BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 0144 of 2014

IN THE MATTER OF THE ADMINISTRATIVE JUSTICE ACT CAP.109B OF THE LAWS OF BARBADOS

AND IN THE MATTER OF THE JUDICIAL REVIEW (APPLICATION) RULES 1983

AND IN THE MATTER OF THE MEDICAL PROFESSION ACT, 2011-1

AND IN THE MATTER OF AN APPLICATION BY ALFRED SPARMAN FOR JUDICIAL REVIEW

BETWEEN:

DR. ALFRED SPARMAN **APPLICANT**

AND

THE BARBADOS MEDICAL COUNCIL **RESPONDENT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court.

2015: November 10, 24
2019: October 10

Sir Richard Cheltenham Q.C., Mr. Alrick Scott Q.C., and Ms. Shelly-Ann Seecharan, Attorneys-at-Law for the Applicant.
Sir Maurice A. King Q.C. and Mr. Edmund R. King Q.C., Attorneys-at-Law for the Respondent.

DECISION

Introduction

[1] The Applicant is challenging the decision of the Barbados Medical Council ("the Council") not to register him as a specialist in cardiology. His application was filed under the Administrative Justice Act ("Cap.109B").

Background

[2] The Applicant was first registered to practice medicine in Barbados on 19 January 2001. His registration was facilitated under the now repealed Medical Registration Act, Cap.371.

[3] Subsequent to his registration, Parliament enacted the Medical Profession Act, No.1 of 2011 ("the MPA"). When this legislation came into force the Applicant had been a registered medical practitioner for ten years.

[4] The long title to the MPA describes it as:

> "An Act to make provision for
>
> (a) the establishment of the Barbados Medical Council;
>
> (b) the registration of medical practitioners;

(c) the regulation of the conduct and discipline of medical practitioners;

(d) the prescription of qualifications, approval of standards and requirement for continual education and training;

(e) the regulation of advertising by medical practitioners; and

(f) the repeal of the Medical Registration Act, Cap.371".

[5] Part III of the MPA provides for the registration of medical practitioners in Barbados. Under this Part the Council is also mandated to keep two registers. The first, or Medical Registrar, contains a list of all individually registered medical practitioners, together with information required by the governing statute. (See S.16). The second, or specialist register, contains a list of medical practitioners "who possess qualifications with respect to a speciality, set out opposite thereto, in Part II of the *Seventh Schedule".* (S.20(5)). The specialist register must also indicate the speciality for which the doctor is registered. (S.20(6)).

[6] The Applicant made separate applications for specialist registration under Sections 20 and 21 of the MPA. As a result of these applications, a series of missives passed between the Applicant, his lawyers and the Council. The Court had some difficulty in reconstructing the paper trail, mainly because neither party filed all the correspondence, or placed the exchanges in

consecutive order. In addition, no cross-examination of the parties occurred in spite of the many affidavits filed.

The Claim

[7] The Applicant is seeking judicial review of:

1. the decision or administrative act or advice or recommendation of the Council contained in the Council's letter dated 26 July 2012 and reconfirmed in its letter dated 06 January 2014 not to approve and/or refusing to approve the application as a specialist in cardiology and/or the refusal to register the Applicant as a specialist in cardiology; and
2. the decision or administrative act or omission or failure or advice or recommendation of the Council not to consider the application for registration and/or to register the Applicant as a specialist in cardiology under Section 21 of the MPA.

[8] The several grounds on which relief is sought are:

1. irrationality and/or illegality for want of consideration of relevant matters and/or for taking into account irrelevant matters;
2. irrationality and/or illegality, in that the Council failed to meet its duty under Sections 20 and 21 of the MPA to consider or assess properly or at all the Applicant's qualification to be registered as a specialist in cardiology;

3. irrationality and/or illegality by reason of the Council's failure to register the Applicant as a specialist in cardiology under Section 20 or Section 21 of the MPA;
4. legitimate expectation in that the Applicant has practised, ever since his registration as a medical practitioner in Barbados in 2001, as a specialist in cardiology with an established cardiology practice;
5. irrationality and/or unreasonableness and/or proportionality in that the Council's decision interferes with the rights of the Applicant exercised for more than twelve years, and affects the Applicant's livelihood and established practice of cardiology. The Respondent was required to act rationally, reasonably and proportionately so as to adopt a course which least interfered with the rights of the Applicant;
6. breach of Council's duty to act fairly and/or to give a fair hearing and/or breach of the principles of natural justice and/or procedural impropriety on the following grounds:

   (i) failing to give reasons or proper reasons for its decision to reconfirm its earlier decision;

   (ii) failing to inform the Applicant of the case he had to meet;

   (iii) given the effect of the Council's decision and refusal on the Applicant's livelihood and reputation, the Applicant was entitled to a fair hearing and/or an opportunity to make representations before a decision or refusal was made or confirmed; and

(iv) bias and/or a real possibility of bias on the part of the Specialist Assessment Committee and/or the Council which considered the Applicant's application for registration as a specialist in cardiology.

7. abdication and/or fetter of discretion, in that the Council adopted an approach which precluded it from considering the Applicant's case on the merits, while making the decision of ABIM the sole material considera-tion;
8. abuse of power and/or unequal treatment and/or arbitrariness and/or un-certainty and/or substantive unfairness;
9. excess of jurisdiction;
10. unreasonable or irregular or improper exercise of discretion;
11. conflicts with the policy of the MPA; and
12. Council's breach of or omission to perform its statutory duty.

[9] The Applicant also applied for interim and final relief. On 19 February 2014, this Court granted an interim order permitting the Applicant to continue practising as a medical doctor in any area of expertise in which he practised immediately prior to his application to Council dated 05 July 2012, until further order of the Court.

[10] Additional interim relief was granted on 02 December 2014, whereby insurance companies were permitted to reimburse the Applicant's patients for

any and all medical services provided to them by the Applicant of whatsoever kind until further order of the Court.

[11] The final orders sought are as follows:

1. a declaration that the Council's decision and refusal are contrary to law, were and are unauthorised, were and are unreasonable, were and are an irregular or improper exercise of discretion, were and are void and of no effect;
2. a declaration that the Council's decision was arrived at taking into account irrelevant considerations and without taking into account relevant considerations;
3. a declaration that the Council was under a duty to give reasons for reconfirming its earlier decision;
4. a declaration that the Council adopted processes under Sections 20 and 21 of the MPA that were secret and unlawful;
5. a declaration that the processes the Council adopted under Sections 20 and 21 were applied arbitrarily, unreasonably, inconsistently and without certainty of approach and/or that the Council failed to treat the Applicant equally with other applicants for registration as a specialist;
6. a declaration that the Council's rules or policies with respect to

applications under Section 21 of the MPA were too rigid and/or were applied too rigidly in respect of the Applicant without considering the individual case of the Applicant;

7. a declaration that the conditions attached to the registration of an applicant under Section 21 of the MPA are ultra vires and/or unreasonable and/or void for uncertainty and of no effect;

8. a declaration that the Applicant has practised as a cardiologist for more than ten years prior to 31st December 2012;

9. a declaration that the Applicant has the number of years training in cardiology as required by Part 11 of the Seventh Schedule to the MPA;

10. a declaration that the Applicant is entitled to be registered as a specialist in cardiology pursuant to Section 20 or Section 21 of the MPA on payment of the prescribed fees under the MPA;

11. a declaration that the Applicant was and is prejudiced by the absence of a clear procedure or clear rules or clear guidelines for making an application for registration as a specialist under Section 20 or Section 21 of the MPA;

12. an order of certiorari to quash the decision of the Council;

13. an order of mandamus or a mandatory order requiring the Council to register the Applicant as a specialist in cardiology under Section 21 of

the MPA upon payment of the prescribed fees under the MPA;

14. alternatively to the order at sub-paragraph 13 above, an order of mandamus or a mandatory order requiring the Council to reconsider and/or re-determine the Applicant's application for registration as a specialist in cardiology in accordance with the law, in particular, allowing the Applicant to submit such documents and/or information as deemed reasonably necessary to support his application under Section 20 or 21 of the MPA;

15. an order for damages as the Council's decision or refusal affected the ability of the Applicant to practise as a cardiologist and thus his livelihood, and the Applicant has been deprived of substantial income;

16. costs;

17. if deemed necessary, an extension of time to file an application or amended application under Section 20 or 21 of the MPA;

18. such further or other relief as the Court may deem just; and

19. interest pursuant to Section 35(1) of the Supreme Court of Judicature Act Cap.117A.

The Legal Framework

[12] Cap.109B facilitates judicial review applications "for relief against an

administrative act or omission". (S.3(1)). An "administrative act or omission" is defined as meaning:

> "….an act or omission of a Minister, public official, tribunal, board, committee or other authority of the Government of Barbados exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by the Constitution or by any enactment". (S.2).

[13] The above definition suggests that the individuals and entities mentioned must be identifiable as governmental authorities. However, the question whether the Council is an authority of the Government of Barbados was not canvassed before this Court. The legal representatives for the Council did not challenge the Court's jurisdiction to hear this matter as a Cap.109B application, or argue that the Council was not an authority of the Government of Barbados.

[14] Albert Fiadjoe in his seminal text "Commonwealth Caribbean Public Law", opined that:

> "Section 3 of [Cap.109B] introduces the procedure of judicial review and makes it clear that an application lies only against the Government of Barbados or some other authority of the Government. Upon a strict construction of the section, this could mean that acts and decisions of non-governmental authorities are excluded from judicial review. This is clearly an attempt to maintain the purity of the distinction between public and private bodies. But this section must now be interpreted in the light of the courts' desire to annex new territory by crossing the boundaries when it is just to do so….it is also possible to give s3 a wide and liberal interpretation

> so that 'other authority of the Government of Barbados' would include the acts and decisions of nongovernmental bodies where those bodies are exercising an 'authority' of the Barbados Government. Such a determination would, of course, require appropriate evidence. But, it would open up exciting possibilities on the argument over the divide between public authorities and private bodies". (3rd ed. at p.102).

[15] As a supervisory and regulatory body established by statute, the Council is subject to the supervisory jurisdiction of the High Court in the exercise of its statutory powers. It performs critical public functions for the protection of the public, and the maintenance of public confidence in the medical profession. The Council is staffed by public officers, (S.3(3); and it is mandated to "consult with the Minister and have regard to the advice of the Minister in establishing and executing the policy of the Council (S.3(6)). Monies collected in accordance with the MPA are paid into the Consolidated Fund (S.45(1)). And the expenses of the Council are defrayed out of money voted by Parliament (S.45(2)).

[16] The Court is satisfied that there is a strong umbilical connection between the Council and the executive purse to distinguish it as an authority of the Government of Barbados. If there be any lingering doubt that this is a valid application under Cap.109B, it is territory that was annexed long ago. In **Jean Pierre Alexander Matthew v. Dental Council, No.334 of 1995, decision**

dated 05 February 1996, the High Court heard and upheld an application under Cap. 109B to quash the decision of the Dental Council not to register the applicant. Likewise, in **Dr. Sally Cools v. The Medical Council, No.1640 of 1996, decision dated 21 September 2000**, the applicant was awarded damages under Cap. 109B for the failure of the defendant to register her as a medical doctor for nearly five years.

[17] The grounds on which relief is sought are a veritable smorgasbord of alleged illegal actions on the part of the Council. According to the Applicant, in refusing him specialist registration, the Council breached its duty of candour and procedural fairness; wrongfully exercised its discretion; committed an error of law; was inconsistent in its application of policy; was unreasonable; either failed to take into account relevant considerations, or took into account irrelevant considerations; frustrated the Applicant's legitimate expectation of procedural fairness; and exhibited apparent bias against him. The Council's decision not to register the Applicant was described as "an incomparably oppressive decision, unequalled and unmatched in any reported case and beyond contemplation". (See para. [156] of Written Submissions filed on 21 September 2015).

<u>The Section 20 Application</u>

[18] Sometime in 2012, the Applicant applied to the Council to be registered as a

specialist in cardiology. Neither party has provided a copy of this application to the Court. In his affidavit filed on 31 January 2014, the Applicant indicated at paragraph 9 that a copy of the application was annexed to the affidavit and marked AS-3. A perusal of AS-3 revealed a letter to the Applicant from the Council dated 06 January 2014, and not his application form.

[19] In his correspondence of 20 July 2012, then counsel for the Applicant, Mr. Alair Shepherd Q.C., mentioned an application dated 07 May 2012. Additionally, the two affidavits of the Council, both filed on 11 March 2014 and sworn by Professor Sir Errol Walrond K.A., contain no copy of the 2012 application.

[20] Despite this omission, the parties agree that the initial application was made under Section 20 of the MPA. For convenience, Section 20 is reproduced here in full.

> "(1) For the purposes of this Act, the Council recognises
>
> (a) as specialties, the areas of medical practice; and
>
> (b) in relation to each specialty,
>
> (i) the institution or body whose certification shall be accepted as proof of qualification in a particular specialty; and

(ii) the minimum periods of relevant post-graduate training and practice that are required

as set out in Part II of the *Seventh Schedule.*

(2) A medical practitioner is eligible to be registered as a specialist in the specialist register where he 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 recognised by the Council.

(3) An application for registration as a specialist shall be made to the Council in the form set out in Form A of the *Fifth Schedule.*

(4) Where the Council receives an application referred to in subsection (1) and is satisfied that an applicant is qualified to be registered as a specialist, the Council, upon the applicant making payment of the prescribed fee, shall issue a certificate of registration, in the form set out in Form C.I in the *Sixth Schedule,* to the applicant.

(5) The Council shall register, in a register to be called the specialist register, a medical practitioner who possesses the qualification with respect to a specialty, set out opposite thereto, in Part II of the *Seventh Schedule.*

(6) The specialist register shall indicate the specialty in respect of which each specialist's name is registered.

(7) The Council shall have the power to require a medical practitioner who is seeking to be registered as a specialist, pursuant to subsection (5), to submit to a review by the Assessment Committee".

[21] Cardiology is a listed specialty under Part II of the Seventh Schedule, and requires a minimum period of four years training for specialty certification. The Council declined to accept the Applicant for registration as a specialist. By letter dated 26 July 2012, the Council informed the Applicant as follows:

> "Dear Sir
>
> **Application for Specialist Registration**
>
> Reference is made to your application for registration as a specialist in Cardiology with the [Council].
>
> I am directed to inform you that the Specialist Assessment Committee of the [Council] has examined your application and supporting documentation and has not approved your application. This is based on the fact that your specialist certification with the American Board of Internal Medicine has been revoked. The Committee's decision was ratified by the [Council]".

[22] The second paragraph of Council's letter refers to a Specialist Assessment Committee ("the SAC"). The MPA does not recognise any entity known as the SAC. Section 6 of the Act establishes an Assessment Committee as follows:

> "(1) The Assessment Committee shall be comprised and regulated in the manner set out in the *Second Schedule.*
>
> (2) The Assessment Committee shall

> (a) examine the 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) have responsibility for the implementation of the system of assessment of medical practitioners".

[23] It is possible that the SAC was appointed by the Council under Section 5(2)(a) of the MPA. But the Court notes that committees other than the Assessment, Complaints and Disciplinary Committees cannot engage in disciplinary functions, qualification assessment or complaint investigation. (See S.5(2)(b)). And this SAC could not be a special review committee under Section 37 of the MPA. Council minutes reveal that the SAC was discontinued "as the bulk of the work was already done and the Assessment Committee would deal with future applications for specialist registration". (See Council minutes at para. 5.1 of Tab 5 Minutes of Meeting Bundle).

[24] There is no allegation by the Applicant that his application for registration was not examined by an Assessment Committee, or that the Assessment Committee was not lawfully constituted as mandated by the Second Schedule to the MPA. However, the evidence before the Court is that an SAC did

consider the Section 20 application. (See Tabs 8 to 13 of Minutes of Meeting Bundle). The validity of the SAC is open to debate.

[25] The SAC considered the Section 20 application at its meeting of 09 May 2012, and did express concern about the absence of certification from the American Board of Internal Medicine ("the ABIM"). (Tab 8 Minutes of Meeting Bundle). The minutes record that

> "4.8. The [SAC] reviewed the application and supporting documentation submitted by [the Applicant] for specialist registration in Cardiology and noted that he was no longer certified by the [ABIM], therefore his specialty designation was not current from the point of view of his qualifications. However, the [SAC] noted that he was in the practice of Cardiology from 1995 and could be eligible for registration under Section 21 (1)(a) of the [MPA] once letters of reference were submitted on his behalf, but there was a concern over the revocation of his specialist designation over this period of time.
>
> 4.9. It was noted that [the] application had revealed that his license to practise had been previously revoked in another jurisdiction and the [SAC] felt that some consideration should be given to this information before considering him for the specialist register.
>
> 4.10. After further discussion on the matter of [the Applicant's] application for specialist registration, the [SAC] concluded that he should not go on the specialist register and decided that notification of this would not be made until the [SAC] has reported to the Council".

[26] The SAC was of the view that the Applicant's specialty designation was not current if he was not recognised by the ABIM. Another cause for concern was that the Applicant's licence to practice was revoked previously in another jurisdiction. The SAC presented its report to the Council at the Council meeting held on 29 June 2012. The Council minutes reflect the following discussion:

> "4.3.1 The Chairman reported that [the Applicant] submitted an application for registration as a specialist. On the application form, he listed he had been suspended from practising in the [USA]. The basis for his qualifications for specialist registration was that he has certification from the [ABIM] and he also did fellowship training in Cardiology for three years in Jacksonville, Florida. However in researching the specialist Board certification, it was found that this certification has been suspended but no reason was given for the suspension. The [SAC] has decided and has recommended to the Council for ratification, that [the Applicant] should not be registered as a specialist while his specialist certifying body has suspended him.
>
> 4.3.2 Applying for specialist registration under the grandfather clause was questioned. The Chairman stated that [the Applicant] had not applied under that clause but if he did, the Committee would consider the application.
>
> 4.3.3 The Chairman stated that in accordance with the [MPA], there was no entitlement for the Council to license [the Applicant] as a specialist. The [SAC] had been using the [ABIM] certification which was not a qualification in that there was not a formal examination. Therefore the [SAC] was

> relying on the good faith of the [ABIM] to say that a person was a specialist and should be treated as such.
>
> 4.3.4 The Chairman stated that the decision not to put [the Applicant] on the Specialist Register was not made due to lack of qualification, but because the qualification was withdrawn.
>
> 4.3.5 The members of Council considered and agreed not to register [the Applicant] as a specialist when his specialist certifying body has suspended him. They were of the view that without current specialist certification, one should not be registered as a specialist". (See Tab 1 Minutes of Meeting Bundle).

[27] The official reason given to the Applicant by the Council for his non-registration under Section 20, was the revocation of his specialist certification by the ABIM. Withdrawal of this certification was considered to be a withdrawal of the Applicant's specialist certification. The Applicant did not apply to be registered as a specialist in internal medicine. However, the minutes provided to the Court surrounding the discussions of the Section 20 application, prior to the letter of refusal in June 2012, do not reveal any mention of a requirement for specialist certification in cardiology. In addition, the letter of refusal does not mention that the Council and the SAC were influence by the fact that the Applicant's licence to practice had been revoked in another jurisdiction.

[28] The Applicant was certified by the ABIM as a diplomate in internal medicine

for the years 1998 to 2008. There was no discussion by the Council or the SAC as to whether suspension of the certification affected the Applicant's ability to practice cardiology as a specialist either in the USA or in Barbados. In other words, was certification in cardiology, by another specialist body, critical to the section 20 application? The Court also noted that the ABIM certification was suspended on 28 April 2004, after the Applicant had established a cardiology practice is Barbados as a registered medical practitioner. At that time a specialty was not recognised as a separate head for registration.

[29] Both Council and the SAC raised the possibility of the Applicant making an application for specialist registration under Section 21 of the MPA. Fully aware that there was a deadline for Section 21 applications, and with the knowledge that the denial of registration under Section 20 could have a catastrophic effect on the Applicant's medical practice, Council did not take the initiative to suggest to him that he might wish to consider an application under Section 21.

[30] Counsel for the Applicant, Alair Shepherd Q.C., wrote to the Council challenging its decision not to register the Applicant as a specialist in cardiology under Section 20 of the MPA. The correspondence, dated 30 July 2012, accused the Assessment Committee of refusing registration based on an

error of fact. (See Exhibit EW 13]. Mr. Shepherd castigated the Assessment Committee for proceeding:

> "….to refuse my client's application on the basis of an error of fact in that my client's specialist certification has not been revoked. What was revoked was his licence to practice in Florida, not his certification as erroneously stated in your letter. This is a serious error acted upon without giving my client any opportunity to be heard. In these circumstances, I invite you to reconsider the said application pursuant to Section 13 of the Act".

This correspondence omitted to mention that the Applicant's certification in internal medicine by the ABIM had been suspended in April 2004.

[31] Section 13 of the MPA states that:

> "(1) Where the Council refuses to register an applicant he may, within 3 months of the receipt by him of the notice of refusal, apply to the Council in writing for a reconsideration of its decision on the basis of submissions made by the applicant.
>
> (2) The Council may allow or deny the application for reconsideration and, where it allows a reconsideration, may
>
> (a) refer the matter for review by a panel appointed by the Council;
>
> (b) confirm its earlier decision to refuse registration; or
>
> (c) register the applicant as a medical practitioner".

[32] Council received Mr. Shepherd's request to reconsider the Section 20 application. By letter dated 16 October 2013, the Applicant was informed by the Council inter alia that:

> "b. The [SAC] of the [Council] having examined your invitation for Council to reconsider your application that was made under section 20 of the [MPA] and the provided information stated in the letter of 30th July, 2012 has confirmed its earlier decision to refuse your application for registration as a Specialist in Cardiology. This decision is based on the ground that you did not submit, along with your application, any certification as proof of a qualification in Cardiology as provided for in section 20 of the [MPA]. On review of the transmitted letter of the earlier decision dated 26th July, 2012, one notes the wording may be misinterpreted to conclude that had your qualification with the [ABIM] been valid, it would have enabled you to be registered as a Cardiologist. Council has accepted certification with the [ABIM] as a specialist qualification in Internal Medicine, not Cardiology.
>
> c. Council also noted that the application under Section 13 was not made by you but on your behalf, and that no further information was submitted to support such an application.
>
> The Committee's decisions were ratified by the [Council]".

[33] Council confirmed its earlier decision under Section 13(2)(b) of the MPA. Once again there is a reference to an SAC that is nowhere mentioned in the MPA. Only the statutory Assessment Committee was empowered to consider the application for registration as a specialist in cardiology under Section 20.

[34] The more profound observation about Council's letter is that a different reason was offered for its decision to refuse to register the Applicant as a specialist in cardiology. The new reason was the absence of proof of a cardiology qualification. Council conceded that the reason given in its letter of 26 July 2012, (see para. [21] supra), was subject to possible misinterpretation. The ABIM certification was in internal medicine and not in cardiology.

[35] The Court holds that neither the original decision nor the confirmation of that decision under Section 20 of the MPA should be allowed to stand. Having offered a different reason for its initial refusal, the effect was to vitiate the basis of that first refusal, and render it a nullity. And the introduction of another reason for Council's initial refusal, at the time when its decision to confirm the original decision was communicated to the Applicant, wrought an egregious injustice on the Applicant. He was given no opportunity to address the second reason, that is, proof of a qualification in cardiology. This was a fundamental error that undermined Council's reconsideration of the Section 20 application. At the very least the Applicant should have been allowed to persuade the Council that he had a cardiology qualification, and to show why suspension of certification by the ABIM should not affect his application negatively.

[36] Council's correspondence of 26 July 2012 and 16 October 2013, indicate that

it ratified the decisions of the Assessment Committee. The Assessment Committee is authorised to advise Council on the adequacy of the Applicant's qualifications, and any additional qualifications required for registration. (See para.[22] supra). There is no affidavit evidence explaining any "system of assessment" implemented by the Committee, as mandated by Section 6 (2)(b) of the Act.

[37] Having received the relevant advice from the Assessment Committee, (more accurately the SAC), it was the duty of the Council to advise the Applicant of his qualification deficits; what was required to correct the deficits; and give him a reasonable time frame within which to comply. There is no evidence that this was done in relation to the Applicant.

[38] Subsequent to the filing of his judicial review proceedings, the Applicant became aware of additional issues raised by the Council and the SAC, prior to the decision not to register him under Section 20. For example, in its Responses to Request for Information filed on 14 April 2015, the Council argued that:

> "….Schedule 7 Part 2 of the [MPA] calls for a minimum period of relevant training in Cardiology of 4 years. The Applicant submitted a period of training of 3 years only. Further, Part 1 of the 7th Schedule identifies institutions acceptable to the [Council] for providing specialised medical training and certification as [a] specialist in medicine. The Applicant

> did not qualify by virtue of the provisions of Part I of the 7th Schedule".

[39] The second official reason given to the Applicant was that he gave no proof of qualifications in cardiology. The unofficial reasons pointed to his failure to achieve the minimum four year period of cardiology training; and to the fact that he did not have the relevant post-graduate training or certification from an institution listed in Part I of the Seventh Schedule. These reasons are irrelevant considerations in so far as they were never shared with the Applicant, and did not form part of the official reasons communicated to him.

[40] Another example of irrelevant considerations not shared with the Applicant are found in the minutes of the SAC for 12 September 2012. (See Tab 10 Minutes of Meetings Bundle). It is recorded at paragraph 6.7 that:

> "The Committee members expressed reservations in relation to the application on the following grounds:
>
> (i) The number of complaints filed against [the Applicant] over the years that he had been practising in Barbados even though they have not gone through the process of adjudication.
>
> (ii) ….
>
> (iii) There was an on-going disciplinary proceeding against [the Applicant].
>
> (iv) The Committee recorded its reluctance to come to any decision until the current disci-

> plinary proceedings against [the Applicant] was concluded".

It appears to this Court that the Council did not communicate all the reasons, or the true reasons for its refusal to register the Applicant under Section 20.

[41] A further note of caution. The decision whether or not to register a medical doctor is the sole province of the Council. Council's role is not to rubber stamp the advice of the Assessment Committee. As the body with the discretionary power, Council must be seen to have applied its own deliberate judgment to the exercise of its discretion, after receiving and considering the Committee's evaluation of an application.

<u>The Section 21 Application</u>

[42] After Mr. Shepherd Q.C. requested the Council to reconsider its initial refusal under Section 20, the Applicant forwarded to Council an application to be registered under Section 21 of the MPA. Section 21 is also referred to as "the grandfather clause". Council acknowledged this second application in its letter to the Applicant dated 16 October 2013. (Exhibit EW2). According to Council's letter, the Section 21 application was dated 22 August 2012. Unfortunately, a copy of this application was not put into evidence by either party.

[43] Section 21 of the MPA provides that:

"(1) Notwithstanding subsections (2) and (4) of section 20, where

(a) on a date not later than the 31st day of December 2012, a medical practitioner who has neither undergone formal training in a specialty nor has the relevant certification in the specialty, satisfies the Council that he has

(i) been engaged in practice in a specialty recognised by the Council for a continuous period of not less that 10 years; and

(ii) the requisite experience, skill and competence in the specialty; or

(b) the medical practitioner has been appointed a consultant with the Ministry of Health or at a public hospital,

the Council shall regard the medical practitioner as eligible for registration as a specialist and he shall, in the appropriate case and upon payment of the prescribed fee, set out in the *Ninth Schedule*, be registered in the specialist register.

(2) Where a medical practitioner purports to rely on a qualification that is not granted by an institution set out in Part I of the *Seventh Schedule*, the Council may in its absolute discretion, seek to verify that the qualification sought to be relied on is of equivalent standard as the qualification in question set out in Part II of the *Seventh Schedule*.

> (3) 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 regarded as having committed an act of professional misconduct.
>
> (4) Council shall instruct, in writing, a medical practitioner referred to in subsection (3) to cease, immediately, his engagement in the practice of medicine as a specialist.
>
> (5) Where, in accordance with subsection (4), the Council has issued an instruction to a medical practitioner and the practitioner fails to comply with the instruction within 7 days of the issue of the instruction, the Council shall terminate his registration as a medical practitioner".

[44] Section 21(1) is immediately relevant to the Applicant. Other subsections are referred to later in this judgment. (See para. [85] infra). With respect to Section 21(1), all that the Applicant needed to demonstrate to the Council was his engagement in the practice of cardiology, a recognised speciality, for more than ten years, and that he had "the requisite experience, skill and competence" in cardiology.

[45] In 2011, the Council issued a notice to all medical doctors informing them, inter alia, of the requirements of Section 21(1) of the MPA. The notice also

stated that:

> "In addition, such applicants are required to furnish the [SAC] with references from two (2) recognised specialists in the specialty being applied for". (See Exhibit EW5).

[46] The Applicant submitted references from two cardiologists who did not practice in Barbados at the time of his application. Council responded to the Applicant by correspondence dated 19 September 2012 as follows:

> "Dear Sir
>
> **Application for Specialist Registration as a Cardiologist**
>
> Reference is made to your letter of August 12, 2012 in which you made a request for specialist registration in cardiology under Section 21 (1)(a) of the [MPA].
>
> I am directed to inform you that the [SAC] of the [Council] has considered the documents submitted and found the letters of reference from Dean Keller and Dr. John Sokolowicz to be unacceptable.
>
> In keeping with the Council's standard, and since you have been practicing in this jurisdiction over the past ten years, you are required to furnish the [SAC] of the Council with references from two registered specialists in the speciality, practicing in Barbados. The letters of reference should be sent directly to the Council by the referees.
>
> The Council appreciates your cooperation".

(See Exhibit EW8).

[47] Mr. Shepherd Q.C. responded on behalf of the Applicant on 27 September 2012. He argued that there was no requirement for referees to be residents of Barbados. He added that "….to disregard any references given by persons not resident in Barbados on the basis of their lack of residence is an unreasonable and illogical decision". Despite this observation, Mr. Shepherd informed Council that he would be writing to persons in Barbados who would qualify as referees, but the Applicant did not expect a positive response from these individuals". (See Exhibit EW9).

[48] Professor Walrond replied to Mr. Shepherd on behalf of the Council. This correspondence is dated 04 October 2012 and said inter alia:

> "….Presuming you are referring to section 21(1)(a), the law states that the applicant must have been engaged in practice in a specialty recognised by the Council for a continuous period of not less than 10 years; and [have] the requisite experience, skill and competence in the specialty.
>
> The Council, in making this assessment had several alternatives to consider and decided that the most efficacious way for applicants would be to obtain references from specialists in the field, who would be familiar with the applicant's practice in the last 10 years. This assessment decision is 'published' to each practitioner on making the application.
>
> In your client's case, his practice has been in Barbados for the last (10) years and Council will

> expect that references would come from the country in which he has practiced for those last 10 years. The Council would also point out that the Assessment Committee is not obliged to accept any reference from any source as we expect those references to speak to the 'requisite experience, skill and competence' of the applicant in the last 10 years". (See Exhibit EW10).

[49] In February and March of 2013, Council wrote directly to the Applicant. The letter of 15 February 2013 informed him that 31 March 2013 was the cut-off date for receiving applications for specialist registration under Section 21(1) of the MPA. The Applicant was also warned that if his outstanding information was not received by 31 March 2013, his application would be considered void. (See Exhibit EW11). The correspondence of 25 March 2013 repeated the content of the February correspondence. (See Exhibit EW12).

[50] Thereafter, the Council further declined to register the Applicant under Section 21 of the MPA. The reason given was the inadequacy of the supporting documentation.

Council's letter of 16 October 2013 informed the Applicant that:

> "I am directed to inform you of the following:
>
> a. The [SAC] of the [Council] having examined your application made under section 21 of the [MPA] and the supporting documentation has not approved your application. This application is denied on the ground that suitable references were not submitted to the Council in support of your application by the cut-off date, March 31,

> 2013. The Council requires referees to speak substantially about your practice in Cardiology in Barbados for the 10 year period you have engaged in such practice".

This was the same letter in which Council confirmed its earlier decision not to register the Applicant under Section 20. (See para.[32] supra).

[51] The Applicant was officially informed of Council's decision not to register him as a specialist under Section 21, more than a year after his application in August 2012. Council's letter was also issued more than six months after the cut-off date for Section 21 applications, i.e. 31 March 2013.

[52] Registration under Section 20 emphasises qualification and training. Whereas, registration under Section 21 requires proof of experience, skill and competence. Council has conceded that the Applicant was engaged in practice in a specialty recognised by the Council for a period of ten years, as stipulated by Section 21(1)(a)(ii). Therefore, the only question for the Court to consider is whether Council acted lawfully in requiring the Applicant to produce references from two local cardiologists who were familiar with his practice during the ten years prior to his application under Section 21.

[53] The MPA offers no guidance as to how experience, skill and competence are to be assessed by the Council. Therefore, any guidelines issued by the Council in this regard should be reasonable. The 2011 notice issued by Council called for references from two "recognised specialists in the specialty being applied

for". (See para.[45] supra). It does not limit the references to specialists in Barbados. The Applicant so interpreted the notice and submitted references from specialists who were familiar with his work in the USA.

[54] The Court accepts that it was necessary for the Council to be able to assess the experience, skill and competence of the Applicant over the ten years of his cardiology practice in Barbados. But its notice as published was subject to another interpretation. Further, this Court considers that the Council's notice was not written in stone, as references from cardiologists in Barbados were not the only means available to the Applicant to demonstrate his experience, skill and competence to the satisfaction of the Council.

[55] Mr. Shepherd Q.C. strenuously objected to the requirement for two local referees. (See Exhibit EW9). Professor Walrond sought to explain that the requirement for references from resident specialists in cardiology was the "most efficacious" of all the other alternatives. (See Exhibit EW10 at para.[48] supra). This admits to the possibility of other means by which the Applicant could have satisfied Council that it was appropriate to register him as a specialist in cardiology under Section 21.

[56] It was reasonable for Council to insist that the Applicant's references should address his experience, skill and competence during his cardiology practice in Barbados. What Council could not do is limit those references to specialists

practising in Barbados; or limit its assessment to references alone; or limit the ten years of practice to a practice only in Barbados.

[57] The Applicant requested the Council to review its decision. (See Exhibit AS-5). He submitted revised references from the two US cardiologists, Dean Heller MD, FACC and John Sokolowicz MD, FACC, and a petition signed by his patients. He appeared to challenge the requirement for two references when he indicated to Council that:

> "I am aware of the document which states that I must [present] two references. However the Act itself merely asks that I establish that I have been in practice as a cardiologist for the past ten years, and that I possess the requisite experience skill and competence in this specialty. In my view I have satisfied these conditions. However I would be happy to provide other proof if the Council thought that it would be helpful".

[58] Council considered the request to review at its meeting held on 06 December 2013. The extract from the unconfirmed minutes of that meeting revealed an allegation that the request was never received by Council, but that it surfaced during court proceedings. The extract referred to "the two references which had previously accompanied the application for specialist registration, as well as a list of names from a support group". (See List of Documents filed on 15 April 2015). No confirmed redacted minutes of this meeting were provided to the Court, however, the minutes were confirmed at the Council meeting

held on 21 March 2014. (See Tab 6 of Minutes of Meeting filed on 21 September 2015).

[59] Council's earlier decision to refuse registration under Section 21 was confirmed by a majority vote. There is no indication as to how the votes were split at the meeting. And the extract does not indicate whether the meeting was informed that, although the references submitted were from the same American doctors, the two references had been revised by those doctors. The extract does not reveal an evaluation of the revised references, or whether members had sight of the references. There is no mention of "another mechanism for review of specialist applicants" referred to in the extract from the confirmed minute of the meeting of the SAC held on 12 September 2012. (See Tab 12 to Core Bundle of Documents).

[60] Based on the available extract, Council's review appears to have been somewhat perfunctory. The Court did not have sight of any correspondence to either the Applicant or his counsel informing him of the confirmation of the refusal of registration under Section 21. Professor Walrond's first affidavit sets out Council's view of the shortcomings of the revised references. But there is no evidence that the Council was prepared to accept from, or suggest to, the Applicant any other means of evaluation.

[61] The elephant in the room, which the Court cannot ignore, is that counsel for the Applicant wrote to three local cardiology specialists requesting references on behalf of the Applicant. None of them responded to either Mr. Shepherd Q.C., or to the Applicant, or directly to the Council. The Applicant approached one other specialist with a similar request, and that individual "politely" refused to assist.

[62] The Applicant's failure to obtain references from local specialists may have raised a red flag with the Council. But there is no evidence that any of these specialists formally objected to the Applicant's registration under Sections 20 or 21 of the MPA. The Court must emphasize that none of these doctors, if they are members of the Assessment Committee or the Council, should in anyway be involved in the assessment or determination of the applications for registration under the MPA submitted by or on behalf of the Applicant.

[63] The Court wishes to refer to another issue, *en passant.* While reviewing the copies of the extracts and redacted confirmed minutes filed in this matter, the Court noted that a particular medical doctor was involved in the deliberations relating to the reassessment of the Section 21 application. This doctor quite correctly questioned whether he should recuse himself as he had made a formal complaint against the Applicant. He was encouraged to remain on the basis that the panel was not then discussing his complaint against the

Applicant. There was no legal counsel in attendance at that meeting. (See Confirmed Minutes of Meeting of Specialist Assessment Committee held on 12 September 2012, Tab 10 of bundle Minutes of Meeting).

[64] The same medical practitioner was also present at the Council meeting held on 29 June 2012, when the report of his complaint was received. He was also recorded as being present at the same meeting when the members of Council "agreed without dissent on the recommendation of the SAC not to register [the Applicant] as a specialist when his specialist certifying body had suspended him. They were of the view that without current specialist certification, one should not be registered as a specialist". (Para.4.3.5). The presence of this doctor during these deliberations by the Council and the Assessment Committee was unfortunate, and questions have been raised justifiably about the fairness of the proceedings.

Subsequent Developments

[65] Sir Richard Cheltenham Q.C. appealed to Council, by letter dated 22 January 2014, to reconsider its refusal to register the Applicant as a specialist. It is not clear from this letter whether he was requesting reconsideration under either Section 20 or 21 or both. Sir Richard stressed that "…The consequence of the Council's decision is to exclude a qualified practitioner who has built up an appreciable clientele over twelve (12) years from practising and earning a

living in his chosen profession". Council was required to approve the Applicant's registration as a cardiologist on or before 12 noon on Monday 27 January 2014. (See Exhibit AS-8).

[66] In April 2014, Sir Richard received three references on behalf of the Applicant from Dr. Emma Herry-Thompson, Joseph A. John MD FACS, and Dolland Noel. (See attachments to Appellant's affidavit filed on 16 April 2014; Tab 9 Core Bundle). The confirmed minutes of an Assessment Committee meeting, held on 14 July 2014, indicate that the references from Dr. Herry-Thompson and Dolland Noel were in the possession of the Committee. (Page 8 to Tab 15 of Minutes of Meeting). A number of pertinent observations were made by individuals at that meeting.

[67] First, the Chairman, in laying out the background to the previous applications, informed the Committee that the Applicant had no qualification in cardiology, and that his Board certification in internal medicine had been suspended. Additionally, the Committee heard that the Applicant had submitted references from two doctors resident in the USA, who were not registered in Barbados, and who "purported to speak for the ten years that he has not practised in the USA". (See para.5.2 of Minutes).

[68] It is interesting that a member of the Committee pointed out that the two USA references "…sought to cover [the Applicant's] period of work from 1999 to

2014 by indicating that they continue to assist and consult with him while he worked in Barbados doing cardiology work…even though the references came from persons outside of Barbados, they spoke of [the Applicant's] work in Barbados". (Para.5.6). The minutes do not indicate any disagreement with this interpretation of the references received from Dr. Heller and Dr. Sokolowicz. Instead there is a rigid adherence to the Committee's earlier decision that "…the most efficacious way of doing this was to have other registered specialists in the field in Barbados [vouch] for the competence of those persons applying under the grandfather clause for specialist registration". (Para.5.7).

[69] Another observation at the meeting was that the references from Dr. Noel and Dr. Herry-Thompson spoke of knowing the Applicant from 2007 and 2004 respectively, "…and therefore did not cover the 10 year period which would have been from 2002 to 2012, therefore these letters were not acceptable". (Para.5.8). Having read the two references, the Court will reproduce them in full for the purpose of analysis.

[70] Dr. Herry-Thompson's reference is dated 02 April 2014. It states that:

> "I have been practising General Internal Medicine here in Grenada for the past sixteen years. During that period I was the Chief Medical Officer for four years. There was a resident cardiologist in Grenada, Dr. Vernon Francis who competently managed my cardiology patients for six years. In 2004 however,

> after the terrible hurricane he decided to return to the United States.
>
> Dr. Francis recommended [the Applicant] who has since been managing my cardiology patients for the last ten years.
>
> Based on outcome and [client] review I find him to be competent in the field of cardiology".

[71] This reference refers to a continuous working relationship with the Applicant for the ten years prior to April 2014, but does not include 2002 to 2004. What is not clear from the reference is whether the Applicant attended to the cardiology patients in Grenada, or in Barbados, or in both countries. The meeting did hint that the Applicant was requesting consideration of his regional practice for the previous ten years. Again the Court noted the rigid adherence to a preference for the experience over those ten years to be related to the practice in Barbados, where the Applicant had been living and practising. (See para.5.3).

[72] The reference from Dolland Noel is dated 08 April 2014. It states that:

> "I am an Internal Medicine Specialist attached to the St. George General Hospital and the above Medical Clinic. In Grenada we do not have a Resident Cardiologist and as such [patients] requiring cardiac investigations and interventions are referred to Trinidad or Barbados based on their preference (except when there is a visiting Cardiologist sponsored by St. George's University as part of a visiting Cardiology Program).

> We have referred patients wishing to go to Barbados to the [Applicant's] Clinic from 2007 and have been satisfied with the service offered. Some of these patients have also continued to follow up with the local visiting cardiology service including patients with pacemakers and ICD's".

[73] Noel's reference covers at least twelve continuous years of the Applicant's local practice, as the Grenada patients come to Barbados. It does not speak to 2002 to 2007. Even if these patients were considered to be a part of a regional practice, as distinct from a local practice, an individual attending the meeting opined insightfully that there was no provision in the MPA that prohibited regional experience being used, or that required that the ten years of experience had to be in Barbados. (See para.5.5).

[74] Although the Assessment Committee discussed the application for a reassessment, it made no recommendation to Council. The decision was to forward the application to the full Council for discussion and a decision. A question may be raised as to whether the Assessment Committee abdicated its statutory function when it declined to make a recommendation to the Council. The Court has seen no subsequent extracts or confirmed minutes of the Council in which the reassessment was discussed by the Council, or a decision taken by the Council.

[75] As noted earlier, the Applicant produced another reference to the Court from Joseph John. There is no mention of this reference in the confirmed minutes

of the Assessment Committee for 14 July 2014. The Court does not know whether the Committee or the Council has this reference in hand. It informs that:

> "I hereby certify that for the past 12 years I have been referring many of my patients in need of cardiology services to [the Applicant] in Barbados because there is no cardiologist in Antigua and there are no invasive cardiology services in Antigua.
>
> These referrals would have included patients in need of basic cardiology evaluation, advanced cardiology diagnostics and invasive cardiology procedures such as coronary artery stenting. To my knowledge the latter procedure is not offered by anyone else in Barbados.
>
> I further state that I have had the opportunity to follow up with all the patients who I have referred to [the Applicant] and they have all been pleased with his care, and his results have been excellent".

[76] This reference covers the critical ten years of the Applicant's cardiology practice from 2002 to 2012, and speaks about patients referred to the Applicant in Barbados. These patients are treated in Barbados, and are therefore a part of his local and/or regional practice. Any reassessment of the applications from the Applicant should take Mr. John's reference into consideration.

[77] The fact that the references from Drs. Herry-Thompson and Noel do not refer to 2002, is in the Court's view of no moment. Both medical practitioners refer

to a minimum ten year period of practice by the Applicant as a cardiologist. And in any event, it was conceded at a meeting of the Assessment Committee that Drs. Heller and Sokolowicz covered the Applicant's cardiology practice from 1999 to 2014. (See para.[68] supra). This would have included the years 2002 to 2004. All of the references viewed by this Court appear to collectively speak to the Applicant's experience, skill and competence from 2002 to 2012 and beyond. The three regional references are results oriented.

[78] The Applicant also submitted a patient support group petition to the Council. (See AS-7). The signatories to the petition hoped that the "matter could be quickly resolved in order to ensure the continuity of the quality of cardiac care that we have grown accustomed". The petitioners supplied names, addresses and contact numbers. Neither Council nor the Assessment Committee expressed any views about the value or weight of this petition to the Section 21 application.

[79] It is recorded that during a Council meeting held on 07 December 2012:

> "Mr. Weekes raised the issue of empirical evidence being used in the assessment and expressed the opinion that doctors could be assessed based on the patients they treated during the last ten years. It was pointed out that the [MPA] allowed for a review of applicants and that would likely take the form of a review of the cases of the practitioner". (para.3.6 of Tab 3 in Minutes of Meeting Bundle).

The possibility of such a review in relation to the Section 21 application does not appear to have been proposed or discussed by either the Council or the Assessment Committee.

Overview

[80] The Court is satisfied that the Council, in reaching its decisions with respect to the two applications, was in breach of the Applicant's right to a fair process. The old case of **Cooper v. Wandsworth Board of Works (1863) 14 CBNS 180** posits the foundation principle that:

> "….although there are no positive words in a statute requiring that a party shall be heard, yet the justice of the common law would supply the omission of the legislature". (Per Byles J. at p.194).

[81] What fairness requires in a particular situation depends upon the context. According to Lord Mustill:

> "The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. An essential factor of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken". (**R v. Home Secretary ex p Doody (1999) 1 A.C.531**, 560).

[82] The procedures of the Council and its various committees, must conform to the broad principles of fairness. In this case the Council was required to

balance the interests of the public against the impact that non-registration of the Applicant as a specialist in cardiology would have on his many years of practice in that field. The impact on his practice, reputation, professional standing and ability to earn a livelihood as a specialist would be seriously compromised. Any policies instituted by the Council must also be clear and capable of being consistently applied. (**See Miller & Anon. v. The Health Services Commr. for England [2018] EWCA CA 144**).

[83] The Bahamas Court of Appeal stressed fairness of process in **Shanmugavel v. The Bahamas Medical Council [2011] 1 BHS J. No.92**. Mrs. Justice Allen, President, emphasised that:

> "64.….whether it is a case of natural justice, or fairness, the right to a fair hearing….given the status of the appellant as a medical doctor, his expectation that he would be registered in as much as he had been previously registered and he knew of no complaints against him, and the serious consequence of the respondent's decision to the appellant, namely, the possibility of ruin to his professional career, there was an obligation to hold a hearing whether to give the appellant an opportunity to influence the respondent, or for securing a fair process.
>
> 65. Of course, the obligation imposed by fairness relative to the right to be heard depends on the circumstances, but we say on an application such as this, that at least due warning should be given of an impending adverse decision, notice of the matters to be considered in making the decision, and adequate

> opportunity to make representations prior to such a decision being taken, are the basics."

[84] With respect to the Section 20 application, the Council offered two different official reasons for its refusal to register the Applicant. And the Applicant was not made aware of all the issues raised against his registration until sight of minutes of meetings of the Council, the Assessment Committee, and the SAC. He was not afforded an opportunity to respond to the negative views expressed before Council made a final decision. This decision will be quashed.

[85] The decision making process under Section 21 was characterised by a rigid adherence to an inflexible policy that did not take into consideration the particular circumstances of the Applicant. The Applicant practised as a cardiologist prior to the coming into force of the MPA. Because of this legislation, he could no longer engage in the cardiology specialty unless he was registered as a specialist. And without specialist registration the Applicant was exposed to a charge of professional misconduct. (S.21(3) MPA; see para.[43] supra). Council could call on him to immediately cease his practice (S.21(4), and terminate his registration as a medical practitioner (S.21(5)). He also faces the very possible ruin of his professional career. In these circumstances it was incumbent upon Council to explore all reasonable and

legal pathways to registration under the grandfather clause. Instead, Council rigidly adhered to its "most efficacious" policy.

[86] The presence of a doctor at meetings of the SAC and the Council, who had an existing complaint against the Applicant, is another cause for concern. Bias may be imputed to both panels. The Section 21 decision will be quashed as well.

[87] The statutory power to register the Applicant resides with the Council. Therefore, the Court will not be directing the Council to register the Applicant as a specialist in cardiology either under Section 20 or 21 of the MPA. The Court is guided by the dicta of Chase J, in **Matthew** case, where he state that:

> "….it would be a usurpation of the statutory functions vested in the [Council] to determine the eligibility of persons to practice dentistry in Barbados, if I were to accede to the submissions of counsel for the Applicant and make an order in the terms proposed. In my opinion the circumstances require that the matter be remitted to the [Council] with a direction that the application be reconsidered and determined with reference to all relevant matters….".

[88] More recently in **Kenyu v. Secretary of State for Foreign and Commonwealth Affairs [2016] A.C. 1355,** Lord Kerr explained that:

> "On a successful judicial review, the High Court merely either declares the decision to be lawful or quashes it. It does not substitute its own decision for that of the decision maker". (Para.272; see also

> **Michalak v. GMC [2017] UKSC 21 at paras. [20] to [30]).**

[89] This is not an appeal from the decisions of the Council, which would allow the Court to substitute its own decisions. Also, Section 9 of Cap. 109 B enacts that:

> "Where the Court quashes an administrative act to which the application relates, it may in addition remit the matter to the court, tribunal or other authority concerned with a direction to reconsider the matter and to determine it in accordance with the Court's order".

This Court will be guided accordingly.

Damages

[90] Part of the Applicant's claim is for an order for damages. He alleges that he has been deprived of substantial income as a result of Council's refusal to register him as a specialist in cardiology. (See para.[11] 15 supra). Section 5(2) of Cap.109B provides that:

> "The Court may, having regard to the scope of the remedies mentioned in subsection (1), grant in addition or alternatively
>
> ……..
>
> (g) restitution or damages in money;
>
> ………"

[91] Profit and loss statements were submitted by the Applicant as exhibits attached to his affidavits filed on 31 January 2014 and 12 October 2015. Counsel for the Applicant submitted that:

> "…..The authorities in Barbados have shown that an applicant can recover his particularised loss. In **Franklyn v. Permanent Secretary No. 525 of 2002**, Madam Justice Reifer reviewed the authorities on damages under [Cap.109B]. The review shows that proven financial loss is recoverable. Even where the actual loss cannot be proven, but the court is satisfied that there was a loss, the court can assess the loss doing the best it can (see **Cools v. The Medical Council of Barbados BB2000 HC 16**).
>
> In this case the Applicant has proven loss and has displayed financial statements to show his substantial drop in revenue following the [Council's] refusal to register him as a specialist in cardiology". (Paras.[201] and [202] of the Written Submissions filed on 21 September 2015).

[92] There is no evidence before the Court that the Applicant was forced to discontinue his practise on receipt of the various refusals by the Council. There is no evidence of a significantly reduced clientele thereafter. What the Court is aware of is that orders were granted allowing the Applicant to continue his practice, and authorising insurers to reimburse his clients. (See paras.[9] and [10] supra).

[93] In the **Cools** case, the failure to register the applicant meant that she was unable to work for a number of years. Therefore, there was no reduction in revenue. The applicant was unable to earn anything from her profession. A chartered accountant gave evidence on her behalf, and she claimed compensation of $8,000.00 monthly until judgment. Waterman J. found that

the respondent's wrongdoing caused the applicant to delay the start of her practice for some considerable time. However, her evidence and that of her accountant was speculative. He estimated that her profits would have ranged from $20,000.00 in her second year of practice, $40,000.00 in the third year, $50,000.00 in the fourth year, and $75,000 in the fifth year. She was awarded compensatory damages in the sum of $185,000.00.

[94] Except for the profit and loss account in this case, there was no expert or other evidence to connect, on a balance of probabilities, any apparent loss of income to the Applicant's inability to register as a cardiology specialist. There was no explanation of the profit and loss account offered to the Court. And this account does not quantify or explain any loss of income to the satisfaction of the Court. In these circumstances the Court is not minded to "assess the loss doing the best it can". (See para.[91] supra].

<u>Disposal</u>

[95] The Court grants the following orders:

(1) an order of certiorari quashing the decision of the Council not to register the Applicant as a specialist in cardiology under Section 20 of the MPA;

(2) an order of certiorari quashing the decision of the Council not to register the Applicant as a specialist in cardiology under Section 21 of the MPA; and

(3) an order of mandamus directing the Council to consider anew the applications for registration of the Applicant as a specialist in cardiology under Sections 20 and 21 of the MPA.

[96] There is no order for the payment of damages to the Applicant.

[97] Costs are awarded to the Applicant to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court