

Ref: **GIL7788**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

STEPHEN GRAHAM TWIBILL

Appellant;

-and-

PHARMACEUTICAL SOCIETY OF NORTHERN IRELAND

Respondent.

*Pharmacist- appeal against decision of the Statutory Committee of the
Pharmaceutical Society of N.Ireland –conviction for non work related possession of
indecent images of children - Pharmacy (Northern Ireland) Order 1976-deference to
the Statutory Committee – fair and proportionate sanction.*

GILLEN J

Application

[1] In this matter the appellant, a registered pharmacist, is appealing against a decision by the Statutory Committee of the Pharmaceutical Society of Northern Ireland (“the Committee”) made on 17 June 2009 that his name be removed from the register of Pharmacists and that no application for restoration to the register should be made before the expiration of 15 years.

[2] The single issue in this appeal is whether the Committee was correct to direct that no application for the restoration of his name to the register should be made before the expiration of the period of 15 years (“the relevant decision”). No issue was taken by the appellant with the decision to remove his name from the register.

Background

[3] The appellant had been arrested on 1 October 2007, following a police search of his home address. The appellant was found to be in possession of 37,845 images of children with 19,396 unique images including images that fell within categories 1, 2, 3 and 4 (“the categories”) pursuant to the categorisation of images specified in R v Oliver and Others [2002] EWCA Crim 2766. There were also approximately 200,000 adult pornographic images on his computer.

[4] The appellant made a number of admissions to the police disclosing that –

- He had created a collection of CDs and DVDs which he had disposed of in July 2007 and which were not recovered by the police.
- He had been accessing indecent images of children since 1996.
- whilst he denied a sexual interest in children, he admitted that he was aroused by watching the images and indulged in sexual activity on his own whilst looking at them.
- He had not viewed pornographic images at his work place.

[5] On 10 October 2008 the appellant pleaded guilty to 24 offences of possessing and/or making indecent photographs of children contrary to Article 3(1)(a) of the Protection of Children (Northern Ireland) Order 1978 (“the 1978 Order”) and Article 15(1) of the Criminal Justice (Evidence Etc) (Northern Ireland) Order 1988 (“the 1988 Order”).

[6] On 13 November 2008 the appellant was sentenced by the Crown Court (“the Court”) to –

- 12 months imprisonment.
- A two year probation order.
- Participate in a Community Sex Offenders Group Work Programme for up to 240 hours.
- Be automatically placed on the Sex Offenders Register for an indefinite period.
- Be disqualified from **working with** (*my emphasis*) children for 15 years pursuant to the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003. I observe that this disqualification applies to work in a “regulated position” as defined in Article 31 of that Order and specifies particular positions e.g. supervising or managing children at day care premises etc. Self-evidently this disqualification would not per se preclude him working as a pharmacist.

[7] On 24 November 2008 the appellant was made subject to a Sexual Offences Prevention Order ("SOPO") pursuant to Section 104 of the Sexual Offences Act 2003 under which, in summary, he was prohibited from –

- accessing the internet by computer except at any place of employment under supervision,
- initiating communication with children
- being within 50 metres of children's education or play facilities unless approved by Social Services,
- taking up employment without the approval of his designated risk manager or social services
- denying the police reasonable access to his home to ensure compliance with the order for a period of 10 years ("the SOPO Order").

[8] The Committee found by way of mitigation that the appellant had an unblemished record, he had co-operated fully with the police, 99% of the indecent images fell within category 1 of the categories, he had suffered severely in his reputation and in his family and work circumstances. It also took into account that he had voluntarily taken the decision not to work as a pharmacist after he was charged with the offences.

[9] By way of aggravation the Committee took express notice of the large volume of images and the length of time over which his activities had been carried out, namely viewing indecent images of children since 1996 as recorded on page 59 lines 17-19 of the transcript of the hearing ("the transcript"). Thereafter the committee arrived at the relevant decision.

The relevant statutory and regulatory framework

[10] The task of the Committee and the appellant's right of appeal are governed by the provisions of the Pharmacy (Northern Ireland) Order 1976 ("the 1976 Order") which provides, where relevant, as follows:

"20.-(1) If a registered person, or a person employed by him in the carrying on of his business, has been convicted of any such criminal offence, or been guilty of such misconduct, as, in the opinion of the Statutory Committee, renders him, or in the case of an employee would, if he were a registered person, render him unfit to be on the register, the Committee, after inquiring into the matter, may, subject to the provisions of this Order, direct the Registrar to strike the name of the registered person off the register."

(4) Where directions are given by the Statutory Committee under paragraph (1) the Committee may further direct that an application made under paragraph (2) (*i.e. for restoration to the register*) shall not be entertained until the expiration of such period or the fulfilment of such conditions as may be specified in the directions.

22.- (3) A person aggrieved by a direction given by the Statutory Committeeunder this Order may, at any time within 3 months from the date on which notice of the direction..... is served on him, appeal against the direction to a judge of the High Court.

(4) If rules of court so provide, the Society may appear as respondent on any appeal to a judge of the High Court under this Order, and, for the purpose of the costs of an appeal shall be deemed to be a respondent to the appeal, whether it appears on the hearing of the appeal or not."

[11] **Schedule 3 of the 1976 Order**, where relevant, provides as follows:

"Proceedings of the Statutory Committee

1. - (1) subject to sub-paragraph (2), the quorum of the Statutory Committee shall be 3, of whom the chairman shall be one, and the Committee may, subject as hereinafter provided, act by a majority of members present.

(2) An order directing that the name of a registered person shall be removed from the register shall not be made except with the consent of the chairman of the Committee."

[12] The Statutory Committee has produced guidance on sanctions to assist practitioners appearing before it. It is known as "**The Indicative Sanctions Guidance**" ("the guidance"). Where relevant the guidance provides as follows:

"3. Purpose of Sanctions

The purpose of sanctions is threefold, namely:

- (i) the protection of the public;
- (ii) the maintenance of public confidence in the profession; and
- (iii) the maintenance of proper standards of behaviour.

It matters not that a practitioner may already have paid a heavy price for his misconduct in prior criminal proceedings. The object of disciplinary proceedings against a practitioner who has been convicted of a criminal offence is twofold. It is to protect members of the public who may use his services and to maintain a high standard and reputation of the profession. The object is not to punish him a second time for the same offence.

4. General Principles – Fairness and Proportionality

In considering whether to apply a sanction the Statutory Committee has to exercise a discretion –

Notwithstanding a finding that the conduct of a pharmacist is such as to render him unfit to remain on the register, the Statutory Committee still has a discretion as to whether or not to direct the removal of that pharmacist's name.

The Statutory Committee is required to exercise its discretion in a way that is fair and reasonable. This will require the Committee to weigh the interests of the practitioner against the need for public protection.

In making its decision, the Statutory Committee will have regard to the public interest. This includes the protection of members of the public, the maintenance of public confidence in the profession, and declaring and upholding proper standards of conduct and performance.

The Statutory Committee will ensure that any sanction imposed is proportionate, in all the circumstances of the case. This will involve a consideration of:

- Any mitigating or aggravating features of the offence or misconduct in question.
- The personal circumstances of the practitioner and any mitigation advanced by him.
- Any testimonials and character references adduced in support of the practitioner.
- Any statement of views provided to the Statutory Committee by a patient or victim.”

[13] The guidance goes on to set out at paragraph 6 examples of certain aggravating features, at paragraph 7 certain mitigating features and at paragraph 8, cases where removal from the register may be appropriate.

The appellant’s case

[14] Mr Pittaway QC appeared on behalf of the appellant with Mr Sharpe. The main thrust of the arguments he advanced in the course of a comprehensive skeleton argument well augmented by oral submissions can be set out as follows:

- Deference to the decision of the Committee should be measured given the lay composition of some members of the Committee and the nature of the offences.
- The Committee had erred in drawing an analogy with the order of the Court that the appellant be not permitted to **work with** children for a period of 15 years. In doing so the Committee failed to recognise that this prohibition was for a wholly different purpose from any direction imposed by the Committee to protect members of the public or to maintain the reputation of the profession since his employment as a pharmacist fell outside the categories of working with children as set out in Article 31 of the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003.
- If the concern of the Committee was that the appellant would come into **contact** with children whilst working as a pharmacist, the terms of the Sexual Prevention Order containing prohibitions for a period of 10 years was the appropriate analogy and it was from that Order that the Committee ought to have taken “its cue”(see paragraph 31 infra).
- The Committee had erroneously elided the distinction between the concept of directing that no application for restoration to the register should be made for a period of years and the wholly separate

determination which would be perhaps made in later years when consideration would be given to an application by the appellant for restoration to the register.

- Even had the Committee directed no application for restoration should be made for 10 years, taking its cue from the SOPO disqualification, that period would have been unnecessary to protect the public since his employment during that period had to be approved by a designated officer or the social services in any event under the terms of the SOPO. Thus even a 10 year prohibition by the Committee was unnecessary for the purpose intended. A period of 5 years prohibition for application for restoration to the register would have been more appropriate. Any further period was neither a fair nor proportional exercise of the discretion.
- The imposition of a period of 15 years was erroneously punitive and disproportionate in that the appellant would be approaching his 65th birthday before he was entitled to make application for restoration to the register and in effect the direction of the Committee would amount to the appellant being permanently disbarred from applying for the remainder of his working life.

The respondent's case

[15] Mr Shields appeared on behalf of the respondent. The main thrust of the argument he advanced in his comprehensive skeleton argument augmented by oral submissions can be set out as follows:-

- The Committee had recognised that the aim of the exercise was not to penalise the appellant but rather to protect the public and to maintain professional standards. This court should pay appropriate deference to this Committee as representing the best possible people for weighing up the seriousness of the misconduct and deciding what was appropriate to protect the public and maintain public confidence in the profession.
- The Committee had expressly recognised and had not confused the distinction to be drawn between the twin concepts of working with children on the one hand and on the other coming into contact with children.
- There was no basis to contend that the decision as to sanction was wrong or manifestly inappropriate in this instance having regard to the appellant's conduct, the aggravating features, the interests of the public and the need to maintain public confidence in the profession. The Committee brought a level of particular expertise to the

proceedings and were best placed to evaluate the standards expected within its profession and how the needs of the public and the profession should be protected.

- The appellant in this case should not have any expectation that he is entitled to rejoin his profession until such times as he has satisfactorily completed his sentence and the orders made consequent upon it (see the Council for the Regulation of Health Care Professionals v. General Dental Council and Fleischmann [2005] EWHR 87 at paragraph 54 (“Fleischmann”).

Principles governing this appeal

Nature of the appeal

[16] This appeal is governed by Order 55 Part II of the rules of the Court of Judicature. Although the mode of hearing this appeal is not defined therein, Order 59 rule 10 applies i.e. the general powers of this court are similar to those of the Court of Appeal in determining this appeal.

[17] I accept the submission of Mr Pittaway that this appeal is in the nature of a re-hearing in the sense that an appeal from the High Court to the Court of Appeal is a re-hearing. Thus it is not a full oral re-hearing and the court is not confined to an appeal on a point of law. This court is therefore free to substitute its own decision for that of the Committee on both the findings of law and fact.

Deference to the Statutory Committee

[18] Nonetheless this court will give appropriate weight to the findings of the Committee especially of primary fact. That proposition has been the subject of much consideration over the years and my attention during the course of this hearing was drawn again to such leading authorities as Re Baird [1989] NI 56 (“Baird’s case”), Ghosh v. General Medical Council [2002] 1 WLR 1915 (“Ghosh’s case”), GMC v. Meadow [2006] EWCA Civ 1390, MacLeod v. Royal College of Veterinary Surgeons [2006] UK PC 39, Raschid and Fatnani v. MGC [2007] EWCA, Civ 46 (“Raschid’s case”), Law Society v. Salisbury [2008] EWCA Civ 1285, Gupta v. GMC [2002] 1 WLR 169 (“Gupta”), Bolton v. The Law Society [1994] 2 All ER 486 (“Bolton”) and most recently Cheatle v. GMC [2009] EWHC 645 (Admin) (“Cheatle’s case”).

[19] From these authorities I have distilled the following principles. First, this court does not write on a blank page. An appellate court should recognise that in most cases the members of this Committee are particularly well qualified to judge what measures are required from time to time for the purposes of maintaining professional standards and protecting the needs of

the public. I consider that applies with particular force when dealing with the question of sanction.

[20] I also bear in mind that where professional discipline is at stake, the professional body is not primarily concerned with matters of punishment and considerations which would normally weigh in mitigation of punishment have less effect in the exercise of this kind of jurisdiction. Accordingly the fact that an order for suspension may mean the practitioner is unable to re-establish his practice does per se render the order for suspension wrong. The reputation of the profession is more important than the fortunes of any individual member (see Gupta p1702 at paragraph 21 and Bolton at p 486).

[21] Equally so, the court should not defer more than is warranted by the circumstances. I respectfully adopt the approach adumbrated by Lord Bingham in the case of Ghosh where Dr Ghosh appealed from a direction of the Professional Conduct Committee of the General Medical Council to erase his name from the register for serious medical misconduct. At page 1923 paragraph 34 Lord Bingham said:-

“ . . . the Board will accord an appropriate measure of respect to the judgment of the Committee whether (*sic*) their practitioners’ failings amount to serious professional misconduct and on the measures necessary to maintain professional standards and provide adequate protection to the public. But the Board will not defer to the Committee’s judgment more than is warranted by the circumstances. The Council conceded, . . . that it is open to them to consider all the matters raised; to decide whether the sanction of erasure was appropriate and necessary in the public interest or was excessive and disproportionate; and in the latter event either to substitute some other penalty or to remit the case to the Committee for reconsideration.”

[22] In short the test that I have to apply is whether the decision of the Committee can be said to be wrong and thus whether the sanction imposed was clearly inappropriate. My approach to this case is that adopted by Cranston J in Cheatle’s case at paragraph 15:-

“ . . . the test on appeal is whether the decision of the Fitness to Practise Panel can be said to be wrong. That to my mind follows because this is an appeal by way of re-hearing, not review. In any event grave issues are at stake and it is not sufficient for intervention to turn on the more

confined grounds of public law review such as irrationality . . . However the degree of deference will depend on the circumstances. One factor may be the composition of the tribunal. In the present case the Panel had three lay members and two medical members. For what I know the decision the panel reached might have been by majority, with the three lay members voting one way, the two medical members the other.”

[23] I pause to observe that in this case whilst the matter is essentially an appeal on sanction where professional judgment is especially important (see Raschid’s case) nonetheless I must bear in mind that the Committee was chaired by a lawyer and contained lay members as well as professionals. The issues under consideration did not involve misconduct in the work place or a consideration of pharmaceutical practice or ability. Rather it was the effect on the profession of a criminal conviction unconnected with pharmacy outside the workplace. Such circumstances may warrant a greater measure of reduced deference to the conclusions of the committee than might have otherwise have been the case.

[24] I reject the submission of Mr Shields that as a general rule where a practitioner has been convicted of a serious crime he should not be permitted to resume his practice until he has completed his custodial sentence **and** the orders added had expired. Mr Shields had adopted as his authority for that proposition the case of Fleischman. In that case a dentist had been sentenced to a community rehabilitation order for 3 years on 12 counts of charges arising out of child pornography. In addition he was ordered to remain on the sex offenders register for 5 years, was prohibited from unsupervised access to children under 16 years and was obliged to participate in a sex offender’s treatment programme. At paragraph 54 Newman J said inter alia:-

“I am satisfied that as a general principle where a practitioner has been convicted of a serious criminal offence or offences he should not be permitted to resume his practice until he has satisfactorily completed his sentence. Only circumstances which plainly justify a different course should permit otherwise. Such circumstances could arise in connection with a period of disqualification from driving or time allowed by the court for the payment of a fine. The rationale for the principle is not that it can serve to punish the practitioner while serving his sentence, but that good standing in a profession must be earned if the reputation of the profession is to be maintained”.

[25] In my view Newman J was referring to the sentencing aspect of the practitioner's punishment, which in the instant case would be the period of 3 years to cover the custodial and probation period of 2 years. I do not consider that the disqualification under the Protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 or that under the Sexual Offences Prevention Order come within the ambit of "the sentence" imposed. The additional orders are for the protection of children and in my view do not constitute part of "the sentence" as envisaged in Fleischmann.

Conclusions

[26] I have concluded that the committee has failed to properly distinguish between the 15 year disqualification from working with children under the protection of Children and Vulnerable Adults (Northern Ireland) Order 2003 and the 10 year prohibition from making contact with children under the Sexual Offences Prevention Order pursuant to Section 104 of the Sexual Offences Act 2003. The appellant's employment as a pharmacist clearly falls outside the categories set out in Article 31 of the former Order. In any event as a pharmacist the appellant clearly is not likely to work with children in the exercise of his duties albeit he will come into contact with them.

[27] Some indication of the failure on the part of the Committee to make this distinction is to be found at pages 59 and 60 of the transcript where, inter alia, the following finding appears:-

"We direct further that not only should he be removed from the register, but no application from him for restoration to the register should be entertained for 15 years. The Crown Court has made an Order that he should not work with children for 15 years and we acknowledge that as it were, a slightly different issue, but we take our cue (sic) from that order and having regard to the fact that there could be no guarantee that if he were restored to the register and that if he were to obtain work as a pharmacist, there could be no guarantee that he would not be in contact with children. We consider proper to impose that time limit that must expire before any such application for restoration can be made."

[28] I fear this fails to recognise the distinction between the 15 year disqualification from *working* with children and the 10 year disqualification prohibiting *contact* with children. Coming as it does at the end of the decision,

I fear it transcends earlier parts of the transcript where the distinction between the two concepts was drawn to the Committee's attention by counsel.

[29] That elision had surfaced earlier in the transcript during the following exchange between counsel and the chairman found at page 21:-

"The chairman: Can I just ask and may be you can answer it or may you need a bit of time to think about it, but you say for instance the Society's concern is the maintenance of confidence in the profession and to a lesser extent the protection of the public. I mean, is there some concern that a pharmacist in the normal course of his business would be in contact with children?

Mr Shields: Well, the difficulty in this case is that there is a Sexual Offences Prevention Order in place which would make it difficult for a person to continue as a pharmacist particularly if there were children coming into the business and the premises.

The chairman: That is the disqualification for 15 years?"

[30] Although subsequently the chairman did revisit the issue and refer to the 15 year disqualification as being from *working with* children, I fear that the Committee failed to consistently preserve the necessary dividing line between the two concepts in the two orders. That confusion I consider may well have infected the decision making process and wrongly influenced the time limit imposed that must expire before any application for restoration to the register could be made.

[31] Further, I am not satisfied that the Committee fully invested this decision with the necessary fairness and proportionality given that in effect its decision would mean it unlikely that the appellant would ever work again as a pharmacist in light of his age. The rights of the appellant under Articles 6 and 8 of the European Convention on Human Rights and Fundamental Freedoms cannot be ignored in this context. Whilst Raschid's case makes clear that the reputation of the profession is more important than the fortunes of individual members, in so far as the Committee purported to takes its "cue" from the Crown Court decision, it is in my view unfair and disproportionate to have relied on the 15 year disqualification order as the touchstone for disqualification rather than the separate 10 year prohibition. The protection of the public is well afforded by the provisions of the SOPO under which taking up any employment is prohibited without the approval of the designated risk manager or social services.

[32] On the other hand, in my view to have debarred the appellant from applying to register for a period as short as 5 years as urged on me by Mr Pittaway, would have been to unreasonably ignore the principle in Raschid to which I have earlier adverted and to have failed to pay appropriate deference to the expertise of this Committee. I have no doubt that such a period would have been too short to maintain public confidence in the profession.

[33] Finally I am unpersuaded that the Committee, both at the original hearing and before me drew a sufficient distinction between those factors relevant to a decision to prevent an application for restoration to the register on the one hand and the separate concept thereafter of applying for restoration to the Register. Different criteria may well apply to each separate stage. That distinction appears to me have been blurred both in the original hearing and in the hearing before me by the respondent.

[34] I consider that the period that should expire before any application for restoration can be made should be reduced to one of 10 years. In doing so I make it absolutely clear that I am not making even the slightest suggestion that this man should be readmitted to the register after such a period of 10 years. It is noteworthy that separate and specific guidance is given by the Pharmaceutical Society of Northern Ireland for such an application for restoration to the register. Specific criteria are set out in that guidance which have to be taken into account when considering an application for restoration. Nothing that I have said in this judgment should influence such a hearing should an application be made after the expiration of 10 years. This will be entirely a matter for the relevant Committee at that stage who will then doubtless consider what steps have been taken in the intervening years to address the appellant's current sexual proclivity. I have therefore determined that the decision of the Committee should be varied in that a time limit of 10 years should expire before any application for restoration to the register can be made. I shall invite counsel to address me on the issue of costs.

Costs

[35] I have now had the benefit of hearing both parties on the issue of costs. I have concluded that there should be no order as to the costs of this appeal. I am of this view for the following reasons.

[36] First, neither side has wholly succeeded in this matter. The appellant through his counsel urged the court to reduce the disqualification to a period of five years whereas the respondent had maintained an argument in favour of a full affirmation of the period of 15 years imposed by the Committee.

[37] Secondly, the court does have a discretion on costs in this matter. As I have already indicated in paragraph [10] of this judgment, Article 22(4) of the 1976 Order states, inter alia:

“... The Society may appear as respondent in any appeal to a judge of the High Court under this order, and, for the purpose of the costs of an appeal shall be deemed to be a respondent to the appeal, whether it appears on the hearing of the appeal or not.”

[38] In ordinary civil litigation, costs normally follow the event. I do not believe that this is an appeal similar to ordinary civil litigation. In my view the respondent is cast in the role as a regulator of the profession of pharmacists. Whilst in the last analysis, what an appellate court thinks is just and right on the question of costs will depend on all the relevant circumstances - and this could include financial prejudice to an appellant - nonetheless normally I do not consider that the respondent should be exposed to the risk of adverse costs in the performance of its functions absent some evidence that it instituted proceedings on an improper basis. The court must be wary of the potential danger that costs implications might have a chilling effect on the exercise of the obligation of this Society to protect the reputation of the profession in a manner that would be disadvantageous to the public good. In this instance the respondent is obliged to appear and argue on behalf of the Committee. Such a function must be performed fearlessly and unflinchingly in the interests of the profession and the public at large. I find no circumstances in this case to merit an award of costs being made against it.

[39] I consider that authority for the propositions that I have propounded in this context is found in Baxendale-Walker v The Law Society (2007) EWCA Civ. 233. That was a matter before the Court of Appeal (Civil Division) arising from the decision of the Solicitors' Disciplinary Tribunal to suspend a solicitor from practice and to make an award of costs. A Divisional Court had dismissed the appellant's appeal against the decision to suspend him from practice and had granted a cross-appeal by the Law Society to order the appellant to pay 60% of the Law Society's costs of the disciplinary proceedings.

[40] In the course of his judgment, Sir Igor Judge (P) said, inter alia, at paragraph 39:

“Unless the complaint is improperly brought, or, for example, proceeds as it did in *Gorlov*, as a ‘shambles from start to finish’, when the Law Society is discharging its responsibilities as a regulator of the profession, an order for costs should not ordinarily be

made against it on the basis that costs follow the event. The 'event' is simply one factor for consideration. It is not a starting point. There is no assumption that an order for costs in favour of a solicitor who has successfully defeated an allegation of professional misconduct will automatically follow. One crucial feature which should inform the Tribunal's costs decision is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage."

[41] I consider that similar principles should apply to the appeal in this instance and I therefore make no order as to costs in this appeal.