Court Of Appeal

Judges

THE HON. CHIEF JUSTICE SILVIO CAMILLERI
THE HON. MR. JUSTICE GIANNINO CARUANA DEMAJO
THE HON. MR JUSTICE TONIO MALLIA

Sitting of Friday 2nd March 2018

Number: 1

Application Number: 740/11 JRM

Isabella Zananian Desira

v.

Kunsill Mediku

The Court:

Having seen the sworn application filed by plaintiff on the 2nd August 2011, which reads as follows:

> "1. Illi d-Dottoressa rikorrenti mara hija ta' nazzjonalita1 Georgana b'serje ta' kwalifiki u diplomi fosthom, *Diploma with Honours – Specializing in Biology Shota Rustaveli State University* fil-Georgie (1994); *Diploma with Honours – Specializing in Medical Biology* mill-*Batumi Medical Ecological Institution* fil-Georgis (2000) u Diploma of Candidate of Science mill-Beritashvili Institute of Physiology fil-Georgia (2006) li wasslet ghal kwalifika ta' PHD;
>
> "2. Illi skont ittra datata 28 ta' Frar 2008, id-Dottoressa Rikorrenti rceviet konferma, wara applikazzjoni taghha fil-11 ta' Frar 2008, minghand ic-Centru Malti ghal Rikonoxximent ta' Kwalifiki u ta' Informazzjoni li d-diplomi taghha

gew rikonoxxuti bhala 'Master of Arts' u ta' Ph.D. ghalhekk permezz ta' dan pajjizna irrikonoxximent ai fini u effetti kollha tal-ligi l-kwalifiki tal-esponenti;
"3. Illi r-Rikorrenti, fit-tlieta (3) ta' Dicembru tal-elfejn u ghaxra (2010), pprezentat talba ghal registrazzjoni taghha fir-registru appositu tal-Kunsill Mediku Intimat flimkien ma' dokument relativi ghal dan il-ghan;

"4. Illi permezz ta' ittra datata sebgha (7) ta' Jannar elfejn u hdax (2011), il-Kunsill Mediku Intimat talab li jinghata "*evidence of her training as a Medical Doctor, with the relevant curriculum and her achievements from the issuing University Medical School*". Ir-Rikorrenti hekk ghamlet u ppresentat kull dokument mitlub mill-Kunsill Intimat u dan permezz ta' ittra datata ghoxrin (20) ta' Jannar elfejn u hdax (2011);

"5. Illi permezz ta' decizjoni datata tlieta (3) ta' Frar elfejn u hdax (2011) u rcevuta fit-tmienja (8) ta' Frar elfejn u hdax (2011), il-Kunsill Intimat cahad it-talba ghal registrazzjoni tad-Dottoressa Rikorrenti sabiex l-istess Rikorrenti tkun tista' tinkiteb fir-registru appozitu;

"6. Illi permezz ta' din id-decizjoni l-Kunsill Intimat stqarr li '*she is being requested to sit for and successfully pass the Medical Council examination for Medical Practitioners*', u dan, dejjem skond l-istess Kunsill Mediku, '*in line with standard policy, since Dr Zananian Desira has graduated with a Non-EU first degree*';

"7. Illi l-Kunsill Mediku Intimat, kien iddikjara u konceda li '*The Medical Counsil has viewed Dr Zananian Desira's course curriculum and has accepted this as equivalent to a Doctorate in Medicine*', izda, ciononostante, l-intimat kkwota l-*standard policy* tieghu li biha iggustifika l-fatt li r-Rikorrenti ghandha tipprovcedi '*to sit for and successfully pass the Medical Council examination for Medical Practitioners*';

"8. Illi dan l-*standard policy*, m'ghandu ebda fundament guridiku u anzi, hija fondata fuq il-bazi diskriminatorja fil-konfront tal-appellanta ghaliex hija gradwat b'*Non-EU first degree*';

"9. Illi r-rikorrenti intavolat appell minn din id-decizjoni tal-Kunsill Mediku fejn qalet li d-decizjoni jew att amministrattiv mehud mill-Kunsill hija manifestament ingusta u diskriminatorja u kontra l-ligi. B'decizjoni datata tnejn u ghoxrin (22) ta' Gunju elfejn u hdax (2011), dan l-appell gie michud mill-Kumitata tal-Appelli u id-decizjoni tal-Kunsill Mediku gie ikkonfermat mill-istess Kumitata tal-Appelli;

"10. Illi r-rikorrenti tirrileva li skond l-Artikolu 11(1)(c) tal-Kap 464 tal-Ligijiet ta' Malta,

> "Il-Kunsill Mediku ghandu jzomm registru, f'dan l-Att, msejjah "ir-Registru Mediku", li fih, wara li ssir applikazzjoni ghaldaqstant mill-persuna involuta, ghandu jitnizzel l-isem ta' kull cittadin ta' Malta, jew ta' Stat Membru jew ta' persuna li tibbenifika mid-disposizzjonijiet tal-Artikolu 11 tar-Regolament 1612/68 KEE jew ta' persuna li tkun [giet stabbilita fi Stat Membru, li jkollu –

"*(c) kwalifika rikonoxxuta ghal dak il-ghan minn xi Stat Membru, miksuba minn Kullegg Universitarju, jew Skola Medika:*

"*Izda ghar-rigward ta' applikanti gejjin minn pajjizi terzi, li l-kwalifiki taghhom ma jkunux gew rikonoxxuti fi Stat Membru, il-Kunsill Mediku jista', ghar-rigward ta' dawk il-kwalifiki, jehtieg lill-applikant jaghmel u jghaddi minn ezami ta' proficjenza professjonali u lingwistika, u jista' wkoll jehtieglu jservi bhala tabib u, jew kirurgu ta' istituzzjoni fi sptar rikonoxxut ghal dak il-ghan mill-Kunsill Mediku, ghal dak il-perjodu, li ma ghandux ikun izjed minn sentejn, li l-Ministru jista' jippreskrivi, u d-disposizzjonijiet ta' l-artikolu 7(3) u (4) ghandhom jghoddu ghal persuna mehtiega bis-sahha ta' dan il-proviso biex isservi bhala tabib jew kirurgu bhallikieku dik il-persuna kienet il-persuna msemmija f'dawk is-subartikoli".*

"11. Illi in vista ta' dan l-Artikolu, l-Kunsill ma kellux triq ohra ghajr dik li jaccetta r-registrazzjoni tar-Rikorrenti stante li l-kwalifiki taghha kienu gja' gew rikonoxxuti u b'hekk li *proviso* appena citat ma setax jigi fis-sehh. Il-Bord tal-Appell kellu jirrettifika dan pero` ghazel li jimxi mad-decizjoni errata tal-Kunsill Intimat. Il-Kunsill hawnhekk ma kellu xejn x'jinterpreta, kellu japplika l-ligi; liema ligi ma gietx applikata a skapitu tad-Dottoressa Rikorrenti;

"12. Illi ghandu jinghad li l-Kunsill Mediku accetta bhala fatt li r-Rikorrenti ghandha kwalifiki ekwivalenti ghal dottorat fil-medicina u, skont il-ligi hawn fuq citata, ma hemmx htiega (stante li l-kwalifiki taghha gja` gew rikonoxxuti mic-Centru Malti ghal Rikonoxximent ta' Kwalifiki u ta' Informazzjoni), li hija tigi sottoposta ghal xi ezami ulterjuri. Il-Kunsill Mediku ghazel din it-triq izda l-esponenti hija tal-fehma li din id-decizjoni tezorbita mill-funzjonijiet tal-Kunsill Mediku u ghalhekk, apparti n-nuqqas tal-applikazzjoni tal-ligi, id-decizjoni hija fil-fatt *ultra vires*;

"13. Illi d-Dottoressa rikorrenti hita tal-fehma li sia d-decizjoni tal-Kunsill Mediku u sia d-decizjoni tal-Kumitat tal-Appelli huma, ukoll, it-tnejn anti-kostituzzjonali u jmorru kontra l-principji tal-amministrazzjoni tajba inkluzi l-principji ta' gustizzja naturali u b'hekk ghandhom jigu annullati u rrevokati;

"14. Illi, in oltre, sia d-decizjoni tal-Kunsill Mediku u sia d-decizjoni tal-Kumitat tal-Appelli huwa milquta minn interpretazzjoni hazina tal-ligi ghaliex ir-regolament numru tlieta (3) subregolament tnejn (2) tal-Avviz Legali mitejn u tmenin (280) tal-elfejn u sitta (2006), jipprovdi tassattivament, '*Ma ghandha ssir l-ebda diskriminazzjoni ghal xi raguni bhal sess, razza, kulur, dizabilita`, lingwa, religion, opinjoni politika jew ta' xort' ohra, origina etnika, nazzjonali jew socjali, appartenenza ghal minorita nazzjonali, proprjeta, twelid jew status iehor, kollha tal-applikant, jew abbazi ta' kull cirkostanza ohra mhux relatata mal-mertu tal-kwalifika li ghaliha jkun qed jintalab ir-rikonoxximent u l-hilijiet akkwiziti*".

"15. Illi jrid jinghad li r-Rikorrenti qieghedha ssofri danni kbar minhabba li l-agir tal-kunsill Mediku u d-decizjonijiet, kontra l-ligi, li saru kontriha. Id-dewmien tal-ghoti ta' dak li haqqha bil-ligi ifisser li hija ma tistax tesercita l-professjoni taghha u dan b'dannu finanzjarju enormi. In oltre, wiehed ma

jistax ma issemmix l-umiljazzjoni li l-Kunsill Intimat se jgieghelha tghaddi minnu jekk hija taghmel dak suggerit minnu, u cioe`, li taghmel l-ezamijiet mal-istudenti tal-Universita`. Dan filwaqt li din il-mara ghandha l-kwalifiki kollha necessarji, liema kwalifiki huma rikonoxxuti ukoll hawn Malta. Dan huwa element car ta' irragonevolezza ta' parti tal-intimat li qieghed iwassal ghall-fatt li r-Rikorrenti qeghdha tbati danni ingenti;

"16. Illi sia d-decizjoni tal-Kunsill Mediku u sia d-decizjoni tal-Kumitat tal-Appelli huma sindakabbli mill-Qrati ordinarji taghna u jistghu jigi mistharrga, annullati u rrevokati mill-istess Qrati;

"17. Illi r-Rikorrenti taf personalment bil-fatti hawn dikjarati fil-paragrafi numru 1 sa 7, 9, 10 u 15 ta' dan ir-rikors guramentat;

"18. Illi ghalhekk kellha ssir din il-kawza;

"Ghaldaqstant ir-rikorrenti qieghdha titlob din l-Onorrablli Qorti sabiex:

"1. Tiddikjara li d-decizjonijiet *de quo* u cioe` dik tal-Kunsill Mediku datata tlieta (3) ta' Frar elfejn u hdax (2011) kif ukoll dik tal-Kumitat tal-Appelli datata tnejn u ghoxrin (22) ta' Gunju elfejn u hdax (2011) huma ingusti, anti-kostituzzjonali, diskriminatorji, illegali, ultra-vires u jmorru kontra l-principju tal-gustizzja naturali kif ukoll minhabba interpretazzjoni hazina tal-Ligi;

"2. Tiddikjara li d-decizjonijiet *de quo* huma, konsegwentement, nulli u invalidi skont il-ligi u tordna r-revoka tal-istess decizjonijiet;

"3. Tordna lill-Kunsill intimat halli fi zmien qasir u perentorju jirregistra l-partikolaritajiet rilevanti tad-Dottoressa rikorrenti fir-Registru appozitu tal-Kunsill Mediku skont kif minnha rikjest;

"4. Tiddikjara l-Kunsill Mediku intimat risponsabbli ghad-danni li l-istess rikorrenti sofriet u li qieghedha u tista' ssofri;

"5. Tillikwida d-danni sofferti mir-rikorrenti anki, jekk ikun il-kaz, permezz ta' Perit nominandi;

"6. Tikkundanna lill-Kunsill Mediku intimat ghall-hlas lir-rikorrenti tal-ammont ta' danni hekk likwidat.

"Bl-ispejjez kontra l-Kunsill Mediku inkluzi l-ispejjez tal-Protest Gudizzjarju intavolat mir-rikorrenti kontra l-Kunsill Mediku bid-data tal-ghoxrin (20) ta' Lulju elfejn u hdax (2011)".

Having seen the sworn reply of the defendant by virtue of which it stated as follows:

"1. Illi l-pretensjonijiet u t-talbiet tar-rikorrenti huma kompletament infondati fil-fatt u fid-dritt, u ghandhom jigu michuda bl-ispejjes kollha kontra r-rikorrent, u dan ghas-segwenti ragunijiet;

"2. Preliminarjament illi l-Kunsill intimat ma agixxiex *ultra vires* u wisq anqas agixxa b'mod ingiust, irragjonevoli u diskriminatorju mar-rikorrenti kif minnha allegat, tant illi l-Kunsill Mediku, mexa maghha preciz bl-istess mod kif jimxi **b'kull** applikazzjoni ohra illi jkollu minn cittadin pajjiz terz fejn u meta l-kwalifika li jkollu tigi rikonoxxuta – u dan dejjem bil-hsieb ahhari tal-kunsill li jiszgura safejn possibbli illi l-persuni elenkati fir-Registru Mediku jkunu tali illi jistghu jservu fil-kamp mediku bl-aqwa possibbli fl-ahjar interess tal-professjoni, tal-pazjent u l-kura medika in generali f'pajjizna.

"3. Fit-tieni lok u minghajr pregudizzju, illi skorretta r-rikorrenti fil-hames premessi taghha meta tghid "*..... il-kunsill intimat cahad it-talba ghal registrazzjoni …..*" – peress illi dan mhux minnu. Ir-rikorrenti giet mitluba toqghod ghal ezami u in segwitu ghal tali ezami illi jigi deciz jekk applikanti bhar-rikorrenti jkolliex l-applikazzjoni taghha milqugha jew michuda.

"4. Fit-tielet lok u ukoll minghajr pregudizzju, illi l-*standard policy* li taghmel referenza ghaliha l-ittra tal-Kunsill intimat tat-3 ta' Frar 2011 u li jsir accenn ghaliha fit-tmien premessa mhux talli "*m'ghandha ebda fundament guridiku u anzi hija fondata fuq il-bazi diskriminatorja*" – talli kif hawn fuq premess, hija *policy* applikata ma' kull applikazzjoni ta' applicant gej minn pajjiz terz, oltre` l-fatt illi, kif anke stqarr l-Appell presedut mill-Magistrat Dr Joseph Cassar, "*The Medical Council is duty bound to assess qualifications within the law. The Malta Qualification Recognition Information Centre recognizes qualifications but not the right to practice a profession, as such right falls in the ambit of the Medical Council*".

"5. Fir-raba' lok u ukoll minghajr pregudizzju, ghalhekk, illi d-decizjoni mehuda mill-Kunsill intimat mhix *ultra vires* u mhix diskriminatorja u mehuda fl-ambitu tal-ligi li tobbliga lill-kunsill intimat jara jassikura illi l-membri kollha fuq ir-registru jkunu idoneji jservu fil-professjoni medika f'Malta fl-ahjar interess tal-interess professjoni, professjonisti u finalment pazjenti.

"6. Salv risposta ulterjuri.

"Bl-ispejjez kontra l-istess rikorrent".

Having seen the preliminary judgment delivered by the First Hall of the Civil Court on the 14th February, 2017 wherein the said Court decided the relevant issues in the case by:

> "**Upholding plaintiff's first request** as being founded in law and in fact in that the decisions handed down by the respondent Council on February 3rd 2011 as confirmed by the Appeals Committee on the 22nd June 2011 were based on a wrong application of the applicable law and *ultra vires* the powers conferred by law on the Council;
>
> "**Upholding plaintiff's second request** by declaring the afore-said decisions to be null and void and by quashing the said decisions for all effects and purposes of the law;
>
> "**Rejecting plaintiff's third request** since it falls beyond the remit of this Court as a reviewing Court, but directing the respondent Council to reconsider plaintiff's request to be enrolled in the Register without delay and in conformity with the considerations made in this judgment;
>
> "**Rejects** respondent Council's **pleas on the merits** insofar as they relate to the plaintiff's first two requests;
>
> "**Ordains** that respondent Council bear the **legal costs** in connection with this judgment; and
>
> "**Adjourns** the case for evidence and submissions regarding plaintiff's third, fourth and fifth requests".

The said Court decided the said issues after having made the following considerations:

> "This is an action for judicial review. Plaintiff is aggrieved by a decision handed down by the defendant Council (hereinafter referred to as "the Council" or "defendant") as confirmed by the Appeals Committee (hereinafter referred to as "the Committee") established under the law[1], whereby she claims that her request to be registered in the Medical Register (hereinafter referred to as "the Register"[2]) was turned down, unless she submits to and successfully pass an examination assessing her competence. Plaintiff claims that, on the basis of the academic qualifications obtained in her country of origin and which were duly recognised by the Maltese Qualification authorities, her application to the Council ought to have been sufficient for registration in the Register and that the condition imposed by the Council was unlawful, unconstitutional, beyond its remit ("*ultra vires*"), discriminatory and based on a wrong reading of the law. She requests a declaration that the said decision is invalid and that it be quashed. She further requests that the Council be ordered to register her in the Register within the short and peremptory time which the Court shall impose upon the Council. She requested damages for the unlawful action of the Council;

[1] Art. 49 of the Health Care Professions Act, 2003 (Axt XII of 2003, Chap. 464)
[2] Art. 11 of Chap 464

"By virtue of a decree made upon a request to that effect by plaintiff's learned counsel, the Court will invest the main question relating to the validity of the impugned decision(s) and defer the issue of damages to a further stage, if that would be applicable;

"The Council rebutted plaintiff's grievance by stating that it acted in a wholly correct manner and that plaintiff's claims are unfounded. In particular, it pleaded that it acted entirely within its remit and in proper observance of the provisions of the law under which it is established, and that in regard to plaintiff it followed the practice which is followed with all applicants who are in an analogous situation as plaintiff's own. Furthermore, it pleaded that the policy which it applied in requesting plaintiff to sit for and pass an examination is prescribed in respect to every applicant hailing from a non-European Union State and constitutes a different consideration from the recognition of qualifications which may be granted by the Malta Qualifications Recognition Information Centre, as the Committee had the occasion to point out in its decision confirming that of defendant Council;

"The relevant facts which emerge from the records of the case show that plaintiff hails from the Republic of Georgia and was born there in 1972. She has Georgian nationality but has since settled in Malta and married a Maltese national;

"She pursued studies in Georgia and holds academic qualifications in specialized fields in biology, medical biology and science from Georgian academic institutions[3], leading to a conferment of a Doctor in Philosophy;

"On February 28th 2008[4], the Malta Qualifications Recognition Information Centre (MQRIC) advised that plaintiff's academic qualifications were recognized in Malta as being tantamount to a Master Degree in Medicine with Honours, a Master Degree in Biology and Chemistry with Honours and a Doctor of Philosophy in Medicine;

"After having filed a number of applications since July of 2006[5] for acceptance as a pathologist and a medical laboratory scientist on the basis of her qualifications and hands-on experience in her native country, plaintiff went through an "adaptation period" prescribed by the Council of Professions Complimentary to Medicine (CPCM)[6] at Mater Dei Hospital which expired on May 5th 2010[7]. On December 2nd 2010[8], plaintiff re-submitted an application to the Council requesting registration as a pathologist in the Register in order to be able to practice as such in Malta, which application was supported by copious documentation;

[3] Doc "A" at pp. 27 – 8 of the record
[4] Doc "PVB2" at pp. 245 – 6 of the record
[5] See documents at pp 111 – 7 and Doc "SC3" at pp 176 to 211 of the record
[6] Docs "K" to "M", at pp 126 – 130 of the record
[7] Plaintiff's affidavit at pp. 108 – 9 of the record
[8] Doc "A", at pp 17 – 8 of the record

"Following an exchange of correspondence[9], by a decision taken on February 3rd 2011[10], the Council acknowledged the validity of her academic qualifications as being equivalent to a Degree of Doctor of Medicine conferred in Malta, but that, in order for her name to be enrolled in the Register, she had to sit for and successfully pass examinations under the current Faculty of Medicine and Surgery and based upon the syllabus applicable to fifth year medical students. The Council further advised plaintiff that at that stage the Council's Examination Committee was in the process of "restructuring" the exam format and could not, therefore, provide her with details as to which exam subjects she would have to sit for. The decision was served on plaintiff on February 8th 2011;

"Plaintiff appealed from the decision to the Committee on February 22nd 2011 and a hearing was held on May 31st[11] during which plaintiff attended assisted by legal counsel and both oral and written submissions were made[12]. By a decision taken on May 31st, the Committee decided to reject the appeal. The Committee informed plaintiff by letter dated June 22nd, that her appeal had been rejected and the Council's decision confirmed[13];

"On July 20th 2011[14] plaintiff filed a judicial protest in terms of article 460 of Chapter 12 of the Laws of Malta against the Council requesting it to revoke its decision and to uphold her application and held it liable to damages for failure to abide by her request;

"Plaintiff filed this action on August 2nd 2011;

"The Court's legal considerations relating to the issue under examination have to focus upon the question of the Council's sphere of action and whether the manner in which it acted falls within its lawful remit. The plaintiff's main contention is that, once her academic qualifications were recognized and accepted by the pertinent Maltese authorities, the Council ought to have accepted her application to work in Malta as a pathologist without attaching any conditions. She argues that the imposition of such conditions – to wit, that before being registered in the Register, she has to submit to and pass an examination set by the Council's own Medical Examination Committee – flouts the express provisions of the law under which the Council was set up as well as being beyond the powers conferred by law on the Council;

"In particular, plaintiff ascribes to both the Council and to the Committee's decisions denying her application a number of vitiating vices being unconstitutionality, violation of the principles of natural justice and proper administrative behaviour, discrimination and wrong application of the law;

[9] Docs "B" and "C", at pp. 53 – 82 of the record
[10] Doc "D", at p. 83 of the record
[11] Doc "MA1", at p. 148 of the record
[12] Testimony of Moira Azzopardi at pp 153 – 4 of the record
[13] Doc "MA2", at pp 149 – 150 of the record
[14] Doc "G", at pp 90 – 5 of the record

"The Court will examine these separate heads in sequence against the evidence which has been tendered and in the context of the submissions made thereto by respective counsel;

"At the outset, the Court considers it expedient to cite the provisions of the law which seem to lie at the heart of the dispute between the parties, and which both parties rely upon to justify their respective positions at law. As a matter of fact, while the Council and the Committee refer to these provisions as the basis for their decision on plaintiff's application[15], plaintiff avers that both the Council and the Committee gave an utterly wrong reading of the law and ruled in flagrant breach of its provisions. In so doing, the Court will attempt to address two of plaintiff's main areas of complaint, namely that relating to the violation of the principles of proper exercise of administrative behaviour (in regard to action "*ultra vires*") and that relating to wrong application of the law;

"The relevant parts of article 11 of Chapter 464 of the Laws of Malta lay down that "*(1) The Medical Council shall keep a register, in this Act referred to as "the Medical Register", in which, following an application to that effect by the person concerned, shall be entered the name of any citizen of Malta, or of a Member State or of a person who benefits from the provisions of Article 11 of Regulation 1612/68EEC or of a person who has been established in a Member State, who holds - (a) the degree of Doctor of Medicine and Surgery from the University of Malta: Provided that the Medical Council shall not enter such name unless the applicant, upon qualifying for such degree, has served as a house physician and, or surgeon in a government hospital or other hospital recognized for that purpose by the Medical Council for a period of one or two years as the Minister may prescribe; or (b) any of the qualifications listed in Second Schedule, Parts Ia, Ib, Ic, Id; or (c) a qualification recognised for the purpose by a Member State, obtained from a University College, or Medical School: Provided that in respect of applicants coming from third countries, whose qualifications have not been recognised in a Member State, the Medical Council may, in respect of such qualifications, require the applicant to sit for and pass a professional and linguistic proficiency test, and may also require that he serves as house physician and, or surgeon in a hospital recognized for the purpose by the Medical Council, for such period, being not longer than two years, as the Minister may prescribe, and the provisions of article 7(3) and (4) shall apply to a person required in virtue of this proviso to serve as a house physician or surgeon as if such person were the person referred to in those subarticles*";

"The Court recalls that plaintiff has shown that the academic qualifications obtained by her following her studies in her native country were effectively recognized by the Maltese competent authorities and given their equivalence as far back as February of 2008. Although from the evidence it does not result whether plaintiff is or has been granted Maltese citizenship, it has not been contested that she was married to a Maltese national and has been established in Malta for a considerable period of time and granted Maltese

[15] Cfr Doc "SC2" at p 174 of the record

identity documentation[16]. For the purposes of the relevant provisions of the afore-mentioned article 11, therefore, plaintiff was eligible to be considered by the Council also on the basis of those circumstances. The point is that her qualifications were obtained pursuant to studies in a third country institution of education (therefore, not an institution of a Member State of the European Union) but this in itself is not a valid reason for the rejection of an application for inclusion in the Register, especially if, as happened in this case, those qualifications are recognized by the competent Maltese authorities[17];

"The Council rightly argues that its functions are proscribed by the enabling powers conferred to it by the law under which it is set up[18] and that its functions are not those of evaluating academic qualifications, but of ensuring that persons enrolled in the Register are competent professionals entrusted with the proper exercise of their calling for the welfare and general well-being of the public[19]. This, however, does not make the Council's exercise of its functions altogether detached from considering such academic qualifications. Article 11(1) of the Act itself makes ample provision for this aspect in the three contingencies that are envisaged. Evidence tendered during the hearing of this case clearly shows also that the Council liaised with the competent recognition authorities in Malta as far back as 2007 with respect to the plaintiff's qualifications[20] as well as regards the institutions from which plaintiff graduated and secured those qualifications[21];

"Furthermore, it has been shown that the Council's decision that applicants in plaintiff's situation would only be enrolled in the Register once they submit to and pass a special oral examination in various medical disciplines is an implementation of a "standard policy" and not the result of an express legislative instrument laying down this requisite. Not only that, but this "standard policy" does not appear to have been at least minuted in the records of proceedings before the same Council at any time but was resorted to as a matter of general practice[22]. Plaintiff argues that this lack of express legal provision is proof in itself that the Council acted "*ultra vires*", because in plaintiff's case, all the Council had to do was to ascertain that her academic qualifications are recognized by the competent Maltese authorities and ratify her application by enrolling her name in the Register and not to resort to any contrived and obscure policy by imposing upon her a condition the law does not prescribe;

"The Court considers that both the Council but more specifically the Committee based their decision (regarding plaintiff's application for registration) on the provisions of article 11(1)(c) of the Act. As stated before, documentary proof exhibited in this case clearly states that the Council considers the wording of the *proviso* to that sub-article as the 'enabling law'

[16] Cfr Doc at p 23 – 4 of the record
[17] Under the provisions of the Mutual Recognition of Qualifications Act (Act XVIII of 2002, Chap 451)
[18] Art. 10 of Chap 464
[19] Testimony of Dr Brian Flores Martin at p. 257 – 8 of the record
[20] Testimony of Philip von Brockdorff at pp. 248 – 9 of the record
[21] Dok "PVB1", at pp. 243 – 4 of the record
[22] Testimony of Svetlana Cachia at pp. 373 – 4 of the record

"on which its 'standard policy' is based"[23]. This snippet of proof is, in the Court's considered view, of remarkable relevance in the determination of the dispute. Firstly, it arises from the workings of the Council itself and originates from it and thus represents its reasoning behind the decision taken in regard to plaintiff. Secondly, by referring to that particular *proviso* as the basis of the policy, the Council seems to restrict the policy's application to the contingency regulated by that sub-section, namely, in regards to "a qualification recognized for the purpose by a Member State, obtained from a University College or a Medical School". Thirdly, the said *proviso* enables the Council to consider (and thus to exercise a discretion) subjecting the applicant to a professional and linguistic proficiency test as well as to require that applicant serve as a house physician or surgeon for a limited time prior to being enrolled in the Register. Fourthly, that any policy devised on the basis of that *proviso* has to be applied strictly within the terms of that legal provision, and although it implies an element of discretion, it has to be exercised properly;

"Plaintiff questions the existence of the policy invoked by the Council and suggests that it is nothing more than a stratagem resorted to by the Council to try to justify the decision taken in regard to her. The Court does not subscribe to this argument, and is of the opinion that the Council truly believed that the said sub-section empowered it to subject the plaintiff to the rigours of an exam prior to registration. This alone, however, does not justify the decision taken in her regard;

"The fact that an administrative body – and the Medical Council amply qualifies as such, given the enabling powers conferred upon it by the law – adopts a policy in regard to some standard or quality which must result in an application brought before it does not render such policy void on the basis alone that there is no express legal provision to buttress it. Policy in the broad meaning of the term is a corollary to administrative action and is an attribute of the discretionary power which, under Administrative Law, is vested in almost every administrative body. The invocation of 'policy' by such an administrative body, however, raises the question of the reasonableness of such policy and other kindred issues like the legitimate expectations of those who are aware of the policy's existence;

"It has been authoritatively suggested that "*Closely akin to the question of wide discretionary power is the question of policy. Policy is of course the basis of administrative discretion in a great many cases, but this is no reason why the discretion should not be exercised fairly vis-a'-vis any person who will be adversely affected*"[24]. Thus, where an administrative body invokes policy as the underlying basis for any of its actions or decisions, it has to be cogently shown that such a policy is indeed well-founded and that it is consistently applied. Thus, "*inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly*"[25];

[23] Doc "SC2" at p. 174 of the record
[24] H W R Wade & C F Forsyth *Administrative Law* (9th Edit2004), p. 533
[25] *Op. cit* p. 372

"Where the issue of the exercise of discretion arises, a number of considerations ensue, chiefly among which is the question of the reasonableness of such a discretion. In the present case, plaintiff contests not only the existence of the policy but the reasonableness behind it;

"When the law confers upon an administrative body the power to exercise discretion, it is effectively granting it "*(the) power to make a choice between alternative courses of action or inaction*"[26]. In such case, this implies that the empowered administrative body is entitled to apply its discretion beyond the objective elements of the issue of the claim raised before it, and is vested with the subjective right to determine whether to follow a course of action rather than another[27] but always within the confines of its powers. It is undoubted that such discretion ought to be exercised within the terms of the enabling law, in a reasonable manner, with equity and a sense of justice[28] and certainly without abuse of that discretion[29]. Another acclaimed principle is that such exercise of discretion must be free from any interference or subjection to any kind of pressure or threat from any third party which vitiates the discretionary exercise itself, since the proper exercise of discretion implies the free and reasoned deliberation of the person vested with that power;

"On the basis of these principles, rules have emerged which determine the proper exercise of discretion by an administrative body and by which Courts may consider the reasonableness thereof. Thus, where an administrative body is vested with discretion in the exercise of its function, a reviewing Court may order such body to exercise it should it result that such body failed to do so. What a Court may not do is to dictate to such body how to exercise such discretion, nor to substitute itself to the administrative body and exercise such discretion itself. This consideration is particularly relevant in the light of plaintiff's third request and will be duly addressed;

"In order that such discretion has been correctly acquitted, it must be shown to the Court's satisfaction that the vested authority has indeed considered all the relevant issues brought before it and that it has done this without any interference by any third party or by not having rendered itself incapable or unable to exercise such discretion[30]. In the exercise of such a review, the Court must ascertain that the administrative body has not transgressed its authority by not acting in a manner which it is expressly prohibited from doing nor to have failed to act in a manner which it is authorized to observe. It is fundamentally important that the administrative body act *bona fide* and has made the relevant considerations of the matter. In brief, these are the basic principles which Administrative Law upholds in determining whether discretion has been duly exercised or whether such exercise was abusive or excessive;

[26] DeSmith, Woolfe & Jowell *Principles of Judicial Review* (5th Edit, 1995), p. 296
[27] Civ. App. **30.11.1993** in the case ***Sammut noe et vs Kontrollur tad-Dwana*** (Kollez. Vol: **LXXVII.ii.376**)
[28] Civ. App. **21.4.1961** in the case ***Masini noe vs Podesta' noe*** (Kollez. Vol: **XLV.i.110**)
[29] Civ. App. **26.2.2010** in the case ***Peter J. Azzopardi et noe vs Awtorita' għas-Servizzi Finanzjarji***
[30] Cfr Civ. App. **20.5.1982** in the case ***Fenech Adami et vs Cremona pro et noe*** (unpublished)

"Any exercise of review of the proper exercise of discretion raises the issue of the reasonableness thereof. The duty upon an administrative body to act reasonably differs from its duty to act *bona fide*[31]. Thus, while not every reasonable exercise leading to a decision is necessarily correct, nor is an erroneous decision automatically unreasonable[32]. In such cases, the Court has to consider whether a decision against which a person feels aggrieved is one where a reasonable person might arrive at such a conclusion;

"It is authoritatively held that the fundamental role of a reviewing Court is to ascertain that the administrative act does not fall short of legality, more than to assure that the administrative body has come to a correct decision. This distinguishes the role of a reviewing Court from that of an appellate Court, which has to investigate the substantive merits of an appeal. This is also the view upheld by our Courts[33];

"To determine whether an administrative body has reasonably exercised discretion in the application of its powers and functions, it has to be shown that such body acted as it ought to have acted and not merely as it was entitled to[34]. This means that the measure of reasonableness is an objective one related to the factual circumstances of the case in which such discretion is exercised[35]. Furthermore, in order that administrative behaviour be found to constitute abusive behaviour, proof of an intention to act abusively and to cause harm has to be brought forward by the party alleging it, which intention can be shown by proving a particular mode of behaviour which forms part of the discretionary process itself. The Court cannot emphasise enough that the exercise of discretion must not only be in conformity with the prescribed procedure ("*rite*") but also equitable ("*recte*")[36]. This is a necessary corollary of the requirement that discretion be reasonably exercised;

"In her final submissions, plaintiff argues that the Council's so-called 'standard policy' was incoherently applied and respected more by its breach than by its observance[37]. She suggests that evidence brought forward by the Council shows that different criteria were applied to different persons, even those who were in the same situation as hers. None of the persons identified by her and who like her were non-EU nationals or who vaunted non-EU academic qualifications were asked by the Council to submit themselves to the exam which she has been asked to undertake;

"It is settled law that "*inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly or contrary to the citizen's legitimate expectations*"[38]. In this regard, plaintiff takes issue with the adopted practice of engaging third country nationals as practising medical doctors at the behest of Government

[31] Cfr. ***R vs Roberts, ex p. Scurr*** (**1924**) 2 K.B. 695
[32] Cfr. ***R. vs W*** **(1971)** A.C. 682
[33] FH JZM **9.6.2011 in the case *Mario Debono et vs Tabib Prinċipali tal-Gvern et***
[34] H.W.R. Wade & C.F. Forsyth, *Administrative Law* (10th. Edit), pġ. 295
[35] Civ. App. **27.3.2009** in the case ***Carmelo Dingli et vs Kontrollur tad-Dwana et***
[36] Inf. App. PS **26.2.2010** in the case ***Peter J. Azzopardi et noe vs Awtorita' għas-Servizzi Finanzjarji***
[37] Note of Submissions at pp. 512 and 517 of the record
[38] Wade & Forsyth *op. cit.* p 372

under a temporary registration, without having to submit the chosen candidates to the qualifying exam, and to convert that temporary registration into a permanent one within a short time and still without observing the "standard policy" which the Council says it has devised in regard to all such candidates;

"The Council's earned counsel argued[39] that plaintiff's application was never rejected but in accordance with its "standard policy" she was asked to submit herself to the exam, as has been the case with other applicants in a similar situation. He also argues that this "standard policy" is dictated by the overriding concern that the Council must assure that the medical service in Malta attain the highest standards for the benefit of public health and the general public;

"Having considered the parties' respective arguments in the light of the evidence produced, and applying the legal principles outlined above, the Court comes to the conclusion that plaintiff's claim is justified. First and foremost, when the Council failed to consider that her academic qualifications were duly recognized in Malta by the competent authorities, it put itself in a position which ran counter to the express provisions of the enabling law. As plaintiff rightly avers, the fact that the MQRIC had officially and irrevocably accepted that her academic qualifications were to be recognized and considered to be equivalent to a medical doctor's degree was an element which should have engaged the Council to apply its considerations under the proper criterion and category. Secondly, a proper reading of the *proviso* ta article 11(1)(c) of the Act would show that plaintiff's situation was not one to which that *proviso* applied. That *proviso* applies to third-country nationals whose qualifications have not been recognized in a Member State, which is certainly not the case with plaintiff, whose qualifications were recognized by the competent Maltese authorities and thereby recognized by a Member State. Thirdly, insofar as the Committee's decision to reject the appeal was expressly based on the said provisions, it follows that the decision was founded on a wrong application of the correct law and thus cannot stand. Fourthly, once the plaintiff's application would not fall within the category covered by the provisions of article 11(1)(c) of the Act, it does not seem reasonable for the Council to impose upon plaintiff a condition which the enabling law does not give it the discretion to impose. The eventuality of asking an applicant to submit oneself to an exam prior to enrolment in the Register is envisaged only where the applicant's academic qualifications have not been recognized. Fifthly, despite the laudable intentions of the Council to assure that practicing medical or health care professionals in Malta be duly qualified and capable of securing the best health care available, the Court does not consider the condition imposed on plaintiff in order to accept her name to be registered to be reasonable in the particular circumstances of the case when it results that plaintiff had, for a considerable span of time and as requested by the same Council, performed "adaptation work" in a State hospital for many months after the Maltese authorities had recognized her academic qualifications and very close to the

[39] Pp. 529B – 529D of the record

time when she resubmitted her application to have her name enrolled in the Register;

"Once the Court has found sufficient reason to uphold the plaintiff's grievances on the above-mentioned grounds, it is neither necessary nor useful to inquire into the other grounds flagged by her, as the identification of one valid ground is sufficient to bring about the effects which may lie with the other grievances, should they have been likewise proven;

"For these reasons the Court finds that plaintiff's **first request** is well founded at law and will be upheld;

"Since the Court has come to the conclusion that the decisions of both the Council as well as that of the Committee were vitiated at law, the **second request** would be a natural consequence of the first request. The role of a reviewing Court lies in the investigative stage as well as in the remedy which it can grant as a result of a finding of a flaw in the administrative act concerned. In this case, the consequence is the quashing of the decisions which are found to be faulty;

"For these reasons, plaintiff's second request too is well-founded at law and will likewise be upheld;

"As regards plaintiff's **third request** the Court feels it pertinent to point out that the powers of a reviewing Court, as mentioned above, are limited by virtue of the nature of the action brought before it. In particular, it is settled law that a reviewing Court may not substitute the administrative body whose action or omission it is called to review nor to exercise the discretion and powers with which such body is vested by its enabling law. When a Court of review finds that an act fall foul of the law, all it can do is to annul such act and remitting the matter to the administrative body for reconsideration, without venturing to pronounce itself also on the merits or re-deciding the matter which is the preserve of the administrative body reviewed. That administrative body must take note of the Court's decision in its reconsideration, but the role of re-examining the case still vests in the administrative body[40];

"It is remarkable that neither party in the present case made any representations in this regard and seemed to put the issue aside, when it is a question of fundamental relevance in a case of judicial review. Plaintiff's third request enjoins the Court precisely to assume the role of the Council and this is therefore beyond the remit of this Court in a case of this nature;

"For these reasons the third request is untenable and will not be upheld".

[40] Civ. App. **11.5.2010** in the case ***Reginald Fava pro et noe vs Suprintendent tas-Saħħa Pubblika et***

Having seen the appeal application of defendant Council by virtue of which, for reasons noted therein, requests this Court to:

> "a) **Revoke** that part of the partial judgement delivered by the said First Hall of the Civil Court on the 14th February 2017 in Case 740/11 JRM whereby the first two requests submitted by Respondent Zananian Desira in the sworn application were upheld;
>
> "b) **Confirm** that part of the partial judgement delivered by the said First Hall of the Civil Court on the 14th February 2017 in Case 740/11 JRM whereby the third request submitted by Respondent Zananian Desira in the sworn application was rejected;
>
> "c) **Revoke** that part of the partial judgement delivered by the said First Hall of the Civil Court on the 14th February 2017 in Case 740/11 JRM whereby the pleas put forward by the Appellant Council in its sworn reply in connection with the first two requests made by Respondent Zananian Desira were rejected; and subsequently
>
> "d) **Accede** to those pleas submitted by Appellant Council as indicated in paragraph (c) above;
>
> "With costs in relation to both First and Second Instance against Respondent Zananian Desira".

Having seen the reply filed by plaintiff by virtue of which, for reasons noted therein, submits:

> "that the appeal lodged by Kunsill Mediku is unjustified and incorrect at law. The elaborate judgement delivered by the First Court after carefully examining the circumstances of the present case is correct and ought to be confirmed. With costs against the Medical Council".

Having heard the oral submissions of defence counsel:

Having taken note of all the acts of the case, including the documents submitted;

Now considers:

That as the First Court noted, this is a case of judicial review. Plaintiff, who at the time held Georgian Nationality (she has since, in 2013, acquired also Maltese nationality) is a qualified medical doctor, whose foreign qualifications were accepted by the Malta Centre for Recognition of Qualifications and Information as equivalent to a Master of Arts and Ph.D. She applied with the Maltese Medical Council to be registered in Malta in the Register of the Council so that she will be able to practice locally her profession. By decision of the 3rd of February 2011, the Council held that for plaintiff's request to be acceeded to "*she is being requested to sit for and successfully pass the Medical Council examination for medical practitioners*", this being the standard procedure for non-European Union citizens who do not have a European Union degree.

Plaintiff does not agree with this decision of the Medical Council and claims that it goes against the law and is discriminatory in her regard.

The Court considers that the whole issue turns on the interpretation of the proviso to section 11(1)(a) of the Health Care Profession Act (Chapter 464 of the Laws of Malta). This article and proviso read as follows:

> "11. (1) The Medical Council shall keep a register, in this Act referred to as "the Medical Register", in which, following an application to that effect by the person concerned, shall be entered the name of any citizen of Malta, or of a Member State or of a person who benefits from the provisions of Article 1 of

> Regulation 1612/68 EEC or of a person who has been established in a Member State who holds –
>
> "*(c) a qualification recognized for the purpose by a Member State, obtained from a University College, or Medical School:*
>
> "*Provided that in respect of applicants coming from third countries, whose qualifications have not been recognized in a Member State, the Medical Council may, in respect of such qualifications, require the applicant to sit for and pass a professional and linguistic proficiency test, and may also require that he serves as house physician and, or surgeon in a hospital recognized for the purpose by the Medical Council, for such period, being not longer than two years, as the Minister may prescribe, and the provisions of article 7(3) and (4) shall apply to a person requited in virtue of this proviso to serve as a house physician or surgeon as if such person were the person referred to in those subarticles*".

The relevant part is the proviso which requires the applicant to sit for and pass a professional and linguistic proficiency test if she is coming from a non-EU country "*whose qualifications have not been recognized in a Member State*".

In its appeal application, the Medical Council is interpreting this part of the proviso in this sense; "*a degree which has previously been recognized by another Member State*". As can be seen, the words "*previously*" and "*another*" are not found in the law, and have been added by appellant to support its decision. This Court, however, does not agree with this submission. Had the law wanted to provide a rule as stated by appellant, it could easily have said so. As it is, the law is quite clear that the test is to be imposed on applicants only where the applicant's qualifications "*have not been recognized in a Member State*". Member State is defined in Article 2 of the Act as "a state member of the European Union, …." Malta is such a state and therefore " a Member State" in the proviso includes Malta.

In this case the qualifications of plaintiff have been recognized by Malta, which is an EU Member State, and there is no requirement that her qualifications be recognized by a second Member State. As Mr Vanbrocdorff, representative of the Qualifications authority, said, the diploma obtained by plaintiff was so obtained by one of the best scientific institutions in Georgia, and is "*considered of Ph.D. standard*", and there is, therefore, no justifiable reason to have her excluded from the Medical Register in terms of Article 11 of the said Chapter 464 of the Laws of Malta, and this so long as she satisfies other provisions of the law which may be applicable to her case. No other "*standard policy*" as practice can substitute the express terms of the law.

In view of the above, this Court rejects the appeal application filed by defendant Kunsill Mediku, and confirms the judgment delivered on the 14th February, 2017 by the First Hall of the Civil Court.

Costs are to be borne by defendant Kunsill Mediku, appellant.

The records of the case are to be sent back to the First Hall of the Civil Court for continuation.

Silvio Camilleri	Giannino Caruana Demajo	Tonio Mallia
Chief Justice	Judge	Judge

Deputy Registrar
mb/rm