

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**PUBLIC LAW DIVISION**

**2019/PUB/jrv/00013**

**IN THE MATTER of an application by Dr. Mandela Kerr for leave to  
apply for judicial review**

**AND**

**IN THE MATTER of the decision of the Respondent to subject the  
Applicant's Registration and the Licensure as a fully licensed medical  
practitioner to the restrictions and conditions particularized in its  
letter to the Applicant dated the 30<sup>th</sup> day of April AD 2019**

**AND**

**IN THE MATTER OF THE Medical Act 2014**

**BETWEEN**

**DR MANDELA KERR**

**Applicant**

**AND**

**BAHAMAS MEDICAL COUNCIL**

**Respondent**

**Before Hon. Mr. Justice Ian R. Winder**

**Appearances: Khalil Parker with Robertha Quant for the Applicant  
Raynard Rigby with Randol Dorsett for the Respondent**

**5 and 7 November 2019**

## WINDER, J

The Applicant (Kerr) has applied for judicial review of the decision of the Respondent (the BMC) with respect to his application to be registered as a fully licensed medical practitioner pursuant to the provisions of the Medical Act 2014 (the Act).

### INTRODUCTION & BACKGROUND

1. There is some history between these parties as this is the second round of litigation relative to Kerr's application to be registered as a fully licensed medical practitioner.
2. Kerr was duly registered by the BMC in the Medical Register on 16 November 2015, Registration No. 2049, and was duly licensed pursuant to s. 29 (1)(b) and s. 22(3)(c) of the Act, most recently on 27 December 2017.
3. On 13 October 2017, Kerr applied to the BMC for licensure and registration as a fully licensed medical practitioner. The BMC advised Kerr, by letter dated 16 November 2017, that he was *ineligible for registration under Section 15 of the Medical Act, 2014 and that he was required to successfully pass the Special Purpose Examination (SPEX)*.
4. Kerr appealed the BMC's decision in Supreme Court Action 2018/APP/sts/00003. This Court, in a written decision dated 31 October 2018 allowed the appeal and set aside the decision on the basis that there was no proper consideration of the application.
5. Shortly after the appeal process the BMC wrote to Kerr, by letter dated 5 December 2018, requesting that he provide:
  1. Evaluations from each of his immediate supervisors at the Princess Margaret Hospital and the Department of Public Health during his time of his employment in The Bahamas;

2. Documentation of cases managed during the time of his employment in Andros and level of supervision received; and
  3. Confirmation that he applied to the BMC for registration and licensure as General Practitioner.
6. Upon receipt of the letter Kerr, through his counsel, responded to the BMC by letter dated 2 January 2019, which provided, in part, that:

*We are in receipt of your letter to Dr Kerr dated 5 of December 2018. ...There is no reasonable or lawful basis for the information requested by your letter. Not only did Dr Kerr submit all the requisite documentation with his application, Dr Kerr has also already satisfied the Council that he is qualified in accordance with s. 16 of the Act. Your requests for further information therefore constitute an ultra vires attempt to abuse s 19(4) of the Act, which will be met with litigation should you persist. For the avoidance of doubt as was found by His Lordship, Dr Kerr is not seeking licensure as a specialist at this time.*

7. The BMC responded to Kerr's letter on 21 February 2019 stating:

*Further to our consideration of your application and as a part thereof, the Council feels that it is appropriate to give you an opportunity to be heard in respect of certain matters which have arisen during our deliberations. In particular, concerns have been raised in respect to your general medical knowledge, and the adequacy thereof. If you would welcome the opportunity to engage in person with the Council in respect of such matters, please indicate your availability to do so over the next three weeks. Should you decline this invitation, the Council will move to conclude its deliberations and issue its decision with respect to your application forthwith.*

8. Kerr responded to the BMC on 7 March 2019 indicating that he would attend to exercise his right to be heard and to representation. Kerr cautioned that he was concerned as to the bona fides of the BMC's re-consideration and requested full particulars of the "certain matters" which have purportedly arisen during Council's deliberations along with full particulars of the alleged concerns regarding Dr. Kerr's general medical knowledge.
9. On 11 March 2019, the BMC forwarded to Kerr minutes of two meetings of its Assessment Committee with respect to his application. Upon receipt of the BMC's minutes, Kerr requested copies of the following documents referred to in the minutes:
- (1) The written summary submitted by Dr Graham Cates on 21 January 2019;
  - (2) The evaluations submitted by the PHA, A&E, Family Medicine Clinic and Public Health/Ministry of Health for Kemp's Bay, Andros; and

- (3) The pre-prepared questionnaire submitted to the respondents interviewed on the 30 January 2019 and any correspondence by, or on behalf of the Council to the respondents enclosed therewith.

The BMC responded on 21 March 2019 providing the requested material in their possession save for item (3) which the BMC said did not exist.

10. The parties agreed to meet on 25 April 2019. The meeting was attended by Kerr, the members of the Assessment Committee, chaired by Dr Weech (Weech), the Attorney for the BMC, Kerr's Attorney and the Registrar of the BMC.
11. Kerr says that Weech, who chaired the meeting, indicated that the purpose of the meeting was to assess Kerr's competency and that the purpose of the meeting was to get Kerr's response to the materials provided to him by the BMC regarding the investigation and get a feel personally about him. According to Kerr, his counsel inquired as to the statutory provision upon which the body proposes to assess Kerr. Upon the failure of the Assessment Committee to answer Kerr's inquiry, Kerr's attorneys indicated that it was a question of jurisdiction and that the statutory basis was a preliminary point beyond which they could not proceed.
12. Weech, on the other hand, says that the meeting was abruptly ended as Kerr and his attorney demanded to know the jurisdiction of the BMC to hold the meeting. Counsel for BMC indicated those issues could be settled after the meeting but Kerr and his attorney indicated that they would leave if not given specifics. Kerr said that he and his attorney only left when the Assessment Committee refused to answer and that he did not leave abruptly.
13. Shortly after the meeting, the BMC communicated its decision on the reconsideration in a letter dated 30 April 2019. The letter stated:

*“The Bahamas Medical Council has completed its consideration of your application for registration and licensure under the Medical Act, 2014, as ordered by Mr. Justice Winder.*

*Council has determined, upon your making payment of the required fee, to register and license you as a fully licensed medical practitioner subject to the following restrictions and conditions:*

- a. You are only permitted to engage in supervised medical practice. You must be supervised by a medical practitioner who has been registered and licensed by the Council to practice as a fully licensed medical practitioner (without supervision restrictions and conditions) for at least five years; and*
- b. You are required to submit monthly evaluations to Council from your supervisor in a form acceptable to Council; the restrictions and conditions which you are subject to will be reviewed in 6 month intervals, at which point Council will make a determination as to whether they will be lifted or continued. Although you are not required to do so, Council also wishes to advise you that the restrictions and conditions which you are subject to may be lifted upon the successful passing of an independent objective examination approved by the Council.*

*Reasons for imposition of restrictions and conditions*

*Public safety is always an issue of paramount importance to the Council. The Council must regulate the standards of medical practice with a view to reasonably ensuring public safety. The Council’s assessment of your application is that it could not reasonably conclude that it would be in the public interest to license you without the aforementioned restrictions and conditions. You have been provided with the material which the Council had before it which raised concerns as to your readiness for independent practice and in particular your general medical knowledge base. Regrettably those concerns have not been resolved to a point where the Council can reasonably conclude that it would be in the public interest to register and license you without restrictions and conditions. The Council also notes that you were invited to make representations to the Council in respect to those issues, but declined to do so, preferring to leave (abruptly) the meeting at the Council’s office where you had been invited by the Council to address such matters. It is regrettable that Council did not have the benefit of your input in this regard. In all the circumstances the Council believes that it is in the public’s interest*

*that you are supervised and that your supervisor provides the Council with evaluations that would enable it to have a current, informed, and more complete picture of your readiness for independent practice.*

*Should you require additional information, please contact the undersigned.*

*Regards,*

14. This judicial review action concerns the review of the BMC's process and decision in the reconsideration of Kerr's application. Kerr says that

"notwithstanding [the Order of the Court for reconsideration], the [BMC] has failed and/or refused to properly consider [his] application, determining instead to conduct an *ultra vires*, biased, arbitrary, oppressive, unreasonable, and unlawful investigation of [him]. The [BMC's] objective being to, again, subject the [BMC's] registration and licensure as a fully licensed medical practitioner to the unreasonable and unlawful requirement that he sit and pass the SPEX."

15. Kerr avers, in the application for judicial review, that the decision and the restrictions and conditions imposed by the BMC on his registration and licensure are *ultra vires*, arbitrary, oppressive, irrational, unreasonable, and unlawful. The reliefs claimed in the judicial review are as follows:

- a) An Order of Certiorari to remove into this Honourable Court and quash the Respondent's Decision to subject or to purport to subject the Applicant's registration and licensure to the restrictions and conditions particularized in the Respondent's letter to the Applicant dated the 30<sup>th</sup> day of April A.D. 2019.
- b) An Order of Mandamus directing the Respondent to register and licence the Applicant as a fully licensed medical practitioner in accordance with the Act without restrictions or conditions for the years ending December 31<sup>st</sup> 2018 and 2019, pursuant to and in accordance with his application for Registration and Licensure received by the Respondent on the 13<sup>th</sup> day of October A.D. 2017.
- c) A Declaration that the said exercise, or purported exercise, by the Respondent of its statutory power to impose restrictions and conditions upon the Applicant's registration and licensure under the Act complained of herein without proper, or any, due process or reasonable or lawful justification, was *ultra vires* the Act, arbitrary, oppressive, irrational, unlawful, unreasonable, null, void and/or of no legal effect.
- d) A Declaration that the Respondent's Decision to subject the Applicant's registration and licensure to the said restrictions and conditions was so

- manifestly unreasonable that no reasonable authority or tribunal, entrusted with its powers, could reasonably have come to that decision in all the circumstances of this case.
- e) A Declaration that the said Decision of the Respondent was arbitrary, oppressive, irrational, unreasonable, unlawful, null, void, and of no legal effect.
  - f) A Declaration that in all the circumstances the Decision of the Respondent not to issue the Applicant's registration and licence without restrictions or conditions was taken in bad faith.
  - g) A Declaration that the Respondent's actions complained of herein constituted an intentional and/or malicious failure and/or refusal to perform its statutory duty.
  - h) A Declaration that the Respondent's policy that all applicants seeking registration and licensure as fully licensed independent medical practitioners must sit and pass the US Special Purpose Examination ("SPEX"), or any other extra-statutory licensing examination, is *ultra vires* and constitutes an arbitrary, oppressive, irrational, unreasonable, and unlawful fetter upon its statutory discretion.
  - i) A Declaration that the Respondent's conduct toward the Applicant complained of herein was arbitrary, oppressive, inhumane, degrading, discriminatory, and/or otherwise unconstitutional.
  - j) A Declaration that the restrictions and conditions imposed by the Respondent on the registration and licensure of the Applicant amounts for all intents and purposes to, and constitutes, a substantive refusal of his application; and that the Respondent failed to discharge its statutory duty to issue a formal refusal to the Applicant thereby depriving the Applicant of his statutory right of appeal with respect to the said substantive refusal of his application.
  - k) A Declaration that the Respondent is estopped from refusing to register and licence the Applicant as a fully licensed medical practitioner without restriction or condition in all the circumstances of this case.
  - l) An award of damages.
  - m) An award of aggravated damages.
  - n) An award of exemplary damages.
  - o) An award of vindictory damages for the Respondent's unlawful interference with, and violation of, the Applicant's statutory, constitutional, and due process rights.
  - p) The costs of and occasioned by this action.
  - q) Such further or other relief as to the Court may seem just.

## THE EVIDENCE

16. Kerr's application for judicial review is supported by his affidavits dated 8 May 2019 and 5 September 2019, the affidavit of Dr Yolanda Griffin-Jones dated 17 September 2019, Dr Crispin Gomez also dated 17 September 2019, Dr Melisande Bassett filed on 4 October 2019 as well as the affidavit of Dr Lina Mortimer Reyes.. The BMC's

case is supported by the affidavit of Dr Mark Weech filed on 16 August 2019 and 31 October 2019.

17. Remarkably, although not being a party to the action, the Attorney-General, purported to file an Affidavit of Dr. Delon Brennen. The affidavit purported to be a response to the Affidavits of Drs Griffin-Jones and Bassett. It is also worth mentioning that, in the interim, the contract of employment in the public health sector of Kerr, was not renewed when it came up for renewal. As the failure to renew Kerr's employment contract is the subject of another pending action before me I would not make any further comments.

#### Kerr's Affidavit evidence

18. Kerr's evidence is found in two affidavits. Kerr's evidence sets out his medical training and experience which he says ought to have led to registration as a fully licenced medical practitioner without restrictions or conditions. The qualifications include:

- (1) Medical Degree from the Higher Institute of Medical Sciences, Santiago de Cuba on 12 July 2007.
- (2) Grade 1 Specialty in Comprehensive General Medicine aka Family Medicine from the Latin American School of Medicine on 20 May 2009.
- (3) Diploma in Natural Medicine from the University of Medical Sciences, Holguin on 22 November 2012.
- (4) Grade 1 Specialty in Dermatology from the Latin American School of Medicine on 10 January 2013.
- (5) Registered by the BMC in the Medical Register on 16 November 2015, Registration No. 2049, and was duly licensed pursuant to s. 29 (1)(b) and s. 22(3)(c) of the Act, most recently on 27 December 2017.
- (6) At the request of the BMC, sat and successfully completed the Caribbean Association of Medical Council's (CMAC) Examination held on 23 November 2015.
- (7) Worked at the Department of Public Health from 2016 and has worked in almost all of the Government Clinics in New Providence. Successfully



completed supervised rotations working in paediatrics, Gynaecology, Family Medicine and 3 months in the Princess Margaret Hospital's Accident and Emergency Department.

(8) Posted by the Department of Public Health as Medical District Officer, the only Medical Doctor for the Island of Andros from January 2017 stationed in the Miriam Green Clinic in Kemp's Bay, South Andros. In October 2017 was officially given responsibility for Mangrove Cay, Andros.

19. Kerr says that at all times he was duly registered and licensed by the Respondent without supervisory restrictions or conditions and that he had been providing medical services to and treating the Bahamian public and visitors in the Department of Public Health since 2016. He says that he has been the only doctor on both Long Island and Andros without any supervisory restrictions or conditions. He says that he has neither received nor been the subject of any complaints with respect to his performances or treatment of patients.

20. Kerr says that the correspondence between he and the BMC demonstrates that the BMC, in unlawful conspiracy with others, had set out to besmirch and slander his professional reputation. He refused to provide the BMC with his confidential employee records not out of any concern regarding the contents thereof, but rather because the BMC had no statutory authority to request it nor did the Respondent have a reasonable basis for requiring the same. Kerr says that the BMC refused to explain the statutory authority upon which it sought and secured his confidential employee records from the Department of Public Health and the Public Hospitals Authority. Kerr also stated that the BMC failed to explain the statutory basis for the purported investigation conducted by its Assessment Committee.

21. Kerr says that he had never been the subject of any complaint before the BMC and he is unclear how his confidential employee records from the Department of Public Health and the Public Hospitals Authority were relevant to the application. He says that he has instituted proceedings against the Department of Public Health and the

Public Hospitals Authority concerning the unlawful disclosure of his confidential employee records. Kerr says that the BMC neither requested nor received any such information when his application was submitted in October 2017.

22. Kerr says that the BMC provided documents from purported investigations which contained interviews, referencing copies of his confidential employee records of which he was not aware. He says that the investigation itself was ultra vires and the BMC has not provided him with advanced notice of the nature basis and scope of the intended investigation. He was unaware that witnesses could be called nor did the BMC afford him the opportunity to call witnesses or put questions to the witnesses called to his prejudice. The BMC did not disclose how it selected persons to give evidence as part of its closed door investigations and only presented to his statements to his prejudice and which they believed supported their predetermined conclusion.

23. The Assessment Committee recorded each of the interviews but destroyed the recordings and released summaries of the interviews.

24. Kerr rejected the assertion that he was practicing under any supervision or supervisory restrictions. He said that Dr Caroline Burnett purported to evaluate his performance with respect to a rotation, which took place between 1 October 2016 -31 December 2016, two years later on 8 November 2018 and a week following his successful appeal in the previous appeal action. He says that the assessment produced, and the statement provided, by Dr Burnett was solicited, curated, and secured by the BMC for the sole purpose of falsely impugning his knowledge base after the fact. Dr Jillian Bartlett admittedly edited or endorsed his confidential Government Performance Appraisal Record to his prejudice after it had been duly completed by the appropriate public officer and without his knowledge.

25. Kerr says that the restrictions and conditions imposed by the BMC on his registration and licensure as a fully licensed medical practitioner effectively prevent him from engaging in independent private medical practice, which is the intended purpose of the license.

26. Kerr says that he has suffered embarrassment both professionally and personally as a result of the BMC's actions.

#### Evidence of Dr Yolanda Griffin-Jones

27. Dr Yolanda Griffin-Jones' evidence was that:

- (i.) She is a fully registered and licensed medical doctor having worked in the Department of Health since 2008. Since 2012 she has been a team leader for the South Beach Health Center. She oversees Abaco and Exuma. She provides guidance to physicians under her charge.
- (ii.) It is incorrect that physicians like Kerr who worked as a part of her team are under any form of mandatory or direct supervision. She is not aware of any mandate that doctors who are not fully licenced medical practitioners are to be subjected to direct supervision. A physician would not have been sent to work on any of the islands if there were any concerns about their readiness or their general knowledge base.
- (iii.) When she applied for registration and licensure as a fully licenced medical practitioner, she was not required by the BMC to produce any of her confidential employee records.
- (iv.) She worked with Kerr from March 2018 to April 2019 when the Department of Public Health purported not to renew his contract. She has never had any issue with the management of any patient treated by Kerr. Kerr is a duly qualified medical practitioner suitable for full registration and licencature. It is incredible that the BMC would casually suggest that a physician working in the public health system could be a threat to public safety. She does not believe that the conditions and restrictions in the nature of those imposed on Kerr to be warranted.

#### Evidence of Dr Crispin Gomez

28. Dr Gomez's evidence was contained in his affidavit dated 17 September 2019. His evidence was that:

- (i.) He has worked for the Public Hospitals Authority since 2009 and in the Department of Public Health since 2015. He is a supervisor for physicians employed by the PHA a complete evaluations.
- (ii.) When he made application to the BMC he was not subject to any such investigation regarding to his professional performance nor were performance evaluations produced by his employers relating to the discharge of duties.
- (iii.) He has worked with Kerr but has never had to evaluate his performance, as he worked with the Department of Public Health. He has never had any report about improper patient management by him or had a nurse query what he does. He has had to refer patients to him for dermatological problems. He is of the opinion that Kerr is suitable for receipt of full registration. There is nothing in the affidavit of Dr Weech which demonstrates that he would be a threat to public safety.

#### Evidence of Dr Melisande Bassett

29. Dr Bassett's evidence is found in her affidavit dated 4 October 2019. Dr Bassett took issue with Weesh's suggestions that: (1) Kerr's registration and licensure would jeopardize public safety; (2) that absurd results would ensue from the decision of the Court in Kerr's appeal process; (3) the BMC's policy concerning the SPEX examination; (4) the assertion that physicians like Kerr in the Public Health System are practicing under direct supervision; and (5) the accessing of Kerr's confidential employee records by the BMC and its Assessment Committee.

#### Evidence of Dr Lina Mortimer Reyes

30. The evidence of Dr Lina Mortimer Reyes was contained in her affidavit of 30 September 2019. Dr Mortimer Reyes complains that the BMC also sought to obtain her confidential appraisals and assessments which she says are protected by the Public Service Regulations. She says that the BMC was unsuccessful in securing these materials unlawfully as it did in Kerr's case.

## Evidence of Weech

31. Evidence of Dr Mark Weech is contained in 2 affidavits filed on 16 August 2019 and 31 October 2019. Weech says that the relief sought by Kerr will have the effect of usurping the lawful powers of the BMC in a manner which is completely at odds with the unanimous professional opinion of the BMC and its members and which would jeopardize public safety. The decisions of the BMC have been made bona fide with a view to discharging reasonably their duty and mandate under the governing legislation.
  
32. The BMC has offered Kerr registration as a fully licensed medical practitioner subject to certain restrictions and conditions, which the BMC considers are necessary. The BMC considered the application afresh and sought additional particulars, in its letter of 5 December 2018 in accordance with section 15(4)(e) of the Act.
  
33. The file of Kerr contained information on Kerr's education qualifications, arrival into the Bahamas medical system as well as his subsequent clinical evaluations from the Public Hospitals Authority and the Department of Public Health. The BMC reviewed evaluations by the PHA, A&E, Family Medicine Clinics and Public Health/Ministry of Health. It is not uncommon for the BMC to receive this information as Kerr was working full time in the public service and under supervision. Kerr was duty bound to provide such information upon request and failure to provide the information in and of itself raises questions about his suitability for registration and licensure. As the evaluations were subjective and they gave the BMC concerns as a result of:
  - (i.) inconsistencies between numbered scoring and written statements;
  - (ii.) the seniority of some of the evaluators; and
  - (iii.) the discrepancy between the opinions of junior versus senior evaluators.

Of concern was the fact that several of the senior consultant level evaluators expressed concerns about Kerr's knowledge base. The Assessment Committee met with three of the consultants, Dr Caroline Burnett-Garraway, Medical Chief of Staff at PMH, Dr Sabriquet Pinder Butler, Clinical Coordinator of the UWI Family Residency

Program and Family Medicine Department and Dr Jillian Bartlett Senior Medical Officer.

34. The BMC, given the reports of the consultants interviewed, had serious concerns and though it best to interview Kerr to give him the opportunity to speak to the issues which had arisen and about his application generally.
35. Given the issues which arose, the Assessment Committee recommended that Kerr take an independent assessment to ensure that the public was not unfairly put at risk in allowing an objective assessment to ensure that the public was not unfairly put at risk.
36. The BMC considered that it was still open to it to determine whether the registration ought to be subject to any restrictions and conditions which in the opinion of the BMC are necessary.
37. Given the unanswered issues which had been raised in respect of Kerr's knowledge base, and the subjective nature of the assessments which had been reviewed the BMC felt strongly and unanimously that it was in the public interest to have Kerr undergo a period of supervised practice, during which time the BMC could assess for itself issues relating to the Applicant's knowledge base.
38. The BMC issued Kerr a section 22(3)(c) license on the basis that he would be working full time in the public service under direct supervision. The public service is staffed with various senior level physicians who are fully licensed medical practitioners who routinely and expectedly supervise the work of persons like Kerr who have a section 22(3)(c) licence. The Respondent fully expected, and granted the Kerr a license on the basis that he would be supervised in the public service. By letter dated 17 June 2015 addressed to Dr Glen Beneby then CMO, in the Department of Public Health, the BMC made it clear that all physicians recruited and appointed and practicing under the Department of Public Health were to be directly supervised unless they met the requirements for independent practice under the Medical Act.

39. Weech says that he regrets that the Applicant did not engage with the BMC with the vigor and thoroughness with which he presented his case to the court. The applicant is for the first time offering an answer to the very serious matters which called into question his knowledge base and readiness for independent practice. The information was vitally relevant to their deliberations.

40. The fact that Kerr was supervised was confirmed by the Department of Public Health. Concerns as to whether Kerr is now able to practice independently arose and went unanswered by the Applicant. The BMC offered him every opportunity to respond to the issues which had arisen. The restrictions and conditions which the BMC placed on Kerr's registration are consistent with previously imposed restrictions and in the circumstances cannot reasonably be said to have been imposed unreasonably.

41. Dr Griffin Jones was "grandfathered" as a fully licenced medical practitioner under the Old Act. She is a team leader in the Public System. Her statements as to persons under her team not being supervised is inaccurate and makes a mockery of any training and supervision within the Department. Contrary to the assurances given by the MOH and Dr Beneby, that persons like Kerr would be supervised.

42. Dr Gomez's assessment was not a part of a deliberative process and he admits to having never evaluated Kerr.

43. According to Weech, had Kerr participated in the process before the Council, the Council may have been satisfied of his fitness for independent practice without supervision.

Evidence of Dr. Delon Brennen

44. Evidence of Dr. Delon Brennen is contained in his affidavit of 1 November 2019. He states that:

- (i.) He is the Deputy Chief Medical Officer of the Department of Public Health and has held the post since 2010. He is responsible for the Office of Medical Staff Development. The affidavit was a response to the evidence of Dr. Griffin-Jones and Dr Bassett.
- (ii.) He says that once a medical practitioner is hired and posed in an area the practitioner is placed on rotation under the direct supervision of team leaders, deputy team leaders or more senior physicians who will be directly responsible for the monitoring of that junior physician. Direct supervision, means that the junior physician will physical be in the same clinical area. The rotations typically last for a year unless there are extenuating circumstances (e.g. physician has extensive prior experience in a clinical area where a rotation would usually occur).
- (iii.) Once the rotation is complete and the physician is deemed to be safe to practice in the setting, the level of supervision decreases and such supervision will depend on the physician's level of proficiency. The supervision is initially done by reviewing selected patient's notes/charts and ensuring that the prescribed medications, dosage and diagnosis are consistent with standard medical practice. There will also be scheduled reviews to discuss the status of patient cases.
- (iv.) Kerr was posted to the Clinic at Kemps Bay South Andros where he was under the supervision of Dr Adderley Cooper who was his team leader. When challenging issues arose with respect to the execution of patient care challenging cases were referred to Dr Jillian Bartlett to supervise and provide guidance.
- (v.) The decision to place Dr Kerr in Kemps Bay, as is the usual case with other relatively new physicians, was made to allow him to practice in an area where there is smaller patient volume and less acute issues so that his approach to care and decision making could be monitored closely, while allowing him to become more acclimated to more independent practice and the challenges of practicing on a family island.



## Analysis and Discussion

45. I should say at the outset that this is an unfortunate matter reflective of unnecessarily harsh and disparaging comments and accusations being levied on all sides of this dispute.

46. Kerr makes a number of complaints concerning the process of the reconsideration of the application for registration and licensure as a fully licensed medical practitioner. For the purpose of my ruling I do not propose to deal with them individually but they may be summarized as follows:

- (1) The obtaining of additional material by the BMC was improper.
- (2) The investigation undertaken by the Assessment Committee was ultra vires, arbitrary, oppressive, unreasonable and otherwise unlawful.
- (3) Denial of due process.
- (4) The restrictions and conditions placed upon the grant of the license undermine the grant thereof:

### Additional material sought and obtained by the Assessment Committee

47. Kerr makes several complaints under this head. He says that:

- (1) The BMC had no right or basis to obtain additional material from him following upon the decision in the appeal.
- (2) The BMC improperly obtained the information which it used in its deliberations.
- (3) The information obtained was prejudicial.

48. Kerr says that the BMC at

*“all material times failed and refused to disclose and demonstrate the statutory basis upon which it sought and obtained the purported “material...which raised concerns as to...[his] readiness for independent practice and in particular...[his] general knowledge base.” The Applicant submitted all the requisite and relevant material in support of his application under consideration on or before the 13<sup>th</sup> day of October A.D. 2017, which was the material the Respondent was required to properly consider.”*

Kerr also says that Section 15(4) of the Act sets out what the BMC was entitled. Finally he complains that the BMC has failed and/or refused to explain the statutory means

by which it came to receive and consider the said "*material*" prejudicial to him and he maintains that the BMC's solicitation and consideration of the said "*material*" was *ultra vires*, arbitrary, oppressive, unreasonable, and unlawful.

49. The BMC does not face the issue frontally in submissions only responding that section 15(4) empowers the BMC to request additional material from an applicant. They maintain that the remittal of the matter required them to consider the matter afresh in light of the Court's decision and to determine what conditions of restrictions, if any would be suitable.

50. The matter had been remitted to the BMC on the basis that the decision, which found that Kerr was ineligible to be registered and licensed as a fully licensed medical practitioner, was bad in law. In remitting the matter, the Court found:

**9** If however, by ineligibility the Council means that the Appellant is not qualified pursuant to Section 15 and 16 as permitted by Section 19(1), this is difficult prospect having regard to the Appellants current registration under section 22(3)(c). The precondition to a section 22(3)(c) registration is that a registrant is qualified to practice medicine pursuant sections 15 and 16.

**10** Section 22 of the Medical Act provides:

22. Temporary, provisional and special registrations. ...

(3)The Council or the Registrar may specially register a person who satisfies the Council that he is qualified to practice medicine under this Act, and in any country or place and that-

(a)he is doing special work in the field of public health or research and is sponsored in respect of such work by the University of the West Indies, the World Health Organisation, the Pan-American Health Organisation, or such other inter-governmental organisation or body approved by the Minister, after consultation with the Council;

(b)he is a medical practitioner, who is employed, on a full-time basis by an international organisation that has an office in The Bahamas, to render medical services exclusively and without a fee to members of that organisation;

(c)he is employed on a full-time basis in the public service; or

(d)he is employed on a full-time basis with the Public Hospitals Authority under the supervision of a consultant or specialist. ...

**11** Registration of a person to practice medicine under the Act is provided for in Section 15 of the Act, which provides:

(1) No person shall practice medicine or surgery unless he is registered by the Council under this Act.

(2) A person who desires to be registered by the Council to practice medicine or surgery shall apply to the Council.

(3) An application for registration referred to under subsection (2) shall be- (a) made to the Council; (b) in Form A in the Second Schedule; and (c) accompanied by the application fee specified in the Seventh Schedule;

(4) An applicant shall submit together with the applicant's application referred to under subsection (2)- (a) evidence of his qualifications; (b) proof of his identity; (c) proof that he is of good character; (d) a certificate of good standing from the applicant's previous registering body, if applicable; and (e) such other particulars as determined by the Council.

(5) Where the Council receives an application referred to under subsection (2) and is satisfied that an applicant is qualified pursuant to section 16 to be registered as a medical practitioner, the Council, upon the applicant making payment of the fee specified in the Seventh Schedule, may- (a) register the applicant in the relevant section of the register, subject to such restrictions and conditions, if any, as the Council considers necessary; and (b) grant a certificate of registration to the applicant as set out in Form B in the Second Schedule.

(6) An application made under subsection (2) by a person who is not either- (a) a public officer; or (b) a citizen of The Bahamas, shall not be granted without the concurrence of the Minister responsible for Immigration.

[Emphasis added]

**12** Qualification to practice medicine under the Act is limited to Section 16 of the Act, which provides:

16. Qualifications. A person is qualified to be registered as a medical practitioner where that person-

(a) holds a medical degree, certificate or other form of qualification granted by a University, College or other institute of learning recognized by the Council as a body empowered to confer authority to practice medicine by the law of the country or place where it is granted, and which in the opinion of the Council is evidence of satisfactory medical training; and

(b) satisfies the Council that --

(i) he has successfully completed the required period of internship with a hospital or medical institution approved by the Council;

(ii) he has completed two years of supervised rotational medical practice or has special training, experience and qualifications, approved by the Council;

(iii) he can read, write, speak and understand the English Language; and

(iv) he is a fit and proper person to practice medicine in The Bahamas.

**13** The Council says that the Appellant was registered under section 22(3)(c) of the Act. This means that he was specially registered under the Act. Section 22(3)(c) of the Act provides that:

"The Council or the Registrar may specially register a person who satisfies the Council that he is qualified to practice medicine under this Act, and in any country or place and that- ...(c) he is employed on a full-time basis in the public service..."

**14** Having specially registered the Appellant under the provisions of section 22(3)(c), the Council has already been satisfied that the Appellant is qualified to practice medicine under the provisions of the Act. Having been registered under Section 22(3)(c) it is axiomatic that the Appellant was qualified to practice medicine under the Act. It is difficult to appreciate therefore how the Council can argue as to his ineligibility, on the basis of qualifications, as it would be inconsistent with his existing registration under Section 22(3)(c).

...

**21** In the circumstances I allow the appeal setting aside the decision of the Council. In as much as there was no proper consideration of the application, I remit the matter to the Council for a proper consideration having regard to my decision herein. As Section 15 of the Act provides for the Council to register the applicant in the relevant section of the register, subject to such restrictions and conditions, if any, as the Council considers necessary, it seems prudent that the decision be properly made by the Council and I resist my inclination to order the registration.

51. When the matter was remitted, indeed it was expected that Kerr's application would be considered, de novo, having regard to the finding that Kerr had been determined by the BMC in November 2013 to have been qualified to practice medicine in The Bahamas. Contrary to what Weech suggests in his affidavit of 16 August 2019, this is the only way a person could be registered and licensed to practice medicine. Whether the BMC was misled by the Public Health Department or erred in that decision, this is what it did. Further, the license issued contained no conditions or restrictions.

52. I therefore accept the BMC's submission that it was entitled to consider the matter, afresh and to consider it based upon current information in order to assess what conditions or restrictions may or may not be required. In this exercise it was indeed open to the BMC to request further information in accordance with Section 15(4)(e) of the Act. Section 15(4) provides:

An applicant shall submit together with the application referred to under subsection (2) -

- a) Evidence of his qualifications;
- b) Proof of his identity
- c) Proof that he is of good character;
- d) A certificate of good standing from the applicant's previous registering body, if applicable; and
- e) Such other particulars as determined by the Council.

53. When the BMC wrote to Kerr in December 2019 seeking his evaluations, in my view, it was not an unreasonable request, having regard to: (1) the time which had passed since his original application in 2017 and (2) the prior understanding, which the BMC maintained that he was being supervised or otherwise evaluated by the Ministry of Public Health.

54. What is troubling to Kerr, and indeed to the Court was how the BMC was able to obtain private confidential information on Kerr's employment file with Public Health. According to Weech, *the file of Kerr contained information on Kerr's education qualifications, arrival into the Bahamas medical system as well as his subsequent clinical evaluations from the Public Hospitals Authority and the Department of Public Health. The BMC reviewed evaluations by the PHA, A&E, Family Medicine Clinics and Public Health/Ministry of Health. It is not uncommon for the BMC to receive this information as he was working full time in the public service and under supervision*". Weech's explanation, that the material was in the BMC's file of Kerr is confusing when the record reflects that Dr Dahl-Regis, Registrar of the BMC, had been asking for the material, and up to 9 January 2019 had offered to assist him in obtaining it. It is troubling, not only because the material had not been authorized by Kerr but more so, because:

- (1) some of the valuations were only recently completed by physicians immediately after he succeeds in his appeal;
- (2) they were evaluating Kerr on observations in some cases 2 years earlier;
- (3) there were senior physicians seeking to overturn positive evaluations given by physicians who actually oversaw his work, and

- (4) Kerr saw some of the evaluations firstly through the BMC and had no opportunity to discuss or comment on the evaluations.

55. On any account, the BMC's obtaining of the material on Kerr's personnel file was improper. The BMC, managed by physicians who previously held high offices in the public service, knew or ought to have known, that the accessing of Kerr's confidential evaluations was wrong. In my view, this is even more so where Kerr was resisting production, albeit unjustifiably. The Court of Appeal, has in the past been forced to remind the BMC that it is an independent statutory authority and not an agency of the Ministry of Health or the Executive (See: ***Shanmugavel v. The Bahamas Medical Council, Civil Appeal No. 14 of 2011.***) Instances like this, involving the sharing of personnel files, suggest that the BMC has not paid heed to the condemnation of the Appeals Court. This is unfortunate and undermines the integrity of this important body.

The investigation undertaken by the Assessment Committee was *ultra vires*, arbitrary, oppressive, unreasonable and otherwise unlawful. Allegation of due Denial of due process

56. Kerr says that Section 33(4)(a) of the Act sets out the statutory jurisdiction of the Assessment Committee with respect to applications for registration, which is to: "*examine applications for registration and advise the Council on the adequacy of the qualifications of an applicant for registration and, in the relevant case, additional qualifications that are required for registration* (emphasis ours)". He also says that his qualification to practice medicine under the Act was beyond reasonable dispute. Therefore, he says, the purported investigation conducted by the Assessment Committee was *ultra vires*, arbitrary, oppressive, unreasonable, and otherwise unlawful."

57. The BMC says that it was ordered by the Court to properly consider the application having regard to the judgment of the court in the appeal matter. Reliance is placed on section 15(5) of the Act which provides:

(5) Where the Council receives an application referred to under subsection (2) and is satisfied that an applicant is qualified pursuant to section 16 to be registered as a medical practitioner, the Council, upon the applicant making payment of the fee specified in the Seventh Schedule, may:

- (a) register the applicant in the relevant section of the register, subject to such restrictions and conditions, if any, as the Council considers necessary; and
- (b) grant a certificate of registration to the applicant as set out in Form B in the Second Schedule.

58. The BMC contends that it had to consider (and indeed investigate) whether Kerr was qualified pursuant to section 16. Part of that investigation included consideration as to whether in their opinion his registration (if he was to be so registered) was to be subject to any such restrictions and conditions, which they considered necessary. The BMC says that it took action including tasking the Assessment Committee “to assist generally with its consideration of Kerr’s application, inclusive of collecting and assessing relevant documentation and interviewing persons who may have a bearing on the issues, and making recommendation to the Council.” The Assessment Committee, says the BMC, is empowered by Section 33 and 53 of the Act, and their conduct was in keeping with its mandate under the Act and the decision of the Court in the appeal matter. The BMC also says that there was no other way to consider whether Kerr was qualified and whether there was a need for restrictions and or conditions to be placed on his registration and that the BMC was not simply to “rubber stamp” Kerr’s application.

59. Section 33 of the Act provides

33. Assessment Committee.

(1) The Assessment Committee shall consist of three members (a) the Chairman of the Council; (b) one member of the Council who is a medical practitioner appointed by the Chairman; (c) a medical practitioner, who is not a member of the Council and who has been registered for at least ten years appointed by the Chairman.

(2) Where the Chairman is absent from a meeting, the Assessment Committee shall elect one of its members present to act as Chairman for that meeting.

(3) The Assessment Committee shall meet at such times as the Chairman considers necessary.

(4) The Assessment Committee shall (a) examine applications for registration and advise the Council on the adequacy of the qualifications of an applicant for registration and, in the relevant case, the additional qualifications that are required for registration; (b) be responsible for the implementation and publication of the system of assessment; (c) perform such other duties as are assigned to the Assessment Committee by the Council.

Section 53 of the Act provides:

53. Direction of matters by Council to Special Review Committee or Assessment Committee.

(1) The Council may direct (a) the Assessment Committee to conduct an evaluation of the qualifications or capability of a medical practitioner or specialist; or (b) a Special Review Committee to conduct a review of the professional performance of a medical practitioner or specialist, where the capability, competence or professional performance is an issue in any matter under this Act.

(2) The Assessment Committee shall submit a report of its findings, in writing, to the Council.

(3) The conduct of the evaluation or review of a medical practitioner or specialist by the Assessment Committee or Special Review Committee under this section shall be in accordance with regulations made under this Act.

60. Although not clearly stated, it is conceivable that an evaluation of the capability of Kerr, to engage in full licensure for the purpose of considering what conditions and or restriction may or may not be necessary, could involve investigations and inquiries. This power, to conduct an evaluation of the capability of a medical practitioner, provided for in Section 53(1) of the Act, appears to be different from the evaluation of his qualifications. It is unfortunate that the Act did not spell out the extent of this function, as tribunals administrative bodies, being statutory creatures are constrained by their statutory framework and ought not to be left to infer the extent of their power.

61. In any event, any process of accessing information other than from Kerr, especially oral evidence from others, must be fair and transparent and a fair opportunity provided for Kerr to respond and be heard prior to any determination being made adverse to him.

62. The BMC was on the correct track when it sought to invite Kerr to make representations where they had concerns about his application. This however was not



an opportunity afforded, but an entitlement of Kerr under principles of basic natural justice. It ought not to be casually executed as it seems to have been.

63. Kerr's evidence, through the licensed physicians who gave affidavits in support of his case, suggests that the process embarked upon in relation to him, was not a process usually engaged by the BMC, for the assessment of applicants for full registration and licensure. Weech argued that this was a new Act and that Kerr's witnesses were licenced under the Old Medical Act. Kerr was nonetheless understandably cautious about the process being undertaken with his application. By letter dated 7 March 2019 Kerr asked the BMC for "*full particulars of the certain matters which have purportedly arisen during the Council's deliberation along with full particulars of the alleged concerns regarding Dr. Kerr's general medical knowledge within seven 7 days hereof*". He was not provided with the specifics but instead on 11 March 2019 the BMC give him minutes of the Assessment Committee meeting. Further material, referred to in the Assessment Committee's was sought and provided to Kerr.

64. It is understandable that at the meeting the specific issues would have been provided.

65. Kerr says that there was no due process afforded to him in the circumstances. He says that

"BMC presented him with its "*material*", containing baseless and unlawful assaults on his professional reputation, *ex post* and, while failing and refusing to state the statutory basis for its purported investigation conducted to his exclusion, invited the [him] to simply comment on the results thereof. [Kerr] was entitled to, and did, request, and [the BMC] was obliged, but refused, to state, the statutory basis, or jurisdiction, upon which its Assessment Committee purported to investigate [him] and had invited him to meet. The [BMC]'s refusal to respond to [his] reasonable request was oppressive, arbitrary, unreasonable, and unlawful. [Kerr] reasonably refused to participate in an *ex post* meeting during which the [BMC] insisted that it would only state the statutory basis, and jurisdiction for, the meeting upon the conclusion thereof. The [BMC] is a statutory body, which ought always to be

prepared and willing to identify and declare the statutory basis for any of its actions.”

66. The BMC says that Kerr and his counsel both knew that the BMC was considering his application and that Weech told them that he was exercising power under the Medical Act. He says that Kerr’s counsel was not satisfied with the answer and demanded to know the exact provision of the Act under which the meeting was being held, if he didn’t receive the specific request. The BMC said that had Kerr’ counsel abruptly ended the meeting and left.

67. This is a judicial review application where the evidence was provided on affidavits. The court is not in a position to reconcile affidavits as to why the meeting didn’t proceed and which side was to blame. At the very least it does appear that cooler heads did not prevail and both the BMC and Kerr did not get an opportunity to reconcile the issues outstanding in his application. What is clear on all accounts however, is that Kerr was refused his request to be told what provisions in the Act the Assessment Committee was being empowered and told that he would have to wait until the conclusion of the meeting. Whether the BMC would have provide this information I am not prepared to speculate or make a determination. It seems to me that the information requested ought to have been provided on request. The BMC is a creature of statute, and being represented by Counsel at the time, ought to have readily indicated the source of its authority. Indicating that it comes from the Act is a non-answer as every source of power in the BMC, as a statutory body, must come from the Act. It seems to me that statutory tribunals exercising jurisdiction ought always to be prepared and willing to identify and declare the statutory basis for any of its actions. Likewise, waiting until the applicant has engaged in a matter which later turns out to have been improper, would be imprudent.

68. There was clearly a basis for the concern of Kerr as to the process being utilized in his application.

- a) There is no clear mandate in the Act to permit the examination of (witnesses) or an interview of applicants;

- b) There is a defined process elsewhere in the Act (Sixth Schedule) for investigations which, although may not have applied to his case, was not being followed;
- c) The interviews had already taken place without Kerr's participation and the audio destroyed; and
- d) BMC's obtaining of Kerr's personal confidential information, some of which he was not privy to;

In my view, the BMC's action gave Kerr very good reason to be cautious as to the process he was about to participate in and perhaps sanction. In the circumstances, there was also more than enough reason for the BMC to have been more patient in the process. Kerr's withdrawal from the meeting could not properly be faulted.

69. The meeting having been aborted, Kerr still did not have any particulars of the Assessment Committee's concerns as this was likely to have been provided at the meeting. Whilst he had the minutes he was left to determine what it was that the Committee considered material and what left them with concerns.

70. Additionally, having selected which medical officers it decided to consult, it would have been appropriate to have requested from Kerr any references he thought may have advanced his cause. This request for references (not only character) is a usual and somewhat universal practice in application processes.

71. Regrettably, rather than re-engage Kerr and seek his responses to their concerns in writing, the Assessment Committee immediately ended its investigation and reported to the BMC. Within a 5 day period of the meeting, the full panel of the BMC is convened and, prematurely in my view, issues the decision which is the subject of this dispute.

72. In my view Kerr was denied substantive natural justice. Weech admits in his evidence, that, had the Council had the benefit of Kerr's position, as came out in this action, the decision may well have been different. Additionally, in regretting that Kerr did not engage with the BMC, Weech also asserts that the evidence which came out in the

hearing would have been vital to the decision making process. This only confirms that the application was not fully considered.

The restrictions and conditions placed upon the grant of the license undermine the grant thereof

73. Kerr says that the restrictions and conditions imposed by the BMC wholly undermine and negate the BMC's decision to register and license him "*as a fully licensed medical practitioner*", as the said restrictions and conditions make independent private medical practice impossible. The BMC cannot approbate and reprobate with respect to its decision to register and license Kerr as a fully licensed medical practitioner in accordance with his application. Kerr says that the BMC's *ultra vires* and *ex post* investigation was merely an unlawful and prejudicial pretense whereby the BMC sought justification to impose restrictions and conditions on the Applicant's registration and licensure which would be so oppressive and draconian as to effectively prevent and preclude the Applicant ever in engaging in substantive and meaningful independent private medical practice.

74. The conditions imposed were as follows:

a. You are only permitted to engage in supervised medical practice. You must be supervised by a medical practitioner who has been registered and licensed by the Council to practice as a fully licensed medical practitioner (without supervision restrictions and conditions) for at least five years; and

b. You are required to submit monthly evaluations to Council from your supervisor in a form acceptable to Council; the restrictions and conditions which you are subject to will be reviewed in 6 month intervals, at which point Council will make a determination as to whether they will be lifted or continued. Although you are not required to do so, Council also wishes to advise you that the restrictions and conditions which you are subject to may be lifted upon the successful passing of an independent objective examination approved by the Council.

75. In my view the submission as to the conditions undermining the grant of registration and licensure must succeed. The BMC, having found that Kerr is qualified to be

registered and licensed as a fully licensed medical practitioner permits him to only engage in “supervised medical practice” and to submit monthly evaluations to the BMC. What is a “supervised medical practice”? It is not a term prescribed in the Act, but whatever it is, it is not a fully licensed medical practitioner and there is no independence. The conditions and restrictions cannot derogate from the grant. In this case the conditions undercuts that registration and licensure. Supervised medical practice is inimical to independent practice.

76. Admittedly the legislation is silent as to the nature of any such conditions and restrictions. One would have thought, given the remit of the BMC they would have to consider conditions and restrictions relative to how he must govern himself as a fully licensed medical practitioner. For example: Whether he could establish a sole practice; what type of practice he could join if it couldn't be as a sole practitioner; whether any such practice was to be limited by the number of other fully licensed medical practitioners or the nature of the work; whether he could only do specific types of medical work; normal continuing education credit requirements; and the like. Such conditions and restrictions as the BMC in their collective professional opinion deemed necessary. What the BMC couldn't do was to grant the license and registration on the one hand and impose conditions and restriction which make the benefit of the grant impossible. In all the circumstances therefore, the restrictions are so unreasonable that no reasonable council properly directing themselves could come to such a decision.

## Conclusion

77. In all the circumstances therefore, for the foregoing reasons, the conditions and restrictions reflected in the decision of the BMC of 30 April 2019 cannot stand and must be quashed. I so order.

78. This is a judicial review application and I am mindful that the BMC is a statutory body empowered under the Act to carry out the functions which parliament has given to it.

That power however must be exercised according to the law and principles of natural justice. My views remain as they were in the appeal action, the matter is remitted to the BMC for a true and proper consideration affording Kerr real and substantive due process.

79. I will decline to grant any of the other relief claimed in the judicial review application.

80. Kerr shall have his costs to be taxed if not agreed.

Postscript

81. I can only hope that cooler heads will prevail on **both** sides of this dispute and that a final resolution of this matter is obtained in the best interest of both sides. I expect that both sides will work together to come to that resolution without the bombast and bravado which the record reflects.

Dated the 22<sup>nd</sup> day of April AD 2020

Ian R. Winder

Justice