COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Public Law Division

2017

PUB/jrv/00011

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

AND

IN THE MATTER of an Application for leave to apply for an Order of Certiorari and Mandamus by Rudolph Junior Gibson pursuant to the Rules of the Supreme Court, Order 53 Rule 1

BETWEEN

RUDOLPH JUNIOR GIBSON

Applicant

AND

THE BAHAMAS PHARMACY COUNCIL

Respondent

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Attorney Murrio Ducille KC for the Applicant

Attorneys Raynard Rigby KC and Asha Lewis Respondent

Date of Hearings: 6th September 2021, 14th December 2021, 23rd February 2022

DECISION

1. The applicant was awarded a Bachelor of Science degree in Pharmacy from McHari Institute on 31st August 2009, and a Master of Science degree in Clinical Pharmacy from the same institution on 11th November 2011. He then applied for registration as a pharmacist by the Bahamas Pharmacy Council ("BPC"), which was granted by letter dated 1st January 2013. He was thereafter licensed annually, until by resolution passed on 24th January, 2017, the BPC determined that the registration of McHari graduates had been ultra vires to the Pharmacy Act Chapter 227. The BPC resolved, among other things, to request that an evaluating agency ascertain whether McHari degrees were

equivalent to a minimum of a Bachelor's Degree in Pharmacy from an accredited College or University.

2. The 2017 Resolution of the BPC states as follows:

"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."

3. Having first obtained leave, by Originating Notice of Motion filed 7th November, 2017 the applicant sought judicial review of the decision of the Bahamas Pharmacy Council, and asked for the following relief: (i) An Order of Certiorari quashing the Resolution adopted by the BPC on the 24th January 2017; (ii) An Order of Mandamus directing the BPC to renew the license of the Applicant; (iii) A Declaration that the Respondent acted unfairly, arbitrarily and capriciously towards the Applicant; (iv) Such further or other relief as the Court deems just; (v) Costs.

4. In the interim, by letter dated 25th September, 2019 the Applicant was advised that the Respondent would be amenable in the circumstances to granting a conditional license to the Applicant in accordance with section 15 (1) of the Pharmacy Act, the condition being that his practice as a Pharmacist would be limited to the Bahamas Government Public Service.

5. Following a relevant decision of the Court of Appeal dated 15th June 2020, the Applicant was informed by letter dated 17th December, 2020 that his registration and license pursuant to the provisions of the Pharmacy Act were cancelled.

6. The parties essentially agree that the issues to be determined are:

a) Whether McHari can be considered an accredited College for the purposes of registering and licensing Pharmacists under the provisions of Section 9(4) (a) of the Pharmacy Act?

b) Whether the Respondent has the authority to revisit its previous decision?

c) Whether the Plaintiff was treated in accordance with the principles of procedural fairness?

d) Whether the Applicant has a legitimate expectation that his registration would not be revoked subject to him complying with the provisions of the Pharmacy Act?

Applicant's Case

7. The Applicant submits that when he was licensed on 1st January, 2013, the only institution in the Bahamas to determine accreditation of tertiary level institutions such as McHari was the Ministry of Education under the direction of its Director of Higher Education and Life Long Learning, Dr. Leon Higgs, who in his affidavit evidence acknowledged that McHari was recognized and approved to offer degrees in Pharmacy in The Bahamas.

8. The Applicant also emphasizes that by training circular No.13 the Public Service Commission stated that Public Officers who obtained degrees from McHari after 21st January, 2009, and before 21st February, 2012 will be accepted by the Public Service. He also notes the affidavits of Shelly Collymore and Dr. Smith of the due diligence carried out by the BPC, and the supplemental affidavit of the Applicant dated 2nd June 2021, attesting that a service described as CREDIT EVAL evaluated the degrees obtained by the applicant, and found them to be the equivalent of Bachelor of Science and Master of Science degrees issued in the United States of America. The Applicant, therefore, submits that the BPC acted within its powers when it registered and licensed the Applicant.

9. The Applicant cites the Australian case of **Kabourakis and Medical Practicioners Board of Victoria (2006) VSCA 301**, in which it was held that the first hearing was final and binding under the provisions of the statute and cannot be revisited. Nettle JA stated at paragraph 48 **"More often than not the requirements for good administration and the need for people affected directly and indirectly to know where they stand mean that finality is the paramount consideration."** Nettle JA further stated at paragraph 64 **"More particularly, however, to borrow from the language of Vaisey J. in Re 56 Denton Road, Twickenham it would introduce a lamentable measure of uncertainty and so much disturbance in the minds of those unfortunate persons who have cause to complain".** The Applicant therefore submits that the initial decision was binding, and that as there is no express provision in the Pharmacy Act for the BPC to revoke registration, therefore the revocation of registration was ultra vires to the Act.

10. The Applicant has averred that he was never permitted to attend a meeting with the BPC either before or after it passed the impugned resolution. He therefore submits that the proceedings were unfair, and cites the Court of Appeal decision of **Shanmugavel v The Bahamas Medical Council (Appeal No.14 of 2011)**, in which Allen P, stated at paragraph 65 **"Of course the obligation imposed by fairness relative to the right to be heard depends on the circumstances but we say on an application such as this that at least due warning should be given of any impending adverse decision, notice of the matters to be considered in making the decision and an adequate opportunity to make representations prior to such a decision being taken, are the basics".**

11. Finally, the applicant submits that he had a legitimate expectation that his license would be renewed annually unless he engaged in some practice which endangered public safety. To this end he cites the authority of **The Queen on the Application of Patel v. General Medical Council (2013) ECWA Civ 327**, in which it was held that the representation given to Mr. Patel did rise to a legitimate expectation because it was clear, unambiguous and devoid of qualifications.

12. The Applicant also cites **North and East Devon Health Authority Respondent v Pamela Coughlan Applicant**, as authority for the proposition that where a lawful promise or practice has induced a legitimate expectation, the court would consider whether it would be unfair to frustrate that expectation.

RESPONDENT'S CASE

13. The Respondent notes the provisions of section 9 of the Pharmacy Act, and submit that the Applicant did not properly qualify for licensing, as the institution from which he obtained his academic qualifications is not properly accredited. The relevant portions of section 9 read as follows:

9. (1) No person shall operate as a pharmacist or pharmacy technician without being duly registered under this Act.

(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) For the purposes of section 9(3)(e), a person is qualified —
(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) holds a pharmacy degree from an accredited college or University; 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).

14. The Respondent relies heavily on the Court of Appeal decision of **Phillippa Finlayson et al v The Bahamas Pharmacy Council SCCivApp & CAIS No. 104 of 2019 ,** in which the Appellant was in the same situation as the present Applicant, and submits that in that decision, the Court of Appeal affirmed that McHari is not an accredited educational institute in the Bahamas, but only one registered by the Ministry of Education.

15. The Respondent therefore submits that McHari is not an accredited educational institution for the purposes of registering and licensing Pharmacists under the provisions of the Pharmacy Act.

16. With respect to the issue of legitimate expectation, the Respondent simply submits that as the Applicant could not lawfully be licensed, no legitimate expectation could arise. The Respondent cites **Commonwealth Caribbean Administrative Law, 2013, Routledge**

Publishing, Professor Eddy D. Ventose, a former Justice, at page 199 paragraph 3, which reads as follows:

> **"The Commonwealth Caribbean courts have made it abundantly clear that such expectations have no legitimacy and could not be held valid in the face of a statute making the action itself unlawful. In other words, the unlawfulness of a practice, promise, policy or the like is sufficient for the courts to reject it as not being 'legitimate' in law. If the expectation is unlawful, it is no answer that the applicant has relied, even to his detriment, on that expectation."**

17. The Respondent also cites **Auburn Court Ltd. v Kingston & St. Andrew Corporation JM 2001 CA 38**, as well as **Elcock v Attorney General of Trinidad and Tobago TT 2008 HC 53,** in which it was held that a person cannot have a legitimate expectation when the expectation is based on an unlawful decision or an unlawful policy. At paragraphs 37 to 39 of that decision, the court quotes a decision of the Privy Council and says as follows:

> **"[37] It has been established since the Privy Council decision Attorney General of Hong Kong v. Ng Yven Shui [1983] 2 AC. 629, that good administration required public authorities to abide by their promises "...provided the implementation did not conflict with their statutory duty..."**
>
> **[38] It is clear therefore that a legitimate expectation cannot legally be based on an illegal promise, practice or policy.**
>
> **[39] It is therefore necessary to consider whether, the old policy was unlawful. Should the Court decide, having regard to decided authorities, that the old policy was unlawful, it would necessarily follow that any expectation held by the applicant was not legitimate and could not form the basis for relief in judicial review."**

18. The Respondent therefore submits that the Applicant could not have a legitimate expectation that his Pharmacy license would be renewed by the Respondent, as the initial grant of that licence was unlawful, and any further renewal would likewise be unlawful. Therefore, the Respondent submits that the Applicant holds an unlawful expectation, not a legitimate one.

19. The Respondent submits that the issue of the authority of the BPC to revisit a previous decision, has already been considered in the Supreme Court decision of **Phillippa Finlayson v The Bahamas Pharmacy Council 2017/PUB/jrv/00006** in which Charles J held (paragraphs 153 through 155).

20. The Court of Appeal has affirmed the decision of the Supreme Court in **Phillipa Finlayson et al v The Bahamas Pharmacy Council SCCivApp & CAIS No. 104 of 2019 .**

21. The Respondent therefore submits that based on the law, it does indeed have the authority to change a previous decision or policy it made, particularly as the previous decision to register the Applicant, a graduate of McHari, was unlawful, due to the fact that McHari was not an accredited institution. The Respondent submits that as the body charged with the responsibility of licensing pharmacists who meet the criteria set out in the Act, it is also within the remit of the BPC to decline to continue to register persons who have not satisfied the statutory requirements.

DISCUSSION

Whether the Plaintiff was treated with procedural fairness?

22. In addressing the issue of procedural impropriety, the Respondent cites the well-known case of **Ridge v Baldwin [1964] A.C. 40**, in which the Court held at page 71 that:

> **No one, I think, disputes that three features of natural justice stand out - (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges. The first does not arise in the case before your Lordships, but the two last most certainly do, and the proceedings before the watch committee, therefore, in my opinion, cannot be allowed to stand."**

23. The respondent also cites **R v Gaming Board for Great Britain, ex parte Benaim and another [1970] 2 All ER 528**, in which applications for gaming licenses were refused, and in which the court said:

> **"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject-matter...The best guidance is, I think, to be found by reference to the cases of immigrants. They have no right to come in, but they have a right to be heard. The principle in that regard was well laid down by Lord Parker CJ in Re K (H) (an infant) ([1967] 1 All ER 226 at 231, [1967] 2 QB 617 at 630) when he said:**

' even if an immigration officer is not acting in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not, as I see it, a question of acting or being required to act judicially, but of being required to act fairly.'

Those words seem to me to apply to the board. The Act provides in terms that, in determining whether to grant a certificate, the board 'shall have regard only' to the matters specified. It follows, I think, that the board have a duty to act fairly. They must give the applicant an opportunity of satisfying them of the matters specified in Sch 2, para 4(5). They must let him know what their impressions are so that he can disabuse them. But I do not think that they need quote chapter and verse against him as if they were dismissing him from an office (Ridge v Baldwin), or depriving him of his property, as in Cooper v Wandsworth Board of Works. After all, they are not charging him with doing anything wrong. They are simply enquiring as to his capability and diligence and are having regard to his character, reputation and financial standing. They are there to protect the public interest, to see that persons running the gaming clubs are fit to be trusted."

24. The Respondent also cites the Jamaican case of **Conroy Housen v The Commissioner of Police and the Attorney General [2016] JMSC Civ. 220** , paragraph 41 of which states:

> **[41] At para. 136, her ladyship later stated, that: 'These factors must be considered within the context of the discretionary powers accorded to the decision-maker by statute, bearing in mind....that a low content of procedural fairness will be invoked where the statute permits the decision-maker the right to select his own procedure. The circumstances in each case vary. The question, in a particular case, is whether the procedural approach by the commission is so unfair that no reasonable commission would have adopted it."**

25. The Respondent therefore submits that there is no hard and fast rule concerning The principles of natural justice, and that it is clear that the principles of natural justice and procedural fairness were followed when deciding to de-register the applicant because it did its due diligence in reviewing the credentials of the Applicant, gave reasonable notice of the decision not to renew the Applicant's Pharmacy license for the year of 2017, through the dissemination of the 2016 Resolution, and considering various documents submitted by the applicant.

26. This issue was also considered in the Supreme Court by the learned Justice Charles in **Phillippa Finlayson v The Bahamas Pharmacy Council 2017/PUB/jrv/00006**. Beginning at paragraph 190, the court said as follows:

> "[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.....".

27. In considering this issue, in my view the main complaint of the Applicant is that he never had a hearing before the Council either before or after the resolution was passed. However, I note that the applicant submitted a number of documents to the Council to be considered, none of which were sufficient to cause a change in the Council's position. While the Applicant may not have been heard prior to the making of the resolution, he has certainly been able to place material before the Council to be considered in relation to this matter. The right to be heard does not always encompass an oral hearing but in some instances such as this, written representations may suffice.

28. I also note the following from **Steeples v Derbyshire County Council** cited above: **"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…"** It is my view that the BPC is primarily administrative, and as such its decision would be invalid only if it actually appeared to be unfair. In considering whether the decision appeared to be unfair, I note that a Justice of the Supreme Court did not consider the impugned decision to be unfair, and the issue did not seem to attract the attention of the Court of Appeal in reviewing that decision. Given those findings, as well as the fact that the decision based on the status of McHari has been found to be correct, I am unable to conclude that this application can succeed on the basis of procedural unfairness.

Whether McHari can be considered an accredited College for the purposes of registering and licensing Pharmacists under the provisions of Section 9(4) (a) of the Pharmacy Act?

29. In considering the issue of accreditation in **Phillippa Michelle Finlayson et al v The Bahamas Pharmacy Council SCCivApp & CAIS No. 104 of 2019**, the Court of Appeal considered the evidence in the court below, and stated as follows:

> **"[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 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 Education Act and Regulations or any other law).

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

[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" with the Ministry of Education in accordance with the EA and the Institutions of Further Education (Registration) Regulations."

21. Unquestionably, the trial judge had before her expert evidence from officials charged with regulating, the recognition of, registration and accrediting of educational institutions in The Bahamas. Their evidence related to the distinction and use of the words "accredited" and "approved or recognized" in the context of evaluating educational institutions operating in The Bahamas. On the other hand, the appellants' argument here and in the court below, conflates the meaning of "accreditation" with that of "registration" under the Education Act.

22. In our view, the trial judge was entitled to find that McHari was not accredited for two reasons. First, Parliament could not have intended "accredited" to have the same meaning as "registration" as it would have chosen to use that language in the PA. Second, although the PA does not define "accreditation", the intent of Parliament must have been to use the definition in the NAECOB Act, that Act having been passed two years earlier and is in pari materia with the PA.

The learned authors of Bennion on Statutory Interpretation Section 18.9 make the point that:

"Application of definitions to other Acts

(1) Where a term is used without definition in one Act but is defined in another Act which is in pari materia with the first Act, the

definition may be treated as applicable to the use of the term in the first Act.

(2) ...

Comment

An Act often defines a term for the purposes of that Act only. Where the same term is used in another Act that is in pari materia and no definition is included, reliance may be placed on the definition in the first Act. Whether it is appropriate to do so will ultimately depend on the context having regard to other interpretative criteria."

23. Furthermore, there is nothing in the interpretation of "accredited" given by the trial judge that is "unworkable" or "impracticable" with the PA as stated in R (on the application of Edison First Power Ltd) or S J Grange Ltd .

24. Consequently, we are unable to agree with the contention of the appellants that the trial judge was mistaken in her interpretation as to whether McHari is an accredited university under the PA. For these reasons, we do not disturb the judge's finding that McHari was not accredited but simply "registered" with the Ministry of Education under the Education Act..."

30. What is clear from that decision is that McHari has been held not to be an accredited institution for the purposes of licensing under the Pharmacy Act. I note also that the Appellants had relied heavily on the evidence of Dr. Leon Higgs with respect to registration. That same material has been deployed before this court, along with other material, but none of that material or indeed the arguments of counsel are sufficient to satisfy me that I am able to depart from the decision of the Court of Appeal in a matter involving the same law and virtually indistinguishable facts. I therefore accept that McHari is not an accredited institution for the purposes of the licensing of Pharmacists.

Whether the Respondent has the authority to revisit its previous decision?

31. Again, this point was considered by the learned Charles J in **Phillippa Finlayson v The Bahamas Pharmacy Council 2017/PUB/jrv/00006**, stated that:

"[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. 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." [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 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."

32. The issue was also considered in the Court of Appeal in **Phillipa Finlayson et al v The Bahamas Pharmacy Council SCCivApp & CAIS No. 104 of 2019** where the court said as follows:

> **"33. However, the appellants cannot invoke legitimate expectation as the respondent is a statutory council performing a statutory duty. This is supported by Lord Woolf MR in R v North and East Devon Health Authority, ex parte Coughlan [2000] 3 All ER 850 at paragraph 64 where he makes the point that a decision-making body's ability to change its policy should not be fettered: "64. ...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..."**
>
> **34. Further, the appellants argue that where licenses are issued to them, contrary to the provisions of the PA, this amounts to an implied representation that the licensure would continue. Taken to its logical conclusion the suggestion is that a public authority is fettered by the unlawful acts of a previous authority differently constituted. We disagree, as this would be farcical and lead to grave injustice."**

33. It is clear that this issue has been considered and rejected by the Supreme Court and the Court of Appeal. It is therefore beyond doubt that the BPC had the authority to revisit and vary the earlier decision to issue a license to the Applicant.

Whether the Applicant has a legitimate expectation that his registration would not be revoked subject to him complying with the provisions of the Pharmacy Act?

34. Again, the issue of legitimate expectation was considered by the learned Charles J., who held at paragraph 177 that there was no evidence of any promise sufficient to ground a legitimate expectation, and at para 178 that even if there were, the Council would still be entitled to change its policy.

35. The learned Justice went on to consider the issue of whether a legitimate expectation could be displaced by considerations of public policy, and wrote, commencing at paragraph 182, that:

> 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."

36. In the instant case, the applicant has likewise based his claim to a legitimate expectation on evidence that he was licensed, and that he expended resources in reliance on that license. Similar claims were made in ***Finlayson***, and rejected by Charles J.

37. The issue of legitimate expectation was also considered by the Court of Appeal in ***Finlayson***, where the court stated as follows:

"33. However, the appellants cannot invoke legitimate expectation as the respondent is a statutory council performing a statutory duty. This is supported by Lord Woolf MR in R v North and East Devon Health Authority, ex parte Coughlan [2000] 3 All ER 850 at paragraph 64 where he makes the point that a decision-making body's ability to change its policy should not be fettered: "64. ...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..."

34. Further, the appellants argue that where licenses are issued to them, contrary to the provisions of the PA, this amounts to an implied representation that the licensure would continue. Taken to its logical conclusion the suggestion is that a public authority is fettered by the unlawful acts of a previous authority differently constituted. We disagree, as this would be farcical and lead to grave injustice.

35. In our judgment, a legitimate expectation cannot arise where the appellants had no right in the first instance to be registered under the PA and where the registration was not lawful."

38. In light of the decisions of the Supreme Court, and more importantly the Court of Appeal, and the statements of law contained therein, and given that the facts are essentially the same, I am unable to find that the Applicant is entitled to rely on a legitimate expectation that his license would be renewed. This contention is therefore rejected.

CONCLUSION

39. Counsel for the Applicant, in the face of the ***Finlayson*** decision, sought to argue that his client had been "grandfathered" in, stating that the Applicant had been licensed in 2013 at a time when the Ministry of Education was the only institution in the Bahamas determining accreditation. He further submitted that the ***Finlayson*** decision concerned persons who had been licensed after the current Applicant. With respect, these submissions are misconceived. The facts outlined in the Court of Appeal decision at paragraph 2 indicates that the "the critical finding made by the Judge on the hearing of the applications was that the Pharmacy Council was in contravention of the Pharmacy Act 2006 in granting the Appellants licenses in 2010." This was also at a time when the Ministry of Education dealt with determining accreditation. There is therefore no material difference between this Applicant and the Appellants in ***Finlayson***, and the reliance on approval by the Ministry of Education does not assist, as this point was specifically addressed in ***Finlayson***. The end result is still that McHari is not an accredited institution for the purposes of the licensing of pharmacists in The Bahamas.

40. In all the circumstances of this case, it is my view that the issues raised by the Applicant have been substantively addressed by the Court of Appeal in ***Finlayson***, and were found to be without merit. The application is therefore dismissed, with costs to the Respondents

to be taxed if not agreed.

DATED this 24th day of January, A.D., 2023

Neil Brathwaite
Justice