COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

PUBLIC LAW DIVISION

2017/PUB/jrv/00006

IN THE MATTER of The Pharmacy Act, Chapter 227 of the Statute Laws of the Commonwealth of The Bahamas

AND

IN THE MATTER of an Application for leave to apply for Judicial Review by Phillippa Michelle Finlayson pursuant to the Rules of the Supreme Court, Order 53 Rule 3

BETWEEN

PHILLIPPA MICHELLE FINLAYSON

Applicant

AND

THE BAHAMAS PHARMACY COUNCIL

Respondent

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Wellington Olander and Ms. Anastacia Hepburn for the Applicant
Mr. Raynard Rigby and Mr. Christopher Francis of Baycourt Chambers for the Respondent

Hearing Dates: 16 February, 9 April, 3 September, 21 September, 9 October 2018

CATCHWORDS:

Public Law - Judicial Review – Grounds for Judicial Review – Change of Policy – Public Authority Change of Policy – Procedural Unfairness – Natural Justice - Legitimate Expectation – Frustration of legitimate expectation – Sections 9 and 12 of the Pharmacy Act, 2009

The Applicant obtained a Bachelor of Science Degree from McHari Institute, Nassau, The Bahamas ("McHari") in July 2006 and a Master of Science in Clinical Pharmacy from the same institution in October 2009. On 22 February 2006, she was approved for registration as a Pharmacy Technician by the Health Professions Council ("HPC") pursuant to Section 12 of the

Health Professions Act, 1998 ("HPA") and maintained that status/registration until on or about 31 December 2009.

On or about 17 December 2009, the *Pharmacy Act, 2009* ("PA") came into effect and the responsibility of registering pharmacists and pharmacy technicians was transferred from the HPC to the Bahamas Pharmacy Council ("the Council") by virtue of Section 9 of the PA. In or about March 2010, the Applicant was granted a Provisional Licence to practice as a Pharmacist pursuant to Sections 9 and 12 of the PA.

On about 18 February 2010, the Council was advised in writing by the Department of Public Service ("DPS") that the Master of Science Degree in Clinical Pharmacy from McHari had not been approved by the DPS. On or about 21 February 2012, the DPS issued Training Circular No.2 of 2012 which rescinded approval (by omission) of all McHari programs and McHari as an institution altogether. In addition, on or about 19 November 2012, the DPS issued Training Circular No.13 of 2012 the sole subject matter of which was the Public Service Commission's position relating to McHari and degrees/diplomas issued by McHari and in which the Commission emphasized that the *"registration"* of a programme by the Ministry of Education was not equivalent to *"accreditation"* of a programme.

During the period 2010 to 2016, the Council having never been satisfied as to the accreditation of McHari, made inquiries of various bodies including the Ministry of Health, the Ministry of Education, the HPC, and the National Accreditation and Equivalency Council of The Bahamas ("NAECOB"). The Council also wrote directly to McHari asking for further documentation that would confirm McHari's accreditation. The Council also commissioned an external evaluation of the Master of Science Degree in Clinical Pharmacy by Professor Rian Extavour ("the Extavour Report"). The Extavour Report found that the McHari MSc degree programme had "significant shortfalls" and NAECOB concluded that McHari was and never had been an accredited institution.

Having considered, among other things, the various DPS Circulars, the Extavour Report and the statement by NAECOB, the Council concluded that McHari was not an accredited institution for the purpose of exercising their function of licensing pharmacists under section 9(4)(a)(i) of the PA, and as a result determined that all licensees who were registered based on degrees from McHari be deregistered. Subsequently, at an Extraordinary Meeting of the Council on 24 January 2017, the Council deliberated on, and subsequently adopted a Resolution the crux of which resolved:

> **"To grant the said McHari Graduates provisional licenses if their degrees are not equivalent to a minimum of a Bachelors degree in Pharmacy from an accredited college or University to be renewed every three months for a period of two (2) years on the condition that during this time, the said McHari Graduates each sit and successfully pass the Council's Registration Examination and the Bahamas Pharmacy Law Examination thereby suspending the practice of annual renewal of their licenses effective 2017. These examinations will be administered biannually in May and October allowing the said McHari Graduates three (3) attempts during the two (2) year period ending December 2018."**

Unhappy with the Resolution that was adopted, the Applicant, on 3 March 2017, applied and was granted leave for judicial review of the Resolution. She sought, among other things, an Order of Certiorari quashing the Resolution, an Order of Mandamus directing the Council to renew her licence and a Declaration that the Council acted unfairly, arbitrarily and capriciously.

The Council contended that McHari and its various programmes were not accredited as envisioned by section 9 of the PA and therefore even if the Applicant was seised of a legitimate expectation for license renewal, the Council was entitled to change its policy and frustrate the said legitimate expectation on the basis of an overriding public interest (safety). The Council further contended that the Resolution which was passed accorded with the tenets of natural justice as it afforded the affected parties provisional licenses and a reasonable timeframe and mechanism for full registration.

HELD: Dismissing (i) an Order for Certiorari to quash the Resolution adopted by the Council, (ii) an Order of Mandamus to compel the Council to renew the Applicant's licence and a Declaration that the Council acted unfairly, arbitrarily and capriciously towards the Applicant and inviting the parties to make submissions on the issue of costs.

1. The Applicant was not seised of a legitimate expectation as she was not a public officer who relied on DPS Training Circular No. 1 of 2009 to enroll in McHari within the period that Training Circular No. 3 prescribed.

2. The Council is a statutory body established by the PA and a decision-making body's authority to change its policy in the face of changing circumstances cannot be fettered.

3. Having weighed the evidence and found that McHari was not an "accredited" institution as envisioned by section 9(4)(a) (i) of the PA, the decision to license the Applicant and the other 16 McHari graduates was made in error. Therefore, the Council was entitled to change its policy with regards to licences previously erroneously issued.

4. The Resolution was not unreasonable in the *Wednesbury* sense. It accords with the principles of procedural fairness because the Council acted ultra vires the PA when it registered the McHari graduates whose degrees were not from an "accredited" college or University. In addition, the Resolution contained an avenue for the affected persons to maintain provisional registration whilst pursuing qualification for full registration.

JUDGMENT

Charles J.

Introduction

[1] This is a judicial review application brought by Ms. Phillippa Michelle Finlayson ("the Applicant") against the Bahamas Pharmacy Council ("the Council') challenging a Resolution adopted by the Council on 24 January 2017 wherein the Council resolved, principally, that the Applicant and 16 other graduates who graduated from McHari Institute, Nassau, The Bahamas ("McHari") were registered by the Council as Pharmacists without documentation supporting the accreditation of McHari Pharmacy Degree programmes. The Council further resolved that the Applicant and the 16 graduates be issued with provisional

licences until an evaluating agency determine whether McHari degrees are equivalent to a minimum of a Bachelor's Degree in Pharmacy from an accredited college or University.

[2] Unhappy with the Resolution that was passed, the Applicant seeks the following relief namely:

i. An Order of Certiorari quashing the Resolution adopted by the Council on 24 January 2017;

ii. An Order of Mandamus directing the Council to renew her licence and that of the sixteen (16) other McHari Graduates;

iii. A Declaration that the Council acted unfairly, arbitrarily and capriciously towards the Applicant;

iv. An Order that all necessary and consequential directions be given;

v. Such further or other relief as the Court deems just; and

vi. Costs.

Factual summary

[3] The relevant facts are broadly not in dispute and can be shortly summarized.

[4] In or about July 2004, the Applicant sat the Pharmacy Certificate of Competency Exam administered by the Health Professions Council ("HPC"). On or about 6 October 2004, the Applicant was advised in writing by the Chairman of the HPC, Dr. Charles Diggiss, that she was unsuccessful in the exam upon earning an unsatisfactory score of 62.2%.

[5] The Applicant later obtained a Bachelor of Science Degree from McHari in July 2006 and a Master of Science Degree in Clinical Pharmacy from the same institution in October 2009.

[6] On 22 February 2006, the Applicant was approved for registration as a Pharmacy Technician by the HPC pursuant to section 12 of the Health Professions Act, 1998 ("HPA") and she maintained that status/registration until on or about 31 December 2009.

[7] On or about 1 July 2008, McHari was advised in writing that the HPC did not approve of its pharmacy programme despite McHari offering the Master of Science Degree in Clinical Pharmacy. The HPC noted that, in its deliberation, it took into account documents prepared by Dr. Leon Higgs, Director of Higher Education at the Ministry of Education, but "*there was still no documented evidence that McHari is an accredited institution*".

[8] In or about January 2009, the Department of Public Service ("DPS") issued Training Circular No.1 of 2009 ("Training Circular No. 1") indicating that the Master of Science Degree in Clinical Pharmacy offered by McHari was accepted by the Public Service.

[9] On or about 17 December 2009, the Pharmacy Act, 2009 ("the PA") came into force. By section 9 of that Act, the responsibility of registering Pharmacists and Pharmacy Technicians was transferred from the HPC to the Council.

[10] In or about March 2010, the Applicant was granted a Provisional Licence to practice as a Pharmacist pursuant to section 12 of the PA.

[11] On or about 21 February 2012, the DPS issued Training Circular No. 2 of 2012 ("Training Circular No. 2") which rescinded approval (by omission) of all McHari programmes and McHari as an institution altogether. Training Circular No. 2 expressly stated that it superseded Training Circular No. 1.

[12] On or about 20 April 2012, the Council was advised in writing by the Ministry of Health that it ought to consider Training Circular No. 2 when exercising its function under section 9(4)(a)(i) of the PA; that is, whether an applicant for licensing "*holds a pharmacy degree from an accredited college or University*."

[13] On or about 19 November 2012, the DPS issued Training Circular No.13 of 2012 ("Training Circular No. 3"); the sole subject matter of which was the Public Service Commission's position relating to McHari and degrees/diplomas issued by McHari. Training Circular No. 3 concluded that the Public Service Commission ("PSC") will only accept degrees/diplomas issued by McHari to public officers who enrolled at McHari on or after 21 January 2009 and before 21 February 2012 ("the prescribed period"). Put another way, only degrees/diplomas earned by public officers who enrolled at McHari as a consequence of relying on the issuance of Training Circular No.1 will be accepted. The Circular noted that "*one must not confuse "registering of programmes*" by the Ministry of Education with "*accreditation*".

[14] It is not in dispute that the Applicant's matriculation dates do not fall within the prescribed period nor was/is she a public officer.

[15] It appeared that the Council was never satisfied as to the accreditation of McHari. It therefore caused inquiries to be made from 2010 to 2016 of various bodies including the Ministry of Health, the Ministry of Education, the HPC and the National Accreditation and Equivalency Council of The Bahamas ("NAECOB"). The Council also commissioned an external evaluation of the Master of Science Degree in Clinical Pharmacy by Professor Rian Extavour ("the Extavour Report"). The Extavour Report found that the McHari's Master of Science Degree programme had "*significant shortfalls*."

[16] Additionally, by letter dated 12 November 2013, the Council wrote directly to McHari seeking documentation and evidence of its accreditation to offer the Bachelor of Science Degree in Pharmacy and Masters of Science Degree in Clinical Pharmacy emphasizing, in summary, that "*accreditation*" and "*registration*" are not the same.

[17] On 18 November 2013, Mr. Kevin Turnquest-Alcena, Chancellor of the College ("Mr. Alcena") responded. In his 10-page letter, he stated, among other things, that

"All of McHari's documentation or evidence of accreditation and registration are on file at the Ministry of Education for your perusal".

[18] Not satisfied with the explanation, the Council concluded that McHari was/is not an accredited institution for the purpose of exercising their function of licensing Pharmacists under section 9(4)(a)(i) of the PA. The Council further determined that all licensees who were registered based on degrees from McHari be deregistered.

[19] Then, at an Extraordinary Meeting of the Council on 24 January 2017, the Council, by a majority of 4 to 1 vote with one abstention, passed the following Resolution ("the Resolution"):

> "**WHEREAS**
>
> A. Seventeen (17) graduates ("hereinafter called "the said McHari Graduates") with degrees from McHari International College were registered as 'pharmacists' by the Council without documentation supporting the accreditation of these pharmacy degree programmes;
>
> B. The registration by the Council of the said McHari Graduates was in contravention of sec 9 (4) (a) (i) of the Pharmacy Act *Ch. 227* which states "to be registered as a pharmacist, if that person ..... holds a pharmacy degree from an accredited college or University";
>
> C. The Council continued to renew the licenses of the said McHari Graduates, annually, to practice as pharmacists;
>
> D. The Council acted *ultra vires* of the Pharmacy Act Ch. 227 in registering the said McHari Graduates;
>
> E. The Council should discontinue the practice of renewing licenses received by the said McHari Graduates to practice pharmacy; and
>
> F. The Council desires to provide an opportunity for the said McHari Graduates to prove their competence to practice pharmacy while allowing the said McHari Graduates to continue to enjoy the benefits and use of the title and professional status of 'registered pharmacists' while ensuring no risk to public safety.

BE IT HEREBY RESOLVED BY THIS COUNCIL

1. To request the said McHari Graduates to have their degrees evaluated by an evaluating agency to ascertain whether the McHari degrees are equivalent to a minimum of a Bachelors degree in Pharmacy from an accredited college or University and to have these reports sent directly to the Council by the evaluating agency.

2. To grant the said McHari Graduates provisional licences while awaiting the evaluation reports from the evaluating agency.

3. To renew the annual licences of the said McHari Graduates if their degrees are equivalent to a minimum of a Bachelor's degree in Pharmacy from an accredited college or University.

4. To grant the said McHari Graduates provisional licences if their degrees are not equivalent to a minimum of a Bachelor's degree in Pharmacy from an accredited college or University to be renewed every three months for a period of two (2) years on the condition that during this time, the said McHari Graduates each sit and successfully pass the Council's Registration Examination and the Bahamas Pharmacy Law Examination (BPCLEX) thereby suspending the practice of annual renewal of their licenses effective 2017. These examinations will be administered biannually in May and October allowing the said McHari Graduates three (3) attempts during the two (2) year period ending December 2018.

5. To make good faith efforts to cause the names of those persons unsuccessful on these examinations after the two-year period to be placed on the register of licensed Pharmacy Technicians after successful completion of a certified pharmacy technician examination or an equivalent examination acceptable to the Council."

[20] On 3 March 2017, the Applicant sought and was granted leave to bring judicial review proceedings against the Council.

Grounds upon which Judicial Review is sought

[21] The Applicant premised her application for judicial review on the following grounds:

1) On 21 January 2009 the DPS issued Training Circular No. 1 naming Institutions and Accrediting Organizations that are accepted by the Public Service. McHari is listed on pages 4 and 5 of the said Circular;

2) Policy Statement on McHari from the PSC dated 3 October 2012 directed to the DPS to accept degrees/diplomas issued by McHari which are listed in Training Circular No. 1 who obtained the degree/diploma enrolled in the course with the Applicant on or after 21 January 2009 and before 21 February 2012.

3) In December 2016, (sic) the Council passed a Resolution not to renew the Applicant's and 16 others Pharmacists' licenses stating that their McHari Institute degrees in Pharmacy were not Pharmacy degrees from an accredited college or University;

4) The Council is in possession of documents stating that McHari's degrees in Pharmacy are accepted by the Ministry of Education;

5) The Applicant has been licensed by the Council from 2010 to 2016 and no complaints have made against her;

6) To refuse to renew the Applicant's licence for 2017 is contrary to law and a breach of the Applicant's legitimate expectation;

7) An Order of Estoppel against the Council because the Applicant's Bachelor's and Master's Degrees in Pharmacy were from an accredited college or University;

8) The arbitrary conduct on the part of the Council is particularly damaging having regard to the Applicant's reputation and her status in the community.

The issues

[22] In summary, the grounds of the application for judicial review raise the following issues:

1. Is McHari an accredited college or University as envisioned by the HPA and the PA for the purpose of licensing Pharmacists in The Bahamas?

2. Did the Council once determined that McHari was an accredited college or University? If it did, can it change its policy with regard to a licence previously issued under such circumstance? If it can, does the change in policy and concurrent deregistration of an affected licensee amount to irrationality to fall in the category of the "*Wednesbury unreasonableness*" principle?

3. Was McHari an accredited college or University at the time of licensing the Applicant as a Pharmacist?

4. Was the Applicant treated fairly/unfairly in accordance with the principles of procedural fairness?

5. Whether the Resolution is in breach of the Applicant's legitimate expectation after engaging in private practice as a Pharmacist for more than seven (7) years; there being no complaint that the Applicant violated the terms of the licence?

6. Was the legitimate expectation of the Applicant frustrated by the Council's decision to refuse to renew her licence to practise as a Pharmacist? and

7. Was there a sufficient public interest to justify the Council's frustration of the Applicant's legitimate expectation?

The evidence

[23] The Applicant testified and called Dr. Leon Higgs, Mr. Philip Gray and Dr. Marvin Smith as her witnesses.

[24] Dr. Higgs, a highly qualified and experienced educator, was the Director of Higher Education and Lifelong Learning in the Ministry of Education from 2004 to 2013. He was responsible for the evaluation and approval of all Tertiary Education,

Scholarship, Public Libraries, The Technical Cadet Corporation, Bahamas Technical and Vocational Institute and Literary programs in the Bahamas. He retired from the Ministry of Education in 2013. From 2013 to 2017, he was a Consultant in that Ministry.

[25] He testified that, to his knowledge. McHari was approved and recognized by the Ministry of Education and the Ministry of Public Service to offer Bachelor, Master and Doctorate Degrees in The Bahamas until February 2012, and that, until 2016, there was no accreditation board for tertiary educational institutions in The Bahamas.

[26] Dr. Higgs further testified that NAECOB came into operation on 28 February 2007, however, the NAECOB's statutory body established under the Act did not become operational until August 2016. Dr. Iva Dahl became the Executive Director. He stated that until the establishment of the statutory body of NAECOB, the Ministry of Education through its Higher Education and Lifelong Learning Department was the Government Body that approved and recognized all tertiary educational institutions in The Bahamas.

[27] Dr. Higgs stated that McHari was registered to offer degree (Bachelor and Masters) courses in The Bahamas since 2001. Sometime in or about 2003, McHari commenced seeking Articulation Agreements with higher learning educational institution in the Republic of Cuba.

[28] He testified that the Ministry of Education has accepted and recognized the articulation agreements between:

1) McHari and Havana University dated August 2006;

2) Articulation Agreement between McHari and Higher Technical University "Jose Antonio Echevarria, dated 30 August 2006;

3) Articulation Agreement between McHari and the Ministry of Higher Education, Cuba dated 7 September 2006 which is the revised version of the first agreement dated 5 May 2003.

[29] Dr. Higgs deposed that, during his tenure as Director of Higher Education and Lifelong Learning, all of the professors in the Pharmacy programmes were holders of medical doctoral degrees and PhD degrees. He opined that the programmes at McHari were strong especially since the curriculum was designed in Cuba and modified for The Bahamas community. Furthermore, the credentials of the faculty were strong.

[30] Under extensive cross-examination by learned Counsel Mr. Rigby for the Council, Dr. Higgs stated that there is a process involved once an institution makes an application to be approved and his department eventually makes the decision whether the institution is to be registered. According to him, as the expert, the Permanent Secretary delegated that authority to him and he, in turn, keeps the Permanent Secretary informed.

[31] In terms of criteria to be considered, Dr. Higgs testified that "*one of the things we wanted the local Bahamian institutions to do is to have affiliation with a recognized international institution...an accredited institution….We look at the faculty, we look at the curriculum and we look at the facilities*."

[32] Dr. Higgs stated that when he got to the Ministry of Education, there were already guidelines in place for accepting and approving institutions. He was also aware of the regulations which were in place as he would have used those. He said that the Director of Education was not involved in the process of approving institutions since his position was lateral with the Director of Education who was responsible for primary and secondary schools and he (Dr. Higgs) was responsible for tertiary education. He said that the Ministry of Education should have a register of the institutions of higher learning in The Bahamas.

[33] Dr. Higgs asserted that when he got to the Ministry of Education in 2004, McHari was already approved.

[34] When asked whether the Department of Higher Learning, of which he was the Director, had the authority to accredit an institution, Dr. Higgs said that there was

no accrediting body in The Bahamas so no one had the authority between 2004 and 2013 to accredit an institution of higher learning in The Bahamas. He accepted that there is a distinction between “approving and recognizing” an institution and “accrediting” an institution.

[35] Dr. Higgs was cross-examined extensively on the three Circulars issued by the DPS. With respect to Circular No. 1 at page 17, he accepted that no reference was made to the acceptance of the Bachelor’s Degree in Pharmacy in 2001. He also accepted that in Circular No. 2, McHari does not appear meaning that the institution was not accepted by the Public Service. In Circular No. 3, Dr. Higgs said that he was aware of the decision of the Public Service to no longer accept the degrees and diplomas offered by McHari and, more than likely, he notified McHari of the decision.

[36] Dr. Higgs further testified that his department did not consider deregistering McHari after receiving Circular No. 3 as he did not see the reason to. He said that McHari lost its recognition in February 2012.

[37] Mr. Philip Gray also testified on behalf of the Applicant. He swore an affidavit on 26 September 2017. He is a Pharmacist by profession and a graduate of McHari with the Master’s Degree in Clinical Pharmacy. He was also the first Chairman of the Council from 2010 to 2012. One of his functions was the issuing of licences. He averred that the Applicant was one of the first persons to practise as a Pharmacist in The Bahamas. Her application to register as a Pharmacist was approved after due diligence was done in that she was the holder of a pharmacy degree from an accredited college or university. He exhibited a letter from Dr. Higgs dated 14 December 2009 wherein Dr. Higgs informed him that “the Bachelor and Masters of Science Degrees in Pharmacy were registered by the Ministry of Education and approved by the Department of Public Personnel since 2002 and 2006 respectively.” Dr. Higgs also penned that McHari is also accredited with Havana University in the Republic of Cuba.

[38] In paragraph 7 of his affidavit, Mr. Gray asserted that the Council was satisfied that the Applicant met all of the requirements of the PA.

[39] Mr. Gray deposed, at paragraph 10 of his affidavit, that he is extremely familiar with the PA and he cannot recall any provision of that Act stating that a successor Council can invalidate a decision of a previous Council.

[40] Under cross-examination by learned Counsel Mr. Rigby, Mr. Gray did not believe that the Applicant had applied for a licence as a Pharmacist during the period of the HPC. He testified that she was licensed as a Pharmacy Technician.

[41] Mr. Gray said that the last sentence of Dr. Higgs' letter which states "McHari International College is also accredited with Havana University in the Republic of Cuba, since August 2006" aided him in arriving at the decision that McHari is an accredited university. He said that the Council also consulted with Dr. Marvin Smith and Dr. Kareem McKinney, now deceased, to evaluate and assess the programmes and to report back to the Council.

[42] Mr. Gray was quizzed on a letter which he wrote on 17 February 2010 to the DPS requesting the following information pertaining to McHari:

1. Whether or not the Master of Science Degree in Clinical Pharmacy was approved by the Department of Public Service; and

2. If there is any other body in (sic) country to which the Council would need approval from prior to registering persons with the abovementioned qualifications.

[43] According to him, he has no recollection of the response to his letter from the DPS dated 18 February 2010. As such, he was unable to state what action, if any, the Council took. When shown the response, Mr. Gray accepted that it expressly stated that the Master of Science Degree in Clinical Pharmacy from McHari has not been approved by the DPS.

[44] Under cross-examination, Mr. Gray stated that, in relation to the letter, he engaged the services of Professor Extavour. According to him, he read her Report which formed part of his due diligence. He recalled that there were some areas of the programme which she spoke about that did not correspond with the University of the West Indies ("UWI") programme.

[45] He admitted that he saw her conclusion. It reads as follows:

> **"In order to offer a postgraduate program in clinical pharmacy, the MHI college will need to revise the curriculum offered to remove redundant baccalaureate courses, develop courses that build on a specific core competency and allow more time for didactic delivery, practical training and independent research. <u>The present program is too diverse to be considered a specialization in the field of clinical pharmacy practice and contains significant shortfalls in the quality human, pedagogical and literary resources</u>."** [Emphasis added]

[46] Mr. Gray stated that the Council also obtained a Report from a 3-Member committee comprising Dr. Marvin Smith, Dr. McKinney and Ms. Paula Sweeting ("the Committee"): see attachment to Exhibit MS1. He was interrogated as to their findings at 2A which states that "*[T]he committee recognizes the unique constraints with local availability of consistent pharmacy programs. It also understands that several years of practical experience can provide invaluable insights into the profession.* ***The committee accepts these admission standards as reasonable, and recommends that the Council seeks to actively monitor future students to ensure that all these requirements are being upheld*****."**

[47] Learned Counsel Mr. Rigby also vigourously cross-examined Mr. Gray on the Extavour Report and whether he took issue with his findings. For example, at page 38 of her Report, Professor Extavour stated:

> **"…<u>The graduate of the MScMHI individual would only develop sufficient knowledge at the level similar to a pharmacy technician</u>. This may be misleading and discouraging to the enrolled student, who upon graduation, would not be adequately prepared to take up the roles and/or responsibilities of a clinical pharmacist and/or manager of clinical pharmacy services".**[Emphasis added]

[48] In answer to this finding, Mr. Gray said that the Council looked at all findings including that of Professor Extavour and the Committee. He was then referred to page 2 of the Report under sub-heading 3: *Evaluate external reviews generated by UWI personnel".* It states:

> **"The Council forwarded a copy of the extensive review completed by Professor Rian Extavour of the College of Pharmacy, University of the West Indies, Trinidad. The review was very well done, extremely comprehensive and it tackled most, is not all of the relevant issues from an academic perspective. In general, the report endorses the academic layout and facilities of the program. <u>The committee wholeheartedly agrees with Professor Extavour's evaluation and recommendations.</u>"** [Emphasis added].

[49] He emphatically denied that the Council appointed the Committee after receiving the Extavour Report although the Committee mentioned the Extavour Report in their undated and unsigned Report.

[50] When questioned about the letter from Mrs. Blanche Deveaux of the Ministry of Health with regards to the obligation of the Council to comply with section 9 of the PA, Mr. Gray said that they took that into consideration but there were persons already registered by the Council. The persons were given provisional licences including the Applicant who received her provisional licence on 30 May 2010. According to him, she would have already gotten her full registration before that date.

[51] Under further cross-examination, Mr. Gray stated that he participated in the deliberation of the Council to issue a provisional licence to the Applicant. A Graduate of McHari, Mr. Gray said that he had no vested interest in the outcome of the Applicant's application. He said that the Applicant met all of the requirements of the PA and when questioned about this, Mr. Gray said that in reaching that conclusion, many documents were considered including those from the Ministry of Education, the Committee and any other documents available to us from the Bahamas Government. To my mind, Mr. Gray deliberately omitted to mention the Extavour Report and when prompted by learned Counsel Mr. Rigby, he stated that "*we looked at all of them*."

[52] When questioned whether the Applicant holds a Pharmacy Degree from an accredited institution in accordance with the requirements of the PA, Mr. Gray said that he was referring to her degree. He agreed that if McHari was not an accredited University, the Council could not be satisfied that she met the requirements of the PA. In the same breath, he stated that he does not agree that the Council would have had no authority to issue a licence.

[53] Under re-examination, Mr. Gray asserted that at the time he approved the Applicant's application, there was no accreditation body in The Bahamas. The Applicant was granted a provisional licence before the Extavour Report and that of the Committee.

[54] The next witness to testify was Dr. Marvin Smith. His evidence in chief is derived from an affidavit that was filed on 7 February 2018. Dr. Smith is licensed to practise as a Pharmacist since 2000. He is presently employed with the Public Hospitals Authority ("PHA") as Deputy Director of Supply-Chain Management Agency. He is the Chief Pharmacist for PMH since 2017.

[55] Dr. Smith holds a Doctoral Degree in Pharmacy from Mercer University, Atlanta, Georgia, USA. He was Deputy Chairman of the Council for the years 2012 and 2013 and a member of the said Council from 2012 to 2017. For the years 2010 and 2011, he was the Chairman of the Committee mandated to review the particulars of articulation agreements between McHari and the Ministry of Higher Education and the Higher Technical University "Jose Antonio Echeverria" of the Republic of Cuba relative to McHari's Pharmacy programme.

[56] Dr. Smith deposed that, at an extraordinary meeting on or around December 2016 (sic), the Council passed the Resolution, He voted against it for the following reasons:

1) Pharmacists already licensed should not be revoked without clear evidence of fraud or malpractice;

2) The Council should not interfere with decisions made by previous competent Council after they have done the necessary due diligence that

the McHari Institute Pharmacy program had been approved by the Ministry of Education;

3) The said Council never provided list of deficiencies in the McHari Pharmacy program as it related to the national competency for practice; and

4) The said Council approved the licences for 22 pharmacy graduates from the University of Havana which was the university for whom the McHari Institute Pharmacy program had been approved to administer the said program, inclusive of curricula and assigned professors on their behalf.

[57] Dr. Smith further deposed that, in or around 2011, the Committee was engaged by the Council under the chairmanship of Mr. Gray **to review** the Masters of Science Degree in Clinical Pharmacy Program at McHari. The Committee reported to the Council that:

1) The program and the first graduating class of students of the Masters of Science Degree in Clinical Pharmacy Programme from McHari be granted accreditation and approval giving them full rights to the said degree; and

2) The Council reserves the right to review all future students to ensure that the standards, quality of lecturers and curriculum are upheld.

[58] Dr. Smith averred that the Council, after receiving the Committee's Report, gave approval and recognition to the University of Havana program being administered by McHari after assessing the University of Havana Pharmacy professors.

[59] In paragraph 16 of his affidavit, Dr. Smith stated that the present Council is setting a dangerous precedent by bringing uncertainty into the decisions of the previous Council established under the PA by overruling decisions made by a previous competent Council. He was unequivocal that, until August 2016, there was no accreditation council in The Bahamas for tertiary educational institutes. He also emphasized that, at the time of the passing of the Resolution, there was no complaints submitted to the Council against any of the graduates of McHari who are licensed pharmacists.

[60] Dr. Smith further stated that there is no provision in the PA, to which he was instrumental in drafting, which authorizes a successor Council to declare that a previous Council acted in error in licensing pharmacists.

[61] Dr. Smith deposed that prior to 2016, the Council acted on the report/advice of Dr. Higgs, to comply with section 9 (4)(a)(i) of the PA as there was no accreditation board of tertiary educational institutions in The Bahamas.

[62] Dr. Smith was vigourously and extensively cross-examined by Mr. Rigby for an entire day. He admitted that he was a member of the Committee which produced a Report. Although undated, he said that the Report was submitted on or about September 2011.

[63] Dr. Smith referred to all of the documents that were provided to the Committee. He also stated that the Committee met with Dr. Higgs but no one from the Ministry of Health or the HPC as they did not feel it was necessary to meet with the latter two bodies.

[64] Dr. Smith was interrogated as to how the Committee arrived at the conclusions in their Report and whether he read and agreed with the recommendations in the Extavour Report. Dr. Smith agreed with the scope of the Report but added that the Committee did not agree with everything that was touched on in the Extavour Report.

[65] Dr. Smith did not accept that the Committee and Professor Extavour had the same mandate, that is, to evaluate the Master of Pharmacy Degree programme offered by McHari. According to him, the Committee was asked to evaluate the programme, the students, the cohorts and, in all, five different components whereas Professor Extavour had one component to evaluate. He said that the Committee agreed with Professor Extavour's finding that the programme met an undergraduate level program but disagreed with her finding that a graduate of the Master's Degree would only develop sufficient knowledge at the level similar to a Pharmacy Technician. He said that the disagreement stemmed from the fact that

she did it as a comparative of the Liverpool John Moore's University (LJMU) programme and from the Committee's perspective, the standard of Pharmacy Technicians in the UK is different from the standard of Pharmacy Technicians in The Bahamas.

[66] Under cross-examination of the Articulation Agreement between McHari and the Ministry of Higher Education - Exhibit "P.M.F. 7", Dr. Smith admitted that, after a review of this Agreement, he was satisfied that all of the requirements were met.

[67] In answer to a question by the Court, Dr. Smith accepted that a simple solution on a way forward would be for an exam to be taken: see page 77 of the Transcript of Proceedings dated 9 April 2018. He hastened to add that "*setting up an examination is not an easy process. It takes time*."

[68] The final witness was the Applicant herself. She swore three affidavits in these proceedings; the first on 28 February 2017; a Supplemental Affidavit filed on 20 March 2017 and a Second Supplemental Affidavit filed on 7 February 2018.

[69] She was registered and licensed as a Pharmacist since 2010. She applied to be licensed as a Pharmacist in 2010 pursuant to the PA which came into force on 17 December 2009. She is presently the President of The Bahamas Pharmaceutical Association having held that office since 2014.

[70] The Applicant averred that, sometime on or about January 2009, the DPS issued Training Circular No. 1 indicating that McHari was one of the colleges/Universities whose degrees/diplomas were accepted by the Public Service. The commencement date for the acceptance of McHari degrees/diplomas was 2001.

[71] Sometime in or about February 2012, the DPS rescinded Training Circular No. 1 and issued Training Circular No. 2 which omitted McHari from the list of approved colleges and Universities. On 19 November 2012, the DPS issued Training Circular No. 3 which directed the PSC to accept degrees/diplomas issued by McHari during the prescribed period.

[72] The Applicant deposed that, for the last seven years, her licence as a Pharmacist has been renewed annually. Then, in or about November 2016, she made an application for the renewal of her licence which was to expire on 31 December 2016 as all pharmacy licences expire on 31 December of each year and that was when difficulties arose.

[73] The Applicant averred that, at a meeting held in December 2016, the Council passed a Resolution, the subject of these judicial review proceedings, which in effect states that the 17 graduates including herself were registered without documentation supporting the accreditation of the pharmacy degree programs and therefore, their registration was in contravention of section 9(4)(a)(i) of the PA.

[74] Thereafter, she submitted the following documents to the Council namely:

1) Letter dated 4 May 2007 from the Ministry of Education to McHari stating that the Bachelor, Master's in Pharmacy and PhD degrees offered by McHari are **recognized** by the Ministry of Education: Exhibit "P.M. F. 8";

2) Letter dated 12 December 2007 from the Ministry of Education, Youth, Sports and Culture to McHari stating that their degree programs in B.Sc. Pharmacy & M.Sc. Clinical Pharmacy Clinical Pharmacy are **registered** with the said Ministry: Exhibit "P.M.F. 9";

3) Letter dated 13 February 2008 from the Ministry of Education, Youth, Sports and Culture addressed to the Registrar of the HPC stating that the Bachelor's and Master's Degree programmes in Pharmacy offered by McHari are **approved and registered** with the Ministry of Education: Exhibit "P.M.F. 10";

4) Memorandum from the Ministry of Education dated 14 December 2009 addressed to Mr. Philip Gray, Chairman of the Bahamas Pharmacy Council stating that the Bachelor and Master of Science Degrees in Pharmacy were **registered** by the Ministry of Education **and approved** by the Department of Public Personnel since 2002 and 2006 respectively: Exhibit "P.M.F. 11";

5) Letter dated 4 February 2011 from the Registrar of the Bahamas Pharmacy Council to the Chairman of the Board of Governors McHari stating that after careful review the Bahamas Pharmacy (sic) has granted approval to the first graduates of the Masters of Science Degree in Clinical Pharmacy Program, McHari: Exhibit "P.M.F. 12".

[75] The Applicant averred that notwithstanding the receipt of the above-mentioned documents, the Council has refused to renew her licence to practise as a Pharmacist for the year 2017.

[76] In her Supplemental Affidavit filed on 20 March 2017, the Applicant deposed that sometime in or about January 2017, she submitted her transcripts and degree certificate for her Bachelor of Science in Pharmacy and Master of Science in Clinical Pharmacy to CreditEval in California, USA to evaluate the course studies for the US equivalencies of the said degrees from McHari. Sometime in February 2017, she received an evaluation report dated 22 February 2017 from CreditEval stating that based on her transcripts for her BSc. Degree on Pharmacy, her US Grade Point Average ("GPA") is 3.44: Exhibit "P.M.F. 4" and for her Master's Degree, her US G.P.A. is 3.44: Exhibit "P.M.F.5".

[77] On 7 February 2018, the Applicant filed a Second Supplemental Affidavit. The gist of her affidavit is that at the time that she received her Bachelor of Science Degree in Pharmacy in 2006 and her Master's Degree in 2009, McHari had Articulation Agreements with the Cuban Higher Technical University "Jose Antonio Echeverria" dated 5 May 2003 and 30 August 2006 as well as Havana University dated 24 August 2006 and the Cuban Ministry of Higher Technical University: Exhibit "P.M.F. 6 & 7".

[78] Under cross-examination, the Applicant said that the first time she knew McHari had a problem was 2014. He never inquired of the HPC whether the programmes at McHari were approved by the Council. According to her, she never knew that McHari was not recognized.

[79] In answer to a question by the Court, the Applicant stated that she invested five years of exams as well as ten years of experience and if an independent body would assess her and the 16 other graduates, she would take the exam.

[80] On behalf of the Council, two witnesses testified. Anne Thecla Vanria Rolle ("Dr. Rolle") testified that she is the Registrar of the Council having been appointed to that post on 5 September 2013.

[81] In her affidavit dated 25 September 2017, she stated that prior to the coming into force of the PA, the HPC was responsible for the registration and licensing of Pharmacists in The Bahamas. She testified that the Applicant purports to have completed a Bachelor of Science Degree in Pharmacy from McHari on 31 July 2006 and a Master of Science Degree in Clinical Pharmacy from the said Institute on 30 October 2009. Dr. Rolle opined that based on the dates of the Applicant's academic achievements, it is expected that she would have applied for registration as a Pharmacist to the HPC, the predecessor Council.

[82] Dr. Rolle stated that, since her appointment as Registrar, she has searched the files of the Council but was unable to locate any document that the Applicant was registered by the HPC as a Pharmacist. Says Dr. Rolle, this means that the Applicant was unable to have her licence continued pursuant to section 11 of the PA.

[83] Dr. Rolle stated that her inquiries revealed that the Applicant was registered as a Pharmacy Technician on 22 February 2006 by the HPC: Exhibit "V.R.1".

[84] Dr. Rolle asserted that the Applicant's purported degrees from McHari were central to her registration under the provisions of the PA. The requirements for registration and licence under the HPA were similar to that under section 9 of the PA. Based on the Act, the Applicant's request for registration was critical to the Council which had to determine whether the Applicant's degrees from McHari satisfied the threshold requirement of section 9(4)(a)(i) of the PA namely: were they issued by an accredited college or University; a focal issue in these proceedings. Dr. Rolle answered this question by referring to a letter dated 1 July 2008 from Bernadette Ellis, Registrar of the HPC to Mr. Alcena. It states:

> **"Notwithstanding the offering of the Master of Pharmacy Programme at the McHari Institute, <u>you are advised that the above programme has not received approval from the Council.</u>"**
>
> **The Council has perused documents submitted through Dr. Leon Higgs, Director of Higher Education, Ministry of Education, however, to date, <u>there is no documented evidence that McHari Institute is an accredited institution….</u>"**[Emphasis added]

[85] Dr. Rolle opined that since McHari was not approved by the HPC, this means that the Applicant was not registered by that Council.

[86] In paragraphs 12 to 14, Dr. Rolle discussed the NAECOB. She deposed that, in accordance with the Act, the NAECOB is responsible for conducting and advising on the accreditation and registration of universities and colleges offering degrees in The Bahamas. According to her, McHari was not accredited by the NAECOB and registered institutes had a period of five years to apply for accreditation under the Act. Furthermore, says Dr. Rolle, in an exchange of correspondence with the NAECOB in relation to the accreditation of McHari, NAECOB confirms that McHari is not an accredited college or University: Exhibit "V.R.3".

[87] In paragraphs 15 to 19 of her affidavit, Dr. Rolle deliberated on the registration of McHari. She said that prior to the coming into effect of the NAECOB Act, universities and colleges in The Bahamas had to be registered under the provisions of the Education Act and the Institute of Further Education (Registration) Regulations. Based on correspondence from the Ministry of Education, McHari was "registered" by the said Ministry: see letters from Dr. Higgs at Exhibit "V.R. 4". In the letter dated 13 February 2008, Dr. Higgs stated as follows:

> **"Based on our records, McHari Institute is also accredited by the Ministry of Higher Education (May 5, 2003), Havana University (August 24, 2006), and The Higher Technical University "Jose Antonio Echeverria" (Cujae) (August 30, 2006), all from the Republic of Cuba."**

[88] In paragraph 17 of her affidavit, Dr. Rolle deposed that she is also in receipt of several Memoranda issued by the Department of Public Personnel relating to the

approved courses which were recognized by the Public Service: See: Exhibit "V.R.5" and also paragraphs 8, 11 and 13 of the summary of facts (supra).

[89] Dr. Rolle next deposed that by letter dated 17 February 2010, the Council, by its Chairman, Mr. Gray, sought clarification from the DPS of the degrees offered by McHari. In a letter dated 18 February 2010 to Mr. Gray, it was confirmed that the Master of Science Degree in Clinical Pharmacy from McHari was "not approved" by the DPS: Exhibit "V.R.6". This is also the same position taken by the HPC.

[90] Additionally, Dr. Rolle commented on letters dated 17 October 2008 and 20 April 2012 respectively. She stated that the degrees offered by McHari in Pharmacy related subjects were not approved by the Government. She observed that the letter of 17 October 2008 is particularly striking because it specifically addressed the degrees offered by McHari which were "accepted and approved" by the Ministry of Education and the Public Service: Exhibit "V.R. 7". In the 20 April 2012 letter, Mrs. Blanche Deveaux wrote to Mr. Gray, attaching the list of institutions that are accepted by the Public Service, and stating:

> **"Kindly also note that this matter is being brought to your attention based upon what is outlined in the Pharmacy Act, Part IV, Section 9, Subsection 4(a) (i)."**

[91] In paragraphs 20 to 28, Dr. Rolle elaborately discussed the Applicant and the other 16 McHari graduates who are seeking registration as Pharmacists under the PA. She said that the Council's position in relation to all of the graduates is consistent in that the Council deems that the degrees issued by McHari are not "accredited' as they fall below the acceptable level based on international standards.

[92] Dr. Rolle stated that the Council's position is that the evaluations done by Josey Silny & Associates Inc. and Professor Extavour are independent evaluations. At paragraph 25, Dr. Rolle stated:

> **"Due to the fact that none of the graduates have a certificate of competency in pharmacy, they could not qualify for registration on that basis under the Pharmacy Act. <u>The certificate of competency was granted by the Board of</u>**

Pharmacy under the Pharmacy Act Chapter 212 (now repealed) after passing the examination administered by the Board." [Emphasis added]

[93] Dr. Rolle deposed that, contrary to her view, the Applicant was unsuccessful in the pharmacy certificate of competency examinations: Exhibit "V.R.10".

[94] She stated that the Council is of the opinion that the Applicant and the other 16 McHari Graduates do not qualify for registration under the PA as they have not satisfied the statutory requirements for registration.

[95] In paragraph 28 of her affidavit, Dr. Rolle averred that she wrote to McHari on 12 November 2013 seeking evidence of its accreditation. By letter dated 18 November 2013, Mr. Alcena forwarded a response to the Council. In her view, the response did not address the issue of accreditation and failed to acknowledge whether its degrees in pharmacy were accredited. According to her, the letter did not assist the Council in achieving its objectives of ensuring that the Applicant and the 16 other graduates are suitably qualified for registration pursuant to the PA: Exhibit "V.R.11".

[96] In paragraphs 29 to 37, Dr. Rolle talked about the Resolution, the subject of these proceedings. According to her, the Council is amenable to the notion that the Applicant and the other 16 graduates take an exam offered by the Council biannually in the months of May and October and if they are successful, the Council will register them under the PA.

[97] Dr. Rolle stated that the Council is of the opinion that it owes a duty to the public in maintaining the health and safety of patients and members of the public and in this regard, the Council has a duty to ensure that it registers suitably qualified persons who have met the statutory requirements.

[98] The Council is also open to the concept that the graduates including the Applicant, enroll in the Pharmacy degree programme offered by the University of The Bahamas which commenced in 2008.

[99] Under cross-examination by learned Counsel Mr. Olander, Dr. Rolle stated that when she became the Registrar, the Applicant was already registered as a Pharmacist and when she was enrolled, there was no Council. In 2010, the Applicant's Master's Degree in Clinical Pharmacy was "recognized".

[100] Dr. Rolle stated that there is a difference between "registration" and "accreditation". Under re-examination, Dr. Rolle said that if an applicant has a degree in Clinical Pharmacy which is accredited, then it will be recognized and that the Council was never satisfied that McHari was accredited.

[101] Dr. Chena Monique Scott also gave evidence on behalf of the Council. Her affidavit, filed on 14 February 2018, stood as her evidence in chief.

[102] She is the current Chairman of the Council since about July 2017. She also has served on the Council since August 2013. She is a qualified Pharmacist and a Registered Nurse. She is currently the Chief Pharmacist at the Princess Margaret Hospital ("PMH") and has held that position since 2010.

[103] It is beyond question that Dr. Scott is highly qualified. Paragraphs 4 to 8 of her affidavit particularized her qualifications.

[104] In paragraphs 9 to 20 of her affidavit, she addressed the deliberations pertaining to McHari graduates from the time she was appointed to the post. She testified that, from the time she was appointed to the Council, the issue of whether or not graduates from McHari were qualified pursuant to the PA has been a vexing one.

[105] She acknowledged that some of the graduates, inclusive of the Applicant received provisional licences in 2010. However, the Council grappled with the "registered" versus "accredited" status of McHari and repetitively sought guidance on the issue.

[106] She further deposed that the Council has dealt with McHari's accreditation from its inception as is evidenced in the various correspondence to the exhibits of Ms. Rolle's affidavit filed on 25 September 2017.

[107] Dr. Scott maintained that, as McHari was not an accredited university as envisioned by the PA, the Council suggested various proposals over the years as to how to fairly deal with McHari graduates.

[108] According to her, the final determination culminated in the Resolution, the subject of these proceedings.

[109] Under cross-examination, Dr. Scott stated that she is currently not a Council member. She did not sit on the Council in 2012 when the Applicant was granted a provisional licence to practise as a Pharmacist. She stated that her understanding of accreditation is not the same as registration.

[110] I find as a fact that the Applicant and Mr. Gray, in particular, used terminologies such as "registered and recognized", "approved and recognized" and "accreditation" as though they are one and the same thing when, in reality, there is a stark difference. This created the conundrum in this matter.

The Statutory Framework

The Pharmacy Act, 2009

[111] The authority to grant/issue licences to practise as a pharmacist in The Bahamas is vested in the Council by virtue of the PA.

[112] Section 9 of the PA sets out the qualifications for registration as a pharmacist or pharmacy technician. It provides as follows:

> **"9 (1) <u>No person shall operate as a pharmacist or pharmacy technician without being duly registered under this Act</u>.**
>
> **(2) A person who, on the date of commencement of this Act is registered as a pharmacist or pharmacy technician under the Health Professions Act shall be deemed to be registered with the Council.**
>
> **(3) A person who, after the commencement of this Act, applies to the Council to be registered as a pharmacist or pharmacy technician and who satisfies the Council that —**
>
> **(a) he can read, write and understand the English Language;**
>
> **(b) he is eighteen years of age or over;**

(c) he is not by reason of age or otherwise, incapable of operating or being employed in a pharmacy;

(d) he is fit and proper, that is to say -

(i) he has not been convicted of any offence under this Act;

(ii) he has not been convicted of any offence under the Dangerous Drugs Act;

(iii) he has not been convicted of any offence within the last five years of which, dishonesty or drug abuse is an element; and

(iv) the Council is satisfied as to the character and competence of the applicant; and

(e) he is qualified to be so registered,

is entitled, upon application and on payment of the prescribed fee, to be issued a certificate of registration subject to such conditions that the Council may determine.

(4) <u>For the purposes of section 9(3)(e), a person is qualified</u> —

(a) to be registered as a pharmacist, if that person has not been disqualified or suspended from operating as a pharmacist whether within or outside The Bahamas and –

(i) **<u>holds a pharmacy degree from an accredited college or University</u>; or**

(ii) **holds a certificate of competency in pharmacy in The Bahamas; and**

(iii) **has at least two thousand (2000) hours of practical experience in pharmacy under the supervision of a person who is licensed as a pharmacist in the jurisdiction where the training took place.**

(b) to be registered as a pharmacy technician, if that person satisfies the Council that he —

(i) has successfully completed a certified pharmacy technician examination or an equivalent examination acceptable to the Council; and

(ii) has completed at least eighteen hundred (1,800) hours of practical experience under the direct and personal

supervision of a person who is licenced as a pharmacist in the jurisdiction where the training took place.

(5) An application for registration under this section shall be made in the prescribed form and an applicant shall furnish to the Council -

(a) proof of his identity;

(b) evidence of his qualifications; and

(c) such further or other information as the Council may require in respect of the matters specified in paragraph (a) - (e) of subsection (3).

[113] Section 12(1) of the PA gives the Council the authority to issue a licence to the registrant. It provides:

> **"A person who, after the commencement of this Act, registers as a pharmacist or pharmacy technician and who desires to practice as a pharmacist or pharmacy technician in The Bahamas, shall upon application in the prescribed manner and on payment of the prescribed fee, be entitled to have issued to him by the Council a licence, subject to such conditions as the Council may determine and every person holding such a licence shall display a copy of their licence and certificate of registration duly certified by the Council in a prominent place in that person's place of practice."**

The Health Professions Act

[114] Prior to the coming into effect of the PA on 17 December 2009, registration and licensing of pharmacists were done by the HPC under the HPA. Section 9(2) is the deeming provision that "grand-fathered" in all pharmacists previously registered under the HPA.

[115] In addition to not having been disqualified or suspended from operating as a pharmacist, section 9(4)(a) of the PA sets out three methods by which an individual is deemed to be qualified for registration as a pharmacist with the Council. One of the methods by which an individual is deemed to be qualified is if he "**holds a pharmacy degree from an <u>accredited</u> college or University**.

[116] Section 12(4) of the PA is critically significant. It allows for the Council to renew a licence after payment of the annual licence fee. However, upon such renewal,

"such licence may be subject to such conditions as the Council may determine…"

Registration versus Accreditation

The Education Act, 1962 ("EA")

[117] Learned Counsel Mr. Rigby has helpfully set out this aspect of the judicial review application which I gratefully adopt. He properly submitted that an important consideration for the Court in this matter is the nomenclature of "registered/registration" versus "accredited/accreditation", as there seems to be the tendency for persons including educators and pharmacists, as this case shows, to utilize them, wrongfully, as though they are interchangeable.

[118] Section 29(1) of the EA provides as follows:

> **"No person shall <u>without the consent of the Minister</u> establish or conduct or continue to conduct within The Bahamas any institution for the provision of further education."**[Emphasis added]

[119] If the Minister consents, section 29(2) next provides for the **<u>registration</u>** of institutions of further education. It states:

> **"The Minister shall cause a register to be maintained of every institution for the provision of further education established or conducted under the provisions of this section, which shall contain such particulars thereof as the Minister may direct."**

[120] As a corollary, section 29(5) provides for the Minister to revoke his consent given under subsection (1) and thereby effect deregistration.

Institutions of Further Education (Registration) Regulations, 1971

[121] In 1971, subsidiary legislation to the EA to govern the registration of further education institutions was promulgated in the form of the *Institutions of Further Education (Registration) Regulations*.

[122] Section 3 of the Regulations allows for the application for registration to be made to the Director of Education instead of the Minister. It reads:

"Every application by a proprietor for the registration of an institution shall be made in writing addressed to the Director of Education and Culture, Nassau (hereinafter referred to as "the Registrar") and shall contain the particulars specified in the Schedule to these Regulations."

[123] The Schedule to the Regulations entitled **"Return To Be Made For The Purposes Of Registration Under Section 30 Of The Education Act And The Institutions Of Further Education (Registration) Regulations"** specifies the particulars that an applicant for registration are required to submit in the form of a Return.

The Department of Public Service ("DPS")

[124] By policy, the DPS issues Training Circulars to advise public servants as to what diplomas and degrees being offered by local tertiary institutions it would accept. It is also customary for DPS to publish the names of approved institutions, and which of their degree offerings would be recognized.

[125] In addition, the Training Circulars list the organizations in North America, Latin America and the Caribbean that are accreditation bodies upon whose approval the Bahamas Government would accept an institution and/or degree program as a matter of course. These accrediting organizations are listed below:-

AABC	Accrediting Association of Bible Colleges
ABHES	Accrediting Bureau of Health Education Schools
ACCSCT	Accrediting Commission for Career Schools and Colleges of Technology
ACICS	Accrediting Council for Independent Colleges and Schools
ATS	Association of Theological Schools in the United States and Canada
AUCC	Association of Universities and Colleges of Canada Association de universities at colleges du Canada
COE	Council on Occupational Education
MSA-CHE	Middle States Association of Colleges and Schools Commission on Higher Education
NASCU	Northwest Association of Schools, Colleges and Universities Commission on Colleges
NCACS	North Central Association of Colleges and Schools

NEASC-CIHE	New England Association of Colleges and Schools and colleges Commission on Colleges
WASC-Sr	Western Association of Schools and Colleges Accrediting Commission for Senior Colleges and Universities
WASC-Jr	Western Association of Schools and Colleges Accrediting Commission for Community and Junior Schools
CONEAU	National Commission for Universities Evaluation and Accreditation
UCJ	University Council of Jamaica

The National Accreditation and Equivalency Council of The Bahamas, 2006 (NAECOB)

[126] Section 3 of NAECOB establishes a body (Council) to carry out the function described in Section 4 of the Act. Section 4 provides:

> **"4. (1) Notwithstanding the provisions of any other law, the Council shall be the principal body in The Bahamas for conducting and advising on the accreditation and recognition of educational and training institutions, providers, programmes and awards, whether foreign or national, and for the promotion of the quality and standard of education and training in The Bahamas.**
>
> **(2) Without prejudice to the generality of subsection (1) the functions of the Council are —**
>
> **(a) to accredit and re-accredit the programmes of institutions operating in The Bahamas;**
>
> **(b) to promote the advancement in The Bahamas of education, training, learning skills and knowledge;**
>
> **(c) to ensure that the quality of all primary, secondary and post-secondary education delivered in The Bahamas is appropriate to the qualifications, degrees, diplomas or certificates conferred and that the appropriate standards are being maintained and improved, to protect the interest of students;**
>
> **(d) to offer public assurance by enhancing public understanding of career and work force development providers and the value of education and the credentials offered by these providers;**

(e) to provide guidance to the educational and technical institutions for the continual improvement of their educational offerings and related activities;

(f) to advise on the recognition of foreign institutions of education and training and their awards;

(g) to determine equivalency of programmes and qualifications in accordance with internationally established frameworks;

(h) to promote a quality assurance culture in The Bahamas;

(i) to provide the public with information on the quality and recognition of programmes and institutions in order to protect the public interest; and

(j) to liaise and co-operate with regional and international accreditation bodies in pursuance of its objectives." [Emphasis added]

[127] Section 3(4) is specifically important. It provides as follows:

> **"Subject to section 13(1), the decision of the Council shall prevail in any dispute regarding assessments conducted by other bodies for the accreditation, or recognition of institutions, providers, programmes and awards."**

[128] In essence, the subsection expressly states that NAECOB's assessment of any program as it pertains to accreditation, or recognition of programs and institutions etc. shall prevail.

[129] The NAECOB Act came into effect on 28 February 2007. The fact that NAECOB was not in force at the time that the Applicant sought enrollment at McHari does not in any way excuse the requirement for the Council to ensure that the degree was conferred by an "accredited University" as mandated by section 9 of the PA.

Judicial Review and the role of the Court

[130] Judicial Review is the method by which the Court exercises a supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties.

[131] In **Council of Civil Service Unions v Minister for the Civil Service** [1985] A.C. 374 at 410-411, the House of Lords has confirmed that powers derived from the prerogative are public law powers and their exercise amenable to the judicial review jurisdiction. Lord Diplock conveniently classifies under three heads the grounds upon which administrative action is subject to control by judicial review as illegality, irrationality or "*Wednesbury unreasonableness*" and procedural impropriety with a caveat for further development on a case by case basis which may add further grounds such as the principle of "proportionality". That said, he explained the three well-established heads in this fashion:

> **"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."**
>
> **By irrationality, I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether the decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system…."**
>
> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice".**

[132] Judicial prudence dictates that the Court, in exercising this power, must however be careful not to overstep its supervisory role. It must not interfere with a decision that a public authority has reached that was not irrational, illegal or procedurally unfair.

[133] **I**n **Bethell v. Barnett and Others** [2011] 1 BHS No. 30, a judicial review proceeding which involved a decision by the Judicial and Legal Services Commission, Isaacs Sr. J. (as he then was), described the court's role in judicial review proceedings as follows: (at para 85):

> **"I must caution myself that this is a judicial review and not an appeal. Thus, the only questions I must answer are: was the decision of the JLSC to appoint the Applicant as the DLRRC irrational; and was the Applicant treated unfairly. I remind myself of the manner in which Gordon, JA put the position in *Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States*, Civil Appeal No. 9 of 2006 at paragraph 31. He opined:**
>
> > **"I remind myself that the function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged. If the process was fair and the decision not deviant, then the order sought under the judicial review must be refused.""**

[134] In judicial review proceedings, the applicant has the onus to prove that a ground for review exists and warrants a hearing by the Court. In **Standard Commercial Property Securities Limited and others (Respondents) v. Glasgow City Council (Appellants) and others** [2006] UKHL 50 at para [61], the House of Lords confirmed that the onus is on the claimant [applicant] to establish a case, and in so doing, affirmed the approach taken by Lord Brightman in **R v Birmingham City District Council Ex p O** [1983] 1 AC 578:

> **"The onus is on Standard (the claimant) to establish that, in deciding that an indemnity for their costs represented the best price or best terms that could reasonably be obtained, Glasgow reached a decision which was ultra vires or which no reasonable authority could have reached: *R v Birmingham City District Council Ex p O* [1983] 1 AC 578, 597C-D per Lord Brightman."**

[135] Now to the issues which are raised in these proceedings.

Discussion

Was/Is McHari an accredited institution?

[136] Issues 1, 2 and 3 are subsumed under this sub-head. In his written submissions dated 8 October 2018, learned Counsel Mr. Olander for the Applicant did not specifically identify whether McHari was (is) an accredited institution as an issue

although, to my mind, it is at the heart of this judicial review application. That said, he submitted that McHari was "approved and recognized" by the Ministry of Education and the Ministry of Public Service to offer the Bachelor of Science Degree and the Master of Science Degree in Clinical Pharmacy from 2001 to 2012.

[137] Mr. Olander submitted that, in January 2009, the DPS had issued Training Circular No. 1 listing McHari as one of the colleges/universities whose degrees are accepted by the Public Service and it was so accepted since 2001.

[138] However, there were other Training Circulars, for example, Training Circulars No. 2 and No. 3. Circular No. 3, issued on 19 November 2012, expressly concluded that the **Public Service Commission will only accept degrees/diplomas issued by McHari** to public officers who **enrolled** at McHari **on or after 21 January 2009 and before 21 February 2012** ("the prescribed period"). The Applicant did not fall in this category.

[139] Learned Counsel Mr. Olander relied heavily on the evidence of Dr. Higgs who testified that "*until the establishment of NAECOB's Council statutory body, the Ministry of Education through its Higher Education and Lifelong Learning Department was the Government Body that* ***approved and recognized*** *all tertiary educational institutions in The Bahamas*". He further testified that McHari was registered to offer degree (Bachelor and Masters) courses in The Bahamas since 2001. He also said that sometime in or about 2003, McHari commenced seeking Articulation Agreements with higher learning educational institution in the Republic of Cuba and the Ministry of Education has accepted and recognized the articulation agreements.

[140] No doubt, the evidence advanced by the Applicant and her highly qualified team of witnesses including Dr. Higgs, Dr. Smith and Mr. Gray was powerful but dealt principally with "registering", "approving" and recognizing". Dr. Higgs admitted that there is a clear distinction between "registration" and "accreditation" and that the Ministry of Education did not have the authority to accredit an institution. When he

was cross-examined by Mr. Rigby, that is what he said, at page 15, line 15 of the Transcript of Proceedings on 16 February 2018:

> "**Q: Listen, Did you have the authority between 2004 through 2013 to accredit an institution in The Bahamas of higher education learning; did you?**
>
> **A: No. No one did.**
>
> **Q: And you agree that there is a distinction between approving and recognizing an institution and accrediting an institution?**
>
> **A: Yes, there is."**

[141] So, despite the fact that Dr. Higgs provided the Council with letters stating that McHari was "registered and approved" by the Ministry of Education; this did not and could not rise to the threshold of "accreditation" of that institution. Simply, Dr. Higgs and the Ministry of Education had no authority vested in them (alone and collectively) to accredit McHari (whether under the EA and Regulations or any other law).

[142] Unfortunately, none of these witnesses was able to satisfy this Court that McHari was/is an "accredited" college or university as envisaged by section 9 of the PA.

[143] Earlier in this judgment, I encapsulated the evidence of the witnesses who testified at this trial. The evidence which was adduced at this trial demonstrates that McHari was "registered and recognised" by the Ministry of Education in accordance with the EA and the Institutions of Further Education (Registration) Regulations.

[144] In or about January 2009, the DPS issued Training Circular No. 1 indicating that the Master of Science Degree in Clinical Pharmacy offered by McHari was accepted by the Public Service.

[145] Then, on or about 21 February 2012, the DPS issued Training Circular No. 2 which rescinded approval of all McHari programmes and McHari as an institution altogether. Training Circular No. 2 expressly stated that it superseded Training Circular No. 1.

[146] On or about 20 April 2012, the Council was advised in writing by the Ministry of Health that it ought to consider Training Circular No. 2 when exercising its function under Section 9(4)(a)(i) of the PA; that is whether an applicant for licensing "*holds a pharmacy degree from an accredited college or University*."

[147] McHari was approached to produce evidence to demonstrate that McHari is an accredited institution but the letter from Mr. Alcena did not do justice to the case. McHari did not produce documentation that it was accredited by any of the accrediting organizations that the DPS recognized, and by which degrees/institutions are accepted at face value by the DPS.

[148] On 16 May 2017, the NAECOB in a letter to the Council captioned Evaluation of Degrees (Phillipa Michelle Finlayson), stated that "*(i) McHari is not an accredited institution, (ii) McHari was de-registered for non-compliance as per the Education Act, and (iii) McHari is not registered with the NAECOB"*.

[149] Furthermore, the Applicant has failed to demonstrate that McHari was accredited, despite the letters produced by Dr. Higgs from the Ministry of Education speaking to "registration and approval" and "recognition" of McHari.

[150] Learned Counsel Mr. Rigby cautioned the Court to pay particular attention to section 4(3) of the NAECOB Act which states that "**the decision of the Council shall prevail in any dispute regarding assessments conducted by other bodies for the accreditation, or recognition of institutions, providers, programmes and awards**."

[151] As Mr. Rigby correctly pointed out, the logical conclusion is that McHari was never accredited as envisioned by Section 9(4)(a)(i) of the PA. As such, the Council,

under the chairmanship of Mr. Gray, acted ultra vires its authority by licensing persons including the Applicant, under the false pretext that McHari was an accredited college or University.

Change of Policy allowed by Decision-making Authority

[152] The third issue to be considered is if the Council once determined that McHari was an accredited college or university, can it change its policy with regard to a licence previously issued under such circumstance? If it can, does the change in policy and concurrent deregistration of an affected licensee amount to irrationality to fall in the category of the *"Wednesbury unreasonableness*" principle?

[153] A decision-making body's authority to change its policy in the face of changing circumstances cannot be fettered. This principle was confirmed by Lord Woolf MR in the case of **R v North and East Devon Health Authority, ex parte Coughlan** [1999] All ER (D) 801 at [64]:

> **"It is axiomatic that a public authority which derives its existence and its powers from statute cannot validly act outside those powers. This is the familiar ultra vires doctrine adopted by public law from company law *(Colman v. Eastern Counties Railway Co. Ltd.* (1846) 16 L.J.Ch. 73). Since such powers will ordinarily include anything fairly incidental to the express remit, a statutory body may lawfully adopt and follow policies *(British Oxygen v. Ministry of Technology* [1971] AC 610) and enter into formal undertakings. <u>But since it cannot abdicate its general remit, not only must it remain free to change policy; its undertakings are correspondingly open to modification or abandonment.</u>"**[Emphasis added]

[154] In **Hughes v. Department of Health and Social Security** [1985] AC 776, the issue before the Court was whether the Department of Health was free to change its policy with regard to the retirement age of employees. A previous department circular had stated that despite the contractual retirement age being 60 years, the department would allow certain employees who were necessary for the efficient operations to continue beyond the age of 60 years. The Department subsequently issued another circular stating that the mandatory age of 60 would be enforced. An application was brought for judicial review by an employee who felt he had a legitimate expectation to work beyond the age of 60 based on the initial circular.

The Court held that that expectation could only exist as long as the original policy was in force, and was ended by notification of a new policy to contrary effect. Lord Diplock pointed out that a decision-making authority has the liberty to change its policy, and further, even if a legitimate expectation existed, it was extinguished upon publication upon the change in policy. At page 788 of the judgment, he stated:

> **"Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government. When a change in administrative policy takes place and is communicated in a departmental circular to, among others, those employees in the category whose age at which they would be compulsorily retired was stated in a previous circular to be a higher age than 60 years, any reasonable expectations that may have been aroused in them by any previous circular are destroyed and are replaced by such other reasonable expectations as to the earliest date at which they can be compelled to retire if the administrative policy announced in the new circular is applied to them."**

[155] Since the decision to license the Applicant and 16 other McHari graduates as pharmacists under the PA were made in error, the Council can change its policy with regards to a licence previously erroneously issued. There is no gainsaying that the Resolution passed by the Council, the subject of these proceedings, to change its policy with regard to McHari graduates cures and rectifies a previously erroneous act by the Council.

The "Wednesbury unreasonableness"

[156] The next question is whether such change in policy and concurrent deregistration of an affected licensee amount to irrationality to fall in the category of the **"***Wednesbury unreasonableness"* principle?

[157] The Applicant submitted, and the onus is on her to prove, that the Resolution was irrational in that it was "unreasonable" in the *Wednesbury* sense. In support of this submission, the Applicant trenchantly argued that the Resolution was irrational because no reasonable decision-maker, acting fairly and only for proper purposes, would pass such a Resolution and specifically, deregistering the Applicant who has been practising her profession for years without any risk to the public.

[158] In the seminal decision of **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation** (1948) 1 KB 223, Lord Greene MR stated (at page 230):

> **"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case the facts do not come anywhere near anything of that kind…**
>
> **It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high policy of this kind…**
>
> **The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that is set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere."**

[159] Irrationality in judicial proceedings was also considered by the House of Lords in **Council of Civil Service Unions v Minister for the Civil Service** [supra], where Lord Diplock stated (at page 410 G):

> **"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applied to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system… Irrationality' by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review."**

[160] In **Nottinghamshire County Council v Secretary of State for the Environment** [1986] Law Reports HOL 240, the House of Lords held (at 241):

> **"That in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the Secretary of State it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration that had been one for the political judgment of the Secretary of State and the House of Commons".**

[161] Simply put, the issue to be determined is whether the Resolution which was passed was so outrageous that it defies logic or accepted moral standards and that no reasonable authority could have arrived at those decisions contained in the Resolution.

[162] Unreasonableness, in the *Wednesbury* sense, requires overwhelming evidence. In **Nottinghamshire County Council v Secretary of State for the Environment** [supra] the House of Lords held that in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the decision-maker, it was inappropriate for the courts to intervene on the ground of 'unreasonableness' in a matter of public financial administration.

[163] It is therefore apposite for the Court to look at all of the evidence when considering the reasonableness or rationality of the Resolution. The Resolution was passed because the previous Council acted ultra vires the PA when it registered the the Applicant as a Pharmacist. As alluded to by Dr. Rolle and Dr. Scott, the Council must act to safeguard the interest of the public and this includes ensuring that those who are registered meet the educational requirements. Dr. Rolle asserted that to register an applicant who has not attained the requisite university degree will not only be in contravention of the PA but will expose the public to persons lacking the competencies to provide quality pharmacy care thereby increasing possible incidences of medication errors.

[164] In this case, bad faith on the part of the Council has not been suggested. No one suggests, nor could it be suggested that the Council acted for an improper motive.

[165] I will therefore reject the so-called "*Wednesbury unreasonableness"* argument. Despite the able submissions of Mr. Olander, in order to prove the "*Wednesbury unreasonableness"*, it requires something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. This ground of challenge fails.

Legitimate expectation

[166] Issues 5, 6 and 7 focused on legitimate expectation which is heavily relied upon by the Applicant to found her main ground for the judicial review application.

[167] It is therefore appropriate to summarise briefly the law relating to legitimate expectation. In **United Policyholders Group and others v The Attorney General of Trinidad and Tobago** [2016] UKPC 17, Lord Neuberger (with whom the other members of the Board agree), in dealing broadly with the principle of legitimate expectation, said at paras [37] to [39]:

> **"37. In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569, cited with approval by Lord Hoffmann in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453, para 60.**
>
> **38. Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty - see eg *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement. This third point can often be elided with the second point, but it can go wider: for instance, if, taking into account the fact that the principle applies and all other relevant circumstances, a public body could, or *a fortiori* should, reasonably decide not to comply with the statement.**
>
> **39. Quite apart from these points, like most widely expressed propositions, the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context (see again *Ng Yuen Shiu* [1983] 2 AC 629, 636). However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field" (in *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131), or indeed the macro-economic field. As the cases discussed by Lord Carnwath show, such issues have been considered by the Court of Appeal**

of England and Wales, perhaps most notably, in addition to *Begbie*, in *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213, *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, and *R (Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755, and also by the Board in *Paponette v Attorney General of Trinidad and Tobago* [2012] 1 AC 1."

Was there legitimate expectation?

[168] Briefly put, the Applicant argued that the Resolution is in breach of her legitimate expectation after engaging in private practice as a Pharmacist for more than seven (7) years and there being no complaint that she violated the terms of the licence. She further argued that she expended considerable time and money for more than seven years and her legitimate expectation was frustrated by the Council's decision to refuse to renew her licence to practise as a Pharmacist. In addition, she asserted that there was not a sufficient public interest to justify the Council's frustration of her legitimate expectation.

[169] Learned Counsel for the Applicant submitted that the cases of **Queen et al v Terreve College Limited** 2016/PUB/jrv'006 (unreported) and **In the Queen on the Application of Patel v General Medical Council** [2013] EWCA Civ. 327 are applicable.

[170] In the latter case, Dr. Patel, a pharmacist, decided to fulfill his long-standing ambition to qualify as a doctor with a view to practice medicine in the United Kingdom. As he was a practicing pharmacist, his plan was to study on a suitable distance learning course. He was thinking of applying to International University of Health in St. Kitts, West Indies ("IUHS"). Dr. Patel made inquiries with the General Medical Council ("GMC") to find out whether it would accept the degree from IUHS. In 2004, the GMC replied that it accepted the primary medical degree awarded from IUHS for the purpose of registration. After obtaining his MBBS in 2011, the next stage was a doctor's post at a UK hospital and he needed to obtain a provisional registration with GMC. So, he applied to GMC for registration.

[171] GMC refused his registration application and Dr. Patel sought judicial review of GMC's refusal. GMC had replaced the 2004 criteria for registration in 2006 and 2010. Dr. Patel challenged GMC on legitimate expectation grounds. At para [83] to [84], the court stated:

> **"83. In that context, I consider that the omission of the GMC to consider the impact of its change of policy on those currently pursuing distance learning courses has a wider significance. When the court considers the fairness of overriding a substantive legitimate expectation, the standard of review is a sliding scale (R v Secretary of State for Education and Employment, ex pafrte Begbie per Laws L.J. at paras. 80-2). Normally, the court would accord a considerable degree of respect to a specialist body such as GMC which is required by Parliament to decide which qualifications should be recognized. However, in the present case there is no reasoning emanating from the GMC at the time the decisions were taken leading to the conclusion that distance learning was such a problem as to require an immediate refusal to recognize the qualifications of those currently pursuing distance learning courses. Nor is there any contemporaneous paper dealing with the steps that might have been taken to mitigate the impact of the change of policy on persons in that position.**
>
> **84. There are present in this case further factors going to the evaluation of unfairness all of which support the appellant's case. They may be summarised as follows:**
>
> **(1) We are not concerned here with an assurance or representation which is derived from a former policy or a course of conduct. Rather, the claimed legitimate expectation is founded on an express statement made by a person held out by the GMC as competent to give such advice and which, for the reasons set out above, I consider could only have been reasonably understood in one sense.**
>
> **(2) A substantive legitimate expectation is more likely to be respected where it arises from a representation to an individual or a small class, for the reasons given by Laws L.J. in Bhatt Murphy referred to earlier in this judgment. In the present case, the appellant was the recipient of an assurance which was directed to him personally and was a response to the particular circumstances of his case."**

[172] In my opinion, Patel's case is quite distinguishable from the facts of the present case for the reasons given in para 84 (1) above.

[173] That said, the Applicant has not established that the Council either (i) acted ultra vires, or (ii) reached a decision which no reasonable authority could have reached.

[174] With forceful dynamism, Mr. Rigby correctly submitted that the Applicant has failed to satisfy the Court on either limb. The Applicant could not have relied on Training Circular No. 1 issued in January 2009 when she alleged to have carried out her 'due diligence' in 2002 prior to enrolling at McHari because Training Circular No. 1 was not in existence at the time of her enrollment in 2002. Therefore, Training Circular No. 1 could not have grounded a legitimate expectation with the Applicant.

[175] Moreover, the Department of Public Service realizing that Training Circular No. 1 may have grounded a legitimate expectation within the public service, sought to rectify this irregularity by stating in Training Circular No. 3 issued in December 2012 that any public officer who relied on Training Circular No. 1 and enrolled in McHari as a result, specifically "on or after 21 January 2009 and before 21 February 2012", the DPS would recognize their degree.

[176] Furthermore, as Mr. Rigby pointed out, not only could the Applicant not rely on Training Circular No. 1 because it was published well after she enrolled in McHari but the Applicant is not and has never been a public servant/officer.

[177] In addition, there is no evidence that any promise was made to the Applicant by the HPC or the Council which could ground a claim in legitimate expectation.

[178] Further, even if I am wrong to find that the Applicant could not ground a claim in legitimate expectation, the Council is entitled to change its policy with respect to the licensing of McHari graduates. *The Council "…must remain free to change policy; its undertakings are correspondingly open to modification or abandonment"*: per Lord Woolf MR in **R v North and East Devon Health Authority, ex parte Coughlan** (supra).

[179] It was the evidence of both witnesses for the Council that the issue of the status of McHari was a vexing one for years. This was borne out by the various correspondences and reports including that of Dr. Extavour and the Commission. After many years of grappling with the status of McHari and the corresponding implication for its graduates, and giving the interested parties an opportunity to

provide evidence of accreditation, it was reasonable and justified for the Council to definitively change its policy on the issue and to bring certainty to the issue once and for all.

[180] In my opinion, any legitimate expectation that was raised by Training Circular No. 1, was extinguished by the issuance of Training Circular No. 2: **Hughes v. Department of Health and Social Security** supra). In any event, Training Circular No. 1 did not apply to the Applicant since she did not fall within the prescribed period, nor was/is she a public servant at the material time.

Overriding public interest may frustrate legitimate expectation

[181] There are exceptions where a decision-making authority may be allowed to frustrate a legitimate expectation, even if it exists. These are usually instances which involve an overriding public interest.

[182] This allowance to frustrate a legitimate expectation was considered by the Board in **Paponnette and others v Attorney General of Trinidad and Tobago** [2010] UKPC 32. Sir John Dyson SCJ, in delivering the judgment of the Board said at para [34]:

> **"The more difficult question is whether the government was entitled to frustrate the legitimate expectation that had been created by its representations. In recent years, there has been considerable case law in England and Wales in relation to the circumstances in which a public authority is entitled to frustrate a substantive legitimate expectation. Some of it was referred to by Warner JA in her judgment. The leading case is *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. Lord Woolf MR, giving the judgment of the Court of Appeal said, at para 57:**
>
> > **"Where the court considers that a lawful promise or practice has induced a legitimate expectation of a *benefit which is substantive*, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."**

[183] The learned Law Lord went on to expound on the burden of proof that exists in circumstances where the decision-making authority overrides an expectation because of public interest. At paras [36] to [37], he continued:

> **"36. The critical question in this part of the case is whether there was a sufficient public interest to override the legitimate expectation to which the representations had given rise. This raises the further question as to the burden of proof in cases of frustration of a legitimate expectation.**
>
> **37. The initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest."**

[184] It is also settled law that even if an applicant can prove the existence of a legitimate expectation, the decision-making authority may frustrate such an expectation if the authority can successfully demonstrate an overriding public interest: see: **Laker Airways Ltd. v. Department of Trade** [1977] QB 643; and **R v. Inland Revenue Commissioners, ex p Preston** [1985] AC 835.

[185] Additionally, in the House of Lords case of **R. v. East Sussex County Council, ex p Reprotech (Pebsham) Ltd.** [2002] UKHL 8, Lord Hoffman drew the analogy between legitimate expectation and estoppel, but opined that public authorities still had to consider the public interest factor. At para [34], he said:

> **"There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, [2000] 3 All ER 850. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote…."**

[186] There is an abundance of judicial authorities which considered situations in which a decision-making authority would be permitted to resile from a legitimate

expectation if one existed: **Silly Creek Estate and Marina Ltd. V The Attorney General,** CL-AP 13/2017 [unreported, Turks & Caicos Court of Appeal] –per Adderley JA at paras [43] to [47] wherein he referenced **United Policyholders Group and Others** [supra].

[187] So, in addition to being entitled to changing its policy, the Council may frustrate any legitimate expectation that the Applicant may be seised of if there is an overriding public interest.

[188] In the present case, the overriding public interest is the health and safety in the dispensation of medicine to members of the general public. The duty of the Council is to register persons who meet the educational requirements and must act in a manner to safeguard the public's interest. To abdicate this responsibility would expose the public to persons lacking the competencies to provide quality pharmacy care and increases the possibility of medication errors. The evidence of both Dr. Rolle and Dr. Scott accentuated that the public interest (safety) is of utmost importance and is the overriding consideration of the Council.

[189] Furthermore, the evidence with respect to public safety remained unchallenged by the Applicant even though she stated that there have been no complaints against the 17 McHari graduates. To my mind, that is not the point. Public safety will and must be a critical concern of the Council at all times.

Procedural fairness

[190] Issue 4 concerns procedural fairness. The Applicant contended that the Council did not treat her fairly and that the Resolution passed is unfair, irrational and unreasonable.

[191] On the other hand, the Council said that it acted in accordance with the principles of procedural fairness.

[192] The law is that the decision-making process by public authorities is subject to review to ascertain whether the body acted in a fair manner towards a person/body affected by its decision. This ground of judicial review has become known as procedural fairness. The learned authors of **Halsbury's Laws of England**, Volume 61A (2018) shed some light on this ground in this way:

> **"Procedural fairness, or the duty to act fairly, are the terms now generally used to describe the range of procedural standards which are applied to the administrative decision-making process. They encompass both specific statutory requirements as to consultation, notice or hearings, and the requirements of natural justice derived from common law."**

[193] The ground has adopted the natural justice and due process principles, inclusive of the right to fair notice and the right to be heard. The principle is variously expressed as being a rule against bias and a rule against predetermination. It has also been described as an aspect of the requirement that decisions must be made fairly. In **Steeples v Derbyshire County Council** (1985) 1 WLR 256, pg. 258, paragraph 3, letter C., the court held:

> **"That, although the decision of the planning committee had been fairly and properly made, natural justice required that the decision to grant planning permission should be seen to have been fairly made; that in deciding whether the decision was seen to have been fairly made the court had to ask whether a reasonable man, who was not present when the decision was made and was unaware that it had in fact been fairly made, but who was aware of all the terms of the council's agreement with the company, would think that there was a real likelihood that the agreement had had a material and significant effect on the planning committee's decision to grant permission; and that applying that test, the decision was not seen to have been fairly made and was either void or voidable as being in breach of natural justice."**

[194] The appropriate tests to apply in deciding whether the decision is to be seen as fair has been succinctly put by Webster J in **Steeples** at page 287:

> **"First,…through whose eyes do I look? It seems that I should look through the eyes of a reasonable person hearing the relevant matters…**
>
> **Secondly, what knowledge should I impute to the reasonable person? There are alternatives. The first is that he is to be taken to know only of matters known to the public to have occurred before the decision (perhaps including**

matters known to the public before the issue of proceedings). The second alternative is that he is to be taken to know of matters, whether in fact known or available to members of the public or not, which are in evidence at the trial. In my view, the second alternative is the lower one…

Thirdly, is a decision unfair only if it is actually seen to be unfair? Or is it unfair if there is a real likelihood that it would be seen to be unfair? Or is it enough in order to show that it is unfair, that there is a reasonable suspicion that it will be seen to be unfair? Which of these tests is to be applied may depend, in my view, on the nature of the decision-making body in question. Where the body is a judicial tribunal it may be that any doubt that justice is seen to be done is enough…On the other end of the scale, where the body in question is primarily administrative, it may be that its decisions are invalid (when they are in fact fair) only when they actually appear to be unfair…

.

Fourthly, what amounts to a fetter upon the discretion in question? In the absence of direct authority on this question, it seems to me that anything constitutes a fetter for this purpose at the very least if a reasonable man would regard it as being likely to have a material and significant effect one way or another on the outcome of the decision in question; and it may very well be that something appearing to have less of an effect than that might constitute a fetter.

Fifthly, what knowledge is to be imputed to a hypothetical reasonable man about the workings of the county council and their committees? …the hypothetical reasonable man is to be taken to know all the relevant facts, then there is no good reason why those facts should exclude the fact that the county council have delegated their planning powers to, inter alia, the planning committee in question.

Sixthly and finally, is the hypothetical reasonable man to be taken to have attended the meeting or to know of my conclusion that the decision was in fact fairly made?...he is not to be taken to have attended the meeting or to know that in fact the decision was fairly made."

[195] I am of the considered opinion that this ground is not borne out by the evidence adduced during the trial. Furthermore, the case as framed took no substantive issue with fairness and/or the Applicant's right to be heard (rightly so) and is limited to the narrow construct of "legitimate expectation".

The Council's right to register includes a right to deregister

[196] Sections 36 and 37 of the Interpretation and General Clauses Act provide:

36. (1) Where any written law confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be

also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

(2) Without prejudice to the generality of subsection (1), where any written law confers power —

(a) to provide for, prohibit, control or regulate any matter, such power shall include power to provide for the same by the licensing thereof and power to prohibit acts whereby the prohibition, control or regulation of such matter might be evaded;

(b) to grant a licence, lease, permit, authority, approval or exemption, such power shall include power to impose reasonable conditions subject to which such licence, lease, permit, authority, approval or exemption may be granted;

(c) to approve any person or thing, such power shall include power to withdraw approval thereof;

(d) to give directions, such power shall include power to couch the same in the form of prohibitions.

37. (1) Where any written law confers power upon any person to issue, grant, give or renew any licence, lease, authority, approval or permit, the person so empowered shall have a discretion either to issue, grant, give or renew or to refuse to issue, grant, give or renew such licence, lease, authority, approval or permit."

[197] I agree with learned Counsel Mr. Rigby that the effect of the sections is that the Council in its power to register a pharmacist also has an express power or discretion "*to approve and/or withdraw approval*". It also seems to logically follow that upon a renewal of the licensure the Council was right to inquire of the status of McHari.

[198] In **Rolle v. The Attorney General and another** [2014] 1 BHS J. No. 111**,** Winder J addressed the import of section 37 in the context of the power of the Secretary of Revenue to grant a business licence under the provisions of the Business Licence Act. He stated:

"21. Having regard to the wide authority in section 7 of the Act and section 37 of the Interpretation and General Clauses Act there is clearly a discretion in the Secretary with respect to the grant or renewal of a business licence. According to the decision in *CCSU v. Ministry of the Public Service* [1985] A.C. 384 **the law merely requires the Secretary, in the exercise of that**

discretion to act lawfully, reasonably and with the appropriate procedural propriety.

22. I find that the request that the applicant produce permission or approval of the owner of premises (from which the proposed applicant proposes to operate) as a precondition to the grant of a licence to operate (from those premises), to be reasonable. I see very little difference in this requirement from the requirement of the Secretary to require the prospective applicant provide proof of citizenship or proof of national insurance registration (or standing) or proof of registration with a regulator. The applicant must prove the legitimacy of the responses (answers) given in the Form A. On the face of the application, the applicant indicated his intent to operate from the property of Atlantis and there was never an indication of any operation otherwise during the proceedings before the Secretary."

[199] Section 12(4) of the PA appears to allow the Council to be "satisfied" that the requirements of the PA are satisfied in respect of any renewal of a licence. The subsection provides:

> **"The Council shall, upon application in the prescribed manner and on being satisfied that —**
>
> **(a) the pharmacist, pharmacy technician or pharmacy intern practiced in accordance with the Act; and**
>
> **(b) the applicant has participated in a continuing education programme of not less than twenty continuing education units during the preceding year,**
>
> **renew a licence upon payment of the prescribed fee and such licence may be subject to such conditions as the Council may determine except that in the case of a pharmacy intern, the Council shall not renew a licence so as to permit a person to practise as an intern for a period exceeding six years."**

[200] On the face of the PA, it seems clear that the right to renewal was not intended to be a "rubber stamp" of and automatic upon the payment of the prescribed fee. Thus, the Council has a continuing duty under the Act and the law generally to ensure that all pharmacists were/are in strict compliance with the provisions of the PA and that included a duty to mandate that they were "qualified" in the first instance and remained qualified to justify registration.

Summary and conclusion

[201] At its highest, the evidence adduced by the Applicant and her witnesses showed that McHari was registered and approved by the Ministry of Education but it was not an accredited college or University. The decision by the Council in 2010 to licence the Applicant under section 9(4)(a)(i) of the PA was ultra vires because McHari was not an accredited University at the material time.

[202] Furthermore, the Applicant is not seised of a legitimate expectation because she could not rely on Training Circular No. 1 which was issued after her matriculation at McHari. Additionally, she was/is not a public officer.

[203] Even if a legitimate expectation could be founded, (which is not the finding of this Court), the Council is legally entitled to change its policy, and frustrate or resile from the said expectation on the basis of public interest (safety).

[204] In addition, it is my firm view that the Council acted fairly and in accordance with the rules of natural justice when passing the Resolution. All that the Council is requesting the Applicants and the other 16 McHari graduates to do is to sit an exam which will be administered biannually in May and October allowing the graduates three (3) attempts during the two-year period. There ought to be no demur with this stance taken by the Council.

[205] In the premises, I will make the following orders:

1. The application for an Order for Certiorari quashing the Resolution adopted by the Council on 24 January 2017 is dismissed;

2. The application for an Order for Mandamus directing the Council to renew the licenses of the Applicant and other McHari graduates is dismissed; and

3. The application for a Declaration that the Council acted unfairly, arbitrarily and capriciously towards the Applicant is dismissed.

[206] With respect to costs, I shall hear the parties.

[207] Last but not least, I owe a great depth of gratitude to all Counsel particularly Mr. Rigby who assisted me greatly with the applicable law.

Dated this 5th day of June, A.D., 2019

Indra H. Charles
Justice