

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 150OF 2021

BETWEEN

THE QUEEN
On the application of
CTMH HOLDINGS LIMITED



Plaintiff

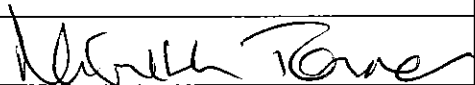
AND

THE GOVERNMENT OF THE CAYMAN ISLANDS

Respondent

APPLICATION FOR LEAVE TO CLAIM JUDICIAL REVIEW
pursuant to Order 53, rule 3

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of Applicant	THE QUEEN On the application of CTMH HOLDINGS LIMITED
Judgment, order, decision or other proceeding in respect of which relief is sought:	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. The grounds on which those omissions are impugned are set below.
Relief sought:	The Applicant seeks: (1) Leave to claim judicial review; (2) Declarations that the Respondent is obliged to:

	<p>(a) formulate criteria for designating an institution as a place at which institutionally registered practitioners may be employed,</p> <p>(b) formulate criteria for reviewing such designation and</p> <p>(c) publish a transparent statement of those criteria.</p> <p>(3) Such further relief as may be needed to give effect to the Court's judgment.</p> <p>(4) Costs.</p>
Name and address of Applicant's attorney	<p>McGrath Tonner PO Box 446 5th Floor, Genesis Building Genesis Close Grand Cayman Cayman Islands KY 1-1107</p>
Signed: 	Dated: 16 July 2021

GROUND S ON WHICH RELIEF IS SOUGHT

A. INTRODUCTION AND SUMMARY OF APPLICATION

1. The Plaintiff applies for leave to apply for judicial review pursuant to Order 53, rule 3 of the Grand Court Rules (1995 Revision). Leave should be granted because the claim is plainly arguable and the Plaintiff has sufficient interest to advance it.
2. This application also raises an issue of general importance. The Health Practice Act (2021 Revision) permits "institutionally registered" medical practitioners to practise in the Cayman Islands, notwithstanding that they may be less qualified and less experienced than fully registered medical practitioners. The Plaintiff accepts that the Legislature was entitled to introduce this second tier of registration, whereby less qualified and less experienced practitioners would be permitted to practise at specially designated institutions. However, in doing so, the Legislature must have intended that these practitioners would be adequately supervised by those designated institutions

3. The Plaintiff's central submission is that the law requires the Government of the Cayman Islands ("CIG") to formulate and apply criteria for designating and supervising the health facilities at which "institutionally registered" practitioners may practise, so that the public can be assured that these health facilities adequately supervise the less qualified and less experienced practitioners who may practise there. In the absence of such criteria, Cabinet's power to designate a facility (as one that can hire institutionally registered practitioners) is liable to be exercised arbitrarily and in a way that fails to promote the legislative purpose.

4. A pre-action protocol letter was sent to the Respondent on 23 April 2021, which asked it to "identify whether there are any criteria for granting and reviewing designations under s.24A(2)" of the Health Practice Act (2021 Revision) and, if not, to "confirm CIG commit to publishing criteria within a specified timeframe". The Attorney General's Office replied on 18 May 2021, admitting that:
 - (1) there are no criteria, published or otherwise, for granting and reviewing designations under s.24A(2) of the Health Practice Act (2021 Revision),
 - (2) CIG is unaware of the reasons why the only facilities designated to date (Health City, the Health Services Authority and Total Health Ltd) were granted designations, and
 - (3) there are no arrangements for supervising the ongoing suitability of those facilities as places at which institutionally registered practitioners may practise.

5. By letter dated 18 June 2021, the Plaintiff offered CIG one final opportunity to commit to publishing criteria for granting and reviewing authorisations, by no later than 25 June 2021, failing which the Plaintiff would apply for leave to apply for judicial review. No reply to that letter has been received.

6. The statutory scheme for institutional designation was introduced in 2011, as one of the inducements offered by CIG to Narayana Hrudayalaya Private Limited, which owns and operates Health City, pursuant to a contract dated 7 April 2010. The scheme has recently come under renewed focus because, on 21 December 2020, CIG entered into a contract with Aster Caribbean Holdings Ltd, which included a commitment by CIG to use its best endeavours to secure the designation of the proposed Aster Cayman Medcity hospital ("ACMH") as a place at which institutionally registered practitioners could practise. ACMH has since obtained the planning permission it sought, and construction of this hospital is underway.

7. For the avoidance of doubt, the Plaintiff does not seek the quashing of the designations already granted to Health City, the Health Services Authority and TotalHealth Ltd. However, through the declaratory relief sought, the Plaintiff seeks to ensure *inter alia* that such designations are henceforth subject to review pursuant to transparent criteria which give effect to the statutory purpose and that any future applications for designation are determined pursuant to such transparent criteria. There is, accordingly, no limitation issue: the Plaintiff only seeks to challenge CIG's failure to publish criteria for the grant and supervision of institutional designation from now onwards.
8. The Court will note that, on 15 April 2021, the Plaintiff was granted leave to apply for judicial review of CIG's failure:

- (1) lawfully to exercise its powers to waive (or refuse to waive) customs duty, work permit fees and stamp duty in relation to Health City and Aster Medcity, and
- (2) to publish a transparent statement of the criteria to be applied when determining applications for the waiver of customs duty, work permit fees and stamp duty (Cause no.55 of 2021).

Assuming that the present application for leave to apply for judicial is granted, the Plaintiff submits that it would be convenient for this claim to be linked to Cause no.55 of 2021. This is because (i) the claims concern the same parties and (ii) there is a significant overlap in the legal issues (*viz.* the legal requirement that the Executive must publish a transparent statement of criteria to be applied when exercising its broad statutory powers). By its letter dated 18 May 2021, the Attorney General's Office stated: "*We confirm that we agree (should your client issue an application in relation to the matters raised in your PAP letter), that it would be optimal for the proposed application for leave to be determined, in the usual way, and if leave is granted, then, for the substantive application to be determined together with Cause No.55 of 2021. This approach should achieve synergies in terms of resources, optimise efficiency and procedural economy, and avoid duplication of Court time. It will of course be a matter for the Grand Court to decide if/whether the two sets of proceedings (which do not arise out of the same grounds of action) should be allowed to 'travel' together*".

9. This document is structured as follows:

- 9.1. Section B – the statutory framework.

9.2. Section C – the need for criteria to give effect to the statutory purpose and avoid the arbitrary exercise of discretion.

9.3. Section D – grounds of challenge.

9.4. Section E – directions and relief sought.

B. THE STATUTORY FRAMEWORK

B.1 Full registration of medical practitioners

10. Section 24 of the Health Practice Act (2021 Revision) provides for the full registration of health professionals. It provides:

"(1) Subject to this Act, a person who satisfies the conditions mentioned in subsection (2) shall be registered by the relevant Council as a fully registered practitioner in the principal list under section 23.

(2) The conditions are that the application is made in the prescribed form and manner and that the applicant —

(a) satisfies the Council that that applicant is of good character;

(b) has the necessary knowledge of English;

(c) has a relevant qualification recognised by the Council;

(d) satisfies the requirements of the Council as to experience;

(e) satisfies the Council that that person's registration would be in the public interest; and

(f) has paid the prescribed fees.

(3) [Repealed]

(4) In cases of emergency, the chairperson of a Council, or in that chairperson's absence the deputy chairperson, may approve the registration of an applicant for a period not exceeding ninety days."

11. The requirements for educational qualifications and experience for full registration are prescribed by regulation 5 of the Health Practice Regulations (2021 Revision) as follows:

“(1) An applicant shall be eligible for full registration where —

(a) the applicant is fully registered as a health practitioner in —

(i) Australia;

(ii) Canada;

(iii) Jamaica;

(iv) New Zealand;

(v) South Africa;

(vi) the United Kingdom; or

(vii) the United States of America;

(b) the applicant has met the Caribbean regional registration requirements, to practise as a health practitioner, as set out by any relevant organisation including, but not limited to, the Caribbean Association of Medical Councils or the Regional Nursing Body;

(c) the applicant has obtained qualifications from —

(i) the University of the West Indies; or

(ii) any institution accredited by the Caribbean Health Education Accreditation Board; and has completed any internship required by the University or the institution where the applicant has obtained such qualifications; or

(d) the applicant provides evidence that such applicant is eligible for full registration in any of the countries listed in paragraph (a).

(2) Where a registered practitioner applies for renewal of the registered practitioner’s practising licence the Council with which that person is registered shall, in considering such application, first be satisfied that the applicant has obtained any or all of the continuing educational requirements specified by the Council for the practitioner’s type of profession during the period in which the practitioner was registered with the Council.

(3) A person who applies for registration as a specialist medical doctor shall provide written evidence that that person has obtained the necessary post graduate qualifications and completed at least three years’ specialist training in posts recognised for such training by the Medical and Dental Council.

(4) A person who applies to be registered as a general practitioner shall provide written evidence that that person has worked as a medical doctor under supervision for a period of two years or more in a variety of medical disciplines and at least a minimum period of three months in —

(a) internal medicine;

(b) paediatrics;

(c) obstetrics and gynaecology; and

(d) accident and emergency,

and that that person has also worked in the general practice of medicine for a period of one year or more under the supervision of a general practitioner approved by the Council.

(5) The Cabinet may, on the recommendation of the Medical and Dental Council and in circumstances in which the Cabinet considers it practicable to do so, exempt any specialist medical practitioner from the requirements of this regulation.”

12. Thus, the following safeguards apply to the full registration of medical practitioners:

12.1. First, the practitioner must be registered or eligible for registration in a particular jurisdiction or have obtained relevant Caribbean qualifications and an internship. This guarantees that the practitioner satisfies a minimum regulatory standard.

12.2. Second, for certain posts, the practitioner must demonstrate particular experience, unless the Medical and Dental Council specifically recommends that it is appropriate to make an exception for that particular practitioner. For example, a person who applies for registration as a specialist medical doctor must provide written evidence that he or she has obtained the necessary post graduate qualifications and completed at least three years' specialist training in posts recognised for such training by the Medical and Dental Council.

B.2 Institutional registration of medical practitioners

13. Section 24A of the Health Practice Act (2021 Revision) permits health professionals to practise in the Cayman Islands even if they are not fully registered, by obtaining “institutional registration”.

14. Section 24A provides:

“(1) Subject to this Act, a person who satisfies the relevant Council of the matters specified in section 24(2) may apply to be institutionally registered under this section, and that person shall be registered by the Council as a registered practitioner in the institutional registration list.

(2) The Cabinet may by Order published in the Gazette designate a health care facility as a facility at which persons institutionally registered under this section may be employed, whether or not together with any other registered practitioners.

(3) A person institutionally registered under this section may practise at the health care facility specified in the person’s application (being a facility designated under subsection (2)) but not otherwise.

(4) Registration under this section shall be for an initial period of two years and may be renewed for consecutive periods not exceeding two years in any period.

(4A) A registered practitioner on the institutional registration list who wishes to renew that registered practitioner’s registration shall apply for the renewal not less than sixty days prior to the expiration of the registration.

(5) In cases of emergency, the chairperson of a Council may approve the registration of an applicant for a period not exceeding ninety days.”

15. The educational requirements are prescribed by regulation 5A of the Health Practice Regulations (2021 Revision) as follows:

“An applicant shall be eligible for institutional registration and licensure where —

(a) the applicant is fully registered as a health practitioner in a country other than —

(i) Australia;

(ii) Canada;

(iii) Jamaica;

(iv) New Zealand;

(v) South Africa;

(vi) the United Kingdom; or

(vii) the United States of America; and

(b) the applicant has —

(i) obtained qualifications from an institution approved by a relevant Council in accordance with guidelines approved by the Cabinet and published by the Council in the Gazette; or

(ii) passed an equivalency examination approved by a relevant Council.”

16. So far as the Plaintiff is aware, no equivalency examination has yet been approved by the Medical and Dental Council for medical practitioners for the purposes of regulation 5A(b)(ii).

17. For the purposes of regulation 5A(b)(i), Guidelines for Institutional Registration were gazetted by Cabinet on 12 June 2013. They provide:

“Medical and Dental Council

An applicant shall possess any one or more of the following qualifications:

1) *Qualifications obtained upon graduation from one of the medical or dental schools, as the case may be, listed in the Avicenna Directory.*

2) *Qualifications obtained upon completion of a programme that in the opinion of the Council, acting reasonably, is equivalent to the minimum standards required by the Caribbean Association of Medical Councils (CAMC).*

3) *Qualifications obtained upon graduation from a school/college/university recognized by the Medical Council of India or the Dental Council of India for the purpose of registration in India as a medical practitioner or dentist, as the case may be.”*

18. The Avicenna Directory, now the World Directory of Medical Schools (the “WDMS”), includes hundreds of medical schools from Afghanistan through to Zimbabwe, which are subject to widely varying regulatory standards.

19. The Medical and Dental Council has, in the past, issued a disclaimer, stating that, whilst it is under an obligation to follow the Guidelines for Institutional Registration:

“The said Guidelines are not consistent with the mandate of the MDC and, without prejudice to the generality of the foregoing, the Guidelines in their present form effectively compromise the MDC’s statutory obligation to exercise due diligence in its investigation of each applicant’s qualifications and credentials”.

20. Institutional registration was introduced by an amendment to the (then) Health Practice Law in 2011. It was introduced pursuant to clause 2.11 of CIG’s contract with Narayana Hrudayalaya Private Limited, by which CIG undertook “to move for and use its best endeavours to pass, amend or issue” legislation to ensure the recognition of Indian medical qualifications in the Cayman Islands. It appears that the purpose of this arrangement was to reduce Health City’s costs, by enabling it to employ medical practitioners who did not satisfy the standards of s.24 of the Health Practice Act (2021 Revision).

21. There is a clear gap between the regulatory standards for full registration and institutional registration, as follows:

21.1. First, as explained by Dr Sidney Ebanks in his First Affidavit sworn on 16 July 2021, whereas those who are fully registered have had to satisfy the high quality regulatory standards and qualified from one of seven particular (developed and high-income) jurisdictions, a practitioner would satisfy the criteria for inclusion on the institutional list merely by having qualified at a medical school listed in the WDMS. As the authors of the WDMS themselves state, the inclusion of a school in the WDMS is not an indicator of quality – it merely records that the school offers a programme of instruction leading to a basic medical qualification.

- 21.2. Second, whereas specialist doctors who are fully registered must have demonstrated particular experience, there is no requirement for those on the institutional list to have any particular experience at all¹.

B.3 The designation of institutions at which those on the institutional list may practise

22. As set out above, section 24A(2) of the Health Practice Act (2021 Revision) provides that:

“The Cabinet may by Order published in the Gazette designate a health care facility as a facility at which persons institutionally registered under this section may be employed, whether or not together with any other registered practitioners.”

23. Thus, a specific decision must be taken as to the appropriateness of an institution as a place at which institutionally registered practitioners (who, as set out above, may not have been registered in a jurisdiction with high quality regulatory standards and may lack any relevant experience) may practise.

24. The Plaintiff submits that the following conclusions can be drawn about the statutory framework:

24.1. First, by introducing institutional registration, whilst retaining the criteria for full registration, the Legislature did not intend to lower regulatory standards and thereby expose the public to the risks of lower quality medical treatment.

24.2. Second, the Legislature must have intended that regulatory standards would be maintained through appropriate recruitment and supervision of institutionally registered practitioners by the institutions designated to employ them.

24.3. Third, by requiring the Cabinet to make decisions about whether to designate an institution as a place authorised to employ institutionally registered practitioners

¹ Section 27 of the Law provides that “Each of the Councils may approve any registered practitioner as a specialist if the Council is satisfied that the practitioner meets the requirements to be a specialist in accordance with rules provided under section 28(2)(j)”. Section 28(2)(j) simply provides cabinet with the power to make regulations regarding “the rules or tests of competence by which a Council shall determine whether a practitioner may be registered as a specialist”. So far as the Applicant is aware, no such regulations exist.

(rather than permitting institutionally registered practitioners to practise at any health facility in the Cayman Islands), the Legislature must have intended the Cabinet to scrutinise the suitability of a particular institution for that purpose.

C. THE NEED FOR CRITERIA TO GIVE EFFECT TO THE STATUTORY PURPOSE AND AVOID THE ARBITRARY EXERCISE OF DISCRETION

25. Section 24A(2) of the Health Practice Act (2021 Revision) does not identify the criteria which the Cabinet must apply when determining whether an institution should be designated as a place which should be authorised to employ and supervise institutionally registered practitioners.

26. However, the Cabinet must publish and employ criteria so as to ensure (1) the promotion of the statutory purpose of safeguarding public health, and (2) the consistent treatment of medical facilities.

27. The first proposition follows from the *Padfield* principle. As Sir Terence Etherton MR put it in *R (BritCits) v Secretary of State for the Home Department* [2017] 1 WLR 3345, para.63: “*The principle is that a discretion conferred by statute on a minister must be exercised so as to promote and not to defeat the object of the legislation in question. It is for the court to interpret the legislation in order to identify the policy and objects of the legislation in question*”.

28. The Plaintiff submits that, in order to promote the statutory purpose of ensuring that institutionally registered practitioners (who *ex hypothesi* may not have been registered in a jurisdiction with high quality regulatory standards and may lack any relevant experience) are properly supervised, the Cabinet must formulate criteria against which to judge the fitness of proposed designated institutions to supervise institutionally registered practitioners.

29. The second proposition follows from the duty of rationality and consistency.

30. Section 19(1) of the Constitution, which requires that all decisions and acts of public officials “*must be lawful, rational, proportionate and procedurally fair*”.

31. It is a “*general axiom of rational behaviour*” that like cases should be treated alike and unlike cases should be treated differently (*Matadeen v Pointu* [1999] 1 AC 98, 109, Privy Council).

32. To achieve consistency and avoid arbitrariness, “[t]he rule of law calls for a transparent statement by the executive of the circumstances in which the broad statutory criteria will be exercised” (*R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, para.34, per Lord Dyson).

33. As the Privy Council held in *De Freitas v Ministry of Agriculture* [1999] 1 AC 69, when determining whether a restriction on the political activities of civil servants was in accordance with the constitution of Antigua and Barbuda:

“One principle which has to be observed here is that of legal certainty. This was succinctly expressed by the European Commission on Human Rights in G v Federal Republic of Germany, 6 March 1989, Application No. 13079/87, 60 D & R 256, 261, where it was stated that ‘legal provisions which interfere with individual rights must be ...formulated with sufficient precision to enable the citizen to regulate his conduct’ ...where the line is to be drawn cannot in fairness be left to the hazard of individual decision” (78E-H, per Lord Clyde).

34. Absent published criteria, an institution will be unable to determine what criteria it must satisfy in order to become a designated institution and members of the public will lack the assurance that institutionally registered practitioners who practise at a hospital at which they propose to obtain treatment are adequately supervised. This is detrimental to the ability of businesses to plan their affairs and detrimental to public confidence in the healthcare system of the Cayman Islands.

D. GROUNDS OF CHALLENGE

35. The Plaintiff submits that CIG’s failure to formulate and apply criteria for designating and supervising the health facilities at which “institutionally registered” practitioners may practise is unlawful, in that it breaches the implied obligation under section 24A(2) of the Health Practice Act (2021 Revision) to formulate and apply such criteria, it fails to promote the statutory purpose of safeguarding public health and/or gives rise to an unacceptable risk of arbitrary and inconsistent decision-making.

E. RELIEF SOUGHT

36. At this stage, the Plaintiff only seeks leave to apply for judicial review. No interim relief is sought.

37. If leave is granted, the Plaintiff asks that the claim be joined to Cause No.55 of 2021.

38. If the claim for judicial review is granted, the Plaintiff will seek declaratory relief to the effect that the Respondent is obliged to publish a transparent statement of the criteria it will apply when determining applications for designation under section 24A(2) of the Health Practice Act (2021 Revision) and when supervising the ongoing suitability of facilities as designated institutions, to include criteria that requires designated institutions to ensure that institutionally registered practitioners they employ meet certain standards as to training, experience and qualifications.

39. The Plaintiff will also seek:

39.1. Such further relief as may be needed to give effect to the Court's judgment.

39.2. Costs.

F. CONCLUSION

40. For the reasons set out above, the Plaintiff seeks leave to apply for judicial review.