COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Public Law Division
PUB/jrv/00003

**IN THE MATTER** of an application by **DR. GAURI SHIRODKAR** for Judicial Review.

**AND**

**IN THE MATTER** of the Decision of the Respondent made and dated the 30th day of December A.D. 2020 that: "*The Bahamas Medical Council has reviewed your application for registration in Radiology. We regret to inform that your application was denied. The Council is unable to verify your specialist qualification in Radiology*." (***the Decision***)

**AND**

**IN THE MATTER** of the Medical Act 2014 (***the Act***).

**BETWEEN:**

**DR. GAURI SHIRODKAR**

***Applicant***

**v.**

**THE BAHAMAS MEDICAL COUNCIL**

***Respondent***

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|---|---|
| Before: | The Hon. Mr. Justice Loren Klein |
| Appearances: | Mr. Kahlil Parker, Ms. Roberta Quant for the Applicant<br>Mr. Raynard Rigby, Ms. Asha Lewis for the Respondent |
| Hearing Dates: | 2 September 2021, 12 November 2021, 3 March 2022, final submissions 25 March 2022 |

# RULING

Klein, J.

*Judicial review—Challenge to refusal to register and license applicant as a specialist in radiology—Medical Act 2014—Bahamas Medical Council—Application for Judicial Review—Principles—Illegality—Irrationality—Procedural impropriety—Reasons—Duty to give reasons in administrative decision-making—Damages—Availability in judicial review proceedings—Need to allege a cause of action at common law—Bad faith and malice—Breach of statutory duty—Constitutional claims—Discriminatory treatment—Exemplary and aggravated damages—Vindicatory damages*

*Order 53, R.S.C. 1978—Practice and Procedure—Alternative remedies—Affidavit evidence—Ex post facto evidence—Damages—Pleadings—Content of Statement—Need to set out claims in Statement with particularity—Ord. 18, r. 12, R.S.C.*

**INTRODUCTION**

[1] The applicant, Gauri Shirodkar, is a qualified medical doctor and radiologist. She was registered and licensed by the respondent, the Bahamas Medical Council ("the Council"), as a medical practitioner and employed by the Public Hospitals Authority ("PHA") for nearly a decade between December 2010 and December 2019 as a "radiology registrar" at the Princess Margaret Hospital.

[2] In June 2020, with a view to transitioning to a private medical facility, Dr. Shirodkar applied to be licensed and registered by the Council as a specialist in radiology, in accordance with the Medical Act 2014 ("the Act"). Her hopes were dashed in three terse lines in a 30 December 2020 letter from the Council:

> "The Bahamas Medical Council has reviewed your application for specialist registration in Radiology. We regret to inform that your application was denied. The Council was unable to verify your specialist qualification in Radiology".

[3] Somewhat taken aback by this decision, she again wrote to the Council to try to persuade them that she met the statutory qualifications to be registered as a radiology specialist and to reconsider their position. The Council reconsidered but did not relent. In an equally short and cryptic letter dated 13 January 2021 it reiterated that it was "…*unable to verify your specialist qualifications in Radiology*."

[4] This led to the applicant, on 4 February 2021, applying for leave to judicially review the decision. I granted leave on 18 March 2021 and the Originating Notice of Motion ("NOM") commencing the application was filed that very day. Following a directions hearing on 8 June 2021, the parties appeared before the court for the hearing of the substantive challenge on 2 September 2021. That hearing did not come on, due to commitments by the parties to attempt to resolve the claim, and the matter was subsequently adjourned on several occasions to allow discussions to take place. The efforts to resolve the matter looked very promising at one point but eventually unravelled. In the end, the parties agreed for the court to consider the application partly on the oral submissions already made during the various appearances and on the written submissions.

[5] Unemployed in the meantime, Dr. Shirodkar made the difficult decision to leave her husband (who is also a medical doctor and radiologist working in The Bahamas) and return half a world away to the United Kingdom with her young daughter to seek employment. Ironically, she found employment with the National Health Service ("NHS") in the United Kingdom as a consultant radiologist.

*Claim for relief*

[6] The Motion commencing the judicial review seeks a wide array of declarations and orders, some 15 in all alphabetically enumerated from 'a-o'. Quite a few of these are repetitive and they may be fairly summarized as follows:

(i) *certiorari* to quash the decision;
(ii) mandamus to direct the Council to register the applicant as a specialist in radiology in accordance with the Act;

(iii) a declaration that the refusal to register the applicant without affording the applicant due process or without lawful justification was *ultra vires* and unlawful;
(iv) a declaration that the refusal to register the applicant was irrational or '*Wednesbury unreasonable*';
(v) a declaration that the decision was taken in bad faith, and/or constituted an intentional and/or malicious failure or refusal by the Council to perform its statutory duty;
(vi) a declaration that the Council's conduct was arbitrary, discriminatory and otherwise "unconstitutional";
(vii) a declaration that the Council is estopped from refusing to register the applicant as a specialist in radiology; and
(viii) damages, including aggravated, exemplary and vindicatory damages for the alleged constitutional claim.

*Grounds of Challenge*

[7] There are also numerous grounds of challenge enumerated in the Statement. On a proper analysis, I am of the view that the main grounds may be distilled as follows: the decision was: (i) *ultra vires* and unlawful; (ii) irrational (*Wednesbury* unreasonable); (iii) taken in bad faith; and (iv) discriminatory and unconstitutional.

*Evidence*

[8] One of the defining features of this application is the inordinate amount of affidavit evidence filed, much of it after the proceedings were in train. As I shall come to explain presently, this reliance on *ex post facto* evidence is to be discouraged in applications for judicial review. In this regard, the applicant filed five affidavits in support of her claim—her first and second affidavits (respectively filed 4 February 2021, 3 August 2021), the affidavit of Dr. Elizabeth Darville (3 August 2021) and two affidavits by her husband, Dr. Muneesh Sharma filed on her behalf after she relocated to the UK (9 November 2021 and 18 March 2022). The respondent relied on four affidavits by Dr. Merciline Dahl-Regis, the Registrar of the respondent Council (filed the 9 July 2021, 26 August 2021, 30 August 2021 and 11 March 2022).

*The Legal Framework*

[9] As stated, the governing Act is the Medical Act 2014. It is a revising Act, which repealed the 1974 Medical Act. Its main objectives are to provide for the regulation of the medical practice in The Bahamas, the registration and licensing of medical practitioners, and disciplinary control over medical practitioners. The latter two functions are carried out through the Council, which is the professional body established under s. 3 of the 1974 Act and continued by s. 4 of the Act. Atop the various functions set out at s. 6 is the responsibility to *"(a) register and license persons who satisfy the requirements under this Act*…".

[10] Part IV of the Act deals with "Registration and Licensing". The main section relevant to these proceedings is s. 26 ("*Specialties and registration of specialists*"), along with the Third Schedule, which sets out the "*relevant post-graduate training and practice*" required in relation to each specialty for registration. I will reproduce the relevant portions below. It will also be necessary to refer to other sections of the Act for the discussion of various issues, and the appropriate statutory reference will be made at that point.

[11] Section 26 provides as follows:

> "26. Specialties and registration of specialists.
>
> (1) For the purposes of this Act, the Council recognizes –
> (a) as specialties, the areas of medical practice as specified in the Third Schedule; and
> (b) in relation to each specialty-
> (i) the institution or body whose certification shall be accepted as proof of qualification; and
> (ii) the minimum periods of relevant post-graduate training and practice required as specified in the Third Schedule.
>
> (2) A medical practitioner shall be eligible to be registered as a specialist in the specialist register where the medical practitioner satisfies the Council that he has completed the required tuition and training in a specialty, and has obtained the relevant qualification from an institution or body recognized by the Council.
>
> (3) An application for registration as a specialist shall be made to the Council in Form A in the Second Schedule.
>
> (4) Where the Council receives an application referred to under subsection (3), and is satisfied that an applicant is qualified to be registered as a specialist, the Council shall, upon the applicant making payment of the fee specified in the Seventh Schedule, grant to the applicant a certificate of registration as set out in Form C in the Second Schedule.
>
> (5) The Council shall register, in a register to be called the specialist register, a medical practitioner who possesses the qualification relating to a specialty specified in the Third Schedule.
>
> (6) The specialist register shall indicate the specialty that each specialist's name is registered.
>
> (7) The Council shall require a medical practitioner who desires to be registered as a specialist, pursuant to subsection (5) and section 27(1), to submit to a review by the Assessment Committee.
>
> (8) Where a medical practitioner relies on qualification that is not granted by an institution set out in the Third Schedule, the Council may confirm that the qualification sought to be relied on is of equivalent standard as the qualification set out in the Third Schedule.
>
> (9) A medical practitioner who is not registered as a specialist and who –
>
> (a) engages in the practice of medicine as a specialist; or
> (b) represents that he is entitled to engage in the practice of medicine as a specialist, shall be guilty of professional misconduct."

[12] Part 1 of the Third Schedule sets out the "*Institutions for Post-Graduate Training and Certification as Specialists*". The relevant post-graduate training and certification acceptable to the Council for registration as a medical specialist are those recognized by the appropriate Royal Colleges of the United Kingdom ("UK") and their equivalent Boards in the Commonwealth, and the Diplomate Boards of the United States of America ("US"), in respect of eight specialties and their major sub-divisions. The sub-divisions are not listed, but the specialties set out ('a'-'h') are surgery, internal medicine, obstetrics and gynaecology, anaesthesia, psychiatry, pediatrics, pathology, and family medicine. There is also a catch-all provision for other institutions whose training and certification may be considered equivalent— "*such other institutions providing post-graduate training and certification as approved by the Minister on the recommendation of the Council*."

[13] Part II of the Third Schedule sets out a list of eight specialties and the minimum training required, the relevant part of which is as follows:

> **"List of the specialties and the relevant training required for specialty certification**
>
> The following qualifications in respect of each of the specialties set out in the first column obtained upon completion of training for the corresponding minimum periods set out in the second column.
>
> | Name of Specialty | Minimum period of relevant training required for specialty certification |
> |---|---|
> | diagnostic radiology | 3 years" |

[14] Part III of the Third Schedule sets out a list of some 36 specialties, and the part most relevant to this application is as follows:

> **"List of Specialist Qualifications**
>
> | Name of Specialty | Minimum period of relevant post-graduate training |
> |---|---|
> | radiology | 3 years |
> | radiotherapy | 3 years" |

*Observations on the legislative scheme*

[15] I think it is appropriate to point out at this stage that the legislative scheme relating to the qualification and certification of medical specialists is not a model of drafting clarity. To begin with, it may be noted that the institutions in Part I of the Third Schedule whose post-graduate training and certification are said to be acceptable for specialist registration only name *eight* medical specialties and their sub-divisions. As stated, the sub-divisions are not set out, but it seems rather clear that radiology does not come within any of the specialisms mentioned. While the Court is reluctant to quote "*Wikipedia*" as an authoritative source, in an entry on medical specialties, radiology is not listed as a subdivision of any of the eight medical specialties mentioned in Part I. It appears as a specialty of its own or is otherwise classified under the group Diagnostic and Therapeutic Medicine.

[16] So, as a matter of strict construction, there are no institutions prescribed under Part I whose qualification and certification are said to be acceptable for a radiology specialism. It may be that Parliament intended that the training and certification from the Royal Colleges of the UK, the equivalent Boards in the Commonwealth, and the US Diplomate Boards would be acceptable for all specializations, subject to any other institutions approved on a case-by-case basis by the Minister on the Council's recommendation. But Part I only contains eight specialties (including their sub-divisions), and the principle of statutory construction known as e*xpressio unius est exclusio alterius* (that which is not mentioned is excluded) might be thought to apply.

[17] Then, there are *eight* specialties listed in Part II, which sets out the relevant training periods for specialty certification. Curiously, the specialties here do not correspond to those mentioned in

Part I, although the list does include the head '*diagnostic radiology'*. The position is not made any clearer by Part III, which goes on to list roughly 36 specialties and sub-specialties for the purpose of indicating the relevant period of "post-graduate" training required. Relevantly, this list includes the specialties of 'radiology' and 'radiotherapy'. It is questionable whether the training periods mentioned in Part II and III are intended to be cumulative, as Part III obviously includes many specialties which are not listed in Part II, as well as sub-divisions of several specialties already listed in Part II (e.g., radiotherapy).

[18] In this regard, it is also noted that Part II and III are apparently intended to deal with different requirements: Part II states the minimum period required for *specialty certification*, and Part III states the minimum period of *post-graduate training* required, in each case said to be three years. Based on the evidence of the respondent Council, and in particular the finding that the applicant does not have the "*three-year course/training as is required by the Third Schedule*", it does not appear that the Council regards the periods as cumulative.

[19] Finally, it is noted that s. 26, the inducing section for the Schedules, provides at (1)(b)(ii) that, in relation to each specialty, the Council recognizes "*…the minimum periods of relevant post-graduate <u>training</u> and <u>practice</u> required as specified in the Third Schedule*" (underlined emphasis supplied). However, as mentioned, while Parts II and III set out relevant training periods, nothing in the Third Schedule sets out any requirement for any period of *practice.*

[20] In making these observations, I emphasize that the Court does not purport to embark on a definitive construction of the provisions of the Schedules and, furthermore, no significant submissions were addressed to me on the point. But these observations are an important backdrop to the Council's decision, and perhaps they ought to prompt the appropriate authorities to have a critical look at the legislative scheme. It hardly needs stating that any lack of clarity in the statutory requirements can hardly be productive of good decision-making.

*Brief factual background and evidence*

[21] Dr. Shirodkar was registered by the Council in the Medical Register on 28 September 2010 as a medical practitioner, pursuant to s. 29(1)(b) of the Act. She was licensed by the Council as a medical practitioner for each of the succeeding years, most recently on the 18 September 2018. On 16 June 2020, she applied for registration and licensure as a specialist in radiology and included copies of her degrees and references. Upon review of the application, the Council concluded that she needed to provide "*evidence of her specialist registration with the General Medical Council*" ["GMC", United Kingdom], and this it invited her to do by letter dated 5 October 2020. It seems that Dr. Shirodkar had provided them with evidence of her registration on the general register of the GMC (in circumstances that will come to be explained), but the Council thought that her status on the specialty register was "unclear". The Council, through its own checks on the GMC's website, ascertained that she was not on the specialist register.

[22] As indicated in the first affidavit of Dr. Dahl-Regis, filed 9 July 2021, the matter was submitted for consideration to a "*Review Committee*" of the Council, which met on the 23 November 2020 to review the application. The findings of that committee, which recommended that the s. 26(4) registration not be granted, were discussed at a meeting of the Council on 1 December 2020 and accepted. Following this, by letter dated 30 December 2020, the Council denied the application, in terms that have been set out above.

[23] According to the applicant's evidence, she replied by email on 5 January 2021 setting out her qualifications and inviting a reconsideration of her application. In addition to her primary medical qualifications, which is a medical degree ("MBBS") from Goa University in 2005, she listed the following specialist qualification and experience in radiology:

(i) Diploma in Medical Radio-Diagnosis ("DMRD") from Goa University (June 2005-May 2007).
(ii) Senior Registrar, Goa Medical College (Sept. 2007-March 2009) (India).
(iii) International Member of the American College of Radiology, certificate dated 14 July 2015.
(iv) Member of the Indian Radiological & Imaging Association.
(iv) European Diploma in Radiology (EDiR), 11 September 2017.
(v) Fellow of The Royal College of Radiologists ("FRCR"), by Certificate dated the 25 day of May A.D, 2018.
(vi) Radiology Registrar, Princess Margaret Hospital (Dec. 2010-Dec.2019)

[24] That letter also explained the circumstances in which she had registered with the GMC in April 2020. She indicated to the Council that she had registered with the GMC as a general practitioner following an interview with Northampton General Hospital in the UK in 2019, which led to her being offered a position as a consultant radiologist. She explained that a certificate of enrollment on the specialist register ("CESR") was only possible after two years of active practice in the UK, although it was not necessary to work as a radiologist specialist in the UK. She reminded the Council that she had never represented to them that she was on the GMC's specialist register, and that much is very clear from the terms of the letter.

[25] It appears that following this exchange, the Council "reconsidered" the application, presumably pursuant to s. 20 of the Act. That section provides for the Council, where it "*refuses to register an applicant*", to reconsider its decision upon a written request by the applicant made within three months of receipt of the notice of refusal. Where the Council decides to reconsider an application, it can either register the applicant, refuse registration, or refer the matter for review by a panel appointed by the Minister after consultation with the Council. It is arguable, from the placement of that section within the Act—it directly follows the sections dealing with registration of a "*medical practitioner*" and comes just before the s. 21 right of appeal in respect of refusal of registration as a "*medical practitioner*"—that the right of reconsideration was intended only to apply to registration as a general medical practitioner. But there is nothing to prevent the Council, as part of its decision-making process and in the interest of fairness, from reconsidering a decision it has made. In any event, following its reconsideration, by letter dated 13 January 2021 the Council indicated:

> "*Your application for registration was revisited by The Bahamas Medical Council. We regret to inform you that your application was denied. The Council is unable to verify your specialist qualifications in Radiology*."

[26] As seen, the decision letters were terse and contained only the very general explanation that the Council was unable to verify the applicant's specialist qualification. During the proceedings, the court gave leave to the respondent to file supplemental evidence to clarify and explain its decision-making process, and likewise the applicant had leave to file responsive evidence. This was not only because there was little by way of elucidatory evidence to help

the court understand how and why the decision was taken and to assess its lawfulness but, as explained, the Council further considered the application even after the refusal of 13 January 2021. By way of additional evidence, the Council filed a series of affidavits. Unsurprisingly, counsel for the applicant complained that the evidence went beyond being merely explanatory, but instead was an attempt to provide *ex post facto* justification for the decision. I will have something to say about this a little later.

[27] In the second affidavit of Dr. Dahl-Regis, which was filed 26 August 2021, the Council supplemented its decision to deny registration as follows:

> "6. The Council is guided by the Third Schedule of the Medical Act in its determination of qualification as a specialist. The Council does not operate on matters that are extrinsic to the Act. The requirement under part II of the Medical Act is for an applicant seeking specialist registration to complete a minimum period of 3 years of relevant training in diagnostic radiology and a similar period of training under Part III in 3 years of post-graduate training in radiology. Prior to the Applicant's entry in The Bahamas, she did not possess the required 3 years training. The Council was not provided with a letter from Dr. Payne-Fielding, the Director of Radiology at Princess Margaret Hospital/Public Hospital Authority, setting out the level of training provided to the Applicant and such or similar matters that address her professional credentials. This absence from the application was a fundamental deficiency in meeting the requirements under the Act.
> […]
>
> 10. It is also important for me to highlight the fact that the Council has a duty to members of the public to register and license persons who are eminently qualified having met and satisfied the requirements of the Act. The Council has a duty to also safeguard the public from unqualified physicians and has to maintain the public safety. This duty applies to all category of physicians including radiologists."

That affidavit also condescended to pointing out that Dr. Shirodkar did not submit to the Council a copy of a work permit issued by the Department of Immigration, said to be a requirement under s. 15(6) of the Act. That section requires a non-Bahamian or non-public officer to have the "*concurrence of the Minister responsible for Immigration*".

[28] In the third affidavit, filed 30 August 2021, the Council was at pains to explain its references to the "review committee" referred to in the first affidavit, which considered the application and made recommendations to the Council.

> "3. In my substantive Affidavit filed on the 9th June 2021, I indicated that the Applicant's application was referred to a review committee of the Council. This committee is a sub-committee of the Council. The committee is not and does not function as the Special Review Committee or the Assessment Committee as are set out and described in the Medical Act. The Review Committee is comprised of Council members who review the application and share views with the full Council. The Council believes that this approach aids in the efficiency of the application process. The review committee of the Council does not render a decision on the application. The Council alone comes to a decision on an application guided by the provisions of the Act."

[29] Further explanation was attempted in the fourth affidavit filed 11 March 2022 (erroneously intituled as the "third affidavit"). In particular, it was indicated that the "Assessment Committee" of the Council met to consider the application of Dr. Shirodkar and presented its findings on 23 November 2021. Based on those findings, the Council remained of the view

that "*Dr. Shirodkar's application does not meet the requirement under the Medical Act to justify her registration on the specialist register*." That affidavit contained several excerpts from the Assessment Committee's findings, as follows:

> "3. The Assessment Committee met to consider the application of Dr. Shirodkar. On 23rd November 2021, the Committee submitted a formal report to the Council which in part stated:
>
> > The Assessment Committee noted that her employment as a Registrar in the Department of Radiology was not a training program nor was there an account of her specialist training exposure at the Princess Margaret Hospital.
> >
> > The assessment committee also reviewed the files of 24 Radiologist who were on the specialist Register after the Medical Act came into force in 2014.
> >
> > It is important to note that this qualifying group were graduates from accredited training institutions in Canada, United Kingdom, South Africa, The West Indies, India and UWI, Jamaica. All 24 Specialists have obtained the required minimum 3 years formalized training in Radiology with the award of a Certificate of Completion.
>
> […]
>
> 7. Having regard to the qualifications that Dr. Shirodkhar holds, which is not a three-year course/training as is required by the Third Schedule of the Medical Act, Council has no lawful basis to register Dr. Shirodkhar on the specialist register.
>
> 8. Upon Dr. Shirodkhar's obtaining specialist registration by the General Medical Council (UK) in Radiology, the Council will likely favour her registration on the specialist register as she would have satisfied the requirements under the Third Schedule of the Medical Act."

[30] There is no indication that the findings of the Assessment Committee were ever drawn to the applicant's attention, who by this time had temporarily relocated to the United Kingdom. But Dr. Dahl-Regis wrote to the applicant's attorneys on 13 January 2021 seeking the following information "*to assist the Council in its deliberations*".

> "(i) A copy of her Certificate of Completion of Completion of Training (CCT) in Radiology from the Royal College of Radiologists (or an equivalent institution).
> (ii) Confirmation that she has obtained specialist qualifications in Radiology from the United Kingdom's General Medical Council.
> (iii) The exact dates when the applicant obtained the FRCR parts 1 and 2 and the circumstances which led to their attainment, if she was in full time employment at PMH.
> (iv) Confirmation of her position at PMH during her tenure."

[31] In the applicant's responsive evidence, some of which is admittedly argumentative, she maintains her eligibility to be registered and attacks the decision-making process of the respondent. In her second affidavit she states:

> "3. Dr. Dahl-Regis seeks, at paragraph 7 of her Affidavit, to suggest that I do not meet the requirements under Part II of the Medical Act 2014 which requires "an applicant seeking specialist registration to complete a minimum period of three years of relevant training in diagnostic radiology and a similar period of training under Part III (*sic*) 3 years of post-graduate training in radiology." However, the Respondent failed to present this, or any reasoned or reasonable justification, as the basis for its decision denying my application,

> made and dated the 30th day of December A.D. 2020, the subject hereof. The Respondent seeks to challenge my post-graduate Diploma in Medical Radio-Diagnosis from Goa University, dated the 28 day of December A.D. 2017, on the basis that it was a two-year program, wholly ignoring my subsequent post-specialist training as a Radiologist." […]
>
> 9. I note that the Respondent has produced an exhibit from the General Medical Council that states that I am not on the GP Register. I must note that this is solely because I have not yet arrived in the UK for verification of my identity, which is an administrative matter. Due to the Respondent's unreasonable and unlawful denial of my application, and undue delay in addressing the same, I have been required to leave my husband, who resides and works in The Bahamas, to take up employment as a Radiologist in the United Kingdom, as I cannot work in The Bahamas until the matter of my specialist licensure is resolved. I will be working in the UK as a Consultant in Radiology. The suggestion that I am not qualified to work as a Radiologist in The Bahamas, where I have been working as a Radiologist and living for over a decade is deeply disturbing and professionally embarrassing."

[32] The first affidavit of Dr. Muneesh Sharma, Dr. Shirodkar's husband, was filed 9 November 2021. The main thrust of that affidavit was to set out the nature of the two meetings the applicant (or her husband, as her agent) had with the Council. It basically confirmed that the meeting held in mid-December 2020 was with Dr. Dahl-Regis herself and not the Council. The second meeting was attended by Dr. Sharma and he states that the meeting in "*mid to late January AD 2021*" was only between himself and Ms. Gregoryia Knowles, the Respondent's Office Administrator. Although it was realized that the meeting with Ms. Knowles was not "*a hearing with the relevant and necessary parties*", Dr. Sharma says the applicant and those supporting her "*were constrained to take whatever opportunities to intervene on the Applicant's behalf that we able to secure for ourselves*…". Mr. Rigby takes issue with this affidavit and challenges its admissibility, but I will come to these objections in due course.

[33] Dr. Sharma's affidavit also alleged that:

> "The Respondent's conduct complained of herein has resulted in loss and damage to the Applicant and the separation of our family. My wife and daughter have had to relocate to the UK, where she is presently working as a Consultant Radiologist, due to the Respondent's inordinate and unreasonable delay in addressing, and unreasonable denial of, the Applicant's application. The Applicant had secured employment with Oaktree Medical Center at a salary of $8,000.00 per month in June A.D. 2020, commencement of which was conditional upon her securing the requisite registration and licensure applied for from the Respondent to practise privately as a Radiologist in the Bahamas."

[34] The second affidavit of Dr. Muneesh Sharma was filed on 18 March 2022 in response to the fourth Affidavit of Dr. Dahl-Regis. He deposes that the Assessment Committee's Report, which was purportedly provided to the Council on 23 November 2021, was never disclosed to the applicant until it was summarized in the affidavit filed 11 March 2022, and she was not allowed an opportunity to respond to anything in it. Further, it disputes the statement in the fourth Dahl-Regis affidavit that the applicant's employment with the PHA "*was not a training program nor was there an account of her specialist training exposure at the Princess Margaret Hospital*." I set out a few select paragraphs from that affidavit:

> "6. Had the Respondent engaged with the Applicant regarding the nature of her work with the PHA, the Respondent would have been advised of the fact that the Applicant was at all material times independently, multimodality (*sic*), at a Consultant Radiology level at the Princess Margaret Hospital. The Applicant taught students at the University of the West

Indies (UWI), conducted biopsies, and worked at the same level as, or above, those holding specialist licensure from the Respondent. …

12. Dr. Dahl-Regis self-servingly suggests that the Respondent "requests that applicants with UK training provide either the CCT or CESR issued by the GMC as the basis for reciprocity". Firstly, this has never been a reason presented by the Respondent for its refusal of the Applicant's application. Secondly, the Medical Act 2014 does not speak to 'reciprocity', instead the Respondent is obliged to consider each application on its merits. Further, the Applicant's application was not based on her having received or, having asserted, any UK training. Therefore, the CCT and CESR are wholly irrelevant to the Applicant's application. The CCT is only relevant to UK trained physicians seeking to secure their CESR. …

17. Not only does the Applicant maintain that her DMRD is equivalent to the three-year course or training referred to in the Act, but this is also demonstrated by the fact that the Applicant was hired to work as a Radiologist by the PHA and was registered and licensed by the Respondent to take up the said employment. The Applicant was engaged by the PHA as a Radiologist based upon her DMRD, prior to her securing her FRCR and EDiR, which qualifications she earned during her subsequent 9 years working as a Radiologist in The Bahamas."

[35] I turn finally to the affidavit of Dr. Elizabeth Darville, herself a specialist in radiology, which was submitted in support of the applicant's application. Dr. Darville explained that the affidavit is made to "*assist the court regarding the status of any person holding the Degree of Fellow of the Royal College of Radiologists (United Kingdom) based on my experience as a Radiologist holding the Degree of Fellow of the Royal College of Physicians (Canada*)." I refer to a few relevant paragraphs below.

"3. The Degree of Fellow of the Royal College of Physicians (FRCP), Surgeons (FRCS), or any of the Specialties represented by the Royal Colleges, is the highest academic formal training and examination-based degree that can be conferred upon a physician, surgeon, or any of the other several disciplines in their chosen specialty, in countries using the British system of medical training, for example, United Kingdom, Canada, Scotland, Australian and New Zealand (who share a College).

4. Over the past fifty years, within the United Kingdom, some specialties have been allowed to move from under the umbrella of the two original Colleges and thus hold their own letters rather than be designated FRCP or FRCS and then have their specialty designated in brackets thereafter. Radiology is one of these and FRCR is today the same degree as FRCP (Radiology). This change has not been extended to all countries, for example in Canada Radiology remains under the umbrella of FRCP (C) Radiology.

7. In the United Kingdom, for the holder of an FRCR placement of one's name only requires that you work within the United Kingdom for a period of approximately eighteen months, which work would then have to be signed off on by your head of department. Because you hold your Fellowship, such work will be as a Consultant, as is the case with the Applicant at present. A consultant is the highest level of the work structure within a hospital or clinic within countries operating under the British system and is therefore entry level for Fellows of the Royal College. Your time with the institution is signed off and submitted to the Royal College by the head of your department, and then your name is placed on the scrolls. …

9. Many foreign graduates obtain their Fellowships and go directly back to their country of origin. They may or may not have UK General Medical Council registration, but their names are not on the scrolls of the College. This does not negate the fact that they earned,

> hold and are due the full privileges of a Fellow of the Royal College. It is important to understand that the process of getting one's name on the scrolls has nothing to do with the Degree of Fellow of the Royal College, and neither adds, nor enhances in any way, that Degree. The process merely gets your name on the specialty scrolls."

[36] It is against this evidential backdrop that I now go on to consider the applicant's claim.

**DISCUSSION AND ANALYSIS**

*Preliminary Point—Exhaustion of alternative remedies*

[37] The general rule is that judicial review is not suitable where other means of redress are "*conveniently and effectively*" available to a party (per Lord Bingham of Cornhill in *Kay v Lambeth London Borough Council* [2006] 2 AC 465). This is especially so where the alternative redress is based on a statutory scheme, as it has been said that to allow a claim for judicial review to proceed in circumstances where there is a statutory procedure runs the risk of undermining Parliament's will (per Moore-Bick LJ in *R (Wilford) v. Financial Services Authority* [2013] EWCA Civ 677, at [20]). The rule is not inflexible, however, and the court may nevertheless grant leave if it is of the view that the alternative remedy may not be available, suitable or not timely or efficacious (see, for example, *R v Hallstrom, ex parte Waldron* [1986] 1 QB 824 at 852, per Glidewell LJ).

[38] Mr. Rigby contends in his skeleton argument that the applicant did not exhaust alternative remedies available to her under the Act, i.e., a statutory right of appeal under s. 21. However, the alternative remedy point was not pursued by the respondent as a reason for the court to set aside leave, nor was it suggested that it precluded a hearing on the merits. It was simply to point out the different function of remedies available at judicial review as contrasted with an appeal. For example, the respondent contended that even if the applicant were successful, the court could not issue mandamus to require the respondent to register the applicant, whereas if the hearing were by way of appeal, the court could order registration of the applicant if it allowed the appeal. This is certainly right and indeed it is nothing more than a statement of the cardinal principle that judicial review is concerned with the decision-making process and that the court will not act as an appeal body and substitute its decision for that of the authority or tribunal legally empowered to make the decision (*Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 [1161]).

[39] For completeness, the alternative remedy point had been canvassed during the *ex parte* application for leave, and Mr. Parker was aware that a challenge could be mounted at the substantive hearing as a ground for refusing judicial review, or any relief. At the leave stage, the question was raised as to whether the appeal process was available to the applicant, based on the provisions of s. 21. In this regard, it is to be noted that s. 23 (1) of the Medical Act 1974 provided a right of appeal (then to the Court of Appeal) generally to "*any person aggrieved*" by the failure or refusal of the Council to register him under the Act, or by an order made by a disciplinary committee. The 2014 Medical Act, which repealed the 1974 Act, prescribed a right of appeal to the Supreme Court, but the right to appeal is expressed in language which is far more circumscribed:

> "21 (1) Where—

(a) an applicant is aggrieved by the refusal of the Council to register the applicant as a medical practitioner; or
(b) the Council has terminated the registration of a medical practitioner in accordance with section 19(2),

the applicant or medical practitioner may, within three months of the date of the notice of refusal or termination, appeal to the Supreme Court against the decision of the Council.

(2) The Judge, at the hearing of the appeal, may—
(a) dismiss the appeal;
(b) on the basis of a finding of procedural irregularity, direct the Council to reconsider the application; or
(c) allow the appeal and direct the Council to register the applicant."

[40] Mr. Parker submitted that based on a plain construction of the section, it appears that the right to appeal is granted only in respect of a refusal to register, or the termination of the registration of, a *medical practitioner* as opposed to a *specialist.* In fact, medical practitioner and specialist are separately defined in the definition section, and while one must necessarily be a practitioner to be registered as a specialist, the provisions relating to registration as a general medical practitioner and as a specialist are discrete. However, as there was no substantive challenge to the judicial review proceedings being heard on the ground of alternative remedy, the court did not have to come to a definitive construction of the section. So there remains, for another day, the question as to whether Parliament intended to exclude from s. 21 a right of appeal for a medical practitioner refused registration as a specialist.

[41] I would indicate in passing, however, that it does not seem logical that the statute would have intentionally created a dichotomy between the two categories with respect to the availability of a right to appeal. But it would have been a very easy thing for the draftsman to say that the right of appeal was being granted against refusal to register, or the termination of registration, as a medical practitioner or a *specialist.* I was (and am) satisfied, therefore, that any doubts as to the availability of an appellate remedy under s. 21 to a medical practitioner refused specialist registration based on the possible construction of the Act, ought to be resolved in favour of the applicant. I therefore exercised my discretion to grant leave on that basis.

*The Grounds of Challenge*

[42] As mentioned, the claimant challenges the Council's decisions on numerous grounds, which are stated rather disparately in the Application, along with a plethora of reasons, many of which are overlapping. But I will deal with the grounds in turn, as they have been summarized above, for the purposes of this Ruling.

*Illegality*

[43] The first attack on the decision is that it was unlawful, in the main because the respondent failed to hear and determine the application according to law. In this regard, the applicant pointed out that s. 26(7) (reproduced above) requires an applicant who desires to be registered as a specialist pursuant to subsection 5 (i.e., qualified by the Third Schedule), to "*submit to a review by the Assessment Committee*." It will be recalled that the Council specifically referred the application to what it called a "Review Committee", whose recommendations it accepted. The applicant contends that the application was "*clandestinely referred by the Respondent to an undefined, undisclosed, and ostensibly ultra vires 'Review Committee'"*, when it should

have required the applicant to submit to a review by the Assessment Committee if it wished to interrogate her qualifications.

[44] Mr. Rigby sought to counter this point by reference to s. 32, which in addition to empowering the Council to establish three standing committees (the Assessment Committee, the Complaints Committee and Disciplinary Committee), authorizes the Council to establish other *ad hoc* committees to assist it in carrying out it functions (s. 32(2)(a)). The third affidavit of Dr. Dahl-Regis attempted to explain the "review committee" as one of these *ad hoc* committees. However, s. 32(2) (b) specifically provides that the Council may—

> "…delegate to a committee referred to under paragraph (a) any function, other than a disciplinary function, qualification assessment function or investigation of a complaint." [Emphasis supplied.]

Section 33 sets out the composition, procedure for meetings and functions of the Assessment Committee, which includes in part that the Committee shall—

> "(a) …examine applications for registration and advise the Council on the adequacy of the qualifications of an applicant for registration and, in the relevant case, the additional qualifications that are required for registration;…
> (b) …be responsible for the implementation and publication of the system of assessment."

[45] In other words, it is clearly the statutory function of the Assessment Committee to examine any applications for registration and advise the Council. It therefore ineluctably follows that the delegation of any assessment functions to an *ad hoc* "Review Committee" was an improper delegation of functions and *ultra vires*. For this reason alone the decision of the Council was unlawful (see, for example, *R v Port Talbot Borough Council, ex parte Jones* [1988] 2 All ER 207). In the cited case, it was held that the decision to allocate housing to the applicant was unlawful, where it was taken primarily by the Chairman and Vice-Chairman of the Council, in consultation with the Borough Housing Office, when under the relevant delegation arrangements made in reliance on the Local Government Act the power was delegated to the Borough Housing Officer. Mr. Rigby's point that the Council took the decision, notwithstanding that it accepted the advice of the Review Council, is without merit. A 'review committee' had no lawful authority to advise the Council on an issue of registration. That is the statutory function of the Assessment Committee.

[46] I therefore would hold in favour of the applicant that the decision was not made in accordance with the statutory requirements and is therefore unlawful. This alone is sufficient to set aside the decision, but there are several other aspects to the decision-making process which must be addressed.

*Procedural impropriety and ultra vires*

[47] The applicant also complains that the decision-making process was flawed, and it is therefore procedurally improper and *ultra vires*. In this regard, it is possible to discern two manifestations of the claim of procedural impropriety as follows: (i) that the applicant was not afforded natural justice rights and due process in the hearing of her application, in particular that she was not afforded an opportunity to make proper representations; and (ii) that the basis

or reason for refusal was not disclosed, in other words, that no proper or lawful reasons were given for the decision

*Due process*

[48] It scarcely needs stating that a decision-maker has a duty to observe the rules of natural justice or due process in the course of their decision-making. One component of this is that a person must be given a proper opportunity to be heard and make representations in respect of a decision which affects them, especially where property rights might be engaged. This duty to act fairly, as it has been described in modern authorities, is somewhat elastic and may vary from case to case. As said in the oft-quoted speech of Lord Bridge of Harwich in the leading case of *Lloyd v. McMahon* [1987] AC 625 [702-203] (reiterated by the Privy Council in the very recent decision of *Public Service Commission v. Ceron Richards (Trinidad and Tobago)* [2022] UKPC 1):

> "…the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demands when any body, domestic, administrative or judicial, had to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguard as will ensure the attainment of fairness."

[49] In this regard, the chief complaint seems to be that the applicant was not afforded a proper right to be heard and make representations to address the Council's concerns. Initially, the evidence was unclear as to the level of engagement and interaction the applicant had with the Council or its representatives. In fact, this was one of the primary considerations on which the court granted leave to the respondent to adduce further affidavit evidence to fill in the gaps in the explanation of the decision-making process.

[50] In the first affidavit of Dr. Dahl-Regis, it is stated that the Council issued letters dated 5 October 2020, 30 December 2020 and 13 January 2021, which they say went unanswered, requesting Dr. Shirodkar to "*verify her specialist qualifications in radiology*". This is obviously an incorrect assertion: it is contradicted by the affidavit itself, where Dr. Dahl-Regis states that "*Dr. Shirodkar submitted a response to my letter of 30th December 2020 and that response by letter dated 5th January 2021 did not satisfy the nature of the inquiry raised and failed in the view of the Council to verify her specialist qualifications*." In her second affidavit, the applicant also states categorically that she responded to each communication from the Council, the last of which resulted in her instituting JR proceedings. That affidavit enclosed her response to the letter of 5 October 2020, which was dated that same day, to a Ms. Knowles, the Council Administrator.

[51] As mentioned, there was also some dispute as to the nature of the meetings the applicant had with the Council. In the third affidavit of Dr. Dahl-Regis, it is stated that the Council "*met with the applicant on two occasions during the application process and informed her (and her husband) of the requirements under the Third Schedule of the Act*." The reference to the two meetings, as clarified by the first Sharma affidavit, appears to be the following: (i) a meeting

that was held with the Registrar of the Council (Dr. Dahl-Regis) on an unspecified date in January 2021 (the affidavit says January *2020*, but this is clearly a mistake), at the request of Dr. Shirodkar; and (ii) a meeting on 29 January 2021 with Dr. Shirodkar's husband, Dr. Muneesh Sharma, who met with Ms. Knowles "*to discuss Dr. Shirodkar's qualifications*." As to the January meeting with the Registrar, the applicant said it was arranged "*after repeated requests, which meeting was inappropriately hostile and left me in tears at the poor treatment I received*."

[52] There are several observations to be made in respect of these meetings. It is clearly the case that the right to be heard does not always require an oral hearing. In some cases, written representations will suffice, if the statutory process does not specify otherwise (*Lloyd v McMahon, supra)*. I am satisfied in this regard that the applicant did have an opportunity to make written representations; her evidence is that she responded to all the requests of the Council. But in my view the process ordained by the Act for processing such an application required much more, and I hardly think the procedure followed by the Council was adequate to attain the requirements of fairness.

[53] Section 26(7) specifically requires an applicant for registration to *submit* to a review by the Assessment Committee. The evidence discloses that the Council's decisions were based on the written representations of the applicant either to the Council or as referred to the review committee. So far as the actual meetings go, it appears that these were only with the Registrar and Ms. Knowles, the Council Administrator. Neither the Registrar nor any administrative staff of the Council could exercise any of the functions of the Council as a body. Therefore, no account can be taken of these meetings for the purpose of the applicant's right to have her application heard according to law and to make representations.

[54] As noted, the Assessment Committee met on some undisclosed date and presented their findings on 23 November 2021. This meeting obviously took place subsequent to the taking of the decisions which had been communicated to the applicant, and the court is unable to discern any reason (other than it being a deliberate omission) why the date of this meeting was not indicated in the respondent's evidence. Not only must they have known when the meeting took place, but one would expect that in the ordinary course of things there would be a record of the proceedings, which could have been presented in evidence.

[55] Interestingly, the Fourth, Fifth and Sixth Schedules of the Act provide detailed guidance as to the conduct of proceedings, respectively, by the Complaints Committee, the Disciplinary Committee and "A Special Review Committee". The latter committee is not to be confused with the *ad hoc* 'review committee' which was initially tasked with considering the applicant's application. It is a committee that can be convened consisting of three medical practitioners to investigate a complaint against a medical practitioner which is the subject of investigation by the Council. As these bodies exercise quasi-judicial functions, it is not surprising that they all require the attendance of the practitioner affected, and the Schedules specifically stipulate the right of a person subject to their process to make representations, give evidence and make submissions.

[56] No procedure is prescribed for the operation of the Assessment Committee, though as noted, one of its functions is the "*implementation and publication of the system of assessment*". It has apparently been left to this Committee to specify its own procedure, but at a minimum it requires the publication of the system of assessment, so it requires some degree of transparency.

However, even in the absence of a prescribed procedure, the use of the phrase "*shall submit to a review*" by the Assessment Committee in respect of a person seeking registration, suggests that the applicant is entitled to have a review by the Committee, and that this ought to be done if (as in this case) there are any questions or concerns about the applicant's qualifications, or if the Council is minded to refuse the registration. The attempted explanation in the first affidavit of Dr. Dahl-Regis that the "*Council afforded Dr. Shirodkar unrestricted access to the Council to discuss her application and its merits*" beggars belief. The evidence is uncontroverted that the applicant never in fact met with the Council and, even then, the two 'meetings' with its representatives were at her behest. These two meetings were a far cry from fulfilling the statutory duty of the Assessment Committee to undertake a review, or for the Council to properly consider the application.

[57] For the reasons given, I find that the procedure to determine the applicant's request for registration did not comply with the statutory requirements as to being heard (i.e., the right to submit to an examination) and also denied the applicant a right at common law to make representations and have them properly considered as part of the decision-making process.

*Lack of reasons*

[58] The next ground of challenge is that there was a failure to give reasons for the decision and that such reasons as were given were inadequate and not proper. As stated in the application:

> "The Respondent presented the Applicant with a bare denial of her application, failing and refusing to state the basis for the purported inability to 'verify' her specialist qualifications in Radiology. The Applicant was entitled to, and did, request, and the Respondent was obliged, but refused to state, the reasons for its denial of her application, and instead merely restated its bare denial."

[59] No submissions were addressed to me as to whether there was a legal duty to give reasons in the circumstances of the case. The Act does not specifically require them, and the position at common law remains that there is no general duty to give reasons for an administrative decision. But the law is evolving in this regard. A synopsis of the common law position was admirably stated by Lord Clyde in *Stefan v General Medical Council* [1999] 1 W.L.R. 1293 [1300] as follows:

> "The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. But this trend is proceeding on a case-by-case basis (*Reg. v Kensington and Chelsea Royal London Borough Council, ex parte Grillo* (1995) L.G.R. 144, and has not lost sight of the established position of the common law that there is no general duty, universally imposed on all decision-makers. It was reaffirmed in *Reg. v Secretary of State for the Home Department, ex parte Doody* [1994] 1 A.C. 531, 564, that the law does not at present recognize a general duty to give reasons for administrative decisions. But it is well established that there are exceptions to where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case. Or, as was recognized in *Reg. v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 W.L.R. 242, 263, there may be classes of cases where the duty to give reasons may exist in all cases of that class. Those classes may be defined by factors relating to the particular character or quality of the decision, as where they appear aberrant, or to factors relating to the particular character or particular jurisdiction of a decision-making body, as where it is concerned with matters of special importance, such as personal liberty."

[60] I consider their Lordship's observations in this case to be of considerable importance, not only because they emanate from the Privy Council, but because their Lordships were concerned with an appeal from a case which roughly parallels the applicant's case. In that case, the appellant, Dr. Stefan, had her registration as a medical practitioner suspended indefinitely by the Health Committee of the General Medical Council over concerns that her fitness to practice was impaired. The only reason given was that "…*the committee have carefully considered all the information presented to them and continue to be deeply concerned about your medical condition. The committee have again judged your fitness to practise to be seriously impaired and have directed that your registration be suspended indefinitely*." The Board allowed her appeal and, after an extensive discussion of the law on the duty to give reasons, held that a duty to give reasons did arise in that particular case. At pg. 1301, Lord Clyde stated:

> "Turning to the particular circumstances of the present case their Lordships are persuaded that there was a duty at common law upon the committee in the present case to state the reasons for their decision."

[61] Their Lordships then set out a number of grounds which they found augured for a common law duty to give reasons, which included the following: (i) the fact that the decision was one open to appeal under the statute and that reasons should normally be given to assist the presentation and preparation of any appeal; (ii) that the judicial nature of the committee and the functions it performs requires reasons; (iii) the importance of the matter to the practitioner, in particular the right to work; and (iv) the applicant's request for reasons from the Committee to understand their decision. They later concluded (pp. 1303-1304):

> "In addition…their Lordships are also persuaded that in all cases heard by the Health Committee there will be a common law obligation to give at least some brief statement of the reasons which form the basis for their decision. Plainly the Health Committee are bound to carry out their functions with due regard to fairness. The first two of the grounds already mentioned will apply to any case coming before the committee: the provision of a right of appeal and the judicial character of the body point to an obligation to give reasons. Furthermore, in every case the subject matter will be the future right of the doctor to work as a registered practitioner, and while there may be differences between individual cases as to the significance of that from the point of view of the particular practitioner, the general consideration will remain that the committee are adjudicating upon the right of a person to work as a registered practitioner. There is nothing in the Act nor the Rules requiring reasons not to be given and no grounds of policy or public interest justifying such restraint. In the light of the character of the committee and the framework in which they operate, it seems to their Lordships that there is an obligation on the committee to give at least a short statement of the reasons for their decisions."

[62] I am persuaded, based on the classes of cases set out in *ex parte Institute of Dental Surgery* and the factors set out in *Stefan v. The General Medical Council* by the Privy Council that this is a case in which a duty arose at common law for the Council to give reasons for its decision. Most of the factors that the Privy Council adverted to in *Stefan* are present in the instant case, and I am also satisfied that the judicial character of the Council and its various committees point towards a duty at common law to give reasons.

[63] I am also satisfied that in the circumstances of this case, the Council failed to give reasons, or failed to give adequate reasons, to the applicant. In this regard, it has to be borne firmly in mind that the formal reason (and perhaps the only reason) given to the applicant for refusing

registration was simply that the Council was unable to verify her specialist qualifications. There is considerable indeterminacy of meaning in that statement. It is not known, for example, whether this was intended to mean that the Council could not determine whether the qualifications or certificates presented by the applicant were authentic, or that they did not know whether they correlated to the qualifications set out under the Schedules.

[64] Mr. Rigby invited the court to accept that the statement that "*the Council is unable to verify your specialist qualifications for Radiology*" denotes a finding by the Council that the applicant did not have the requisite certification in radiology. He submitted further that the ordinary meaning of the word verify (Cambridge English Dictionary) means "…*to prove that something exists or is true, or to make certain that something is correct*". I am not at all persuaded by these submissions. It seems to me that the reference to the dictionary definition only helps to illustrate (rather than clarify) the ambiguity in the explanation given by the Council.

[65] Notably, the Council never said, at least not in its decision letters, that we have determined that your qualifications are not equivalent to the qualifications set out in the Third Schedule. Only that they could not *verify* the qualifications, notwithstanding that the applicant had provided them with copies of her certificates, references, and websites which allowed them to research her qualifications, and assess their equivalency. In this regard, section 26(8) of the Act deserves mentioning. It provides that: "*Where a medical practitioner relies on qualification (sic) that is not granted by an institution set out in the Third Schedule, the Council may confirm that the qualification sought to be relied on is of equivalent standard as the qualification set out in the Third Schedule*."

[66] As has been recounted, the Council did attempt to provide further reasons and the rationale for its decision by way of the several affidavits filed after the commencement of the proceedings. I shall return to the significance of that evidence a little later in this Ruling. But the decision letters of 30 December 2020 and 13 January 2021 are self-evidently devoid of reasons for the Council's decision, and I find that this ground is made out.

*Decision irrational (Wednesbury unreasonable)*

[67] The applicant also complains that the decision of the Council was "*so unreasonable that no reasonable authority or tribunal, entrusted with its powers could reasonably have come to that decision in the circumstances of this case*." This is what is known in law as irrationality or *Wednesbury* unreasonableness, to which I now turn.

[68] The common law has not stood still with respect to the concept of irrationality. The classic formulation set out in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, from whence the *Wednesbury* formulation is derived, to refer to a decision which is "*so unreasonable that no reasonable authority could ever have come to it*", or outrageous in its defiance of logic or moral standard that no "*sensible person*" could have arrived at it (*Council of Civil Service Union ("CCSU") v. Minister for Civil Service* [1985] AC 373), has been somewhat tempered. A more modern statement of the test of irrationality was described by the UK Divisional Court (Leggatt LJ and Carr J) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, which I gratefully adopt:

> "98…The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as

> it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is so 'unreasonable that no reasonable authority could even have come to it'; see *Associated Picture Houses Ltd. v Wednesbury Corpn*. [1948] 1 KB 223, 233-234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g., *Boddington v British Transport Police* [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

[69] I am not persuaded that this is a case that would satisfy the classic test of *Wednesbury* unreasonable, in other words, that it is a decision so unreasonable or so aberrant that no reasonable tribunal or authority could come to it. The case law is replete with references to the duty to give due deference and respect to decisions which Parliament have entrusted to professional bodies, which are eminently qualified to make those decisions (see, for example, *Ross v Secretary of State for Transport* [2020] EWHC 226 (Admin), per Dove J.). And it is clear that the standard for *Wednesbury* unreasonableness in the traditional sense is very high.

[70] However, I must also consider whether the Council's decision may be irrational in terms of the second aspect described in *R v Lord Chancellor*, *supra*, i.e., that it is either flawed in internal logic, or not supportable by the evidence or grounds relied on by the Council. For the purposes of this assessment, it is useful to have regard to the overall reasoning and decision-making process. Firstly, the Council indicated that it could not verify the applicant's specialist qualifications. Then, it indicated that the applicant needed to provide evidence of her specialist registration with the GMC. And finally, as set out above in the extracts from the relevant affidavits, the Council went to great length to reason that the applicant did not have the requisite three years' post-graduate training required under the Act and Schedules. It also added as an additional ground—an "oh-by-the-way ground"—that the applicant did not provide evidence of her immigration standing.

[71] I will dispense with the immigration point with the brevity it deserves. As was pointed out by Blackman J.A. in *Shanmugavel v. Bahamas Medical Council* [2012] 3 LRC 448 [72], in respect of a similar objection raised to the registration of the applicant in that case, the Council is "…*not an extension of the executive. Consequently, it should not be concerned, as seems to be the case, with compliance with 'Immigration Laws or Personnel Issues*'…". Likewise, the immigration status of the applicant is not a matter for the Council, and in any event, having regard to the decision which the Council made, it was clearly a red herring.

[72] In my judgment, the farrago of affidavit evidence presented by the respondent after the institution of judicial review proceedings, far from clarifying the decision-making process and the basis on which it was taken, only further exemplified the flaws in the process, as well as the errors in reasoning. The conclusion of the Council that the applicant needed to be on the specialist register of the UK GMC to be considered eligible to be registered as a specialist in The Bahamas involved a clear error of reasoning, and there is nothing in the Act that would justify such a conclusion.

[73] In coming to that conclusion, the Council seemed to conflate the role of the professional body, the GMC, charged with registering medical specialists for the purposes of regulating their practice in the UK, with the academic or clinical qualifications which the Schedule sets out as being acceptable for specialist registration under the Act. The First Schedule does not require reciprocal registration by the professional bodies which monitor and regulate the practice of medicine in either the UK, the Commonwealth, or the US as a pre-condition for registration in this jurisdiction. It speaks to the institutions whose academic and formal training are equipollent to the standards acceptable under the Act for specialist registration. As pointed out in the affidavit of Dr. Darville, the FRCR is the highest academic training that can be conferred upon a physician in radiology and many foreign graduates may obtain their fellowship and return to their own countries, having no need to be registered in the UK, since there is no intention to practise there.

[74] It also seems to me that the applicant was not relying solely on her academic or formal qualification in the UK as the qualifications for the purposes of meeting the statutory requirements for registration. Thus, the assertion in the fourth affidavit of Dr. Dahl-Regis that the Council "*requests that the applicants with UK training provide either the CCT* [Certificate of Completion] *or CESR* [Certificate of Eligibility for Specialist Registration] *as the basis for reciprocity*" was based on a false premise. As pointed out in the applicant's evidence, the CCT or CESR are pathways to obtaining specialist registration in radiology for persons completing that course of training in the UK and seeking to be registered on the specialist register by the GMC to practice in the UK. The applicant holds the FRCR as well as the EDiR and was obviously also relying on those clinical qualifications in her application. But her application was primarily grounded on her post-graduate Diploma in Medical Radio-Diagnosis (DMRD) from Goa University, and the further training and experience during the period as a senior registrar in India for one and a half years, and the nearly 10 years as a radiology registrar at the PMH.

[75] It appears that the Council, after a prolonged opportunity to consider the position in light of the judicial review challenge, fastened on the primary finding that the applicant's post graduate training or qualification was only for a period of two years and not the requisite three years' training which they determined was required under the Act. In this regard, I am of the view that the Council failed to take into account or failed to have regard to several relevant considerations in coming to its conclusion. First, the Council failed to consider the letter from Dr. Mahesh Sardessai, Professor and Head of the Department of Radiology, Goa Medical College, indicating that in addition to the 2-year training for the DMRD, the applicant worked as senior registrar at Goa Medical College for a period of one and a half years "*undergoing further training under my supervision*". That letter was dated 14 June 2016 and was apparently written for the purposes of demonstrating the applicant's completion of the "*necessary 34 months of Radiology Training for sitting a FRCR 2B examination*" with the UK Royal Colleges. It appears this was acceptable to gain entry into the FRCR programme, as the applicant was allowed to sit and attained the *FRCR 2B*.

[76] Further, the applicant indicated that she completed the FRCR Part I in June 2015, and FRCR Part 2A (6 modules of system-based SBA exam) in March 2016, and the FRCR Part 2B (long and short cases, rapid reporting, 4 *viva voce* session) in March 2018. It will be recalled that one of the demands from the Council, in the letter dated 13 January 2021 to the applicant's attorneys, was that the applicant provide the exact dates when she obtained her FRCR Parts 1 and 2, and the circumstances which led to their attainment if she was in full-time employment

at PMH. However, the applicant's letter to the Council dated 5 January 2021, which was exhibited in the first affidavit of Dr. Dahl-Regis and stamped with the Council's receipt on *6 January 2021*, included the dates and periods as indicated above. Thus, the Council already had in its possession information that it was demanding of the applicant to assist in evaluating her specialist training.

[77] Moreover, the applicant indicated in her evidence that her time at PMH included further training, and in fact that she provided training to UWI students, which ought to have been taken into consideration. In fact, Dr. Solange Payne, the Head of the Imaging Department at PMH, by letter dated 20 August 2019, wrote a general reference indicating that the applicant was employed as a Radiology Registrar from December 2010 until 2019, and stated that "*If you have any further queries in this regard, you may reach me by email*." There was also an earlier letter written in 2016 providing a reference for the applicant's renewal of her contract. The Council dismissed both out of hand:

> "7. The Council duly considered the letters from Dr. Payne-Fielding (as are exhibited to the Applicant's First Affidavit) but it was the view of the Council that in substance they did not condescend to matters of the nature, scope and level of training afforded to the Applicant while she was employed at PMH. Additionally, the letters were not addressed to the Council and hence the Council was absent a letter of recommendation from Dr. Payne-Fielding. In the absence of the same, the Council could not venture into 'guess work' of whether training was afforded to the Applicant during her tenure at PHM."

[78] One might be forgiven for thinking that the Council's response in this regard smacks of pedantry—e.g., the observation that the reference letter could not be taken account of because it was not specifically addressed to the Council. But it also indicates that the Council was not prepared to undertake any inquiries, as it is empowered to do under s. 26(8) of the Act, to confirm that any training or qualifications sought to be relied on and not prescribed in the Act were of equivalent standard. This is not to suggest for one minute that it was the duty of anyone other than the applicant to provide information on the content of her job and training experience at PMH to the Council. But she was never provided with an opportunity to put this information before the Assessment Committee, or the Council for that matter. The applicant also drew attention to the fact that the Chief Medical Officer ("CMO") is an *ex officio* member of the Council. So, it is hardly realistic for the Council to suggest that it would be totally ignorant of the nature of the applicant's job at PMH and any training that might have been afforded to her.

[79] Finally, it is to be noted that the Council was refusing to register the applicant as a specialist even though she had been functioning in the Public Service at the PMH for nearly a decade in the capacity of a specialist, notwithstanding that she was not registered as such. It will also be recalled that the Council indicated that part of its motivation in scrutinizing applications was to "*safeguard the public from unqualified physicians*". This duality of standards is hard to reconcile. In fact, s. (9) of the Act provides that a medical practitioner who *"(a) engages in the practice of medicine as a specialist; or (b) represents that he is entitled to engage in the practice of medicine as a specialist*" shall be guilty of professional misconduct. Taken to its logical (or perhaps illogical) conclusion, it would mean that the applicant was sanctioned to do under colour of public service employment that which would make her guilty of professional misconduct if done privately without the requisite specialty registration.

[80] In the circumstances of this case, I would hold that the Council's logic and process of reasoning in concluding that the applicant was not qualified to be registered as a specialist due to a cited lack of the three years' post-graduate training was an irrational and unreasonable decision in the circumstances of this case. This resulted from a failure to give any (or any adequate) consideration to the applicant's cumulative period of formalized training and qualifications in radiology (e.g., FRCR, EDiR, registrar at Goa Medical College, and registrar at PMH), which were clearly relevant considerations to be taken into account in addition to the DMRD.

*Damages*

[81] A considerable amount of argument was directed to the claims for damages, and the parties lodged extensive supplemental arguments in this regard. As a matter of principle, damages are not generally awarded by courts in judicial review proceedings. The purpose of public law proceedings is to ensure that public authorities exercise their powers lawfully, not to compensate individuals affected by any misuse or mistake in the exercise of such powers, or punish public authorities for any failings. As noted by Baroness Hale in *R (on the application of Quark Fishing Ltd.) v. Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 [96], "*Our law does not recognize a right to claim damages for loss caused by unlawful administrative action…. There has to be a distinct cause of action in tort*…". That statement of the English common law position applied equally in this jurisdiction.

[82] However, Order 53, r. 7 specifically empowers the court to award damages in judicial review proceedings subject to certain criteria. That section provides as follows:

> "7. (1) On an application for judicial review the Court may, subject to paragraph (2) award damages to the applicant if—
>
> (a) he has included it in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and
>
> (b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
>
> (2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading."

[83] Thus, to sustain a claim for an award of damages in judicial review proceedings, an applicant has to satisfy three requirements: (i) he has to claim damages in his statement arising from matters in the JR application; (ii) the court has to be satisfied that if the claim relating to those facts were made in an ordinary private law claim at common law, damages would be obtainable; and (3) the applicant must plead particulars of the claim in his statement as would ordinarily be done pursuant to Ord. 18, r. 12 in a statement of claim in a civil action. Thus, there is a requirement for an underlying cause of action and for the matters to be properly pleaded before there can be an award of damages (see, *R (Knowsley Metropolitan Borough Council), ex p. Maguire* (1992) Times, 26 June).

[84] Mr. Rigby referred to a number of cases and texts setting out the principles relating to damages in public law, but I only think it necessary to refer to the Court of Appeal's decision in *Bruno Rufa v Regina & William Pratt* [SCCivApp. No. 131 of 2016], per Crane-Scott, JA [112-114]:

> "112. Undoubtedly, and as expressly provided in O.53, r. 7 RSC, the Supreme Court has power on an application for judicial review to award damages to the applicant provided that the applicant has firstly, included a claim for damages in the supporting statement filed with the application as required by rule 3; and secondly, the court is satisfied that the applicant could have been awarded damages had he, at the time of applying for judicial review, also instituted a separate action.
>
> 113. The availability of an award of damages as a remedy in judicial review proceedings is explained at paragraph 15-002 on page 582 of de Smith, Woolf & Jowell's "Principle of Judicial Review" in the following terms:
>
> > 'A claim for damages may also be included in an application for judicial review, but these will be awarded only if the applicant proves that an actionable tort has been committed by the respondent public body. In practice, any claim for damages is usually adjudicated upon at a separate hearing after the public law issues have been determined.'
>
> 114. The following extract found at paragraph 19-025 page 999 of De Smith on "*Judicial Review*" is to the same effect:
>
> > 'A finding by a court that a public authority in performing a public function has breached a ground of judicial review does not of itself provide a basis for entitlement at common law to compensation….To recover damages, a recognized cause of action in tort must be pleaded and proved such as negligence, the tort of breach of statutory duty, misfeasance in public office, false imprisonment or trespass. So while in some cases it may be a necessary condition, it is never a sufficient one for the award of damages that the act or omission complained of be 'unlawful' in a public law sense.' "

[85] As to stating a claim for damages, the applicant claims general damages, aggravated damages, exemplary damages and vindicatory damages, the latter said to be for "*unlawful interference with, and violation of*" the applicant's statutory, constitutional and due process rights. It is rather more difficult, however, to discern the particular bases or causes of action on which the damages claims are founded. There appears in the Applicant's Statement, so far as may be relevant to asserting any cause of action, the following claims for reliefs and grounds:

> **Relief Sought**
>
> "f) A Declaration that in all the circumstances the Decision of the Respondent to refuse the Applicant's application for registration as a specialist in Radiology was taken in bad faith.
>
> g) A Declaration that the Respondent's actions complained of herein constituted an intentional and/or malicious failure and/or refusal to perform its statutory duty.
>
> h) A Declaration that that Respondent's conduct toward the Applicant complained of herein was arbitrary, oppressive, inhumane, degrading, discriminatory, and/or otherwise unconstitutional."
>
> **Grounds**

> "12. The Respondent knew, or ought to have known, that its Decision to deny the Applicant's application for registration and licensure as a specialist in Radiology was arrived at in breach of the legislation by which its jurisdiction is conferred. […]
>
> 14. The Applicant is unable to take up her intended contractual employment in The Bahamas as a Radiologist and continues to suffer financial loss and damage as a result of the Respondent's actions complained of herein, which were carried out in an unreasonable, unlawful and oppressive manner.
>
> 15. The wrongs committed by the Respondent against the Applicant complained of herein are so aggravated by the facts of this case, the exceptional degree of malice and/or disregard shown by the said Respondent, and the said Respondent's serial, arbitrary, and/or oppressive breaches of its duties owed to the public at large and the Applicant in particular that the Applicant seeks an award of aggravated, exemplary, and vindicatory damages. The Respondent's unreasonable and unlawful acts breached the Applicant's statutory and constitutional rights, oppressively and arbitrarily causing the Applicant to be made the subject of undue professional embarrassment and mistrust. The facts relied on are confirmed and outlined in detail in this Statement and the Affidavit of the Applicant filed herewith. […]
>
> 21. The Respondent failed to reasonably, lawfully and fairly perform its duties in accordance with its statutory obligations."

*Bad faith and malice*

[86] I can deal briefly with these grounds. Although the applicant seeks a declaration that the decision was taken in bad faith and makes general allegations of "oppressive" and "arbitrary" conduct, there is little by way of any specific factual allegations in the statement to support the claim that the Council either acted dishonestly or took action which was known to be improper, such as would justify a finding of bad faith (see for example, *Cannock Chase District Council v Kelly* [1978] 1 WLR1, per Megaw J.).

[87] A distinction is also to be drawn between actions which may be quite unreasonable but performed without any dishonest intention or intention to achieve an improper purpose. The UK Court of Appeal addressed this point in *Western Fish Products Ltd. v Penwith District Council* and Another [1979] 38 P. & C.R. 7, where Megaw, LJ, delivering the judgment of the Court of Appeal said:

> "In his concluding address, Mr. Sparrow referred to the fact that in some authorities and text-books the phrase 'bad faith' is used to describe cases in which a statutory authority has, in what would ordinarily be called good faith, made a mistake as to the extent of its powers or, without any dishonesty or malice, acted in a way that was not permitted by its own powers and in a way that infringed someone's legal rights. We regret that there should be that debasement of the currency of language. It is not fair to a public authority or its members or servants that the public, not versed in the technical jargon, should read that a court has found them to be guilty of 'bad faith' when they have made an honest mistake. Nor is the use of the phrase in such a technical sense conducive to preserving the seriousness of a finding of bad faith, where there has been dishonesty. If and in so far, however, as "bad faith" may properly be used to describe the acts of a public authority where, without dishonesty or malice, it has made errors of fact or law, then it is open to the plaintiffs to allege 'bad faith', but let it be clear, in that sense only."

[88] The nearest one gets to an allegation of bad faith is the suggestion in the first affidavit of the applicant that the Council operates a deliberate policy of refusing specialist registration to foreign medical specialists, even though employing them in that capacity in the Public Service. This is stated thus:

> "11. The Respondent's deliberate abuse of its own registration and licensing powers, through its practice of compelling medical specialists, particularly foreign medical specialist, employed in the Public Service as specialist to apply for registration and licensure as general medical practitioners, knowing that they will be practising as specialist is no justification, but rather is itself evidence of ongoing oppression and corruption of the statutory process….The Respondent has refused specialist registration and licensure to foreign radiologist who seek to leave the Public Service and work privately in The Bahamas and yet subsequently licensed them to return to work as Radiologists for the Public Service. The Respondent's capricious refusal of specialist registration in order to keep duly qualified medical specialist tethered to the Public Service is wrong."

[89] If the allegation were correct, it would certainly suggest that the Council was using its powers to achieve an improper purpose under colour of carrying out its duties, and this would smack of bad faith. But allegations of bad faith and malice are serious charges and public authorities, like individuals, are entitled to have such allegations properly particularized: see, Ord. 18, r. 12; *Cannock Chase District Council v Kelly, supra.* Other than the general allegation, no such particulars are provided, and the court will be very slow to infer bad faith or malice on behalf of a statutory body charged with carrying out public functions in the absence of clear evidence. However deficient the decision-making process may appear to have been, and even though the applicant may feel rightly aggrieved, I do not think this court is in a position to infer bad faith in respect of the Council's decision, and this claim must be rejected.

*Claims of unconstitutionality*

[90] Like the claim of bad faith and malice, I can also dispense with the constitutional claim fairly shortly. The applicant prays in aid article 26(2) of the Constitution, which provides that "*no person shall be treated in a discriminatory manner by any person acting in virtue of any written law or in the performance of the functions of any public office*." The constitutional claim raises both procedural and substantive issues, which it is only necessary to address briefly.

[91] Although the leave granted for the judicial review proceedings included the claims for constitutional relief, as a matter of procedure it is always doubtful whether constitutional claims are properly deployed in judicial review proceedings. I had occasion to review the case law on the point in the recent case of *Dwayne Woods et. al. v. Dion Foulkes et. al* [2021/PUB/jrv/00016] [26-33] and concluded that:

> "The upshot of these cases is that an applicant for judicial review, while not necessarily precluded from alleging constitutional breaches as part of his judicial review grounds, or as an incidence or example of the breach, cannot use judicial review to deploy a direct constitutional claim."

However, the issue was raised during the *ex parte* hearing for leave and I granted leave for the constitutional claim subject to any procedural objections that might be taken at the substantive hearing.

[92] Mr. Rigby did not take any issue with the procedural question of the propriety of seeking constitutional relief via judicial review. For the respondent, it was simply contended that the respondent has fallen short of proving that any of her constitutional rights were violated under Art. 26. I agree. The constitutional claim suffers from a lack of particularization of the alleged breach and any supporting factual allegations. There seems to be a general allegation that at least one other practitioner in similar circumstances as the applicant was registered on the specialty register, but the respondent denied this and indicated that in fact, the person referred to had been registered prior to the 2014 Act, in very different circumstances.

[93] However, for completeness, I will say something about the constitutional claim. 'Discriminatory' is a term of art defined by the Constitution and a claim is only actionable on the following enumerated grounds (art. 26(3)):

> "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such descriptions are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

[94] The point is neatly made in the West Indian case of *Nielsen v Barker* [1982] IR 254 (at pg. 280) (quoted with approval by the Bahamian Supreme Court in *Fawkes v Attorney- General and another* [1994] BHS J. No. 1) as follows:

> "The word 'discriminatory' in Article 149 [identical to art. 26(3) of the Bahamas Constitution] does not bear the wide meaning assigned to it in a dictionary. It has a precise connotation. Although it contains the elemental constituent of favouritism, or differentiation in treatment, its application is confined only to favouritism or differentiation based on 'race, place of origin, political opinions, colour or creed'. No other kind of favouritism is 'discriminatory' within the narrow constitutional definition of that word in Article 149(2). It is to be profoundly in error to think that there has been a contravention of a person's fundamental right under Article 149 where the alleged discrimination is based on some grounds other than those referred to above, no matter how reprehensible such grounds may appear to be. Such a situation clearly does not come within the purview of the constitutional guarantee, although there may well be other means for its investigation and for securing redress."

[95] Thus, an allegation of unconstitutional discrimination must specify the particular ground in art. 26(3) on which the discrimination is said to be based. The applicant has not indicated the constitutional basis on which it is alleged she has been discriminated against, nor shown how any like comparators in like situations have been treated differently from her. This ground is not made out.

*Breach of statutory duty or other tort*

[96] It remains to be ascertained whether the applicant has made out a case that would ground any other action, say in tort, breach of statutory duty, misfeasance, etc. As noted, the applicant seeks a declaration in her statement that the respondent failed or refused to perform its statutory duty. In support of this, she alleges that the respondent "*ought to have known*" that its decision was "*arrived at in breach of the legislation*" and that the respondent "*failed to…perform its duties in accordance with its statutory obligations*." In other words, there seems to be an allegation that the respondent Council breached its statutory duties to the applicant.

[97] Like the allegations of bad faith and malice, as well as the constitutional rights claims, the general references to a breach of legislation or failure to perform statutory duties do not properly plead a breach of statutory duty that would satisfy the requirements of Ord. 18, r. 12. Ordinarily, one would expect a pleading for breach of statutory duty to set out the particulars of the allegations said to evidence the breach of duty or duties, with reference to the corresponding sections of the legislation which are said to have been breached. That is not done here.

[98] In any event, putting the deficiencies in the pleadings to one side, although an action for breach of statutory duty is well established in the law, such an action will only be sustainable in very limited legal and factual circumstances. Firstly, the nature of the duty must be expressed in clear terms and must impose a mandatory duty on the individual or authority. The duty to register under s. 26 only arises if the Council is "*satisfied that an applicant is qualified to be registered*", and therefore it is a duty only triggered after a determination by the Council. Therefore, failure to register an applicant, even if arrived at in circumstances which the court considers to be flawed in administrative law, does not *ipso facto* amount to a breach of statutory duty.

[99] Secondly, the court has to construe the legislation pursuant to which it is said the duty is created to determine whether or not Parliament intended to confer a benefit on a class of persons or an individual that would be remediable in damages. Normally, the fact that the Act provides for an appeal or other procedure as a mechanism of enforcing any duty under the Act militates against the court finding that it was Parliament's intention that a failure to carry out the duty under the Act in respect of an individual would lead to an award of monetary compensation (see, for example, *Thornton v Kirklees Metropolitan BC* [1979] QB 626). As indicated, there is arguably an appeals process for failure to register, even though it is unclear whether it was intended to extend to the situation of a specialist registration.

[100] I therefore find that a claim for breach of statutory duty has not been properly pleaded. But in any event, I am not convinced that as a matter of principle, absent cases such as where the Council fails to exercise the duty at all or acts with extreme delay, that a claim for breach of statutory duty would be supportable in the context of the statutory provisions under consideration. Thus, to the extent that the application asserts a claim for breach of statutory duty, I would dismiss also that.

[101] For completeness, and while on the point of investigating possible civil claims disclosed by the application, I should also indicate that, to the extent that there are allegations relating to the conduct of the respondent being intentional or deliberate, I do not find anything in the statement that would satisfy the constituent elements of a claim for misfeasance in public office. A claim for misfeasance requires allegations that the behavior which injured the applicant was deliberate, and the harm was caused either maliciously or knowingly, or that malice or actual or constructive knowledge of the harm is to be inferred from the nature of the acts or omissions (see *Three Rivers DC v Bank of England (No.3)* [2000] 2 W.L.R. 15).

*Conclusion on claims for damages*

[102] I therefore do not find that there is any civil claim to which damages can attach. Having come to this conclusion, it appears to me that nothing needs to be said of the claims for aggravated, exemplary or vindicatory damages, which are obviously collateral to a finding that there is an actionable civil claim or constitutional breach that would sound in damages. The

circumstances are well established at common law as to the basis and considerations justifying such awards, and no parade of academic learning on damages is required here. The claims for damages are all dismissed.

*The pleadings issue*

[103] Having regard to the general issues raised as to pleadings in the context of a claim for damages in judicial review, I think it is important to state a point of principle. The ability to claim damages in judicial review is intended to avoid the inefficiency and costs that would be associated with having to institute parallel proceedings, but it does not create a new format or avenue of asserting a cause of action. And it does not lower the requirements for an applicant to plead in the Statement allegations that would support a cause of action in an ordinary civil claim. An applicant must still plead a cause of action to the requisite standard that would sustain a claim if those pleadings were made in a stand-alone civil claim for that action.

[104] As I had occasion to remark in *Rossetta Foster and Jamar Wright v. Attorney-General and ors*. [2020/PUB/jrv/0005] (unrept.) in the context of an application for leave for judicial review, but which is equally apposite the substantive claim [43]:

> "It is not the role of the court …to attempt to find in the interstices of legal arguments or affidavits some slight or other wrong which can be added to the judicial review arsenal of the applicant and thereafter furnish some ground which had not been thought of…".

[105] In similar vein, in *R. (Brookes) v. Secretary of State for Work and Pensions* [2010] EWCA Civ. 420, the UK Administrative Court said:

> "An application for judicial review is an application to review one or more identifiable decisions on grounds of error of law. Both the decision and the alleged error must be identified with particularity in the claim. It is not acceptable for a claim for judicial review to consist of narrative, of unfocussed complaint and of general reflections (good or bad) upon the nature of the legislation in question."

O. 53, r. 3 contains a requirement for applicants to set out their grounds and the facts relied on in their Statement, and applicants for judicial review would do well to heed this advice.

*Delay and Estoppel*

[106] There are two other claims which I ought to mention for completeness. The applicant claimed that the respondent failed to consider her application within a reasonable time (i.e., that there was unreasonable delay), and also sought a declaration that the respondent was "*estopped from refusing to register the Applicant…in all the circumstances of this case*." Neither claim was significantly developed beyond the assertions in the Statement.

[107] As to delay, the application was submitted on 16 June 2020 and the Council rendered its decision (at least initially) on 30 December 2020, although there was some correspondence between the applicant and the respondent in the interim. Unreasonable delay in carrying out a statutory function might amount to *ultra vires* abuse of power (see, for example, *Oliveira v The Attorney General (Antigua & Barbuda)* [2016] UKPC 24, where the PC held that a 19-month delay between an application for citizenship and the interview for that purpose was unreasonable delay and amounted to a breach of the applicant's constitutional rights).

However, the question of unreasonable delay has to be considered in all the circumstances of the case. While roughly six months might not be considered prompt for taking a decision relating to an application that might affect a person's ability to work, making allowances for all the circumstances of this case, including the fact that the application process unfolded during the height of the Covid-pandemic, I would not hold that there was unreasonable delay.

[108] On the issue of estoppel, the argument appears to be that the conduct of the Council, by registering the applicant as a generalist practitioner knowing that she would be functioning as a specialist, amounted to a kind of promissory or expectation estoppel that rendered it inequitable to refuse to register the applicant as a specialist. I do not consider that the necessary elements for establishing estoppel have been pleaded or made out—e.g., there is no reference to, or reliance on, (i) any specific representation, promise or conduct attributed to the defendant Council that it would register the applicant as a specialist, (ii) which was intended to affect their legal relationship and to be acted on and (iii) on which she relied to her detriment. But in any event, an estoppel cannot be asserted to "*prevent the exercise of a statutory discretion or to prevent or excuse the performance of a statutory duty*" (see, *Western Fish Products Ltd*.). This claim is clearly misconceived and is rejected.

*Ex post facto evidence*

[109] I also indicated that I would say something about the copious amount of affidavit evidence that was filed in these proceedings. The position is clear that the courts will be reluctant to grant leave for the parties, and the respondent in particular, to file additional evidence during the course of the hearing, and that there are inherent dangers associated with such evidence. The position was summarized in detail by the UK Court of Appeal in *The Queen (on the application of United Trade Action Group Ltd., Licensed Taxi Drivers Association Ltd) v Transport for London, Mayor of London* [2021] EWCA Civ. 1197 [125], from which I lift only two paragraphs of a 7-paragraph summary:

> "(4) Sometimes elucidatory evidence will be appropriate and necessary, sometimes not. But even where the evidence in question is merely explanatory, the court will ask itself whether it would be legitimate to admit the explanation given. Circumstances will vary. For example, as was emphasized by Singh L.J., with whom Andrews and Nugee L.JJ. agreed, in *Ikram v Secretary of State for Housing, Communities and Local government* [2021] EWCA Civ 2, at paragraph 58, when the court is dealing with a challenge to a planning inspector's decision it will have in mind that "there is an express statutory duty…for a planning inspector to give reasons for his decisions." Thus, in *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin) Ouseley J. strongly discouraged the use of witness statements to amplify or enhance the reasons given in their decision letters. He stressed that "[the] statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of the challenge", that "[a] witness statement should not be a backdoor second decision letter" (paragraph 52), and that such a witness statement "would also create all the dangers of rationalisation after the event…" (paragraph 52). The Court of Appeal in the same case approved, obiter, Ouseley J.'s observations at paragraph 51 ([2024] EWCA Civ. 432, at paragraph 41).
>
> (5) It is not likely to be appropriate for the court to admit evidence that would fill a vacuum or near-vacuum of explanatory reasoning in the decision-making process itself, expanding at length on the original reasons given. Such evidence may serve only to demonstrate the legal deficiencies for which the claimant contends (see *R. (on the application of Watermead*

> *Parish Council) v. Aylesbury Vale District Council* [2017] EWCA Civ 152; [2018] PTSR 43, at paragraphs 35 and 36)."

[110] As has been stated, the court was constrained to grant leave for further affidavit evidence in circumstances where the responsive evidence did little to irradiate the full facts of the decision-making process, and it was admitted as "*elucidatory*" evidence. In this regard, I find the observations of Laws LJ in *Quark Fishing* case (*supra*) [at 50, 68] to be particularly apposite the facts of this case:

> "…there is—of course—a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide….
>
> I am constrained to say that the Secretary of State in this case has fallen short of those high standards of candour which are routinely adhered to by government departments faced with proceedings for judicial review. ..
>
> I feel constrained to add, and I do with a sense of melancholy, that while for my part I have found nothing to demonstrate bad faith on the part of the Secretary of State, the history of this case has demonstrated to my mind that the approach taken to the public decisions that had to be made fell unhappily short of the high standards of fairness and openness which is routinely attained by British government departments."

[111] It should be clear, however, from the summary of principles stated above in the *United Trade Action Group* case, that in the exceptional circumstances where the court does grant leave to file elucidatory evidence, it is not licence for a second or even third bite at the cherry in terms of an opportunity to proffer further explanations or reasons for the decision-making process. As is often said, the duty of "cooperation and candour" requires the respondent to make a clean breast of the relevant facts and put the cards face-up on the table. Further, and similar to the position in *Quark Fishing*, while I could not find anything to attribute bad faith or malice to the Council, the dismissive and patronizing tone adopted by the Council at times in its affidavits to explain its interaction with the applicant is perplexing. The applicant, as appears from all of the reference letters written on her behalf, is a competent physician, well respected by her colleagues, and it seems most unfortunate and regrettable that she should not be accorded what, to my mind, is the basic professional courtesy one would expect the Council to routinely extend to any registered medical practitioner.

*Strike-out*

[112] I would add one final remark on the point of the affidavits, and it is this. I did not find it necessary to strike out any parts of the affidavits of the applicant, as contended for by Mr. Rigby on behalf of the respondent, firstly because there was no proper application made for that purpose, and secondly because the case law is clear that the court can decide to ignore offending or gratuitous material in an affidavit. As said by Hall, J (as he then was) in *McMillen Trust (trustee of) v Rawat* (Equity Action 1407/1990), applying the judgment of Peter Gibson in *Savings and Investment Bank Ltd. v Gasco Investments (Netherlands) BV* [1984] 1 ALL ER 296): "*…where an affidavit…contains any matter which it ought not to contain, the court only need ignore the offending matter unless the breach is egregious*." That said, the place for deploying legal arguments is skeleton submissions, not affidavits.

**CONCLUSION & DISPOSITION OF THE ACTION**

[113] For the reasons given above, I would make the following order, and invite the parties to submit a draft Minute of Order reflecting the terms of this Ruling:

(i) I grant the declaration that the decision of the Council was *ultra vires* and unlawful.
(ii) I grant the declaration that the decision was irrational and unreasonable.
(iii) I refuse the declaration that the decision was taken in bad faith, and or constituted an intentional and/or malicious failure or refusal by the Council to perform its statutory duty.
(iv) I refuse the declaration that the Council's conduct was discriminatory and/or unconstitutional.
(v) I refuse the declaration that the Council is estopped from refusing to register the applicant as a specialist in radiology.
(vi) I refuse the claim for damages, including aggravated, exemplary and vindicatory damages.
(vii) I grant the order for *certiorari* quashing the Council's decision.
(viii) I grant an order of mandamus requiring the Council to rehear and reconsider the application of the applicant according to law.

[114] With respect to the relief at paragraph "viii", I am constrained by the bounds of judicial review to do no more than direct a reconsideration of the application according to law. This court is not functioning in an appellate capacity that allows it to assess the merits of the conclusions of the Council and substitute its own decision. However, it is expected that on any rehearing, the Council will give proper consideration to the legal principles and matters that have been stated by the Court in its Ruling.

[115] Although the applicant has been successful in having the Council's decision quashed, it has not all gone her way, and as a result I will direct the parties to submit written submissions (not more than 5 pages) on the issue of costs within 14 days of the delivery of this Ruling.

**KLEIN, J.**

22 July 2022