

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2014/0534

**IN THE MATTER of the decision of the Medical Council not to renew the licence of Dr. Jose
Humphreys**

And

IN THE MATTER of Section 18(3) of the Medical Practitioners Act, 2009

And

IN THE MATTER of sections 3 and 18 of the Constitution of Antigua and Barbuda

And

IN THE MATTER of an Application for an Administrative Order

BETWEEN:

DR. JOSE HUMPHREYS

Claimant

and

THE MEDICAL COUNCIL

Defendant

2017: January 30

Appearances:

Dr. David Dorsett of Watt, Dorsett & Company for the Claimant
Ms. E. Ann Henry Q.C. of Henry & Burnett for the Defendant

[1] **HENRY, J.:** By Fixed Date Claim filed herein the claimant seeks the following relief:

- 1) A declaration that the decision of the defendant not to renew the licence and issue a new licence to the applicant permitting the applicant to practice as a medical practitioner is unlawful and ultra vires section 18(3) of the Medical Practitioners Act 2009 and in contravention of the claimant's right to liberty as guaranteed by section 3(a) of the Constitution of Antigua and Barbuda;
- 2) An order of mandamus requiring the defendant to renew the licence of the claimant to practice medicine
- 3) Damages
- 4) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act;
- 5) Cost

[2] The facts upon which the claim is based are not in dispute. The claimant is a medical practitioner who, on 22nd September 2011, was registered and obtained a licence under the Medical Practitioners Act 2009 (the Act). His medical licence was due to expire on 22nd September 2014. The defendant is the Board known as the Medical Council (the Council) established by section 3 of the Act. On 17th July 2014, the claimant applied to the Council for renewal of his licence pursuant to section 18 of the Act. Having had no response from the defendant, on the 22nd September 2014, the claimant's Attorneys wrote to seek confirmation from the Council of the renewal of the Licence. By letter dated 25th September 2014 the Council wrote to advise that the renewal application was still pending. The letter also stated that "the Medical Council is of the considered opinion that based on the documents on your file and those provided by you in support of your application, you have not met the requirements of the Medical Practitioners Act, 2009". The Council requested that the claimant provide certain information and documentation pertaining to the licence. The claimant did not respond to the letter. These proceedings were thereafter instituted with leave of the court.

[3] In his written submissions the claimant asserts as his main contentions that:

- 1) The Council has not acted in accordance with the Act as it relates to the renewal of the claimant's licence as the Council was bound to renew the licence of a medical practitioner who (a) is not erroneously registered under the Act and (b) has properly applied under the Act, in circumstances where there is no change in the relevant law or in the relevant circumstances of the medical practitioner so applying;
- 2) The Council, more than 35 days after the receipt of an application duly made for the renewal of a licence, cannot put forth reasons so as to refuse to renew the licence of a medical practitioner who was not registered in error;
- 3) The Council by unlawfully failing to renew the claimant's medical licence has contravened the claimant's right to liberty as guaranteed by section 3 of the Constitution of Antigua and Barbuda.

[4] The Council contends that as a matter of fact, the renewal application has not been determined by the Council. The Council's position is that in order to fairly consider the renewal application and to make a deliberate decision on the application, the Council decided that it required certain

documentation from the Claimant. As at the date of the hearing of the matter, that documentation has not been supplied. It is the Council's contention that the renewal application is still pending and that its delay in considering the renewal application is due entirely to the refusal of the claimant to provide the requested documentation and that the Council has merely sought to put itself in a position to properly consider the renewal application .

The Law

[5] As stated in the case of **Council of Civil Service Unions et al v Minister for the Civil Service**¹, administrative action is subject to judicial review under the following heads:

- 1) Illegality – where the decision-making authority has been guilty of an error of law, eg by purporting to exercise a power it does not possess;
- 2) Irrationality – where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision;
- 3) Procedural impropriety – where the decision-making authority has failed in its duty to act fairly.

The Decision

[6] It is apparent from the decision to commence these proceedings and from the nature of the relief sought that the claimant came to the conclusion that the Council had taken a decision not to renew his licence. The first sentence of the letter to the claimant dated 25th September 2014 states: "We write to advise that your application for the renewal of your licence to practice medicine is still pending and before the Medical Council for consideration." Further on in the letter the Council requested certain documents and information. The penultimate paragraph states:

"The Medical Council will then have a review of the documents and information provided, and consider whether you have met the requirements of the Act. Should we need any further information or explanation than provided on the documents requested, you shall be invited to meet with the Council as to same."

[7] The Chairman's evidence is that the Council, mindful of its duty under section 18, sought to review the applicant's file and discovered certain documents were not there. Therefore the letter of 25th September was sent requesting additional documents. On cross-examination the chairman was asked whether the Council had identified any relevant changes of circumstances so that Dr. Humphreys no longer meets the requirements of the Act. She responded by saying that the Council cannot yet identify relevant changes. She went on to state that the Council has asked for additional information to be considered on the application so as to reach a determination as to whether there was any relevant change of circumstances. Council again asked, "So no relevant changes have been identified by the Council. Her response was: "correct". Counsel then put to the Chairman: "Since no relevant changes have been identified by the Council, the Council has no lawful authority

¹ [1984] 3 All ER 935

not to renew the licence." To which the Chairman responded that according to section 18(4) if the medical Council is unsure, the Council may require the applicant to meet further information. The Council, she insisted, has not refused the applicant's licence, it has merely asked for more information.

- [8] The Chairman's evidence, in the court's view, is consistent with the contents of the letter. Notwithstanding that the letter also expresses a certain opinion, the court finds that, when read in its entirety, the letter does not contain a decision not to renew the licence of the Claimant. It clearly informs that the renewal application is still pending and that upon receipt of the information requested, it would engage in further deliberations.

Has the Council acted unlawfully and ultra vires section 18?

- [9] The claimant's contention is that the Council has not acted in accordance with the Act as it relates to the renewal of the claimant's licence.

The relevant sections of the Act are:

Section 7 (1) and (2)

7. Functions and powers of the Medical Council

(1) The functions of the Medical Council are

- (a) to register and license persons as medical practitioners who meet the requirements of this Act and possess the qualifications and experience prescribed by regulations;
- (b) to prescribe the Code of Ethics and to monitor adherence to and investigate breaches of the Code; (c) to collaborate with and advise the Medical Association on the Council's requirements for Continuing Medical Education;
- (d) to organise whether or not in conjunction with the Medical Association or the Ministry of Health, seminars, courses and practicals in respect of Continuing Medical Education;
- (e) to advise the Minister with respect to amendments to this Act; and
- (f) to perform any other function conferred on it by this Act or any other law.

(2) The Medical Council has the power to

- (a) cause the registration of medical practitioners and issue medical licences to persons who meet the requirements of this Act and possess the prescribed qualifications and experience;
- (b) cause disciplinary proceedings against medical practitioners to be taken in accordance with this Act; (c) suspend or revoke the licence of a medical practitioner;

Section 18

18. Validity and renewal of licence to practise medicine

- (1) Unless it is sooner revoked or suspended, a licence to practise medicine is valid

(a) in the case of a licence issued to a person who is provisionally registered, for two years; and (b) in any other case for three years.

(2) No later than 60 days before the date on which the licence to practise medicine expires, a medical practitioner who wishes to renew the licence shall apply for a renewal of the licence.

(3) The Medical Council shall renew the licence and issue a new licence to the applicant unless it is of the view that the person no longer meets the requirements of this Act.

(4) If the Medical Council is unsure as to whether or not an applicant meets the requirements of this Act, the Medical Council may require the applicant to provide further information, in writing and, if it does so, the applicant must be given a reasonable time period in which to provide the information.

(5) Subsections 16(2) and (4) apply, with the necessary modifications, to a renewal of a licence to practise medicine.

Sections 16(2), (4) and (5)

(2) The Medical Council shall consider an application for a licence and shall inform the applicant, no later than 35 days after receipt of the application, whether or not the applicant meets the requirements of this Act.

(4) If the Medical Council is of the opinion that the applicant does not meet the requirements of this Act, the Medical Council shall provide the reasons for the refusal to license the applicant and indicate to the applicant the steps that are required in order for the applicant to be eligible to be licensed.

(5) A medical practitioner licensed to practise medicine shall display the licence in a prominent place on the premises on which he or she practises medicine.

[10] Specific guidelines for renewal of a licence are provided in section 18. The application for renewal must be made no later than 60 days before the date on which the licence expires. Subsection 3 provides that the Council shall renew the licence and issue a new licence to the applicant, unless it is of the view that the person no longer meets the requirements of the Act. If the application leaves the Council in a state of uncertainty, the Council has the authority to require the applicant to provide further information. The Council is required to consider the application and inform the applicant, no later than 35 days after receipt of the application, whether or not the applicant meets the requirements. It is this 35 day period that the claimant asserts the Council has fallen afoul of and which forms the gravamen of his complaint.

[11] The claimant's application for renewal was timely submitted on 17th July 2014. The letter from the Council written on 25th September 2014 was after the expiration of the 35 days. The Chair of the Council, Dr. Leslie Walwyn gave evidence on this issue. She stated:

"I received my instrument of appointment on or about the 12th August and the first meeting of the Council was convened and held on 14th August 2014. When we first met as a Council, in August 2014, the application which had been filed by the applicant on the 17th July 2014

for renewal of his licence was before us for consideration. During the meeting, when we started to consider the application it was apparent that the file in our possession was incomplete. Further consideration of his application was therefore adjourned to give the Council sufficient time to check all of the records kept by the Council so as to be in a position to properly consider the application. . . Having regard to the provisions of Section 18 of the Act, and the requirement in respect of which we had to be satisfied, we considered it relevant to consider the documentation submitted on the original application so as to reach a determination as to whether there was any relevant change of circumstances. We therefore reviewed the files which had been taken over by us and realized that the file did not include certain documentation which we believed should have been there as they were necessary to support the issuance of the original licence which was now being sought to be renewed. . . At a subsequent meeting of the Council on 18th September 2014, the decision was taken to request this documentation, and this was done in our letter to the applicant dated the 25th September 2014."

- [12] Admittedly the Council did not communicate within the 35 day period. The question is what is the legal consequence of the non-compliance?

The claimant's position is that the Council being a creature of statute with various powers provided for by statute is confined in the exercise of its powers to the four corners of the statute. If it goes beyond the powers contained in its enabling statute it will be acting ultra vires. The claimant therefore concludes that the Council, after the lapse of 35 days, is not empowered as a matter of law to advise the claimant that he no longer meets the requirements of the Act.

- [13] As early as 1979, Lord Hailsham in **London & Clydesdale Estates Ltd v Aberdeen District Council**², discouraged the use of rigid legal classifications like mandatory and directory. The court stated:

" . . . when a question like the present one arises – an alleged failure to comply with a time provision – it is simpler and better to avoid these two words 'mandatory' and 'directory' and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so did the legislature intent that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void."

- [14] This approach was followed by the Privy Council in **Wang v Commissioner of Inland Revenue**³. The same approach was taken more recently by the Privy Council in the case of **Charles v Judicial and Legal Services Commission and Another**⁴. The case concerned the effect of failures to observe the time limits laid down by regulations dealing with discipline and misconduct in the public

² [1979] 3 All ER 876

³ [1995] 1 All ER 367

⁴ [2002] UKPC 34

service. In that case, complaints were made about the conduct of the Deputy Chief Magistrate. The Judicial and Legal Services Commission appointed the Master of the High Court as the investigating officer. She was one day late in giving the Appellant the required written notice inviting him to give an explanation concerning the matters under investigation. The Regulations also required the investigating officer, with all reasonable dispatch, but not later than 21 days from the date of her appointment to forward to the Commission, for its information, all original statements and all relevant documents together with her own report. The Master did not submit her report within this timeframe. Under the regulations the Commission was obliged to consider the report of the investigating officer and any explanation given by the person under investigation and then to decide whether that person should be charged. The Commission did so, and decided to charge the Appellant. He sought judicial review of that decision on the basis that the Commission had no power to make it, because of the lateness of the investigating officer's report. His application was declined by the High Court, and the Court of Appeal upheld the decision. On appeal the Privy Council, found that the framers of the Regulations must have intended those involved to comply with the relevant time provisions. Having considered the legislation and the relevant policy, their Lordships also observed that it was highly unlikely that the framers could have intended that breaches of time limits at the investigation stage would inevitably prevent it from discharging its public function and duty of inquiring into and, if appropriate, prosecuting relevant indiscipline or misconduct.

- [15] The court is cognizant that in matters such as the present one, each case must be decided on its own facts and circumstances having due regard to the substance of the legislation in question. This court therefore must examine the legislation, including any policy along with the facts and circumstances in order to do what is just in all the circumstance.
- [16] When a medical practitioner applies for renewal of a licence there are three possible steps or action the Council is required to undertake within the 35 day period:
- 1) If the applicant meets the requirement, then the Council must so inform the applicant within the 35 days;
 - 2) If the Council is unsure that the applicant meets the requirements, then section 18(4) applies and the Council may require the applicant to provide further information and the applicant is given a reasonable time period in which to provide the information;
 - 3) If the Council is of the opinion that the applicant no longer meets the requirements of the Act then pursuant to section 16(4), the Council must so inform the applicant and provide the reasons and indicate to the applicant the steps that are required in order for the applicant to be eligible for renewal of the licence.
- [17] While section 18 does not specifically mention an "investigation", the renewal of a licence involves more than a rubber stamping of an application. It is for the Council to determine whether the person "no longer meets the requirements of the Act". Consequently, the Council is given the authority to require the applicant to provide further information in writing. This lends support to the position that on renewal some review or inquiry is to be undertaken.

- [18] The purpose of the time periods connected with licensing and renewal is to expedite the investigation and decision-making process and the communication of the relevant decision to the applicant. In the case of renewals, the applicant is required to make the application some 60 days before the expiration of his current licence. Thus ensuring adequate time for investigation, decision and communication before the current licence expires. Where the Council requests additional information, of necessity it must await the provision of the information before it is put in a position to make a decision. Section 18 (4) does not contain a time limit in which the applicant must respond. It simply provides that the applicant be given a reasonable time in which to provide the information. However, what is reasonable must be viewed in the context of the time provisions in the statutory scheme. The statutory scheme makes it clear that of importance is the effective investigation and determination by the Council as to whether or not each applicant meets the requirements of the Act, and ensuring that only those who continue to meet the requirements of the Act remain licenced.
- [19] In this case the incoming Council members could not have convened a meeting prior to receipt of their instruments of appointment. By the time the first meeting was convened on 14th August 2014, almost a month had already elapsed before the Council undertook the consideration of the application at that first meeting. So that the time during which the Council actually had the application under consideration was not inordinate. The evidence reveals no bad faith. On the other hand, the Court cannot overlook that by the 25th September, the 60 days had lapsed and the Claimant's licence had expired, so the claimant did suffer some prejudice. His license was subsequently continued by the Court of Appeal.
- [20] The Privy Council noted in **Charles** that the choice open to a court faced with a decision as to what should be the legal consequences of non-compliance with a statutory or regulatory provision of that nature, is seldom black and white. The court cited the following words of Lord Hailsham in **London & Clydesdale Estates**:

"At one end of this spectrum there may be cases in which a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequences upon himself. In such a case if the defaulting authority seeks to rely on its action it may be that the subject is entitled to use the defect in procedure simply as a shield or defence without having taken any positive action of his own. At the other end of the spectrum the defect in procedure may be so nugatory or trivial that the authority can safely proceed without remedial action, confident that, if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint."⁵

It cannot be said that this is a case in which a fundamental obligation has been outrageously and flagrantly ignored or defied. Nor is the case at the other end of the spectrum where the non-compliance can be termed nugatory or trivial. The claimant did suffer the expiration of his licence as

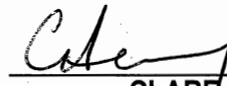
⁵ At page 189

a result of the delay. Moving from trivial to flagrant, this case falls closer towards the middle of the spectrum.

- [21] The court accepts the submission that the Council has an overarching regulatory function to ensure that all medical practitioners are duly and properly qualified. The Council has a duty and a responsibility to the public to ensure that a person licensed to practice meets the requirements of the Act. The functions and powers given to the Council under sections 7(1)(a) and 7(2)(a) are consistent with this mandate.
- [22] Given the entire statutory scheme, the court is of the view that it was the intention of Parliament that the Council comply with the time provisions. However, it could not have been the intention of Parliament that the consequences of the breach would be to deprive the Council of the power to make the important determination and result in an automatic renewal of the licence on the 36th day, especially given the responsibilities the Council has to the public.
- [23] Claimant proceeded to court on the mistaken belief that the letter of 25th September 2014 was a denial of the application to renew. It was not. The Council having required the claimant to provide further information, it is for the claimant to comply with the request within a reasonable time. Thereafter, the Council will be in a position to make a decision pursuant to section 18(3). Under these circumstances, the claim for declaration & mandamus must fail.

The Constitutional Claim

- [24] The claimant submits that the Council has unlawfully denied him the renewal of his medical licence and in doing so has unlawfully contravened the claimant's right to liberty, inclusive of the right to lawfully earn a living. Having found that the letter of 25th September 2014 does not contain a denial of the claimant's application for renewal, the court need not proceed to consider this aspect of the claim.
- [25] Accordingly, the relief sought by the claimant is denied in all respect.


CLARE HENRY
High Court Judge
Antigua & Barbuda