In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 112

BETWEEN:

DEVON HEWEY

Applicant

-and-

LEGAL AID COMMITTEE

Respondent

JUDGMENT

Before: **Hon. Acting Justice Alexandra Wheatley**

Appearances: **Mr Bruce Swan of Bruce Swan & Associates for the Applicant**

Ms Shakira Dill-Francois of the Attorney-General's Chambers for the Respondent

Date of Hearing: 2 February 2024
Date Draft Circulated: 15 March 2024
Date of Ruling: 19 March 2024

Judicial Review; Decision was Ultra Vires/Unlawful/Irrational/Unreasonable/Unfair; Bermuda Constitution; Right to be defended before the Courts; Criminal Charges; Choice of Counsel; Publicly Funded Defence Counsel

JUDGMENT of Hon. Acting Justice, Alexandra Wheatley

INTRODUCTION

1. The Applicant in this matter was charged along with his co-defendant, Jay Dill (**Dill**), for the premeditated murder of Randy Robinson and the use of a firearm to endanger life. The Applicant and Dill were convicted on 25 February 2013 by a jury of their peers. Both defendants appealed against their convictions. The Court of Appeal dismissed both the Applicant's and Dill's appeals on 18 March 2016 with the reasons for the dismissals being delivered on the 13 May 2016.

2. Following the Court of Appeal's dismissal, the Applicant applied to the Judicial Committee of the Privy Council (**JCPC**) seeking leave to appeal the Court of Appeal's decision. Leave was granted and the JCPC considered the appeal in February 2022. The JCPC allowed the appeal in its judgment handed down on 11 April 2022 – *Devon Hewey* v *The Queen* [2022] UKPC 12 (**the JCPC Judgment**), thereby setting aside the Applicant's conviction and sentence. Subsequently, and as directed by the JCPC, the matter was remitted to the Court of Appeal to determine whether the Applicant should be retried. This issue was heard by the Court of Appeal on 9 June 2022 (**the Retrial Hearing**). On 17 June 2022, the Court of Appeal ordered that "*the interests of justice requires that the Appellant should be retried*" (**the COA Retrial Order**). The reasons for the COA Retrial Order were handed down on 12 August 2022 – *Hewey* v *The Queen* [2022] CA (Bda) 15 Crim.

3. Notably, throughout the duration of the criminal proceedings from the initial trial in the Supreme Court to its return to the Court of Appeal in 2022, the Applicant was legally aided. Mrs Simone Smith-Bean was appointed as his counsel to have conduct of the Retrial Hearing. On 2 September 2022, Mrs Smith-Bean, indicated to the Respondent that she was seeking overseas counsel to have conduct of the retrial. Mrs Smith-Bean provided an opinion as to why overseas,

Queen's Counsel (as it was then) was required[1] to the Respondent for consideration on 23 November 2022 (**the Opinion**). The Opinion relied on the judgments of the JCPC and Court of Appeal, to support why the Applicant's case was an exceptional one where overseas counsel was necessary to do justice to the points of public importance that would arise. An estimate of the costs of instructing Mr Thomas KC was subsequently submitted to the Respondent for consideration.

4. The Respondent refused to appoint overseas counsel. Instead, on 30 November 2022, the Respondent added Legal Aid Counsel, Ms Susan Mulligan, to the Applicant's legal aid certificate. The Applicant was informed in the Respondent's correspondence of 1 December 2022 that "*there are not sufficient grounds to warrant overseas counsel*" in his case.

5. Additionally, on 30 November 2022, Mrs Smith-Bean provided Bar Council with a similar submission to that of the Opinion which also gave notification of the Applicant's intention to seek special admission of overseas counsel for the purposes of the retrial. Bar Council subsequently informed Mrs Smith-Bean on 9 December 2022 that it had no objections to Mr Thomas KC's admission to the Bermuda Bar for the purposes of the Applicant's retrial. It expressly stated that it was satisfied that the test under section 51 of the Supreme Court Act 1905 (**the SCA**) was met. Mr Thomas KC was thereafter issued with a special practicing certificate on 26 January 2023.

6. The Applicant had also written to the Respondent on 12 December 2022 advising why he had no trust and confidence with Ms Mulligan representing him at the retrial. The Respondent refused to "*transfer from Ms Mulligan as lead counsel to Ms Smith Bean*" in its correspondence to the Applicant dated 14 December 2022[2].

7. Mrs Smith-Bean wrote to the Respondent in January 2023 requesting that it reconsider Mr Thomas KC being appointed as counsel. On 20 January 2023 the Respondent sent a letter to Mrs Smith-Bean declining the approval of King's Counsel being appointed and stated as

[1] Mrs Smith-Bean's opinion is exhibited to the Affidavit of Senior Legal Aid Counsel sworn on 1 June 2023 (**SLAC's Affidavit**) at pages 42 to 46.
[2] The Respondent's letter dated 14 December 2022 is exhibited to SLAC's Affidavit at page 50.

follows:

> "*…The committee refers you to their previous decision on 30 November 2022 to decline a KC for this matter and their decision remains unchanged. There are seasoned counsel in this jurisdiction who have experience with the areas of law which will arise in this retrial therefore a KC is not required.*
> *Please note that approval has already been granted for in house Legal Aid Counsel Ms Susan Mulligan, who is experienced counsel, as Lead Counsel and Mrs. Simone Smith-Bean as Second Chair for this trial. The Committee will not consider any further request for a KC.*"[3]

8. Mrs Smith-Bean sent further correspondence for the Respondent to reconsider its refusal to fund overseas counsel on 24 January 2023. Thereafter, the Applicant requested by letter dated 25 January 2023, as an alternative, that Ms Smith-Bean be permitted to conduct the trial alone.

9. On 24 January 2023, Legal Aid Counsel, Ms Mulligan, visited the Applicant after her appointment as his Lead Counsel. Thereafter, Ms Mulligan provided a memo to the Respondent for consideration which recommended that the Applicant should not be permitted to have overseas counsel but should be permitted to appoint an alternative local senior counsel as well as provided her opinion that the Respondent should not fund Ms Smith-Bean to conduct the trial alone. The Respondent wrote to Mrs Smith-Bean and Ms Mulligan on 27 January 2023 informing them, inter alia, that it would not allow Mrs Smith-Bean to be Lead Counsel, that a KC would not be appointed and that alternative, local counsel can be appointed as Lead Counsel with Mrs Smith-Bean being second chair[4].

10. Whilst the Applicant's representation issues were ongoing, Mrs Smith-Bean for the Applicant continued to proceed with the application for the special admission of Mr Thomas KC. On 9 December 2023, Bar Council informed the Applicant that it had no objections to Mr Thomas KC's admission to the Bermuda Bar for the purposes of the Applicant's trial. It expressly stated that it was satisfied that the test under section 51 of the Supreme Court Act 1905 (**the SCA**) was met. Mr Thomas KC was issued with a special practising certificate by Bar Council on 26 January 2023. As a result of Bar Council's approval, the Department of Immigration approved Mr Thomas KC's application for a work permit on 12 April 2023. The Court was also satisfied

[3] The Respondent's correspondence of 20 January 2023 is exhibited to SLAC's Affidavit at pages 42 to 46.
[4] The Respondent's correspondence of 27 January 2023 is exhibited to SLAC's Affidavit at pages 71 to 72.

that the statutory test for overseas counsel was met and granted Mr Thomas KC special admission on 25 April 2023.

11. The Applicant subsequently requested on 5 February 2023 that his legal aid certificate be transferred from Mrs Smith-Bean to Ms Shi-Vaughn Lee of 95 Law Ltd. The Respondent accepted there was a good enough reason for there to be a change in appointed counsel and discharged Mrs Smith-Bean. However, in the Respondent's letter of 10 February 2023, it informed the Applicant, that it would "*consider*" amending the certificate to appoint Ms Lee on the condition that the Applicant also either accepted Ms Mulligan as lead counsel at his trial, or chose a different local senior counsel approved by the Respondent.

12. The Respondent wrote to the Court on 3 March 2023 where a query had arisen at a case management hearing as to why the Applicant was unrepresented, setting out the history of the Respondent's decisions in the Applicant's matter as well as confirming the status of legal aid at that time. The Respondent concluded as follows:

> "*…The Committee has carefully considered all of Mr. Hewey 's requests and affirms, once again, its decision not to appoint King's Counsel from overseas to represent Mr. Hewey. The Committee also declined to provide public funds to retain inexperienced junior counsel to represent Mr. Hewey without being guided by an experienced lead counsel.*[5]"

13. Given the position set out by the Respondent in this correspondence, the Applicant investigated the possibility of appointing local lead counsel. This was unsuccessful given the late stage of being retained with the retrial being less than one month away as they were either not available, would not be bound by the legal aid rates, or no response was received. Therefore, the retrial set to commence in April 2023 was adjourned due to the Applicant's lack of legal representation, and these proceedings were commenced.

14. This is an application for the judicial review of the Respondent's decisions to: (1) refuse to fund the Applicant being appointed overseas counsel, Mr Thomas KC, to represent him at his retrial for pre-meditated murder as his "*counsel of choice*"; and (2) the LAC's refusal to appoint the Applicant's local counsel of choice for the retrial[6].

[5] The Respondent's letter to the Court dated 3 March 2023 is exhibited to SLAC's Affidavit at pages 92 to 95.
[6] On 30 March 2023, the Applicant was granted leave to pursue his claim for judicial review by the then Chief Justice, Narinder Hargun.

15. In summary, the Applicant's position is that in refusing the applications, the Respondent has acted both *ultra vires* and arbitrarily. In the alternative, that the Respondent's decisions were irrational and/or wholly unreasonable. Further, the Applicant is alleging that the Respondent failed to provide sufficient reasons for its refusal to fund overseas counsel, is a breach of basic principles of natural justice. It is also the Applicant's case that the inference to be made from the Respondents' purported inability to provide adequate reasons is that there were no lawful or good reasons behind the refusals.

16. The following remedies are being sought:

"i. *A **Declaration** that the decision of the Legal Aid Committee refusing to fund overseas King's Counsel to represent the Applicant at his retrial for premeditated murder was unlawful, and/or irrational and/or unreasonable.*

ii. ***Certiorari** quashing the said decision of the Legal Aid Committee.*

iii. ***Mandamus** compelling the Legal Aid Committee to appoint overseas Kings Counsel for the purposes of representing the Applicant at his retrial for premeditated murder.*

iv. *A **Declaration** that the decision of the Legal Aid Committee refusing to appoint Ms Shi-Vaughn Lee to represent the Applicant at his retrial proceedings was unlawful, and/or irrational and/or unreasonable.*

v. ***Certiorari** quashing the said decision of the Legal Aid Committee.*

i. ***Mandamus** compelling the Legal Aid Committee to appoint the Applicant's choice of local external counsel for his retrial for premeditated murder.*

ii. ***Costs**, on an indemnity basis, alternatively on a standard basis.*

iii. *Any other relief that the Court deems appropriate."*

17. The Applicant relies upon his affidavit sworn on 20 March 2023 (**Applicant's First Affidavit**) as well as his affidavit in reply sworn 15 June 2023 (**Applicant's Second Affidavit**). The Respondent relies on the affidavit of Senior Legal Aid Counsel (**SLAC**), Ms. Susan Moore-Williams, sworn on 1 June 2023 (**SLAC's Affidavit**).

18. Both parties presented their respective oral submissions on 2 February 2024 as well as provided written submissions. Notably, Mr Swan for the Applicant filed very lengthy and detailed submissions which cited thirty-four authorities. I am grateful for both Counsels' submissions as I have largely incorporated these into this judgment.

APPOINTMENT OF KING'S COUNSEL

THE LAW

Legal Aid Framework

19. The right to a fair trial regarding criminal offences, which *inter alia*, includes representation before the Courts, is embedded in the Bermuda Constitution Order 1968 (**the Constitution**). Order 6 provides as follows:

> "***Provisions to secure protection of law***
>
> *(6) (1) If any person is charged with a criminal offence, then, unless the charge withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *(2) Every person who is charged with a criminal offence –*
> *…*
> *(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or, where so provided by any law, by a legal representative at the public expense;…*" [Emphasis added]

20. The provision for a person charged with a criminal offence being defended before the Courts "*by a legal representative at the public expense*" is governed by the Legal Aid Act 1980 (**the Act**). The Respondent is charged with carrying out the duties set out in the Act as well as in accordance with the Legal Aid (General) Regulations 1980 (**the Regulations**). Section 5 of the Act provides as follows:

> "***Functions of the Committee***
> *5 (1) The Committee shall in consultation with the Bermuda Bar Council prepare and maintain a list of barristers and attorneys who are in active private practice in Bermuda, from which shall be drawn the names of all counsel who are able and willing*

to represent applicants and assisted persons; the Committee may prepare rosters of such counsel for the more efficient administration of this Act, and such rosters shall include one of counsel who are willing and able to interview and advise persons charged with criminal offences in the circumstances set out in section 7.

(2) The Committee shall receive and consider every application for legal aid made under section 8 and, subject to the following provisions of this Act and any regulations, shall grant a certificate to an applicant in any proper case, with or without provision for payment of contributions by the applicant." [Emphasis added]

21. The Respondent's decisions are also regulated by The Policies and Guidelines of the Legal Aid Committee. These are a published a set of guidelines for practitioners applying for legal aid, but in my view are not relevant.

22. Under section 10(2) of the Act, a person charged with an offence listed in the Second Schedule, which includes premediated murder, is entitled to legal aid as of right (subject to him or her satisfying the means test). There is no dispute in these proceedings that the Applicant satisfied the means test and it is accepted that he is entitled to legal aid as of right in accordance with the Act.

23. Upon making an application for legal aid, an applicant may state his or her counsel of choice. The assignment of counsel to a legal aided person is set out in section 12 of the Act:

"***Assignment of counsel***

12 (1) Subject to subsections (2) to (4), whenever a certificate is granted by the Committee, the Committee shall direct the Senior Legal Aid Counsel to assign Legal Aid Counsel to the assisted person.

(2) But if the Committee, on the advice of the Senior Legal Aid Counsel, determine that assignment of Legal Aid Counsel in a particular case—

(a) is not practical;
(b) is not appropriate to the nature of the proceedings for which the certificate is granted; or
(c) might give rise to a conflict of interest,

the Committee shall direct the Senior Legal Aid Counsel to assign to the assisted person the external counsel of the assisted person's choice.

(3) Notwithstanding subsection (2), if the assisted person's external counsel of

choice—

(a) is unavailable;
(b) is unwilling to take on the case; or
(c) refuses to be bound by the Schedule of Fees annexed to the Legal Aid (Scale of Fees) Regulations 1980,

the Committee shall direct the Senior Legal Aid Counsel to assign another counsel to the assisted person.

(4) In this section, "external counsel" means counsel whose name appears on the appropriate roster maintained under section 5." [Emphasis added]

24. Further to the provisions of the Act, the Respondent can consider the funding of two counsel for an applicant under section 10(3) of the Regulations in circumstances where appointed counsel considers it necessary:

"***Certificates; general provisions***

10 …(2) Where it appears to the aided person's counsel necessary for the proper conduct of the proceedings to take or to apply to the court for leave to take any one or more of the following steps, namely—
…
(d) to instruct more than one counsel;
…
he shall (unless the certificate provides for the act in question to be done) apply to the Committee for authority so to do, and no payment shall be allowed on taxation for any such step taken without the approval of the Committee." [Emphasis added]

25. Section 5 sets out the conditions for counsel to be added to the legal aid roster, which are twofold: (i) the barrister is in private practice in Bermuda and (ii) is willing to take on legally aided cases. In addition, section 13 of the Regulations concerns the Respondent's duty to maintain the legal aid roster (**the Roster**):

*"**Roster of Counsel***

13 (1) The Committee shall maintain separate rosters containing the names of counsel willing to act for assisted persons in—

(a) criminal prosecutions (including criminal appeals);
…

…

(3) The Committee shall enter on the appropriate roster any limitation as to the number of proceedings per annum in which counsel is prepared to act for assisted persons and shall give effect to such limitation.

(4) For the removal of doubt, it is hereby declared that where any counsel is assigned for the purpose of any proceedings any other counsel in the same firm may act for the assisted person therein."

Special Admission of King's Counsel

26. Section 51(3) of the SCA enables the Court to admit overseas counsel to the Bermuda Bar to have conduct of a specific case. The factors considered by the Court are whether (i) the questions of either law or practice are of considerable difficulty; or (ii) questions of either law or practice which are of public importance. Prior to the Court deciding such applications, both Bar Council and the Department of Immigration play a role. Section 51(3) states as follows:

"***Admission of barristers and attorneys***

51…(3) The Court shall have power to admit and enroll any qualified person to practise as a barrister and attorney in the courts of Bermuda in any particular case or series of cases which, in the opinion of the court, involve questions of law or practice of considerable difficulty or public importance." [Emphasis added]

27. The Bermuda Bar Act 1974 (**the BBA**) at section 4 defines the general responsibilities that Bar Council has for the management of the affairs of the Bermuda Bar Association which chiefly is responsible for matters pertaining to admission to practice law in Bermuda and rules of conduct for its members. Section 4 of the BBA, *inter alia*, provides as follows:

"*…(d) the support of the public right of access to the courts and of the right of representation by members of the Bar before courts and tribunals;*

(e) the encouragement of improvements in the administration of justice and procedure including arrangements for legal advice and aid and for a system of law reporting;…"

28. Bar Council also has published a policy which applies to applications for special admission

namely, Admission of Foreign Counsel – Statement of Policy dated 12 November 1998 (with subsequent amendments on 19 September 2012 and 20 October 2014) (**the BC Foreign Counsel Policy**). The BC Foreign Counsel Policy clearly sets out the principles that are the foundation for the Bar Council to consider these applications:

"*The Principle*

1. *As a rule parties before the Bermuda court should be represented by barristers and attorneys who are members of the Association and entitled to practice before the Bermuda courts ("local counsel"). Bar Council considers that it is contrary to the long term interests of the bar in Bermuda for local counsel to act as mere agents for foreign law firms in relation to cases pending before Bermuda courts. Accordingly, Bar Council will not support applications for "teams" of foreign barristers and solicitors in relation to cases pending before Bermuda courts.*

2. *Section 51(3) of the Supreme Court Act 1905 ("the Act") recognizes that foreign counsel may be admitted to appear in the courts of Bermuda in any particular case or series of cases which involve questions of law or practice of considerable difficulty or public importance. As an exception to the rule, and in rare cases, Bar Council will support an application to admit foreign leading counsel to appear in a particular case provided that the broad criteria set out in Section 51(3) of the Act is satisfied.*" [Emphasis added]

29. In addition, the BC Foreign Counsel Policy sets out the factors which should be taken into consideration when determining an application for overseas, King's Counsel to be granted special admission which are as follows:

"*The Criteria*

3. *In considering whether exceptional circumstances exist warranting the admission of foreign leading counsel in a particular case the Bar Council shall be guided by the following criteria in descending order of importance:-*

   (i) The legal complexity of the case before the Bermuda courts and/or the general public importance of the case in Bermuda, including the importance of the case to Bermuda's offshore services industry.

   (ii) The availability of local counsel within Bermuda to adequately present the case.

   (iii) The impact of the case upon the individual client, for example in criminal, defamation and professional negligence cases.

30. Therefore, when an application is made under section 51(3) of the SCA for special admission of

overseas counsel, Bar Council is permitted to make representations and be heard if it objects to the application. Bar Council also submits its view to the Department of Immigration pursuant to section 61(4) of the Bermuda Immigration and Protection Act 1956 when a work permit application is made for an overseas counsel to appear in the Bermuda courts. If the Bar Council determines that the use of overseas counsel is appropriate, then it issues a special practicing certificate and informs Department of Immigration. Bar Council's representations are then considered by a judge of the Supreme Court who then determines the application for special admission.

APPLICANT'S POSITION

31. The Applicant submits that the Respondent's decision refusing to provide funding for overseas counsel as well as the Respondent's substitution of Legal Aid Counsel (or other counsel approved by the Respondent) was:

    i. *Ultra vires.*
    ii. Irrational and/or wholly unreasonable.
    iii. A breach of natural justice.

***Ultra Vires* and unlawful**

Not approving "counsel of choice"

32. It is further alleged that there was a breach of the principles of natural justice, since the Respondent failed to provide adequate reasons for its decision to refuse to appoint overseas counsel and to give the Applicant an opportunity to address those reasons before a final decision was made.

33. Mr Swan submitted that when quashing the Applicant's conviction, the JCPC set out three questions of mixed law and fact that required resolution before any guidance could be given about the probative value of single and two-component particles alleged to be GSR. He further purported that none of the questions for determination had been previously brought to the attention of the Bermuda Courts in the Applicant's case by his counsel. Furthermore, Mr

Swan suggested that none of the issues raised before the JCPC (which would need to be determined at the retrial) have been raised in any criminal trial in Bermuda to date, even though particle evidence has been adduced to secure convictions in firearms offences for many years.

34. It was further submitted by Mr Swan that the Court of Appeal not only recognized that the Applicant's retrial involves serious charges, but also has the potential to:

> "*i. Restrict the admissibility of particle evidence in criminal trials involving firearms (which would bring Bermuda in line with the practice and the rest of the Caribbean and in the UK).*
> *ii. Influence the directions to be given to juries where particle evidence is admitted.*
> *iii. Fundamentally reappraise practices in Bermuda with regard to expert witnesses.*"

35. Further submissions were made that the key components as to why the Court of Appeal determined that a retrial was appropriate was not just due to the public interest in having these issues resolved, but also that it would provide "*invaluable contribution to jurisprudence in Bermuda*" as referenced by Acting Justice of Appeal, Mrs Charles-Etta Simmons at paragraph 56 of *Hewey* v *The Queen* [2022] CA (Bda) 15 Crim (**the Retrial Judgment**).

36. Mr Swan averred that all correspondence sent by the Respondent to the Applicant and/or his counsel failed to provide adequate reasoning for its refusal to appoint Mr Thomas KC as well as for Ms Lee to be appointed as his lead trial counsel. Mr Swan submitted that as it specifically related to the Respondent's letter dated 20 January 2023, the following was omitted:

i. The statutory test was not addressed.

ii. There was no explanation as to why it viewed the case differently from Bar Council.

iii. Made no reference to the public importance of the effect the Applicant's case would have on practice in the jurisdiction, which was the focus of Mrs Smith-Bean's advice and the views of the JCPC and Court of Appeal in its Retrial Judgment.

iv. It also made no reference to any of the alleged factors said by Ms Moore-Williams

to be relevant to a consideration of a request for funding for overseas counsel.

37. Moreover, Mr Swan contended that at that time it was clear the Respondent closed its mind to any further reconsideration of funding overseas counsel by stating that it *"will not consider any further requests for a KC"* as the Respondent has maintained that position ever since.

38. As it relates to the Respondent's discretionary powers, the SLAC's Affidavit at paragraph 60 states:

> "*60. If an applicant is eligible for legal aid pursuant to the relevant provisions of the Legal Aid Act 1980, the Committee in their discretion [**EMPHASIS ADDED**], and in the exercise of their discretion, have the right to consider whether it is in the interest of justice to grant legal aid or not.*"

39. Mr Swan submitted that this is not an accurate reflection of the Respondent's powers regarding criminal cases. Specifically, when a person is charged with one of the offences set out in the Second Schedule of the Act, plus any other offence where the maximum penalty is 5 years' imprisonment or more, that person is entitled to legal aid as of right (subject to meeting the means test). Part of this entitlement, Mr Swan says, that the Applicant may request his or her counsel of choice in accordance with Section 12 (2) of the Act, when the Respondent has on the advice of the Senior Legal Aid Counsel determined that assignment of Legal Aid Counsel would not be appropriate, the Senior Legal Aid Counsel must assign the person his or her "*external counsel of the assisted person's choice*". Mr Swan raised that it is only in circumstances set out in Section 12(3) where the Respondent can assign alternative counsel to the assisted person's counsel of choice.

40. Mr Swan submitted that as it had already been determined by the Respondent that Legal Aid Counsel, Ms Susan Mulligan, would not be appropriate to have conduct of this case as she was the Applicant's previous counsel in the Court of Appeal for the initial criminal trial. Therefore, Mr Swan submitted that as Mr Thomas KC is the Applicant's "*counsel of choice*", and Mr Thomas KC has also met factors set out in Section 12(3) (that he is available, willing, and agreeable to be bound by the Legal Aid (Scale of Fees) Regulations 1980), he must be appointed

as the Applicant's counsel. Mr Swan stated that the Respondent has no discretion to appoint any alternative counsel to have conduct of the Applicant's retrial due these circumstances.

41. It was contended that the Applicant did not nominate a local senior counsel because the Respondent's refusal to either fund overseas counsel or fund appointed Counsel, Mrs Smith-Bean, to conduct his trial was unlawful, irrational, and/or unreasonable.

42. Furthermore, Mr Swan argued that as the Supreme Court had granted Mr Thomas KC's application for special admission, in addition to there not being any objections from Bar Council, then the Respondent is obligated to approve funding for Mr Thomas KC to be retained. Mr Swan noted that a "*similar*" opinion to the Opinion of Mrs Smith-Bean to the Respondent for consideration to appoint King's Counsel was provided to Bar Council in relation to Mr Thomas' special admission application. The said opinion was exhibited to SLAC's Affidavit at pages 42 to 46.

43. On 25 April 2023, 95 Law wrote to the Respondent advising it that Mr Thomas KC was granted special admission by the Court, the Respondent was informed that, while he was in Bermuda, Mr Thomas KC was willing to have his name included on the roster of counsel willing to undertake legal aid cases and be bound by the legal aid scale of fees[7]. Although the Respondent had no power under the statute to refuse to add Mr Thomas KC to the roster, it declined to do so, citing these proceedings as the reason.

Appointment of two counsel

44. A legal aid certificate can be granted to two counsel under section 10(3) of the Regulations where the appointed counsel considers it necessary and the Respondent grants authority for the instruction of an additional counsel. Mr Swan contends that there is no restriction in the Regulations that the second counsel instructed must be included on the legal aid roster as required by section 12 of the Act and are also not required to be bound by legal aid scale of fees. This Mr Swan says, is supported by the reference made in section 12(3)(c) of the Act to counsel as being merely "*counsel*" rather than "*external counsel*".

[7] 95 Law's letter to the Respondent is exhibited to SLAC's Affidavit at pages 97 to 98.

45. Additionally, Mr Swan argued that there is no power given to the Respondent in either the Act or the Regulations to impose a second counsel on and assisted person. He therefore stated that once the Applicant had requested that his appointed Counsel, Mrs Smith-Bean, conduct the trial alone instead of being second chair; i.e. Junior Counsel; with the Legal Aid Counsel, the Respondent had no power to insist that the Applicant be represented by more than one counsel. Mr Swan purported that the way the trial was to be conducted was a matter for the Applicant and Mrs Smith-Bean.

Refusal to appoint overseas counsel

46. Mr Swan further submitted that the Respondent's decision to refuse to appoint overseas counsel was arbitrarily and unfairly made and therefore unlawful. Mr Swan says that the Respondent has been unable or unwilling to provide the court with a consistent policy guiding its decision making on whether it should provide funding for overseas counsel. In SLAC's affidavit it stated that it only appoints King's Counsel in cases where there are "*novel areas of law not yet settled in Bermuda*" or if "*it is in the public interest*". Mr Swan noted that in the SLAC's affidavit, reference is made of the former chairman of the Legal Aid Committee, Mr William Francis about the Respondent's approach to the requests for an overseas King's Counsel. In the reasons provided by Mr Francis he stated the Respondent looked at: (i) the nature of the offence, (ii) whether there is a point of law that has not been addressed in Bermuda, (iii) whether the law is unclear, (iv) whether it is in the public interest and, (v) whether it is in the interest of justice.

47. The criteria provided by the SLAC and Mr Francis do not appear clear on how these two sets of criteria relate to each other or to how the two policies/individual factors are weighted. Is also unclear whether it is sufficient for there to be one factor present or more than one, or that all of them must be ~~filled~~ fulfilled before funding will be granted. Furthermore, circumstances in which an appointment overseas counsel might be "*in the public interest*" are vague and unclear. It is noted that both SLAC and Mr. Francis state "*the legal aid committee has not approved overseas counsel for serious criminal cases for some years*".

48. It is contended by the applicant that the purpose of a policy is to ensure fairness and consistency,

a public body has a duty to follow its policy guidance, unless there are special reasons for not doing so as set out in *R (Lumba)* v *Secretary of State for the Home Department* [2011] UKSC 12. The sole reason given for the refusal to fund overseas King's Counsel was not one of the factors mentioned by either SLAC or Mr Francis. A different reason seems to have been considered, which is that there are local counsel available. There is no indication in the Respondent's correspondence or in the minutes of the meetings, that the Respondent considered any of the other factors that have now been said by SLAC to be relevant. It was submitted that in accordance with *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs* [2008] QB 365 that the Respondent cannot now rely on different or supplemental reasons in the absence of any contemporaneous evidence.

49. Mr Swan also cited the case of *EC Grandsen & Co* v *Secretary of State for the Environment* [1987] 54 P and CR86 wherein it was confirmed that where there is a failure to adhere to policy guidance without providing good reasons for departure there from that any such decision is rendered arbitrary and unfair.

50. Furthermore, the Applicant suggests that given the statements of SLAC and Mr Francis it appears that there is a blanket policy of refusing appointment of overseas counsel to assisted persons in cases before the Bermuda courts, regardless as to the merits for their instruction. Mr Swan averred that such a fixed policy would explain why the Respondent gave so little weight to the views of the Bar Council and the observations of the JCPC and Court of Appeal. Moreover, it suggested that this would explain why the Respondent have not disclosed how many overseas counsel have been appointed to conduct local trials for an assisted person in the last decade.

51. Therefore, Mr Swan submitted that it was unlawful for such a policy to be so rigid that it effectively amounts to a fetter on the discretion of the decision-makers in accordance with *Lumba*. Mr Swan also relied on the case of *R* v *Secretary of State for the Home Department, ex parte Venables* [1998] AC 407 in support of the proposition that any decisions made under an inflexible policy are arbitrary and unlawful.

Irrational and/or wholly unreasonable

52. Further and alternatively, the Applicant submits that the Respondent's decision to refuse overseas counsel was irrational and/or wholly unreasonable. The basis for this argument is that the Respondent evidently considered irrelevant factors and/or failed to properly take account of relevant ones. Mr Swan relied on the case of *Associated Provincial Picture Houses Ltd* v *Wednesbury Corp* [1948] 1KB 223 (commonly known as the *Wednesbury Principles*), where Lord Greene at page 228 confirmed:

> "*When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a Court of Appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters."* [Emphasis added]

53. Mr Swan submitted that contrary to the *Wednesbury Principles*, the Respondent erred as follows:

i. Failed to have regard to, or gave manifestly insufficient weight to, the views and observations of Bar Council, the Court of Appeal and JCPC. These were so obviously material to the Respondent's decision that it was irrational and/or unreasonable to either disregard them or marginalize their significance: *R v Secretary of State for the Home Department ex parte Jamil* [2000] 3 All ER 649 at [51]; *R (Client Earth v Secretary of State for Business, Energy and Industrial Strategy* [2021] PTSR 1709 at [99].

ii. Did not consider the statutory test for determining whether overseas counsel is appropriate in any given case.

iii. Allowed a single factor, that is the availability of suitable local counsel to be the predominate factor for refusing to fund overseas counsel, to the exclusion of all other factors. The excessive weight placed on this factor was irrational and wholly unreasonable. Mr Swan referenced the case of *R (Gallagher) v Basildon District Court* [2010] EWHC 2824 (Admin) where Parker J held that:

> "***[41]*** *For these reasons, the challenged decision has failed to take into account relevant considerations, has taken into account irrelevant considerations, or has given manifestly disproportionate weight to certain considerations, and does not show the rational quality of response that, in this particular statutory context, is required in law.*" [Emphasis added]

iv. Relied upon powers that it did not possess, such as an ability to appoint in-house Legal Aid Counsel in the place of overseas counsel, and an ability to appoint two counsel where the such circumstances did not arise as well as disregarded the Applicant's counsel of choice. The Respondent did not have the powers that it purported to exercise. Therefore, the Respondent's decision-making in these circumstances was unlawful.

v. Failed to take account of the Applicant's reasons for why overseas counsel was necessary in his case. The content of the Opinion and the follow-up submissions made to the Respondent addressed the potential influence the Applicant's trial would have on practice in Bermuda, and that highly skilled cross-examination by an advocate familiar with the up-to-date scientific knowledge of particle analysis of GSR was required. The Respondent's refusal to fund overseas counsel solely based on local counsel's alleged familiarity with the law (unspecified) was irrational and unreasonable and not logically connected to the Applicant's reasons for overseas counsel's appointment.

vi. Finally, there was an insufficient evidential basis for the Respondent to make a finding that there were local counsel available to satisfactorily conduct the case.

As such, the Respondent's decision was irrational and wholly unreasonable. Additionally, Mr Swan asserted that the Respondent's claim that there were suitable counsel in Bermuda was entirely at odds with the fact that local counsel had failed to raise the issues set out by the JCPC and later in the Court of Appeal in any previous trial, despite countless opportunities. That included Legal Aid Counsel, Ms Mulligan, who represented the Applicant on appeal. Mr Swan purported that the potential deficits in the expert evidence and risk of unsafe practices in Bermuda were only exposed by overseas counsel in the JCPC because of their broader knowledge and experience of this area. Mr Swan relied on the House of Lords case of *R* v *Hillingdon Borough Council ex parte Islam* [1983] 1 AC 688 where Lord Lowry considered the lack of evidence to support the panel's decision. At page 717 at G, Lord Lowry stated as follows:

> "*The view which I have taken of the law makes it unnecessary to consider in detail the panel's decision but it appears to me to be one in which, as Lord Radcliffe has put it in Edwards v Bairstow [1956] A.C. 14, 36, "the true and only reasonable conclusion contradicts the determination," which is another way of saying that there was no evidence to support the panel's decision and that it ought therefore to be reversed by judicial review and suitable declarations granted…*" [Emphasis added]

Therefore, Mr Swan asserted that there was an insufficient evidential basis for the Respondent to make the decision that it did which supports the notion that's such a decision was irrational and wholly unreasonable.

Breach of natural justice

54. The Applicant's position is that the Respondent has breached the Applicant's right to natural justice by failing to provide adequate reasons to appoint Mr Thomas KC. Mr Swan says that adequate reasons should have been provided regarding this refusal and thereby giving the Applicant the ability to respond accordingly.

55. Whilst it was conceded by Mr Swan that the Respondent has no statutory duty to provide reasons for an adverse the decision, he suggested that a duty may arise under public law and

relied on the case of *R* v *Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763. He further submitted in instances where reasons are provided albeit there being no statutory duty that those reasons must be judged at the same standard as reasons given under a legal obligation. Mr Swan relied on the case of *R* v *Criminal Injuries Compensation Board ex parte Cummings* [1992] 4 Admin LR 747 to support this proposition.

56. The Applicant suggests that the Respondent's reason confirmed in its letter dated 20 January 2023 that there are local counsel available to have conduct of the retrial is a wholly inadequate explanation as it did not provide any rationale for dismissing the views of the Bar Council which had already determined that there were no local counsel to adequately conduct the case.

Adverse inferences

57. Mr Swan invited the Court to draw adverse inferences against the Respondent on account of their alleged failure to conduct proceedings in accordance with its duty of candour as a public body in accordance with the cases of *Bancoult* and *R* v *Lancashire County Council ex parte Huddleston* [1986] 2 AER 941. He argued that the Respondent's refusal to voluntarily disclose material relevant to these proceedings such as, the Respondent's meeting minutes along with the lack reasons for the refusal provided by the Respondent in either its correspondence or in the SLAC's affidavit back the notion that adverse inferences can and should be made against the Respondent.

58. It is well-established that a failure to disclose critical information does not prevent the Court from making findings: *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] AC 997. The Court is entitled to draw adverse inferences against a respondent that fails to provide voluntarily, or at all, full and accurate information relevant to the decisions challenged: *R (I) v Secretary of State for the Home Departmen*t [2010] EWCA Civ 727. Mr Swan contends the Respondent has not disclosed any satisfactory rationale behind its refusal to appoint King's Counsel because there was no lawful, rational or reasonable basis to do so.

59. What is more, Mr Swan submitted that should the respondents attempt to fill in evidentiary gaps with late explanations in their written submissions or at the hearing, such explanations should

be treated with the utmost circumspection. Once proceedings have commenced it is common practice for the courts to be very cautious before allowing decision makers to add to initial reasons or rely on retrospective ones. Mr Swan submitted that it is an established principle that the court must look at the decision at the time the decision was made and communicated to the Applicant rather than consider a later reason or rationalization for it: *R (Hereford Waste Watchers Ltd)* v *Hereford Council* [2005] EWHC 191.

Remedies sought

60. In circumstances where there is only one just outcome, Mr Swan submitted that the Court is entitled to substitute its own view for that of the Respondent and relied on the cases of *R(O) v Asylum and Immigration Tribunal* [2010] EWHC 2055 (Admin); *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 536 in support of this position.

61. Moreover, it would be unfair to allow the Respondent (which will be the same composition of members and the same advisors) another opportunity to resist the Applicant's request and cause further delay to his retrial proceedings: *R v Inner London Crown Court ex parte Provis* COD/1757/1999.

62. The Applicant avers that the Respondent acted outside the scope of its powers when it interfered with his counsel of choice. In addition, the Applicant's position is that he has shown there is no consistent policy for the appointment of overseas counsel, or that there is an unlawful blanket policy in place that no overseas counsel are appointed for ~~a~~ local cases.

63. Both issues are matters of law. Since the Respondent does not have the powers it purported to exercise and/or there is no lawful policy in place upon under which the Respondent may decide the Applicant's request for overseas counsel, the Court is entitled to substitute its own view for that of the Respondent: *R v Monopolies & Mergers Commission Ex p. South Yorkshire Transport Ltd* [1993]1 WLR 23.

64. Therefore, the Applicant invites the Court to make, not only a declaration and order for certiorari, but an order for mandamus compelling the Respondent to fund overseas counsel.

Alternatively, should the Court find in favour of the Applicant only on the basis that the Respondent failed to provide sufficient reasons for its decision to refuse to appoint overseas counsel, or to give the Applicant the opportunity to address those reasons, then the Applicant accepts that the appropriate orders are for a declaration and certiorari only and the Respondent should reconsider the Applicant's request in accordance with the principles of natural justice.

RESPONDENT'S POSITION

65. A major area of dispute is the allegation that none of the questions for determination before the JCPC had been previously brought to the attention of the Bermuda Courts in the Applicant's case. This same argument was used by his former Counsel, Mrs Smith-Bean, in her Opinion provided to the Respondent (undated, but prior to the Respondent's meeting of 30 November 2022).

66. Mrs Dill-Francois drew to the Court's attention the judgment of *Devon Hewey and Jay Dill*, to show that the issues regarding GSR particles were in fact raised by Ms Mulligan. The President of the Court of Appeal, Sir Scott Baker stated as follows at paragraph 35 of *Devon Hewey and Jay Dill*:

> "*35. Hewey alleged that the evidence of G.S.R. particles found on items connected to him should not have been admitted. The basis of his argument is that no three component particles were found and that one and two component particles do not prove anything in that their presence does not necessarily indicate that they came from a firearm. It was more prejudicial than probative. The judge concluded at the start of the trial that there was some merit in the argument that the prosecution expert's report was short on detail as to what the presence of one and two component particles really meant, but he felt that this could be cured in the course of the trial, if necessary for the service of additional evidence. He ruled that there was no sufficient reason to exclude it.*" [Emphasis added]

67. The President further set out the trial judge's reference to the Applicant's case in relation to the one and two component GSR particles in paragraph 37 that:

> "*37. …The judge also describes carefully the limitation of the G.S.R. particle evidence, describing what was found and what could and could not be deduced*

> *from it. In particular, he explained the defence case that the one and two component particles could have come from an innocent source. (emphasis added).*"

68. Further, Mrs Dill-Francois relied on the JCPC Judgment, wherein Lord Hughes and Lord Lloyd-Jones, at paragraph 24 noted that:

> "*24. ...A number of grounds of appeal were advanced in addition to an application to admit fresh evidence. Ground six of the appellant's appeal was that the judge should not have admitted the evidence of the one-component and two-component particles found on his person and possessions, because that evidence was more prejudicial than probative. In its judgment of 13 May 2016, the Court of Appeal (Baker P, Kay JA and Bell JA) held that the jury was entitled to consider the significance of the particle evidence against the appellant in the context of the other evidence in the case. The President, with whom the other members of the court agreed, observed that the judge had described carefully the limitation of the GSR particle evidence, having described what was found and what could and could not be deduced from it. In particular, the judge had explained the defence case that the one-component and two-component particles could have come from an innocent source.*"

69. It was averred by Mrs Dill-Francois, that in essence, the JCPC found that the trial Judge, in summing up to the jury, went off on a frolic of his own with respect to what inferences could be drawn from the presence of one and two component particles (in the absence of any full three component particles). The trial Judge's view of the evidence was that if there were single component particles of all three types - lead, barium and antimony - it most likely came from firing a firearm and no other innocent source. Ms Mulligan highlighted this as an error to the Court of Appeal, but her argument was rejected. Notwithstanding, Ms Mulligan's arguments were ultimately adopted by the JCPC.

70. Hence, the Respondent asserts that the Applicant has misrepresented that trial counsel in the Supreme Court as well as Ms Mulligan before the Court of Appeal failed to raise the points of fresh evidence and those relating to the presence of one and two component particles.

71. As it relates to the suggestion that the Applicant's retrial would be complex, involving new points of law not tried before in Bermuda, Mrs Dill-Francois submits that there is no basis to support this. The JCPC clearly set out the law and way the trial judge ought to have dealt with

the GSR evidence led against the Applicant in his summation. This will serve as a guide to both the court and counsel at his retrial.

72. Accordingly, Mrs Dill-Francois submitted that should these issues be raised at the retrial, as the JCPC indicated, the experts will be cross-examined and their evidence will be summed up for the jury by the trial judge.

73. It is accepted that there were three issues raised by the JCPC which needed to be addressed at the potential retrial. The JCPC chose not to hear the fresh evidence because it was unnecessary for their purposes, having already found that the errors by the trial judge at the first trial were sufficiently serious to set aside the verdict. Mrs Dill-Francois emphasized that those issues are not points of law, but rather areas about which the experts may disagree and are set out at paragraph 48 of the JCPC judgment as follows:

> "*48. At the hearing of this Appeal a number of further issues concerning GSR evidence were disclosed by the fresh evidence lodged by the parties, including the following:*
>
> *(i) In light of evidence that the presence of a three-component particle may indicate that one component particles in the same population are the product of firearm discharge, is it permissible to aggregate the three component particles found on Dill with the one component and two component particles found on the appellant and items associated with him and to treat them as one population for this purpose?*
>
> *(ii) Is it permissible to aggregate the one-component and two-component particles found on different items associated with the appellant and to treat them as one population for this purpose?*
>
> *(iii) Does the presence of a two-component particle in the same population as one-component particles indicate that the one-component particles are the product of firearm discharge?*
>
> *In view of the substantial disagreement between the experts on these further issues it would, in the Board's view, have been impossible to resolve these issues fairly without hearing cross-examination of the experts and their written evidence. In the event, the view taken by the board of the summing up makes it unnecessary to seek to resolve these further issues.*"

74. The Respondent says the issues for consideration at the retrial are issues of factual dispute between the experts that the JCPC did not find necessary to hear fresh evidence as the experts

were not present to be cross-examined, to decide the appeal. Even if the experts testify about these three areas, it will be a matter for the jury to decide what evidence they accept on these points. It will in no way settle the law in Bermuda on the points because these are not legal points. Mrs Dill-Francois submitted that it therefore follows that there is nothing novel or complex regarding counsel having to challenge experts through cross-examination who disagree as to the strength and meaning that might be ascribed to the evidence. The legal point regarding admissibility and the correct manner of instructing a jury has already been determined.

75. Furthermore, Mrs Dill-Francois relied on the Bermuda Court of Appeal case of *Jahmico Trott* v *The Queen* [2022] CA (Bda) 14 Crim Justice of Appeal Sir Maurice Kay addressed the implication of the JCPC's decision (in the Applicant's case). At paragraphs 25 and 26 Kay JA held that:

> *"25. In the current appeal, following his conviction, on the retrial, the Appellant again complains about the way in which the judge dealt with the evidence in the summation but does not repeat the challenge to its admissibility. The evidence was not actually the same as it had been in the original trial, nor was the approach of the Judge identical to that of his predecessor. Since the retrial the Judicial Committee of the Privy Council has considered the case of Hewey v R [2022] UKPC 12. The Judicial Committee was concerned solely with the issues surrounding the GSR evidence in that case. On the question of the admissibility of the evidence of one and two component particles it approved the approach of the trial judge. The judgment of Lord Hughes and Lord Lloyd Jones stated at paragraph 32:*
>
> > *"As the Court of Appeal observed in the present case, the judge was correct in admitting the evidence of particles because it had to be considered in the context of all the evidence in the case. The judge correctly exercised his discretion to admit it and the Court of Appeal correctly declined to interfere with the exercise of his discretion."*
>
> *26. However, that Judicial Committee allowed the appeal on the grounds that in his summation, the trial judge had, "effectively reversed the burden of proof" (paragraph 29), and that his approach to the one component particles was not consistent with the expert evidence on the present appeal Mr. Horseman seeks to derive significant support from Hewey…*" [Emphasis added]

76. Kay JA, at paragraph 31 summarized as follows:

> "*31. It does not seem to me that the decision of the Judicial Committee in Hewey had*

changed the law. The appeal was allowed because the trial Judge had misdirected the jury on the burden of proof and had misrepresented the evidence. As to the reversal of the burden of proof, what concerned the Judicial Committee was the trial judge's observation that there was no credible evidence that the one and two component particles were from an innocent source, whereas it was for the Crown to disprove innocent sources. That is what "effectively reversed the burden of proof". [Emphasis added]

77. As it relates to the special admission of Mr Thomas KC, Mrs Dill-Francois submitted that not only was the Respondent not bound by the decision of the Bar Council and the Court, but that the basis of which the approval was obtained must be considered. Mrs Dill-Francois referred to the Opinion which had been submitted to the Respondent and that Mr Swan did confirm a "*similar opinion*" to the Opinion was also submitted by Mrs Smith-Bean for her application for Mr Thomas KC's special admission to the Bermuda Bar. Notably, paragraphs 16 to 19 of the Opinion set out the reasons for which Mrs Smith-Bean says that there is significant public importance of this case as well as there being novel areas of law that have not been tried in Bermuda:

"*16. Furthermore, when the Court of Appeal determined that a retrial of the Defendant should be ordered, one of the reasons that it gave for making the order was that there would be "a substantial public interest in having the GSR experts' evidence tested by cross-examination". The Court went on to say,*

"*Looking at this from a broader perspective the benefit of the cross-examination of the GSR experts would make an invaluable contribution to jurisprudence in Bermuda. This I anticipate will not only guide the trial judge who may be charged with the retrial, but also judges in cases of a similar nature involving the use of firearms and the incidence of GSR particulate evidence."*

17. In my opinion, the substantial public importance of this case justifies overseas leading counsel being instructed.

18. As to the complexity of the issues at stake, it should be observed that the JPCP allowed the Defendant's appeal without a determination of all the issues because the trial judge had, in multiple ways, misdirected the jury about the potential probative value of the particle evidence. It was plain from the trial judge's summing up that the judge had misunderstood the particle evidence. Other cases reveal that he has not been alone. This is because particle evidence is not intuitive and requires a nuanced understanding. Misconceptions can easily arise through what is often believed to be 'common sense'.

19. *The difficulties associated with this evidence, therefore, further justify the instruction of overseas counsel familiar with these kinds of misunderstandings to conduct the Defendant's trial.*" [Emphasis added]

78. The Opinion further intimated that there is no local counsel available to adequately present the case, at paragraphs 21 and 22:

"*21.* *Particle evidence has been relied upon by the prosecution in criminal trials in Bermuda for more than a decade. That evidence has usually been given by analysts from one US laboratory, and all similarly trained. It was only when the Defendant's matter came before the JCPC that the orthodoxy of this type of evidence and how it has been historically presented was fully explored. If the issues to which the JCPC adverted are to be thoroughly ventilated, counsel conducting the Defendant's trial must not only have experience of dealing particle evidence of this nature, but also have knowledge of the forefront of scientific understanding.*

22. *Mr Thomas is a highly experienced advocate and a part-time judge who is renowned for his exceptional ability to process, distil and convey complex issues quickly and effectively. He has frequently appeared before the courts of the highest level, including cases that have involved this type of particle evidence.*" [Emphasis added]

79. However, if Bar Council was provided with such an opinion, it is likely that the opinion would not have accurately reflected the position taken by the JCPC in the Hewey case, giving Bar Council the impression that this case involved novel points of law.

80. Nevertheless, it is submitted that the Respondent is not bound by the decision of Bar Council. Mr Thomas KC was not an external counsel, meaning he was not on the roster list of barristers and attorneys who are in "*active private practice in Bermuda*".

81. Further, as outlined by Kawaley J in *R* v *Ingham* [2004] Bda LR 41, citing *In Re Heslop* [1990] Bda LR 20, the right of the Applicant to be represented by counsel of his choice is a right to Counsel available in Bermuda.

82. Mrs Dill-Francois reminded the court of the definition of "*external counsel*" under section 5 of the Act requires counsel to be in "*active private practice in Bermuda*" as the starting point as to whether he or she can be included on the Roster. Therefore, the Respondent says that Mr Thomas KC does not meet this requirement.

83. Section 12 of the Act makes clear that in every instance where a certificate is granted by the Respondent, Legal Aid Counsel shall be assigned. It is only when the Respondent determines it is not practical, it is not appropriate given the nature of the proceedings or there is a conflict of interest, that the Respondent directs Senior Legal Aid Counsel to assign counsel from the Roster.

84. For these reasons, the Respondent contended that the decision of the Respondent not to appoint Mr Thomas KC to represent the Applicant at the Applicant's retrial was not unlawful, and/or irrational and/or unreasonable.

FINDINGS

85. For the avoidance of doubt, it is not disputed by the parties that the applicant is entitled to legal aid as of right in accordance with section 10 of the Act. What is clearly in dispute is what representation the applicant believes he is entitled to.

86. Having considered both parties' submissions, all the affidavit evidence (with the corresponding exhibits thereto), and along with the authorities produced by Mr Swan and Mrs Dill-Francois, I make the following findings:

***Ultra Vires* and unlawful**

Not approving "counsel of choice"

87. The Act and the Regulations are unambiguous as it relates to the circumstances where "*counsel of choice*" is or is not appointed. Section 12 of the act directs that once the Respondent has determined that an applicant is eligible to receive legal aid, i.e. in this case that he has the automatic right to appeal as well as meets the financial test, the Respondent must appoint legally counsel to the applicant. It is only in the circumstances set out in subsection 2 that allow an applicant to be appointed "*external counsel*" of the " *assisted person's choice*" in this case the

Respondent had determined that the assignment of Legal Aid Counsel was not appropriate which thereby allowed the Respondent to be appointed "*external counsel*". The next test set out in subsection 3, is limited to allowing the Respondent to give a direction to Senior Legal Aid Counsel to assign "*another counsel*" to the assisted person when that "*external counsel*" of choice listed under subsection 12(3) is (i) unavailable, (ii) unwilling to take the case or (iii) refuses to be bound by legal aid's schedule of fees. It would normally end there; however, in this case it is being disputed as to how "*external counsel*" is defined. Section 12(4) of the Act provides the definition of "*external counsel*" as being "counsel *whose name appears on the appropriate roster maintained under Section 5*". Section 5 of the Act then defines the roster as containing "*a list of barristers and attorneys who are in active private practice in Bermuda, from which shall be drawn the names of all counts who are able and willing to represent applicants and assisted persons;*". It is at this stage that there is a main contention between the parties.

88. In section 2 of the Act, "*counsel*" is defined as "*a person who is a barrister within the meaning of the Bermuda Bar Act 1947*" (**BBA**). It follows that the definition in section 1 the BBA of a "*barrister*" is "*a barrister and attorney admitted as such*". "*Admitted*" is also defined in section 1 of the BBA as meaning "*in relation to a barrister means admitted and enrolled as a barrister and attorney under section 51 or 53 of the Supreme Court Act 1905*".

89. I do not accept that once a request is made by a counsel to be included on the Roster on the basis that he or she is in "*active private practice in Bermuda*" and are "*able and willing*" to take on legally aided cases that the Respondent must add him or her to the Roster. Section 5 requires the Respondent to in "*consultation*" with Bar Council prepare and maintain the list for the Roster.

90. Notwithstanding the Respondent's discretionary nature of maintaining the Roster, it is far-fetched to accept that Mr Thomas KC's special admission under section 51(3) of the Act includes him in the category of being in "*active private practice in Bermuda*". Whilst the definition of "*counsel*" and "*barristers*" (as set out in paragraph 81 above) includes those counsel admitted under section 51 of the SC Act, I reject that Mr Thomas KC's special admission constitutes him meeting the requirement of being in "*active private practice in Bermuda*". Without each of these critical words being defined by statute, their ordinary meanings are applicable. Mr Thomas KC is

employed by Doughty Street Chambers in the UK and is not employed with any law firm within Bermuda. Moreover, he is not permitted to appear before any court in Bermuda other than before the Supreme Court at the Applicant's retrial which is subject to him being funded by legal aid or privately. Consequently, Mr Thomas KC not being on the legal aid roster prohibits him from being appointed as "*external counsel of the assisted person's choice*" as defined in section 12(4) of the Act as "*counsel whose name appears on the appropriate roster…*". The fact that Mr Thomas KC has confirmed that he is available, willing to take on the case as well as agreeing to be bound the legal aid scale of fees is therefore irrelevant as the Respondent would not have had any power to appoint Mr Thomas KC in the first place.

91. Even if I was wrong regarding the interpretation of the Act as it relates to the definition of external counsel, I do not accept that the Respondent is in any way bound by the decision of Bar Council and the court to specially admit Mr Thomas KC. It would not be right that a separate body and the court would be the arbiters of the provision for public funding in accordance was the Act. Had it been the intent of Parliament for Bar Council and the courts to determine the funding of representation for an assisted person it would have explicitly provided provisions in the Act to do so. For example, in the Court of Appeal Act 1964, section 26 allows the court to appoint counsel under the Act.

92. Furthermore, the Respondent has a duty not only to protect the public purse but also to ensure that any assisted person is provided appropriate and fair representation before the courts. To do so, the Respondent has a duty to consider what factors would be reasonable to take into consideration. I therefore accept that it was entirely reasonable for the Respondent to exercise its discretion under the Act by discounting Bar Council's support of Mr Thomas KC's application for special admission. I agree with Mrs Dill-Francois in that the opinion produced by Mrs Smith-Bean must be looked at in terms of whether its content accurately and fairly reflects the factors that must be considered in the statutory test in Section 51(3) of the SC Act as well as the considerations set out in BC's Foreign Counsel Policy. It is not disputed that such considerations are, in summary, whether the case involves questions of law or practice of considerable difficulty or public importance and whether there is local counsel in Bermuda that

can "*adequately present the case*"[8]. Accordingly, I find it is neither unreasonable nor unfair for the Respondent to discount Bar Council's approval. In my view, it is clear from the passages Mrs. Dill-Francois relied on and the Court of Appeal case the JCPC case as well as the case of Jamiko Trott that no novel points of law would be raised at the retrial as ultimately the Applicant's conviction was overturned due to the trial judge's misrepresentation of the expert GSR evidence which had the effect of reversing the burden of proof. It is evident that the Opinion misrepresented and overstated the requirement for expert evidence to be challenged in cross-examination. Additionally, Mrs Dill-Francois is correct that the issue of the GSR particle evidence was raised by Ms Mulligan during the Court of Appeal hearing in 2016. This also supports the proposition that there are local counsel who can adequately represent the Applicant at his retrial. To specifically address the findings of the Court of Appeal at the retrial hearing, I do accept that there may be an impact on the jurisprudence in Bermuda regarding GSR evidence; however, any case before the courts has the ability to do so. Further, it is evident in paragraphs 55 and 56 of the retrial judgment that the testing of the GSR evidence in cross examination will be helpful in guiding the trial judge as well as other judges where GSR evidence is relied on. This, in my view, does not raise anything that is novel or complex as it simply the testing of experts who disagree as to what weight and significance should be attributed to the evidence. Acting Justice of Appeal, Charles-etta Simmons at paragraphs 55 and 56 stated as follows:

> "*55. Having heavily weighted the prevalence and seriousness of the offence of murder by firearms, there is in my judgment a substantial public interest in having the GSR experts' evidence tested by cross-examination. The result may support the Appellant's challenge to the admission, interpretation or value to be place on the particle evidence. On the other hand, the result may not weaken the prosecution case to that extent. Ultimately the interest of justice will have been served in a fair trial setting before a judge who can give clear and helpful guidance to a jury (should it come to that) to assist them in their role as "judges of the facts".*
>
> *56. Looking at this from a broader perspective the benefit of the cross-examination of the GSR experts would make an invaluable contribution to jurisprudence in Bermuda. This I anticipate will not only guide the trial judge who may be charged with the retrial, but also judges in cases of a similar nature involving the use of firearms and the incidence of GSR particulate evidence.*" [Emphasis added]

[8] BC's Foreign Counsel Policy, Criteria – paragraph 3 (ii).

Appointment of two counsel

93. Firstly, it is important to look at the underlying facts which form the basis for the Applicant's argument in relation to this issue. Mr Swan's submissions relied on the fact that Mrs Smith-Bean was originally appointed under section 12(2) of the Act as the applicant's local counsel of choice. This is simply inaccurate. Mrs Smith-Bean was appointed as the Applicant's counsel as it related to the retrial hearing. The Respondent at no point granted the Applicant a legal aid certificate for Mrs Smith-Bean to represent him at the Supreme Court's retrial. Therefore, the notion that the Respondent had no authority to change the Applicant's certificate is fundamentally flawed. The first instance where the Respondent granted the Applicant legal aid in respect of the retrial was when it appointed legal aid counsel, Ms Mulligan, as lead counsel in the matter with Mrs Smith-Bean being appointed as second chair. This certificate was granted on 30 November 2022 and the Mrs Smith-Bean was advised of this decision on 1 December 2022.

94. The memorandum of 25 January 2023 that Ms Mulligan presented to the Respondent for consideration recommended that there be two counsel appointed to the retrial. Section 10(3) of the Regulations allows for an applicant to be appointed more than one counsel in his or her case. I do not accept the interpretation that the Respondent has no authority to appoint two counsel in a matter unless the legally aided person's counsel writes to the Respondent for approval of additional counsel. The wording in this section of the regulations specifically states "*...he shall (unless the certificate provides for the act in question to be done) apply to the committee for the authority to do so...*" (emphasis added). The significance of this is that there is a clear implication that the Respondent has the ability to provide a second counsel when an assisted person is initially granted a legal aid certificate. In this case, Ms Mulligan was assigned Legal Aid Counsel from the outset of the Applicant's legal aid certificate for his retrial and her recommendation to two counsel was considered and acted upon by the Respondent.

95. It is also entirely uncertain why the Applicant believes that it was accepted by the Respondent at any point that Ms Mulligan would not be appropriate for his representation (in accordance with section 12(2) of the Act) which would therefore initiate the provision for the Applicant to

propose external counsel of his choice in section 12(3) of the Act. In fact, Ms Mulligan was required to meet with the Applicant to obtain a clear understanding of his position regarding the suggestion that she was conflicted in providing him representation. It was a direct result of this meeting which required Ms Mulligan to provide her opinion to the Respondent regarding the representation of the Applicant for his retrial.

Refusal to appoint overseas counsel

96. It is not accepted that the Respondent has been unable or unwilling to provide the court (or indeed the Applicant) with a consistent policy relating to the appointment of overseas King's Counsel. Whilst there may not be a formal policy it is abundantly clear in SLAC's correspondence of 3 March 2023 as to the factors taken into consideration for all its decisions. Whilst the principles set out in *Lumba* as well as *Bancoult* it is not accepted that these are cases are applicable to this matter. In particular, I do not accept that there was only one reason provided by the Respondent for its refusal and thereby reject the notion that it is only as a result of these proceedings that the respondent has provided supplemental reasons. Likewise, the case of *EC Grandsen & Co* does not apply as I do not accept that the Respondent provided no reasons for its decisions which were not in line with its informal policy.

97. Additionally, I do not agree that there is a blanket policy of the Respondent to deny all applications for King's Counsel to be appointed are outright rejected and no other factors are taken into consideration. Therefore, the submission that any decisions made under an inflexible policy are arbitrary and unlawful in accordance with *Venables* does not arise.

Irrational and/or wholly unreasonable

98. The Applicant's position is that in applying the *Wednesbury Principles,* the Respondent in exercising its discretion to refuse the appointment of King's Counsel, the Respondent considered irrelevant factors and/or failed to properly take account of the relevant ones.

99. As it relates to the six alleged errors to have been made by the Respondent, I find as follows (references to these six points are those referred to in paragraph 55 above):

i. I am not satisfied that the Respondent provided insufficient weight to the views of Bar Council the Court of Appeal and the JCPC.

ii. I believe the Respondent undoubtedly considered the statutory test for determining whether overseas counsel should be appointed in any particular case.

iii. I reject the notion that the Respondent only considered the availability of local counsel as the predominant factor and its decision.

iv. The Respondent acted within its powers to a point Legal Aid Counsel for the Applicant's representation at his retrial. My reasons for this have already been identified in the findings set out at paragraphs 89 to 98 above.

v. The respondent did fully consider the applicant submissions as to his reasons to why he says King's Counsel is required.

vi. I don't accept that there is any force behind the argument that the Respondent improperly determined that there were local counsel available to have conduct of the Applicant's retrial. Notably in correspondence sent by Mrs Smith-Bean and her letter dated 25 January 2023 where in two local counsel were identified by the applicant to have conduct of his retrial, albeit at that time they did not have availability for the April 2023 hearing. It then begs the question as to what efforts the applicant has made since January 2023 to obtain alternative local counsel who are suitably able to provide representation at his retrial which is now listed to commence on 20 May 2024.

Breach of natural justice

100. The question here arises is whether it is accepted that proper reasons were not provided by the Respondent for its refusal to appoint Mr Thomas KC as the Applicant's counsel. From the initial letter from the Respondent dated one December 2022 through to its correspondence dated 3 March 2023 it is evident that the Respondent did provide reasons for Mr Thomas KC not being appointed. It is likely the case that the Applicant in his disappointment in being denied

his request simply did not accept the Respondent's reasons. Evidently the Applicant's letter to the Respondent dated 14 February 2023, inter alia, stated as follows:

> "*The Committee's decision not to approve King's Counsel is without reasons as is the Committee's decision not to approve the transfer of my legal aid certificate to Counsel Shi-Vaughn Lee of 95 Law Ltd. Moreover, the Committee's decision is with respect, devoid of any legitimate basis of law, particularly when considering the very specific statutory framework enshrined into the section 12 Legal Aid Act which confirms that after the test set out in section 12(2) has been met, the committee "shall direct" the Senior Legal Aid Counsel to assign to the assistive person the external counsel of the assisted persons choice.*" [Emphasis added]

101. Additionally, the Applicant's previous letter to the Respondent dated 5 February 2023 set out his understanding of why Ms Lee was not appointed as his lead counsel:

> "*In closing, I wish to clarify that I understand that Ms Lee is a new barrister who has recently been called to the bar a few years ago, and this will be her first jury trial of this kind; None the less, she is my counsel of choice and in line with the provision of the Legal Aid Act, Ms Lee of 95 Law Ltd is listed on the Section 5 roster referred to in section 12(2) of the Legal Aid Act.*" [Emphasis added]

102. Based on the content of these letters alone, I have little doubt that the Applicant fully understood the Respondent's reasons for both Mr Thomas KC and Ms Lee not being appointed as his counsel. As such, I do not accept that there has been any breach of the Applicant's right to natural justice.

Adverse inferences

103. The first issue to be addressed is whether it is accepted that proper reasons were not provided by the Respondent for its refusal to appoint Mr Thomas KC as the Applicant's counsel which I have already addressed regarding the alleged breach of natural justice. Bearing in mind the determination set out in paragraphs 100 to 102 above, I can say that considering the content of

the Respondent's letters referred to therein, alone, I have little doubt that the Applicant fully understood the Respondent's reasons for both Mr Thomas KC and Ms Lee not being appointed as his counsel. Therefore, the matter of adverse inferences does not arise.

104. It was also argued that adverse inferences should be drawn regarding the Respondent's failure to provide the requested disclosure of the Respondent's meeting minutes that was eventually order by the Court to be provided. I reject that the fact that the Respondent had to be ordered to provide specific disclosure would in any way give the Court the ability to make a finding that would impact the substantive relief being sought by the Applicant. For example, the non-disclosure of meeting minutes on the dates where decisions were made regarding the Applicant's requests/applications, does not allow the Court to say that the Respondent acted unreasonably therefore its decisions should be quashed.

REFUSAL TO APPOINT MS LEE AS COUNSEL

THE LAW

105. In addition to the law referenced in paragraphs 19 to 25 above, the provision for a change of appointed counsel, once a certificate of legal aid has been granted, section 5 of the Regulations sets out the provisions as to circumstances where a person can request to change his or her previously appointed counsel:

> "***Amendment of certificate***
>
> *The Committee may amend a certificate—*
> *(a) where it appears to them that there has been some error or mistake in the certificate; or*
> *(b) when, in their opinion, it has become desirable either for the certificate to extend to other proceedings, being part of the same action, cause or matter to which the certificate relates or proceedings for the enforcement of any such order or agreement as is referred to in regulation 12, or for the certificate not to extend to certain of the proceedings in respect of which it was issued; or*
> *(c) <u>when an assisted person desires to change his counsel</u> or counsel gives up an assisted person's case.*" [Emphasis added]

106. The Policy Guidelines indicate that the current practice of the Respondent, when an assisted person wishes to change appointed counsel, it is required that the applicant set out reasons for such a request. If accepted, the Respondent appoints the new counsel.

APPLICANT'S POSITION

107. For the reasons set out in the Applicant's First Affidavit, the Applicant wished to change his local counsel from Mrs Smith-Bean to Ms Lee. Ms Lee is on the Respondent's roster of advocates willing to conduct legally aided cases. Whilst the reasons provided by the Applicant for the change of counsel were accepted by the Respondent, Mr Swan emphasized that it was conditional on the basis that the Applicant must either accept Ms Mulligan as lead counsel, or chose a different local, senior counsel approved by the Respondent to be lead counsel as it would only approve Ms Lee to be appointed as junior counsel.

108. The Applicant submits that the Respondent's refusal to appoint Ms Lee as the Applicant's counsel was *ultra vires* and a breach of statutory duty as well as unlawful and/or irrational and/or unreasonable.

***Ultra Vires* and Breach of Statutory Duty**

The Respondent had no power to insist that the Applicant be represented by two counsel.

109. Mr Swan's submissions relied on in relation to this point are those same ones set out in paragraphs 47 and 48 above regarding the appointment of King's Counsel.

Section 12 of the Act does not apply to a change in counsel, and there is no power to refuse the assisted person's counsel of choice.

110. The Applicant further submitted that the provisions of section 12 of the Act do not apply to a change of counsel. There is no express or implied statutory provision extending section 12 of

the Act to section 5 of the Regulations.

111. Moreover, under section 5 of the Regulations, there is neither the power for the Respondent to amend a legal aid certificate by appointing Legal Aid Counsel, nor to deny or substitute the Applicant's new counsel of choice, once the Respondent has accepted that a change in counsel is necessary or reasonable. Any decisions made outside of the Regulations would be *ultra vires* to the powers granted by Parliament under the Act. The use of the word 'may' in section 5 of the Regulations suggests that a change in counsel is not necessarily automatic upon one or more of the circumstances set out in (a) to (c). However, plainly, if it is the Respondent's opinion that a certificate should be extended to other proceedings in (b), then the certificate must be amended to reflect that opinion. Any refusal to amend the certificate would be irrational and unreasonable and contrary to the purpose of the enabling Act. Furthermore, if appointed counsel gives up an assisted person's case as in (c), plainly, new counsel must be appointed. The only circumstance where it seems possible that the section creates any discretion for the Respondent is in relation to the power to amend the certificate where the assisted person wishes to change his or her appointed counsel. This limited discretion to accept or reject the request for a change of counsel appears to be consistent with the objectives and purpose of the enabling Act. But the Respondent went further than this and decided that the Applicant's new counsel was not suitable.

112. Additionally, Mr Swan argued that the Respondent's ability to interfere with the Applicant's choice of counsel is strictly confined to the initial selection of counsel and in the circumstances set out in section 12 of the Act. He says this is supported by the changes made to the Act by the Legal Aid Amendment Act 2003 (**the 2003 Amending Act**). Prior to the 2003 Amending Act, the position regarding choice of counsel in accordance with section 12 of the Act did not include the option for Legal Aid Counsel to be appointed. Section 12 of the 2003 Amending Act provided as follows:

> "***Choice of counsel etc.***
>
> *12 (1) Subject to subsections (2) to (4), whenever a certificate is granted by the Committee it shall be the duty of the Senior Legal Aid Counsel to assign to the assisted person a counsel—*

(a) whose name appears upon a roster maintained under section 5; and
(b) who is the assisted person's counsel of choice.

(2) Subsection (1) does not apply where the counsel chosen by the assisted person—
(a) refuses to be bound by the Schedule of Fees annexed to the Legal Aid (Scale of Fees) Regulations 1980; or

(b) for any other reason refuses the assignment.
(3) Where—

(a) an assisted person, for whatever reason, does not exercise his right to choose a counsel under subsection (1); or

(b) pursuant to subsection (2), subsection (1) does not apply,

the Senior Legal Aid Counsel shall assign to the assisted person a counsel whose name appears upon the roster referred to in subsection (1)(a).

(4) For the purpose of subsection (3), the Senior Legal Aid Counsel shall have regard to the principles that-

(a) the assignment of counsel should be appropriate to the nature of the proceedings for which the certificate is granted; and

(b) so far as is practicable, the volume of legal aid work should be evenly distributed between counsel listed on the appropriate."

113. Notably, Mr Swan raised that the duties of Senior Legal Aid Counsel in section 12 (4) of the Act, were amended further by the Legal Aid Amendment Act 2018 (**2018 Amending Act**). He submitted that it is plain is that the discretion of SLAC to assign counsel to an assisted person has only ever applied where an assisted person does not make a choice of counsel, or where his or her chosen counsel refuses the brief or the legal aid scale of fees.

Even if the Act applied, the Respondent's view on counsel's experience was not a ground under the Act for refusing to appoint counsel of choice.

114. Even if it was accepted that section 12 of the Act did apply (which it is not), Mr Swan submitted that it would be irrelevant due to the following circumstances:

a) The Applicant was entitled to legal aid as of right under section 10 of the Act.

b) Under section 5 of the Act, the Respondent had a duty to provide him with legal aid assistance.

c) The Respondent had already identified the Applicant's case under section 12(2) of the Act as one in which in-house legal aid counsel was unsuitable and had appointed Ms. Smith- Bean.

d) The Respondent had accepted that Mrs Smith-Bean should be discharged and replaced for the reasons given by the Applicant.

e) Ms. Lee was on the legal aid roster pursuant to section 12(4) of the Act.

f) None of the criteria for rejecting counsel of choice in section 12(3) Act applied.

115. It was therefore submitted that there was no legitimate basis for the Respondent to refuse to transfer the legal aid certificate from Mrs Smith-Bean to Ms Lee. The Act, if it applied, is very clear: once one of the reasons in section 12 (1) (a) to (c) are present, the Respondent "*shall direct the Senior Legal Aid Counsel to assign to the assisted person the external counsel of the assisted person's choice.*" The Respondent may, itself, select counsel when one or more of the factors in section 12(3) applied. But those reasons did not include the Respondent's view of the experience of chosen counsel. Mr Swan argued as such, the Respondent was, therefore, required to appoint Ms Lee and in failing to do so, the Respondent acted unlawfully and breached its statutory duty.

Even if the Respondent had some discretion to vet counsel of choice (which is not accepted), the Respondent was using its powers under the Act for an improper purpose.

116. The Applicant does not suggest that the Respondent was motivated by bad faith; however, Mr Swan submitted that the Respondent used its powers for an improper purpose, that is, to pressure the Applicant into accepting a senior local counsel, instead of overseas counsel, to represent him at his trial. Mr Swan asserted that it was clear that the Respondent's primary objective based on the contents of its letter dated 10 February 2023 was not to provide legal assistance to the Applicant, but rather to ensure that his case was allocated to a local senior

counsel. Mr Swan says that this is evident because of the following:

i. If the Respondent had a genuine concern about Ms Lee's lack of experience, that concern could have been alleviated by the appointment of overseas counsel, just as much as it could be by local counsel. Insisting on a local senior counsel was not rationally connected to the refusal to appoint Ms Lee.

ii. The Respondent discharged Mrs Smith-Bean. If the Respondent had genuine reservations about amending the certificate to appoint Ms Lee, the proper course was for Mrs Smith-Bean to remain as appointed counsel.

iii. The Respondent was aware that the Applicant's retrial was imminent. But having discharged Mrs Smith-Bean and having refused to appoint both Mr Thomas KC and Ms Lee, the Respondent had left the Applicant unrepresented on a charge of premeditated murder if he did not accept the Respondent's conditions.

iv. The approach of the Respondent in withholding the funding of any legal representation to the Applicant unless he accepted Ms. Mulligan, or an approved local senior counsel, did not comport with the spirit and purpose of the Act. Mr Swan argued that the Respondent misused its powers by doing this in order to ensure its preferred counsel conducted his case when it was duty bound to provide funding to the Applicant in accordance with the Act.

The decision to refuse to appoint Ms Lee was arbitrary.

117. Finally, even if the Respondent had a broad discretion to reject Ms Lee without her being led by a senior counsel (which is not accepted), Mr Swan asserts that this decision was arbitrarily made. The Respondent has not provided any written policy on how it decides whether counsel is 'senior' or 'junior' or suitable for a particular case. Mrs Smith-Bean, for example, was over ten years qualified in Bermuda at the time of the Applicant's request and also had been practicing in the Bahamas for longer. However, the Respondent rejected the Applicant's request for Mrs Smith-Bean to have sole conduct of his retrial.

118. Mr Swan contended that without a policy or guidelines, there is no guarantee that the same factors are considered and weighted similarly in every case. Furthermore, the Respondent does not keep records of its counsel appointments, so it has no means of monitoring whether its approach is consistent or not. Neither does it give reasons for refusing a particular choice. Therefore, is was submitted that there can be no confidence that different compositions of the Respondent, with different advisors, would have reached the same outcome.

The Respondent's decision to refuse to appoint Ms Lee was irrational and/or unreasonable

119. The Applicant further submits that the Respondent's decision to refuse to appoint Ms Lee was irrational and/or unreasonable, for the following reasons:

i. The Respondent disregarded the fact that the Applicant was entitled to publicly funded legal assistance as of right.

ii. The Respondent did not take into account that the Applicant was about to be tried for the most serious of offences. It is the Respondent's duty under the Act to provide legal assistance in any proper a case. Yet the Respondent was prepared for the Applicant to be unrepresented at his trial for premeditated murder, rather than to fund his representation for Ms Lee.

iii. The Respondent disregarded the fact that the Act, plainly, seeks to give effect as far possible to an assisted persons' choice of counsel.

120. The Applicant's submission is that there was only one lawful answer to his request for Ms Lee as counsel and that was that she should have been appointed by the Respondent. However, since the commencement of these proceedings, the Applicant has been required to seek alternative representation. Therefore, the Applicant requests that his draft order be amended to reflect that, instead of Ms Lee, the Respondent is compelled to appoint the Applicant's local external counsel of choice.

RESPONDENT'S POSITION

121. Mrs Dill-Francois avers that section 12 of the Act makes clear that in every instance where a certificate is granted by the Respondent, in house Legal Aid Counsel shall be assigned. It is only when the Respondent determines it is not practical, it is not appropriate given the nature of the proceedings or there is a conflict of interest, the Respondent may instruct Senior Legal Aid Counsel to assign counsel from the Roster.

122. It was noted that it was not disputed by the Applicant Ms Lee is a junior counsel who has limited court experience in criminal law and has not conducted any serious criminal trials. In fact, it was expressly stated in the Applicant's transfer request sent to the Respondent that despite her inexperience that he still desired for Ms Lee appointed as his lead counsel.

123. In this regard, it is a well-established principle that justice should not only be done but should manifestly and undoubtedly be seen to be done; appointing Ms Lee as lead counsel to a premeditated murder trial would defeat this principle.

124. Further, it is contended by the Respondent that when considering the application of section 12 of the Act, the assignment of "*external counsel of the assisted person's choice*" must be construed in accordance with the Barrister's Code of Professional Conduct 1981 (**the Code**). The Respondent avers that the following provisions of the Code would be applicable in this case:

> ***Making legal services available***
>
> ***79*** *A barrister should decline to act for a prospective client if he is not adequately qualified in the field of law in respect of which he is asked to act.*
>
> ***Respect for administration of justice***
>
> ***102*** *A barrister shall encourage public respect for and shall try to improve the administration of justice.*
>
> ***Responsibility to profession***

> ***103*** *A barrister shall assist in maintaining the integrity and reputation of the Profession.*
>
> ***Rules to be observed in the spirit***
>
> ***126*** *A barrister shall observe these rules in the spirit as well as to the letter.*

125. Following this, Mrs Dill-Francois relied on the Supreme Court case of the *Queen* v *Clarke and Adderley* [2022] SC (Bda) 3 Cri, wherein the Crown challenged the representation of Mr Clarke by former Magistrate Mr Archibald Warner, on the basis that such representation would offend the Code. The argument against the Crown's objection was that section 6 (1) (d) of the Constitution provides for the right of an individual to be represented by the counsel of his or her choice.

126. At paragraphs 19 and 22 of *Clarke and Adderley*, Subair Williams J stated:

> "19. *In my judgment, these kinds of resulting issues offend the meaning and spirit of section 101 of the Barristers Code of Professional Conduct 1981 which is ultimately aimed to keep the integrity of the administration of justice intact.*"
>
> "22. *In this application the Court is being asked to reinforce the well-established doctrine that justice must not only be done but also be seen to be done. This simply means that it must appear to an informed and fair-minded observer that the administration of justice is not being operated in any way which would present a real risk of impartiality or inequity in the process.*" [Emphasis added]

127. Mrs Dill-Francois accepted that the factual matrix in *Clarke and Adderley* is different from the current case; however, she submits that the same principle applies. It is arguable that Ms Lee's representation of the Applicant would be contrary to sections 79, 102, 103 and 126 of the Code, due to her limited experience. Therefore, Mrs Dill-Francois submitted that the Respondent has the right to take Ms Lee's inexperience into consideration, for the protection of the Applicant, the public and in accordance with the Code.

128. For these reasons, Mrs Dill-Francois argued that the decision of the Respondent not to appoint Ms Lee to represent the Applicant at his retrial was not unlawful, and/or irrational and/ or

unreasonable.

FINDINGS

129. Having considered both parties' submissions, all the affidavit evidence (with the corresponding exhibits thereto), and along with the authorities produced by Mr Swan and Mrs Dill-Francois, I make the following findings:

***Ultra Vires* and Breach of Statutory Duty**

130. I will address each of the five reasons Mr Swan presented as to why the Applicant says the Respondent acted *ultra vires* and a breach of statutory duty.

The Respondent had no power to insist that the Applicant be represented by two counsel.

131. I have already addressed the representation of two counsel in my findings regarding the appointment of Mr Thomas KC and restate those findings which are referenced at paragraphs 93 to 95 above.

Section 12 of the Act does not apply to a change in counsel, and there is no power to refuse the assisted person's counsel of choice.

132. When the applicant was appointed Legal Aid Counsel as lead counsel for his retrial, the ability of the Applicant to be assigned "*external counsel*" of his choice would not arise. The only circumstance where an applicant can be appointed "*external counsel*" of his or her choice is when the Respondent has deemed that the Legal Aid Counsel would not be appropriate in accordance with section 12(2) of the Act. As previously determined, I do not accept that the Respondent, based on the evidence in SLAC's Affidavit (along with exhibited documents), ever indicated that such a determination had been made under section 12(2) of the Act.

133. Even if I am wrong, I do not accept that there is no power for the Respondent to refuse appointing the Applicant's counsel of choice by way of an amendment to the certificate in accordance with Section 5 of the Regulations. The Respondent has a discretion under Section

5 of the Regulations to amend a legal aid certificate in certain circumstances as it states, "*the Committee <u>may</u> amend a certificate...*" (emphasis added). Consequently, it is not an absolute for any applicant to be assigned new counsel when requested.

<u>Even if the Act applied, the Respondent's view on counsel's experience was not a ground under the Act for refusing to appoint counsel of choice.</u>

134. I accept Mrs Dill-Francois' submissions that given the Respondent's overall duties to the public purse as well as to the administration of justice that the doctrine as cited in Clarke and Adderley by Subair Williams J, "*that justice must not only be done but also be seen to be done. This simply means that it must appear to an informed and fair-minded observer that the administration of justice is not being operated in any way which would present a real risk of impartiality or inequity in the process*". Within this doctrine, the Respondent must have particular concern with ensuring equity in the process. This includes, no doubt, that all assisted persons have adequate and appropriate representation before the courts. As such, it would be unreasonable, irrational, and unfair for the Respondent not to have regard to the Code which undoubtedly in this instance, should specifically consider sections 79, 102, 103, and 126 of the Code.

135. I find that in exercising its discretion the Respondent was able to take into consideration Ms Lee's lack of seniority as well as her lack of experience in conducting Supreme Court trials as defence counsel and as such reject that the respondent acted *ultra vires*.

<u>Even if the Respondent had some discretion to vet counsel of choice (which is not accepted), the Respondent was using its powers under the Act for an improper purpose.</u>

136. I reject the submission by Mr Swan that the Respondent acted unlawfully as it was abusing its powers. I also do not agree that Respondent was exerting pressure on the applicant to accept senior local counsel rather than overseas King's Counsel. The Respondent's primary objective has been to provide the applicant with adequate and appropriate representation for his retrial bearing in mind its duty to protect the public purse. It is unequivocal, in my view, that the Respondent provided the Applicant with several options for his representation at the retrial which were well within its remit to do. It is the Applicant who has been difficult and

unreasonable throughout the legal aid process which has caused the delay in his retrial proceeding. Moreover, it is inaccurate to suggest that the respondent is duty bound to provide funding for any applicant. Even where there is a right to obtain funding in accordance with section ten of the act, this right is "*to have a certificate granted to him*" or her which is entirely distinctive from a right to be funded. Funding would only be considered in the event that Legal Aid Counsel were considered inappropriate in accordance with section 12(2) of the Act and in instances where section 12(3) applies the definition of "*external counsel*" must be considered in line with Section 5 of the Act.

The decision to refuse to appoint Ms Lee was unlawful for being arbitrarily and unfairly made.

It is not accepted that the Respondent acted *ultra vires* as the decision was arbitrarily and unfairly made not to appoint Ms Lee. Specific reference was given to there being a lack of written policy on how the response decides whether counsel is senior or junior or suitable for a particular case. It was therefore submitted that without a policy or guideline speaking to this issue, that a differently constituted Legal Aid Committee would potentially reach a different conclusion. Whilst it may be helpful to the lay person to have a written policy or guideline as it relates to the suitability of counsel, the issue of seniority (which also looks at counsel's experience) is so plainly obvious that the absence of any such guideline, in my view, does not afford the Applicant the outcome of setting aside the Respondent's decision. Indeed, the Respondent's consideration of Ms Lee being a junior member of the Bar as well as having no experience representing a defendant who is before the Supreme Court on criminal charges provides the Applicant with protection to ensure he has fair and equal representation before the Courts which ultimately safeguards the administration of justice. It would be extremely concerning for the Respondent to grant any applicant funding for an attorney to appear before the Supreme Court on the most serious offence of premeditated murder. It could even be said that the Respondent would be acting negligently had it done so.

The Respondent's decision to refuse to appoint Ms Lee was irrational and/or unreasonable

137. As it relates to the alternative argument that the Respondent's decision to refuse to appoint Ms Lee was irrational and or unreasonable, I find as follows:

(i) It was not disputed that the Applicant was entitled to legal aid as of right. The Applicant does not have a right to "*funding*" for counsel before the courts. What the Applicant has is a constitutional right to legal representation before the Courts ", *where so provided by any law, by a legal representative at the public expense"*. Henceforth, such legal representation is provided for in accordance with the parameters set out in the Act and the Regulations.

(ii) I do not accept that the Respondent put the Applicant in a position to be unrepresented at his trial. The Applicant had several opportunities to accept representation which was being provided to him in accordance with the Act, but he chose not to do so.

(iii) I also reject the notion that the Act seeks to give effect as far as possible to an assisted person's counsel of choice. The purpose of the Act is to provide adequate and appropriate legal representation before the courts to those persons who qualify.

138. Given the above, I do not accept that the Respondent was irrational and/or unreasonable in refusing to appoint Ms Lee as the Applicant's counsel for his retrial.

CONCLUSION

139. Having regard to all the findings I have made herein, I refuse to grant the remedies being sought by the Applicant in paragraph 16 above as I do not accept that the Respondent acted *ultra virus*, arbitrarily, that its decisions were irrational and/or wholly unreasonable and that there has been any breach of the basic principles of natural justice.

140. The Applicant's view that the Respondent is attempting to "*impose*" the use of Legal Aid Counsel for his representation is misguided. It is unmistakable to me that the Respondent's intent from the outset is to ensure that the Applicant is being provided appropriate representation before the court. Moreover, it is evident that the Applicant has a fundamental

misunderstanding of his constitutional right to be represented before the courts on his criminal charges.

141. It is crucial to differentiate one's right to be represented before the criminal courts in accordance with the Constitution (as set out in paragraph 19 above). Albeit every person has a right to representation by his or her "*counsel of choice*" before the Courts where such counsel is privately funded, the right of having his or her "*counsel of choice*" is not extended to those who are publicly funded. Any applicant seeking legal aid assistance must always have at the forefront of his or her mind that the granting of a legal aid certificate does not amount to funding of whomever he or she wishes to represent him or her before the court. A legal aid certificate is not a blank check to be handed out to whomever an assisted person desires. There must be checks and balance in place to ensure that justice is not only done but seen to be done.

142. As it relates to costs, I make no order as to costs unless counsel confirm in writing within fourteen days from the date hereof that they wish to be heard on costs.

DATED: 19 MARCH 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA

SIGNED

ALEXANDRA WHEATLEY

ACTING PUISNE JUDGE OF THE SUPREME COURT