NZLR

MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 74/95

BETWEEN	RUDOLF ISTVAN MAROS HOLLOKOI	
	Plaintiff	
AND	THE MEDICAL COUNCIL OF NEW ZEALAND	
	Defendant	

Hearing: 15 May 1996

Counsel: C J Hodson for Plaintiff
S S Williams with M Simmons for Defendant

Decision: 16 May 1996

ORAL DECISION OF McGECHAN J

Solicitors:

for Plaintiff
Kensington Swan, Solicitors, Wellington for Defendant

This is an appeal, or some might call it application, under sections 33A(2) and 23 of the Medical Practitioners Act 1968. It relates to a refusal on the part of the Council to grant probationary registration. It requires urgent disposition. However, it is an important and unusual matter and I have taken such time as is available to consider.

I must first note briefly the statutory background.

The Act recognises four types of registration; full registration under s18; conditional registration under s15; probationary registration under s33A, the category relevant here; and temporary registration under s33. The qualifications required for probationary registration under s33A are set out in ss1(a), (b) and (c) and ss(1A):

> "**33A. Probationary registration**-(1) Notwithstanding anything to the contrary in this Act, but subject to the provisions of this section, any person may apply to the Council for a certificate of probationary registration, and if it is satisfied that the applicant-
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> (a) Has a reasonable command of the English language; and
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> (b) Is the holder of a degree, diploma, or other qualification which-
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> (i) Was granted by a university or institution outside New Zealand; and
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> (ii) Entitles him to practise medicine and surgery in the country in which his degree, diploma, or other qualification was granted; and
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> (c) Has sufficient knowledge and experience to practise efficiently medicine and surgery in a hospital other institution or with a general practitioner,-
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> the Council may, on payment of the prescribed fee (if any), issue to him a certificate of probationary registration entitling him, subject to subsection (7) of this section, to practise as a medical practitioner for a period not exceeding 18 months in such hospital or institution or with such general practitioner as may be specified in the certificate.
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> (1A) The Council may, before issuing a certificate of probationary registration to any applicant under subsection (1) of this section, require the applicant to undertake and pass an examination set by the Council for the purpose of satisfying itself that the applicant has sufficient knowledge and experience to practise efficiently medicine and surgery in a hospital or other institution or with a general practitioner and that his command of the English language in relation to the practice of medicine and surgery is reasonable;

> and for the purposes of this subsection, the Council may conduct such oral, written, and practical examinations as it thinks fit."

The procedure for probationary registration under s33A is laid down through ss2 which invokes s19-23.

Briefly summarised, there is application to Council; it is considered by the Council, which has power to examine on oath. If Council is of opinion applicant is entitled to registration, applicant is registered; if not, applicant is not. There is no entitlement as of right to registration, nevertheless, in event of certain presently irrelevant, circumstances such as convictions and the like. Section 23 provides the so-called "appeal" to this Court.

I turn next to the history, both personal and institutional, underlying this matter.

Appellant was born in 1945 in Hungary. He qualified in Berlin over 1985 and 1986 with medical and scientific degrees, and appears to have received a doctorate magna cum laude in July 1986.

The Department of Health in New Zealand at that time was advertising abroad for junior doctors, fearing a shortage in this country. The appellant applied for and was accepted for such a position, and arrived in the country in July of 1986.

The position in relation to registration of doctors so arriving from overseas in like manner was causing some difficulty for the Council. The solution ultimately adopted was to grant temporary registration, at least initially, for an anticipated period of two years with an air fare provided home at that point. That was a category more usually employed for visiting students or tutors, but it was stretched to serve this purpose. As subsequent events have proved that may not have been altogether wise.

Appellant started work initially in the Otago area.

As time passed it emerged, and I must say predictably, that many who had so arrived on this supposedly temporary basis wished to remain in this country. Appellant was amongst them. The Council developed some concerns as to the quality of some allowed in and remaining in that way. There were not, at least at any early stage, particular concerns in relation to the appellant. However, the Council's solution to this more general problem, by late 1987, was to direct those here on such temporary registrations to either sit what was then known as the PRENZ, the equivalent of the New Zealand graduate level, or to commence specialist training with one of the Colleges. The latter seems to have been tacitly assumed to manifest a like level of ability.

There was a warning to the appellant in November 1987 along those lines; that is, that he should do one or the other. In any event, he enrolled in the training programme for the College of Psychiatrists in November 1987. That involved a commitment of some three years before Part 1 of the College's exam could be taken. That in itself comprised three elements of case studies, written examinations and a clinical. There was a Part 2 which may need to be sat subsequently unless exemption was obtained. As events transpired, his decision to take the specialist training route rather than sit PRENZ may have been unwise. It was taken on advice of colleagues; not advice from the Council, which in fact continued to warn as to the risks involved. In that connection in February 1989 a further warning issued that unless progress was made on the professional training side it may be necessary for appellant to sit what had now become NZREX examinations, the replacement for the old PRENZ. Appellant protested that possibility, and was in fact exempted from Parts 1 and 2 of NZREX comprising, it appears, English and multiple choice questions, but not then Parts 3 and

4 which comprised, it appears, short answer questions and the clinical oral aspect. Appellant has never sat those latter elements or their replacement.

After that introduction I can summarise the subsequent history relatively briefly. It contains a number of strands.

First, the appellant remained in employment in Otago, later Waikato and the Bay of Plenty. His work record was very good. There are no known complaints. He gained good standing with his colleagues, and in due course obtained high recommendations from some well placed to comment. He consistently obtained good reports as required in terms of his temporary registration, with one minor aberration which need not be explored further. Plainly he came to be, and is, valued where he presently is in the Bay of Plenty. He holds a position of Medical Officer Special Scale (psychiatry) which is of a senior character. Clearly he has now been working in this country for almost ten years.

Second, and with rather different impact, appellant struggled severely with the College training course. He eventually supplied five satisfactory case studies, but failed the second component of Part 1, namely the written examination, no fewer than four times. There was some doubt over dates. I record those ultimately accepted by counsel as March 1992, March 1993, March 1994 and August 1995. In view of those difficulties he has not, of course, made further progress toward the Fellowship.

Third, notwithstanding those difficulties, he nevertheless applied for full registration twice on 7 May 1993 and 21 December 1993 and later, and more realistically perhaps, probationary registration on 23 March 1994. That was declined on 22 August 1994. He applied in effect for reconsideration in March of 1995 and that was declined again on 28 March 1995, a decision to which I will return.

Fourth, the Council, and understandably, displayed some growing impatience with lack of progress by examination. By July 1993, at latest, it made it plain to the appellant his temporary registration was at risk. If he lost that then, of course, he lost the ability to practice in New Zealand, which had become his home.

Fifth, at the end when appellant did not sit a March 1995 examination, perhaps on medical grounds, and the Council had again declined his application for probationary registration on 28 March 1995, patience ran out. The Council informed him his temporary registration would end on 30 April 1995. This appeal filed 27 April of that year followed. The appellant has remained in New Zealand and remained working under extensions to temporary registration issued in view of this proceeding, albeit with growing concern at the delay.

It is proper I record at this point the terms of the decision of 28 March 1995 against which appeal is brought in the Council's statement in the minutes 14-16 March 1995, and the letter of 28 March 1995 to the appellant.

Minutes:

> "Dr Hollokoi is an advanced trainee in psychiatry and has held temporary registration since July 1986. At its September 1994 meeting, the Council resolved to extend Dr Hollokoi's temporary registration, for the final time, to allow him to continue working while he prepared for his fourth attempt at the RANZCP Written examination. His temporary registration was subsequently extended until the end of April 1995 as there had been a technical problem with his entry to the examination.
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> The Council was asked to reconsider its decision not to grant Dr Hollokoi permanent registration. Two letters were received from Dr Hollokoi, the earlier letter advising that he did not wish to appear at the Written examination on 15 and 17 March 1995, as he has had inadequate preparation time owing to a difficult workload. Attached to the second letter was a medical certificate indicating that he had a physical problem which made it difficult for him to write for an extended period. The

Council resolved to endorse its previous decision to grant Dr Hollokoi temporary registration until the end of April 1995 only.

Before further registration can be considered, Dr Hollokoi must show that he is making progress towards completing the requirements for specialist registration. If he passes the Written examination in August 1995 the Council will consider granting him further temporary registration to enable him to continue working while he prepared for the Clinical examination in October. A letter is to be written to the Assistant Registrar (Fellowships) confirming that a Certificate of Temporary Registration can be issued for the duration of the Written examination if required. The College will also be asked if special arrangements can be made for people who have a disability to sit the Written examination.

The Council does not choose to use its discretion to grant Dr Hollokoi probationary registration. To do so would create anomalies with other overseas trained doctors in a similar situation to his. He has not fulfilled the criteria and met the standard expected for probationary registration (which have been known to him since the outset) as he is not specialist eligible nor has he completed NZREX. Dr Hollokoi must meet the usual requirements for probationary registration, which have also been placed on other overseas trained doctors with whom he worked in psychiatry at Dunedin Hospital."

Letter of 28 March 1995 reads:

"The Council gave careful consideration to Dr Hollokoi's request for further registration at its meeting on 15-16 March 1995. Letters of support were received from Dr Pan, Dr Mackirdy and Dr Goodwin. In addition, the points raised in your letters were re-considered.

The Council does not choose to use its discretion to grant Dr Hollokoi probationary registration. To do so would create anomalies with other overseas trained doctors in a similar situation to his. He has not fulfilled the criteria and met the standard expected for probationary registration (which have been known to him since the outset) as he is not specialist eligible nor has he completed NZREX. Dr Hollokoi must meet the usual requirements for probationary registration, which have also been placed on other overseas trained doctors with whom he worked in psychiatry at Dunedin Hospital.

The Council resolved that Dr Hollokoi's temporary registration cannot be extended beyond 30 April 1995, the expiry date of his current certificate. Further temporary registration will only be considered when Dr Hollokoi is able to show that he is making progress towards completing the requirements for specialist registration. If he passes the RANZCP Written

> examination in August 1995, the Council will consider granting an extension of his temporary registration to enable him to continue working while he prepares for the RANZCP Clinical examination.
>
> I have advised Dr Hollokoi that I will write to Margaret Ettridge, Assistant Registrar (Fellowships) at the College and explain that the Council is willing to issue a Certificate of Temporary Registration for the duration of the Written examination to ensure that Dr Hollokoi can be accepted as a candidate."

I note in summary submissions on behalf of the appellant. It was urged that s23 should be approached as if the appeal were a hearing at first instance, with no onus to show the Council is wrong. Where on the face of information supplied an appellant, such as it was said the present, appears entitled to registration, then that should be accorded, or at least the Court should start from a neutral position. It was not, it was said, a matter of exercising discretion in favour of an appellant. It was urged that his qualifications, experience and professional support were of such substance that they demonstrated he had sufficient knowledge and experience under s33A(1)(c). His inability to pass examinations was dismissed as irrelevant, proving no more than that he cannot pass examinations. It was indeed mentioned that the Council had no power to require him to pass outside College examinations in the way stipulated. It was submitted the Council had fettered itself by its policy of requiring NZREX or specialist training, and had misplaced concerns over setting precedents. It was said this case would not do so. The court, it was urged, should be satisfied that appellant should be admitted to probationary registration.

Submissions for the Council took a very different perspective. It was submitted the Court should treat this as an appeal by way of rehearing, with corresponding obligation on appellant to show the Council was wrong. It should not be treated as a de novo proceeding. The Court should give due weight to the Council's expertise. It was said requirement for the Council to be "satisfied" suggested elements of judgment and discretion were involved, with approach tailored correspondingly. It was said that

s33A1(a)'s provisions that the Council, and I quote, "may" require examinations equated to power to do so which was to be exercised in any normal situation. The "may" did not mean "shall", but created a norm. Within that there was power to excuse from sitting the Council's examination if specialist training was achieved through a College. It was urged that, given the public interest, the Council must be cautious. It should require examinations in all but exceptional cases, and it was said must be consistent. It was submitted that the Council, when it said it saw no difference from other overseas doctors, was saying it saw a situation where either the NZREX or specialist training must be undertaken. The Council, it was said, was entitled to reach the view it did that appellant did not have sufficient knowledge and experience even apart from failing examinations. That requirement went beyond the merely academic. Support from colleagues was not enough, and an ability to practice in the United Kingdom on account of German qualification was not enough. Nor were the years of experience of more than limited relevance on the question. Counsel referred me to a decision which has some analogies, and which I note: ***Opara v New South Wales Medical Board*** (1982) 6 NSWLR 544.

I come to my decision on this matter in the light of these preliminaries.

I consider that s23, although referring in the marginal note to an "appeal", in reality provides for a fresh application. The matter in my view is to be approached de novo by the Court on such materials as are put before it, most usually of course those which the Council considered. There is in my view no onus either way. The provision is an unusual one, with its complete absence of reference to "appeal" within the body of the section in marked contrast to other provisions in the Act and in other Acts. I agree immediately, however, that in that process the Court will give weight to views previously reached by the Council in the previous decision in areas where the Council has expertise. That is simply no more than common sense.

I consider the strongest factor in any decision must be the public interest in ensuring that doctors attain a suitable standard by New Zealand expectations. The Courts will move with caution. Personal hardships and considerations of individual fairness may need to give way to that over-riding public interest concern.

It is clear that the appellant meets the opening requirements of s33A(1)(a) relating to English language and (b) relating to foreign qualification. The only question, and it is the crucial one, is whether he also meets the requirements of paragraph (c).

I must ask myself whether I am satisfied he "has sufficient knowledge and experience to practice efficiently in a hospital other institution or with a general practitioner". This of course requires a weighing of his now nearly ten years experience in New Zealand hospitals, mainly in psychiatry, and the knowledge and experience that demonstrates, against his clear inability to pass the written College examinations and the fact he has not been credited with the remaining NZREX Part or Parts.

Council's view as to that weighing process, as put forward on this appeal, is clear. Council says that experience in itself, even considered in the light of favourable views of colleagues, is not sufficient. Colleagues' views are subjective and can be biased by a desire to assist an employee. They are given diminished weight. There is, in Council's view, an over-riding need for an objective test by examination in all but, as it was put, the most exceptional cases. This was not one.

Of course I give Council's expertise real weight, but as this right of appeal demonstrates, it can never be conclusive in its own right.

I am not so sure. I have some concerns Council may have been somewhat diverted by collateral considerations in the decision which it reached, and I will come to those matters shortly. I must allow for that in assessing the previous decision.

I prefer to focus on the statutory s33(1)(c) test. It does not simply say "sufficient knowledge and experience to practise" full stop. It says "sufficient knowledge and experience to practise efficiently in a hospital other institution or with a general practitioner". It envisages situations in which other expertise, indeed it may be supervision, is available. The doctor will not be alone.

The condign fact is that the appellant has been doing exactly that since July 1986, nearly ten years, without known complaint and with widespread commendation from senior colleagues and regular satisfactory reports. By acid test of actual functioning, and over a period of some ten years, he has risen to the position of MOSS and shown to all appearances that necessary degree of knowledge and experience. I do not for a moment downgrade the significance of examinations or their usefulness as a test. They are the standard and objective means of appraisal. They should remain the usual means, and indeed there is room for some concern when, as here, a candidate fails College examinations no less than four times. The reality seems to be that it is beyond him, and I must approach this matter with that recognition. However, when that inability is weighed against the acid test of established ability to function in a hospital environment proven by ten years service and experience, it is in my view simply precious to regard those examinations or the remaining Parts of NZREX as necessary. It is possible, I suppose, that the appellant has just been extremely lucky. It is much more likely that he has the basic knowledge and experience required in terms of paragraph (c), and while I exercise caution and acknowledge the public interest elements involved, I am prepared to act on that likelihood.

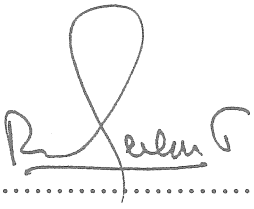
I do not ignore concerns expressed by Council in its decision, as recorded, which plainly weighed heavily with it. I do doubt whether these are legally relevant to the particular decision to be made, but in any event they cannot over-ride the directly relevant consideration to which I have just referred. Clearly the Council was concerned

at anomalies which it thought might be created relative to other doctors who had sat exams or had given up. This feared anomaly may not be real, on the evidence before me; but in any event this decision must be approached on appellant's own individual merits. Clearly also, the Council was concerned at setting some precedent. I do not see why. This is not any general decision that examinations are unnecessary, or should be dispensed with, or that experience in foreign countries as contrasted with New Zealand, or a year or two's experience in New Zealand can be any substitute. It is a wholly exceptional situation of a man who through a succession of circumstances has in fact worked for nearly a decade on temporary registration in hospitals in this country. It is very unlikely it will recur. If for any reason a duplicate situation did arise, then so be it. I do accept that this decision will open the way eventually for appellant to obtain full registration, provided he continues to practice satisfactorily for a period, and he will have achieved that without sitting the entirety of NZREX or obtaining specialist eligibility. That does not control entitlement to probationary registration under s33A, a provision which allows that to occur. It would not be correct in law to impose some premature full registration standard of knowledge and experience in lieu of that specifically prescribed by paragraph (c). Whatever follows from that statutory structure, must follow.

Finally, I do not ignore the *Opara* case. It has some interesting factual analogies and valuable logic. It was, however, decided on a different statutory provision, and the practitioner concerned had noticeably less experience in the country concerned. It is a decision on it own facts, which are not our facts.

In the result the application under s21 should be allowed. I see no need to remit the matter back to Council. The position is clear, and I must take the responsibility involved as the statute envisages. The application, or if one prefers, appeal, is allowed accordingly, and being of the opinion that within s21 Dr Hollokoi is entitled to probationary registration, I direct he be so registered.

I will reserve costs, a topic which may have some complications of its own.



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R A McGechan J