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**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 10 April 2014

**B e f o r e:**

**MR JUSTICE MITTING**

**Between:**
**THE QUEEN ON THE APPLICATION OF BAPIO ACTION LTD**
**Claimant**

v

**ROYAL COLLEGE OF GENERAL PRACTITIONERS**
**First Defendant**

**GENERAL MEDICAL COUNCIL**
**Second Defendant**

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(Official Shorthand Writers to the Court)

**Ms K Monaghan QC and Ms S Hannett** (instructed by Linder Myers) appeared on behalf of the **Claimant**
**Mr P Oldham QC** (instructed by Clyde & Co) appeared on behalf of the **First Defendant**
**Mr J Bowers QC and Mr I Hare** (instructed by GMC) appeared on behalf of the **Second Defendant**

J U D G M E N T
(Approved)

1. MR JUSTICE MITTING: In this judgment I will use only two acronyms: "GMC" for General Medical Council, because it is in general use, and "BME" for Black and Minority Ethnic, an imprecise and shifting definition of categories of people perceived to be at a disadvantage within Western society. Any reference to "he" includes reference to "she".

2. Before a person can practise unsupervised as a general practitioner in the United Kingdom, he must satisfy a series of educational and vocational training requirements, typically achieved over a period of ten years:

1) a first degree in medicine and surgery or equivalent, awarded by a UK or foreign medical school, typically requiring five years' study;
2) a two-year Foundation Programme in the United Kingdom, typically made up of six four-month placements in different specialities in a hospital or general practice setting. At the end of each placement and year a doctor's performance is assessed by those who have supervised him;
3) a doctor with a first degree from a foreign medical school, not taught in English, must achieve level 7 of 9 on an International English Language Test, a widely used test of general competence in English, and pass a professional and linguistic assessment intended to demonstrate that he has achieved the level of a UK graduate who has completed Year 1 of the Foundation Programme. He must also have undertaken at least 24 months of experience in educationally-approved posts in the United Kingdom or overseas since graduating;
4) both categories of doctor must then have a computer-based assessment of their competence and skills as doctor. The standard is that of a doctor who has successfully completed Foundation Year 2. The pass rate is just over 50 per cent. The doctor is then allocated to a Deanery of his choice in descending order of success in the assessment;
5) the doctor will then undergo a three-year training programme, partly in hospital and partly in general practice, under the supervision of one of the Deaneries;
6) towards the end of the three-year programme the doctor must submit to a three-part assessment: 1) a work place assessment; in other words, assessments by those who have supervised his work during the three year programme; 2) a computer marked applied knowledge test; 3) a Clinical Skills Assessment. If successful in all three, the doctor will be awarded a Certificate of Completion of Training by the Royal College of General Practitioners ("the Royal College").

3. The Clinical Skills Assessment is designed to assess the doctor's skills in three respects: 1) gathering information from patients; 2) developing a diagnosis; 3) communicating with the patient. The assessment takes half a day and is based on role play. The part of the patient is played by a professional role player. 13 cases are selected from a regularly refreshed database of 696 cases. The doctor is given ten minutes in which to examine the patient, reach a diagnosis and explain it to the patient. The process is intended to mimic a real consultation. It is witnessed by an examiner who is an experienced practising or recently retired general practitioner. The examiner and "patient" are the same for each group or "diet" of doctors to be assessed. Marks are awarded out of four for each of the three clinical skills tested: 0 is a clear fail, 1 is a fail, 2 is a pass and 3 is a clear pass. The doctor can therefore score a maximum of 9 per case and 117 overall.

4. The assessment was devised and is set and supervised and refreshed by the Royal College. The clinical skills assessment was approved by the Postgraduate Medical Education and Training Board, now subsumed within the GMC, in 2007.

5. The method of determining those who had passed and failed was changed in 2010. Before 2010 a doctor who achieved a pass, in other words a 2, in nine out of 12 cases (the 13th was an unmarked pilot case) passed, however badly he had done on the remaining three cases. A doctor who failed to achieve nine passes failed, however well he had done on those that he had passed. This was thought to be potentially unfair to the latter and too generous to the former. It also failed to allow for relative difficulty in the cases upon which a doctor was assessed. On a day of difficult cases a doctor might, unfairly, do less well than another doctor would do on a day of easy cases.

6. The replacement system required examiners to answer, but not mark, how a doctor had performed in the case examined: Pass, borderline or fail. The scores of all those assessed as "borderline" were then collated and a mean score determined. After adjusting by a margin of 1.64, the mean score was then the pass mark for that "diet". The mean score has proved by experience to be about 73 out of 117. Four attempts, plus, exceptionally, a fifth, are allowed.

7. All but a handful, at most three per cent, of the doctors who submit to the assessment eventually succeed. Figures collated by the Royal College show that between October 2007 and May 2012, 133 out of 11,862 candidates who had undertaken the Clinical Skills Assessment more than four times still failed. Of that 133, 120 were foreign graduates. That figure may not, however, include all of the candidates who, in one way or another, fail the assessment. Some will give up all together. Bapio suggests that the true figure may be as high as 300, hence my outline estimate of the number of those who ultimately fail as up to three per cent.

8. There is a marked difference in the pass rate at first attempt of doctors who have a first degree from a UK medical school and those with a first degree from a foreign medical school and between different groups of doctors, categorised by race in each category. The difference is illustrated by the figures for the year August 2012 to July 2013. There are minor anomalies in the figures supplied which do not materially affect the overall pattern. 87.7 per cent of UK graduates passed at first attempt, but only 52.1 per cent of non-UK graduates. Within the category of UK graduates, 93.5 of those describing themselves as "white" passed but only 76.4 and 72.7 per cent of those describing themselves as "South Asian" or "black" respectively. Within the category of non-UK graduates, 62 per cent of those describing themselves as "white" passed at first attempt but only 49.6 and 51.6 per cent of those describing themselves as "South Asian" or "black" respectively.

9. The Claimant's case is that the Royal College as assessor and the GMC as regulator have failed to fulfil the public sector equality duty imposed on them by section 149 of the Equality Act 2010 and that the differences in outcome described are, in whole or in part, the result of that failure and establish against the Royal College alone that it has discriminated, directly or indirectly, against South Asian and BME doctors. Both the

Royal College and the GMC assert that they have, in fact or in substance, fulfilled their public sector equality duty and, in the case of the Royal College, it denies that it has discriminated against South Asian and BME doctors.

10. The first, and by now uncontroversial, issue is whether or not the public sector equality duty applies to the Royal College and the GMC. The GMC has always admitted that it does and the Royal College is prepared, for the purposes of these proceedings, to accept that it does. Both concessions are right. The GMC is a public authority, listed as such in schedule 19 to the 2010 Act. The Royal College exercises public functions. Paragraph 2(j) of the Royal Charter granted to it in 1972 empowers it:

> "To conduct examinations and award postgraduate diplomas or other certificates of proficiency or standard in general medical practice . . . "

11. The award of a Certificate of Completion of Training to a doctor who successfully completes the three-part assessment at the end of his three years' vocational training permits him to practise as a general practitioner in the United Kingdom. That is a matter of public importance and not just of private importance for the doctor. The health of all or almost all members of the public is dependent to some extent on the conscientious and skillful performance by general practitioners of their duties. Consequently, the exercise of the power to determine who should be authorised to perform those duties is a matter which affects the public as a whole. It is clearly a function of a public nature and would be so categorised for the purpose of section 6(3)(b) of the Human Rights Act 1998. Accordingly, the public sector equality duty applies to the Royal College (see 150(5) of the 2010 Act.)

12. The public sector equality duty is set out in section 149(1):

> "(1) A public authority must, in the exercise of its functions, have due regard to the need to—
>
> (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
>
> (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
>
> (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

13. Is not only public authorities as such who are subject to the public sector equality duty. Subsection (2) provides:

> "A person who is not a public authority but who exercises public functions must, in the exercise of those functions, have due regard to the matters mentioned in subsection (1)."

14. The scope of the public sector equality duty imposed on a person who is not a public authority is, however, limited by those words. It is only, and I emphasise, "in the exercise of those functions", ie public functions, that the duty is imposed. As a matter of language, that limits the duty to the functions which the person who is not a public authority exercises, not those which it could exercise if it chose to do so. Paragraph 2(d) of the Royal College's charter requires it:

> "To undertake or assist others in undertaking training courses or other educational activities designed to enhance the medical knowledge and skill of general practitioners."

15. If, which I doubt, that paragraph empowers the Royal College to train doctors who wish to be general practitioners rather than those who have already become general practitioners, it does not, in fact, do so. Training of aspiring general practitioners is left to the Deaneries.

16. Ms Monaghan submits that the public sector equality duty might require the Royal College to establish training courses itself, to remedy perceived shortcomings in performance on the part of South Asian and BME doctors of the kind apparently identified by the Clinical Skills Assessment. I do not agree. The public sector equality duty cannot require the Royal College to consider exercising public functions which it has chosen not to exercise, or even to require it to consider exercising those functions.

17. A narrower submission is, however, justified. The Royal College's charter empowers it:

> "To encourage persons of ability to enter the medical profession and become general medical practitioners." (Paragraph 2(i)).

18. And:

> "To do all such other things as are incidental or conducive to the attainment of the object of the College." (Paragraph 2(p)).

19. The object defined at the start of paragraph 2 is:

> " . . . to encourage, foster and maintain the highest possible standards in general medical practice and for that purpose to take or join with others in taking any steps consistent with the charitable nature of that object which may assist towards the same."

20. Thus the Royal College is empowered to encourage the Deaneries to address the fact of underperformance by South Asian and BME candidates in the Clinical Skills Assessment by, for example, providing training to familiarise and equip them to deal with the assessment or to provide remedial training for those who have failed at first attempt. Dr Rendel, the Royal College's chief examiner who has provided lengthy witness statements in support of its case, can be encouraged to give the presentations to candidates to help them succeed, as she has done already (see paragraph 260 of her first

witness statement.) All of this activity is closely connected to the public functions which the Royal College is, in fact, exercising.

21. Accordingly, in my judgment, it is well within the scope of the public functions that it exercises for it to consider taking steps such as those I have identified. If the Royal College were not to consider taking steps such as those, it might well be that it would not, as of now and in the future, discharge its duty under section 149.

22. Such measures have, however, not been the target of this claim. Its target is the Clinical Skills Assessment itself. A declaration is sought that it is unlawful and the focus of the Claimant's pleaded concerns has been the nature and performance of the assessment. There it may be on weaker ground. There have been numerous investigations (about 18 at the last count) into the assessment by a medical academics and statisticians. In recent years notable reports include: 29 December 2010, a report by Katherine Woolf and others; May 2011, a review by Birmingham University; February 2012, one of several reports by Richard Wakeford of the University of Cambridge; 22 June 2013, a review by Denney, Freeman and Wakeford; 18 September 2013, a report commissioned by the GMC by Professors Esmail and Roberts and, later on in 2013, a report by Professor Norcini. It is not necessary to refer extensively to these reports. All that I need do for the present purposes is to summarise their conclusions:

1) there is a persisting difference in the outcomes of the clinical assessments between:
a) doctors who are UK graduates and those who are foreign graduates;
b) doctors who are UK graduates who are white and those who are South Asian or BME;
c) doctors who are foreign graduates who are white and those who are South Asian or BME;
2) the difference reflects similar experience in other tests conducted by the Royal College, the Applied Knowledge Test, and by other examiners, for example the Professional and Linguistic Assessment and by examiners in other medical disciplines, for example, psychiatry;
3) there is an unavoidable risk of subconscious bias on the part of role players or, more significantly, examiners in a role play-based test. In one instance (in Denney et al), a small but significant bias was measured. BME examiners rated BME candidates 2.2 per cent higher than did their white colleagues;
4) a significant part of the difference between UK graduates and foreign graduates can be put down to different standards of education and cultural experience in the countries in which they graduated. In particular, foreign graduates may lack familiarity with the approach expected by patients of general practitioners in the United Kingdom because of the nature of their training and the nature of medical practice in the country in which they trained.

23. In addition, Professors Esmail and Roberts have concluded that the possibility of subconscious racial bias on the part of examiners may also play a part in the difference in outcome. So, too, may other factors identified by Dr Rendel: In the case of foreign graduates, a different age profile and the possible relative lack of rigour of the Professional and Linguistic Assessment; in the case of all graduates, differences in the quality of training under different Deaneries leading to different success rates. For example, the London Deanery has a first time pass rate of 82 per cent, the East

Midlands Deanery a first time pass rate of 57 per cent. None of these factors are under the direct control of the Royal College.

24. In summary, the extensive research undertaken so far has identified the problem of differential outcomes which are only partly explicable by known factors and produced tentative suggestions for making alterations: within the competence of the Royal College, the encouragement of and cooperation with the Deaneries to educate candidates in the requirements of the Clinical Skills Assessment and an effort to secure a more representative profile of examiner. I would be surprised if the Royal College had not itself reached the conclusion that steps along those lines should now be taken and, if not, that the GMC, as its regulator, would not insist that they were taken.

25. Ms Monaghan's basic submission is that the Royal College should have embarked on those steps well before these proceedings were issued and that its failure to do so can ultimately be traced to a failure to fulfil its public sector equality duty in the systemic way required by the case law. She points, correctly, to the absence of any minute of a meeting of the Council of the Royal College before 15 June 2013, which refers to the commissioning of an Equalities Impact Assessment in respect of new policies and major decisions and to the denial, not now pursued, that the Royal College does exercise public functions and so is subject to the public sector equality duty. In those circumstances, she asks rhetorically, how can the Royal College have had due regard to its duties under section 149? She relies on by now fairly settled case law, beginning with R (Brown) v Secretary of State for Work and Pensions [2009] PTSR 1506, in which at paragraph 90 Aikens LJ said the following:

> "90. Subject to these qualifications, how, in practice, does the public authority fulfil its duty to have 'due regard' to the identified goals that are set out in section 49A(1) of the 1995 Act? An examination of the cases to which we were referred suggests that the following general principles can be tentatively put forward. First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have 'due regard' to the identified goals . . . thus an incomplete or erroneous appreciation of the duties will mean that 'due regard' has not been given to them . . . .
>
> 91. Secondly, the 'due regard' duty must be fulfilled before and at the time that a particular policy that will or might affect disabled people is being considered by the public authority in question. It involves a conscious approach and state of mind."

26. In R (Hurley and Moore) v Secretary of State for Business Innovation and Skills [2012] HRLR 13 at 374, Elias LJ at paragraph 78 observed that:

> "The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications than did the decision maker."

27. Finally, in R (Bailey) v London Borough of Brent Council [2011] EWCA Civ 1586 at paragraphs 73 to 75, Pill LJ observed:

> "73. In Harris, the council's stance was that section 71 considerations were effectively built into the decision making process because the development brief for the area and the relevant planning follows themselves reflected section 71 considerations. That submission was rejected by the court.
>
> 74. What was underlined in Harris was the need to analyse the material before the council in the context of the duty . . . which in this case is the duty to have due regard to the need to eliminate discrimination . . . .
>
> 75. I confirm that approach. When preparing policies and making decisions, decision makers must always keep in mind their duties under the 2010 Act."

28. Mr Oldham QC for the Royal College submits that substantial compliance with the duty suffices and that there is no need to prove a documentary trail, including an Equality Impact Assessment, to demonstrate compliance. He relies on Elias LJ's observations in Hurley at paragraph 74:

> "Similarly, there is no obligation in law to provide an equality impact assessment, although as Aikens LJ pointed out in R (Brown) . . . :
>
> > 'proper record keeping encourages transparency and will discipline those carrying out the relevant function to undertake their . . . duties conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade a court that it has fulfilled a statutory duty'."

29. All cases up to now have been concerned with the need for a public authority to apply its mind to the section 149 duty when proposing to take a decision which will have an impact on the users of existing services provided by the authority, for example a library, or of the financial terms on which people can make use of them, for example student fees. This case is different. It concerns what needs to be done to address a long-established state of affairs. I do not accept Ms Monaghan's submission, faintly made, that a duty to conduct a formal assessment of the differential impact of the Clinical Skills Assessment arose annually because the assessment was approved annually. I am dealing in reality, as is the Royal College, with a continuing method of assessment that, apart from a change in the method of marking, has remained in place for the last seven years. Nor do I accept Mr Oldham's proposition that the duty only arises when major change is contemplated. The duty is to have regard to the need to eliminate discrimination and advance equality of opportunity in the exercise of public functions, whether or not it is contemplated that there will be a change in the manner in which those functions are exercised. If there are grounds to believe that the manner in

which public functions is being exercised is not fulfilling the statutory goals, then due regard must be had to exercising them in a manner which does. I consider, therefore, and hold that the Royal College was and remains under a continuing duty to have regard to the need to eliminate discrimination and advance equality of opportunity in the exercise of its public functions of granting Certificates of Completion of Training and in setting and administering assessments which lead to the grant of that certificate and that it can only discharge that duty by conscientiously applying its mind to that need.

30. However, I accept Mr Oldham's submission that no formal Equality Impact Assessment was required or is now required. It is sufficient that the Royal College has addressed its mind to the need by commissioning and considering the many expert reports, plus that commissioned by the GMC, which it has done over the years.

31. In the case of a long-standing problem, such as that which exists here, that may not, however, be enough. Section 149 does not permit a person exercising public functions to identify the need to eliminate discrimination in one of the public functions it exercises and then do nothing about it. If it acted thus it would not be "having regard" to the need to eliminate discrimination in the exercise of its public function, it would be disregarding a specific need which it had itself identified. In many, but I think not in all cases, it might also be infringing section 19 if it acted thus.

32. On the facts of this case, the Royal College has now identified the respect in which, in the discharge of its public functions, it needs to act to eliminate discrimination and has identified some of the means by which that need might be addressed and fulfilled. The time at which it should act upon the information which it has gathered and analysed has either arrived or will do so very soon. If it does not act and its failure to act is the subject of a further challenge, it may well be held to be in breach of its duty under section 149 for that reason alone. As of now, I am not satisfied that it is in breach of its duties under section 149 or was at the time when this claim form was issued.

33. I turn then to the claims of direct and indirect discrimination under section 13 and 19 of the 2010 Act. Ms Monaghan recognises the difficulty of establishing direct discrimination when there is no individual claimant discriminated against and no person who has treated that person less favourably than he would treat others. In the language of section 13 there is no "A" or "B". Mr Oldham submits that without the participation of such individuals in the events which give rise to the claim, a claim of direct discrimination cannot succeed in principle. I would not go that far. A local authority which refused to employ black people or women could properly be the subject of a direct discrimination claim brought by the Equality and Human Rights Commission without the need to identify any individual black person or woman who had been refused employment. But in a case such as this which depends upon the performance of individuals in assessments examined by other individuals, I do not see how a claim of direct discrimination can be evaluated or substantiated. The statistical differences which exist do not of themselves establish direct discrimination, or transfer to the Royal College the burden of disproving discrimination under section 136. What they do, but all that they do, is to demonstrate that there is a difference of outcome. They do not establish the reason or reasons for the difference, still less that it is because the Royal

College, or individuals for whose actions the Royal College is responsible, are subjecting doctors who fail the assessment to less favourable treatment on a prohibited ground. I am satisfied that the direct discrimination claim does not get off the ground.

34. The same arguments are advanced in relation to indirect discrimination. Section 19 provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

35. The provision criterion or practice identified by the Claimant is the requirement to undergo a Clinical Skills Assessment. Ms Monaghan submits that it puts South Asian and BME doctors at a disadvantage when compared with their white colleagues and that the Royal College cannot show it to be a proportionate means of achieving a legitimate aim.

36. A number of preliminary questions arise. Mr Oldham submits that South Asians and BMEs are not racial groups. I do not accept that submission as it stands. Section 9(4) provides that:

> "The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group."

37. One person can belong to two or more racial groups, for example a Sikh of Indian nationality, but so too can two people of different nationality, for example Pakistanis and Indians. A hotel keeper who excludes Asians from his hotel would be discriminating against them on grounds of race, even though individual Asians might be Pakistanis, Indians or Chinese. The group "Asians" would be a group comprising two or more distinct racial groups of people of different nationality and ethnicity.

38. What that example shows is that a racial group may be identifiable by reason of the fact that it is so categorised by the person discriminating. I am satisfied that "South

Asians" are a racial group comprising people of Pakistani, Indian, Nepalese and Sri Lankan nationality or ancestry. I doubt that BMEs can so categorised. Ms Monaghan submits that they can be because the Royal College categorises them as a group, but it does so not with a view to discriminating against them or a dealing with them in a manner different from that of other racial groups, but simply for statistical purposes. To establish a claim under section 19, it would probably be necessary to break down BMEs into component groups. That, however, is an academic issue, given that the section 9 claim has to be considered in relation to South Asians and because it would no doubt be possible to breakdown BMEs into component groups without undue difficulty.

39. It is rightly common ground that requiring would-be general practitioners to submit to a Clinical Skills Assessment is a provision, criterion or practice and that if it puts South Asian UK graduates at a disadvantage by comparison with their white UK graduate colleagues and South Asian foreign graduates at a disadvantage when compared with white foreign graduates, it is discriminatory and that it is for the Royal College to show that it is a proportionate means of achieving a legitimate aim to discriminate between them in the manner which has occurred.

40. I am satisfied that the Clinical Skills Assessment does put South Asians of both categories at a disadvantage when compared with their white colleagues in the same category. Can the Royal College show that the assessments are a proportionate means of achieving a legitimate aim? Two pieces of evidence establish beyond argument what the legitimate aim is. I take the first from the witness statement of Dr Rendel and her citation from a paper produced by the Royal College in January 2011.

> "The MRGCP [an acronym for the three assessments to which I have referred] is a licensing examination which is by definition 'high stakes' in that those who pass will be licensed to practise medicines in an unsupervised capacity. Patient safety is therefore paramount and given that assessment is an imperfect science, the treatment of the measurable error must act in favour of patients rather than doctors. Specifically, we must be more confident that doctors who pass are safe to practise than that doctors who fail are unsafe. This aim is achieved not by one examination component in isolation, but by all three components of the MRCGP acting in a mutually complementary and supportive capacity, much like the three legs of a stool."

41. In their report Professors Esmail and Roberts describe the assessment as follows:

> "The CSA is not a culturally neutral examination and nor it is intended to be. It is not and nor should it be just a clinical exam testing clinical knowledge in a very narrow sense. It is designed to ensure that doctors are safe to practise in UK general practice. The cultural norms of what is expected in a consultation will vary from country to country. So for example, a British graduate will have difficulty in practising in a general practice setting in France or India until they become acculturated to that system of care. British graduates have

> much greater exposure, both personally and through their training, to general practice when compared to the majority of IMG who graduate from health systems which are not as dominated by primary care as the NHS. Most medical schools in the UK now have well developed programmes for communication skills training, reflective practice and direct exposure of students to General Practice as a discipline."

["IMG" are International Medical Graduates, those to whom I have referred as "foreign graduates".]

42. I am also satisfied that the Clinical Skills Assessment is a proportionate means of achieving that legitimate aim. It is necessary to test three of the skills required of a general practitioner: 1) gathering information; 2) arriving at a diagnosis; 3) communicating with the patient. No better means of testing those skills has yet been devised than the Clinical Skills Assessment. The method is in common use across the civilised world, unsettling and expensive though it may be for those who fail the first time at a cost of £1,600. The eventual failure rate is very small.

43. The assessment serves the legitimate purpose of protecting patient safety by means that are, in principle, acceptable and do so at a human cost which is tolerable for those who ultimately succeed. There is no basis for contending that the small number who fail ultimately do so for any reason apart from their own shortcomings as prospective general practitioners.

44. Ms Monaghan submits that section 19 imposes on the Royal College the duty to take positive steps to reduce discrimination and that, in the absence of such steps, the means of achieving the legitimate aim should not be deemed proportionate. I do not agree. The fact that it is possible to improve on the means of achieving an aim does not mean that before improvement occurs the means are not proportionate. Section 19 does not demand perfection. What must be judged is the balance between disadvantage, aim and means at the time when the provision, criterion or practice is in place and is scrutinised.

45. By that standard, I am satisfied that the Clinical Skills Assessment is a proportionate means of achieving the legitimate aim identified. For those reasons, the claim against the Royal College must be dismissed.

46. I can deal shortly with the position of the GMC. Its general role is set out in section 1(1A) of the Medical Act 1983:

> "The main objective of the General Council in exercising their functions is to protect, promote and maintain the health and safety of the public."

47. In relation to the training and qualification of general practitioners, its function is set out in section 34H:

> "(1) The General Council shall—
>
> (a) establish standards of, and requirements relating to, postgraduate medical education and training, including

> those necessary for the award of a CCT [Certificate of Completion of Training] in general practice and in each recognised speciality;
>
> (b) secure the maintenance of the standards and requirements established under paragraph (a) . . . "

48. The GMC acknowledges that it owes duties under section 149 and its evidence demonstrates that it takes formal steps to demonstrate fulfilment of those duties. It has also undertaken steps of potential practical value to do so. Principal amongst them is the commissioning of the report from Professors Esmail and Roberts. I was told this morning by Mr Bowers QC for the GMC that it has acted upon that report in, amongst others, the following respects: setting about the collection of data from doctors in difficulty and on the assessment results, working on standards for examiners and discussing with the Royal College the recruitment of more BME role players and examiners to address, perhaps, the apparent bias detected by Denney and others in their report. In due course, it may have to use its powers under section 34H(1)(a) and (b) to establish and secure the maintenance of standards of medical education and training for would-be general practitioners in the skills measured by the Clinical Skills Assessment undertaken by the Deaneries, a power which the Royal College lacks.

49. All that is necessary for me to state is that as of now, the Claimant has not shown that the GMC has, when its claim was issued or since, failed to have proper regard to its duties under section 149. The claim against the GMC is therefore also dismissed.

50. I do not, however, wish to conclude this judgment without stating that I am satisfied that this claim has been brought in good faith and in the public interest by an organisation acting for a proper purpose.

51. I am also satisfied that the bringing of this claim is likely in the end to produce something of benefit for the medical profession and so for the public generally. The claim was only brought by the Claimant when it felt that no other course was open to it to attempt to rectify an anomaly acknowledged by all to exist. This claim has served a useful purpose and the Claimant has achieved, if not a legal victory, then a moral success.

52. With those comments and that judgment, I have no doubt that there are applications which are consequent upon it, but I hope that in the light of what I said at the end of the judgment, that instructions will be taken in the few minutes during which I will rise as to some of those consequences.

**(A Short Break)**

53. MR OLDHAM: My Lord, we're grateful. There is an application, which is: we take on board very seriously what your Lordship has said in all respects and we do apply for the costs of the claim for these reasons. First of all, we are very conscious that your Lordship has suggested as part of the judgment that there are now or may in future be steps which your Lordship feels we should consider taking, pursuant to the public sector equality duty and I hope I've demonstrated that the College is a responsible

organisation which your Lordship can expect to take very seriously your Lordship's observations in that regard, but that doesn't alter the fact that the claim which Bapio chose to bring has indeed failed and failed on all counts.

54. Your Lordship kindly gave us a few minutes to take instructions on the costs point and whether we should be making an application for costs. My Lord, I would say a number of things. First of all, the fact that a claim has been brought in good faith and for proper purposes -- which we don't, of course, dispute -- doesn't alter the fact that the claim has been brought and has failed. One would hope that all litigation is brought in good faith and, indeed, for proper purposes.

55. My Lord, in our case there is a further issue, which is that there is a third party interest in this litigation, as your Lordship may apprehend, namely that we are an insured party and the lead insurers therefore have an entirely legitimate interest in ensuring that the extent that would normally occur -- costs should be sought and that's what we do. My Lord, to show our willing and, again, our good faith we have sought, in the short time available, to contact the insurers but we haven't managed to get through to the right person. We do take it that our standing instructions are, of course, to protect the insurer's position. For that reason we are really obliged to apply for costs.

56. My Lord, there is a further point as well. We, of course, are a charity and I think I have intimated to your Lordship that I'm not a charities expert but it would be the duty of the trustees of the organisation to ensure that it did not suffer loss. I understand, without giving away any commercial details, that there is a relatively smallish excess that would have to be paid, notwithstanding that we are insured. So your Lordship may think that is also of relevance.

57. My Lord, for all those reasons we do say, notwithstanding the opportunity, for which we are grateful, to take instructions on the point, that we are really obliged to apply for our costs and we do and say that they should be awarded, as would normally be the case.

58. There may be other points my learned friend wishes to say about it which I have not canvassed and if I can be allowed to come back in reply I would be grateful.

59. MR JUSTICE MITTING: Certainly. Mr Bowers.

60. MR BOWERS: My Lord, one recognises the agony of those who have failed these "high stakes" exams but, in our submission, the GMC was always an inappropriate party to this claim. As Mr Justice Stuart-Smith indicated, it was inconceivable that the court would grant relief against the GMC, if not against the RCGP and we also are a charity supported, I am told, by some 260,000 doctors putting in their contributions. This is litigation which has inevitably been expensive and it has been important that the GMC is properly represented. We would say that our response has been proportionate, only putting in one witness statement and accepting from the beginning that we were a body with public functions. We say that even if there has been a moral success, these legal proceedings as against the GMC were always misconceived, as the GMC sought to indicate from the beginning, and, furthermore, sought to pursue, as you saw in the

correspondence I took you to yesterday, for some particularisation of exactly what the case was without any real success.

61. So, my Lord, we do say that whatever the position as to the RCGP, the GMC should be awarded its full costs. Unless there are any other matters, my Lord, those are my submissions.

62. MR JUSTICE MITTING: No. Ms Monaghan.

63. MS MONAGHAN: My Lord, we would, unsurprisingly, invite your Lordship exceptionally not to follow the usual course and make an order for costs against Bapio. As your Lordship has already observed, these proceedings were not just brought in good faith, but they were brought in the public interest and not just the interests of trainee doctors but ultimately for the public good, more generally.

64. My Lord, I do have a case. I'm sure it's so well-known to you that I probably don't need to refer to it, but Davey. I do have a copy if you would like to look at it.

65. MR JUSTICE MITTING: I would, please. **(Handed)**.

66. MS MONAGHAN: I deal with it for two points. The first is one of the principal issues in the case and I'll come to that as my absolute last resort, if I have to get there: the question of whether the costs of the permission hearing should be embraced by a general costs order in the Judicial Review proceedings. But the first part of the judgment I should like your Lordship to look at, paragraph 21, which is Lord Justice Sedley dealing with the sorts of issues that may arise in public interest litigation and picked up by Sir Anthony Clarke later on:

> " . . . these seem to me to be the appropriate guidelines for dealing with the present problem. They should be . . . subject to the caveats set out in the judgment of [Sir Anthony Clarke].
>
> (1) On the conclusion of full judicial review proceedings in a defendant's favour, the nature and purpose of the particular claim is relevant to the exercise of the judge's discretion as to costs. In contrast to a judicial review claim brought wholly or mainly for commercial or proprietary reasons, a claim brought partly or wholly in the public interest, albeit unsuccessful, may properly result in a restricted or no order for costs.
>
> (2) If awarding costs against the claimant, the judge should consider whether they are to include preparation costs in addition to acknowledgment costs . . .
>
> (3) It is highly desirable that these questions should be dealt with by the trial judge [rather than the costs master] . . .
>
> (4) If at the conclusion of such proceedings the judge makes an

undifferentiated order for costs in a defendant's favour

(a) the order has to be regarded as including any reasonably incurred preparation costs; but

(b) the 2004 Practice Statement should be read so as to exclude any costs of opposing the grant of permission in open court . . . "

67. So that's my last resort point. My first point is: in public interest litigation it's recognised that that is a particular context where discretion might be exercised to go outside the usual rule and you have that discretion; of course I don't need to trouble you with that.

68. The Mount Cook principle, as your Lordship will no doubt know, simply refers to mischievous bad faith-type and so on.

69. Then at paragraph 29, Sir Anthony Clarke:

> "I entirely agree with the guidelines set out by Sedley LJ at paragraph 21 above. I would however add one note of caution. It does seem to me that costs should ordinarily follow the event and that it is for the claimant who has lost to show that some different approach should be adopted on the facts of a particular case."

70. He cites the Child Poverty Action Group and then at 30 he deals with the preparation costs for permission. As I say, that's a separate point but my principal point is simply to remind your Lordship that a different approach is often appropriate, generally appropriate perhaps.

71. MR JUSTICE MITTING: Well, it's available.

72. MS MONAGHAN: Is available -- forgive me -- available in public interest litigation and will often be appropriate because we depend sometimes on those who are prepared to put their heads above the parapet and take the risks that litigation involves to ensure that we all enjoy some greater good from that. There have been, as your Lordship has observed, achievements so far as the claimants are concerned. It has focused -- there's no doubt about it -- the minds of the defendants on their obligations and some victory can be claimed, if not a legal victory.

73. My Lord, that's the public interest point. It is also right to observe, if I may say so, that the GMC did not come here with evidence about what they have done, they have told you what they have done after instructions were taken overnight in response to your Lordship's questions and there were efforts before the hearing to come to some mediated settlement through BMA. My clients have always indicated a willingness to discuss -- I can show you volume one of the hearing bundle in 1G, page 19, where our instructing solicitors write to the RCGP's instructing solicitors, dealing with the witness statement of Dr Rendel where she suggests at various points that Bapio have been approached to assist in various matters. That's dealt with and I needn't trouble with

you that now, unless it helps your Lordship. Certainly at the end, penultimate paragraph:

> "My clients considered it important to draw these matters to your attention as they wish to make it clear that they have sought to resolve matters other than by litigation and remain committed to doing so if possible."

74. There wasn't any response indicating that some other route might be available or any discussion --

75. MR JUSTICE MITTING: This isn't really the sort of case that can be mediated. Your client has brought a claim which has failed, for reasons I've explained, but in the public interest and on questions of general importance, some of which are relatively novel and need to be resolved. Whether I've given the right answer or not may be seen in due time, but this is not an ordinary Judicial Review claim, it's a claim that, in my judgment, it has been necessary to bring to get the wheels properly set in motion for attempting to resolve these difficult problems.

76. MS MONAGHAN: My Lord, in view of that, in my submission, it really would be appropriate for your Lordship to exercise your discretion not to make an order for costs and I would invite you so to do.

77. MR JUSTICE MITTING: Anything to say about the fact that the College is insured? Which surprised me, I must say, but I didn't know about it, whatever Mr Oldham may have thought.

78. MS MONAGHAN: I would have to ask Ms Hannett. Ms Hannett knows much more than me. My Lord, we submit that the sources of funding for the litigation are irrelevant to the question whether or not you should exercise your discretion. If it's not an appropriate case to award costs, then how that's funded is not a consideration.

79. MR JUSTICE MITTING: Thank you. Mr Oldham, or whoever wants to go first.

80. MR OLDHAM: I think I'm first on the indictment list, so --

81. MR BOWERS: I have the lectern.

82. MR OLDHAM: My Lord, the litigation might, as your Lordship possibly speculates, end up benefiting the public and I understand what your Lordship is saying but that is different from saying that the litigation was brought in the public interest. We know why the litigation was brought. Entirely understandably, it was bought by Bapio on behalf of its members and the witness statements that Bapio has put in make it clear that it was brought on behalf of certain of their members. There's no evidence that Bapio were motivated by the fact that the claim would benefit standards of public health, that is not why the claim was brought. My Lord, I do say this isn't public interest litigation in that sense. It was brought in the interests of the doctors and their representatives.

83. Further, my Lord, we have just received Davey but the normal route these days to go down --

84. MR JUSTICE MITTING: Protective costs order.

85. MR OLDHAM: Protective costs order, which was not applied for at all and Davey is from 2007. As I say, a protective costs order is the way these things are done.

86. My Lord, lastly, on the issue, to the extent that it's relevant, the issue of mediation: in fact we did engage, we engaged with the BMA on mediation. I don't think your Lordship has the material in front of your Lordship in the core bundle but there was discussion of the terms of the reference for the mediation, which ground into the same, for reasons I don't need to bother you with. But the idea that, if it's suggested, we simply turned away from mediation is not right.

87. My Lord, unless I can help you further, those are my submissions.

88. MR BOWERS: My Lord, I was hoping to get in first on the protective costs order point because we submit that that would have been the appropriate course. Secondly, Davey makes it clear that the normal rule, even in JR public interest litigation, is that costs should follow the event and, thirdly, with an unparticularised claim, with the rather extravagant relief that was sought, mediation is really out of the question --

89. MR JUSTICE MITTING: I agree with that.

90. MR BOWERS: -- as a way forward. So, my Lord, for all those reasons we would ask for the costs.

91. MR JUSTICE MITTING: This is not a normal or straightforward Judicial Review claim. It was, for reasons I have explained, brought substantially in the public interest by Bapio, admittedly acting on behalf of its members, but its members, as I understand it, comprise in the main those who have successfully qualified as general practitioners or specialists and they are, therefore, funding an action brought on behalf of their would-be successors. This is not a claim brought for commercial or selfish interest.

92. I take the point that a claim of this nature would ordinarily be accompanied by an application for a protective costs order. The jurisprudence on protective costs order is developing and the Claimant might have thought that the fact that it represented those with an interest in the outcome of these proceedings might have disqualified it from applying. I do not know.

93. I am satisfied that I should not make a straightforward order for costs in favour of both Defendants, but I should attempt retrospectively to mimic a protective costs order which I would have thought appropriate had it been applied for in the first place. I do not know enough about Bapio's means to make a judgment upon the amount, nor do I know a ballpark figure for the costs that have been incurred on all sides.

94. That is what I intend to do and I invite submissions now as to means and costs.

95. MS MONAGHAN: I know the litigation is funded by donation, so people putting their hands in their pockets, the doctors. Some of the money was raised through donations outside of Bapio's, in particular trainee doctors -- £5, £10, that sort of figure -- otherwise mainly the qualified doctors putting more substantial sums in. They have no assets, they rent a building that they use for office purposes and so any costs order will be met -- there aren't any assets in Bapio but I anticipate that if it is enforced, then efforts will have to be raised to put hands deeper into the individual doctors' pockets.

96. MR JUSTICE MITTING: How much has been spent on your side, ballpark figure?

97. MS MONAGHAN: About 175.

98. MR JUSTICE MITTING: With three 0s at the end.

99. MS MONAGHAN: Regrettably.

100. MR JUSTICE MITTING: Can I have some idea of the defendants' costs? Ballpark figures only.

101. MR OLDHAM: My Lord, it's in the order of £288,000.

102. MR JUSTICE MITTING: Don't worry about the precise details.

103. MR BOWERS: I'm told between £75,000 and £100,000.

104. MR JUSTICE MITTING: I take it that if I make a single order for costs, capped, that the defendants will agree on a share out of anything recovered.

105. MR OLDHAM: My Lord, I have to resist any attempt, as it were, to cramp my style as regards costs.

106. MR JUSTICE MITTING: You've lost on the principle. I'm going to fix a sum.

107. MR OLDHAM: Yes, but as regards myself and my friend, if there is to be a dispute between us, your Lordship knows my position. We would say in those circumstances -- my Lord, I interrupted. Perhaps if your Lordship explains what your Lordship has in mind.

108. MR JUSTICE MITTING: I am going to make an order that the claimant pay a fixed sum by way of the defendants' costs. I will, if you like, divide it up between the defendants but I had hoped that once the size of the sum is known -- and I fear it's a relatively small size in relation to the costs that have been incurred -- that the defendants will not fall out amongst each other as to the division of that sum.

109. MR OLDHAM: My Lord, I think I may see a way through without bothering your Lordship necessarily just now. Can I take instructions?

110. MR JUSTICE MITTING: Of course.

111. MR OLDHAM: My Lord, we are grateful for the time. My Lord, again, because of our position, which I hope your Lordship can understand, can I suggest this: that my learned friend and I or our clients do indeed try, with the approval of my insurers, to reach agreement and if no agreement is reached, for to us make very brief written submissions to your Lordship in due course.

112. MR JUSTICE MITTING: I will ignore any submission longer than one page of A4.

113. MR OLDHAM: It won't be longer than one page.

114. MR JUSTICE MITTING: The order as to costs which I make is that the Claimant must pay a total sum of £50,000 to the two Defendants, to be divided between themselves as they agree or, in default of agreement, decided by me on paper.

115. I make that order for a number of reasons. First, I have to acknowledge that the Claimant has lost, albeit has achieved, as I put it, a moral success. Secondly, this claim has been brought in the public interest. Thirdly, it is nonetheless right that those who have risked their own funds and ultimately that of the Claimant by bringing this litigation should bear a small portion of the costs of its lack of legal success. I fix the sum by reference to the amounts that have been raised by voluntary contributions, which I am told amount to £175,000. I believe that I am dealing with honorable people and that in the circumstances there should not be an insurmountable problem in raising the sum at which I have capped the order for costs at £50,000. Anything else?

116. MS MONAGHAN: Finally, my Lord, if we're to make an application for permission to appeal, I must make it first and I must make it now, so I do so. I rely principally on the grounds already in the claim form and in particular holding my Lord that a public authority can't be required by the public sector equality duty to take steps or exercise functions that it isn't already exercising. My Lord, in concluding, as you did, that due regard had been had at material times, that in due course would be adequately to discharge the duty. And, my Lord, that your Lordship fell into error in the approach to proportionality in failing to have regard to the question whether a better outcome could have been achieved and in relation to the GMC that the duty had been complied with in circumstances, we say, where there is no adequate evidence so to say.

117. MR JUSTICE MITTING: Mr Oldham and Mr Bowers, some, at least, of these points are novel and of some importance for other cases. I obviously believe that my rulings upon them are right, but others might take a different view.

118. MR OLDHAM: Which one do you want to hear from first?

119. MR JUSTICE MITTING: I don't mind.

120. MR OLDHAM: My Lord, we say that, on the contrary, one can put aside the direct and indirect discrimination claims, which factually don't get off the ground and even if they had would be subject to very well-known principles which would have rendered them, we say, impossible to appeal. Your Lordship applied very well-known principles to the facts and reached a conclusion that your Lordship was plainly entitled to reach on proportionality, essentially.

121. My Lord, on the PSED we say that, again, this was the application of facts to well-established principles. Your Lordship, if I may respectfully say so, adverted to relevant case law and directed your Lordship's judgment by reference to it. The first point that my learned friend raises is: that's to say the scope of the duty, in effect whether it applies, or should apply to require us to do things that we weren't, in fact doing. Whether it's novel or not I don't know, but it must follow that the reason why it hasn't been adverted to in all the case law so far, and there's a lot of it, is that it's a bad point and that your Lordship's approach is correct.

122. My Lord, unless I can assist your Lordship further.

123. MR BOWERS: My Lord, briefly, we say that on the PSED that your Lordship effectively applied relatively uncontroversial legal principles to the facts of the case, so no point of importance really arises. Secondly, even if your Lordship felt that it was appropriate to grant leave in relation to the RCGP, as far as the GMC is concerned it's inconceivable that any relief would be gained against the GMC that was not gained against the RCGP. We say we were never a party and we shouldn't be a party on appeal either.

124. MR JUSTICE MITTING: Ms Monaghan, I think your claim against the GMC does not raise any questions of wider importance or have any realistic prospect of success and I refuse you permission to appeal on my finding against you in their case. But some of the issues raised in your case against the Royal College could be decided differently. I am not encouraging you to appeal but I am simply saving a step which you would have to take if I were to refuse you permission. Accordingly, I am minded to give you permission limited to those grounds that I think raise questions of wider interest. If you would care to formulate them in writing, I will say yes or no on a one, two, three, four basis.

125. MS MONAGHAN: I am grateful. Just for completeness, so I don't waste your reading time, can I take it that the grounds don't include the proportionality ground in relation to indirect discrimination or otherwise? I'll formulate the ground, shall I?

126. MR JUSTICE MITTING: I think one or perhaps two of the grounds you've identified either are or involve novel principles or the application of the law in the manner that hasn't been applied before, and I think it's legitimate to ventilate those before the Court of Appeal if you really wish to. But the others don't and at this stage in the afternoon I think I can only say: please put them on a single sheet of A4 as grounds of appeal and I will say yes or no, one, two, three, four.

127. MS MONAGHAN: My Lord, we'll make sure they're over in the morning so they're fresh.

128. MR JUSTICE MITTING: Thank you, that would be very helpful.

129. MS MONAGHAN: There is one matter I should have raised, and Ms Hannett has handed me a sticker, which is that, as I understand it from my note, the ordinary period for payment of any costs is 14 days.

130. MR JUSTICE MITTING: Yes.

131. MS MONAGHAN: Since we will have to be sending the envelope round, so to speak, could that be extended to three months, my Lord?

132. MR JUSTICE MITTING: That must be right.

133. MR BOWERS: Yes, we are content with that, as long as we're not sent an envelope.

134. MS MONAGHAN: I can bung them a tenner myself now, if that would help.

135. MR OLDHAM: I don't think I can make a submission on that, for the reasons that your Lordship is aware of.

136. MR JUSTICE MITTING: I agree that the order should contain that provision for payment is three months, not 14 days. I am asked if you would draft the order, please, between you.

137. MS MONAGHAN: Certainly, my Lord. Thank you.

138. MR JUSTICE MITTING: Thank you all for interesting submissions in a far from straightforward case.