationals of a Member State who qualified in any of the other eleven Member States; and all other foreign doctors who graduated anywhere except in the specified Irish Universities and Colleges. Unless and until rules made by the Council under ss. (2)(d), specifying the requisite criteria, were in place, the Council had no power to register any such doctor in the

000072

register.

Ss. (2)(d) is included in a subsection in which all other categories therein set out are entitled to be registered in the register. It was submitted on behalf of the Council that the subsection should be construed as giving a discretion to the Council to decide whether rules should be made or not - in other words, as if the words "which may be" were inserted between "rules" and "made". I am satisfied that, having regard to the scheme of the subsection, and to the words used in ss. (2)(d), the provisions contained in (d) were intended to require, and require, rules to be made by the Council, and that to construe the words "as are specified for the purpose of this section in rules made by the Council" as other than mandatory would be an impermissible construction. The Council was, therefore, in my opinion required to make rules specifying the courses of training which must have been undergone, and the examinations which an applicant was required to pass, before any such applicant could qualify for registration.

000073

With regard to the second ground of appeal argued, I am quite satisfied that, having regard to the provisions of s. 27, the Council had no power to determine an application for full registration without regard to or in the absence of rules made by it under the subsection.

With regard to the third ground of appeal, in my opinion the Council was required to make rules of general application which would apply to all applicants, and it has no power under the subsection to consider the application of the applicant on an individual basis in the absence of rules or to consider his application as if it was an application for temporary registration under s.

Further, as s. 29(2) provides that the aggregate of the periods of temporary registration shall not exceed 5 years, the Council was powerless to grant to the applicant a further period of temporary registration once the statutory period of 5 years was exhausted.

Although the Council was required to make rules

under the subsection, it was not, in my opinion, in default in not preparing and adopting rules prior to 1987. On the evidence, there was no call for such rules before that time, although different considerations might have arisen if the applicant had not left this country in 1984. In September 1987 the applicant's solicitor was informed that his application was under active consideration by the Council. Notwithstanding the difficulties that may arise in the preparation of rules of this type, in particular in view of the requirements of s. 36 of the Act and the Directives of the European Community, I would consider that one year would be a reasonable maximum time within which to prepare and adopt the necessary rules. It appears to me that if the Council had not, in June 1988, adopted the erroneous stand that it was not required to make rules under the subsection, but instead proceeded with all reasonable expedition to make rules, the necessary rules would in all probability have been in place by the autumn of 1988, i.e. one year before they came into force.

In the result, the Council was in my view in default of its statutory obligation for that year, during which time the applicant undoubtedly suffered hardship in that he was neither able to practise medicine nor to have the opportunity of satisfying the Council that he had undergone the courses of training and passed the examinations now specified in the Council's rules. Although this appeal was pending, he could have made an application for registration under the rules and sat for the examination which took place last autumn, but he did not do so. The damage he suffered by reason of the default of the Council should, therefore, in my opinion be limited to one year.

In his evidence in the High Court the applicant stated that his take-home pay would have been in the region of £1,000 per month if he had been engaged in the practice of medicine in a hospital. This evidence was not challenged. Although it is unusual for this Court to assess damages where no assessment has taken place

in the High Court, damages have in fact, to my knowledge been assessed by this Court in the first instance where finality is desirable and where the cost of referring the case back to the High Court would be out of all proportion to the amount of damages likely to be awarded. In my opinion, this is such a case, and in the circumstances the damages should be assessed by this Court. Having regard to my findings as to the period during which he suffered damage, and his evidence as to his probable loss per month, I would assess his damages at £12,500.

I would therefore dismiss this appeal in so far as it was against the declaration of default by the Council and in so far as it was against the finding of the entitlement of the applicant to damages.

I would allow the appeal in so far as the order of the High Court declared that the Council should take up the applicant's application to be registered on the permanent register of Medical Practitioners without regard to the rules which the Medical Council, at

the time when the order was made, proposed to bring in.

I would vary the order with regard to damages by awarding to the plaintiff an order, in lieu of the sum to be assessed by the Master of the High Court, the sum of £12,500.

Approved
FB
6.4.1990