CROSS BORDER ISSUES IN PROFESSIONAL MISCONDUCT

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1. Introduction

The increased facilitation of the movement of professionals between various jurisdictions is posing significant challenges for regulators charged with protecting the interests of the public. It is increasingly common for professionals of various different types to be registered to practice in both Ireland and in other jurisdictions, most commonly the United Kingdom. Whilst this is to be encouraged, the regulation of professionals registered in multiple jurisdictions has proven to be a challenging one for legislatures and regulators alike. In particular, the professional who can continue to practise in Ireland having been struck off by another jurisdiction has proven to be a difficult challenge for regulators to grapple with and, as we will see, the Irish courts have been unable to provide significant assistance to regulators who are tasked with the responsibility of protecting the public from registrants who may not be fit to practise.

The purpose of this paper is to explore the cross border issues arising for regulators when faced with a complaint against an Irish registered professional who has been been struck off in another jurisdiction but may continue to practise here by virtue of their registration in this jurisdiction. This is an area that requires significant exploration and analysis given the increased focus on free movement of professionals throughout the European Union. The paper will identify the particular difficulties faced by regulators in prosecuting cases of professional misconduct where the misconduct in question has occurred in another jurisdiction. The paper will also suggest and explore potential issues for further discussion that may help to resolve problems faced by regulators in dealing with cases containing cross border issues.

2. Borges v Medical Council

The starting point of our analysis is *Borges v Medical Council*[1]. Dr Borges was a medical practitioner registered both in Ireland and the United Kingdom. He was struck off the register in

[1] [2004] 1 IR 103

the United Kingdom on the grounds of professional misconduct on the basis that he was found to have performed inappropriate and indecent examinations on two female patients. The decision of the Professional Conduct Committee of the General Medical Council ("the GMC") in the United Kingdom was upheld by the Privy Council on appeal. The challenge faced by the Medical Council in this jurisdiction was that Dr Borges remained registered as a medical practitioner in Ireland and was free to practise in this jurisdiction. In light of this, the Irish Medical Council commenced an investigation of Dr Borges under the Medical Practitioners Act 1978 on the grounds of professional misconduct and proposed holding an inquiry into Dr Borges. The allegations against Dr Borges concerned the inappropriate and indecent examinations carried out in the UK which led to his strike off in that jurisdiction.

It was initially intended to call the women that had been subject to the examinations by Dr Borges to give direct evidence. In the course of preparation of the case, it became apparent that the two women were not prepared to attend the inquiry to give evidence in person and were not prepared to give evidence via video link and were obviously not amenable to compulsion as they were outside the jurisdiction. Faced with the prospect of a significant evidential deficit in the case, the Registrar proposed that evidence in the form of the transcripts of the hearing before the GMC would be relied on as evidence supporting the allegations against Dr Borges at the inquiry. The Fitness to Practise Committee determined that it would proceed on the basis of the transcript of the proceedings before the GMC and the Privy Council being furnished as evidence of professional misconduct on the part of Dr Borges.

Dr Borges sought and was granted leave to judicially review the decision of the Fitness to Practise Committee to proceed on that basis. In the course of the High Court hearing and on appeal to the Supreme Court, Dr Borges argued that his constitutional right to a fair hearing would be violated as he would be denied the right to cross-examine his accusers.

The Medical Council argued that Dr Borges's right to cross-examine his accusers had not been violated as he had availed of that right during the course of the inquiry in the UK. In addition, counsel on behalf of the Medical Council argued that it was an important feature of the procedures being adopted that it was not simply a question of the Committee being asked to "rubber stamp" the findings of the GMC inquiry. The Committee was being asked to give such weight as was considered appropriate to the transcript, the decision of the GMC and the upholding of the decision by the Privy Council of the United Kingdom. It was also submitted on

behalf of the Medical Council that the Committee would have the benefit of a witness from the English General Medical Council and an independent consultant in the form of an expert. The applicant would be entitled to cross examine those witnesses, to call witnesses in his defence, including expert witnesses and, if he elected to do so, to given evidence himself. It was also argued that, as the Committee was not a court, it was entitled to allow evidence under certain exceptions to the rule against hearsay once the evidence adduced met the requirements of necessity and reliability[2].

The Supreme Court unanimously held that Dr Borges was entitled to an order of *certiorari* quashing the decision of the Committee to proceed to inquiry. The Supreme Court held that Dr Borges could not be deprived of his right to fair procedures, including the right to cross-examine his accusers. The Court held that this was particularly so given that Dr Borges was being exposed to the possibility of being precluded indefinitely from practising as a doctor. Keane CJ held that, notwithstanding certain case law in the United Kingdom, the admission of transcript evidence in the manner proposed by the Committee "*offend against fundamental concepts of fairness, which are not simply routed in the law of evidence either in its statutory or common law vesture*"[3]. The Court endorsed the dicta of Henchy J in *Kiely v Minister for Social Welfare*[4] where the Supreme Court had held that a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and effectively unquestionable evidence on the other side had "*neither the semblance nor the substance of a fair hearing*" and that such a hearing would be "*contrary to natural justice*".[5] In summary, in order the vindicate Dr Borges' right to fair procedures, it would have been necessary for the CEO of the Medical Council to call the direct evidence of the complainants in order to prove the allegations against Dr Borges. Any attempt to admit the transcripts as evidence of Dr Borges alleged wrongdoing breached Dr Borges' constitutional right to fair procedures, including his right to cross-examine his accusers.

Impact of *Borges* – Issues Arising

It is clear that the decision of the Supreme Court in *Borges* creates significant difficulties for regulators in seeking to deal with professionals who have been struck off in neighbouring

[2] *Per DPP v Myers* [1965] AC 1001 and *R v Kahn* [1990] 2 SCR 531
[3] [2004] 1 IR 103, at 115
[4] [1977] IR 267
[5] *Ibid.*

jurisdictions but remain free to practise in this jurisdiction. *Borges* creates a significant burden on regulators in that it effectively requires that a hearing that may have been run in another jurisdiction in accordance with the highest standards of fairness will nonetheless be required to be rerun again in this jurisdiction in order to comply with Irish standards of constitutional justice. Significant difficulties are also created for regulators in that they are required to seek out, preserve and present original evidence from outside the jurisdiction in order to sustain a complaint against a practitioner registered in this jurisdiction.

In light of this judgment, it is proposed to explore a number of potential issues arising and suggest a number of possible ideas that would assist regulators in seeking to protect the public against professionals that have been struck off in other jurisdictions. However, the area is fraught with difficulty and these are best described as ideas for further discussion.

Unwillingness to appear

It is interesting to note that the Supreme Court in *Borges* placed significant emphasis on the fact that the complainants were available but unwilling to give evidence. Keane CJ stated that the injustice of the proposed hearing was:-

> "*inevitably seriously enhanced where, as here, the hearing is being conducted in that form solely because the complainants are unwilling to travel to Dublin or, indeed, to give their evidence by way of video link or attend a hearing of the [Committee] in the United Kingdom*"[6]

It should be noted that the Supreme Court expressly did not determine whether transcript evidence could be admitted as an exception to the hearsay rule as the Supreme Court was satisfied that the exceptions to the hearsay rule identified by the Medical Council did not apply in circumstances where the complainants were *unwilling* to give evidence. This leaves open the possibility that evidence could potentially be admitted if the complainants were unable to give evidence. Mills et al[7] consider that it is impossible to be definitive on this issue but the possibility

[6] [2004] 1 IR 103, at 116
[7] Mills, S., Ryan, A., McDowell, JP., and Burke, E. (2011) *Disciplinary Proceedings in the Statutory Professions.* Dublin: Bloomsbury Professional, pp.187-188.

of admitting evidence where the complainant is unable to give evidence by reason of death or otherwise is certainly worthy of consideration and further discussion.

Notwithstanding the introduction of significant new legislation governing regulatory bodies, the Oireachtas has not provided any legislative assistance to regulators in dealing with a *Borges*-type case and the legislature has appeared reluctant to grasp this issue. In related issues concerning persons applying to join a professional register in Ireland, the legislature has intervened to provide that an application for registration by such an individual may be refused by the relevant council[8]. By way of example, section 14(2) of the Pharmacy Act 2007 provides that:-

> "*in determining whether someone is fit to be registered, the Council must have regard to whether the person has been prohibited from acting as a pharmacist in another member state*".

Provisions such as this may provide some comfort to regulators seeking to prevent first time registration or renewal of lapsed registration. Certainly, on an application for such registration, the relevant regulatory body must satisfy itself that the applicant is capable of practising and does not pose any risk and therefore, it would be entitled to take into consideration any prior disciplinary Order(s) in such circumstances.

However, the legislature did not seek to provide a specific statutory basis in the Pharmacy Act 2007 to investigate a professional who has been struck off in another jurisdiction. Further, such a statutory provision does not clear the hurdle of a situation whereby an individual is already registered and the relevant regulatory body wishes to remove that person on foot of a prohibition imposed in another country.

EU Directive 2005/36 (as amended by the EU Directive 2013/55)

Certain strides have been made towards greater co-operation between regulators on a European level. Under Article 56 and 56A of EU Directive 2005/36 (as amended), extensive powers have been granted to regulators to enable the sharing of information in respect of

[8] Interestingly, section 91 of the Legal Services Bill (as passed by the Dáil) provides that a barrister that has been struck off in another jurisdiction will not be entitled to be a partner in a multidisciplinary practice

professionals that have been struck off in other member states. However, the sharing of information alone does not go far enough to allow for that information so shared to be utilised in the various EU jurisdictions to allow for automatic cross border recognition and enforcement. Ironically, the freedom of movement espoused by the EU makes cross border enforcement a real problem with increased migration of professionals to other EU Member States.

It is clear that strides have been made towards the regulation of professionals on a pan-European or on a cross border basis but the core difficulties of *Borges* remain namely that an Irish regulator in the case of a UK professional who has been struck off is required to call and prove the entire underlying case against the practitioner again and cannot resort to reliance on the transcript or order of the UK-based regulator. In light of this, a number of options may merit consideration.

A legislative amendment providing for the admissibility of findings in neighbouring jurisdiction

One potential option would be for the Oireachtas to expressly amend the regulatory legislation in question to provide that the finding/order of a regulatory tribunal is a ground of complaint in itself. So an additional ground of complaint to that of "professional misconduct" or "poor professional performance" might be "adverse disciplinary finding and/or sanction by a comparable regulator in another jurisdiction".

In the UK, this approach was explored in the case of *In re a Solicitor*[9]. In this case, the solicitor in question had qualified in Western Australia and been struck off in that jurisdiction for committing perjury in respect of her own family law proceedings. A complaint on the basis of this behaviour was made to the Solicitors Disciplinary Tribunal in England who ordered that the solicitor's name be struck from the roll on the basis of the Australian charge. On appeal, it was held that the findings of the Australian board did not constitute hearsay or opinions. Rather, they were the judgment of that Tribunal based on an assessment of all matters of fact and law which had been presented and therefore, it was open to the English Tribunal to make such use of those findings as was proper in the circumstances.

[9] [1992] 2 WLR 552

However, the Supreme Court did not accept this authority in *Borges*, with Keane CJ noting that the issue as to whether the findings of one tribunal could be admitted as evidence in another was "*considered solely in the context of the relevant law of evidence"* and further that:

> *"The question as to whether such a hearing offended natural justice was not addressed at any stage. The proposition that a tribunal can adjudicate on serious allegations of professional misconduct which may result in a person being struck off the rolls of his profession without hearing the testimony of his accusers being given orally and tested by cross examination before them, simply because they are unwilling to attend the hearing, is, in my view, irreconcilable with the standards of natural justice and fair procedures which are required of such bodies in this jurisdiction."*[10]

It is important to note, therefore, that the Supreme Court distinguished this judgment on the grounds that natural justice had not been considered by the English Court and, even if the Supreme Court was incorrect, it declined to follow that judgment.

In any event, there may always be significant difficulty in recognising any finding/sanction by an overseas regulatory body that is not made to a criminal standard. If a finding is made on the lower civil standard of proof, it would be difficult to see how a finding made on the balance of probabilities could safely be used to secure any kind of finding or lead to any kind of sanction in this jurisdiction. It does not seem that any reliance can therefore be placed by Irish regulators on findings/sanctions from other jurisdictions based on the application of a civil standard of proof.

Alternatively, it is worth considering whether it would be open to the legislature to provide for the admissibility of witness statements as evidence where witnesses such as the witnesses in *Borges* refused to give evidence. In criminal proceedings, the legislature has intervened to provide for such a scenario under Section 16 of the Criminal Justice Act 2006. Specifically, Section 16 provides that certain statements are admissible if very specific criteria under that legislation are complied with. The trial Judge retains the discretion to exclude the evidence in the interest of justice. It is inherently unlikely that the legislature would proceed to adopt such an approach in the case of regulatory bodies in the absence of formalised statutory procedures for taking witness statements. For example, one would have thought that the introduction of a caution, the video taping of evidence and other issues would have to be considered.

[10] [2004] 1 IR 103, at 116

The alternative would be to facilitate and encourage the use of video link evidence, if necessary by introduction of specific statutory provision in order to reduce the burden on complainants who have to travel to a foreign jurisdiction in order to give evidence in respect of a very troubling or even harrowing ordeal.

Conclusion

Notwithstanding the expansion and facilitation of movement of professionals between jurisdictions, both the *Borges* case and the absence of harmonised standards of proof place significant obstacles in the way of a harmonised and effective system of regulation. At present, it would appear as though the complaint must again be proved presenting all original evidence that was presented before the overseas tribunal. This, in turn, presents witness difficulties for the regulators which in certain cases may prove insurmountable.

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