



IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: G169 of 2020  
Legal Aid No: LACV0109/2020

KATTINA ANGLIN

Plaintiff

-v-

THE DIRECTOR OF LEGAL AID

Defendant

IN CHAMBERS

Appearances: Mr Hugh Southey QC and Mr Rupert Wheeler of KSG Attorneys for the Plaintiff  
Mr Waide DaCosta for the Defendant

Before: Hon Mr Justice Alistair Walters (Actg.)

Heard: 9 August 2022

Draft Circulated: 15 August 2022

Judgment Delivered: 23 August 2022

#### HEADNOTE

Appeal against refusal of continuation of legal aid for appeal to Court of Appeal. Exercise of discretion by Director of Legal Aid, whether Public interest.

#### JUDGMENT

##### Summary of background

1. This is the hearing of an appeal by the Plaintiff against the rejection of her application for continued legal aid to pursue an appeal (the "Appeal") against the judgment of Justice Williams dated 28 March 2022. The Plaintiff seeks a declaration that she should be granted an extension of legal aid to pursue the Appeal and an order quashing the Defendant's (or the "Director's") decision of 11 April 2022 refusing to extend it.



2. The proceedings before Justice Williams involved a challenge by the Plaintiff by way of judicial review of the decision of His Excellency the Governor of the Cayman Islands (the “Governor”) made on 4 September 2020 to assent to the Civil Partnership Act 2020 (“CPA”) using his reserved power under s.81 of the Bill of Rights (Schedule 2 of the Constitution of the Cayman Islands) (“**the Bill of Rights**”). The CPA had been rejected by Parliament, but then enacted by the Governor using s.81.
3. In the judicial review proceedings, the Plaintiff submitted that this was an error of law because the enactment of the CPA was beyond the scope of the Governor’s reserved powers as defined by s.55 of the Bill of Rights. The Governor purported to pass the CPA using ss.81 and 55 to ensure that the United Kingdom was compliant with the European Convention on Human Rights. The key question in the application was whether or not the enactment of the CPA was a matter of “external affairs” and thus within the remit of the Governor’s reserved powers under s.55(1)(b). The Plaintiff argued that the CPA was not a matter of external affairs and could not be passed through the Governor’s reserved powers. The Plaintiff’s case was that had the United Kingdom wished to pass the law, it could have done so through the Order in Council route under s.125 of the Constitution, but not through the Governor.
4. The Plaintiff had been granted legal aid in relation to the judicial review proceedings. In her affidavits dated 9 August 2021, 15 October 2021 and 19 May 2022 she explains that her original application for legal aid was made on 31 August 2020. The Plaintiff had sought contributions to her initial legal costs and donations were made into a mixed use account in the name of the Christian Association for Civics and Political Education (the “Association”) with which the Plaintiff is associated. The grant of legal aid was subject to three mandatory contributions which were met via donations. The affidavits sworn by the Plaintiff also outline her personal financial position and confirm that she has limited personal means with which to fund the legal fees associated with both the judicial review and the Appeal. The Plaintiff’s evidence is that her means have not changed since her first application for legal aid was made and she has confirmed that neither she nor the Association has received any further donations towards her legal fees and that the Association does not intend to solicit any. This evidence had not been challenged or questioned.
5. On 5 April 2022, KSG, the Plaintiff’s attorneys applied for an extension of legal aid to allow her to appeal against the decision of Justice Williams (the “Judgment”).



6. On 5 April 2022, the Director refused that application. The 5 April 2022 refusal certificate stated:

*“[h]aving reviewed the judgment of the court and section 5 of the Legal Aid Act, an extension of this certificate is refused. If the Applicant seek to further appeal of this matter, they should make their own private arrangements with counsel. Circumstances do not justify the expenditure of public funds.”*
7. On 11 April 2022, KSG requested reconsideration of this decision under s.37 of the Legal Aid Act (the “Act”). The reconsideration request attached an advice note from Mr Hugh Southey QC and also provided the Plaintiff’s skeleton argument from the judicial review application and the Judgment.
8. On 26 April 2022, following reconsideration, the Director refused the further application. The reasons provided for this refusal simply state that the Director reviewed the submissions and the Judgment and concluded that the Director was of the view that: *“It is highly unlikely that an appeal will be successful as the use s.81 of the constitution was not an error in law and well with the scope of the Governor’s responsibilities...”*
9. In the meantime, on the 11th April 2022 the Plaintiff filed a notice of appeal against the Judgment. The progress of that appeal awaits the outcome of this legal aid appeal.
10. Returning to the question of what information was available to the Director for the purposes of her reconsideration of the application for an extension of legal aid, Mr Southey’s note read as follows:

*“1. The purpose of this note is to consider whether an appeal should be funded in this matter.  
2. It would appear clear that it was concluded by the Legal Aid Officer before the hearing in the Grand Court that matters raised by this case were important enough to justify funding. Had that not been the case, funding would not have been granted. That conclusion is not surprising as this claim raises important issues about the powers of the Governor. It should be noted that Richard Williams J expressly noted that the application for judicial review raised a ‘matter of general public importance’ [12]. The significance of the importance of the issues is clear. In re appeals by Governing Body of JFS and others [2009] 1 WLR 2353 the United Kingdom Supreme Court noted the importance of funding appeals where:*

*...the issues raised on the appeal are of general public importance which it is in the public interest to resolve and his case on these issues is unlikely to be properly argued unless he continues to be funded by the Legal Services Commission. [22]*



*As I understand it, this case is one that is both important and where legal representation depends upon Legal Aid funding.*

*3. This note should be read with the skeleton argument submitted to the Grand Court. That sets out the arguments in support of the application for judicial review. It appears to me that the arguments continue to have merit. Nothing in the reasoning of Richard Williams J undermines them. I would emphasise the following:*

*a. The judge found that section 78(2)(c) of the Constitution is otiose but had been enacted as a consequence of the application of a 'belt and braces' approach [49]. That was material as the Respondent accepted that he could only succeed if section 78(2)(c) was otiose. However, '[t]he presumption is that the legislature does nothing in vain' (section 13.6 of Bennion, Bailey and Norbury on Statutory Interpretation). There is no example identified by any party of legislatures adopting otiose provisions.*

*b. The judge did not adequately address the Applicant's arguments about the dualist legal system. The argument was not that the United Kingdom had no power to impose legislation. It was that in a dualist system, compliance with international obligations is not an external matter. That is why the Constitution appears to distinguish between 'external affairs' and compliance with international obligations (section 78).*

*4. I am willing to provide a more detailed analysis if that would assist the Legal Aid Officer."*

## **LAW**

11. An assisted person may appeal to a judge in chambers where they are refused legal aid or legal aid is withdrawn (s.38 of Act).

12. Under s.4(6)(e) of the Act, legal aid may be granted for the purpose of appeals in civil cases subject to sub-s.(3) and (5), neither of which apply here.

13. Under s.5 of the Act,

*"[l]egal aid in civil proceedings may only be granted if the Director is satisfied, after making inquiries under section 16, that the applicant appears to have a reasonable prospect of succeeding on the merits of the case."*

14. Under s.16:

*"Power to make inquiries*

*16. (1) Where an application for legal aid is made, the Director —  
[...]*

*(b) shall make such inquiries as to the means and condition of the applicant and as to the merits of his case;*

*(c) shall require the applicant to furnish such information and documents as the Director may require for the purpose of considering his application; and*



*(d) shall require the applicant to attend personally before the Director unless the Director considers this to be unnecessary or the circumstances of the applicant do not permit such attendance.”*

15. Under s.17(1) of the Act,

*“A legal aid certificate may be granted to an applicant by the Director if his disposable income is the prescribed amount or less”.*

Disposable income is calculated by reference to the Legal Aid Regulations, 2016 (the “Regulations”) (s.18).

16. Under s.17(3), applicable in this case because legal aid is not available as of right pursuant to s.17(2), the Director shall consider whether it is in the interests of justice to grant legal aid.

17. Under s.17(4), in considering whether it is in the interests of justice to grant legal aid under sub-s.(3), the Director shall consider:

*“(b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;*

*[...]*

*(e) whether it is in the interests of another person that the person be represented.”*

18. Under s.8 of the Regulations:

*“Grant of certificate in civil proceedings:*

*8. (1) A certificate shall be granted if the Director is satisfied that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.*

*(2) In determining whether the applicant has the means to retain the attorney-at-law to represent him in any civil proceedings the Director shall have regard to —*

*(a) the amount of the applicant’s disposable income;*

*(b) the applicant’s ability to obtain employment;*

*(c) the nature and complexity of the proceedings or intended proceedings; and*

*(d) the likely cost of the proceedings.”*

### **Positions of the parties**

19. The Judgment set out clearly the background to the issues leading to the judicial review. The judge summarized the position as follows:

*“12. At the end of the hearing, I adjourned the matter in order to prepare and then deliver this reserved written judgment. When determining the issues dealt with in this Judgment, I have considered the written and oral submissions received from each Counsel, as well as the content in the core bundle and the bundles of authorities. The challenge raised in relation to the scope of the reserved powers of the Governor under s.81 of the Constitution*



*is a matter of general public importance. There appears to be no case precedent on the issue in the Cayman Islands or any other British Overseas Territory and, in such circumstances, although I am grateful to the parties for their patience in waiting for the handing down of this Judgment, the parties will hopefully understand that this decision could not be rushed as the material submitted and submissions made merited a thorough review.”*

20. On any analysis, this is an unusual case raising issues of law that are unexplored from a judicial perspective and substantive.
21. Mr Southey argues that the bases for the Plaintiff’s appeal as identified in his note dated 9 April 2022 carry with them a reasonable prospect of success before the Court of Appeal. He stresses the fact that when refusing legal aid the Director failed to address those arguments at all and provided no reasoning as to why those arguments do not or might not have a reasonable prospect of success.
22. Mr Southey also argues that s.17(4) of the Act requires the Director to consider whether it is in the interests of justice to grant legal aid. He says that a proper consideration of that factor would have resulted in it being granted.
23. It is stressed on behalf of the Plaintiff that the determination of the matter involves consideration of a substantial question of law (s.17(3) (b)). In that regard Mr Southey points to the comments of Justice Williams which I have set out above. He also highlights the extensive team of lawyers representing the Defendant, and the fact that the Colours Caribbean was given leave to intervene.
24. He argues that there is no doubt that it is in the interest of other persons that legal aid be granted (s.17(3)(e)). There is limited case law and jurisprudence in relation to the questions raised on this case and they are of significance to both the Cayman Islands and other British Overseas Territories where there are similar provisions regarding reserved powers.
25. Mr Southey relies on the case of *In re appeals by Governing Body of JFS (SC)*<sup>1</sup>. That is a decision of the English Supreme Court involving the position taken by the English Legal Services Commission<sup>2</sup> to require that a legally aided party must apply for a protective costs order prior to being granted an extension of legal aid to defend an appeal. The protective costs order would

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<sup>1</sup> [2009] 1 WLR 2353.

<sup>2</sup> The body which ran the legal aid scheme in England from 2000 – 2013 when it was replaced by the Legal Aid Agency.



prevent any of the other parties seeking an order for costs against the Legal Services Commission in the event that the legally added party was unsuccessful. On the hearing of the application for the protective costs order, the Supreme Court set out some general principles relating to the provision of legal aid:

*“It should be understood, as a principle of general application, that if the Legal Services Commission decide to fund a litigant whether by way of claim or a defence who is successful in his cause, that decision must ordinarily be seen to carry with it something close to an assurance that the commission will continue to support him in any subsequent appeal by the unsuccessful party whilst he remains financially eligible. This will particularly be so where (a) the withdrawal of support would expose the publicly funded litigant to a substantial risk for future costs, (b) he retains a significant interest, quite apart from his interest in resisting any future costs liability, in maintaining his success in the litigation and (c) the issues raised on the appeal are of general public importance which it is in the public interest to resolve and his case on these issues is unlikely to be properly argued unless he continues to be funded by the Legal Services Commission. All three of these circumstances prevail in this case.”<sup>3</sup>*

26. The Court reiterated that:

*“... it is essential that there should be representation for both sides before the court. The case raises issues of considerable public importance, and it is plainly in the public interest that both sides of the argument should be properly presented.”<sup>4</sup>*

27. Mr Southey says that factors (a), (b) and (c) identified by the Supreme Court and as set out above apply in this case as does the need for equality of arms.

28. The one major difference between this case and the case of *JFS* case is that in this case the Plaintiff is the appellant. The Plaintiff is not being forced to respond to an appeal by the Defendant.

29. Finally, Mr Southey raises the statement by the Director that the Applicant has the means or access to means to make her own private arrangements with counsel. As outlined above, the Plaintiff did receive some initial donations towards her legal costs but she has made it clear in her affidavits that there will be no further solicitation for donations and that her circumstances have not changed, meaning that she does not have the means to fund the appeal personally.

30. The Director does not explain her statement in any more detail and Mr Southey argues that the Director cannot now rely on the initial donations as a basis for rejecting the extension of legal aid.

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<sup>3</sup> Paragraph 22.

<sup>4</sup> Paragraph 16.



31. In reply Mr DaCosta argues as follows:

31.1 When refusing legal aid, the Director took account of the note from Mr Southey, the written submissions provided, the Judgment and relevant case law and formed the view that it was highly unlikely that an appeal will be successful. On that basis, the circumstances do not justify the use of public funds. Mr DaCosta referred at length to the Judgment and relied on the reasoning of the judge himself to justify the decision of the Director.

31.2 Mr DaCosta referred to two Cayman Islands cases in which the Grand Court heard appeals against the exercise of discretion by the Director to refuse legal aid. The first is a decision of Dame Linda Dobbs dated 14 August 2020<sup>5</sup> in which the court was satisfied that there was no public interest and no reason for the Director to exercise her discretion in the appellant's favour.

31.3 The second is a decision of Justice Cheryll Richards QC dated 22 January 2020<sup>6</sup> in which the judge declined to interfere with the decision of the Director who had a discretion as to what inquiries to make prior to taking a decision about the grant of legal aid and in circumstances in which the matter was not complex, did not involve a substantial question of law and did not relate to a matter of public interest.

31.4 Mr DaCosta emphasized the duty that the Director owes in relation to the expenditure of public funds. He also emphasized that just because legal aid had been granted for the judicial review proceedings did not mean that it can be guaranteed for any further appeals.

32. During the course of submissions Mr DaCosta accepted that the case involves matters of public interest and was unable to amplify the rationale of the Director in relation to question of the means of the Plaintiff other than to agree with me when I asked whether the Director might have simply assumed that the Plaintiff might be able to rely on donations again.

### **Analysis and conclusion**

33. There is no doubt that the Director has a discretion in relation to the grant of legal aid and that the Director can make such inquiries as she sees fit. There is no suggestion that the Plaintiff's means

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<sup>5</sup> LACV 30/2020, *in the matter of an Application for Legal Aid by Applicant Rick Lee, And in the matter of an Appeal against the decision of the Director of Legal Aid.*

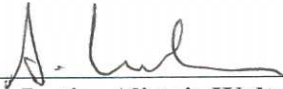
<sup>6</sup> LACV 0119/2016, *In the matter of an Appeal of the decision of the Director of Legal Aid and in the matter of the Appellant Ani Sobeyda Scott.*



have changed since she was originally granted legal aid. It is accepted by all parties that this is a case which does not involve any disputed facts but does involve a substantial question of law. It is also accepted that it raises matters of public interest.

34. I am satisfied that the note from Mr Southey outlining the basis of the Plaintiff's appeal does demonstrate, when read in conjunction with the written submissions and the Judgment that there is a reasonable prospect that the Plaintiff's appeal will succeed. These are novel questions of law and, in my view, it was unreasonable for the Director to discuss summarily the prospects of success without providing any reasoning for that decision. To simply rely on the judge's own reasoning in the Judgment without addressing the proposed grounds of appeal is, in my view, insufficient.
35. Similarly, I regard it as unreasonable to assume (if that is what the Director did) that the Plaintiff might be able to obtain donations from the public towards her legal expenses. There was no evidence to suggest that otherwise the Plaintiff's means had changed.
36. Regardless of the question of the Plaintiff's prospect of success on appeal, there is no suggestion that the Director considered in accordance with s.17(4) whether it was in the interests of justice to grant legal aid.
37. In my view this is a case which is unusual and which indisputably raises issues of significant public importance. Based on the facts of this case, I am satisfied that the factors as outlined in *JFS* are applicable here albeit that it is the Plaintiff as the applicant for legal aid who is appealing. On the basis that the appeal does demonstrate a reasonable prospect of success on the merits and there is no change in the Plaintiff circumstances then there must be an expectation (as opposed to an assurance) that legal aid will be available to fund an appeal. The withdrawal of support would expose the Plaintiff to a costs risk in the event that she pursued the appeal without legal aid. However, I do not regard that as the most significant factor that is relevant here. The more material issues are that the Plaintiff maintains a significant interest in arguing her position in the litigation and in my view, most importantly, the issues raised on the appeal are of general public importance which are unlikely to be argued unless legal aid is granted. Added to that is the fact that if the matter is to proceed to appeal, the Plaintiff should be represented to ensure that her arguments are properly presented.
38. On the basis of the above, I grant the relief sought by the Plaintiff; namely, that the Plaintiff should be granted an extension of legal aid to appeal against the Judgment, subject and limited to the cost

estimates already provided to the Director and that the Director's decision of 11 April 2022 refusing the extension of the Plaintiff's legal aid be quashed.



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**Hon. Mr Justice Alistair Walters**  
**Acting Judge of the Grand Court**