

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2020/0034

**IN THE MATTER OF AN APPEAL UNDER SECTION 71 OF THE MEDICAL ACT, 2000 (AS AMENDED)
AND UNDER EC CPR PART 60**

BETWEEN

TOMMASO BARUCCA

Appellant

AND

ALLIED HEALTH PROFESSIONALS COUNCIL

Defendant

Appearances: Mr. Romane Duncan and Mr. Richard Parchment of Harneys, Counsel for the Claimant
Mr. Michael Adkins and Ms. Daisy Bovingdon of Collas Crill, Counsel for the Defendant

2020: October 29th
2021: December 6th

JUDGMENT

[1] **ELLIS J:** Before the Court is a statutory appeal filed pursuant to section 71 of the Medical Act 2000 (as amended) (“the Act”). The Appellant seeks to appeal the decision of Allied Health Professionals Council (“the Council”) to refuse his application for registration as a chiropractor (“the Decision”). The relevant factual background which informed this appeal is largely not disputed and is summarised below:

- i. In or around June 2019 the Appellant submitted an application to the Allied Health Professionals Council for registration to practice as a chiropractor in the British Virgin Islands.
- ii. On 18th July 2019, the secretary to the Council communicated to the Appellant that the Council had received his application for registration but that he did not meet the criteria

for registration as a chiropractor because he did not hold a doctor of chiropractic degree. According to Counsel for the Council, this was not the corporate decision taken by the Council (who only met to consider the Application on 23rd October 2019) but rather a preliminary indication.

- iii. On 23rd October 2019, the Council deliberated on the Application and determined that it would refuse the Appellant's application for registration on the basis that it was not satisfied that he was eligible by reasons of his qualifications and experience to be registered as a chiropractor. The reasoning of the members of the Council was recorded in a document known as a "sign off" sheet dated 23rd October 2019.
- iv. By emailed message dated 12th November 2019, the Council's Registrar was informed of a request to review its Decision to refuse the Appellant's application. The author informed the Registrar that:
 - a. The Msc in Chiropractic is a full 5 year course compared to the shorter Masters in Chiropractic;
 - b. In the UK the Masters in Chiropractic entitles the holder to use the title of Doctor of Chiropractic;
 - c. The title of Doctor of Chiropractic is a professional designation and not a true doctorate and that the tradition of the world outside the USA is to issue academic qualifications such as Bsc Chir, Msc Chir after equivalent courses of study and that these qualifications are recognized for registration to practice. One such body is the European Council of Chiropractic Education.
- v. On 28th November 2019, the Council finally indicated its Decision to the Appellant by way of email. By this email the Council adopted the emailed decision of 18th July 2019 and stated as follows:
 - 1. "Please note the information that was sent to you in reference to your request for registration below. This email indicated to you that you do not meet the requirements for registration as the Council does not register applicants with Msc in Chiropractic. Hence this email serves as the formal correspondence as to your denial and reason for denial. Please see the email below in red that was pasted for your convenience. [the 18th July 2019 email was pasted below]
 - 2. Please note in response to considering by law, it is not a requirement to be a DC in order to work in the BVI that the qualifications for registration for any Allied Health Practitioners are not listed in the Law but in our **Requirements for Registration for Alternatives Practitioners**.
 - 3.
 - 4."

- vi. The Council has represented that it was guided in its decision making by a formal policy/recommendation of the BVI Medical and Dental Council and which was adopted by the Council on 16th February 2016.
- vii. By way of Fixed Date Claim Form dated 12th February 2020, the Appellant lodged an appeal in the High Court, under the Act and EC CPR Part 60, against the Decision of the Council (“the Appeal”). He seeks the following relief:
 - (a) That the Decision be set aside;
 - (b) An order directing the Council to approve the registration of the Appellant as a chiropractor;
 - (c) Costs.
- viii. On 17th April 2020 the Council filed and served an affidavit by way of defence to the Appeal. In response, the Council raised two preliminary points, namely:
 - (i) that there is no statutory appeal pursuant to section 71 (1) of the Act from the Decision as; (a) the registration of the Appellant was conditional upon the Appellant satisfying the Council that he is qualified to be registered; and (b) Section 71 (4) excluded such decisions from the ambit of the statutory appeal mechanism provided by section 71 (1) of the Act (Preliminary Issue 1); and
 - (ii) that the Appellant is out of time to bring the Appeal as; (a) Rule 60.5 of the EC CPR provides that an action pursuant to rule 60 must be brought within one month of the decision being appeal; (b) the Decision was made on 23rd October 2019 and communicated on 28th November 2019; and (c) the Appeal was brought on 12th February 2020, some 2 – 3 months after the Decision was issued (Preliminary Issue 2), (together, the Preliminary Issues).
- ix. On 19th May 2020, after hearing oral submissions from the Parties, the Court gave an oral judgment dismissing the Council's Preliminary Issues.

[2] The Appellant has advanced 4 main grounds of appeal:

Ground 1 – that the Council erred and/or misdirected itself in law in finding that the Appellant does not meet the requirements under the Act for registration as a chiropractor when he plainly satisfies the required criteria.

Ground 2 – that the Council erred and/or misdirected itself in law in finding that a doctor of chiropractic degree is required in order to be registered under the Act as a chiropractor when such a requirement cannot be construed from the Act.

Ground 3 – that the findings of the Council that the Appellant does not meet the requirements for registration under the Act and that a doctor of chiropractic degree is required to be registered as a chiropractor are irrational and unreasonable.

Ground 4 – that the Council acted ultra vires in refusing to give effect to the legitimate expectation of the Claimant being registered under the Act in circumstances where the Council has in the past approved registration of chiropractors with qualifications other than a doctor of chiropractic degree.

THE PARTIES' SUBMISSIONS

- [3] Because of its sweeping application, the Court has first considered Ground 3 of the Appeal. Under this Ground, Counsel submitted that although this claim is a statutory appeal, the Court is not proscribed by matters of legal interpretation but may engage the full range of issues which would otherwise be the subject of an application to the High Court for judicial review. In support of this contention, Counsel for the Appellant relied on the following dictum of Bean LJ in **Nipa Begum v Tower Hamlets London Borough Council**¹:

“In my view, the law is correctly stated in the commentary to section 204 in the Encyclopaedia of Housing, Vol. 1, paragraphs 1-1799/860 and in the note on the section at page 1577 of the current edition of the Green Book. **It is that “a point of law” includes, not only matters of legal interpretation but also the full range of issues which would otherwise be the subject of an application to the High Court for judicial review, such as procedural error and questions of vires, to which I add, also of irrationality and (in) adequacy of reasons.** This broad construction of the provision is supported, as the editors of the Encyclopaedia observe, at Vol. 1, paragraphs 1-1799/860 and 1-1799/869, by the somewhat wider or more immediate power to vary given to the County Court by section 204 (3) than the High Court normally exercises in its judicial review jurisdiction.” Emphasis mine

- [4] This reasoning was approved by the House of Lords in **Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)**² where Lord Bingham of Cornhill stated:

“although the county court's jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review ...thus the court may not only quash the Authority's decision under s. 204 (3) if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact...”

¹ [2000] 1 WLR 306

² [2003] UKHL 5

- [5] On the strength of these authorities, Counsel for the Appellant submitted that the Appellant is at liberty to challenge the Council's Decision on what would typically be considered to be judicial review grounds.
- [6] Counsel for the Appellant elected to deal with grounds 1 and 2 together. He submitted that section 41 of the Act confers a discretion on the Defendant to approve the registration of individuals who are seeking to practice as allied health practitioners in the British Virgin Islands. This interpretation is clear on the wording of the Act as subsection 41 (3) states that the Council must be '*satisfied*' that the applicant has the requisite qualifications. However, in keeping with the authorities above and on the very wording of the provision, the discretion afforded to the Defendant is not absolute and must be exercised in a proper way. The limits to this discretion are apparent on the ordinary meaning of the provisions of the Act which state that the Defendant 'shall direct that the applicant be registered if it is satisfied that the applicant has the requisite qualifications set out in Part II of Schedule 4 in respect of his application.'
- [7] According to Counsel for the Appellant, the meaning of the Act is clear. It does not intend for the Council to put a gloss on the requisite qualifications. The Act intends that the Council look to and rely on Part II Schedule 4 of the Act to ascertain whether an applicant possesses the qualifications contained therein. Part II of Schedule 4 (b) (i) of the Act prescribes the persons that are entitled to be registered as Allied Health Professionals. Such a person is one who shows to the satisfaction of the Council that he is of good character and otherwise fulfils the conditions prescribed by the Act and who holds a degree, diploma or license from any university, college or other institution, which is authorised to offer training in that particular discipline. Counsel emphasised that the Council cannot substitute the qualifications contained in Part II of Schedule 4 of the Act with its own qualifications.
- [8] Counsel further submitted that it is clear from the ordinary meaning of Part II of Schedule 4 of the Act that an individual who has been awarded a degree, diploma or license in chiropractic from an accredited institution would have the requisite qualifications referred to in section 41 (3) of the Act to be registered as a chiropractor. Further, Part II of Schedule 4 (b) (ii) of the Act prescribes that a person who holds a certificate from the membership of a recognised society of health, possesses the requisite knowledge and skill for the efficient practice as an allied health practitioner. This means

that where a person does not hold the qualifications in Part II of Schedule 4 (b) (i) but holds membership from a recognised health society, then that person also meets the requisite qualifications referred to in section 41 (3) of the Act. An individual who holds no degree in chiropractic but holds membership from a relevant health society also possesses the 'requisite qualifications'. These are very clear limits on the discretion afforded to the Defendant when deciding whether an applicant should be registered as an allied health practitioner in the British Virgin Islands.

[9] Applying this interpretation, the discretion of the Council to decide whether an applicant has the requisite qualification is limited by Part II Schedule 4 of the Act. The grammatical meaning of the words used in the Act is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural meaning. Counsel submitted that the Court should give effect to the clear grammatical meaning as disclosing the intention of Parliament in using them.³

[10] Counsel submitted that the Appellant possesses the requisite qualification under 41 (3) pursuant to Part II of Schedule 4 (b) (i):

- i. The Appellant holds a Bachelor of Science in Chiropractic from AECC;
- ii. The Appellant holds a Post Graduate Diploma in Chiropractic from AECC;
- iii. The Appellant holds a Master of Science with Merit in Chiropractic from AECC;
And
- iv. AECC is an accredited institution, i.e. it authorised to offer training in Chiropractic.

In the alternative, the Appellant possesses the requisite qualification under 41 (3) of the Act pursuant to Part II Schedule 4 (b) (ii) as he holds a certificate of registration Minister of Health and Community Services in the State of Jersey.

[11] Counsel therefore concluded that the preliminary indication sent to the Appellant via email on 18th July 2019 that he did not meet the requirements for registration because the Council does not register

³ BVIHCV 2017/0175 - Financial Service Commission v Harneys Insurance Management Service

applicants with MSc. in Chiropractor is an error in law. The follow up explanation sent to the Appellant via email on 19th July 2019 that in the BVI the qualification for someone to be registered as a Chiropractor is a Doctor of Chiropractic is not supported by Part II of Schedule 4 of the Act and is therefore a perpetuation of the error. The Decision communicated to the Appellant on 28th November 2019 made formal and referred to the preliminary indication that the Appellant did not meet the requisite qualification as he does not hold a Doctor of Chiropractic. The basis of the Decision is corroborated by the Sign off Sheet that the Appellant:

- i. did not possess the requisite qualification which is a Doctor of Chiropractic; and
- ii. did not obtain his MSc in Chiropractic from an accredited university.

[12] It follows that the Decision is an error of law as the discretion afforded to the Council does not allow the Council to ignore the requisite qualifications stipulated by the Act and possessed by the Appellant and instead arbitrarily require that the requisite qualification be a Doctor of Chiropractic. Further, in arriving at the Decision, the Council exercised its discretion contrary to the intention of the Act. The Council did not understand that Part II of Schedule 4 was a limit on its discretion in deciding whether an applicant has the requisite qualification. The Council therefore did not give effect to Part II Schedule 4 of the Act and in those circumstances; the Decision has to be reviewed.⁴ Separately, the Appellant has put in evidence that his MSc in Chiropractic is from an accredited institution and the Defendant has not placed any evidence to the contrary before the Court:

Counsel also submitted that this misdirection as to the parameters of the discretion afforded to the Council renders the Decision ultra vires the Act and a nullity as held by Lord Irvine LC in **Boddington v British Transport Police**.⁵ In addition, the reliance by the Council on an internal policy that cannot amend the Act, to justify its departure from the qualifications stipulated by the Act is contrary to good sense. The policy is a clear departure from the objects of the Act and thus objectionable.⁶

[13] The Appellant put evidence before the Court that while it is the tradition in some parts of the world to issue a Doctor of Chiropractic (North America) that other parts of the world (Europe) issue Bachelor of Chiropractic and Master of Chiropractic etc. The Councils on Chiropractic Education International has stated that the qualifications, due to the comparable curricula, are validated as equivalent even

⁴ Council of Civil Service Unions v Minister for the Civil Service

⁵ [1999] 2 AC 143, [1998] 2 ALL ER 203, [1998] 2 WLR 639

⁶ Roncarelli v Duplessis [1959] S.C.R. 121

though they are differently titled. This evidence has not been contradicted by the Defendant and therefore the Court is invited to consider this evidence incontrovertible.

[14] Counsel referred the Court to the dictum in **Roncarelli v Duplessis**⁷ in which the Supreme Court of Canada asked the rhetorical question “*Could an applicant be refused a permit because he had been born in another Province or because of the colour of his hair?*” Counsel suggested that this Court must similarly ask itself “*Can this Appellant be refused registration as an allied health practitioner because he completed his chiropractic studies in Europe and not in North America?*” He submitted that the Appellant should not have been denied registration on that basis.

[15] Having submitted on the authority of **Nipa Begum v Tower Hamlets Landon Borough Council** that the Court may in the context of this statutory appeal, engage the full range of issues which would otherwise be the subject of a judicial review application, Counsel for the Appellant submitted that the Council’s determination that the Appellant does not meet the requirements for registration under the Act and that a Doctor of chiropractic degree is required to be registered as a chiropractor are irrational and unreasonable. He referred to the judgment in **Attorney General v Kenny D. Anthony**⁸ in which the Eastern Caribbean Court of Appeal, cited Lord Diplock in **Council of Civil Service Unions v Minister of the Civil Service**, which outlined the test of irrationality or unreasonableness:

“By ‘irrationality’ I mean what can now be succinctly referred to as ‘Wednesbury Unreasonable’ ... It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer ...”

[16] Counsel submitted that the Council’s decision is one which is so outrageous in its defiance of logic that no sensible person who applied his or her mind to the question could have arrived at it. In support of this contention, Counsel for the Appellant explained that the Council’s stated reason for denying the Claimant’s application is that (i) the Claimant does not meet the requirements for registration, in that he does not possess a Doctor of Chiropractic degree; and (ii) the Council does not register applicants with a master of chiropractic. However, Schedule 4, Part II of the Act is clear as to the requirement for registration under the Act as an allied health practitioner. There is no

⁷ [1959] S.C.R. 121; 16 DLR (2d) 689 at 705

⁸ HCVAP2009/0031, 14th June 2010, unreported at para. [58]

warrant in the legislation to support the Council's contention that the sole requirement for registration as a chiropractor is a Doctor of Chiropractic degree. This much is conceded by the Council, who relies not on the provision of the Act to support this contention but the Requirements for Registration for Alternative Practitioners policy ("the Policy").

- [17] Counsel noted that section 78 (2) provides a mechanism for any amendment to Schedule 4. It requires that any amendment to the qualifications requirement be by Order published in the Gazette. There is no evidence before the Court which indicates that this was done and so it follows that the Policy is unlawful insofar as it purports to lay down or amend the requirements for qualification set out in Schedule 4.
- [18] The Policy, such as it is, cannot override or amend the Act. Moreover, Counsel submitted that the Policy and any decision taken pursuant to it are unlawful and unreasonable in that it imposes a condition for registration outside the governing statute.
- [19] While the Appellant conceded that a body on whom a power is conferred is not precluded from developing and applying a policy in the generality of cases, he submitted that where the policy precludes a body from taking into account circumstances which are relevant to the particular case both the policy and the decisions taken pursuant to it will be unlawful: **R v Secretary of State for the Home Department, ex p Venables**.⁹ The result is the same where the Policy circumscribes the relevant qualifications for registration.
- [20] According to Counsel for the Appellant, the relevant question is not whether the Claimant has a Doctor of Chiropractic Degree, but whether the Appellant meets the qualification requirements under the Act. As the Policy on which the Council relies is unlawful. There is therefore no rational basis for the Council's decision. For these reasons, he concluded that the Council's decision is irrational and unreasonable and should be set aside.

⁹ [1998] AC 407 at page 497, paras [A – B]

- [21] Finally with regard to Ground 4, the Appellant submitted that the Council acted *ultra vires* in refusing to give effect to the legitimate expectation of the Appellant being registered under the Act in circumstances where the Council has in the past approved the registration of chiropractor(s) with qualifications other than a Doctor of Chiropractic degree. A legitimate expectation may arise from a course of conduct or from a stated policy or undertaking whether written or otherwise. **See: La Baia Limited v the Attorney General Anquilla**¹⁰ and it includes a substantive benefit derived from a representation implied from regular and established practice, based upon past actions of a public body. See: **Simmonds LJ Leacock v Attorney-General**.¹¹
- [22] Counsel for the Appellant contended that it is well known that the Council, as far back as 2013, recognised degrees other than a Doctor of Chiropractic as being sufficient to meet the requisite requirements for registration. The Appellant makes no complaint about this as it is indeed consistent with the Act. He pointed out that there is no evidence before the Court justifying the circumstances under which such registration was made, or explaining the change in policy. Nor is there an explanation as to why a different standard applies to the Appellant.
- [23] Counsel noted that the Gazette stands as notice to the world that the Defendant registers applicants other than those that hold a Doctor of Chiropractic degree. He submitted that this is evidence of a course of conduct of the Council that the Appellant was entitled to rely on. The qualification referred to is an 'MTech in Chiropractic', this is a consistent equivalent qualification to the Doctor of Chiropractic degree and to the Appellant's MSc. in Chiropractic. Counsel argued that the Court should not allow the Council to now resile from its past and perfectly lawful practice and refuse the Appellant registration. For these reasons, Counsel submitted that the actions of the Council are therefore *ultra vires* and the Court should give effect to the legitimate expectation of the Appellant to be registered as a chiropractor in the circumstances.

¹⁰ Claim No. AXAHCv2012/0067, 4th October 2013, para [3]

¹¹ (2005) 68 WLR 181

[24] Counsel for the Appellant therefore invited the Court to set aside the Decision to ensure that the powers of the Council are exercised lawfully (**R v Hull University Visitor ex. p Page**). In doing so, he argued that the Court should allow the appeal and direct the Defendant to approve the Claimant's registration.

[25] The Appeal was robustly opposed by the Council. Rather than responding directly to each ground of appeal raised, Counsel for the Council submitted that each complaint can be reduced to the same underlying issue: *Did the Council have any discretion to evaluate the merits of Mr. Barucca's application; or is their function simply a mechanical 'tick-box' exercise which would be satisfied if Mr. Barucca minimum generic education requirement specified by the Medical Act?*

[26] According to Counsel, this boils down to a narrow issue of statutory construction. He submitted that the Court is required to:

- (1) construe the Council's decision making power under section 41 (3) of the Medical Act (Skeleton Authorities Bundle Tab 1); and
- (2) determine whether or not the Council's decision fell within the discretion afforded by the statute.

[27] The Council submitted that it has an obvious discretion to assess an Appellant's eligibility to be registered as an allied health practitioner. The plain terms of the Act give the Council a broad discretion to do so. Such a construction is, most significantly, consistent with the purpose of the Act and the Council's role envisaged by it.

[28] Counsel submitted that this construction is also supported by all other applicable cannons of construction. In that regard, he submitted that the starting point is the text itself. He referred the Court to the judgment of the Eastern Caribbean Court of Appeal in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**¹² where at paragraph [24] Carrington JA (Ag) observed:

Parliament is expected to say what it means and mean what it says. The first recourse in determining the meaning of a statutory provision should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one

¹² (Unreported, 30th May 2018 BVIHCVAP201610013)

meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them.

- [29] Counsel submitted that in the case at bar the express words of the Act could not be clearer. A number of matters are apparent from the text. First, the Council must be satisfied and Counsel submitted that the term “*satisfied*”, is key. According to Counsel, this is a well-known formulation used in administrative statutes which creates the discretion in the decision maker. In **Din (Taj) and Another v Wandsworth London Borough Council**¹³ the English House of Lords at p.664 observed:

The words “are satisfied” must be noted: they leave the decision, on these issues of fact, to the local authority. On well-known principle, there is no appeal to a court against such a decision, but it may be subject to “judicial review” for error in law including no doubt absence of any material on which the decision could reasonably be reached.

- [30] Counsel submitted that the syntax used makes it clear that there are three separate matters of which the Council must be satisfied:

- (a) that an applicant has the minimum qualifications set out in the Schedule;
- (b) that the applicant is eligible; and
- (c) that the applicant is fit and proper.

Counsel further argued that the word “shall”, in this context is qualified by the earlier use of the word “satisfied”. In substance it is not mandatory, because the compulsory effect is subject to the Council being subjectively satisfied of the specified matters.

- [31] Counsel then reiterated that the Council clearly has a discretion pursuant to s. 41 (3). The Court must therefore determine the width of that discretion; specifically, the width of the discretion afforded to the Council provided by the second and third requirements. He argued that on a plain textual analysis, the terms “eligible” and “fit and proper” are not qualified in any way. In construing the width of a statutory discretion, the Court should have regard to the purpose of the legislation as a whole.

¹³ [1983] 1 AC 657 per Wilberforce LJ

He commended to the Court, the dictum of Bridge LJ in **Tower Hamlets London Borough Council v Chetnik Developments Ltd**¹⁴ in which he stated:

[Thus, before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion is conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be challenged if shown to have been exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be validly exercised for reasons relevant to the achievement of that purpose.]

[32] Counsel for the Council also submitted that in construing the relevant statutory provisions the Court should bear in mind the following relevant canons of construction:

1. The Court must also construe the relevant statute in the context of the act itself: see **TRC v Cable & Wireless** [25] (Skeleton Authorities Bundle/Tab 3).
2. The Court should endeavour to give meaning to words in a statute and avoid redundancy: Bennion on Statutory Interpretation 7th ed. 'section 21.2 (Skeleton Authorities Bundle/Tab 7): Presumption that every word has a meaning'; and
3. The overriding rule of construction, that where the literal meaning is clear and in accordance with the legislative purpose, it should be followed: see **Williams v Central Bank of Nigeria 2014 UKSC 10** (Skeleton Authorities Bundle/Tab 8).

[33] Applying the purposive rule of construction, Counsel submitted that although the Act itself does not expressly stipulate the purposes of that Act, nor the purposes of the Council, the purpose must be distilled from the Act itself. In that regard, Counsel submitted that the Act's overarching purpose is, broadly, the protection of public health. The Act is intended to ensure that there are appropriately qualified medical personnel to support the health and wellbeing of the citizens, residents and visitors of the British Virgin Islands. It does this by regulating the admission, and then the discipline and regulation, of those who are permitted to hold themselves out as specialist medical, dental and allied health practitioners in particular fields, as well as the sale of drugs.

¹⁴ 1988] 1 ALL ER 961 at p. 967

[34] In construing this purpose the Court was asked to note that the Council is not a 'lay' body, but is a committee of experts who are qualified in appropriate fields, consisting of the Director of Health Services; a medical practitioner; and four Allied Health Professionals: see: Sch. 5 Medical Act. Such qualifications are appropriately adapted to the Council's statutory functions, which include:

- (i) Considering applications for registration of Allied Health Practitioners: section 41 Medical Act (s. 41);
- (ii) Imposing terms and conditions on registration: (s. 41 (1));
- (iii) Disciplining Allied Health Practitioners (s. 50); and
- (iv) Making rules with the approval of the Minister including (but not limited to) those regarding examinations, services, professional conduct; complaints; disciplinary proceedings and the formation of special boards and committees for any allied health profession (s. 52).

[35] Counsel submitted that a consideration of the purpose of the Act and the role and function of the Council support a broader, rather than more narrow, construction of the Council's discretion. The legislature has created an expert body and invested it with functions and powers that must be exercised with the full breadth and depth of its members' expertise in order to fulfil the public purposes of the Act. The Council expressly enjoy wide elements of discretion within the Medical Act, including in sub-section 41 (3) itself, wherein it can impose on registration "*such terms and conditions as the Council may deem fit.*" To give a narrow construction to the Council's registration function, like the simple box-ticking role suggested by the Appellant would be to strip the Council of its ability to achieve the purposes for which it was created, and would hamper, not further, the purposes of the Act. Registration under the Act would become a veritable free for all, with any basic qualification entitling an applicant admission to practice, no matter how unsuitable they may be.

[36] Further, the narrow construction contended for by the Appellant would not make sense, with in the scheme of the Medical Act, for the Council to have such a limited role on registration, whilst permitting the Council to freely impose conditions, make disciplinary decisions and promote professional rules. It would also render the other criteria for registration in section 41 (3) otiose and would render the provision for discretion at all, as is clearly provided for in section 41 (3), substantially meaningless.

- [37] Counsel for the Council argued that the Council's decision was well within the scope of its discretion and properly directed to the purposes for which its registration power is given. It declined the Appellant's application because it was not satisfied that he was eligible to practice as a chiropractor in the Territory. According to the evidence of Mrs. Gracia Wheatley-Smith, the Council has formulated the Policy, following recommendations of the Medical and Dental Council, in order to guide the exercise of its discretion under the Act. The Policy, stipulates, amongst other things, that a person should hold the degree of Doctor of Chiropractic.
- [38] Whilst the Appellant might have met the generic minimum qualification, he did not hold the advanced degree that is preferred for chiropractors, as a matter of the Policy. The Sign-Off Sheet refers to the comparative position in Jamaica, which is a neighbouring jurisdiction to which the Council often defers, and explains that the advanced degree is a requirement there. It also explains that the Appellant's qualifications would not enable him to be registered to practice in the United Kingdom. The Council further determined that the Appellant had insufficient and insufficiently varied experience as a chiropractor. Bearing in mind that the BVI is a small community with little peer support for many professionals, he would be practising without the professional support of more experienced colleagues.
- [39] According to Counsel, this reasoning cannot be the subject of legitimate complaint. Quite plainly all of these factors are logically relevant to any assessment of whether or not a person is eligible to practice. Accordingly she concluded that the Decision was therefore well within the Council's discretion to make and was not irrational or unreasonable. Moreover, whether or not others practitioners with different experience and qualifications to the Appellant have been registered is irrelevant.

COURT'S ANALYSIS AND CONCLUSION

General Principle of Statutory Construction

- [40] The practical starting point of any discussion relative to the scope of statutory provisions must begin with the construction and interpretation of the particular legislative framework. In **R v Secretary of**

State for the Environment, Transportation and Regions ex parte Spath Holme Lord Nicholls explained the scope of that exercise in the following terms:

“Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used.”

- [41] In carrying out this exercise, this Court has had regard to the most recent dictum delivered in 2018 by the Eastern Caribbean Court of Appeal in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**. At paragraphs 22 – 25 of the judgment, Carrington JA (Ag) considered the appropriate approach to be adopted by a court:

“Parliament is expected to say what it means and mean what it says. The first recourse in determining the meaning of a statutory provision should be to the grammatical meaning of the words used and their context. If the grammatical meaning of the words used is clear and the context does not lead to the conclusion that the words used may have more than one meaning or a different meaning from the natural grammatical meaning, then effect should be given to the clear grammatical meaning as disclosing the intention of Parliament in using them. When considering the context of words in an enactment, one has to consider the enactment as a whole, and not only the section in which the words under consideration appear, as well as all facts relevant to the subject matter of the Act that are before the court, including any commentary supplied by the drafters of the Act. The ultimate aim of the court is to arrive at what **Bennion on Statutory Interpretation** refers to as an informed interpretation of the legislation under consideration. *Bennion on Statutory Interpretation* suggests that this is arrived at in two stages:

“What may be called first stage of interpretation arises when the enactment is first looked at. Here a provisional view may be formed, perhaps that the meaning is clear. Or it may appear at the first stage that the enactment is grammatically ambiguous or vitiated by semantic obscurity. In all three cases it is necessary to go on and apply the informed interpretation rule. Thereafter, at second stage interpretation, a final view on legal meaning is formed.”

Bennion’s “informed interpretation rule” is that the court should infer that the legislator, when settling the wording of legislation intended it to be given a fully informed, rather than a purely literal interpretation (though the two usually produce the same result).”

- [42] Turning to the case at bar, the Court is asked to consider the provisions of the Act. This Act is *inter alia* deals with the registration and regulation of health practitioners in the British Virgin Islands. The Act is divided into various parts and divisions. Part I deals with the establishment, functioning,

powers and duties of the Medical and Dental Council. It is clear that the Medical and Dental Council is *inter alia* tasked with the responsibility of assessing applications for the registration as medical practitioners and dental practitioners and registering those persons who satisfy the requirements for registration under the provisions of the Act.

- [43] On the other hand, Part II of the Act regulates the establishment and functioning of the Allied Health Professionals Council. That Council also has the responsibility of assessing applications for registration. However, Part II of the Act must be read together with Schedule 4 - Part I which prescribes the list of allied health professionals approved to practice in the British Virgin Islands and Schedule 4 - Part II which prescribes the qualification requirements for registration as an allied health practitioner. Under section 41 (1) of the Act, the Council is empowered to register an applicant to practice as a chiropractor in the BVI if it deems that the applicant has the requisite qualifications and is a fit and proper person. Section 41 of the Act insofar as relevant provides:

“(1) Where any person desires to be registered as an allied health practitioner under this Act, he shall make application to the Registrar in such form as may be approved by the Council and shall submit such evidence as may be required to establish that he is eligible to be registered and is a fit and proper person to be so registered.

(2) The evidence submitted under subsection (1) shall include a declaration on oath in proof of the applicant's identity and good character, and of the authenticity of any diploma or certificate submitted in support of the application.

(3) The Registrar shall refer the application to the Council and the Council, if satisfied that the applicant has the requisite qualifications set out in Part II of Schedule 4 in respect of his application, and is eligible and is a fit and proper person to be so registered, shall direct the Registrar to register him upon payment of the fee set out in Schedule 7 and subject to such terms and conditions as the Council may deem fit.

(4) ...”

- [44] Section 71 in so far as relevant states:

(1) Subject to subsection (4), any person who is aggrieved by the refusal of ... the Allied Health Professionals Council to approve his registration under this Act ... may, within three months of the receipt by him of a notice of such decision or action by the Registrar, appeal against such decision or action to the High Court, and the appeal shall be to a judge in chambers.

(2) ...

(3) The judge may,

(a) on hearing an appeal against refusal to approve registration, dismiss the appeal, or allow the appeal and direct the appropriate Council to approve the registration;

(4) ...

[45] It appears to be common ground between the parties that when construing the legislative provisions, regard must be given to the purpose of the legislation. There is clear support for this approach in section 42 (1) of the **Interpretation Act**¹⁵ which provides that:

“in the interpretation of a provision of an enactment, an interpretation that would promote the purpose or object underlying the enactment (whether that purpose of [sic.] is expressly stated in the enactment or not) shall be preferred to an interpretation that would not promote that purpose or object.”

[46] In the case at bar, the Act provides for the establishment of the relevant regulatory agencies with functions including to register suitably qualified and competent persons in the health profession and, if necessary, to impose conditions on the registration of persons in the profession. One of the clear objects of the Act is to establish a registration scheme for the registration and regulation of health practitioners in the Territory. The aim of that scheme is to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practice in a competent and ethical manner are registered, and to facilitate the provision of high quality education and training of health practitioners. Ultimately, the health and safety of the public are paramount.

[47] Parliament has prescribed that the Council, made up of suitably qualified professionals, is to be charged with the responsibility of maintaining appropriate standards of competence in the profession. This involves a particular exercise of judgment, both professional and academic. The Council has a duty to apply and where necessary set appropriate criteria which, in its judgment, ensured that a candidate evidenced appropriate skills and attributes before registration.

[48] Given that context, however, an obvious guiding principle of the scheme is that it must operate in a transparent, accountable, efficient, effective and fair way. Entities such as the Council with functions under the law are to exercise those functions having regard to the objectives and guiding principles

¹⁵ Cap. 136 Revised Laws of the Virgin Islands, 1991 (Skeleton Authorities Bundle/Tab 6)

of the relevant legislative scheme. The Court is also satisfied that to the extent that legislative scheme affords a discretion to a public body or decision maker, the common theme in judicial reasoning is that the decision maker must act within the confines of the statutory power conferred.

- [49] In **Roncarelli v Duplessis**¹⁶ the Canadian Courts summarised the discretion afforded to public bodies:

“Discretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud and corruption. Could an applicant be refused a permit because he had been born in another Province or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.”

- [50] In **Padfield v Minister of Agriculture, Fisheries and Food**¹⁷, Lord Reid expressly rejected the proposition that discretion must be ‘*all or nothing*’ as unreasonable and held that:

“Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be construing the Act as a whole and construction is always a matter of law for the court.... if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion so as to thwart or run counter to the policy and objects of the Act. then our law would be very defective if persons aggrieved were not entitled to the protection of the court.”

What is the legal basis for registration as an allied health practitioner?

- [51] A useful interpretive principle prescribes that whenever the question arises as to the meaning of a certain provision in a statute, it is proper and legitimate to read that provision in its context. The authorities on the interpretation of statutes generally agree that a statute is to be read as a whole and that every clause is to be construed with reference to the other clauses of the act and its context, to the greatest extent possible.¹⁸ In **Attorney General v Prince Ernest Augustus of Hanover**¹⁹ Viscount Simonds put the position in the following terms:

“A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in

¹⁶ (1959) 16 DLR (2d) 689 at [705]

¹⁷ [1968] AC 997

¹⁸ Maxwell on Interpretation of Statutes and Driedger on Construction of Statutes

¹⁹ (1957) AC 436, at page 461, 473 and see Maunsell v Olins (1975) AC 373, at page 386

a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. **When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on.....Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context - meaning by this as well the title and preamble as the purview or enacting part of the statute.”** emphasis mine

- [52] The relevant statutory provisions cannot be read in isolation: their colour and content are derived from their context. The words of any statutory provision must therefore be read in the context provided by the statute as a whole. The Court is obliged to examine every word of a statute in its context. Such context will include not only other enacting provisions of the same statute, the existing state of the law, and the mischief which a court can, by those and other legitimate means, discern the statute was intended to remedy. In as much as there may be inaccuracy and inconsistency a court must, if possible ascertain what is the meaning of the instrument taken as a whole in order to give effect to the intention of the legislator.
- [53] This Court is therefore obliged to consider the provisions which regulate or prescribe the persons entitled to be registered as allied health practitioners in the context provided by the Act as a whole. Additionally, in considering the legal basis for registration, a court must also take into account the salient features of the profession in question; the composition and aims of the regulatory body and the specific legal, procedural and policy framework under which it operates.
- [54] Under Part I of the Act, the Medical and Dental Council is tasked with considering applications for registration and satisfying itself that the applicant is eligible and is a fit and proper person to be registered. Section 23 and Section 31 of the Act regulates or prescribe the base academic or professional qualifications required for registration as a medical and dental practitioner respectively. These sections provide that a person who satisfies the Medical and Dental Council that he holds a medical or surgical degree, diploma or qualification from any university, college, or incorporated society **recognised by the Council**. In the case medical practitioners, section 23 of the Act goes on to state that:

“(2) The medical or surgical degree, diploma or qualification referred to in subsection (1)
(b) must be shown to be one that

- (a) was obtained by examination after attending a prescribed medical course; and
- (b) is registrable in the country in which it was obtained.”

[55] In the case of the Allied Health Professionals Council, the Act presents clear points of distinction which in the Court’s view are critical. Section 41 of the Act provides that an applicant seeking registration should submit an application for registration together with *such evidence as may be required to establish that he is eligible to be registered and is a fit and proper person to be registered*. That evidence must *include a declaration on oath in proof of the applicant’s identity and good character and the authenticity of any diploma or certificate* submitted in support of the application. Once the registrar is in receipt of these documents he/she must refer the application to the *Council which must satisfy itself that the applicant has the requisite qualifications set out in Part II of the Schedule 4 in respect of the application and is eligible and is a fit and proper person to be so registered*.

[56] Part II of the Schedule 4 of the Act expressly prescribes the qualification requirements for registration as an allied health practitioner. In the Court’s judgment, this presents an important statutory context. It provides that:

“The following persons are entitled to be registered as Allied Health Practitioners under this Act:

- (a) a person who, having undergone a prescribed course of study in any profession specified in Part I of this Schedule, is in actual practice in the Virgin Islands at the commencement of this Act;
- (b) a person **who shows to the satisfaction of the Council that he is of good character and otherwise fulfills the conditions prescribed by this Act, and who**
 - (i) **holds a degree, diploma or licence from any university, college or other institution, which is authorized to offer training in that particular discipline of Allied Health Professionals; or**
 - (ii) **holds a certificate from the membership of a recognized society of health, as furnishing sufficient guarantee that the holder possesses the requisite knowledge and skill for the efficient practice as an allied health practitioner. Emphasis mine.**

[57] In the Court's judgment, the combined reading of section 41 and the Part II of Schedule 4 sets out the remit for the Council's exercise of discretion as to the qualification requirements for registration. In the case of both Councils, the Act does not specifically prescribe the actual medical or surgical degree, diploma or qualification which would entitle registration. Neither does it specifically identify the issuing university, college or incorporated society. However, in the case of the Medical and Dental Council the university, college or incorporated society must be recognized by the Council²⁰ while in the case of the Allied Health Professionals Council, all that is required is that the applicant holds a degree, diploma or licence from any university, college or other institution, which is authorized to offer training in that particular discipline.

[58] It is clear to the Court that the Legislature has applied an obvious point of distinction which is critical and which cannot be ignored. The Court must contend with the plain and obvious meaning of the wording of Part II of Schedule 4 of the Act and in doing so has considered the judgment in **Pinner v Everett**,²¹ where Lord Reid expressed the plain meaning rule as follows:

“In determining the meaning of any word or phrase in a statute, the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot be reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase.”

[59] Applying the approach to statutory interpretation applied in **Telecommunications Regulatory Commission v Cable & Wireless (BVI) Limited**, the Court is satisfied that the BVI Legislature said exactly what it means and means exactly what it said in this legislation. The grammatical meaning of the words are clear and the particular context does not lead to the conclusion that the words used have more than one meaning, or a different meaning from the natural grammatical meaning. In the context of the clear and unambiguous criteria, the Council should be reluctant to import words or phrases which contradict the ordinary and clear meaning of the statutory provisions.²² The relevant legislative provisions do not present any grammatical ambiguity or semantic obscurity and as the meaning of the words are clear and no ambiguity arises then under the rule of statutory construction, the statutory intention must be found in these words.

²⁰ Section 23 (1) (b) and Section 31 (b)

²¹ [1969] 1 WLR 1266 at 1273

²² *Gwynne v Burnell* (1840) 6 Bing NC 453; in the *Corporation of The County of Vercheres v The Corporation of The Village of Varennes* (1891) 19 Scr 365

[60] It has been suggested that the provisions are overly permissive because the Council has no way of verifying that such degree, diploma or qualification furnishes a sufficient guarantee of the possession of the requisite knowledge and skill for the efficient practice which may lead to the registration of wholly unsuitably qualified or trained individuals. However, there is a further point of distinction because unlike the case of the Medical and Dental Council, the Legislature has prescribed a procedure which the Allied Health Practitioners Council may follow itself where it is of the opinion that any qualification is not evidence of satisfactory medical training.

[61] Section 42 of the Act clearly provides for the circumstances where the Council is not satisfied that the qualifications advanced by an applicant for registration. Section 42 provides:

- (1) Where, in respect of any application for registration as an Allied Health Practitioner,
 - (a) the Council is satisfied as to the matters specified in subsection (1) of section 41, but is of the opinion that any qualification mentioned therein which the applicant holds is not evidence of satisfactory medical training, or
 - (b) a question has arisen with respect to the evidence presented by the Applicant as to his training, the Council may require that the applicant submit to examination in such subjects as it considers necessary to establish that he possesses satisfactory medical training.
- (2) For the purposes of any examination pursuant to subsection (1), the Council shall appoint a Board of Examiners (hereafter in this section referred to as "the Board") consisting of three Allied Health Practitioners to set and conduct the examination in such subjects as the Council directs.
- (3) The Council shall enter into special arrangements with the University of the West Indies or any regional medical body appointing the University or that body as the Board for the purposes of subsection (2), on such terms and conditions as may be agreed between the Council and the University or that body.
- (4) The Board shall fix a time and place for holding the examination and the Secretary shall notify the applicant of that time and place.
- (5) The applicant shall pay to the Secretary such fee, subject to the approval of the Minister, as may be determined by the Council.
- (6) The Board shall, as soon as practicable after the examination, report the results of the examination to the Council.

- (7) Where, as a result of the examination, the Board finds that the applicant is sufficiently informed and skilled in the subjects in which he was examined, he shall be deemed, on the receipt of the report of such findings by the Council, to have satisfied the Council that he is qualified to be registered as an allied health practitioner for the purposes of subsection (1) of section 41.
- (8) Where the Board reports to the Council that the applicant has been unsuccessful in the examination, he shall not, unless the Board so recommends, be permitted to present himself for further examination until the expiration of six months from the date of the examination in which he was unsuccessful.
- (9) An applicant who is unsuccessful in an examination under this section shall, before being permitted to sit for further examination, comply with such conditions as the Council directs, including the payment to the Secretary of such further fee as, subject to the approval of the Minister, may be determined by the Council.”

[62] Having regard to this fulsome context, the Court is not satisfied that the Council has demonstrated that applying the ordinary and clear meaning of the legislative provisions would stultify or defeat the purpose or intention of the Legislature or produce an absurdity, anomaly or contradiction which would mandate a secondary interpretation. Moreover, it has not been demonstrated to this Court that consequences of the current provisions are objectionable, undesirable, unreasonable, unworkable, impracticable, anomalous or illogical. In the Court’s judgment, there is no real doubt about the legal meaning of the provisions and so there is no need to move on to the second stage of the informed interpretive rule.

[63] However, it is clear that the Council in this case has gone further. The evidence before the Court indicates that by a document dated 12th February 2016, the Council accepted (and presumably adopted) the recommendations made by the Medical and Dental Council in a document dated September 2008 and entitled **The Medical and Dental Council - Recommendations for the Registration and Practice of Health care Practitioners – Nurse Practitioners and Non Allopathic Practitioners in the Virgin Islands** (“the Recommendations”).

The Application of the “Recommendations”

[64] The historical background which informed the 2008 Recommendations and the intended addressees is unknown to the Court but in the introductory summary, the author recognises that the “changing

landscape of health care coupled with the effects of globalization are brining non – traditional medicine into our reality.” At **Section 2: Non-traditional Branches of Medicine** paragraphs 3 and 4, the author states:

“Branches of medicine other than the traditional allopathic medicine are recognized in North America and in other parts of the world. The reality of globalization for us is that we will be faced with the possibility of such practitioners on our shores or their services being demanded by the public. Our responsibility is to protect the public from harm and to ensure that they can make informed choices about their care.

There has always been concern over the lack of rigor in the demonstration of effectiveness of non-allopathic branches of Medicine. Typically the treatments do not undergo the level of scientific testing for effectiveness that traditional medical interventions and pharmaceuticals undergo before being addressed.”

[65] At paragraph 2 of Section 4 – Conclusions, the author reiterates the position as follows

“The overriding principle of health care practitioner regulation in the Territory should be to protect the public from harm. Secondly, we should be guided by the principle of providing effective, evidenced based and appropriate health care. Thirdly we should be guided by a respect for the autonomy of individuals to make informed safe decisions about their health.”

[66] For some reason, at paragraph 4 on page 1 of the Recommendations, the author attempted to classify the categories of practitioner which should be registered by each Council, acknowledging that chiropractors DC (Doctor of Chiropractic), DCM (Doctor of Chiropractic Medicine) should to be registered by the Council “*as is now the case*”. In addition, on page 5 of the documents, the following is noted:

“Chiropractic

Background

1. The qualifications of DC (Doctor of Chiropractic) or DCM (Doctor of Chiropractic Medicine) is the basic qualification required to practice Chiropractic Medicine.
2. Chiropractors generally complete a four year degrees and post graduate training prior to registration.
3. The scope of practice of Chiropractors is restricted to diagnosis and treatments of musculoskeletal complaints and their treatments usually by manipulations and advice.

Recommendations

1. Chiropractors should continue to be registered under the Allied Health Professionals Council according to current provisions.”

[67] At paragraph 11:3 and repeated at 31 of the evidence of the affidavit of Ms. Gracia Wheatley-Smith, Chairperson to the Council explains the position in the following terms:

“Substantively:

- (a) Mr. Barucca incorrectly proceeds on the basis that the Council has no discretion in considering whether or not to approve a person’s application for registration pursuant to section 41 of the Medical Act.
- (b) This misunderstanding of the law pervades each of Mr. Barruca’s Grounds of Appeal
 - (ii) The Council did not err or misdirect itself in law that Mr. Barucca did not meet the requirements for registration as a chiropractor. The Council has a discretion under the operative provisions of the Medical Act as to whether or not an applicant is eligible to be registered.
 - (iii) The Council did not err or misdirect itself in law that a Doctor of Chiropractic degree was required to be registered under the Medical Act. The Council has formulated policy in order to guide the exercise of its discretion under the Medical Act and assist it to determine whether or not a person is eligible to be registered as a chiropractor. **The policy stipulates among other things that a person should hold a degree of Doctor of Chiropractic. The decision was taken in accordance with that policy [GWS-1/Tab 1]” emphasis mine**

[68] The document referenced and exhibited as **[GWS-1]** is in fact the Recommendations. Having carefully reviewed the same, this Court cannot agree that the Recommendations are framed as a policy document. Rather, it provides a summary of the relevant background and then sets out the author’s recommendations on the appropriate course to be adopted in the future. In no way could it be said that the Recommendations “*stipulates among other things that a person should hold a degree of Doctor of Chiropractic*”. Indeed, the author simply indicates what he no doubt believed was an accurate statement of the relevant background. The actual recommendation advanced with regard to this category of allied health practitioner is that they should “*continue to be registered under the*

Allied Health Professional Council according to current provisions” and in that regard the Court notes that this had in fact been the case since 15th November 2001 when the Act came into force.²³

- [69] Assuming that the Recommendations were adopted by the Council it is clear that it could not form the basis upon which the Council could refuse the Appellant’s registration because in no way could it be said that that document prescribes or mandates that an applicant possess a DC (Doctor of Chiropractic) or DCM (Doctor of Chiropractic Medicine) in order to be registered as a chiropractor in the British Virgin Islands. There is therefore no written policy which requires a person to hold a degree of Doctor of Chiropractic for registration.
- [70] Having said this, it is not uncommon for regulators to adopt statements of policy or to promulgate guidance as to how their decision making functions will be exercised. Such policies may address both the procedure to be followed and the factors and criteria that will be considered in taking the decision. Such policies are useful as they enable those who are potential subjects of the statutory regime to know what is expected of them but also ensuring that the basic principle of fairness will apply. However, where a regulator has established a statement of policy or guidance, it is clear that certain base legal principles would need to be borne in mind.
- [71] First, a policy can be challenged on the basis that it is unlawful or unpublished. In **R (Lumba & Anor) v Secretary of State for the Home Department**²⁴ the Secretary of State maintained an unpublished policy for over two years which set out a presumption in favour of the detention of foreign national offenders (FNOs) pending deportation, after their term of imprisonment ended. This ran contrary to the published policy and resulted in a near blanket ban on the release of FNOs. Following a challenge by two FNOs to the legality of their detention, the Supreme Court held that the particular decisions to maintain detention under that policy were unlawful. Further, the Court found the unpublished policy itself to be unlawful because it was a blanket policy which admitted of no exceptions and was inconsistent with the published policy; that the Home Secretary had a duty to publish the current policy and to follow that published policy so that a person who was affected by it

²³ SI 45 of 2001

²⁴ [2011] UKSC 12

could make informed and meaningful representations before a decision was made; and that, accordingly, the application of the unlawful, unpublished policy in force between April 2006 and September 2008 to the claimants' detention had been an unlawful exercise of the Home Secretary's power to detain. At paragraphs 35 – 36 of the judgment the English Supreme Court noted the following:

“35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338 e. **There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it.** In *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, para 26 Lord Steyn said:

“Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice.”

36 Precisely the same is true of a detention policy. Notice is required so that the individual knows the criteria that are being applied and is able to challenge an adverse decision. I would endorse the statement made by Stanley Burnton J in *R (Salih) v Secretary of State for the Home Department* [2003] EWHC 2273 at [52] that “it is in general inconsistent with the constitutional imperative that statute law be made known for the government to withhold information about its policy relating to the exercise of a power conferred by statute.””
mine

[72] If (which the Court does not accept) the Recommendations amounted to a policy, from all accounts, they may have been known to the members of the Council but they would not have been published and therefore could have come to the knowledge and attention of potential applicants for registration. The Appellant's evidence in this regard is telling. At paragraph 3.1 of his Affidavit, he avers that he was advised in an emailed message that the Council has received his application but that he did not “*meet the requirements for registration.*” On the same day he enquired into what was the required qualification to be eligible to be registered as a chiropractor and the following day he was advised that “*in the BVI the qualification for someone to be registered as a Chiropractor is a DC (Doctor of Chiropractic)*”. Nowhere in the application documentation: the requirement form, the application form or the instructions is there any indication of the minimum qualifications for registration. Moreover, it is readily apparent that the appellant was unaware of this purported requirement. The evidence before the Court is that the first time that the Appellant would have seen the Recommendations

would have been when it was served on him in the context of the litigation on 17th April 2020 and attached to the witness statement of Mrs. Gracia Wheatley-Smith. In the Court's judgment this is inconsistent with good administration.

[73] Secondly, it is clear that a policy must not be applied in an overly rigid fashion: allowance must be made for the possibility that in a particular case there may be reason to depart from a published policy. The courts have repeatedly held that while it is lawful and essential for fairness and consistency in decision making for decision makers to have a policy,²⁵ they should nevertheless direct their minds to the facts of the particular case and be prepared to make exceptions. The Council could not have determined that its discretion was fettered or otherwise limited. In that case it could not be said to have exercised its discretion at all.

[74] The Court is guided by the following dictum in **R v Secretary of State for the Home Department, ex parte Venables**:

“Just as in exercising his discretion in an individual case the Home Secretary is required to exercise his discretion in the manner which accords with the law so he must also do so in determining his policy. If the position was otherwise the existence of policy would enable the discretion to be exercised in a way which would not be permissible in the absence of the policy. This means that the policy must not be so inflexible that it cannot accommodate the range of different situations to which it will have to apply. Here, in the case of young offenders, from the child just over the age of criminal responsibility to the 17-year-old.

In addition the policy must not be so rigid that it does not allow for the exceptional case which requires a departure from the policy, otherwise it could result in fettering of the discretion which would be unlawful.

The reason for the significance of the unlawful fettering of discretion is accurately described by Professor Sir William Wade in *Administrative Law*, 7th ed. (1994), p. 360, under the heading “Over-Rigid Policies:”

“It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its merits and decided as the public interest requires at the time.”

²⁵ R v Southwark LBC, ex parte Udu [1996] E.L.R. 390 at 391, R v Secretary of State for the Home Department, ex parte Venables [1998] A.C. 407 at 433

[75] Assuming that the Council did in fact have an appropriate policy in place prescribing the qualification for registration as a chiropractor, it follows that it was obliged to consider and assess the Appellants application, his qualifications and his representations in arriving at its decision. Having reviewed the evidence filed in this matter, the Court is not satisfied that this was properly done in this case.

[76] At paragraph 4 of his affidavit, the Appellant avers that he is a trained and qualified chiropractor and osteopath. He holds a postgraduate diploma with merit in Advanced Professional Practice (Sports Rehabilitation) from the Anglo–European College of Chiropractic from AECC University College in 2014. In 2015 he was awarded a BSc First Class Honours in Human Sciences by the AECC University College and in 2017, he was awarded a MSc with merit in Chiropractic by the AECC University College. He further stated that he is registered with the General Osteopathic Council in the United Kingdom as an osteopath and with the Minister of Health and Community Services in Jersey USA Channel Islands as an osteopath and chiropractor.

[77] Importantly, at paragraph 5 of his affidavit, the Appellant puts his qualifications into context, summarizing the global accreditation process and bodies responsible for the accreditation of the chiropractic profession. He avers that the AECC University College is accredited by the European Council on Chiropractic Education which is an autonomous body established to accredit and reaccredit institutions providing chiropractic undergraduate education. This body is a founding member of the Council of Chiropractic Education International CCEI the global accreditation body for training and development which is made up of several accreditation bodies including the USA, Canada and Australia. The Appellant then exhibited a policy document published by the CCEI in which it notes as follows:

“... (the CCEI) recognises that while the tradition in some parts of the world is to issue the professional degrees of Doctor of Chiropractic (D.C.) upon completion of the prescribed curriculum, the tradition in other parts of the world is to issue academic qualifications such as Bsc Hons CHir, Msc. Chir, Cand Manu etc.

CCEI acknowledges that credentials conferred by programs or institutions accredited by CCEI members agencies are issued after completion of equivalent courses of study and are recognized by all CCEI member agencies. CCEI confirms that these credentials represent comparable performance expectations, clinical competencies and required outcomes for graduation. Therefore CCEI validates these credentials as equivalent.”

[78] The Appellant therefore concluded that an MSc in Chiropractic is recognized by the US Board of Chiropractic Examiners (the US Board), the international testing organization for chiropractic profession responsible for ensuring the professional competency of chiropractors. relevant documentation.

[79] It appears to be common ground that this information would have been conveyed to the Registrar by the Appellant and by those who acted on his behalf. By email dated 22nd August he sought to have the Council reconsider its decision to refuse registration. However, by email dated 28th November 2019, the Council notified him that he did not meet the requirements for registration as a chiropractor must possess a Doctor of Chiropractic. In its Decision, the Council does not address the representations made on behalf of the Appellant and it is unclear what, if any, consideration or weight was attached to them. Rather, in that email, the Chairperson to the Council reiterated and ratified the earlier “preliminary” correspondence of 18th July 2019 in which the Council advised the Appellant that his application for registration was refused. She reiterated that “*the Council does not register applicants with MSC in Chiropractic.*” Hence this email serves as the formal correspondence as to your denial and reason for denial.” Counsel for the Council has, through legal submissions represented that the Council had concerns about the fitness or eligibility of the Appellant, however, on the face of this correspondence it is clear that this was the sole basis for refusal of the Appellants application.

[80] Remarkably, the email then goes on to make the following statements:

- i. That the qualifications for the registration for any Allied Health Practitioner are not listed in the Law but in our **Requirements for Registration for Alternative Practitioners**.
- ii. That Schedule 5 No. 6 of the Act states that “in the conduct of its business, the Council shall determine its own “rules of procedure” and according to section 52 (1) (d) subject to the approval of the Minister, the council may make rules for any of the following purposes (d) the determination of professional conduct and general fitness to practice any allied health profession.

[81] In the Court’s judgment, these representations do not in any way assist the Council. First, the Council has failed to put any document intituled - **Requirements for Registration for Alternative Practitioners** into evidence before the Court. The Court can only conclude that it does not exist and in the event that it does exist, it clearly constitutes a secret policy which would run afoul of the legal

principles adumbrated in **Lumba v Secretary of State**. Further, neither of the statutory provisions relied on by the Council is applicable in the circumstances of this case. The first addresses matters of process and practice rather than substantive qualifications for registration while the latter address the power of the Council to make subsidiary legislation in consultation with the Minister. It has not been advanced that the Council has taken any steps to promulgate any rules or regulations.

[82] The combined emails of July 2019 and November 2019 set out the Council decision and its reasons. However, before this Court, the Council presented a copy of the **Sign-Off Sheet** which affords a compilation of the views of individual members of the Council reflected in manuscript notes. Contrary to what was represented by Counsel for the Council, the **Sign-Off Sheet** does not reflect the corporate decision of the Council (there is no corporate decision indicated at the top of the form). Rather it reflects the individual views of members. What is disclosed is that the members maintained that the Council currently accepts Doctor of Chiropractic as the *only* qualification for registration as a chiropractor in the Virgin Islands. One member referenced that the Council is guided by the Recommendations which they felt determined that the BVI Medical and Dental Council advised that chiropractors must earn the Doctor of Chiropractic (D.C.) degree. For the reasons already indicated, it is clear that this is not accurate. Conspicuously absent is any analysis of the nature of the Doctor of Chiropractic degree programme and a comparison with the Appellant's academic degree programme in order to assess whether it posited a sufficient guarantee of the possession of the requisite knowledge and skill necessary for the efficient practice.

[83] The reasoning of the membership also reveals deference to the practice and procedure in Jamaica which registers chiropractors with a Doctor in Chiropractic degree. There was an acknowledgement that countries such as the UK do register persons with MSc degrees but such qualification must be obtained from a recognized university. It was determined that the Appellant did not obtain his Msc degree from a recognized accredited program in the United Kingdom. It follows that the Appellant would not have been registrable in the United Kingdom. Finally, the notes reflect that the members considered that the Virgin Islands is a small community with little peer support for many professionals which demands that persons seeking registration have a high level of knowledge, great foundation and varied experience to be able to manage the myriad of conditions that they will encounter.

[84] Clearly, the full spectrum of these views was not reflected in the decision which was actually communication to the Appellant and it would therefore be unclear as to whether they ultimately informed the Council's final Decision. It seems to the Court that if this were the case, the Council would have been able to provide a more fulsome set of reasons when communicating its decision to the Appellant.

[85] As it is, it was only during the course of this litigation that the Council attempted to expound on the reasons for its decision. At paragraph 32 of her affidavit Mrs. Wheatley-Smith purports to provide an *ex post facto* rationalization for the Council's decision. She avers that the assertion that the Appellant's application was not refused *only* because he did not hold the qualification of Doctor of Chiropractor is false. She asserts that the Appellant's application, training and experience were fully considered and that the fact that he does not hold a Doctor of Chiropractic was only one relevant consideration. Further, at paragraph 16.2 of her witness statement, Mrs. Wheatley-Smith represents that she instructed the Council's secretary to investigate the registration requirements not only in Jamaica but also regionally and internationally. That investigation concluded that Jamaica, Bahamas, Canada and the US required applicants hold a degree of Doctor of Chiropractic. Along with the Recommendations she stated that the Council also considered the unique challenges faced by the BVI as a small isolated territory and the need for health practitioners to have sufficient experience to be able to operate with a high degree of independence.

[86] No doubt these factors would have come as some surprise to the Appellant who would have only have been provided with the emailed communications of July 2019 and confirmed in November 2019 in which the Council clearly reiterated that he does not meet the requirements because the Council does not register applicants with an MSc in Chiropractic. This presents a grave difficulty for the Court.²⁶

[87] At paragraph 19 of **Machado v Secretary of State for the Home Department**, the Sedley LJ had this to say:

“Mr Draycott submits that as a matter of law the second document cannot form part of the decision and should not therefore have been entertained by the adjudicator or the IAT. He points to the requirement, to which I have referred, that a person must be informed of the

²⁶ Machado v Secretary of State [2005] EWCA Civ 597 at paragraph 19

basis on which it has been decided that he should be removed on grounds of public policy: in other words, a simple invocation of public policy is not enough. He points out, too, that the principal purpose of giving reasons is to enable the individual concerned to decide whether he can and should appeal: see ***Rutli v Minister for the Interior*** [1975] ECR 1219, §52 and (per A-G) at p.1242. I think that there is great force in these points. There are no doubt logistical reasons why the Home Secretary prefers not to set out his full reasoning until and unless his decision is challenged, but convenience is not a sufficient answer if the price of it is injustice. The courts are not receptive, for obvious reasons, to ex post facto justification of decisions: see ***R v Westminster City Council, ex p Ermakov*** [1996] 2 ALL ER 302, 316; ***R (Nash) v Chelsea College*** [2001] EWHC Admin 538, p.14.”

[88] The duty to give reasons is a fundamental hallmark of good administration as they promote transparency and rational and lawful decision making. There a number of advantages and benefits to this duty which from the individual’s perspective includes, (1) the ability to satisfy the expectation of just and fair treatment by the decision maker (2) the ability to properly discern and decide whether the decision is open to challenge by way of further representations, appeal or judicial review. From the decision maker’s standpoint, there are also obvious advantages. Where a decision maker is obliged to give reasons for his decision, there can be no doubt that this will ultimately improve the quality of decision making. If one is aware that one is obliged to justify decisions in writing, that fact alone would reduce the likelihood of capricious or arbitrary decisions.

[89] In ***R (Nash) v Chelsea College of Art Design***, a case which concerned an application for judicial review the English Court summarised the position in the following terms:

“Where there was a statutory duty to provide reasons, a court should accept late reasons only in the most exceptional of circumstances. However where, as in the instant case, there existed no such express duty, the court had to be cautious in accepting subsequent evidence of reasons, and had to consider whether the additional reasons were consistent with the original reasons provided and were the reasons of the entire committee, the delay in providing the later reasons, the circumstances surrounding the provision of late reasons, and the risk of ex post facto reasoning, R. v Westminster City Council Ex p. Ermakov [1996] 2 ALL E.R. 302, R. v Northamptonshire CC Ex p. D [1998] Ed. C.R. 14 considered. Moreover, the level of scrutiny required was dependent upon the seriousness of the subject matter of the decision in question. The court had to also take into consideration the qualifications and experience of the administrative tribunal when considering the clarity of the reasons provided.” Emphasis mine

[90] Further, the Court is guided by the dicta of Simon Brown J in **R v Legal Aid Area No. 8 Appeal Committee ex parte Angel**²⁷:

“Naturally the Courts will look circumspectly at additional reasons; these clearly cannot carry quite the same authority as reasons properly given as part of the actual decision, and of course, anything suggestive of ex post facto reasoning, let alone anything in the way of inconsistency with previous reasons, would be particularly scrutinized. Certain bodies, moreover, will clearly be held to the reasons expressed with their decision — for instance, the Secretary of State on planning appeals and tribunals of the kind in question in f Machinery and ex parte Khan. Furthermore, whenever as here a public body files evidence, it is desirable that each member should approve the supplementary reasoning disclosed in the individual deponent's affidavit as the actual basis for the decision earlier taken.

[91] This Court is therefore reluctant to accept the *ex post facto* reasons advanced in Mrs. Wheatley-Smith's evidence which is obviously inconsistent with the original reasons communicated to the Appellant. Applying a heightened level of scrutiny to the facts of this case, the Court has no reservations in concluding that the actual basis for the Council's decision is that communicated in its unequivocal and unconditional message to the Appellant i.e. that he did **“not meet the requirements for registration as the Council does not register applicants with MSC in Chiropractic.”** This reiterated (*almost verbatim*) what was communicated on 18th July 2019 and reinforces the Court's view that this reflects the true basis for the Council's refusal.

[92] From all accounts, this Decision was premised on an error of fact since the purported Recommendations do not as a policy require applicants to possess a Doctor of Chiropractic degree before registration. The Decision also reflects errors of law because, the Council applied irrelevant statutory provisions to support its decision to rely on the Recommendations. Moreover, it is clear to the Court that the Council would have applied this in the purported policy in an overly rigid fashion making no allowance for the possibility that this particular case may justify a departure from the policy. The Council was mandated to direct its mind to the facts of the particular case and be prepared to make exceptions. The Court finds that it did not do so. Rather, the Council's discretion was clearly fettered or limited unlawfully by its purported policy and by the **Requirements for Registration for Alternative Practitioners** or was not applied at all.

²⁷ (1990) 3 Admin LR 189

[93] There appears to be some suggestion in the **Sign-Off Sheet**, that individual members of the Council would have been minded to permit registration if the Appellant had in fact obtained his qualification from such recognized institutions. This seems unlikely in view of the fact that this concern was never conveyed to the Appellant. There was no effort made to address these matters in the evidence filed on behalf of the Council in this matter. The Council could not *without more* have considered itself bound by the mandates of the UK General Medical Council but instead would have been obliged to carry out its own analysis in order to verify whether the Appellant was sufficiently informed and skilled in the relevant subject area. Certainly, the Council was mandated to give due consideration to the legislative provisions and verify whether or not it is satisfied that the qualifications mentioned is evidence of satisfactory medical training. In the event that the Council had concerns the education and qualification of the Appellant was evidenced of satisfactory medical training, it had recourse under section 42 of the Act to resolve these concerns. There is no evidence to indicate that any effort was expended in this regard.

Legitimate Expectation

[94] Counsel for the Appellant placed significant reliance on the fact that as far back as 2013, the Council has recognised degrees other than a Doctor of Chiropractic as being sufficient to meet the requisite requirements for registration. The Appellant produced in evidence, extracts from the British Virgin Islands Official Gazette which reflects that the Council has in the past registered applicants who hold qualifications other than a Doctor of Chiropractic degree. The Gazette reflects that in September 2003, an applicant with an 'MTec in Chiropractic' was registered to practice in the Virgin Islands. From all accounts that individual remains on the register as at 2019. The Appellant submitted that an 'MTec in Chiropractic' is a consistent or equivalent qualification to that of the Doctor of Chiropractic degree and to the Appellant's MSc. in Chiropractic.

[95] Counsel for the Appellant submitted that this is evidence of a course of conduct of the Council upon which the Appellant was entitled to rely. Counsel for the Appellant argued that the Court should not allow the Council to now resile from its past and perfectly lawful practice and refuse the Appellant registration. For these reasons, Counsel submitted that the actions of the Council are therefore ultra

vires and the Court should give effect to the legitimate expectation of the Appellant to be registered as a chiropractor in the circumstances.

- [96] The Council did not specifically address the evidence of registration contained in the British Virgin Islands Official Gazette. Instead, in her affidavit, Mrs. Gracia Wheatley-Smith does not accept that such evidence could be considered a representation to the Appellant that he would obtain any substantive outcome in his favour in respect of his own Application. Registration of other individuals as chiropractors would go no further than to provide him with a reasonable expectation that he would be considered for registration as a chiropractor notwithstanding the fact that he does not hold a Doctor of Chiropractic qualification. She concluded that the decision to refuse his application was within the Council powers.
- [97] The legal submissions filed on behalf of the Council do not take the matter any further. At paragraph 27.3 Counsel submitted that *“Whether or not other practitioners with different experience and qualifications to Mr Barruca have been registered is irrelevant.”* In the Court’s judgment, the Council’s response to this Ground of appeal is derisory and perplexing given the fact that during the course of this trial, it was represented that the Council was no longer advancing that the Doctor of Chiropractic degree is the only acceptable qualification for registration.
- [98] Where a decision maker either expressly, or through custom or previous conduct, suggests that a particular outcome is likely and an individual relies on this to their detriment - this is known as legitimate expectation. If the Court accepts that a legitimate expectation has arisen in a case it may rule that in breaching that promise or legitimate expectation the decision maker acted unfairly and unlawfully. Whether there is a legitimate expectation depends on a number of factors, e.g. [1] Were the words or conduct (‘promise/representation’) which gave rise to the expectation unequivocal?; [2] Did the person promising the benefit have legal power to grant it, or was it ultra vires?; [3] Who made the promise and how many people stood to benefit by it? [4] Did the person to whom the promise was made take action in reliance on it, which placed him in a worse position than he otherwise would have been?

[99] In the case at bar, there is no evidence that the Appellant placed any reliance on the Council's past conduct of registering persons with an MTec qualification when he applied to be registered or that he otherwise acted to his detriment. However, the Council's failure to put evidence before the Court which would justify the circumstances under which such registration would have been made, or which would explain the disparate application or change in policy or which would provide any explanation as to why a different standard would have been applied to the Appellant in this case, gives rise to the inference that there is in fact no rational or defensible point of distinction and the Councils' refusal to register the Applicant was capricious or arbitrary.

[100] In the Court's judgment whether the matter is put in terms of a legitimate expectation, ordinary fairness, or the obligation to take a rational approach to the duties of good administration, in this specific situation the law imposes upon the Council a duty to explain why a different approach was adopted in this case. Its failure to do so is wholly inconsistent with the duties of fairness and good administration imposed upon decision makers by the common law.²⁸

The Requirement of Post Qualification Experience from outside the Virgin Islands

[101] In legal submissions filed on behalf of the Council, it was represented that the Appellant had insufficient varied experience as a chiropractor. This was a surprising submission bearing in mind that the Act does not require any period of post qualification experience as a criterion for registration. Indeed, neither do the purported Recommendations. Instead, the Council relied on its approved application form which must be completed by applicants seeking registration. Attached to the Form is a checklist which sets out the requirements for registration. At number 9 of the Checklist the following requirement is set out.

"Persons not deemed to belong to the British Virgin Islands are to have two (2) years post-graduation experience."

²⁸ M v Secretary of State for the Home Department per Laws LJ at paragraph 19 and see Paponette and Others v Attorney General of Trinidad And Tobago [2012] UKPC 32, Lord Dyson JSC

- [102] It was also surprising because this contention did not form part of the Council's Decision and was not expressly referenced in the deliberations set out in the **Sign-Off Sheet**. Indeed, the first reference to this issue was set in legal submissions filed by Counsel. For the reasons already indicated, the Court is satisfied that this attempt at *ex post facto* rationalization should not be allowed.
- [103] Moreover, it is apparent that this requirement presents a significant departure from the statutory provisions and the purported policy set out in the Recommendations. Not only is a period of post qualification experience mandated, but the provision only applies to individuals who are non-belongers. It follows that belongers are not required to have any experience before seeking registration. This presents a significant hurdle for the Council's case.
- [104] First, while the Act does vest the Council with power to make delegated legislation (rules), this requires compliance of the prescribed legislative process which includes the approval of the relevant Minister. There is no evidence that these processes were undertaken in this case. Second, it is trite law that a public authority can only take into consideration matters which are consistent with the objectives of an Act. The Scottish case of **Brightcrew Limited v City of Glasgow Licensing Board**²⁹ illustrates the point clearly. That case concerned an application for judicial review of decision to refuse a premises licence.

"[24] Turning to the substance of the issues before us, we consider that, in general terms, there is force in the submission advanced on behalf of the appellants that, on a proper construction of the statute, the essential function conferred on a licensing board by the 2005 Act is that of licensing the sale of alcohol. It is, in our view, clear from what the 2005 Act terms its "core provisions" that the statute is concerned with the regulation of the sale of alcohol by means of the grant of licences. Of significance also, in our view, are the terms of section 27 (7) of the 2005 Act which limit the extent to which a licensing board may impose particular conditions. **In particular, a licensing board may not impose such a condition which "relates to a matter (such as planning, building control or food hygiene) which is regulated by another enactment."**" *Emphasis mine*

²⁹ [2011] CSIH 46; 2012 SLT 140

[105] The point was further illustrated in **The Corporation of The County of Vercheres v The Corporation of The Village of Varennes**³⁰ where the Municipality of the County of Vercheres passed a by-law defining who were to be liable for the rebuilding and maintenance of a certain bridge. The Municipality of Varennes by their action prayed to have the by-law in question set aside on the ground of certain irregularities. The above was maintained and the by-law set aside.

“But we cannot extend our jurisdiction by interpretation to cases not clearly and unmistakably provided for by the statute. In Parliament, not in this court, lies the power to remedy the act if an omission appears therein. We cannot add anything to its enactment.”

The Court in that case concluded that:

“No right of appeal can be given by implication, *Langevin v. Les Commissaires etc. de St. Marc* ([5]); and **“the courts are not to fish out what may possibly have been the intention of the legislature;”** per Lord Brougham, *Crawford v. Spooner* ([6]); or **extend the language of a statute beyond its natural meaning for the purpose of including cases simply because no good reason can be assigned for their exclusion;** *Denni v 1891 Reid* ([7]); and unless by “words “written, or words necessarily implied and therefore virtually written, the intention has been declared, we cannot give effect to it. Coleridge J. in *Gwynne v Burnell* ([8]), or as Lord Verchères Eldon said in *Crawford v Spooner* ([9]), **“we cannot add and mend and by construction make up deficiencies which are left there.”** Emphasis mine

[106] The dictum in **The Corporation of The County of Vercheres v The Corporation of The Village of Varennes** summarizes the position which has been generally been adopted and applied by courts: that it is not open to a public authority to add or augment statutory requirements where they are not strictly necessary to give effect to the legislative provisions. An authority, cannot take into account any issues that are dealt with by other authorities in the same or other statutes, such as those regulating immigration and labour. Given the limitations prescribed by section 49 (1) of the Act which precludes a foreign registered allied health practitioner from engaging in private practice or being employed by a private medical or dental practitioner without the written approval of the Minister, and by section 49 (2) which mandates that it is only where such non-belonger has 5 years’ experience prior to the commencement of the Act that he would be permitted to engage in private practice, it seems to the Court that any concerns regarding post qualification experience and supervision would fall within that remit.

³⁰ (1891) 19 Scr 365

[107] While it is reasonable and proper for a public authority to imply matters which are reasonably incidental to its powers, in the Court's view, the Council in this case has gone further here - imposing a requirement which has a "*legislative character*" in that it alters the content of the statute and has the potential to impact a privilege or interest, impose an obligation, create a right, or vary or remove an obligation or right. The simple fact is that the Legislature did not prescribe post qualification experience as a criterion for registration although it may well be a criterion for actually engaging in private practice. It follows that in the event that this issue was pivotal in the Council's decision making; it would in the Court's view have constituted an error of law which would render the Decision a nullity.

[108] For the reasons set out the Court is satisfied that the grounds of appeal have been made out and that the Council's Decision should be set aside and the appeal allowed. The Appellant has in addition, asked that in accordance with section 71 (3) (a) of the Act that the Council should also be directed to approve registration of the Applicant as a Chiropractor. This appears to be the prescribed consequence of the decision to allow the appeal.

Costs

[109] Costs would normally follow the event. In this case, the Court is satisfied that Appellant is entitled to his costs. As to the basis upon which such costs are to be quantified, neither the Act nor the CPR specifically mandates a basis of quantification for the costs on this appeal. The Court acknowledges that there are apparent conflicting appellate decisions but will nevertheless will apply the decision in **Richardson et al v Richardson et al**³¹ in which the Eastern Caribbean Supreme Court of Appeal took the time to specifically consider the quantification of costs of an appeal to the Anguilla High Court. The Court is therefore satisfied that the Appellant's costs in this Claim should be quantified on a prescribed basis and that this would be reasonable and proportionate in all the circumstances.

³¹ AXAHCVP2016/002

[110] It is therefore ordered as follows:

- i. The Appeal is allowed and the Council's Decision is set aside.**
- ii. The Council should also be directed to approve registration of the Appellant as a Chiropractor.**
- iii. Costs to the Appellant to be quantified on a prescribed basis.**

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar