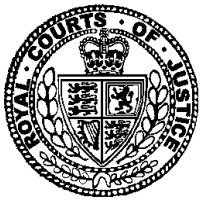

Neutral Citation Number: [2024] EWHC 2211 (Admin)

Case No: AC-2022-LON-002916 / AC–2023–LON-001111

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th August 2024

Before:

MR JUSTICE GARNHAM

- -

Between:

THE KING **(on the application of DR MARWA KARMAKAR)** **-and-** **(on the application of THE BRITISH MEDICAL ASSOCIATION)**	**Claimants**
- and - **THE ROYAL COLLEGE OF GENERAL PRACTITIONERS**	**Defendant**
-and- **THE GENERAL MEDICAL COUNCIL**	**Interested party**

- -
- -

Jenni Richards KC and Emily Wilsdon (instructed by **Leigh Day**) for the **British Medical Association**
Emily Wilsdon (instructed by **Thompson Solicitors**) for the **Dr Karmakar**
Peter Oldham KC (instructed by **Clyde & Co**) for the **Defendant**

Hearing dates: 10th, 11th, 12th July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 27th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE GARNHAM:

Introduction

1. In order to qualify for membership of the Royal College of General Practitioners ("the RCGP" or "the College") a candidate must sit and pass three assessment tests. This case concerns the lawfulness of a rule, or policy, adopted by the College that it would permit only four attempts at each of those tests, even in circumstances where a candidate discovers, after sitting a test, that she has a disability which, if known at the time, would have entitled her to "reasonable adjustments", including additional time for the taking of the test.

2. I have before me two separate claims each of which raise this issue. The first is brought against the College by Dr Marwa Karmakar, a trainee general practitioner. She seeks to challenge a decision of the College dated 11 January 2023 refusing to grant her a further attempt at the College's Applied Knowledge Test (or the "AKT") and the lawfulness of the rule generally. She was given leave to apply for judicial review on 6 November 2023 by Vikram Sachdeva KC, sitting as a deputy judge of this court.

3. The second is brought by the British Medical Association ("the BMA"), the professional association representing doctors and medical students. The BMA seeks to challenge the lawfulness of the College's policy as it applies to both the AKT and the Recorded Consultation Assessment (the "RCA"). The BMA's application for an extension of time and permission to apply for JR was refused on the papers by Lang J on 28 July 2023. On 21 December 2023, Foster J ordered a "*rolled up hearing*" of the BMA's renewed application for permission and directed that "*the issues of delay, extension of time and substantive merits would be heard*" at that hearing.

4. It is common ground that these two matters can sensibly be heard together since a number of the issues that arise are common to both sets of proceedings. The parties all proceed on the basis that all evidence in both claims is admissible in each. Ms Emily Wilsdon appeared for Dr Karmakar and Ms Jenni Richards KC and Ms Wilsdon represented the BMA. They divided up the arguments advanced for the two Claimants between them. Mr Peter Oldham KC represented the RCGP.

5. Both Claimants argue, in summary, that what has been called "the attempts policy" amounts to an unlawful fettering of discretion, is irrational, breached the public sector equality duty and was inconsistent with other requirements of the Equality Act 2010.

The Background

The RCGP and its work

6. In order to practice as a GP a trainee must obtain a Certificate of Completion of Training ("CCT"), which is issued by the General Medical Council ("GMC"). The CCT is awarded after successful completion of a GP specialty training programme. One of the requirements of that programme is successful completion of the assessment for membership of the RCGP. The RCGP's assessment process is governed by the "Membership of the Royal College of General Practitioners Regulations for doctors training for a CCT in General Practice" (the "MRCGP regulations"), pursuant to which candidates take three assessments: a written exam called the applied knowledge test

("AKT"), an assessment of consultations with patients (at the time the claim was issued this was the RCA; it has now been replaced by the "SCA" – the Simulated Consultation Assessment); and the Workplace-Based Assessment ("WPBA"). Failure to pass the MRCGP examination means that a doctor cannot work in general practice in any capacity.

7. At the time of issue of this claim, the RCGP permitted a maximum of 4 attempts at the AKT and at the RCA, with a fifth attempt being permitted exceptionally and solely on the basis of additional educational attainment (see *MRCGP Examination Exceptional Fifth Attempts at the Applied Knowledge Test (AKT) and Recorded Consultation Assessment (RCA) Policy, Procedure and FAQs* ("the *Exceptional Fifth Attempts Policy*")). However, the RCGP's policy was (and remains) that candidates for the AKT and RCA who, after they have undertaken an attempt at the AKT or RCA, receive a diagnosis of disability that would have entitled them to reasonable adjustments, cannot have an additional attempt or attempts and cannot have previous unsuccessful attempt(s) voided or disregarded, even though their earlier attempts were undertaken without the reasonable adjustments to which they would have been entitled had they known of their disability. This is set out in the RCGP's publication *MRCGP Equality and Diversity: reasonable adjustments* which poses the following question, and gives the following answer, in relation to the AKT:

> *"If I have previously been unsuccessful at an examination and then discover that I might benefit from a reasonable adjustment, such as extra time, am I entitled to an extra attempt?*
>
> *If you are unfortunate enough to be unsuccessful at your AKT and are subsequently diagnosed with a disability (such as a specific learning difficulty) then you will be entitled to reasonable adjustments for any future attempts. However, your unsuccessful attempt(s) will still stand."*

8. The same position applies in relation to the RCA and is reiterated in the Exceptional Fifth Attempts Policy:

> *"Can I apply for an exceptional fifth attempt for any reason other than demonstrating additional educational attainment?*
>
> *No. This policy allows examination candidates, who have the support of their deanery, to make exceptional fifth attempts at the AKT or RCA only on the basis of additional educational attainment. It is very important that trainees and educators consider the need for any reasonable adjustments in advance of a trainee's possible exceptional fifth attempt. The RCGP cannot void previous attempts on this basis.*
>
> *Can I apply for an exceptional fifth attempt on the basis that I was not previously aware of needing reasonable adjustments?*
>
> *No. This policy allows examination candidates, who have the support of their deanery, to make exceptional fifth attempts at the AKT or RCA only on the basis of additional educational attainment. It is very important that trainees and educators consider the need for any reasonable adjustments in advance of a trainee's possible exceptional fifth attempt. The RCGP cannot void previous attempts on this basis.*"

9. In August 2023 the RCGP amended its regulations and policies so that new trainees entering training for the first time on or after 2 August 2023 would be permitted a maximum of 6 attempts at each examination. However, as the statement of Stuart Copus, the RCGP's Assistant Director of Examinations, confirms:

> *"There has been no change to the Defendant's approach to nullifying examination attempts where there has been a late disability diagnosis: the Defendant does not offer further attempts following a late disability diagnosis, and cannot discount, void or nullify previous attempts on the basis that the candidate later reports a disability which they say could have affected previous examination performance and/or for which they required reasonable adjustments" (emphasis added)*.

10. The Academy of Medical Royal Colleges is the membership body for the UK and Ireland's 24 medical royal colleges and faculties. The RCGP is a member of the Academy. The Academy had previously urged its members to *"develop a consistent policy on further candidate attempts where candidates receive a late diagnosis of dyslexia"*. In November 2023 it published "*Principles for nullifying exam attempts and the provision of additional exam attempts to a candidate"*. The fourth principle identified by the Academy is *Granting of additional attempts* and it provides as follows:

> *"When new information is received by a college, for example a new diagnosis or a change in the recommendation for reasonable adjustment, which might lead to the granting of additional attempts, it should be considered whether this information will have affected all previous attempts, or only some, and the number of remaining attempts calculated accordingly. For example, new information on the diagnosis of a disability which is likely to have affected all previous attempts, could lead to the full number of attempts being granted."*

11. Consistent with the Academy's position, 15 UK based Royal Colleges and faculties either expressly make provision for discounting previous attempts, or take a flexible approach, giving consideration to the possibility of additional attempts, or expunging previous attempts, on a case-by-case basis. Five member colleges of the Academy have arrangements similar to the RCGP.

Dr Karmakar and her attempts at the AKT

12. Dr Karmakar is a GP trainee in Northampton. She took the AKT on three occasions prior to November 2020. First, she took the test on 1 May 2019, when she scored 35.5%, thereby failing the test by 32%. Second, on 30 October 2019 she scored 44.2%, (failing by 24.14%). Third, on 28 October 2020, she scored 55.28% (failing by 14.57%).

13. On 24 November 2020 her educational supervisor told her he felt that she was "*struggling organisationally on busy clinic days*" and that he suspected she may have a neurodiverse condition. Up until that point, she had been unaware of that possibility. She was advised not to take further attempts at the AKT without first being assessed. She followed that advice. She was referred for a neurodiversity assessment later that year but, because of the Covid-19 pandemic, that assessment could not be conducted until 2021.

14. The report of that assessment was dated 28 February 2021. The author of that report, Charlie Eckton, concluded as follows:

> "*Dr Karmakar has a neurodiverse cognitive profile, characterised by relative strengths in verbal comprehension and perceptual reasoning and relative weaknesses in working memory and processing speed. She has a specific difficulty in processing*".

15. In light of that report, the Claimant applied for reasonable adjustments for her fourth attempt. She was granted 25% extra time. That fourth attempt took place on 27 October 2021. The Claimant scored 66% (failing by 4.5%).

16. On 14 January 2022, she emailed the Defendant's exam department and asked that her attempts before the diagnosis be disregarded. She had the support of her educational supervisor, head of school, training programme director, and post graduate dean. On 27 January 2022 the RCGP's exam department responded "*We are not able to void previous attempts based on what you have outlined below*", but referred her to the possibility of an application for an exceptional fifth attempt.

17. In February 2022 Dr Caroline Ahrens, Head of GP School for East Midlands, made the application for an exceptional fifth attempt. On 23 February 2022 the RCGP granted that fifth attempt on the basis of additional educational experience.

18. An occupational health report on 18 March 2022 found that it was likely that her neurodiversity had been a relevant factor in her difficulties passing the examinations and noted her marked improvement with reasonable adjustments.

19. On 26 October 2022, the Claimant made her fifth attempt. She scored 66%, (failing by 6.5%).

20. On 5 January 2023 she emailed the RCGP to request that her first three attempts be discounted (voided) or that she be granted a sixth attempt.

21. The RCGP's Examinations Administrator responded on 11 January 2023 indicating that there was '*no regulatory mechanism available to enable you a further attempt*'. He said that the RCGP was '*duty bound to uphold these regulations consistently for every trainee'* and that the RCGP '*cannot annul or void any previous attempts for a trainee who retrospectively applies for reasonable adjustments, either for a more progressive disability or a new disability*'. That is the decision under challenge.

The Issues

22. Following argument, the following preliminary issues arise for consideration:

    (i) Is this matter non-justiciable because it turns on matters of academic judgment?

    (ii) Should either claim be dismissed for delay?

    (iii) Is judicial review the appropriate remedy?

23. If and insofar as the claims survive those objections, the following issues arise:

    (iv) Has the College unlawfully fettered its discretion?

(v) Was the College's policy and/or the decision in Dr Karmakar's case irrational?

(vi) Was the College in breach of the Public Sector Equality Duty?

(vii) Was the College in breach of its duty to make reasonable adjustments?

(viii) Was the College guilty of indirect discrimination?

24. I deal with each of those in turn.

(i) Academic Judgment

25. On behalf of the College, Mr Peter Oldham KC argues that the common law grounds, fettering discretion and irrationality, challenge the College's expert academic determination of how many attempts to pass an exam a student should be permitted, and the circumstances under which they may have a legitimate reason for claiming to resit it. He says the RCGP will take a view on that question in the light of its understanding of its candidates, their training, the assessment, and the requirements of the GP profession. The Court has none of that expertise. He says that neither Claimant cites any caselaw supporting the contention that these matters may be determined by the Court in a common law claim and the RCGP is aware of none. Consequently, he submits, the common law grounds should be rejected.

26. In *R (Gopikrishna) v The Office of the Independent Adjudicator for Higher Education* [2015] EWHC 207 (Admin), an authority relied upon by both parties, HHJ Curran reviewed the relevant authorities on this issue at [143-152] and [183-188]. This was in the context of the powers of the OIAHE under the Higher Education Act 2004 which, by s 12, prevented it from considering student complaints in matters of "*academic judgment*". He decided that the common law and statutory exclusions for academic judgment were co-extensive. All parties accepted that that was a correct analysis and I agree. At [188(ii)], Judge Curran said this:

> *"Not all judgements which academics have to make qualify for the immunity. Nor can an academic institution expect that any claim for academic judgement immunity will be accepted uncritically. The nature and extent of the judgement determines the point. In its scrutiny of the relevant decision, the court (or the OIA) should consider whether the decision is of a purely academic nature — such as a dispute over a mark, or the class of degree awarded — or whether the academic extent of the decision is only one element of it: as where, for example, the complaint relates to procedural unfairness in reaching the decision, or to an allegation that extraneous or irrelevant matters were taken into account by the decision-maker. A gross example would be where there is evidence that impropriety has occurred, such as an examiner purporting to mark a paper without reading it all."*

27. At the extremes, in my view, determining whether a decision is the result of an academic judgment or not is straight-forward. Judge Curran gives the example of the class of degree awarded, where the decision is plainly one of academic judgment, and of a complaint of impropriety by the examiner which equally clearly is not.

28. On facts such as the present which do not lie at either of these extremes it is necessary, in my judgement, to identify the nature of the academic expertise allegedly exercised and the academic foundation for the judgment. In Judge Curran's example of the decision as to the class of degree to be awarded both would be obvious. Here, there is no evidence as to either. The College's evidence does not identify the nature of the expertise on which it relied to decide the base number of attempts to be permitted, or the discipline or learning on which that expertise was based. Nor are we told what academic discipline enables the College to decide whether further attempts should not be permitted for those who discovered a disability after an attempt at the exam had been made.

29. It is not difficult to imagine that there might be academic studies into the consequences of repeated attempts at an examination or test. It might be that there are learned techniques gained by repeated attempts which improve or alternatively devalue the results of the test. It might be that there is an optimum number of tests to best assess a candidate's true ability. It may also be that there has been academic work on the effect of repeated attempts on the performance of candidates with various neurodiverse conditions. But all this is to speculate about a case the College might have been able to put forward but has not.

30. We are left instead with the bald assertion, in the defendant's skeleton argument, that the College "*will take a view*" on the issue "*in the light of its understanding of its candidates, their training, the assessment and the requirements for the profession*." That amounts to nothing more than an assertion that the matter is best left to the College's instinctive feel. That is not an academic judgment.

31. It seems to me useful to compare the position of the other medical colleges. As was discussed in the hearing, there is considerable difference amongst the colleges on both the base number of attempts to be permitted and the circumstances in which additional attempts will be permitted. The RCGP does not even attempt to explain the academic justification, if such there be, for these different decisions.

32. In those circumstances, I unhesitatingly dismiss this preliminary objection.

(ii) Delay

33. There are two provisions relevant to delay and its consequences in JR proceedings. First, an application to apply for judicial review cannot be granted unless permission is obtained. CPR r54.5 (the successor to RSC Ord. 53, r. 4(1)) provides that "*the claim form must be filed (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose*."

34. Second, by s31(6) of the Supreme Court Act 1981 (the "SCA"):

> *Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*

35. It is necessary in this regard to consider separately the position of the two Claimants. First, Dr Karmakar.

36. Dr Karmakar is challenging a decision dated 11 January 2023. Her claim form was dated 6 April 2023, so less than three months after the decision under challenge. When permission was granted the deputy judge said that "*the claim does not appear to be out of time from when the decision under challenge was made*".

37. Mr Oldham argues that in giving permission to apply, the Deputy Judge did not determine the issue of promptness under CPR 54.5. In any event, even if he did, Mr Oldham says, the RCGP may still argue that relief should be refused due to undue delay under the SCA.

38. I reject the proposition that in granting leave the deputy judge did not decide the issue of promptness. That seems to me implicit in the first clause cited above; it seemed to the deputy judge that the application was in time. In any event, he went on to grant leave and he could only do so if the application was made promptly (or he extended time, which he did not do explicitly). In those circumstances, in my judgment, it is not now open to the Defendant to challenge the grant of permission on the basis that it is out of time. In R v CICB, ex p A [1999] 2 AC 330, Lord Slynn said:

> *"If leave is given, then unless set aside, it does not fall to be reopened at the substantive hearing on the basis that there is no ground for extending time under Ord. 53, r. 4(1). At the substantive hearing there is no "application for leave to apply for judicial review," leave having already been given. Nor in my provisional view…is there a power to refuse "to grant ... leave" at the substantive hearing on the basis of hardship or prejudice or detriment to good administration. The court has already granted leave; it is too late to "refuse" unless the court sets aside the initial grant without a separate application having been made for that to be done."*

39. I accept that, even though the College cannot now challenge the grant of leave, it can still argue that relief should be refused because of delay. Lord Slynn continued after the passage just cited to say, "*What the court can do under section 31(6) is to refuse to grant relief*." I will return to that issue at [45] below.

40. In case I am wrong about the effect of the grant of leave on the issue of delay in Dr Karmakar's case, I go onto consider Mr Oldham's next submission. He points to Dr Karmakar's evidence that her educational supervisor suspected that she was neurodiverse in November 2020, and referred her for screening. In April 2021 she was diagnosed as neurodiverse. She took her fourth AKT attempt in October 2021, with the benefit of reasonable adjustments, and failed. But, says Mr Oldham, she did not ask the RCGP to void her earlier attempts in the light of her diagnosis until her request in January 2022. She was told on 27th January 2022 that this was "*not possible*". She therefore knew at that point, at the latest, that the College did not allow earlier attempts to be voided in the light of late diagnosis.

41. Dr Karmakar sat an exceptional fifth attempt on 26th October 2022, again with reasonable adjustments. On 11th January 2023, in response to her email of 5th January 2023, the RCGP told her that she had exhausted her attempts. Mr Oldham argues that she purports to bring this claim against that communication but contends that she knew from 27th January 2022 that she would have no more attempts. "*Anything that happened after 27th January 2022 was simply the playing out of that decision. No new decision was taken*."

42. I reject that argument. In my view, Dr Karmakar was entitled, if not obliged, to follow the route to a further attempt suggested by the College. Had she begun proceedings then, I have little doubt the College would have asserted that judicial review at that stage was premature because a further attempt at the AKT was still available to her. In my view, it would be wholly unrealistic to expect a medical student in Dr Karmakar's position not to make use of that fifth chance as suggested by the College, but instead to embark on difficult legal proceedings in an attempt to establish that the College of which she hoped to achieve membership had acted unlawfully in denying her a further chance at qualification.

43. If I am wrong to say that the matter was already determined by the deputy judge's decision and wrong to say that time did not begin to run until the January 2023 notification, then, in the exercise of my discretion I would extend time. In all the circumstances, in my view, Dr Karmakar acted reasonably in delaying the commencement of proceedings until after she had exhausted all other avenues of challenge.

44. Mr Oldham says that there has been undue delay in making this application and the granting of the relief sought would be likely substantially to prejudice the rights of others, or would be detrimental to good administration, such that the Court should refuse to grant relief: SCA, s 31(6)(b). He points out that Dr Karmakar attacks the validity of the rule itself. He says that between 27 January 2022 and 6 April 2023 inclusive there were 6,233 candidate entries from 5,304 candidates, so that the outcome of the case could relate to a considerable number of candidates within that period, as well as many in the future. A challenge to rules regulating entry into general medical practice should be made as soon as possible, so that both candidates and the public can be assured that they are lawful, or if not then changed quickly.

45. I reject that submission too. I do not see how the potential correction of the error in the College's approach prejudices the rights of others and, in my view, it is not detrimental to good administration to challenge and correct systemic errors in that administration, which is the potential consequence of Dr Karmakar's action.

46. The position of the BMA seems to me rather more difficult. The BMA challenge the attempts policy and originally also challenged the "6 month policy", which concerns the length of time allowed for GP trainees to make recordings for the RCA (the Recorded Consultation Assessment). They issued proceedings on 17 October 2022. The explanation for their delay in commencing proceedings was set out in a witness statement dated 1 February 2024 from Daniel McAlonan, the BMA's head of Professional Policy and Activities.

47. Mr Oldham submits that the BMA was aware of the rule for at least 10 years prior to the claim; that this was not a claim brought by an individual affected by the rule then challenged but by a body making an "*abstract*" challenge, for which time runs from when the policy was adopted; and that re-publication of a policy does not give fresh grounds for challenge. He says that there has been both lack of promptness under CPR 54.5 so that the application for permission to apply should be refused, and undue delay under the SCA, so that the application for permission to apply should be refused, and in any event relief refused.

48. Ms Richards accepts that the College introduced four attempts as *"the standard"* in August 2010 and that the exceptional fifth attempt policy was introduced in 2016. She points out that the current Exceptional Fifth Attempts Policy was published in January 2022 and republished in July 2022. That policy affirmed that the RCGP did not permit the voiding of previous attempts on the grounds of a late diagnosis of disability. She says the policy under challenge was one of continuing application. In my judgment, as Mr Oldham argues, re-publication of a policy does not give fresh grounds for challenge. I see no possible basis for saying that re-publication gives a fresh ground for challenge.

49. The MRCGP Regulations which introduced the limit of 4 permissible attempts have been in place since 2010. The additional fifth attempt has been in place since 2016. There can be no doubt that the BMA was aware of the rules which had the capacity to affect their members in the manner complained of since at least 2016. Ms Richards says, however, that it is neither proportionate nor feasible for the BMA to monitor and/or review every single new policy or position change that is published by a public body that is in some way relevant to the BMA's work each year, to ensure that it is lawful, complies with equality legislation and does not cause concern for its members.

50. The BMA's challenge, however, is not a claim brought by an individual affected by the rules but by a body making an abstract challenge. It was held by the Divisional Court (of which I was a member) in *DSD* [2018] EWHC 694 at [167] that:

> *"there is a distinction between cases where the challenge is to a decision taken pursuant to secondary legislation, where the ground to bring the claim first arises when the individual or entity with standing to do so is affected by it, and where the challenge is to secondary legislation in the abstract."*

51. That analysis was implicitly approved by the Court of Appeal in *Badmus v SSHD* [2020] EWCA Civ 657 in which, at [63], Sir Terence Etherington, the MR, described the distinction as being between "*the person specific category*" and "*the abstract category*".

52. It is suggested on behalf of the BMA that the latter category applies only to Regulations and that the MRCGP regulations do not state that no further attempts will be granted if a disability is subsequently discovered. I do not accept that submission. The MRCGP regulations provide that only four, or exceptionally 5, attempts can be made. As Mr Oldham argued before Foster J, the fact that they do not mention that subsequently discovered disability will not allow a further attempt does not alter that fact. In any event, in my judgment, the principle which underlies the decisions in *DSD* and *Badmus* does not turn on the precise category of the decision under challenge. What matters is whether the challenge is focused on the personal impact of the decision or its abstract, or general, lawfulness.

53. In any event, Ms Richards accepts that "*the issue of late diagnosis and its impact on the number of permitted attempts came to the BMA's attention in September 2021 in relation to a specific GP trainee*." They learned of the second and third complaint from individual members in November 2021. It must therefore have been apparent to the BMA at that time that this was not an isolated problem. The reason why, despite this knowledge, the BMA did not begin proceedings is explained in Mr McAlonan's statement. He says that "*for relationship as well as other reasons, before undertaking formal legal action in relation to a particular issue the BMA prefers to engage in direct and 'non-legal' correspondence with the relevant organisation in an attempt to resolve the issue without*

having to resort to litigation" and this was "*exactly the approach the BMA took on this occasion*".

54. That may well be understandable but in my view these tactical and relationship considerations do not provide a good reason for taking no action. The BMA must have appreciated, at least by November 2021, that the issues now raised could be of general concern to its members. They could then have taken action; they could have issued proceedings and, if appropriate, sought a stay whilst they negotiated with the College. It is, in my view, no answer to that proposition to say that the BMA decided to support JR proceedings by individual doctors and then realized that these individual claims could be settled, thus removing the vehicle by which the underlying policy could be challenged. The BMA is an experienced player in this field and must have known that JR claims can settle. In fact, they delayed a further 11 months before issuing proceedings. In any event, the test is not whether the BMA acted reasonably but whether it acted promptly. In my judgment, it cannot be said that the BMA commenced this action promptly and it was certainly not commenced within 3 months. It follows that even if I am wrong about the consequences of the "*abstract*" nature of the BMA's challenge, their application is out of time.

55. Furthermore, given the matters discussed in the preceding paragraph, there seem to me no good reason on the facts of this case to extend time. Ms Richards argues, relying on cases like *R. v Secretary of State for the Home Department Ex p. Ruddock* [1987] 1 W.L.R. 1482, *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386 and *R. (on the application of the Law Society) v Legal Services Commission* [2010] EWHC 2550 (Admin), that the general importance of the substantive issues being resolved can justify an extension of time. That may well be true, but in my view that principle does not apply here because those issues are to be addressed in the subsisting proceedings being brought by Dr Karmakar.

56. It follows that I decline to extend time in the BMA case and refuse their renewed application for permission to make this application. In discussing the grounds of challenge below, I will nonetheless give a brief response to the BMA's arguments where they differ from Dr Karmakar's.

(iii) Judicial review: the appropriate remedy?

57. Mr Oldham argues that, as regards the discrimination claims, judicial review is not the appropriate remedy.

58. As he points out, by ss 53 and 120(1)(a), the Employment Tribunal ("the ET") has jurisdiction to consider claims of breach of the Equality Act 2010 by a qualifications body such as the RCGP. He acknowledges that s113 of the 2010 Act provides that "*Proceedings relating to a contravention of this Act must be brought in accordance with [Part 9]"* but that sub-section (3) provides that "*Subsection (1) does not prevent—(a) claim for judicial review*; ". Nonetheless, he argues, both Claimants have an alternative and more appropriate remedy.

59. As to the BMA, Mr Oldham submits that it does not have the right to bring an ET claim against the effect of the rule. Its claim is essentially parasitic on the claim of individual GPs like Dr Karmakar. What it seeks in these proceedings is to attack the rule. But he

says that insofar as it does so through Discrimination Grounds, the attack can only be carried out by means of a claim by an individual Claimant. The BMA cannot have rights in relation to discrimination law which go beyond the terms of the Equality Act 2010. The BMA's remedy is therefore to support an individual in bringing ET proceedings against the effect of the rule. Accordingly, the Discrimination Grounds advanced by the BMA should be dismissed because it has an alternative remedy.

60. I agree. If I had extended time and given the BMA permission to bring these proceedings, I would have held that they cannot base their argument on the Equality Act because it provides remedies to individual Claimants, not to representative bodies like the BMA.

61. As to Dr Karmakar, he says that not only does she have a remedy in the ET, but the ET claim is by far the more appropriate remedy. She has in fact brought such proceedings which are stayed pending the outcome of these proceedings.

62. First, Mr Oldham points out that, by s 20(3), a reasonable adjustment (or "RA") claim involves an individual ("a disabled person") first establishing that a provision, criterion or practice ("PCP") puts that individual at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. These matters relate only to the individual Claimant. Only if that is established does the respondent have to show that it has "*taken such steps as it is reasonable to have to take to avoid the disadvantage*" for that individual. That is made clear, he says, by provisions in the 2010 Act which, for the purposes of duties of some bodies <u>other</u> than qualifying bodies like the RCGP, deem the phrase "*a particular person*" to mean "*disabled persons generally*". He says this distinction is deliberate.

63. It follows, argues Mr Oldham, that whether the rule breached the RA duty would depend on a particular disabled person's particular circumstances e.g. the extent and nature of their disability, the time elapsing between failing the MRCGP and the candidate informing the RCGP of the post hoc diagnosis, since (for instance) these factors would be relevant to reasonableness of requiring the RCGP, by way of RA, to allow a further attempt. Consequently, there can be no successful claim that the RA duty has been breached save by reference to the circumstances of an individual.

64. But, he says, in these proceedings Dr Karmakar seeks an order quashing the rule and that goes beyond the statutory tort provided for by the 2010 Act, which can only arise in the case of an individual.

65. I do not agree. In many cases, Mr Oldham's analysis may hold good. But in the present case there are no significant factual issues. The extent and nature of Dr Karmakar's disability is not in dispute and the timetable of events is readily ascertainable. The court is as well placed as the tribunal to decide whether the RA duty has been breached.

66. The same problem applies, says Mr Oldham, to Dr Karmakar's indirect discrimination claim. By s 19(1) of the 2010 Act, indirect discrimination arises where an organisation (here the RCGP) applies a PCP to "another" (here a disabled person) which puts that specific person, and other disabled people, at a particular disadvantage when compared with non-disabled people, and the organisation is unable to show that the PCP is a proportionate means of achieving a legitimate aim. Again, these matters relate to the situation of a particular Claimant. Yet here again, Dr Karmakar seeks to invalidate the rule entirely and for all purposes. Accordingly, Mr Oldham argues that the

Discrimination Claims should not be brought by way of judicial review proceedings. The ET is the only appropriate forum for them.

67. Again, I do not accept that argument. Dr Karmakar can, before this court, set out her case as to indirect discrimination under the 2010 Act as she says it affected her. I accept that she could not on that basis seek to invalidate the rule entirely, but she has other arguments on that topic.

68. Second, he says that even if Dr Karmakar had limited her claims to a remedy for her own particular case, many of the elements of discrimination claims are highly fact sensitive and should be dealt with by live evidence. These include the nature and extent of the Claimant's disability, the extent of the alleged disadvantage, and any justification by way of RA or otherwise. For the same reasons as are set out above I do not accept that argument.

69. Third, he contends that the remedies which Dr Karmakar may seek in the ET are if anything more comprehensive, nuanced and direct than in a JR claim. S 124 provides that where an ET discrimination claim succeeds: -

> *(2) The tribunal may—*
>
> *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation.*
>
> *(3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate…*

70. He says that ET proceedings are much more suitable for challenges such as these. He says the concept of PCP is central to all such cases, that such cases are highly fact sensitive and that the remedies available are more comprehensive. In particular, he says that an ET declaration has the same effect as an Administrative Court injunction.

71. Yet again, I do not accept that argument. The PCP is relevant to the discrimination claims but not, directly, to the common law claims. The claim of Dr Karmakar proceeds on facts that are essentially agreed. And the one relevant remedy the ET cannot give is the quashing of the rule and that is the ultimate remedy Dr Karmakar seeks. None of the remedies available to the ET are the equivalent of a quashing order.

72. In *R (on the application of MM) v Secretary of State for Work and Pension* [2012] EWHC 2106 (Admin) Edwards-Stuart J was faced with an argument that proceedings in the county court provided a suitable alternative remedy in a case in which the Claimant who sought to challenge the process by which the Secretary of State assessed, for the purpose of eligibility to receive Employment Support Allowance, persons with impaired mental, cognitive and intellectual functions. At [58] he said in response:

> *Given the statutory provisions, there can be no bar to an application for judicial review and, in the case of this claim, I am clearly of the view that a judicial review provides the most convenient, expeditious and effective means of fairly disposing of it. Miss Lieven has made no bones about the fact that this claim is being brought for the benefit of those persons suffering from mental health problems as a class. Unless that can be regarded as an abuse of the process of the court, which was not a submission made by Mr Chamberlain, very properly if I may say so, I do not see why this is not a proper case for judicial review. I therefore reject the alternative remedy defence. Further, I do not consider that it is sufficiently arguable to justify my giving a direction that it should be determined as a preliminary issue, as the Secretary of State invites me to do.*
>
> (See to similar effect the approach of the Divisional Court in *Adath Yisroel Burial Society v HM Senior Coroner for Inner North London* [2018] EWHC 969 (Admin) at [136].)

73. Similar considerations to those referred to in *MM* apply here, and, in respect of Dr Karmakar, I am of the same opinion. S113(3) preserves the right to seek judicial review in the High Court and this is, manifestly, an appropriate case for judicial review. The court is perfectly well equipped to determine the matters in issue and, if the merits favour Dr Karmakar, a quashing order may well be appropriate. In my judgment, judicial review provides the most convenient, expeditious and effective means of fairly disposing of the issues raised in this litigation.

(iv) Discretion Fettered?

74. It was the case of both Claimants that the central error committed by the College in reaching its decision about Dr Karmakar, and in devising and enforcing its policies generally, was that it had fettered its discretion by refusing to contemplate allowing someone in Dr Karmakar's position to have a further attempt at the AKT (and the RCA).

75. The rule against fettering discretion was articulated in the following way by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex p. Venables* [1998] AC 407, at pp.496-497:

> *When Parliament confers a discretionary power exercisable from time to time over a period, such power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way in which he will exercise his power in the future. He cannot exercise the power nunc pro tunc. By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such exercise.*
>
> *These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of cases: …But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case in relation to which the discretion is being exercised. If such an*

> *inflexible and invariable policy is adopted, both the policy and the decisions taken pursuant to it will be unlawful ….*

76. Ms Richards submits that it is a well-established principle of public law generally that a *"decision-making body exercising public functions which is entrusted with discretion must not disable itself from exercising its discretion in individual cases. It may not 'fetter' its discretion …"* She referred in support of that contention to *De Smith's Judicial Review, 9th edition, at para 11-002*. She says that there are multiple articulations of this principle in the caselaw. She referred, in particular, to *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 where, at 625C-D, Lord Reid said that the *"general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'.*

77. I raised with Ms Richards whether in fact that rule was simply a rule of statutory construction. She accepted that the point is often raised in a statutory context but referred me to a number of cases where the enunciation of the principle has not been expressly limited to statutory powers. In my view, however, on analysis, and despite the width of the judicial expression in some of the cases, the question at stake in all the cases she initially referred me to is, in fact, one of statutory construction. In *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 the Court of Appeal (Laws and Treacy LJJ) said at [19]: *"The rule against fettering discretion is a general principle of the common law. It is critical to lawful public decision-making, since without it decisions would be liable to be unfair (through failing to have regard to what affected persons had to say) or unreasonable (through failing to have regard to relevant factors)"*), However, that case turned on the construction of s38(6) of the Planning and Compulsory Purchase Act 2004. In *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 Lord Dyson said at [21]: *"it is a well-established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers"*. That however was a case that turned on the proper application of Section 3(5)(a) of the Immigration Act 1971. In *R (Singh) v Cardiff City Council* [2012] EWHC 1852 (Admin), Singh J, noted at [80] that the application of a blanket policy *"can lead to the risk of arbitrary and unequal treatment"*). That however was in the course of construing s61 of the Local Government (Miscellaneous) Provisions Act 1976.

78. When pressed on the point, Ms Richards was able to refer to just one case where, arguably, the principle of not fettering a discretion was adopted in a non-statutory contest, namely the *Adath Yisroel Burial Society* case referred to above. There the Divisional Court (Singh LJ and Whipple J) held that the principle applied to Coroners exercising common law powers.

79. The essential reasoning of the court on the facts before it, it seems to me, was as follows:

> *85…the present context is one where at most there is only a residual common law power. Most of the functions which are exercised by a Coroner in the present context derive from legislation, which we have summarised earlier. For example, the Coroner exercises statutory powers when she makes preliminary enquiries relating to death (under section 1(7) of the CJA); when she decides whether to discontinue an investigation (under section 4); when she orders a PME (under section 14); or when she has the body moved for the purposes of a PME (under section 15). Furthermore, as we have seen in summarising the legislative*

> *framework, the Coroner's ability to retain the body of the deceased person is limited in time by legislation: regulation 20 of the Regulations.*
>
> *86. In those circumstances we conclude that the power being exercised by the Coroner in this case was akin to a power derived from statute. The principle against fettering a discretion applies in the present context.*

80. The conclusion of a Divisional Court is plainly a matter to which I must attach great weight. But strictly speaking I am not bound by it. If it were necessary for me to decide the point, I would, with great respect, disagree with the Divisional Court in *Adath Yisroel* on the issue whether the rule prohibiting a decision maker from fettering his discretion applies to non-statutory discretions. However, for the reasons that follow, it does not seem to me that I need to decide the point.

81. At the beginning of this hearing, I asked Ms Richards to identify the power she said the College was exercising when it made the rules under challenge. After taking instructions, she said that the College gained its authority from its Royal Charter of 23 October 1972, its Supplemental Charter of 27 February 2003 and its Ordinances made by Warrant under the late Queen's Sign Manual. The following provisions of the Supplemental Charter are particularly material:

- By Clause 4, the object for which the College was established was to "*encourage, foster and maintain the highest possible standards in general medical practise and for that purpose to take or join with others in taking any steps consistent with the charitable nature of that object which may assist towards the attainment of that object*."

- By clause 4 it was provided that "*in furtherance of the college object the college may exercise any of the following powers to achieve the college object:… (h) to encourage persons of ability to enter the medical profession and become General Medical practitioners; (i) to award postgraduate diplomas and certificates in General Medical practise or any particular aspect of it...(o) To do such other things as are incidental or helpful to the attainment of the college object*."

- By clause 8, "*members... are appointed by the council in accordance with the procedures in the ordinances and must comply with the entry requirements in the ordinances*".

- By clause 16 "*…the Council shall exercise the following functions:…(vi) subject to the provisions of the ordinances leading the development on all matters relating to training and qualifications offered to members and potential members of the college including the award of membership of the college; (vii) dealing with all policy issues relating to the registration and revalidation of general practitioners.*"

82. Clause 4 of the Ordinances provide that:

> Applications for membership shall be in such form and contain such information as the council may require. Each applicant for membership...must be a fully registered medical practitioner and, unless the council in its discretion in an

> exceptional individual case waves any or all of the following requirements, shall either (i) have completed special vocational training for general practise, the length and content of which complies with the requirements of the council and satisfy the council by examination that he or she has had satisfactory training for general practise...

83. It is clear from those provisions that the powers of the College are not statutory but derive from its Royal Charter. The grant of a Royal Charter is an act of the royal prerogative. It is also plain that, on the face of those documents, the College was not limited by internal legal constraints from determining for itself the rules relating to applications for membership.

84. That, in my judgment, is sufficient to enable me properly to distinguish the present case from *Adath Yisroel.* Unlike *Adath Yisroel,* in the present case the power being exercised by the College is not akin to a power derived from statute and cannot fairly be said to be a "*residual*" common law power. It is instead the exercise of a power granted by a Royal Charter, which grant is itself an act of the Royal Prerogative. In that regard the two cases referred to by the Divisional Court in *Adath Yisroel* are instructive.

85. At [79] the Divisional Court said this:

> *As will be apparent from that passage, the principle usually applies where the source of a discretionary power is legislation. The position is different where the source of the power is the Royal prerogative and not legislation: see R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs [2014] UKSC 44; [2014] 1 WLR 2697.*

86. The Court then referred to paragraphs [60] to [62] in the Supreme Court's judgment in *Sandiford*:

> *60. The issue which divides the parties is, in short, whether there exists in relation to prerogative powers any principle paralleling that which, in relation to statutory powers, precludes the holder of the statutory power from deciding that he will only ever exercise the power in one sense.*
>
> *61. The basis of the statutory principle is that the legislature in conferring the power, rather than imposing an obligation to exercise it in one sense, must have contemplated that it might be appropriate to exercise it in different senses in different circumstances. But prerogative powers do not stem from any legislative source, nor therefore from any such legislative decision, and there is no external originator who could have imposed any obligation to exercise them in one sense, rather than another. They are intrinsic to the Crown and it is for the Crown to determine whether and how to exercise them in its discretion.*
>
> *62. In our opinion, in agreement with the Court of Appeal, this does have the consequence that prerogative powers have to be approached on a different basis from statutory powers. There is no necessary implication, from their mere existence, that the state as their holder must keep open the possibility of their exercise in more than one sense. There is no necessary implication that a blanket policy is inappropriate, or that there must always be room for exceptions, when a policy is formulated for the exercise of a prerogative power.*

87. The Divisional Court then referred to the decision of the Court of Appeal in *R (Elias) v Secretary of State for Defence* [2006] EWCA Civ 1293, noting what Mummery LJ said at para 191-193:

> *191. I agree with Elias J that the authorities do not assist the case advanced by Mrs Elias on this point. The analogy with statutory discretion, as in the British Oxygen case [1971] AC 610, is a false one. It is lawful to formulate a policy for the exercise of a discretionary power conferred by statute, but the person who falls within the statute cannot be completely debarred, as he continues to have a statutory right to be considered by the person entrusted with the discretion. No such consideration arises in the case of an ordinary common law power, as it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be. If there are no exceptions the decisionmaker is under no duty to make payments outside the parameters of the scheme. The consequence of the submission made on behalf of Mrs Elias would create problems by requiring every individual case falling outside the scheme to be examined in its individual detail in order to see whether it would be regarded as an exceptional case.*
>
> *192… With regard to the compensation scheme it was necessary to formulate what Mr Sales called 'bright line' criteria for determining who is entitled to receive payments from public funds. Subject to the race discrimination point the criteria implement the policy or the compensation scheme. They are not a fetter on an existing common law discretionary power to decide each application according to the circumstances of each individual case. In my judgment, there was nothing unlawful (subject again, of course, to the race discrimination point) in using common law powers to define a scheme to be governed by rules, to make specific provision for general criteria of eligibility and for exceptions and in then refusing to apply different criteria or, by way of exception, to consider or grant applications from those not falling within the published criteria.*
>
> *193. The Secretary of State has not unlawfully fettered an existing relevant ordinary common law power (or prerogative power) nor has he acted arbitrarily nor under a mistake as to the nature and scope of his powers by rejecting or refusing to consider or reconsider Mrs Elias's application as exceptional on the basis of the circumstances of her internment or of the appalling consequences of it for her or of her very strong close links with the UK" (emphasis added).*

88. In my judgment, there is a close parallel between the facts of the present case and those of *Elias*. In making the rules the College was exercising powers it possessed consequent upon the grant of a Royal Charter, which it received as an act of the Sovereign. Subject to other legal restraints, in my view, the College can decide on broad and clear criteria for admission to the College. Further it can decide, adopting the words of the Court in *Elias*, either that there are no exceptions to the criteria or, if there are exceptions, what they should be.

89. I say subject to other legal restraints because, as was the case in *Elias*, the College is subject to statutory duties not to discriminate and I turn below to consider whether it was in breach of those obligations. It is also, in my judgment, subject to a requirement

of rationality as a body exercising public functions. In that regard it is material to note what Lord Carnwath and Lord Mance said at [65] in *Sandiford*:

> *As we have already made clear, this does not mean that the formulation or exercise of a prerogative power may not be susceptible to review on other grounds. In particular there is no reason why a prerogative refusal to fund foreign litigation should be immune from all judicial review. It does not raise any real issues of foreign policy. As we understand it, the Government's current blanket policy is motivated largely by domestic policy and funding considerations. In particular, as Abbasi made clear, there is no reason why action or inaction in the exercise of such a power should not be reviewable on the grounds of irrationality or breach of other judicial review principles.*

90. For those reasons, I reject the submission that the College was under a discrete obligation not to "*fetter its discretion*". Provided the College acted rationally and consistently with the obligations imposed on it by the Equality Act, it could lawfully adopt bright line criteria, just as the Secretary of State did in formulating the scheme described in *Elias.*

(v) Rationality

91. It follows from my conclusion on fettering discretion that the College has a wide discretion as to how it should go about achieving the object set out in is charter and ordinances. It can apply and operate its own scheme. But the scheme's criteria must be rational.

92. It is plainly rational to have a limit on the number of attempts a candidate can make - otherwise its resources would be unjustifiably stretched and the process of seeking membership made potentially never ending. It is plainly rational, as well as a requirement of statute, that it should make reasonable adjustments for disabled candidates. But, in addition, when the scheme imposes limitations on the attempts that can be made by a candidate who discovers she is disabled, that rule must also be rational. There must be some reasoned basis for it.

93. A curious feature of this case is that the College has maintained throughout, until implicitly in this hearing, that it has no power, or at least no administrative machinery, by which a candidate could be granted permission to resit after four or five failed attempts, even in circumstances of late discovered neurodiversity. For example, Professor Martin Marshall, the Chair of the RCGP, wrote to the BMA in a letter dated 24 November 2021 "*RCGP cannot annul or void any previous attempts for a candidate who retrospectively applies for reasonable adjustments, either for a progressive disability or a new disability*". In my judgment, that is patently incorrect. There is nothing in the Royal Charter, the Supplemental Charter or the Ordinances limiting the College's ability to cater for such circumstances. On the contrary, the latter two instruments give the College a wide power to determine the length and content of the training required and a power to deal exceptionally with exceptional cases. There is no other constraint acting on the College which could have the effect of preventing it offering additional tests if it thought it appropriate. The College has simply chosen to present its position as absolute on this topic.

94. It is not difficult to see why adopting a "blanket" or "bright line policy", to the effect that is has no power to permit additional attempts, is attractive to the College. Apart from anything else, it discourages applications for special treatment. Mr Oldham says that the assertion that it has no power to make exceptions only appears in "*informal documents*". Certainly, it cannot be thought to represent the true position; the College plainly does possess the power to agree to additional attempts. In fact, though it has been careful not to acknowledge it, the College must have exercised the power to agree to further attempts in other cases. Judicial reviews brought by other doctors seeking an additional attempt in similar circumstances to Dr Karmakar have been compromised on terms not disclosed publicly. Those doctors are now in practice and the irresistible inference, since passing the tests is the only route to practice as a GP, is that they were allowed to sit the tests again. If the College allowed them a further resist, and they took it and passed, then the College plainly had the power to grant an additional resit.

95. In the light of the analysis in *Sandiford* and *Elias* and on principle, it cannot be said that "*bright line*" requirements are necessarily unlawful. Although it is certainly an unattractive stance to adopt, it was not suggested to me that there was illegality in the College denying it had a power to cater for exceptions when it had such a power. Instead, Ms Richards argues that a point-blank refusal to void unsuccessful exam attempts made before the individual had a diagnosis, and thus where the exam was undertaken without any of the reasonable adjustments to which the individual would have been entitled, is unreasonable. She says that given the absence of any reasonable justification for this position, it must represent a deliberate decision not to treat disabled candidates fairly and that is irrational.

96. Ms Wilsdon submitted on Dr Karmakar's behalf that no reasonable examination body would have refused her request to void pre-diagnosis attempts given (i) the nature of the reasonable adjustment awarded to her and the reason for it, namely her neurodiversity, (ii) the fact that she had at all times required the reasonable adjustments but had taken the examination the first three times without them because of a lack of diagnosis, (iii) the fact that unlike most candidates, she has not had four or five fair attempts: only one standard attempt with reasonable adjustments and one exceptional further attempt on the basis of her additional educational experience, (iv) the fact that her previous attempts showed improving results, (v) the fact that she had passed all other training requirements and (vi) the fact that her results for her attempts with reasonable adjustments were very significantly better and showed she had a real chance of passing with the standard number of fair attempts.

97. Mr Oldham makes two immediate responses which he suggests are complete answers in themselves. First, he says that the Claimants accept that the College could adopt a rule under which it "point-blank refused" to void unsuccessful exam attempt for a disabled candidate. I do not understand the Claimants to do any such thing. The point the Claimant's witnesses make is that there could properly be a limit ordinarily applicable, provided it was subject to a facility to disapply that limit where the particular circumstances made that appropriate. That seems to me to dispose of the surprising suggestion that the Claimants have conceded the critical point in the case.

98. Second, he suggests that the irrationality challenge is simply a repackaging of the reasonable adjustment claim and that if the reasonable adjustment claim fails, then there can be no irrationality. I do not agree. The rationality challenge is free-standing and stands or falls on its own merits. I address the Equality Act claims below but this

response from the Defendant provides no answer on its own to the common law challenge.

99. As to the substance of the response to the allegation of irrationality, Mr Oldham refers to the reasons advanced by the College which he says are plainly rational. He refers, in particular, to the evidence of Prof Withnall, the Defendant's chief examiner, and to his explanations for the policy. He says that the Court should show considerable restraint in considering a determination by the expert regulator, such as the RCGP, of the right to resit professional exams.

100. I deal first with the question of restraint. I accept, of course, that the court will be slow to impugn a decision of an expert regulator in a highly technical field (see *R (GNER) v Office of the Rail Regulator* [2006] EWHC 1942 (Admin) at [39], [44]), but in my judgment this issue is not a highly technical one and the College has produced no evidence to show that its decision was the product of expert, technical analysis. I repeat what I have said above about this not being an academic judgement. I note in this regard that the only expertise which Prof Withnall claims for the college is in "*generalist clinical primary care*". He makes no other claims for expertise on his own behalf or on behalf of the College.

101. As to the reasons for the attempts policy, Prof Withnall says:

- the membership exam licenses newly qualified GPs to work unsupervised.
- membership of the Royal College is the gateway to unsupervised general practise through which all GP's must pass before licencing by the GMC, and in that respect is different from "*hospital doctors who usually work in a team*".
- the limiting of attempts is in accordance with GMC expectations and to ensure patient safety.
- if a candidate fails an exam five times over 2 years of training, was subsequently diagnosed with a neurodiverse condition and was permitted to void all previous attempts they may end up sitting up to 10 times over 4 years. It is not practical for trainees to take the AKT 10 times during the training period.
- A trainee failing and seeking further attempts beyond five would require the relevant deanery to extend their work placement beyond the usual three-year. However the RCGP has no say in the deanery's decision to extend or terminate training and to meet the additional costs associated with continuing to train a candidate if a place is available.
- He says that any decision to enable trainees to apply retrospectively for reasonable adjustments that were not evidenced or provided at the time of the examination would have considerable impacts on the training community and NHS to continue to fund places to train perspective GPs.

102. In my judgment there is no merit in any of these points. In large measure I accept Ms Richard's and Ms Wilsdon's submissions in this regard. Dealing with Prof Withnall's points in turn:

- The fact that newly qualified GPs work unsupervised is irrelevant to the argument, given that no newly qualified GP would be working as such unless they had passed all the assessments. Furthermore, every Certificate of Completion of Training awarded by the GMC can lead to unsupervised medical practice, whatever the speciality, and most are based on specialty exams set by Royal Colleges and other medical faculties, most of which do not have the same policy as the RCGP.

- It is asserted that the limiting of attempts is in accordance with GMC expectations, but there is no evidence that the GMC has expressed any expectation that Royal Colleges should adopt the approach which the RCGP has taken, and the Academy of Medical Royal Colleges advocates a different approach. The GMC expectations of up to six attempts says nothing about the rationality of a policy that denies the possibility of retakes by those with late discovered neurodiversity.

- Public safety cannot conceivably be put at risk by a policy that gives doctors with neurodiversity additional opportunities to pass the relevant exams. The candidates only pass and gain access to unsupervised practice if they achieve the required pass marks. If neurodiverse candidates who know of their condition and are given additional time or other reasonable adjustments are not a risk to the public, despite taking a test four times before passing, it is impossible to see how a neurodiverse candidates who did not know of their condition at the time of earlier tests, only receive additional time for later attempts and pass on the fourth attempt can possibly be regarded as such a risk.

- There is likely to be a limiting factor on the number of tests a candidate can take in any event. As Prof Withnall explains, the training window for trainees is three years and the AKT and SCA can only be taken during training year two and three. So there will be a limited period during which the tests can be taken. But that is not a good reason for not permitting additional tests, within that time period, for those with late discovered neurodiversity. In any event Prof Withnall's approach appears to assume that the choice is between the current blanket policy and a policy which allows an unlimited number of further attempts. What the Claimants seek, in contrast, is a measure of flexibility that would enable the College to grant further attempts on the facts of a particular case where the facts of the case merit it.

- It is right that a trainee failing and seeking additional attempts would need their deanery to extend their work placement and that has an impact on NHS funding. But that is a matter for the deanery or the wider NHS, not for the RCGP. There is no evidence that deaneries or the NHS more generally would be unwilling or unable to extend trainees' employment to allow further attempts. In any event, it may well be thought that there would be a considerable financial saving if candidates with neurodiversity were able, on

> a further sitting, to make the grade; that would mean an additional GP was qualified, to the benefit of the NHS as a whole, and without the wastage of resources that would follow a final, failed attempt. It is to be noted in this regard that this does not appear to be a concern either for the Academy of Medical Royal Colleges or for the other Royal Colleges and faculties who do permit additional attempts and/or treat earlier attempts as void.

103. Mr Oldham also submits that "*the surrounding evidence supports the rationality of the Rule*". He refers in particular to the fact that the RCGP does a great deal to warn candidates to consider whether they may have a disability, and to assist them if they do: the rule is by no means an anomaly amongst medical royal colleges, and accords with GMC expectations: and the very limited adverse statistical impact of the rule on people disabled by reason of learning difficulties.

104. In my view there is nothing in any of these points either. The College's preference for neuro-diversity screening happening much earlier is entirely understandable but it is nothing to the point: late diagnoses routinely happen, through no fault of the individual candidate, and a policy which refuses to allow further attempts does nothing to advance the cause of earlier national screening.

105. I have set out at [10] above position of the Academy of Medical Royal Colleges and of the majority of its member colleges. I note, however, that there are other Royal Colleges with similar rules to the RCGP; they are in a minority but I accept the RCGP is not alone, to date, in declining to give candidates with late diagnosed neurodiversity additional chances to sit the tests. But I have no evidence as to the schemes operated by those other colleges, their reasoning in doing so, or the impact of them on their students, and no evidence as to whether those policies of other Royal Colleges have ever been subject to independent scrutiny. I have to consider the rationality of this College's rules and mere comparison with some other Colleges is no substitute for proper analysis.

106. It may be that there are relatively few candidates who would benefit from the sort of flexibility Dr Karmakar seeks, so as to entitle the College to say, as Mr Oldham does, that statistically the impact of the present arrangement is modest. Viewed across the whole field that may be right but that is to disregard the enormous consequence the policy has for those individuals affected. (Parenthetically, I note that this submission by the Defendant does not sit happily with their submission as to the significant detriment to good administration which they suggest would follow an extension of time to enable these claims to be brought.)

107. In my judgment, the College has failed entirely to provide a coherent justification for its policy.

108. Furthermore, standing back from the fray, I can see no justification that *could be* advanced for an arrangement that says it is right to allow disabled candidates who know of their disability to benefit from, say, additional time in which to sit their examinations, but "not possible" to make equivalent allowance for disabled candidates who discover their disability after failed attempts at the tests. That different treatment is irrational. It is different treatment between classes of disabled people depending simply on when they discover their disability.

109. It follows in my judgment that the rule operated by the RCGP, to the effect that it will not even consider offering further attempts following a late disability diagnosis, and cannot discount, void or nullify previous attempts, on the basis that a candidate later reports a disability which would have justified reasonable adjustments, is irrational.

110. Dr Karmakar has challenged both the rule as a whole and its application to her as expressed in the decision letter of 11 January 2023. Her challenge on common law grounds has succeeded on grounds that are applicable in principle to the generality of candidates for membership of the College. I have refused the BMA permission to apply for judicial review. In my view, in those circumstances, the appropriate remedy is an order quashing the RCGP's decision of 11 January 2023 and quashing the rule as it relates to the AKT. Dr Karmakar was not directly affected by the rule as it relates to the SCA (or RCA). It will be for the RCGP to consider whether, in those circumstances, it wishes to make any amendment to its rules for that latter test.

111. I will consider further submissions as to whether the quashing of the AKT rule should be retrospective or only prospective. My preliminary view is that it should be the latter.

112. That being my conclusion on the common law challenges, it is not strictly necessary for me to consider the Equality Act grounds of challenge. However, in case this case goes further, and in deference to the quality of the argument I heard, I set out, briefly my conclusions on those matters.

(vi) Was the College in breach of the Public Sector Equality Duty?

113. The public sector equality duty imposed by s. 149 of the Equality Act 2010 requires a public authority to

> *"have due regard to the need to (a) eliminate discrimination … (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it"* and to have *"due regard, in particular, to the need to (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it"*.

114. The applicable principles were described by the Court of Appeal in *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and approved by the Supreme Court in *Hotak v London Borough of Southwark* [2016] AC 811 at [73]. They include the following:

- Equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.

- An important evidential element in demonstrating discharge of the duty is the recording of steps taken by the decision maker in seeking to meet the statutory requirements.

- A decision maker must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a

proposed policy, and not merely as a "rearguard action" following a concluded decision.

- The duty must be fulfilled before and at the time when a particular policy is being considered.

- The duty must be exercised in substance, with rigour and with an open mind. It is not a question of ticking boxes.

- General regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.

115. Ms Richards argues that in the present case there is no evidence of any substantive consideration of the matters mandated by s. 149, still less the conscious and conscientious, rigorous and open-minded consideration that is required, either in the initial devising of the policy, or in its maintenance in light of the concerns raised by the BMA and affected candidates, or in light of the new guidance issued by the Academy of Medical Royal Colleges. On the contrary, she says, the RCGP appears to be dismissive of the position of candidates who receive a late diagnosis of disability. Its response to this ground of claim has simply been to point to other ways in which it has sought to eliminate discrimination or advance equality of opportunity, and its evidence fails to address this ground as a matter of substance.

116. Mr Oldham responds to what he said was "*the only point made in the Claimants' otherwise wholly unparticularised argument on PSED*", namely that the RCGP did not give "*conscious and conscientious*" regard to it. He says that argument is misconceived. He says the College goes to great lengths to assist disabled candidates. Referring to the statement of Prof Withnall, he says that the College has a very extensive programme of RA for examinations, and extensive resources relating to disability for trainees and their supervisors.

117. He says that the College also reminds candidates, before an exam, to consider whether they may need additional support or have a specific learning difficulty. He says that the suggestion that the RCGP is "*dismissive*" of those who receive a late diagnosis should not have been made. The RCGP also has a very committed approach to equalities more widely and demonstrates a conscious approach to the PSED generally, of which its support for disabled candidates is an example.

118. Had it been material, I would have accepted Mr Oldham's argument on this topic. Given the evidence as to the steps the College takes to provide RA to candidates and the resources it makes available, it seems to me impossible to say that the College has not conscientiously and carefully considered the position of disabled candidates. In my judgment it has in general a consistent and committed approach to equality. It is not necessary that the decision maker refers expressly to the PSED (see for example *McDonald v Kensington and Chelsea Royal London Borough Council* [2011] UKSC 33 at [24]). The PSED is a duty of consideration and the RCGP has properly considered the impact of disability on candidates, and how it might be ameliorated. Ms Richard's argument, in my view, come close to asserting that the PSED requires a particular result, namely permitting a further attempt and it is trite law that that is not the test.

119. Accordingly, I would dismiss the PSED argument.

(vii) Was the College in breach of its duty to make reasonable adjustments?

120. By s53(6) of the Equality Act 2010 a qualifications body is under a duty to make reasonable adjustments. It is agreed that the College is a qualification body. By s20(1) "*where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply*…" By ss2 the duty comprises three requirements. Only the first, which is set out below, is relevant here.

121. S20(3) provides that:

> *The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

122. It is agreed that Dr Karmakar's neurodiverse condition constitutes a disability.

123. Identifying with precision the "*provision, criterion or practice*" ("the PCP") is always important in a case under s20 and here it has to be said that there has been some uncertainty in the Claimants' formulation of the PCP they seek to attack. The formulation could not be "*no additional attempts for any reason save for exceptional academic progress*" or "*no attempt shall ever be voided*" or "*only allowing four (exceptionally five) attempts at the AKT and/or refusing to void, discount or annul attempts*" (all versions floated by Ms Richards and/or Ms Wilsdon) because they are factually inaccurate; the College may declare an attempt void under their appeals process. The one remaining formulation "*the College will never make a reasonable adjustment for a disabled trainee who receives a late diagnosis*", is factually accurate and, in my view, is a realistic assessment of the position. It encapsulates the effect of the College's letter of 24 November 2021. That was the PCP that was applied.

124. But, as Mr Oldham submits, correctly in my judgment, that PCP is not a capable of founding a RA claim because it was not a PCP that could be applied to both disabled and non-disabled applicants. Only a disabled person could apply for reasonable adjustments. Therefore, it could not be discriminatory for the purposes of s 20(3). As Simler LJ (as she then was) put it in *Ishola v Transport for London* [2020] EWCA Civ 112,

> *"To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply."*

125. On that ground this head of challenge must be rejected.

126. It also fails on Mr Oldham's second objection. The obligation to make reasonable adjustment does not apply where, in certain types of claim, the defendant does not know that the disabled person has a disability. By Schedule 8, paragraph 15, these types of claims include where a qualification body "*decides upon whom to confer a relevant qualification*" and in "*conferment*" thereof. Paragraph 20 provides that in such cases:

> *A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know…(b) … that an interested disabled*

person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

127. Dr Karmakar accepts in her Statement of Facts and Grounds that the RCGP did not know, and could not have known, that she was disabled or likely to be placed at a disadvantage until, at the earliest, some months after her fifth attempt on 26th October 2022. The Claimant submit that this is "*no answer to its failure to make reasonable adjustments once informed*". I agree with Mr Oldham that that cannot suffice. The relevant point in time, for the purposes of knowledge, was when Dr Karmakar sat the exams. That was when she suffered the detriment of which she complains.

128. For that reason too I would reject this head of claim. And in my judgment, the BMA could not, even if it had been given leave, fare any better than Dr Karmakar on the reasonable adjustment ground.

129. Mr Oldham advances further arguments, but it is not necessary to explore them all. It suffices to note that, although now academic given my finding on rationality, I would dismiss all the arguments based on s20 of the 2010 Act.

(viii) Was the College guilty of indirect discrimination?

130. S19 of the 2010 Act provides that:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*
>
> *(a) A applies, or would apply, it to persons with whom B does not share the characteristic,*
>
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) it puts, or would put, B at that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*
>
> *(3) The relevant protected characteristics are…disability.*

131. Ms Richards and Ms Wilsdon argue that the College's policy on retakes after discovery of disability is indirectly discriminatory, applying those provisions. They repeat their argument that the policy in question constitutes a PCP. Applying the same policy to those with disabilities will disadvantage them as compared to those without disabilities.

132. The short answer to this is the same as the first I gave in addressing the previous issue. The only realistic formulation of the PCP is "*the College will never make a reasonable adjustment for a disabled trainee who receives a late diagnosis*". Although factually accurate, that PCP is not capable of founding an indirect discrimination claim because it

was not a PCP that was capable of being applied to both disabled and non-disabled applicants. Only a disabled person could apply for reasonable adjustments. Therefore, it could not be discriminatory for the purposes of s19.

Conclusions

133. For those reasons, I conclude:

(i) this matter is justiciable; it does not turn on matters of academic judgment;

(ii) the claim by Dr Karmakar is in time and, in any event, permission to apply for JR has already been given. The claim by the BMA is out of time, I decline to extend time and the BMA's application for permission is dismissed;

(iii) judicial review is an appropriate remedy;

(iv) the College did not unlawfully fetter its discretion; but

(v) its decision in Dr Karmakar's case was irrational; its policy on re-sitting the AKT was irrational;

(vi) the College was not in breach of the Public Sector Equality Duty;

(vii) the College was not in breach of its duty to make reasonable adjustments;

(viii) the College was not guilty of indirect discrimination.

134. Against those finding the application for permission to apply for judicial review by the BMA is dismissed. Dr Karmakar's claim succeeds; I quash the decision of 11 January 2023 and quash the rule as it relates to the AKT. I will hear further submissions on the precise terms of the order that should follow.