IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 55 OF 2021 and
CAUSE NO. G 150 OF 2021

BETWEEN: **CTMH HOLDINGS LIMITED**

Applicant

AND **THE GOVERNMENT OF THE CAYMAN ISLANDS**

Respondent

(1) NARAYANA HRUDAYALAYA PRIVATE LIMITED
(2) ASTER CARIBBEAN HOLDINGS LIMITED

Interested Parties

Appearances:	**Mr. Chris Buttler KC instructed by Ms. Sally Bowler on behalf of McGrath Tonner for the Applicant** **Mr. Tom Hickman KC instructed by Mr. Jevon Alcock and Mr. Nigel Gayle of the Attorney General's Chambers for the Respondent**
Before:	**Hon. Justice Richard Williams**
Hearing:	**25 January 2023**
Draft Judgment Circulated:	**7 February 2023**
Judgment Delivered:	**14 February 2023**

HEADNOTE

Judicial review – Government contracts with private medical facilities containing undertakings granting long term customs duty and stamp duty waivers and work permit concessions - Relief hearing - Declarations and recitals sought - Costs hearing

JUDGMENT

Background - The parties

1. The Applicant is CTMH Holdings Limited ("CTMH"). CTMH trades as the Doctors Hospital. The Respondent is the Government of the Cayman Islands ("the Government").

2. Narayana Hrudayalaya Private Limited ("NHPL") is an interested party. NHPL is an Indian domiciled company which set up an integrated hospital in Grand Cayman primarily aimed at medical tourists, with an assisted living facility. In April 2010, NHPL entered into a contract with the Respondent ("the 2010 Contract") to provide medical care facilities and, as a part of the agreement, it was agreed that it would benefit from tax and duty waivers. NHPL has not sought to take up the opportunity to actively participate in these proceedings.

3. Aster Caribbean Holdings Limited ("ACHL") is also an interested party and has also not sought to take up the opportunity to actively participate in these proceedings. ACHL agreed to set up a three-phase project to develop new medical facilities to provide affordable healthcare to residents and further the growth of medical tourism, with an assisted living facility and a medical university. In December 2020, ACHL entered into a contract with the Respondent ("the 2020 Contract") to provide medical care facilities and, as a part of the agreement, it was agreed that it would benefit from tax and duty waivers.

Background - Application Cause No. G 55 of 2021

4. On 20, 21 and 22 April 2022, I heard the substantive hearing of the Applicant's two consolidated applications for Judicial Review. The first application is brought in Cause No. G 55 of 2021. The Court was informed that the relief sought in the first application was in respect to:

(i) "The Respondent's ongoing grants of waivers of customs duty, work permit fees and stamp duty to (NHPL) and proposed grant of such waivers to (ACHL) in reliance on its view…that it is contractually bound to grant such waivers"; and

(ii) "The Respondent's failure to publish a transparent statement of criteria by which it will grant or refuse waivers of customs duty, work permit fees and stamp duty".

5. In the Notice of Motion filed in Cause No. G 55 of 2021[1] the Applicant pleads its two grounds for judicial review as follows:

> *"11. First, the Respondent cannot lawfully contract out of or otherwise fetter the exercise of its statutory discretion to waive (or refuse to waive) customs duty, work permit fees and stamp duty. The Respondent's 2010 and 2020 Undertakings are expressly stated to be subject to the laws of the Cayman Islands and, accordingly, (on their true construction) do not fetter the Respondent's powers. Alternatively, if (on their true construction) the Respondent's Undertakings purport to bind the Respondent then they are ultra vires and of no legal effect. Either way, the Respondent is currently operating under a misapprehension of its statutory powers to waive customs duty, work permit fees and stamp duty in relation to Health City East End. For the same reasons, the Respondent's 2010 Undertaking will not bind the Respondent in relation to Health City Camana Bay. And, again, for the same reasons, the 2020 Undertaking cannot bind the Respondent to grant customs waivers to the Second Interested Party.*
>
> *12. Second, the rule of law requires the Respondent to publish a transparent statement of the criteria to be applied when determining applications for the waiver of work permit fees, stamp duty and customs duty, to ensure that such applications are determined in a consistent and non-arbitrary way. The Respondent's failure to publish such criteria is unlawful."*

6. In the Notice of Motion, the following relief was sought:

[1] Paragraphs 11 and 12 in the Notice.

(i) A declaration that the Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the Interested Parties are unfettered;

(ii) A declaration that the Respondent is obliged to publish a transparent statement of the criteria it will apply when determining applications for waivers of customs duty, work permit fees and stamp duty;

(iii) A declaration that the Respondent's decisions to grant waivers to NHPL and/or ACHL and/or refusal to grant waivers to the Applicant were unlawful and breached s.19 of the Constitution[2]; and

(iv) An order for damages, to be assessed, against the Respondent, on the ground that the Respondent's grant of waivers to NHPL and/or ACHL and/or refusal of waivers to the Applicant, which were unlawful and in breach of s.19 of the Constitution, have caused financial loss to the Applicant in terms of the duty which the Applicant has paid and the competitive disadvantage caused by the difference in treatment.

Background – Application Cause No. G 150 of 2021

7. The second application is brought in Cause No. G 150 of 2021. The relief sought in the second application was in respect to:

"The Respondent's ongoing failure to:

(a) formulate criteria for designating an institution as a place at which institutionally registered practitioners may be employed;

(b) formulate criteria for reviewing such designation: and (c) publish a transparent statement of those criteria."

[2] The second part of this declaration which related to unlawful refusal to grant waivers and breach of the Constitution was abandoned.

8. The following relief was sought in the Notice of Motion in Cause No. G 150 of 2021:

(i) A declaration that the Respondent is obliged to formulate criteria for designating an institution as a place at which institutionally registered practitioners may be employed;

(ii) A declaration that the Respondent is obliged to formulate criteria for periodically reviewing such designation; and

(iii) A declaration that the Respondent is obliged to publish a transparent statement of those criteria.

9. After the close of each party's case and after receiving comments on the draft judgment pursuant to Practice Direction 1/2004, I delivered my reserved judgment on 18 August 2022. I do not intend to again set out the background contained in the Judgment.

The Judgment - Initial comments made in the Judgment concerning Cause No. G 150 of 2021

10. In the early stages of the Judgment, prior to dealing with the parties' positions in relation to the live issues, I reviewed areas of agreement and made certain observations in relation to both Causes.

11. At paragraph 21 in the Judgment, I noted that no issues (save for costs) in Cause No. G 150 of 2021 now required the Court's consideration. In its Skeleton Argument dated 30 March 2022, the Applicant stated that there was no evidence that the Respondent had made any progress in preparing draft criteria with a view to placing it before Cabinet and at that stage still sought a declaration that the Respondent had a legal duty to prepare such criteria. However, in its Supplementary Skeleton Argument dated 10 April 2022, the Applicant accepted that the Respondent had produced the required *"Guidelines for Designation as an Institutionally Registered facility to employ practitioners on the Institutional Registration List"*, albeit adding that this was at the *"eleventh hour"* and in response to the claim. The Respondent submitted in its Written Submissions dated 6

April 2022 that this made the ground of challenge "*moot*", but added the approval of the guidelines was without prejudice to the Respondent's position that it was not under any legal obligation to formulate such criteria. The Applicant agreed that this rendered academic the claim for a declaration concerning such criteria. Accordingly, in the Judgment, I noted that prior to the hearing there had been a narrowing of the issues because the Government had produced the criteria sought in one of the requested declarations.[3]

12. During the hearing, the remaining pleaded declaratory issue raised in Cause No. G 150 of 2021, which related to the absence of published criteria for periodically reviewing the designations of institutions, did not require resolution by the Court following indications given by Mr. Hickman KC. Mr. Buttler KC invited (i) the Court to record the concessions expressed by Mr. Hickman KC concerning such criteria; and (ii) to indicate whether the Court accepted that concession was one properly made. Accordingly, I commented at paragraph 21 of the Judgment as follows:

> *"Towards the close of the second day of the hearing, Mr. Hickman QC addressed the second declaration sought by the Applicant, namely that the Government should put in place "some sort" of criteria for reviewing a designation. Mr. Hickman QC stated: "I accept my instructions[4] that there should be and must be and will be a review of designated institutions against the designation criteria at reasonable intervals." He added that this did not amount to a concession that the Government was under a duty to formulate and publish these criteria or that the Court had the power to order it to do so. He indicated that the review "concession" was being made because, following the formulation and distribution of the designation criteria, it was necessary for a mechanism for review to also be set out. This concession is one that is understandably made by the Government, and it is clearly in the medical profession's and patients' interests that such reviews be required and take place."*

[3] On 5 April 2022 the Cabinet approved guidelines for designating facilities as facilities permitted to employ practitioners on the institutional registration list.
[4] In his oral submissions Mr. Hickman stated that the instructions had been received on the previous day.

This section of the Judgment was intended to be read as being a recording of the concession/observation made at the invitation of the Applicant, and any observation then given by me was made without conducting a full review of the issue and it should not be elevated to being anything beyond that. I was not making any finding on the potentially contentious issue that, under the system that was in place at that time, there existed risks to patient safety. At the hearing neither party indicated to the Court that the purpose of seeking a recording of the concession and my observations thereon in the Judgment was for the purpose of a possible recital or declaration in the order. When I recorded the concession and made the observation, I did not intend them to be treated as the foundations for declarations or to necessarily be included in a preamble to any order, but (as requested) they were included to inform those reading the Judgment.

13. Although not part of the pleaded declaratory relief, at the substantive hearing the parties made representations about the Health Practice Act (2021 Revision) ("the HPA") and the Health Practice Regulations (2021 Revision) ("the HPR"), with specific reference to Regulation 5 and Regulation 5A of the HPR. Those Regulations deal with the educational qualifications for full registration of health professionals and the educational qualifications for institutional registration. Mr. Hickman KC made clear that his client's position was that they required the standards to be met and he stated that if the Court wished to record that then he invited it to do so. Mr. Buttler KC invited the Court to *"either make a recommendation as to the tidying up the legislation"* or *"to construe the regulations we would have"*. I indicated that I understood that Mr. Buttler KC was seeking to have me comment upon the concerns raised, even though they may be outside the boundaries of what is sought in the pleadings. At the hearing neither party indicated to the Court that the purpose of seeking a recording of (i) the concessions and (ii) of an expression of my observations thereon in the Judgment was being requested for the purpose of a possible recital or declaration in the order.

With the above in mind, I was content to accede to the parties' request and I commented at paragraph 22 in the Judgment about the parties' observations concerning the HPA and HPR as they related to Cause No. G 150 of 2021, as follows:

> *"Although the requirements set out at Regulation 5(2)-5(4) HPR are not replicated at Regulation 5A HPR, the parties both agree that the Regulations should be interpreted to read that Regulation 5(2)-5(4) HPR should also apply to an applicant applying for institutional registration. I agree with the parties that such an interpretation is most desirable and is to be commended, as it deals with the safety of patients and would ensure that all doctors have the appropriate level of experience. I see there being great merit in the Legislature considering whether there is a need to clarify/amend the wording in Regulation 5 and Regulation 5A HPR to remove any potential uncertainty in this important area of patient safety."*

These were observations made by me at the parties' request without conducting a full review of the issue and again they should not be elevated to being anything beyond that. I did not intend them to be treated as the foundations of declarations not sought in the pleadings or to be set out in recitals in an order but I included them to inform those instructing Counsel and others who may read the Judgment.

The Judgment - Initial comments made in the Judgment concerning Cause No. G 55 of 2021

14. At paragraph 9 in the Judgment, I found about Cause No. G 55 of 2021:

> *"There is evidence that the Respondent has on a number of occasions granted financial waivers to the Applicant. The evidence before me at this time does not ground an application for a declaration that the refusal to grant waivers to the Applicant was unlawful and in breach of s.19 of the Constitution. The Respondent was entitled to grant and refuse waivers depending on the circumstances of each application. In the oral and written submissions made, minimal time was spent on this part of the third declaration and accordingly, it would not be appropriate to make such a declaration in this judgment."*

The Judgment – The Court's consideration of the live issues in Cause No. G 55 of 2021

15. In relation to the first declaration sought I found that there appeared to be no dispute between the parties on the issue raised regarding whether a declaration should be made. Accordingly, at paragraph 91 of the Judgment, I indicated that I would make a declaration in the form sought in paragraph (a) of the Notice of Motion, namely that:

> *"The Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to the Interested Parties are unfettered."*

16. When considering the declaration sought at paragraph (c) of the Notice of Motion, I highlighted my concerns about the Respondent's approach[5], especially in relation to the longevity of waivers. However I found, despite these concerns, that it would not be appropriate to make the widely worded declaration sought and that decisions by Government to grant tax concessions to interested parties to stimulate development are not in themselves unlawful.[6] I added that it was a matter of degree, having regard to the quantum of concessions and the duration. I noted that the area of concern arises from the insular process that Cabinet adopted to reach such decisions because the granting of concessions over an extended period time, coupled with the Respondent acting in a manner that is consistent with the belief that Government and successive administrations were bound by the contract to give waivers without further review, was inconsistent with the fettering principle. I stated that it was an improper fetter of an administration's discretion and use of its powers to bring in revenue if it acted in a manner consistent with the belief that it was bound by the undertakings in the contracts and that it should keep on granting waivers without any review of the prevailing circumstances that arose over time. I concluded that the Government had acted inappropriately in awarding waivers of concessions for the extremely lengthy periods that they did

[5] Paragraphs 92 and 93 of the Judgment.
[6] Paragraph 93 of the Judgment.

without any meaningful reference to Parliament. I carefully chose my words; I purposively used the word *"inappropriately"* rather than *"unlawfully"*.

17. When considering the declaration sought at paragraph (b) of the Notice of Motion, I reviewed the two Auditor Generals' recommendations concerning Cabinet's failure to publish criteria for the determination of applications for tax waivers under the statutory discretion. These recommendations included one that:

> *"The Government should formalise policies and procedures to provide documented and consistent roles, responsibilities and accountabilities for all parts of the revenue waiver process, including a set of decision criteria on which to assess revenue waiver applications and a formalized records management process."*

18. I then went on to comment[7] that there was:

> *"...little doubt that this recommendation, made by the Auditor General when he was considering good governance, has great merit and one would have expected the Government to have acted upon it. This is especially so when the Auditor General has stated that the lack of systems and documentation that his team found during the audit "should be of great concern to Legislators, who would expect that decisions made are based on clearly documented criteria applied in a fair and consistent manner."*

19. I further commented[8]:

> *"There is little doubt that the implementation of such a policy is well overdue. The need for such a policy to be put in place is unquestionable, and that principle seems to have been accepted by previous Governments, but not actioned. What is at issue is whether it is appropriate for the Court to make the declaration that the Government is obliged to do that."*

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[7] Paragraph 99 of the Judgment.
[8] Paragraph 103 of the Judgment.

20. I concluded that:

> *"...despite the clear merits of the clarity which would derive from a criteria put in place for the reasons espoused by both Auditor Generals, I am not satisfied that it is appropriate for the Court to make a declaration that the Respondent is obliged to publish a transparent statement of the criteria that it will apply when considering concessions. Of course, the Respondent would be well advised and would be acting in a manner consistent with good governance if it did so..."*

Again, I did not intend these observations to be treated as the foundation of a declaration or to be set out in the preamble to an order, but I included them to inform those instructing Kings' Counsel and others who may read the Judgment.

The Judgment – Consideration of the issue of costs

21. At the end of the Judgment[9], on the issue of costs, I remarked as follows:

> *"Neither party has been fully successful in this matter. My provisional view is to make no order for costs. However, if either party wishes be heard on costs, they may apply by Summons for a costs hearing."*

22. I am aware from the open correspondence placed before the Court that the parties have had discussions about the appropriate costs order. However, they were unable to agree and their primary position is that they should both now seek costs orders to be made in their favour. Therefore, the issue of costs is one for me to determine in this Judgment.

Background – Proceedings post the delivery of the Judgment

23. On 15 November 2022, a case management hearing was conducted by me, it having been fixed at my direction. Although the Respondent raised a contention shortly before the hearing that all issues

[9] Paragraph 109 of the Judgment.

could and should be dealt with at that hearing, the Court agreed with the Applicant that the potential complexity of the issues required directions to be given to a more substantive hearing. Therefore, agreed directions were made to a hearing, on the first available date after 23 January 2023, to address the question of consequential relief and costs in light of the Judgment. The costs of the case management hearing were reserved.

The relief and costs hearing

24. The relief and costs hearing took place remotely by Zoom on 25 January 2023. The remote hearing was agreed by all parties and approved by the Court. At the hearing I received oral submissions from Kings' Counsel for each party. Although there were some minor connectivity issues, I am satisfied that I have been able to receive and assess the oral submissions properly. At the close of the hearing, I adjourned the matter in order to prepare and then deliver this reserved written Judgment. When determining the issues raised in this Judgment, I have considered the written and oral submissions filed on behalf of each party and the content contained in the filed bundles.

The parties' general positions

25. The parties agree that no damages fall to be awarded as that claim has been abandoned. However, the parties have very differing views about other areas of appropriate relief and have submitted draft orders setting out the provisions they submit that the Court should make. The Applicant seeks a number of declarations and recitals in the order which they say arise from the Judgment. It is submitted by the Applicant that this is because the order should give effect to the Court's findings in the Judgment. On the other hand, the Respondent submits that the Applicant's position on both relief and costs is unnecessarily complex and wrong in principle. The Respondent highlights that the declarations now sought were not contained in the Applicant's pleaded case and that, save for

one declaration[10], the Court had deemed in the Judgement that it was not appropriate to make any of the other declarations sought in the Notice of Motion. Therefore, I must determine whether to grant the declarations and recitals now sought by the Applicant.

The parties' positions in relation to the relief to be ordered in Cause No. G 150 of 2021

A. The recitals

26. In relation to Cause No. G 150 of 2021 the Respondent contends that the order should be that the Cause is dismissed. The Applicant also states that the order should be that the Cause stand dismissed (subject to costs), but does so on the basis that the following three recitals and one declaration are set out in the order, namely:

(i) The Respondent having produced "Guidelines for Designation as an Institutionally Registered facility to employ practitioners on the Institutional Registration list" ("the Designation Criteria") [Judgment, para.21];

(ii) The Respondent having accepted that it must review designated institutions against the Designation Criteria at reasonable intervals, and the Court observing that it is clearly in the medical profession's and patients' interests that such reviews be required and take place [Judgment, para.21]; and

(iii) The Court considering there to be great merit in the Legislature considering whether there is a need to clarify and/or amend the wording of regulations 5 and 5A of the Health Practice Regulations, further to the first declaration below [Judgment, para.22][11].

[10] See paragraph 15 above.
[11] That sought declaration is set out at paragraph 33 below.

27. At the hearing an alternative draft order was produced by the Applicant. That draft retained the proposed recital (i) and (ii) above, but revised recital (iii) to read:

> *"The parties agreeing that, on the proper interpretation of the Health Practice Regulations (2021 Revision), the requirements of regulation 5(2) (continuing educational requirements for practitioners), regulation 5(3) (required postgraduate qualifications and specialist training for specialist medical doctors) and regulation 5(4) (required experience for general practitioners) apply to institutionally registered practitioners in the same way that they apply to fully registered practitioners, and upon the Court commending that interpretation and observing that there would be great merit in the Legislature considering whether there is a need to clarify and/or amend the wording of regulations 5 and 5A of the Health Practice Regulations [Judgment, para.22]."*

The Applicant stated that, if this revised recital was contained in the order, the declaration mentioned in paragraph 26 above and set out in paragraph 33 below would no longer be required.

28. The Applicant contends that the recitals are necessary to explain how and why Cause No. G 150 of 2021 has concluded with the order for dismissal. The Applicant states that the absence of such detail would lead to a misleading impression being given and a lack of clarity.

29. The Respondent rightly highlights that the reason for an order for dismissal of this claim (which has not been formally withdrawn) is that the issues raised in the pleadings became academic because:

(i) criteria for designating institutions as a place at which institutionally registered practitioners may be employed had been published prior to the hearing; and

(ii) a clear indication was given by the Respondent at the hearing that it would review such designations at reasonable intervals. This meant, and I accepted at the hearing,

that there was no need for me to resolve any legal issues (save possibly for costs) raised in this Cause.

Conclusions about the recitals to be included in the order relating to Cause No. G 150 of 2021

30. However, I note that there is some agreement concerning the proposed Recital 2[12] and, to a degree, in relation to Recitals 1 and 3 in the Applicant's initial draft order. In relation to Recital 2, I am content for the order to include the agreed recital:

> "The Respondent having produced "Guidelines for Designation as an Institutionally Registered facility to employ practitioners on the Institutional Registration list" ("the Designation Criteria")."

31. In relation to Recital 3[13], I prefer the wording set out in the draft order of the Respondent and I am content for the order to include the recital:

> "The Respondent having accepted that it must review designated institutions against the Designation Criteria at reasonable intervals".

It is upon this basis that this issue became an academic one and partly led to the Cause being dismissed. I am not satisfied that Recital 3 in the initial draft order should include my observation concerning the interests of the medical profession and patients. As already mentioned herein, the purpose of this observation was to assist those reading the Judgment and it was not intended to be a basis upon which the Cause would be dismissed. Having in mind that the purpose of the Judgment is partly being to inform, I am satisfied that Recital 1 in the order should read:

> "The Court handing down its Judgment on 18 August 2022 and for the reasons given in that Judgment".

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[12] Recital (i) in paragraph 26 above.
[13] Recital (ii) in paragraph 26 above.

32. The making of the Recital 4[14] in the Applicant's initial draft order or the alternative Recital 4 in the draft order produced at the hearing which are sought by the Applicant are opposed by the Respondent. As mentioned in paragraph 12 above the observations were not intended to be set out in the preamble or main part of any court order. The observation made recommending or inviting that consideration be given by the Legislature to the wording in the legislation was placed in the Judgment in response to the Applicant's request made during the oral submissions for the Court to make a recommendation about the tidying up of the legislation in the Judgment. It should not be elevated by either party as having a purpose beyond that and it had no bearing on the reasoning why the Cause is being dismissed. The Judgment, which is available to the public and which the relevant bodies would be expected to read, contains the clear narrative of what the parties' positions are. Accordingly, Recital 4 set out in the Applicant's draft order should not be included in the order. I accept that by reaching this decision I must still go on to consider whether it is appropriate to make Declaration 1 set out in the initial draft order submitted by the Applicant.

B. The declaration sought by the Applicant in Cause No. G 150 of 2021

33. Apart from costs, the significant area of contention that remains in relation to Cause No. G 150 of 2021 concerns the declaration sought by the Applicant which is worded:

> *"On the proper interpretation of the Health Practice Regulations (2021 Revision), the requirements of regulation 5(2) (continuing educational requirements for practitioners), regulation 5(3) (required postgraduate qualifications and specialist training for specialist medical doctors) and regulation 5(4) (required experience for general practitioners) apply to institutionally registered practitioners in the same way that they apply to fully registered practitioners [Judgment, para.22]".*

[14] Recital (iii) in paragraph 26 above.

34. The Applicant submits that the Court received submissions and counter arguments from both parties and the proper construction of Regulation 5(2)-(4) that the Court *"made its own finding"* that:

> *"The Regulation should be interpreted to read that Regulation 5(2)-5(4) HPR should also apply to applicant applying for institutional registration".*

It is contended that the proposed declaration records the Court's interpretation of Regulation 5. It is submitted that the Court, in the absence of any recital on the issue, should make the declaration as there is an:

> *"overwhelming need for clarity as to the qualification and training standards for institutionally registered practitioners."*

Conclusion about the Declaration 1 sought by the Applicant in Cause No. G 150 of 2021

35. When I considered Regulation 5 at paragraph 22 in the Judgment I chose my words carefully. The intention was not to make a reasoned finding about the application of the regulation to institutionally registered practitioners. I had in mind that the subject matter did not form part of the declaratory relief pleaded in the Notice of Motion. In relation to the oral presentations made to me by the parties, in paragraph 22 I deliberately did not refer to them as being submissions but as being the parties' *"observations"* that I was noting. Similarly, I deliberately did not state that I made a finding, but I used the following wording:

> *"I agree with the parties that such an interpretation is most desirable and is to be commended."*

I was not making a finding that the Respondent had acted unlawfully nor dealing with a pleaded request for an advisory declaration and I felt it best to deal with the matter by recommending that the Legislature consider whether there is a need to review the wording in the Regulations. Again,

one should not elevate this observation, made by me *"before moving away from Cause No. G 150 of 2021"* and pursuant to what I believed to be a request made by the parties to record the same in the Judgment, as amounting to a finding reached by the Court following an analysis of submissions made. Accordingly, I do not make the sought Declaration 1 sought out in the Applicant's initial draft order.

36. The order should include the provision that: "Cause No. G 150 of 2021 is dismissed".

The parties' positions in relation to the relief to be ordered in Cause No. G55 of 2021

A. The recitals

37. In relation to Cause No. G 55 of 2021 the Applicant contends that the order should record that:

> *"The Claim in G55 of 2021 is allowed to the extent set out in the judgment and is otherwise dismissed."*

The Respondent commends the following slightly different wording:

> *"Save to the extent set out in the Judgment, Cause No. G55 of 2021 is dismissed."*

There is no significant difference between the two suggestions and I would not have a particular issue with either of them. However, I prefer the Respondent's wording and this should be included in the order.

38. The Applicant seeks Recital 5 set out in its submitted draft orders to be inserted into the final order. The Respondent does not agree. The proposed recital is:

> *"The Court considering that there is an unquestionable need for a policy to be put in place in relation to the granting of revenue waivers and that the implementation of such a policy is well overdue [Judgment, para.103], but that it is not appropriate to make a declaration that the Respondent is obliged to publish such a policy [Judgment, para.108]".*

39. The Applicant contends that the recital is necessary to partly explain how and why Cause No. 55 of 2021 has concluded with the order for dismissal. The Applicant again states that the absence of such detail would lead to a misleading impression being given and a lack of clarity on the publication of the criteria issue.

Conclusions about the recital sought to be included in the order relating to Cause No. G 55 of 2021

40. The reason why there is no order made is because I deemed it inappropriate to make the declaration concerning the publication of the criteria. That said, following my analysis of the recommendations of the Auditor General and the Government's previously expressed acceptance of some of those, my Judgment contains my observations at paragraphs 99, 103 and 108 concerning the desirability of there being a transparent statement of the criteria to be applied when considering the granting of financial concessions. The analysis of the relevant background and my observations were carefully worded. However, they were not intended to be recited or form part of the order. The only relevant section of the Judgment on this issue which might helpfully be placed in the order is narrative about the Court finding it to be inappropriate to make the declaration sought, thereby adding some clarity as to why that that part of the judicial review was not allowed. I have not received any submissions concerning such a recital being set out in the order and therefore I do not direct that it be included, relying on the fact that the Judgment is clear on the point. Accordingly, Recital 5 set out in the Applicant's draft order should not be included in the order.

B. Declarations

41. As already mentioned at paragraph 15 herein, I indicated in my Judgment that I would make the declaration claimed in paragraph (a) of the Notice of Motion. Accordingly, I make a declaration that:

"The Respondent's statutory powers to refuse to grant waivers of customs duty, work permit fees and stamp duty to NHPL and ACHL are not fettered by the 2010 Contract between NHPL and the Respondent or the 2020 Contract between ACHL and the Respondent."

42. As set out in paragraph 20 above, I deemed it inappropriate to make the declaration sought at Paragraph (b) in the notice of Motion. As mentioned at paragraph 16 above, I also deemed it inappropriate to make the widely worded declaration sought at Paragraph (c) in the Notice of Motion. I have not received any submissions concerning recitals being set out in the preamble of the order to reflect those two decisions and therefore do not direct that it be included, relying on the fact that the Judgment is clear on the point.

43. The Respondent submits that *"the result of the claim is clear from the Judgment"* and that, save for the making of the first declaration which the Court has already held should be made, the Cause No. G 150 of 2021 should be dismissed as there is no proper basis for any other relief.

The declarations sought by the Applicant in Cause No. G 55 of 2021

44. The Applicant takes a different view and now seeks the following declarations which were not pleaded in its Notice of Motion:

1. It was unlawful for the Respondent to award waivers and concessions to NHPL and ACHL for extremely lengthy periods without any meaningful reference to Parliament [Judgment, para.93]. In particular:

1.1 The following clauses of the 2010 Contract between NHPL and the Respondent are unlawful and of no legal effect:

1.1.1. Clause 2.9 (work permit fee concessions without an expiry date) [Judgment, para.31];

1.1.2. Clause 2.10(a) (stamp duty concessions for as long as Health City is operational) [Judgment, para.35];

1.1.3. Clause 2.10(b) (customs duty exemptions on the first US$800m of imports, with no expiry date) [Judgment, para.32];

1.1.4. Clause 2.10(b)(i) and (ii) (customs duty exemptions for 30 years from the date on which the value of imports has reached US$800m) [Judgment, para.33];

1.1.5. Clause 2.10(c) (customs duty exemptions for 50 years on all life-saving medical equipment and medical supplies) [Judgment, para.34].

1.2 Clauses 2.7-2.8 and Schedule 2 of the 2020 Contract between ACHL and the Respondent are unlawful and of no legal effect (no taxes on profits, estate duty, customs duty on medical equipment and supplies for 25 years; and no stamp duty for as long as Aster Cayman Medcity is operated) [Judgment, para.43].

2. The Respondent acted unlawfully in treating itself as required to grant tax waivers to NHPL in accordance with clauses 2.9, 2.10(a), 2.10(b), 2.10(b)(i)-(ii), and 2.10(c) of the 2010 Contract [Judgment, para.92, taken with paras.31-35].

The parties' submissions relating to the declarations sought by the Applicant in Cause No. G 55 of 2021

45. The Respondent contends that there *"is no warrant at all"* for the Court to make declarations that are not pleaded and that the declarations that are now sought are inappropriate and should not be made. The Respondent states that the Court addressed the declarations which were sought in the Notice of Motion and that the Court's reasons in the Judgment speak for themselves and should not and need not be set out in separate declarations. At the hearing it was agreed that consideration of the terms of any contentious declaratory relief would be better left to a relief hearing post-delivery of the Judgment. The Respondent contends that relief hearings can be used in relation to declarations sought at the hearing to enable the wording to be tailored to the terms of the Judgment, but it says they should not be used to formulate *"wholly new and different"* declarations after the Court has given judgment.

46. In relation to the declaration pleaded at paragraph (c) in the Notice of Motion, the Respondent argues that it related to decisions to grant waivers and was directed at past decisions and not about the future performance of the contracts which the new declarations relate to. It highlighted that the Court found in the Judgment that decisions to grant tax concessions to stimulate development were not in themselves unlawful. It is submitted that this position conflicts with the approach now advocated by the Applicant, who now seeks a series of declarations that clauses in the contracts are *"unlawful and of no effect"*. The Respondent contends, with reference to the Applicant's earlier Skeleton Argument and the pleaded case, that the Applicant did not seek to impugn the contracts containing undertakings which were subject to a caveat that the Respondent was bound by them only to the extent that they were permissible by the laws of the Cayman Islands, by putting forward or pleading a case for relief that the contracts were unlawful.

47. The Respondent, therefore, argues that the Applicant is not now refining the content of the declarations that were sought in the pleadings, but is actually *"reformulating its entire case"*. It is submitted that this is not acceptable as the declarations may well impinge on the legal rights of the interested parties who decided not to play any part in these proceedings on the basis that the Applicant had expressly stated that it would not be making any claim or seeking any relief against them.

48. The Respondent submits that the concerns which it says arise from the Applicant's approach have been addressed in ***R (Talpada) v Secretary of State for the Home Department*** [2018] EWCA Civ 841 at [67]-[69], where Singh LJ stated:

> *"Courts should be prepared to take robust decisions and not permit grounds to be advanced if they have not been properly pleaded or where permission has not been granted to raise them. Otherwise there is a risk that there will be unfairness, not only to the other party to*

the case, but potentially to the wider public interest, which is an important facet of public law litigation."

49. The Respondent also relied upon Holgate J's comments in ***Keep Bourne End Green v Buckinghamshire Council*** [2020] EWHC 1984 (Admin) J at [37]-[41] that changes to a claimant's case should be reflected in amendments to the grounds of challenge and that:

"It is unacceptable for the matter to be dealt with informally (e.g. simply in a skeleton)."

50. The Respondent contends that, in any event, the Court did not find any clauses of the contract were unlawful and of no effect, with it simply stating in the Judgment that:

"Some of the provisions in the contracts which grant release from payment of revenue for very long periods of time and some without any cut-off date, are arguably incompatible..."

51. The Applicant submits that if the Court finds that the Respondent has acted unlawfully, then there is a presumption that a declaratory order be made to reflect the Court's finding. It referred to Lord Toulson's statements in ***R (Hunt) North Somerset Council*** [2015] 1 WLR 3575 para 12. Lord Toulson rejected the Appellant's argument that the Court of Appeal should have made a declaration of its own initiative. When doing so he stated that the judgment of the Court of Appeal itself contained a ruling that the Respondent had acted unlawfully and the authority of its judgment would be no greater or less by making or not making a declaration in the form of the order to the same effect. However, Lord Toulson added:

"...in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice."

52. The Applicant sought to reinforce this with reference to the following remarks of Singh J at paragraph 39 in ***R (on the application of First Stop Wholesaler Ltd v Commissioners for HM Revenue & Customs*** [2012] EWHC 1106 (Admin):

> *"…… in the context of declaratory relief, the matter is one of discretion for the court. But nevertheless, as counsel for the claimant forcefully submitted before me, in principle, if a claimant has succeeded in establishing that there has been an error of public law in the Administrative Court, normally, other things being equal, the court should reflect that in some form of declaratory relief. Justice would tend to suggest no less."*

Conclusion about the Declarations 3.1 and 3.2 sought by the Applicant in Cause No. G 55 of 2021

53. With the above submissions in mind, I turn to the declarations sought. In relation to the declarations sought at paragraphs 3.1 and 3.2, the Applicant concedes that its case under Ground 1 in the Cause was that the clauses 2.9, 2.10(a), 2.10(b)(i)-(ii), and 2.10(c) of the 2010 contract were ineffective rather than unlawful. At paragraph 54 in the Judgment I noted:

> *"The Applicant accepts that the granting of the waivers is not unlawful, but contends that the decision to grant waivers on the premise that the Government is bound as a matter of law to do so when the contractual undertakings given are as a matter of law not so binding is unlawful."*

Despite that, the Applicant contends that the declarations have been sought because they give effect to its interpretation of the Court's conclusion in relation to the Ground. I found that the process adopted when formulating the Agreements with such waivers was inappropriate, but I did not make a finding that it was unlawful for the Respondent to award waivers and concessions in the two contracts for extremely lengthy periods without any meaningful reference to Parliament in the two contracts. Nor did I make the finding that Clauses 2.7-2.8 and Schedule 2 of the 2020 contract were unlawful and of no legal effect. When expressing my concerns about the process (and the effect of it) in the judgment, I was aware that the Respondent's undertakings in both Agreements were

expressly stated to be subject to the laws of the Cayman Islands and that the Applicant was not seeking to impugn the Contracts by challenging the lawfulness of the awarding of the waivers. Accordingly, I do not make Declarations 3.1. and 3.2 in the Applicant's draft order.

Conclusion about the Declaration 4 sought by the Applicant in Cause No. G 55 of 2022

54. The Applicant states that the "*key*" declaration in this Cause is the one set out at paragraph 4 in its initial draft order[15] as it relates to the pleaded Ground 1 and gives effect to the Court's central finding. By the time of the Judicial review hearing the Applicant's case had developed. The case became the continuing granting of waivers based on the Respondent's alleged view that it was constrained by the contract to grant those waivers which the Applicant sought to challenge, and which it contended to be amenable to judicial review. At the hearing I was aware of the Applicant's, by then, more refined case, as can be seen from paragraph 80 in the Judgment. It was contended that the Respondent's approach to the concessions had been and remained one consistent with being bound by the two Agreements and that it had and was continuing to grant the waivers on that premise.

55. The Applicant submits in relation to this proposed declaration that it is inappropriately vague. It submits that the Court did not find that the Respondent acted unlawfully in considering itself obliged to grant tax waivers during the full duration of the contracts and contends that it was entitled to hold such a view for a reasonable period of time.

56. At the judicial review hearing, reference was made to the affidavit of Kenneth Jefferson[16], the Financial Secretary and Chief Officer at the Ministry of Finance and Economic Development, in which Mr. Jefferson states: *"The First Interested party receives the exemptions from liability to*

[15] Reproduced at paragraph 2 in Paragraph 44 above.
[16] Paragraph 17 of the affidavit sworn on 5 November 2021

pay any customs or similar duty on the first US$800 million in value of all medical equipment and medical supplies, on the terms set out in clauses 2.10 of the Agreement" and in which he did not then go on to outline any further factors that were taken into account or to provide any details of any ongoing review or re-evaluation before the relevant waivers were being processed. The Applicant also highlighted an article in the Cayman Compass which reported the then Premier as saying that the concession and duty waivers already in place for Health City would apply to the new facility.

57. The Applicant also placed reliance upon its correspondence with the Respondent. The Applicant wrote to the Respondent on 6 January 2022 asking a number of questions, including one about whether the Respondent felt itself bound to comply with the waiver clauses in the 2010 Contract. The Respondent, in its reply dated 27 January 2022, declined to specifically address the questions as it deemed them to be in reality interrogatories and stated that the points set out in its Statement of Opposition did not require evidential clarification. The Respondent added that there did not *"appear to be any disputable facts between the parties"* and that *"the questions seemed designed to elicit legal arguments which could enable the Applicant to characterise the Respondent's position in the Applicant's own skeleton arguments"*. The Applicant replied on 15 February 2022, indicating that, having read the Points of Objection, the Statement of Opposition and the above-mentioned affidavit of Mr. Jefferson, it would proceed on the basis that the Respondent felt that it was bound to comply with the waiver clauses in the Agreement and that it has granted the waivers to NHPL and treated NHPL as exempt from the duties in accordance with the waiver clauses. The Applicant stated that the content in Mr. Jefferson's affidavit was consistent with such a view and commented in the letter that if the affidavit was inaccurate or gave a misleading impression it was "*incumbent*" on the Respondent to correct that. No clarification was forthcoming in correspondence

from the Respondent. Despite having the opportunity to do so, the Respondent did not produce any evidence to demonstrate that it has not taken the approach of unquestionably applying the waivers pursuant to the 2010 Contract or to show that it has at any time considered whether the terms need not be rigidly applied due, for example, to other social considerations.

58. Having reviewed the evidence that was placed before me, including the above, I stated at Paragraph 92 in the Judgment that:

> *"Despite the concession made in relation to the content of the first declaration sought, it is evident that the Respondent continues to act in a manner consistent with a belief that it is bound by the undertaking and that it should keep on granting the waivers without any review of the prevailing circumstances despite a passage of time, for example since entering the 2010 Contract. Such an approach is an improper fetter of an administration's discretion and use of its powers to bring in revenue which may be required for it to govern and to meet the public's needs at that time."*

If one reads paragraphs 31-34 and 92 in the Judgment together, it is evident that when I made the above statement I had in mind the waivers under clauses 2.9, 2.10(a), 2.10(b)(i)-(ii), and 2.10(c) in the 2010 Contract. I was not saying that financial waivers/concessions are in themselves unlawful. I was not stating that the grant of a particular waiver or concession in relation to a particular item or individual was unlawful, but that the approach of the Respondent in treating itself as being bound by the Agreements to grant waivers/concessions without any consideration of other factors is what is unlawful.

59. I accept that the making of a declaration by the Court is discretionary. I am conscious of Lord Toulson's view in ***Hunt v Somerset Council*** that the authority in a judgment may be no greater or less by making or not making a declaration in an order to the same effect and that, in circumstances where an attorney does not seek a declaratory order, the Court is under no obligation to make it. In

the circumstance prevailing in the matter before me, where the declaration has been requested and where no mandatory, prohibitory or quashing order has been made, I am satisfied, in the interests of justice, that it would be appropriate to make a declaration to reflect this Court's finding in the Judgment. Accordingly, the order should include the declaration that:

> *"The Respondent acted unlawfully in treating itself as required to grant tax waivers to NHPL in accordance with clauses 2.9, 2.10(a), 2.10(b), 2.10(b)(i)-(ii), and 2.10(c) of the 2010 Contract."*

Costs in Cause No. G 150 of 2021

60. As set out above, the first part of the claim in this Cause[17] was compromised due to the Cabinet issuing *"Guidelines for Designation as an Institutionally Registered Facility to employ practitioners on the Institutional Registration List"* on 5 April 2022[18], only about two weeks prior to the hearing and over 8 months after the claim was issued. The Applicant indicated in its Supplementary Skeleton Argument dated 10 April 2022 that it would be seeking its costs for this part of the case and would rely on the case of ***R(M) v London Borough of Croydon*** [2012] 1 WLR 3607.

61. As also set out above, the second part of the claim in this Cause[19] was compromised due to the concession made by the Respondent on the second day of the hearing that there should and must be a review of designated institutions against the designation criteria at reasonable interviews.

62. As a result of these very late developments, the Applicant obtained both the criteria publishing and the review practical outcomes that it sought and there was, of course, no need for it to continue to

[17] Issues arising out of Declaration 1 and 2 in the Notice of Motion.
[18] Served on the Applicant on 6 April 2021.
[19] Issues arising out of Declaration 2 in the Notice of Motion.

seek the relevant declaratory relief. Therefore, the Applicant contends that it should be viewed as being the successful party and, applying the Overriding Objective of the GCR Order 62, it should recover from the Respondent the reasonable costs it has incurred in conducting the proceedings[20]. In addition, GCR Order 62 r.4(5) provides that if the Court when exercising it discretion deems it appropriate to make a costs order:

> *"The Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*

63. There is common ground between the parties that due to the similarities between the costs rules in the Cayman Islands and England and Wales that the Grand Court can be guided by the approach taken in the latter's case law. Therefore, reference is made by the Applicant to Lord Neuberger MR's statement at paragraph 59 in ***R(M) v Croydon*** that:

> *"Where...a claimant obtains all the relief which he seeks, whether by consent or after a contested hearing, he is undoubtedly the successful party who is entitled to all his costs, unless there is a good reason to the contrary."*

64. The Applicant took the Court through the chronology in support of its contention that it was the successful party. On 23 April 2021, the Applicant sent a pre-action protocol for judicial review letter to the Respondent in which is indicated an intention to challenge the failure of the government to publish criteria by which to determine, under s.24A(2) of the HPA:

(i) Whether to designate a healthcare facility as a place at which persons institutionally registered under s.24A(1) may be employed. The letter requested the Respondent to identify, by 7 May 2021, whether there were any criteria for granting and reviewing designations under s.24A(2) of the Health Practice Act (2021 Revision); and

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[20] GCR Order 62, r.4(2).

(ii) If not, to commit to publishing criteria within a specified timeframe.

On 4 May 2021, the Attorney General's Chambers sent an interim reply to the letter before action indicating that it opposed the proposed application for judicial review and seeking an extension of time to 18 May 2021 to enable it to respond and address the Applicant's request for information and documents. By letter dated 12 May 2021, the Applicant agreed to the requested extension for the response to 18 May 2021. In its reply dated 18 May 2021 the Attorney General's Chambers indicated that the issues raised in the letter before action were opposed in full, and referred to a letter from the Chief Officer dated 23 April 2019 which had set out the particulars to be provided to the Ministry of Health for a designation application to be submitted to Cabinet for consideration and confirmed that there were no other published criteria. The letter did not contain any commitment to a designation and/or review criteria.

65. On 18 June 2021, the Applicant responded to the Attorney General's Chambers and indicated that it would afford the Respondent a further seven days to commit to publishing criteria for granting and reviewing designations under s.24A(2) within a defined period. It made clear that if this was not received then an application for leave to apply for judicial review would be promptly filed. As no reply and no such commitment was received, on 16 July 2021 the Applicant filed its application for leave to apply for judicial review. It was clear from that pleading what decision was being challenged and that the applicant was seeking publication of designation and review criteria. The Applicant submits that the declarations would have been the "stepping stone" used to obtain the actual criteria.

66. Leave was granted on 26 July 2021. Three days later, on 29 July 2021, the Attorney General's Chambers wrote to the Applicant indicating that the matter was being accorded *"urgent attention"*

by the Ministry and that the Ministry was in the process of preparing draft criteria with a view to placing such criteria before Cabinet for its consideration and approval.

67. The Notice of Motion was filed on 6 August 2021, maintaining the relief sought. On 29 September 2021 the Applicant wrote to the Attorney General's Chambers indicating that the content of the 29 July 2021 letter did not come close to offering the required relief as it offered:

(i) No assurance that Cabinet accepted that it must promulgate criteria;

(ii) No assurance that Cabinet accepted that the purpose of the criteria was to ensure that designated institutions would adequately supervise institutionally registered practitioners who they employ; and

(iii) No date for deadline for its decision. In the letter the Applicant explained how it felt the claim could be satisfactorily compromised.

It is stated that the Cabinet would need to:

(i) Accept (by way of undertaking or agreed declaration) that it has an obligation to formulate criteria for the registration and periodic review of institutions as places at which institutionally registered practitioners may be employed, for the purpose of ensuring that those institutions will adequately supervise institutionally registered practitioners who they employ; and

(ii) Commit to a timeframe for the promulgation of the criteria.

68. On 5 November 2021, as directed, the Respondent filed its Points of Objection. In that document the Respondent admitted that it may be desirable to formulate criteria for designating an institution and a criteria for reviewing such designations, but stated that it wasn't under a legal duty to do so.

The document did not contain an explanation as to why the criteria had not been produced or when it might be produced.

69. On 13 December 2021, as directed, the Respondent filed its Statement of Opposition. I note that this was approximately five months after the letter in which it had been indicated that the Ministry was according urgent attention to the matter and the draft criteria was being prepared to be placed before Cabinet. In that document similar wording was used as set out in paragraph 68 above and, again, it contained no explanation as to why the criteria had not been produced or when it might be produced.

70. On 30 March 2022 the Applicant filed its Skeleton Argument in which it had to deal with all of the issues in the Cause. The Applicant contends that the chronology shows why it had to continue to press the first part of the claim between July 2021 and 6 April 2022. The Applicant submitted that the *"Respondent sat back and allowed the Applicant to incur the costs"* in relation to the issue related to those two parts of the Cause[21]. The Applicant added that the second part of the claim in Cause No. G 150 of 2021[22], which remained unresolved until the afternoon of the second day of the hearing, had to be dealt with in a Supplementary Skeleton Argument and preparation was required for a contested determination of the issue at the hearing at which lengthy oral submissions were made.

71. With this chronology in mind, the Applicant highlighted that the law in relation to costs in compromised cases had changed since ***R (Boxall) v Waltham Forest LBC*** (2001) 4 CCL Rep 258 and that it no longer required the party seeking costs to persuade the Court that it would have won at trial and that the default position was no longer no order for costs.

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[21] Declaration 1 and 3 in the Notice of Motion.
[22] Decalration2 in the Notice of Motion.

72. In ***Bahta and Others, T (on the application of) v Secretary of State for the Home Department and Others*** [2011] EWCA Civ 895, Lord Justice Pill indicated that the appeal raised a question of general application that applied across the judicial review public law jurisdiction. He acknowledged that Public authorities on occasion grant the relief sought by the claimant, or other substantial relief, at some stage in the proceedings by which time substantial costs may have been incurred. When considering the approach to be taken when dealing with cost applications in such circumstances, he stated at paragraphs 58 and 59:

> *"58. In my judgment, it is the date at which the application for costs is determined that is the relevant date for assessment. However, a consideration of what order should be made requires consideration of the whole sequence of events and the conduct of the parties throughout. That includes the conduct of the parties after the defendant has told the claimant that relief is being offered and what the relief is.*
>
> *59. What is not acceptable is a state of mind in which the issues are not addressed by a defendant once an adequately formulated letter of claim is received by the defendant. In the absence of an adequate response, a claimant is entitled to proceed to institute proceedings. If the claimant then obtains the relief sought, or substantially similar relief, the claimant can expect to be awarded costs against the defendant. Inherent in that approach, is the need for a defendant to follow the Practice Direction (Pre-Action Conduct) or any relevant Pre-Action Protocol, an aspect of the conduct of the parties specifically identified in CPR r.44.3(5)."*

The Applicant's case is that the chronology is relevant when considering the conduct of the parties since, as an adequate response was not given when the Respondent was notified of the claim, proceedings had to be instigated and that the concessions made, although not in the form of the relief pleaded, could be viewed as being substantially similar because they provided the Applicant with the conclusion that the declarations sought were designed to achieve.

73. At paragraph 64 in ***Bahta and Others***, Lord Justice Pill held that if a defendant wanted to compromise on the no costs basis pursuant to the principles set out in ***R (Boxall) v Waltham Forest LBC*** that should occur at the pre-action stage of the proceedings. The Applicant submits that it sought a commitment to designation criteria within a specified period pre-action and that if such a commitment had been received at that stage then the matter would have settled on a no costs basis. The Applicant states that the indication given on 29 July 2021 (after leave to apply for judicial review been granted) was that the Ministry of Health was in the process of preparing draft criteria with a view to be placing it for Cabinet (but not specifying any timeframe)and that it was insufficient and only a partial compromise which was not followed up with any meaningful communications until shortly before the hearing in April 2022. The Applicant contends that in such circumstances it was entitled and compelled to incur costs which it should be able to recover.

74. ***Bahta and Others*** meant that a party could argue that any degree of success would entitle them to their full costs. However, the Court of Appeal in ***R(M) v Croydon*** took a slightly different and less rigid position, as it provided that where an applicant wins on some points and not on others, there is room for a different order as to costs. It established that the Court will need to look at the conduct of the parties, and in particular compliance with the pre-action protocol. If an applicant succeeds in part only, or on a different basis from that advanced, a different order as to costs may be ordered. The Court will need to look at the degree of success, and conduct, in order to decide where costs should lie. As already mentioned, the Applicant in the matter for me contends that although it was not resolved by means of declarations, the outcome meant that in reality it got all of the relief that it was seeking.

75. At paragraph 60 In ***R (M) v Croydon***, Lord Neuberger MR drew a distinction between three categories of case, namely:

(i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement; and

(ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement; and

(iii) a case where there has been some compromise which does not actually reflect the claimant's claims.

76. At paragraphs 61-63, Lord Neuberger MR went on to give guidance in relation to each of the above categories. At paragraph 61 he stated that in relation to category (i), it was hard to see why the claimant should not recover all his costs, unless there was some good reason to the contrary. He said that whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant could, at least absent special circumstances, say that he has been vindicated, and as the successful party that he should recover his costs. He stated that in the latter case the defendants could no doubt say that they were realistic in settling and should not be penalised in costs, and he added:

> *"But the answer to that point is that the defendants should on that basis have settled before the proceedings were issued: that is one of the main points of the pre-action protocols."*

77. At paragraph 62, Lord Neuberger MR stated in relation to category (ii) that, when deciding how to allocate liability for costs after a trial, the Court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. He said that as there will have been a hearing, the Court will be in a reasonably good position to make findings on such questions. He added that where there has been a settlement, the Court will, at least normally, be in a significantly worse position to make

findings on such issues than where the case has been fought out. He commented that in many such cases the Court will be able to form a view as to the appropriate costs order based on such issues; in other cases it will be much more difficult. He went on to say:

> *"I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs...However, where there is not a clear winner, so much would depend on the particular facts. In some such cases it may help to consider who would have won if the matter had proceeded to trial as, if it is tolerably clear, it may for instance support or undermine the contention that one of the two claims was stronger than the other..."*

78. At paragraph 63, Lord Neuberger MR stated in relation to category (iii) that the Court is often unable to gauge whether there is a successful party in any respect and, if so, who it is. He said in such cases there was an even more powerful argument that the default position should be no order for costs. He commented that in some such cases it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. He added that if it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

79. The decision in ***R(M) v Croydon*** was followed in ***R (on the application of Tesfay) v Secretary of State for the Home Department*** [2016] 1 W.L.R 4853. In this case the claimants were asylum seekers whose removal to Italy or Malta had been ordered and who had made human rights claims that had been certified by the Home Secretary as clearly unfounded. The claimants then brought proceedings for judicial review in respect of the removal and certification decisions. Following the decision of the Supreme Court's decision in another case, the Home Secretary's certification decisions were withdrawn by consent. Each claimant then sought to recover their costs.

80. With this background, Lloyd Jones LJ found at paragraph 56 that the Judge below should have approached the matter by asking two questions. The first question being, was the effect of the withdrawal of the certification of the human rights claims such that the claimants should be regarded as having succeeded so that in accordance with the ***Bahta*** case and ***R(M) v Croydon*** case they should normally receive their costs? The second question being, if so, was there a good reason for making a different order? At paragraph 57, when he considered the first question, Lloyd Jones LJ highlighted that after a compromise in judicial review proceedings, unlike in a settlement of private law proceedings, there existed particular difficulties associated with determining success, as it was often difficult to identify with some precision the extent to which a party has been vindicated. Proceedings for judicial review are brought by persons dissatisfied with decisions of public bodies. He added that:

> *"The Courts are not the decision-makers and often in public law the most that can be achieved is an order that the decision-maker reconsider on a correct legal basis. That may not lead to ultimate victory for the claimant because the new decision may be a lawful decision against the interests of the claimant. Nevertheless, to achieve an order for reconsideration will often be a substantial achievement. Success in public law proceedings must be assessed not only by reference to what was sought and the basis on which it was sought and on which it was opposed, but also by reference to what was achievable."*

81. At paragraph 55, Lloyd Jones LJ accepted that the *"whole purpose"* of the ***R(M) v Croydon*** case was to avoid the need for the court to undertake an investigation into which party would have won had the matter gone to trial. In relation to the first question mentioned by Lloyd Jones LJ, the Applicant repeated that in the matter before me, unlike in ***Tesfay,*** a quashing order was not being sought. It added that the effect of the Respondent promulgating the designation criteria and conceding that there had to be a review at reasonable periods against the criteria is that it should be regarded as succeeding. The Applicant stated that if the declaration had been obtained at the hearing

then the outcome would have been the same, albeit delayed, because the Respondent would have been expected to publish criteria for designation review. It is submitted that the chronology shows that the Applicant needed to pursue the proceedings after leave could have been granted because the timing of the designation criteria shows that they would not have been produced other than in response to the claim and that the concession about the review criteria would not have been forthcoming without the claim being pursued. In relation to the second question mentioned by Lloyd Jones LJ, the Applicant stated that there was no good reason for making an order different to the one that the successful party should be awarded its costs.

82. The Respondent contends that if the matter gone to trial then they would have succeeded having regard to the Court's finding in relation to the application of ***R (Lumba) v Secretary of State for the Home Department*** [2012] 1 AC 245 and resultant refusal to make a declaration that the respondent is obliged to publish a statement of criteria pursuant to Ground 2 in Cause No. G 55 of 2021. The Applicant rightly highlights that the Notice of Motion in the present matter was based not only on ***Lumba,*** but also primarily on the Padfield principle, it being argued that the Cabinet must publish criteria to ensure the promotion of the statutory purpose of safeguarding public health. The Applicant rightly stated that the Court has made no findings about the effect of the Padfield point and that it is unclear who would have one on that issue. The Applicant submitted that to determine that point the Court would have to delve into the merits. That would not be appropriate as the above case law indicates that at costs hearings one should avoid investigating the merits.

83. In relation to Cause No. G 150 of 2021 the Respondent's primary position is that it should be awarded its costs in a case in which it has made clear that it did not accept that it was obliged to promulgate the criteria sought and has therefore not conceded the legal issue.

84. The Respondent contends that it should be awarded its costs. It submits that the chronology does not support the Applicant's contentions. It relies upon the content of the letter from the Applicant to the Attorney General's Chambers on 29 September 2021, in which the Applicant explained that the claim could be compromised if Cabinet were to accept by an undertaking or declaration an obligation to formulate criteria and to commit to a timeframe for the same. The Respondent says that it relied upon that indication and *"took the Applicant at its word"* that it was stating that anything short of that meant that the matter would go to trial. The Respondent stated that in such circumstances it consistently made clear that it would not settle the legal issues raised in the Cause as there was no legal obligation upon it formulate and/or publish such criteria. The Respondent stated that the fact that it belatedly made decisions which rendered the claims academic did not amount to concession of the pleaded claim.

85. However, The Respondent must have been aware from the letters of the Applicant dated 23 April 2021 and 18 June 2021 that what was being sought was the publishing of the criteria for granting and reviewing designations within a defined period and that the Applicant felt that declarations were the only possible avenue for doing that if it was not otherwise forthcoming within a reasonable time or at all. I accept that in July 2021 the Attorney General indicated that urgent attention was being given to the matter by the Ministry of Health. That said, the Respondent's approach thereafter was not consistent with there being any urgency and, until shortly before the hearing, uncertainty about whether it was actually being actioned at all. After the July 2021 letter, although clear indications were given that the relief pleaded would not be agreed to as there was no obligation on the Respondent, the Respondent failed to give any indication about whether the Ministry was progressing the criteria to Cabinet or how it was progressing it and it is understandable that the Applicant concluded that it was not going to be done within a reasonable timeframe or even at all.

If the Respondent had communicated with the Applicant and informed it how the criteria was progressing (if it actually was at all) in a timely fashion and that it agreed that there must be a review criteria, then arguably the Applicant would have had to carefully consider whether to stay the proceedings as it should then have ben unnecessary to come to court.

86. The Respondent submitted that judicial review should not be used for political pressure and that it is not about seeking something to be done (for instance having the criteria published) but that it is about obtaining relief. The obtaining of the practical objective that is sought is not the same as succeeding in judicial review. In relation to the three categories highlighted by Lord Neuberger MR in a ***R(M) v Croydon***, the Respondent contends in its oral submissions that Cause No. G 150 of 2021 fell into category (iii) as the compromise did not reflect the claim and the legal issues raised were not resolved one way or the other. It is submitted that, because of the belated decisions taken by the Respondent, the claim became academic and the Applicant did not receive any of the pleaded relief that it sought.

87. The Respondent indicates that, in such circumstances, the default position should ordinarily be no order for costs. However, it went on to say that, because of the reasoning given and approach taken by the Court in Cause No. G 55 of 2021 when refusing declaratory relief in relation to the promulgation of criteria, the Court could be confident that the claim in Cause No. G 150 of 2021 would similarly fail and, therefore, the Respondent should be awarded its costs. However, I do not accept that position because, as indicated above, the primary submission made in Cause No. G 150 of 2021 was different and it would not be appropriate for me to explore the merits of the application. The Respondent does say that, if the Court does not award Respondent its costs, it would not be appropriate to award costs against it and that the order should be that each party bear its own costs.

88. I have to consider how the outcome was achieved and whether the Applicant's claim has been vindicated to the extent that is should be regarded as being the successful party. The promulgation of the criteria for designation and review was the primary objective of the Applicant and was the reason why the proceedings were brought. The belated promulgation of the criteria and the indication that there must be review were as a consequence of the proceedings being issued, and despite the indication given by the Attorney General's Chambers on 29 July 2021, the evidence does not show that the matter was being progressed urgently or even at all. I am satisfied that there is a sufficient causal relationship between the claim brought by the Applicant and the outcome achieved and that outcome resulted from claim. In such circumstances, I am satisfied that the Applicant may be viewed as being the successful party in relation to Cause No. G 150 of 2021 and accordingly, I order that the Respondent should pay the Applicant's costs on the standard basis, to be taxed if not agreed.

Costs in Cause No. G 55 of 2021

89. The Respondent contends that, subject to any ruling only in this judgement concerning the declarations now sought, the Applicant has not obtained any of the contested relief claimed in the Notice of Motion that on this basis the claim failed. It is claimed that in such circumstances the Respondent should be awarded its costs.

90. The Applicant concedes that it was not successful in every point raised in this cause, but argues that overall it was the successful party. It rightly points out that it won on the three preliminary issues raised in the Respondent's argument which occupied time in preparation for and at the hearing. The Court found that the claim was not academic, that the Applicant had standing and that the Applicant had not delayed in issuing the claim.

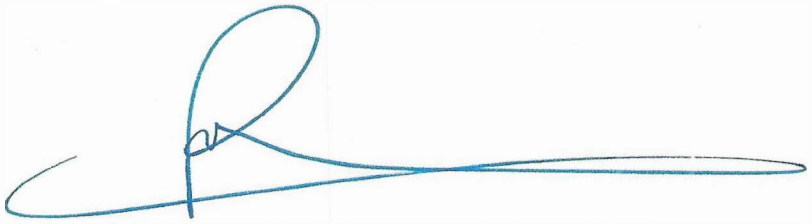
91. In the judgment, apart from successfully arguing the preliminary issues, the Applicant was only successful in obtaining the non-fettering declaration which the parties both agreed. On balance, due to the limited relief obtained, the scales were balanced in favour of the Respondent. However, following the making of the additional declaration at the relief hearing which arose out of the Court's findings in the substantive hearing, coupled with my above observations about the preliminary issues, both parties had a similar degree of success/lack of success in the proceedings relating to this Cause. Although, I have carefully considered each parties submissions concerning a proportionate division of costs in each's favour, having regard to the outcome of the claims made, I am not satisfied that this is a case in which the Court should be granting either party a percentage of its costs order. Accordingly, I am still satisfied that there should be no order for costs in relation to Cause No. G 55 of 2021.

Costs of the relief and costs hearing in relation to both Causes

92. Right at the end of the hearing the Applicant indicated that, as costs of the relief/costs hearing depended on the outcome of this Judgment, there may be a need to file further submissions or for a further hearing. With that in mind, I do not intend to rule on that today but to give a preliminary view.

93. I am aware that Respondent made an open offer to resolve the costs issue on a no order for costs basis. The Applicant did not accept this. That is the order that I ended up making in relation to Cause No. G 55 of 2021, but is not the order that I made in Cause No. G 150 of 2021. My preliminary view is that neither party had been globally successful in their arguments for costs and that my provisional view would be to make no order for costs relating to the costs hearing. However, if either party wishes to be heard on costs they should communicate that to the Court within 14 days of receiving this Judgment.

94. In relation to the relief part of this hearing, my provisional view again is that that the Applicant has only been partly successful and argued some unsuccessful points that I would be minded to make no order for costs. However, if either party wishes to be heard on costs they should communicate that to the Court within 14 days of receiving this Judgment.



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The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT