



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

Grand Court Cause No. G 22 of 2023

BETWEEN

FELINE FRIENDS LIMITED

Applicant

-and-

THE CABINET OF THE CAYMAN ISLANDS

Respondent

-and-

THE NATIONAL CONSERVATION COUNCIL

Interested Party

ON THE PAPERS

Before: Hon Justice Marlene I. Carter (Actg.)

**Parties: Jackson Law for the Applicant
Attorney General’s Chambers for the Respondent and Interested Party**

Decision: 4 April 2023

Ruling on Application for leave for Judicial Review

1. The Applicant seeks leave to apply for judicial review of the decision of the Respondent to promulgate the National Conservation (Alien Species) Regulations 2022, (“the Regulations”), pursuant to Section 50 (1)(h) of the National Conservation Act (“the NCA”)

The Parties

2. The Applicant is a Cayman Island registered not-for-profit limited liability company engaged in, amongst other aims, the care of feral and abandoned cats in the Cayman Islands.
3. The Respondent is the Cabinet of the Cayman Islands who promulgated the Regulations, pursuant to the NCA.
4. The Interested Party is established by section 3(1) of the NCA and is charged with exercising its powers and carrying out its duties under that Act.
5. The Relief sought by the Applicant on the review is set out at page 1 of the Application for leave ("the Application") and consists of an order of certiorari or alternatively an order of prohibition as well as a declaration that the provisions of Part 3 of the Regulations are ultra vires and/or incompatible with Sections 15 and/or 19 of the constitution. The Applicant seeks a stay of the Regulations, particularly Part 3 thereof. Alternatively, the Applicant seeks an interim injunction to prevent the enforcement of Part 3 of the Regulations at this stage.
6. The Application was initially placed before this court to be considered *ex parte*. The court's attention was drawn to a letter from the Attorney General, counsel for the Respondent and the Interested Party which referred to the fact that the Pre-Action Protocol¹ ("the Protocol") had not been complied with. The Letter before Action was sent to the Attorney General's Chambers on the 30th of January 2023. The Application was filed on the 3rd February 2023. The Respondent and the Interested Party were therefore not afforded the requisite 14 days, as per the Protocol, to consider their position before the Application was filed.
7. The court determined that an *inter partes* hearing was appropriate and invited the Attorney General to attend.
8. The court was thereafter informed of the inability of the parties to agree a date for hearing before 28 April 2023. In an effort to have the views of all of the parties, and not wanting to delay consideration of the application the court invited counsel or the Respondent and the Interested Party to set out their position in writing, if they were so minded, by 13th March 2023.
9. The Attorney General has now filed submissions and authorities for the Court's consideration.

¹ GCR Order 53 as read with Practice Direction no. 4 of 2013

The Pre-Action Protocol

10. The Respondent submits that the court should not grant leave based on the Applicant's non-compliance with the Protocol. The Protocol states at paragraph 3:

"3.1 The Parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. Both the applicant and the defendant may be required by the Court to provide evidence that alternative means of resolving their dispute were considered. The Court takes the view that litigation should be a last resort, and that proceedings should not be issued prematurely when a settlement is still actively being explored. Parties are warned that if the protocol is not followed (including this paragraph) then the Court may have regard to such conduct when determining costs. However, parties should also note that an application for judicial review "shall be made promptly and in any event within 3 months from the date when grounds for the application first arose."

11. The Applicant's pre-action protocol letter of 31st January stated, inter alia:

"9. In order to avoid unnecessary time and expense, Cabinet is asked to consent to a voluntary Stay of the Regulations, pending resolution of the disputed and/or the until the Court has determined the claim.

.....

11. In light of the short timeframe, we are unable to provide you with the usual 14 days to respond to the subject letter and we therefore propose to file the application for leave for judicial review with the Grand Court on the 2 February 2023 and would therefore welcome your response to this letter on or before the 1 February 2023."

12. At paragraph 10 of the affidavit of Patricia Bodden, the Director of the Applicant, the following is stated:

"10. I first became aware of the National Conservation (Alien Species) Regulations (the "Regulations") on or about the 14th December 2022, when I came across an article in the Cayman Compass. It took me some time to make sense of the contents of the Regulations,... After the Christmas and New Year holidays, I was able to contact legal counsel to undertake a review of the regulations on or about mid-January 2023 and advise Feline Friends as to the effect of the regulations on the charity. Once onboarding was completed and we received the relevant advice we felt constrained to file this application for leave for judicial review."

13. The affidavit of Gina Ebanks-Petrie was filed in support of the Respondent and the Interested Party. Ms. Ebanks-Petrie is the Director of the Department of the Environment and a voting member of the National Conservation Council. At paragraph 4 of her affidavit filed in these proceedings, regarding the filing of the Application without counsel having had an opportunity to respond to the letter before action, she stated: *"This unilaterally ended any pre-litigation opportunity for Alternative Dispute Resolution as required by the Protocol."*
14. The contents of paragraph 5 and that affidavit is also noted:
 - “5. *I have been advised by Counsel and do verily believe the same to be true that, upon examination of the actual grounds filed, there were material differences observed from what issues and grounds had been outline in the Letter. In fact, many of the grounds were new and others were materially altered. To date, the Applicant has failed to respond to our Counsel’s letter of 1st February 2023, nor has the Applicant explored or undergone ADR. The Respondent and Interested Party are not averse to ADR, especially where it may significantly reduce the number of grounds or eliminate the need for a judicial review altogether.”*
15. The Attorney General submits that the court should not grant leave based on the Applicant’s non-compliance with the Protocol. The Protocol *"sets out a code of good practice and contains the steps which parties should generally follow before making an application for judicial review."* While the court will always endorse full compliance with the Protocol and encourage engagement between parties before litigation of this nature is embarked upon to explore alternative methods to resolve the issues between them or, at the very least, to narrow those issues, non-compliance with the Protocol is not determinative of an application for leave.
16. Paragraph 12 of the Protocol states: *"An application should not normally be issued until the proposed date for reply given in the letter before action has expired, unless the circumstance of the case require more immediate action to be taken."* It appears from the tenor of the Applicant’s affidavit and the Letter before Action that the Applicant was keenly conscious of the time limit for filing the application. The Applicant seemingly concluded that the circumstances of the case required immediate action be taken.
17. Any issue as to the conduct of the Applicant in this regard and consequences flowing therefrom are matters that may be considered at a substantive hearing stage.
18. Section 50 (1) (h) of the National Conservation Act states that the Cabinet may make regulations *"controlling or regulating population of alien or genetically altered species;"* The Applicant states in paragraph 5 of its application that-

“5. Pursuant to its Mandate the Applicant has provided free community trap-neuter-and-release, health care and feeding programs on Grand Cayman for stray and feral cats since 2011. The Applicant is severely impacted by the promulgation of the Regulations as it has provided free community spay, neuter and release programs, feeding programs of established neutered and spayed cats and provided general veterinary medical care wherever necessary for stray and feral cats throughout the Islands, albeit primarily in Grand Cayman, which programs have now been prohibited or severely impacted by the Regulations under threat of criminal penal sanction.

.....

7. The Regulations refer to “Domestic Cat” and provide that if it is living in the wild, defined as any area which is not under active management and control of any person may “destroy” the cat “in a manner which does not cause unnecessary suffering”. The Regulations also provide that it is an offence to feed such a cat. A person contravenes the Regulations is liable to penalties under section 38 of the Act, which provides that a person who commits an offence under the Act is liable on conviction to a fine of five hundred thousand dollars or to imprisonment for a term of four years, or both.”

19. I am satisfied that the applicant has a sufficient interest in the matter to which this application relates.

The grounds of the application

20. There were four main grounds of the application each of which involved consideration of several aspects of the Regulations. These were set out at pages 13-18 of the Application. In summary these were:

- (i) the Regulations are unlawful and/or ultra vires in
 - (a) In exceeding the scope of the NCA as the Regulations purport to extend beyond the overall remit of the NCA by creating definitions for terms whereby those definitions effectively alter the spirit and intent of the NCA.
 - (b) Regulation 16 authorizes actions beyond the scope and remit of the NCA and procures or intends to authorize persons to commit offences against the Animals Act and/or the Penal Code.
 - (c) Part 3 of the Regulations are in conflict with the provisions of the Animals Act.

- (d) Regulation 15 purports to grant the Director of the Department of the Environment authority that exceeds her statutory powers under the NCA.
 - (e) The Regulations purport to usurp and/or displace the powers and duties of the Department of Agriculture and the Director of Agriculture under Section 70(8) of the Animals Act.
- (ii) the promulgation of the Regulations was irrational since:
- (a) Neither the cabinet nor the Interested Party were in possession of necessary independent scientific information /data to make a reasonable determination as to the need for and/or effect of the regulations.
 - (b) It was unreasonable to authorize private persons to kill an animal they believe to be a feral alien species or genetically altered species under stated provisions of the Regulations.
 - (c) The Respondent failed to consult with and/or reasonably take into considerations the views or the public and relevant stakeholders.
 - (d) Terms in Regulation 18 are undefined and ambiguous.
 - (e) Penalties imposed in Regulations 17 and 18 are manifestly disproportionate.
 - (f) The effects of Regulations 17 and 18 are counterintuitive and counterproductive.
 - (g) The Regulations purport to apply uniformly throughout the 3 Cayman Islands which is manifestly unreasonable as different considerations apply to the different islands and even within particular areas within grand Cayman.
- (iii) the promulgation of the regulations was procedurally unfair as the Respondent failed to confer with the Public, the Applicant and other relevant stakeholders despite being aware of the severe impact to the Regulations on such organizations
- (iv) The Regulations are incompatible with the Cayman Islands Constitution Order 2009
- (a) they threaten the unlawful interference with personal property rights protected by Section 15 of the Constitution including the personal rights to an animal and the personal rights to the enjoyment of property by feeding and/or providing water to alien species and genetically altered species thereon

- (b) the Regulations are in breach of Section 19 of the Constitution as the promulgation of same was not lawful, rational, proportionate and/or procedurally fair.

Court's considerations

21. In considering whether to grant leave to apply for judicial review the court's role is to consider whether *"there is some arguable case or claim which is not obviously untenable, vexatious or frivolous"*.²
22. In *Sharma v Brown-Antoine*³ it was further clarified that the applicant must demonstrate that it has arguable grounds for judicial review having a realistic prospect of success.
23. In *Shirley Tyndall O.J. et al v Hon. Justice Boyd Carey (ret'd) et. al.*⁴ Mangatal J. stated:
- "It is to be noted that an arguable ground with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful or frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth though it must ensure that there are grounds and evidence that exhibit this real prospect of success."*
24. This court is not now concerned with the merits of the claim. It is no part of my consideration at this stage to determine the issues raised by the affidavit of the Applicant. I am satisfied that the Applicant has met the required threshold on the application for leave. The grounds of challenge are not obviously vexatious or frivolous. There is an arguable case for the granting of the relief sought by the Applicant on grounds 1, 2 and 4. Leave is not granted regarding Ground 3 of the Application.
25. The applicant has also sought a stay of Part 3 of the Regulations pursuant to Order 53, rule 3(10) of the Grand Court Rules. The stay will be granted with respect to Part 3 of the Regulations with liberty to apply to the Respondent and the Interested Party.

Hon Justice Marlene Carter
Judge of the Grand Court (Actg.)



² Smith v Commissioner of Police [1980-83 CILR 126]

³ [2006] UKPC 57

⁴ 2010 HCV 00474, (Unreported) Mangatal J.