



SC/CIV/08/03

JUDGMENT

The Queen (on the Application of) Michael Charles Bingham

Applicant

v

Her Majesty's Attorney General for the Falkland Islands

Respondent

before

James Wood, Chief Justice

JUDGMENT GIVEN ON 25th November 2003

This judgment will be published indefinitely for this reason:

- *The authors of this judgment are of the view that indefinite publication of this judgment is appropriate.*

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IN THE FALKLAND ISLANDS SUPREME COURT Case No: SC/CIV/08/03
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT

B E T W E E N

**THE QUEEN on the application of
MICHAEL CHARLES BINGHAM**

Applicant

And

HER MAJESTY'S ATTORNEY GENERAL FOR THE FALKLAND ISLANDS
Respondent

JUDGMENT

Coram Wood CJ

This is an application for Judicial Review made by Michael Charles Bingham (the Applicant) relating to a decision of the Government of the Falkland Islands communicated to the Applicant by a letter of 27th March 2003 concerning an application for Falkland Islands status. Leave to make this application was given by me on 14th July 2003 in a form subsequently amended by consent in this Court on 10th October 2003.

I shall refer to the decision in detail below, but the operative part of the above mentioned letter signed by his Excellency the Governor of the Falkland Islands (The Governor) is as follows:-

I am ... refusing your application for Falkland Islands status in accordance with section 4(1) of the Falkland Islands Status Ordinance 1998.

The Applicant contends that the reasons stated for the decision were:-

As to each of the first two stated reasons, that they were unfair, unjustified, unreasonable and disproportionate.

As to the third stated reason that it was wholly irrational, arbitrary, unreasonable, unjustified, unfair and disproportionate.

As to the fourth stated reason, that it constitutes a severe and disproportionate hindrance to the Applicant's right to free expression.

and the application seeks:-

- (a) A declaration that the decision under review was unlawful.
- (b) An order for certiorari quashing the decision.
- (c) Costs.
- (d) Such other relief as the Court may deem appropriate.

In this case the Applicant is represented by Messrs Leddingham Chalmers, legal practitioners, and Miss Maya Lester of Counsel from England and Wales. The respondent appears by Mr Dermot Woolgar of Counsel also from England and Wales. I have been assisted greatly by the most helpful and thorough skeleton arguments submitted by each party, together with a further supplemental submission handed up by Mr Woolgar during the course of the hearing.

Falkland Islands Status

The Falkland Islands Constitution Order 1985 (as amended), section 17(5) provides:-

For the purposes of the foregoing provisions of this chapter a person will be regarded as belonging to the Falkland Islands if he enjoys Falkland Islands status and the person enjoys such status if that person is -

- (a) a citizen who is born in the Falkland Islands; or

(b) a citizen who was born outside the Falkland Islands -

(i) whose father or mother was born in the Falkland Islands, or

(ii) who is domiciled in the Falkland Islands and whose father or mother became, whilst resident in the Falkland Islands, a citizen by virtue of having been naturalised or registered as such or as a British subject or as a citizen of the United Kingdom and Colonies; or

(c) a citizen by virtue of having been so naturalised or registered whilst resident in the Falkland Islands; or

(d) a Commonwealth citizen who is domiciled in the Falkland Islands who either -

(i) is ordinarily resident in the Falkland Islands for the 7 years immediately preceding 1st September 1997; or

(ii) has been granted such status under the provisions of an ordinance providing for the grant of that status to Commonwealth citizens who have been ordinarily resident in the Falkland Islands for a period of at least 7 years and has not, in accordance with the provisions of that ordinance, lost or been deprived of such status; or

(e) the spouse, widow, or widower of such person as is referred to in any of the preceding paragraphs of this sub-section and, in the case of a spouse, is not living apart from her husband or his wife, as the case may be, under a decree of a competent court or a deed of separation; or

(f) under the age of 18 years and is the child, step-child or child adopted in a manner recognised by law, of such a person as is referred to in any of the preceding paragraphs of this sub-section.

The Legislation

Falkland Islands Status Ordinance 1998

2 (Interpretation) "Falkland Islands Status" has the same meaning as it has in S.17(5) of the Constitution.

"Qualified person" means a person who is a Commonwealth citizen and who has been ordinarily resident in the Falkland Islands for not less than the 7 years immediately preceding his application under Section 3 of this Ordinance.

3(1) A person may apply for Falkland Islands status by delivering an application in the prescribed form to the Principal Immigration Officer.

(2) The Principal Immigration Officer if the applicant, on perusal of his application, does not appear to be a qualified person may -

- (a) by notice in writing to the applicant, require the Applicant to furnish him with such further written information as is specified in the notice, being information intended to demonstrate whether or not the Applicant is a qualified person;

- (b) by notice in writing to the applicant, reject the application because the Applicant does not appear to the Principal Immigration Officer to be a qualified person on such of the following grounds as is stated in the notice -

- (i) that the Applicant is not a Commonwealth citizen;

- (ii) that the Applicant was not ordinarily resident in the Falkland Islands for at least the 7 years immediately preceding his application.

(3) For the purposes of this section without prejudice to any other basis upon which a person may be regarded as having been ordinarily resident in the Falkland Islands for the 7 years immediately preceding his application, he shall be so regarded if -

(a) he has not been absent from the Falkland Islands for more than 630 days in aggregate during those 7 years; and

(b) he has not been absent from the Falkland Islands for more than 180 days in aggregate in any one of those 7 years nor for more than 90 days in aggregate in the year immediately preceding his application.

Provided that he must have been physically present in the Falkland Islands throughout the whole of the first 180 days the first year counted as part of his period of ordinary residence in the Falkland Islands.

- (4) The Principal Immigration Officer shall not reject an application on the ground mentioned in sub-section (2)(b)(ii) except in accordance with the advice of the Attorney General in writing.
- (5) Unless he rejects the application under sub-section (1) in accordance with the previous provisions of this section the Principal Immigration Officer shall cause notice of the application to be published in the *Gazette* and additionally in a newspaper circulating in the Falkland Islands.
- (6) The notices published under sub-section (5) shall state that any person who desires to object to the granting of the application may do so by notice in writing sent or delivered to the Principal Immigration Officer within 21 days of the publication of the notice. The application shall thereafter be considered together with any objections received in respect of it, by the Governor in executive council at the first convenient meeting of the Executive Council following the expiration of the period for objections.

4(1) The Governor acting in accordance with the advice of the Executive Council may as he sees fit grant or refuse an application for Falklands Islands status, but must state the ground on which he refuses an application and shall not refuse an application upon any ground until he has notified the Applicant in writing of his intention to refuse the application upon that ground, has given the Applicant a reasonable opportunity to make representation in writing to him in relation to that ground and has caused those representations to be considered by the Executive Council.

- (2) Nothing in sub-section (1) shall be deemed to require the Governor to disclose to the Applicant either directly or indirectly the identity of any objector to the grant of Falkland Islands status or any other matter or document which it is contrary to the public interest to disclose to the Applicant and it is sufficient for the Governor in any such case to disclose to the Applicant in any notice under that sub-section as much as it is possible in all the circumstances, in accordance with the public interest, for him to disclose to enable the Applicant to make adequate representations against the refusal of his application.

6(1) No appeal lies at the instance of any person to any tribunal, court, or authority against any decision of the Governor under section 4, section 5 or sub-section (2) of this section.

The position of the Governor

The constitution, section 18:-

- (2) The Governor shall have such powers and duties as are conferred upon him by or under this constitution or any other law and such other powers and duties as Her Majesty may from time to time be pleased to assign to him and, subject to the provisions of this constitution and any other law, he shall do or execute all things that belong to his office according to such instructions, if any, as Her Majesty may, through a Secretary of State, from time to time see fit to give him:

Provided that the question whether the Governor has in any matter complied with any such instructions shall not be enquired into in any court of law.

And

- (5) Where the Governor is directed by this constitution to exercise any function in accordance with the advice of or after consultation with any person or authority, the question whether he has so exercised that function shall not be enquired into in any court of law.

61(1) Subject to the provisions of this section, in the formulation of policy and in the exercise of the functions conferred upon him by this constitution or any other law the Governor shall consult with the Executive Council.

(Sub-section 2 sets out the circumstances in which the Governor shall not be obliged to consult with the Executive Council. As it is common ground in this case that the decision which is the subject of this application does not fall within such exceptions, the provision is not set out here.)

62(1) In any case in which the Governor consults the Executive Council, he may act against the advice given to him by the Council if he thinks it right to do so.

(2) Where the Governor acts, in pursuance of sub-section (1) of this section, against the advice of the Executive Council, he shall without delay report the matter to a Secretary of State with the reasons for his action.

(3) Whenever the Governor acts against the advice of the Executive Council any member of it may require that there shall be recorded in the minutes any advice or opinion he gave upon the question at issue and his reasons.

(4) The question whether the Governor has exercised any power after consultation with the Executive Council shall not be enquired into in any court of law.

The Executive

The constitution - Section 50

(1) The executive authority of the Falkland Islands is vested in Her Majesty.

(2) Subject to the provisions of this constitution, the executive authority of the Falkland Islands shall be exercised on behalf of Her Majesty by the

Governor, either directly or through offices subordinate to him.

(3)

(4) Nothing in this section shall preclude persons or authorities other than the Governor from exercising such functions as are or may be conferred upon them by any law.

51 There shall be an Executive Council which shall consist of 3 of the elected members of the legislative council, and 2 ex officio members namely the Chief Executive and the Financial Secretary. The ex officio members shall have no right to vote on any matter that is put to the vote at a meeting of the Executive Council.

55(1) The Commander British Forces and the Attorney General shall have the right to attend all meetings of the Executive Council and take part in their proceedings except that if a matter is put to the vote they may not vote.

57 There shall preside at any meeting of the Executive Council -

(a) The Governor; or

(b) In the absence of the Governor, such member of the Executive Council as the Governor, acting in his discretion, may appoint to preside at that meeting.

The Factual Background

The Applicant was born on 14th June 1958, and accordingly at the date of hearing of the application is 45 years of age. He is a British citizen. On 29th June 1993 Mr Bingham, then resident in Wales in the United Kingdom, completed an application form for the post of Conservation Officer with Falkland Conservation, a charitable trust, to be based in Stanley. The Applicant was interviewed for this position in London on 28th July 1993, and was subsequently appointed to the post for which he had applied with effect from 11th October 1993. The Applicant travelled to the Falkland Islands with his then wife and 2 stepchildren, arriving on 12th October 1993. He continued in that post until 30th June 1997 (his contract not having been renewed beyond that date) and

subsequently took up a post as watch-keeper at the Stanley Power Station on 5th November 1997. He remains in that occupation, and I accept that he has throughout fulfilled his responsibilities there in an entirely appropriate manner.

On a date in 1998, the Applicant sought employment as a police officer with the Royal Falkland Islands Police. That application was unsuccessful.

On 21st August 1997 the Applicant was instrumental in the incorporation of a company by the name of Environmental Research Limited, a company which I assume to be registered in the Falkland Islands. The Applicant is a director and company secretary of that company, and I am told that he is a major shareholder therein. It would appear that (presumably due to the terms of his contract of employment at the power station) the Applicant sought and obtained the consent of the Chief Executive to his employment by Environmental Research Limited, and I am told this was upon the basis that such work would not compromise his duties at the power station. It would appear that work with this company is carried out by the Applicant in his spare time and holiday periods arising from his employment with the Government.

On 20th April 2001, whilst still employed at the power station, the Applicant sought the leave of the Director of Human Resources of the Falkland Islands Government to carry out work in Chile setting up a penguin monitoring programme for the Chilean Government, such programme being funded by the British Government. Again, consent was given for the Applicant to perform the duties involved, subject to the caveat that employment with the Falkland Islands Government would take priority.

In order to take up his employment with Falkland Conservation in 1993, the Applicant sought, and was granted, a residence permit (and though I am not told, I assume a work permit), a necessary pre-condition to employment in any capacity other than within the public service. It would appear that such permit was initially for a period of 1 year, although I assume (but again I am not told) that this was periodically renewed during the period of the applicant's employment with Falkland Conservation.

As the law stood in 1993, a person who did not enjoy Falkland Islands status was required to obtain a work permit, unless such employment were as a public officer employed by the Falkland Islands Government.

On 1st January 2000, the provisions of the Immigration Ordinance 1999 came into effect, replacing the Immigration Ordinance 1987. In essence, the 1999 ordinance removed from those seeking employment in the public service the exception for the requirement of a work permit (or other status or certificate carrying with it the right to carry out employment).

At the date of commencement of the 1999 ordinance, the Applicant was employed at the power station in Stanley which employment had been subject to the exception from the requirement of a work permit or similar under the terms of the 1987 ordinance.

The 1999 ordinance contains transitional provisions which applied to the applicant. The provision is brief:-

42(5) Where immediately before the commencement of this ordinance, a person not having the right of abode in the Falkland Islands was serving Her Majesty in right of her Government of the Falkland Islands as a public officer -

- (a) under a letter of appointment for a fixed term, or
- (b) without limitation as to the period of his appointment,

and until the earliest to happen of -

- (i) the expiry of the fixed term referred to in the letter of appointment;
- (ii) the person ceasing to hold the public office in question;
- (iii) the expiry of 3 years from the commencement of this ordinance

the person shall not by reason of his holding of the public office be in breach of the provisions of the ordinance as to work permits.

It is convenient at this point to digress from the factual background to deal briefly with a matter which was not raised before me. That is, whether or not the removal of the exemption of a requirement to obtain a work permit for employees in existing Government service was lawful within Chapter 1 of the Constitution. In the applicant's case, he had taken up employment at the Power Station in circumstances where a work permit was not required. There is no question of his having failed to meet his

obligations in that employment. The effect of the 1999 Ordinance was to require him (subject to the terms of the Transitional Protection Provisions) to obtain a work permit or Falkland Islands status - exempting him from the need to obtain a work permit - if he wished to continue in that employment. If he were not to obtain Falkland Islands status or a work permit, then the effect of the Immigration Ordinance 1999 would be that he would be unable to continue in his employment. Insofar as it related for the requirement that he should obtain a work permit, the Applicant was later faced with a decision that there would be a moratorium on the receipt and consideration of such applications. This resulted in his post at the Power Station being advertised, although I am told this course of events appears to have been suspended.

I pose this question, which may be for resolution on another day. Can it be right for a public servant without Falkland Islands status to be deprived of his employment which he had taken up when there was no such requirement? Even if constitutional per se, is it capable of being rendered unlawful by the imposition of a moratorium upon the receipt of applications for permanent residence permits?

As I have indicated, it has not been suggested to me by the Applicant that either the provisions of the ordinance as they apply to him or the imposition of a moratorium was unconstitutional or in any way unlawful. Whilst Miss Lester on behalf of the Applicant has indicated that she wished to proceed with the application insofar as it related to the permanent residence permit, it was, with respect to her, not an argument advanced with any enthusiasm. Indeed, it was later conceded by her that the effect of the moratorium was to render the applicant's purported application for permanent residency invalid. In the circumstances, it is not a matter that I need address further.

In any event, the Applicant was afforded the protection of the transitional provision until 31st December 2002, being 3 years from the commencement of the ordinance.

I am told that during the course of events which forms the subject matter of the application before me, the Applicant has been granted a work permit in respect of his employment at the power station until 31st December 2004, and additionally has a work permit or permits in respect of the other activities referred to above.

For completeness, I note that the Applicant made unsuccessful applications for employment in the public service as an environmental planning officer in October 1996

and a computer technician in May 2000. Neither application is relevant to the matters before me.

The Applicant has made a number of applications in the past for a permanent residence permit. The earlier history is set out in a document headed "Confidential Executive Council" Annex K dated 25th July 2000, and appearing at the agreed bundle at document 251. This shows in summary that applications were made in 1995, 1996, 1997, and 1998. A 5th application was later submitted on 18th March 2003. This application will be referred to below, but I would indicate at this stage that it is common ground between the parties that at some date prior to the submission of the application, and lasting until 31st March 2003, there was imposed (by, I assume, Executive Council) what has been called a moratorium upon the submission and consideration of applications for permanent residence permits by any person. Again, it would appear to be common ground that there is accordingly no extant valid application for a permanent residence permit.

On 27th May 2002 the Applicant completed an application for Falkland Islands status. For reasons which are not wholly apparent to me, this application was not finally determined until 27th March 2003, the decision being communicated by letter of that date as indicated earlier.

In setting out the above facts, I have refrained from referring to any matters in contention. I will now turn to those facts which are themselves either in dispute, or the consequence of which is fundamental to the issues before the court.

I have not had the benefit of hearing oral evidence, a matter upon which I comment below. I have before me the affidavit of the Applicant sworn on 3rd July 2003 and the affidavit of Howard John Stredder Pearce (the Governor) sworn on 17th September 2003.

For clarity, it is helpful at this stage to set out the substance of a letter of 29th November 2002 from the acting Governor (Mr R T Jarvis) to the Applicant setting out the proposed grounds for refusal of the applicant's application for Falkland Islands status, and the subsequent letter of 27th March 2003 from the Governor setting out the decision and the reasons for that decision.

First, the letter of 29th November 2002. This letter was written by reason of the requirement in section 4(1) of the Falkland Islands Status Ordinance (above) the purpose of which is to enable an applicant to respond to the proposed grounds for refusal of an application. The operative part of this letter is as follows:-

The Executive Council advised the Governor that your application should be refused on the grounds that it would be wholly inappropriate for you to be granted Falkland Islands status because -

- a) You were first employed in the Falkland Islands on the basis of a deliberate misrepresentation that you held a BSc First Class Honours Degree from the Open University.
- b) You pretend that you hold a doctorate from a genuine University, and describe yourself as "Dr Bingham" both locally and internationally, and in connection with your representations that you are an expert conservationist, particularly in relation to penguins. The "University" in question is "Shelbourne University" which purports to operate in Dublin, Republic of Ireland, an institution which has been described by the Irish Minister of State for Education as being entirely bogus, not recognised by the Irish authorities under the Universities Act 1997, and a "University" that Minister has said his ministry will take action to close down. Further "Shelbourne University" is not recognised by the United Kingdom's Department of Education and Skills.
- c) By reason of (a) and (b) Executive Council do not believe that you possess skills, abilities and qualifications of which the Islands are in need.
- d) Since leaving the employment of Falklands Conservation you have repeatedly, through published and oral communication (including lectures), sought to discredit and bring into disrepute the state of the Falkland Islands environment and the role of the Government in its protection. This includes presentations at overseas conferences, particularly that at the International Penguin Conference in Chile in 2000, where other attendees expressed their concern at your misleading and inaccurate reinterpretation of data in a manner substantially at

variance with your previously published interpretation of the same information.

- e) You have recently sought to involve the backing of the International Union for the Conservation of Nature (IUCN) from prejudicial statements concerning the protection accorded to penguins in the Falkland Islands, statements from which the IUCN has disassociated itself in writing. Other material of a similarly prejudicial nature has been published in Penguin News and can be found on your web site and web sites of others.
- f) Executive Council concluded that you have regularly attempted to discredit the reputation of the Government of the Falkland Islands in particular and the Falkland Islands in general.

I intend to refuse your application on the ground stated above.

The second letter - namely that of 27th March 2003 is, save for the final paragraph dealing with the application for a permanent residence permit, set out in full:-

At its meeting on Wednesday 26th March the Executive Council considered your application for Falkland Islands status.

Executive Council decided not to grant your request for further time to make representations. They considered that you had been given ample time (including two previous deferrals of Executive Council's decision at your request) in which to consult your legal advisers and to make full representations in support of your case.

Executive Council advised me to refuse your application for Falkland Islands status on the following grounds.

- a) You were first employed in the Falkland Islands on the basis of a deliberate misrepresentation that you held a BSc First Class Honours Degree from the Open University;

- b) You pretend that you hold a doctorate from a genuine University, and describe yourself as "Dr Bingham" both locally and internationally, and in connection with your representations that you are an expert conservationist, particularly in relation to penguins. The "University" in question is "Shelbourne University" which purports to operate in Dublin, Republic of Ireland, an institution which has been described by the Irish Minister of State for Education as being entirely bogus, not recognised by the Irish authorities under the Universities Act 1997, and a "University" that Minister has said his ministry will take action to close down. Further "Shelbourne University" is not recognised by the United Kingdom's Department of Education and Skills.
- c) Executive Council considered that you do not possess skills, abilities and qualifications of which the Islands are in need which would be sufficient to outweigh the considerations contained in points (a) and (b).
- d) Since leaving the employment of Falklands Islands Conservation you have repeatedly, through publication and oral communication (including lectures) sought to discredit and bring into disrepute the management of the Falkland Islands environment and wild-life on the basis of misleading and inaccurate reinterpretation of data without any creditable scientific justification.

I am therefore refusing your application for Falkland Islands status in accordance with Section 4(1) of the Falkland Islands Status Ordinance 1998.

Executive Council did however decide to ask the Principal Immigration Officer to extend the work permit which you hold for your post as power station operator until 30th June 2003 to enable you to re-arrange for affairs.

Counsel have adopted for paragraphs (a), (b), (c) and (d) above, the term the first, second, third and fourth reason. For convenience, I will do likewise.

To the extent that it is relevant, I will deal with the evidence relating to each of those reasons in the order in which they appear.

The first reason.

Was it a condition of employment with Falkland Conservation that an applicant should possess a Bachelor of Science or other degree? On the face of it, yes. I have been shown a photocopy of the advertisement to which the Applicant replied. Insofar as it is relevant to the matters before me, this advertisement includes the following passage:-

Falklands Conservation requires Conservation Officer (based Stanley). Degree and proven track record in conservation and research essential for Conservation Officer post. (Post) initially offered for 1 year period. Send CV and s.a.e. for job application to (address).

It is the respondent's case that the Applicant misrepresented that he had been awarded a Bachelor of Science degree and that had it not been for such representation, he would not have been appointed to the post, and by inference would not have moved to the Falkland Islands. It is the applicant's case that not only did he not represent that he had been awarded such a degree, but that Falkland Conservation were aware that he was not a graduate.

I have been shown what is said by the respondent to be a photocopy of the applicant's application to Falkland Conservation dated 29th June 1993. This is what appears to be a typewritten or computer generated form which is then completed in manuscript and signed and dated by the applicant. It includes the following:-

University education: *Open University* Years: *1988-1993*
Special subjects: *Ecology/Environment*
Degree: *BSc Honours (First)*

On the face of it this would appear to be a form completed by the Applicant representing that he has a First Class Honours Degree of Bachelor of Science in the subjects of ecology/environment granted by the Open University by reason of studies having taken place between 1988 and 1993.

In his affidavit of 3rd July 2003, the Applicant says that during the course of his interview on 28th July 1993 he stated that his Open University course "was not complete, and even presented copies of (his) course results and other qualifications at the interview". Somewhat surprisingly perhaps the Applicant does not refer to the curriculum vitae which was apparently submitted by him together with a request for an

application form for employment with Falkland Conservation, which I refer to below. As to the completed application form, I am told that the Applicant considers this to be a forgery, although I am not told as to whether it is said to relate to the whole or only part of that document. I am told, and I accept, that following the offer of employment to the applicant, the latter made it clear that he wished to make arrangements, after arrival in the Falkland Islands, to take some examinations set by the Open University. The Applicant asks me to find that this alone would be corroboration of his contention as to what was disclosed at the interview as above. The respondent, on the other hand, says that submitting himself for further examination by the Open University was not necessarily indicative of not yet having obtained a degree. The letter exhibited to the applicant's above mentioned affidavit (exhibit MCB1, page 137/8) refers to "my examination". This phrase certainly suggests that there had been some discussion previously (that is, the reference to *my* examination rather than *an* examination) but regrettably does not take matters further.

The matter is further addressed in the applicant's response to the above mentioned letter of 29th November 2002 from the Acting Governor setting out the proposed refusal of the application upon the grounds stated in that letter. The Applicant here refers to "my Open University *Undergraduate* examinations", but I have not been referred to any document contemporaneous with the original application which uses such term.

I will deal briefly with another series of events dealing with the same point. It would appear that a prosecution was commenced against the Applicant upon the basis that he had obtained his employment by reasons of a deliberate misrepresentation. That prosecution was discontinued, the reason for such discontinuance being disputed by the parties to these current proceedings. I will say only that I draw no conclusions from the commencement or indeed the discontinuation of such proceedings.

Included in the bundle of documents before me are copies of statements of Professor John Patrick Croxall, Julian Richard Fitter, and Carol Miller dated respectively 3rd March 1999, 15th March 1999 and 31st March 1999. Professor Croxall indicates that it was he who drew up the job description and indicates that he believes the Applicant would not have been appointed had he not believed to be a graduate. Mr Fitter indicates that he formed part of the interviewing panel, but (perhaps understandably in view of the lapse of time) indicates that he cannot specifically recall what was said about the applicant's qualifications, though believes that it was conducted upon the

basis that he was indeed a graduate. In fairness to the applicant, however, Mr Fitter includes the following passage in his statement:-

"The fact that he did not hold this degree would not necessarily detract from his ability to be able to fulfil his responsibility as conservation officer."

Appended to Mr Fitter's statement is a copy of the curriculum vitae said to have been provided by the Applicant as required in the original advertisement. This contains the following line:-

1988 - 1992 Open University Biology and Environment (Grade 1)

I will refer to this document further.

As I have indicated previously, in 1998 the Applicant sought employment with the Royal Falkland Islands Police, and a copy of the form of application, completed in manuscript, has been shown to me. A similar document, though with what the Applicant says are significant changes, is also produced. This latter document is a typewritten transcript of the application form extracted at some later date by a police officer.

The original manuscript form, in a section headed "Educational Qualifications" contains the following:-

Date	Qualifications		Institution
1988 - 1993	BSc course		Open University
	Science	Distinction	(Distinction equals 85% +)
	Biology	"	
	Ecology	"	
	Geology	Merit	(Merit equals 70-85%)
	Environment	"	

The typewritten transcript (an extract of which is exhibited to the applicant's above mentioned affidavit at page 141), under the same 3 column headings simply reads 1993 - BSc - Open University.

What conclusion am I to draw from all of this? The Applicant would have me believe that he has never represented that he has a Bachelor of Science Degree, that the manuscript application for employment with Falkland Conservation (at least in the form in which it is presented to me) is wholly or partly a forgery, and that the typewritten transcript produced by the police is an indication of a deliberate attempt to misrepresent what he himself had said.

I have not had the opportunity of hearing the applicant's oral evidence, and I must say that in view of the issues of fact involved in this application, I am surprised that the Applicant has not deemed it appropriate to present himself for cross-examination. I am told that he is currently in Chile, but I have to say that in view of the importance to the Applicant of these proceedings - and it is certainly put to me by Counsel for the Applicant that it is a matter of great importance - I would have expected him to attend. I cannot escape the conclusion that his absence is a deliberate choice motivated at least in part by his wish to avoid being questioned upon some matters.

In concluding as it did that the Applicant does not have a Bachelor of Science Degree and that he had represented that he was so qualified, Executive Council and the Governor were entirely justified. It is a view with which I concur. In the absence of evidence that the application form for employment with Falkland Conservation was indeed a forgery, it is appropriate to assume that it is a representation of fact made by the applicant. Though differing slightly ("first" as opposed to "grade 1") it is consistent with the curriculum vitae submitted by the Applicant when hoping to obtain an interview for that position. That the Royal Falkland Islands Police should subsequently - though wrongly - transcribe the applicant's form of application to become a Police Officer in such a way as to show that he was a graduate is again an indication of the inference to be drawn from the manner in which the form itself had been completed, in my view, in a deliberate way by the Applicant to increase the status of his application. As I am satisfied that what at best may be described as the half truth as to his qualifications from the Open University was deliberately inserted by the Applicant to enhance the status of his application, he is hardly in a position to criticise the police for interpreting his form as indicating that he had a degree of Bachelor of Science.

That deals with the factual basis of the *first ground*, though I will return to this topic in terms of the conclusion to be drawn from such findings and the substantive issues before me.

I now turn to the factual basis of the *second ground*. This has been set out in full above and I will not repeat it. In essence, it is said of the Applicant that he purports to have been awarded a doctorate and describes himself as "Dr Bingham" whereas the degree is from what the respondent terms a "bogus" University. The Applicant responds (his letter of 6th December 2002) in the following manner:-

I have never claimed that my PhD is from any other University than Shelbourne, nor hidden the fact that Shelbourne is not an accredited University. I accept that a correspondence University such as Shelbourne may not be in the same league as accredited universities, but I had never considered them as being "bogus".

The allegation concerning this degree differs from the first ground in two ways. First, the degree is said to have been awarded on 12th January 2001, more than 7 years after the applicant's arrival in the Falkland Islands, and some 3½ years after his employment with Falkland Conservation was terminated. Second, it is not suggested by the respondent that the Applicant has misrepresented the *award* of the degree. Clearly it would not have been in a position so to do, the certificate of award having been produced. What is in issue here is the status of such award.

I will dispose of this issue with some brevity. Shelbourne University is not an academic institution at all. It does not award degrees or honours upon the basis of merit, but does so in return for payment. Its degrees are valueless as establishing any particular degree of skill or achievement upon the part of those to whom they may be awarded.

I reject entirely the suggestion by the Applicant that he believed it to be a university in any real sense of the word. Either he was so blinded by the prospect of being awarded a distinction which he would not otherwise be able to achieve upon the basis of merit that he displayed a lack of discrimination bordering on irresponsibility, or he was aware of the true nature of the institution and exploited what might be termed a loophole which enabled him to use the title "Dr". For reasons which will become apparent below, for the purpose of these proceedings it matters not which is the case. What does matter is that Executive Council and the Governor were quite entitled to the view which they formed in relation to this matter.

The *third reason* does not require any finding of fact by me, but again will be referred to below.

Of the *fourth reason*, whether in the form appearing in the letter of the Acting Governor dated 29th November 2002, or in the letter of the Governor dated 27th March 2003, I will say only that it is not in dispute that the Applicant has published a number of articles highly critical of the Government and its policies. This will be addressed further below.

I now turn to the circumstances surrounding the consideration of the application for Falkland Islands status by the Applicant and to its eventual refusal.

The application for Falkland Islands status was made by the Applicant on 27th May 2002, at which time he had been present in the Islands for something in excess of 8 years. It is not in dispute that the Applicant is a "qualified person" under the provisions of the Falklands Islands Status Ordinance set out above and that the application complies with the appropriate statutory and regulatory requirements. A criminal records enquiry made in the United Kingdom wrongly identified the Applicant as having been convicted of one or more criminal offences in that country, but it soon became apparent that the record concerned related to another person of the same name. The Applicant has a conviction for a minor offence in the Falkland Islands, but as that has not been raised as an issue, I will not address it further.

Following receipt of the application, a notice under Section 3(5) of the Falkland Islands Status Ordinance was duly published in the *Gazette*, and also in the *Penguin News*, and a number of letters were received in response from members of the public. Following an application made by Miss Lester on behalf of the Applicant to disclose these letters, Mr Woolgar (in my view rightly) conceded that they should be disclosed, subject to redaction in order to preserve the anonymity of their authors. I will comment separately upon this point below.

Five letters of objection were received by the Government Secretary. Three of the letters were short but contained reasons. Two of the letters were even more brief and non-specific, and a little to my surprise I note that the authors were invited by the Government's Secretary to provide reasons for their objection. One of them did so. One letter raised the issue which subsequently formed the *first reason* as above. One letter, at some length and with a number of appended documents, raised doubts as to the suitability of the applicant's character as exemplified by what was said to be his

previous behaviour, and also raised the issue of the criticisms expressed by the Applicant as to various aspects of Government policy in the area of conservation. There were a number of other matters raised in this letter, but I do not propose to deal with them further. The remaining observations related either to the character of the Applicant or to his expressed views on a number of issues.

There have been produced to me a number of extracts of the minutes of Executive Council and of papers produced by the Government Secretariat for consideration by the Executive Council all in connection with this application. Some have been edited for confidentiality, others have not, but I do not propose to identify individual Councillors in this judgement.

In a report dated 15th October 2002, the Principal Immigration Officer recommended to the Executive Council of 24th October 2002 that the application be refused. I do not propose to set out in full the reasons given, but in essence they are as follows, summarised in the order in which they appeared:-

The Applicant was said to have misrepresented a number of matters concerning Government policy over environmental issues and as regards his own situation concerning residency status.

The Applicant was said to misrepresent his own qualification to comment on environmental issues by reason of what was described as a qualification from a "bogus" institution.

Executive Council was still awaiting details relating to skills and qualifications possessed by the applicant, this having been requested in relation to his previous application for a residence permit.

The applicant's employment history was set out. The report went on to identify (and append) the letters of objection referred to above together with an additional letter from Professor Croxall (whose statement to the police has been mentioned by me above). This latter document was both appended to the report, and the following passage was also quoted.

"By any scientific standard, Bingham's presentation represented a substantial deliberate misrepresentation of data (and a position substantially at variance

with that taken in "his" paper in Oryx (1998), based on exactly the same data). His presentation has removed any vestiges of scientific credibility among the penguin research community."

The Principal Immigration Officer added his own comment to the effect that he too was "concerned about the malicious damage (the applicant) appears to be trying to inflict on the Falkland Islands Government, and the consequent impact it is likely to have on the Islands' reputation on the world stage". The report concluded with a number of observations regarding the possible consequence of refusal.

In the event, Executive Council decided to defer a decision until a later meeting to allow the Applicant time to deal with the enquiries raised in relation to his permanent residence application.

That information was provided by the Applicant in a letter of 28th October 2002 and appears at page 598 of the agreed bundle. I will comment only that although the full picture could not be ascertained from the documents attached to that letter (to which I have not been specifically referred) I do note that the Applicant refers to "under-graduate and post-graduate qualifications" although he does not, as I have indicated above, suggest that he has ever graduated from any University other than Shelbourne.

I have gone on to consider a further report of the Principal Immigration Officer dated 28th November 2002, and minutes of a meeting of the Executive Council held on 21st November 2002. In view of the chronology of these two documents, it is not apparent to me whether the report was ever considered by Executive Council. It is certainly not referred to in the extract from the minutes of the meeting of 21st November.

The minutes disclose what in my view is a particularly significant debate which took place. On that occasion, one member enquired as to whether "there was any legal way that the application for status by (the Applicant) could be refused". Another member enquired whether "because (the Applicant) had lied about his qualifications to gain employment in the Islands" it was sufficient to deny him Falkland Islands status.

The chairman (whom I assume to be the then Acting Governor, although I may be wrong as to this) observed that he had been "struck" by the number of objections received from members of the public, an observation which caused members to agree that "there was little support for (the Applicant) in the community". In the event,

Executive Council agreed that the application should be denied on the following basis, which I set out in full:-

- Large number of objections received.
- Gained entry into the Islands by way of lying about his qualifications to Falklands Conservation.
- He pretends to hold a doctorate from a genuine University.
- The University in question is Shelbourne University and has been described by the Irish Minister of State for Education has been entirely bogus.
- That Mr Bingham has deliberately set out to bring the Falkland Islands into disrepute in an international forum, namely the International Penguin Conference in Chile in November 2000 by misrepresentation.

As a result of the above, the Acting Governor wrote to the Applicant on 29th November 2002 in the terms set out earlier in this judgement.

Following the applicant's responses to that letter, Executive Council met once again on 19th December 2002, and considered, among other things, a report of the Government Secretary as to the application. The meeting also considered the Applicant's letter of 6th December which was produced for their consideration. In the event, Executive Council agreed to a request by the Applicant for further time.

On 20th December 2002 the Applicant met with the recently arrived new Governor (Mr Pearce) and I have seen a letter from the latter addressed to Mr Jarvis (previously Acting Governor) which takes the form of a minute of that meeting. As a result of that meeting, it is apparent that the Applicant asked for further details of the allegations against him. This was raised at a meeting of Executive Council on 30th January 2003, and further details were duly provided in a letter dated 10th February 2003 written by the Governor to the applicant.

Before leaving the meeting of 30th January, I note that, with what proved to be significant prescience the Attorney General observed that "the essential problem is that Mr Bingham will claim that he has been victimised because FIG do not like what he is saying and that is a breach of his fundamental rights to freedom of speech". It is apparent by this time that other members of Executive Council were concerned

regarding the possibility of legal proceedings and indeed one enquired as to whether or not minutes of Executive Council meetings might have to be disclosed.

The Applicant wrote at some length to the Governor on 7th February, though that letter appears not to have been received until after the Governor's own letter of 10th of that month referred to above.

I do not propose to deal with the letter of 10th February in any detail, save to say that it sets out at some length the list of publications or other items in which it is said that the Applicant criticised the Government or Government policy. In response, the Applicant sought further time, and at its meeting on 27th February 2003 Executive Council agreed once again to defer consideration of the application until its meeting on Wednesday, 26th March.

The applicant's response was two-fold. On 17th March 2003 he completed an application for a permanent residence permit, and on 18th March 2003 wrote to the Governor. This letter addresses a number of the issues which had been raised in the application, but also suggests that the Applicant would be content not to proceed with his application for Falkland Islands status were he to be granted a permanent residence permit, which suggestion he offered "as a compromise".

At its meeting on 26th March 2003 Executive Council considered a lengthy and, if I may say so, most helpful summary of the history of this application prepared by Crown Counsel. In the event Executive Council resolved to refuse the application for Falklands Islands status. Somewhat curiously (as it would appear that there was a moratorium imposed at that time upon applications for permanent residence permits) it also agreed that an application for a PRP from Mr Bingham should be considered in the normal manner. This latter observation would appear to be a reflection of a similar suggestion in the report from Crown Counsel referred to above.

Following that meeting, the decision was communicated to the Applicant by letter of 27th March (referred to and set out in full insofar as it concerns Falklands Islands status, above) but concluded with this paragraph:-

Executive Council could not consider your application for a permanent residence permit because the law requires that such applications must be advertised in the Gazette, and a fee of £155 must also be paid when your

application is lodged with Customs and Immigration Department. You should be aware, however, that there is a moratorium until 31st March 2003 on the receipt and consideration of permanent residence permit applications.

Councillors are considering whether or not to extend this moratorium during their current budget meetings.

Finally, I turn to the affidavit of the Governor sworn on 17th September 2003.

Although this point will be addressed further below, I begin by noting the contents of paragraph 6, the relevant part of which is as follows:-

I noticed that in my memo (of 23rd December 2002 to Mr Jarvis) I took the view that the decision to grant or refuse the application was for Executive Council to take. My understanding of the roles that Executive Council and I respectively had to play in determining the applicant's application for Falkland Islands status became clearer after I wrote this memo. I was advised by the Attorney General before the Executive Council meeting that was held on 26th March 2003 that while I was required by the relevant ordinance to act in accordance with the advice of Executive Council, the decision to grant or refuse the application was for me to take. He advised that if I wanted to refuse the application for different reasons than those given to me by Executive Council, I would have to report the matter to the Secretary of State under section 62(2) of the constitution.

In paragraph 2 of his affidavit, the Governor recalls his process of familiarisation with the application shortly after taking up his post. He comments "I was not personally persuaded on the information available to me that the contents of paragraphs (d), (e) and (f) of that letter were either sustainable in every respect or that they were relevant and appropriate grounds on which to refuse the application. In contrast I was persuaded of those matters in relation to the contents of paragraphs (a), (b) and (c) of that letter."

The letter referred to was that of 29th November 2002 written by the then Acting Governor to the applicant.

In paragraph 11 of his affidavit, he adds:-

"I was still un-persuaded about the contents of paragraphs (d), (e) and (f) of the letter of 29th November 2002 and before the meeting took place I voiced my concerns in this respect to the Attorney General. I thought it very possible that the Honourable Members of Executive Council would advise me at the meeting to refuse the application on the same, or substantially the same, grounds as had been included in the letter of 29th November 2002 and because I was still un-persuaded about paragraphs (d), (e) and (f) asked the Attorney General whether I could exclude them from my decision letter. I was advised that my letter should include them - I was told that it should accurately reflect the advice that I received at the meeting from Executive Council. It was on this occasion that I was given the advice by the Attorney General described in paragraph 6 above."

The Governor goes on to say (paragraph 12) that he made it known to members of Executive Council his marked dissatisfaction with paragraphs (d), (e) and (f) as grounds upon which to refuse the application but that as he considered himself constrained to include in any decision the reasons and recommendation of Executive Council in communicating his (the Governor's) decision to Mr Bingham, the matters could be "boiled down". The final advice was formulated with the assistance of the Governor.

The Governor adds (paragraph 14):-

It would not be right for me to suggest that paragraph (d) did not weigh with me at all in reaching my decision, but I was really persuaded to refuse the application for the reasons given in paragraphs (a), (b) and (c). I regarded paragraph (d) as a subsidiary ground only. The fact that I so regarded paragraph (d) was intended by me to be made clear to the Applicant by the way in which all four paragraphs were drafted. They were stated in order of importance: the first three paragraphs were intended to be read together - as the reference in paragraph (c) to paragraphs (a) and (b) was intended to make clear - leaving paragraph (d) to be read as a subsidiary ground. My decision letter merely reflected the drafting of the reasons that had been carried out at the meeting of Executive Council.

During the course of the hearing, I suggested to Counsel that in so stating, the Governor had taken the view that he was bound (unless he wished to follow the course

in section 62 of the constitution) to follow the advice (which he considered to be the recommendation *and* the reasons for that recommendation by Executive Council) but that he had made the observations regarding the subsidiary nature of the 4th reason as he was clearly unhappy with it and that perhaps had he considered himself to have an unfettered discretion, would not have relied upon that at all. Miss Mayer for the Applicant concurred with my interpretation.

I will now turn now to the submissions before me.

The Applicant asked me to find that the application for Falkland Island status was refused in reality because of the applicant's political views. Further, it is said that the decision was made on the basis of irrelevant, unconstitutional and illegitimate considerations - that is, the applicant's political or scientific views - contrary to Section 10 of the Constitution, such considerations having tainted the other reasons given for the refusal. The Applicant says that the decision was disproportionate, irrational, arbitrary and unfair in the light of the reasons given, the applicant's submissions, and what was at stake for him. The Applicant says that the decision was made without taking into account various relevant considerations, and that by giving inadequate reasons and allowing insufficient time to allow the Applicant to respond, there were breaches of the rules of natural justice and procedural fairness.

The respondent says that the decision to refuse Falkland Islands status was made by the Governor and not by Executive Council, and though it is conceded that the *fourth* reason was flawed, the remaining reasons were valid and supportable.

Mr Woolgar has quite properly reminded the Court of its role in this matter, quoting the well known passage from Fordham, Judicial Review Handbook. It is worth repeating here.

Judicial Review is the basic procedural mechanism by which High Court judges scrutinise public bodies and public law functions, intervening, as a matter of discretion, to quash, prevent, require or clarify decisions, not because they disagree with a merits judgement, but so as to right a recognisable or public wrong, whether that wrong takes the form of unlawfulness, unreasonableness, or unfairness. The Court is exercising a supervisory jurisdiction in which it is concerned with the technical legality of the decision making process; the Court's role is not to usurp that of the decision maker.

Further, it will be apparent from Section 6(1) of the Falkland Islands Status Ordinance 1998, set out above, that there is no appeal against the decision of the Governor as to Falkland Islands status applications. Thus, I do not have to decide whether or not the decision itself was "right" but on the contrary I must consider whether or not the decision maker approached the decision in the appropriate manner. In the words of Lord Greene (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB223), the decision maker:-

Must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. *Warrington LJ in Short v Poole Corporation* [1926] gave the example of the red haired teacher dismissed because she had red hair. That is unreasonable in one sense. In other sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all of these things run into one another.

That is what is now commonly described as irrationality, or "Wednesbury unreasonableness".

I must first deal with the decision making process. I begin by addressing the issue as to the identity of the person or body in whom the decision is vested by the legislation set out above. I conclude that it is vested in the Governor, and the Governor alone, in consultation with Executive Council. The wording of the legislation is somewhat unfortunate. It will be recalled that Section 4(1) of the Falkland Islands Status Ordinance provides that "the Governor acting in accordance with the advice of the Executive Council may as he sees fit grant or refuse an application for Falkland Islands status," If the Governor may grant or refuse an application *as he sees fit*, why is he required to act in accordance with the advice of the Executive Council? Does this differ from the provisions of Section 61 of the Constitution (again set out above) which requires that "in the exercise of the functions conferred upon him by this Constitution or any other law the Governor shall consult with the Executive Council".

The Respondent invites me to conclude that it is with the Governor that the decision rests. The submission is, if I may say so, well put in the supplemental skeleton handed up by Mr Woolgar during the course of the hearing, and upon which he subsequently addressed me.

The Applicant's case is that the Governor is obliged to act in accordance with the advice of Executive Council and that it is not open to him to say that he personally took a different view. Further whilst the Governor was obliged to act on the advice of Executive Council in the absence of a formal "disagreement" under Section 62(2) of the Constitution, the Applicant resiles somewhat from that position by relying on the inclusion of the words "as he sees fit" in Section 4(1) of the 1998 Ordinance. As Miss Mayer submitted, this indicates that the Governor is not "merely a rubber stamp" or "at the very least, the Executive Council's advice must be a substantial influence on the Governor's decision".

The Respondent does, I think, slightly misconstrue the approach of the Applicant, but in any event says that the position of the Governor is that he must himself decide how he should exercise his powers and that he is obliged merely to consult Executive Council before making his decision.

Mr Woolgar argues, with some force, that the position of the Governor in relation to Executive Council as exemplified in Section 50 of the Constitution differs fundamentally from the relationship between Her Majesty and her Ministers in the United Kingdom. He distinguishes the position of responsible Government (by which I hasten to add he means accountable in the constitutional sense) from the position in the Falkland Islands where the Governor possesses wide reserved powers over the legislative process and where, in his terms, Executive Council in this context "is a consultative body only". Mr Woolgar goes on to express the view, with which I entirely concur, that:-

There is, quite simply, no provision in the Constitution requiring the Governor to act on the advice of Executive Council. There is a last resort by the Applicant to "the Constitutional Convention" that the monarch or other head of State acts on the advice of her Ministers. The Applicant singularly fails to show that this Convention applies in the Falkland Islands. It does not. Indeed it cannot in the light of the Constitution.

Section 62(2) of the Constitution envisages circumstances in which the Governor, having consulted Executive Council, chooses to act against the advice given to him, and that section sets out the procedure to be followed in such circumstances. The use of the words "consult" and "advice" in Section 62(1) suggests that the former means "invites Executive Council to recommend a course of action" and the latter means "the course of action recommended by Executive Council". Section 61 appears to be of wide application in that it does not appear to be limited to those circumstances in which the Governor is obliged to consult with Executive Council as set out in Section 61(1) but to all circumstances where the Governor has consulted Executive Council, such as those matters set out in Section 61(2)(e).

Where then does this leave the Governor in relation to Section 4(1) of the 1998 Ordinance?

The Governor is required to act in accordance with the advice of the Executive Council. That presupposes that the determination of an application for Falkland Islands status does not fall within the exceptions to the requirement to consult Executive Council set out in Section 61(2) of the Constitution. That is a view accepted by both parties and, as indicated above, by me.

This was clearly a matter exercising the mind of the Governor when considering the Applicant's application for Falkland Islands status. It was addressed in paragraphs 6, 11 and 14 of his affidavit. It must be remembered that the Governor was in the unenviable position of having just been appointed and having only recently arrived in the Falkland Islands he was about to be required to decide on the longstanding and contentious application of the applicant.

Initially, the Governor took the view that "the decision to grant or refuse the application was for Executive Council to take". He was subsequently advised by the Attorney General prior to the Executive Council meeting of 26th March 2003 that "while (he) was required by the relevant ordinance to act in accordance with the advice of Executive Council, the decision to grant or refuse the application was for (him) to take" and further "if (he) wanted to refuse the application for different reasons than those given to (him) by Executive Council, (he) would have to report the matter to the Secretary of State under Section 62(2) of the Constitution."

At paragraph 11 of his affidavit, the Governor, who it will be recalled was somewhat unhappy at the inclusion of the fourth reason for the refusal, was advised that he could not exclude the reasons of Executive Council underlying its advice to him, and that his decision letter should "accurately reflect the advice that (he) had received at the meeting from Executive Council".

And at paragraph 14 of his affidavit: -

The decision letter merely reflected the drafting of the reasons that had been carried out at the meeting of Executive Council.

The Applicant's approach in these proceedings is somewhat similar to the understanding of the Governor at that time.

I think it fair to summarise the position of the Governor, as he saw it, was that having been corrected in his initial view that it was a decision for Executive Council, he was required to adopt the advice of Executive Council as to whether the application should be granted or refused, and in so doing was required to adopt the reasons for such advice reached by Executive Council. If he were not to do so, then he would be required to follow the procedure in Section 62(2) of the Constitution. This appears to be the Applicant's position.

I conclude that this view, based upon the advice given to him by the Attorney General, was wrong insofar as it failed to distinguish between the reasons for the advice and the advice itself. The correct approach is as follows: -

An application for Falkland Islands status is submitted to the Principal Immigration Officer under Section 3 of the Ordinance. Assuming that it does not fall, so to speak, at the first hurdle by reason of the Applicant not being a "qualified person", and notices duly having been published under Section 3(5), the application will thereafter be considered by the Governor in Executive Council. It is in him that executive authority is vested by the Constitution. Although the decision is one for the Governor under Section 4 of the Ordinance, he is required by that section to consult Executive Council. I use the word "consult" in the same sense that I find it is used in Section 62 of the Constitution. Executive Council will then advise the Governor, and he will adopt one of the following courses of action

If the advice is to refuse the application and he concurs, or the advice is to grant the application and he elects not to follow that advice, he must notify the applicant as required by Section 4 of the Ordinance giving those reasons he proposes to rely upon. These reasons need not necessarily be the same as those given by Executive Council.

If, Executive Council and the Governor having had the opportunity to consider the applicant's response, the Governor is not minded to grant the application he should refuse it, where appropriate reporting to the Secretary of State as required under section 62(2) of the constitution if his decision departs from the advice of Executive Council either upon first consideration or after consideration of the response.

If Executive Council advises the Governor to grant the application and he agrees to do so, then he should grant it forthwith.

It is my view that the learned Attorney General failed, in advising the Governor, to differentiate between the advice of Executive Council in the sense that it represents a recommendation to him either to grant or refuse the application for Falkland Islands status, and the reasons adopted by Executive Council for such recommendation.

It will be apparent from the above that I have concluded that the Governor was free to follow the advice of Executive Council in refusing the applicant's application, were he to see fit to do so, but to further adopt or reject any of the individual reasons given by Executive Council in reaching its advice.

This is reinforced by the further wording in Section 4(1) which provides that the Governor "shall not refuse an application upon any ground until he has notified the Applicant in writing of his intention to refuse the application upon that ground".

This is not a requirement upon Executive Council to notify the Applicant that it intends to recommend to the Governor that he should refuse an application upon stated grounds, but is a requirement that the Governor shall notify the Applicant of the grounds upon which it is *his* intention to refuse the application. This must encompass circumstances where the Governor's intention to refuse an application is based upon grounds not necessarily those adopted by Executive Council.

It is only in circumstances where the Governor chooses not to follow the advice of Executive Council to grant or refuse such an application that he must adopt the Section 62(2) procedure.

Thus, it was open to the Governor, if he was so minded, to concur with the recommendation of Executive Council to refuse the application, but to do so by reason of some but not all of the grounds adopted by Executive Council. That he wrongly fettered the exercise of his discretion in such a manner would have led me to find that the decision was flawed for procedural impropriety even had I not found the decision to be flawed on substantive grounds.

By reason of the fact that the Governor considered himself to be bound by the reasoning of Executive Council, he accordingly adopted its reasoning to a greater or lesser extent. Although I consider this to be a misunderstanding as to the true position, it is nonetheless the case that he did adopt it. Any views which he may personally have held became effectively subsumed within those of Executive Council and it is necessary for me to examine those reasons given by Executive Council and forming the basis of its advice to the Governor.

I will say at the outset that I am drawn inescapably to the conclusion that the decision to recommend to the Governor that he refuse the application was permeated inextricably by constitutionally improper motive. It is my view that what was to become, in one form or another, the *fourth reason* underlay the whole decision to refuse the application. In essence, Executive Council had formed the view that by reason of his criticism of the Government and of its policies and by reason of what might be termed his "anti-establishment" views, the Applicant did not deserve Falkland Islands status, and the only remaining issue was how the refusal consequent upon such a view might be justified.

I will deal with two aspects only regarding this.

The first is that Section 10 of the Constitution, subject to what might be termed the usual exceptions, guarantees freedom of expression, including:-

The freedom to hold opinions without interference. Freedom to receive information and ideas without interference, freedom to disseminate information

and ideas without interference (whether the dissemination be to the public generally or to any person or class of person) and freedom from interference with his correspondence or other means of communication.

This is a powerful and fundamental freedom underpinning a democratic society. It is not qualified by allowing the expression of only those views which are acceptable to the Government or to any particular part of society. Nor does it restrict the expression of the eccentric, the bizarre or the simply wrong. In the words of Justice Jackson of the United States Supreme Court in *Barnette* (319 U.S.) quoted with approval in *Texas v Johnson* 1988 U.S. 414:-

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

A freedom to praise Government but not to oppose it is a chimera; it is not a freedom at all. This is not what the Falkland Islands constitution is about.

My second observation on this issue is brief. The applicant, when seeking leave to make this application, sought to persuade me as to the merits of his views on conservation issues. I have not heard expert evidence, nor is it necessary for me to do so. It matters not for the purpose of the proceedings before me whether the views expressed by the Applicant in his various publications are as characterised by Professor Croxall above or whether they are sound views founded on good science. That is not a matter for Executive Council or this court to judge.

In fairness to the Respondent, it has been conceded from the outset in these proceedings, though in somewhat understated terms that the *fourth reason* was "flawed". To its credit the Respondent, through its counsel, reaffirmed in unequivocal terms its commitment to freedom of speech as guaranteed by the constitution. Notwithstanding that such principle was not adhered to in this particular instance, I have no hesitation in accepting such assurance.

I now turn to the component parts of the decision.

I have had regard to the English decision of *R v Derbyshire County Council, ex parte The Times Supplements Limited and Others (1991) 3 Admin LR 241*, to which I have been referred by Miss Lester. There the controlling political group on a local authority required its chief executive to implement a decision in relation to which:

...he was uneasy about the lack of legal foundation for (it)... It was decided that counsel's advice should be sought in order to discover whether a sound ... ground could be discovered for a decision which (he) said he knew at that time was not supported by any such ground.

And

(the controlling political group having directed the Chief Executive to implement its decision) set about trying to discover whether there was available the reality or semblance of a lawful excuse for that conduct.

There, the decision was quashed as being *ultra vires*. That is not the position here, although one cannot but note certain similarities with the facts of the present case.

In another English case, *R v Broadcasting Complaints Commission, ex parte Owen* [1985] QB 1153 May LJ at 1117b, said

Where the reasons given by a statutory body for taking or not taking a particular course of action are not mixed and can be clearly disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review .

I respectfully agree, but here the position is different.

As I have indicated above, I have concluded that the hostility engendered by the Applicant's views underlay the whole of the decision making process within Executive Council. In reaching this conclusion I have had careful and detailed regard to the minutes and papers of Executive Council as disclosed in these proceedings, although it is apparent on even a superficial consideration of such documents that this was indeed

the case. Miss Lester put it to me (paragraph 45 of the applicant's skeleton argument) in the following way:-

Those reasons are impossible to disentangle from the real reason for the decision and accordingly it is not necessary to consider these reasons on their own merits. The legal principles are clear that a decision substantially influenced by an improper motive cannot be saved by the existence of other grounds which may or may not by themselves have justified the decision.

This is in essence the view of Neill LJ in the English case of *R. v Lewisham Borough Council, ex parte Shell UK Ltd* [1988]1 All ER 938 at 951j

I find the above decisions persuasive, and I agree with Miss Lester's submission on this point; it cannot be disentangled. Like the curate's egg it is simply not possible to extricate the bad and say that what remains is good.

For these reasons I would grant the Applicant an order of certiorari and quash the decision of the Governor.

Before leaving this issue, I will make two observations.

First, I indicated in open Court that I was led to the view from the Governor's affidavit that he considered the fourth reason to be improper. I am still of that opinion, and I am satisfied that it was adopted by him with great reluctance and in the light of the advice given to him.

My second observation relates to the matter of the letters of objection.

It will be recalled that the Principal Immigration Officer is required to publish a notice of application for Falkland Islands status. That was done here. On receipt of those letters, it was apparent that more than one objection was in the vein of "we do not therefore feel he is the sort of permanent resident we want here". Whilst I could not say that in all circumstances it would be wrong for further enquiries to be made of an objector, the circumstances in which it is right to do so must be limited indeed. It is not the role of Government to solicit reasons. Objectors must write what they consider to be appropriate and Government must place upon objections the weight which they may respectively warrant. Further, although the provisions of Section 4(2) of the Falkland

Islands Status Ordinance 1998 does not require the Governor to disclose to the Applicant the identity of any objector "or any other matter or document which it is contrary to the public interest to disclose to the applicant" the identity of respondents to the statutory notice should not be withheld from the Applicant unless it is "contrary to the public interest" to do so. The prospect of the identity of each writer being withheld may well induce the submission of vexatious or malicious objections. Unless therefore there is specific reason in each individual case to withhold the identity or content of any objection, the whole of the content of each objection must be made available to the applicant, including the identity of the author.

I will now turn to the remaining grounds for the decision. I have made detailed findings of fact regarding the first and second decision above, and I have concluded that Executive Council and the Governor were entitled on the evidence before them to find as they did. That does not, however, end the matter.

The first ground, it will be remembered, was that the Applicant had falsely represented that he had been awarded a Bachelor of Science degree. The second ground that he represented that the degree of Doctor of Philosophy awarded by Shelbourne University was a mark of his having achieved a high degree of academic excellence.

It is not immediately apparent from the first and second reason alone as to the significance of the matters contained therein. Some help is to be found from considering the third reason - "Executive Council considered that you do not possess skills, abilities and qualifications of which the Islands are in need which would be sufficient to outweigh the considerations contained in points (a) and (b)".

The first and perhaps most obvious point is that there is no requirement for any particular level of academic achievement to have been achieved before Falkland Islands status can be granted. The fact that the Applicant did not possess a degree at all in any recognised sense of the word would not have been a reason to decline his application. The third ground poses the possibility that notwithstanding the first two grounds, status might well have been granted to the Applicant had he possessed "skills, abilities and qualifications of which the Islands are in need". What was it therefore about the first two grounds which so weighed against the applicant?

Was it that it was felt that the applicant's presence in the Islands (and thus his status as a "qualified person") had been secured by a misrepresentation or was it, more simply,

that the representations inherent within the first two reasons was so indicative of bad character that the application should be refused?

As I indicated above, it is not the role of this Court to substitute its own decision for that of the decision maker. Though I was asked by Miss Lester to do just that, these courts are reluctant, and in my view rightly so, to substitute their own decision for that of the body whose legal duty it is to make the decision in the first place. I will say only that my doubts concerning the reasoning behind the first three grounds is such that I would be unable to say with any confidence that the outcome of the application would have been precisely the same on those grounds alone.

Directions

The decision of the Governor of 27th March 2003 being quashed, the application of the Applicant for Falkland Islands status is referred to the Governor and for Executive Council to advise him as to whether grant or refuse the applicant's application. The Governor will either concur with that decision and grant or refuse the application as advised by Executive Council, or will depart from such advice and will follow the procedure set out in Section 62(2) of the Constitution. Should the Governor wish to act upon the advice of Executive Council but to reject one or more of the reasons advanced by Executive Council for its advice, then he is free so to do provided that he is satisfied that, should his decision be to reject the application, his reasons are sufficient in law to justify such refusal. If it is proposed that the application be refused, then the Governor must comply with the requirements of the provisions of Section 4(1) of the Immigration Ordinance 1998 in that he must afford the Applicant a reasonable opportunity to make representations in writing as to the proposed grounds as set out in that section.

Neither Executive Council in deciding upon what advice to give to the Governor, nor the Governor in reaching his proposed or actual decision upon the application shall have regard to any matter falling within ground (d) (*the fourth reason*) of the previous decision or to any matter of a similar nature falling within the protections afforded by Section 10 of the Constitution except as may be allowed therein.

As to the matters which Executive Council and the Governor *may* take into account I would firstly direct their attention to the provisions of the Falkland Islands Status Ordinance itself. As will be apparent from the extracts set out above, the ordinance

contains no guidance as to the factors which may or may not be taken into account. The ordinance does, however, make provisions in Section 5 as to the circumstances in which Falkland Islands status may be revoked. Whilst those considering the application may take the view that the matters in the sub-sections to that section do not have relevance in relation to an application for Falkland Islands status, some guidance may be derived from both the nature and gravity of the specific matters set out in Section 5(3).

In terms of application by the Applicant in this case, if it is intended to rely upon the matters forming the substance of the *first reason*, then the Applicant must be left in no doubt as to why that should constitute a reason, or one of a number of reasons, as to why his application should be refused. Were it intended to constitute an example of bad faith, character or dishonesty, then the decision maker must say so.

If it were to be relied upon in some way to suggest that the Applicant became a "qualified person" within the meaning of the Falkland Islands Status Ordinance only by reason of some deception - in other words, that his presence in the Falkland Islands only arose due to the circumstances in which employment with Falkland Islands Conservation arose, then again this must be clearly stated.

With regard to both these matters concerning the *first reason* then regard must be had to his subsequent employment and what by all accounts is a good record with the Power Station. Adopting the logic of the *third reason*, if bad character arising from this were said to be a ground for refusal of the application, then the Applicant must be left in no doubt as to why it is considered that the circumstances surrounding the application for the initial employment were not outweighed by the subsequent 6 years of employment in which the Applicant appears to have conducted himself well.

If it were intended to rely upon the lack of qualifications on the part of the Applicant, then the Governor must satisfy himself that this is a relevant consideration which is taken into account when considering such applications generally. Similar considerations must also be taken into account if the issue of skills or abilities are considered to be a relevant factor. It must be borne in mind that the application is for Falkland Islands status, not a work permit.

With regard to the *second reason*, then I say only this. No evidence has been put before this Court to suggest that the Applicant has utilised the "qualification" of Doctor

of Philosophy to obtain employment or in such a way as to falsely enhance his application for Falkland Islands status or a permanent residence permit. If it were to be considered that the use by the Applicant of the title "doctor" or of any representations he may have made concerning the status of that degree are indicative of bad character, then again that fact, and the weight placed upon it, must be made clear.

For the avoidance of doubt, I am satisfied that the requirement upon the Principal Immigration Officer that notice of the application should be published in the appropriate journals has been satisfied. No further notice is required in relation to this application.

I would urge upon those offering advice to the Governor, and upon the Governor himself to consider the passage from Wednesbury set out above and to have regard to the overriding principles set out in the Constitution. In this case, there has been a failure to abide by either principle and accordingly I have quashed the decision. I do not know whether or not the Applicant's application for Falkland Islands status will be successful. If it is, that is the end of the matter. If it is not, then the reasons for refusing it must be clear and unambiguous and must be in accordance with the above directions. The factors to be taken into account are not necessarily limited to those which I have considered above and which were taken into account when earlier considering the application for status. It must however be clear to all that this applicant has not been treated differently from any other applicant.

Finally, for completeness, I will mention the issue of permanent residence. As it has been conceded by the Applicant that there is no outstanding application for a permit in this regard, the failure to make a decision cannot be open to challenge. In the event of that application being renewed or indeed having been renewed, then those considering the application shall in addition to considering the matters appearing at Section 18(4) of the Immigration Ordinance 1999 have regard to the general principles set out in this judgement and in particular implicit or explicit within the above directions.

I conclude with these remarks. The Applicant may well feel, rightly, that the Executive Council does not emerge from this case with any great credit. He may, however, wish to reflect upon the fact that he is to an extent the author of his own misfortunes. Whilst the fact that he has been penalised for his views is constitutionally and, if I may say so, morally indefensible, the Applicant's own attempts to bolster the provenance of those views by representing his academic background as something which it is not does him no credit.

Order as issued.

James Wood
Chief Justice of the Supreme Court

Dated this 25th day of November 2003