

**ND COURT OF THE CAYMAN ISLANDS****CAUSE NO: G255 OF 2022****IN THE MATTER OF THE MUTUAL LEGAL ASSISTANCE TREATY (UNITED STATES OF AMERICA) ACT (2015 REVISION)****IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW****IN THE MATTER OF AN APPLICATION FOR A CONFIDENTIALITY ORDER****Appearances:**

Mr Peter Hayden, Mourant Ozannes (Cayman) LLP on behalf of the Applicant

Before: The Hon. Justice Kawaley (in Chambers)**Heard:** On the papers**Judgment Delivered:** 1 December 2022**INDEX**

Leave to seek judicial review-relevant test for granting leave- sealing and confidentiality orders - Mutual Legal Assistance (United States of America) Act (2015 Revision), section 10—Cayman Islands Constitution, section 19(1) Grand Court Rules Order 53 rule 3

RULING ON EX PATE APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW

The application

1. The Applicant by Notice of Application dated 30 November 2022 primarily applies for leave to seek judicial review. The relief sought is an Order of Certiorari to quash the Notice to Produce Documents issued by the Cayman Mutual Legal Assistance Authority (the Authority) to the Applicant dated 19 October 2022 (the “Production Order”). The grounds on which this substantive relief is sought are that:

“...the Production Order is unreasonable, disproportionate and is not in accordance with the terms or spirit of the Mutual Legal Assistance Treaty (United States of America) Act (2015), nor the underlying terms of the Treaty to which the Act relates. The Production Order should be suitably refined and clarified by the Authority as proposed or, in the absence of such refinement and clarification, set aside.”

2. At the heart of the substantive proposed application is the Applicant’s contention that the Production Order’s terms are so wide that in the absence of clarification and/or refinement it would take 6 months to comply with. An extension of time for complying with the Production Order was agreed but that extension expires today; the attorneys for the Authority are apparently awaiting further instructions and the Applicant understandably wishes to avoid finding itself in breach of the Production Order. The fact of this initial extension of time agreement supports the arguability of the application to some extent.
3. Based on quick electronic searches I can find no published judgments on the terms and effect of section 7 of the Mutual Legal Assistance (United States of America) Act (2015 Revision) under which it appears the Production Order is made:

“Powers to compel witness or for production of evidence

7. (1) Where, in pursuance of the terms of a request, any person is required to testify or to produce in the Islands documentary information, which is in his possession or under his

control, the Cayman Authority shall have the same powers as the Grand Court for compelling that person to comply with the request; and if that person wilfully fails or refuses so to do he shall be liable to be dealt with by the Grand Court as if he had failed to comply with an order for a similar purpose issued by the Grand Court.

(2) A person required to testify or to produce documentary information shall have the right to be represented by an attorney when he does so.”

4. On its face, the Production Order is arguably unreasonable and/or disproportionate because:
 - (a) it seeks the production of broad categories of documents without any limitation of time;
 - (b) if the terms of the Treaty were complied with in the Request made to the Authority, it such a Request should ordinarily have included “*the time period to which any such evidence or information relates*” (Article 4 (2) (e)); and/or
 - (c) the Production Order fails to include any time for compliance with its clearly broad terms, and implies that compliance is possible “forthwith”.
5. The Applicant, after noting that the various legal grounds for judicial review (illegality, irrationality, procedural impropriety and proportionality) are not mutually exclusive¹, then pertinently points out in its counsel’s Written Submissions:

“4...Section 19(1) of the Constitution expressly introduces a new ground of proportionality into Cayman judicial review, in providing: All decisions of public officials must be lawful, rational, proportionate and procedurally fair.”

The legal test for granting leave

6. In *Cable & Wireless (Cayman Islands) Limited v. Information And Communications Technology Authority and Digicel Cayman Limited* [2008 CILR Note 6], the Cayman Islands Court of Appeal

¹ *R v Bridger, ex p. Henderson* [2009] CILR Note 4.

defined the test for whether or not leave to seek judicial review should be granted substantially in the following terms:

“In considering ex parte applications for leave to seek judicial review, the court had to have regard to (a) whether there was an arguable ground that the judicial review had a realistic prospect of success (which meant more than ‘potential arguability’ or a ‘strong argument’), not subject to a discretionary bar such as delay or an alternative remedy; (b) the fact that that test was flexible, to be applied with proper regard to the nature and gravity of the issue raised...”

7. That suggests a far higher threshold that has in recent times been applied by this Court to leave applications and it is impossible to readily verify the accuracy of the note of the report. I am accordingly content to accept the following submissions set out in the Applicant’s Written Submissions which support a more liberal approach:

“1. In respect of leave to apply, any application for leave is “is in the nature of an administrative procedure intended simply as a filter against frivolous, vexatious or hopeless applications for judicial review”: per Smellie C.J. in Cable and Wireless (Cayman Islands) Limited v The Information and Communications Technology Authority 2007 CILR 273 at [61].”

8. In *Re an Application to Seek Leave for Judicial Review* [2019 CILR 690] (at paragraph 29), a case where the function of the leave filter received the benefit of full argument (and upon which the Applicant relies), I cited the following passage from the speech of Lord Diplock in *Inland Rev. Commrs. v. National Fedn. of Self-Employed & Small Businesses Ltd.* [1982] A.C. 617 (at 642-643):

“Its [the leave filter’s] purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could

safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.”

9. As Richard Williams J also recently held in *Anglin-v-Governor of the Cayman Islands*, Cause No. G 169 of 2020, Judgment dated November 20, 2020 (unreported):

‘2... The purpose of the requirement for leave...is to eliminate at an early stage any applications which are frivolous or hopeless and to ensure that the matter only proceeds to a substantive hearing if there is a case fit for consideration. I bear in mind that leave should be granted if the Court thinks, on the material available and without going into the matter in depth, that there is an arguable case for granting relief.’”

10. Applying the test for granting leave contended for by the Applicant, it being obvious that the Applicant has sufficient interest, I grant leave to seek judicial review in the present case. The Application also sought the following ancillary relief:

“The Court file in respect of the Application be sealed, pursuant to Grand Court Rules Order 63, rule 3(4).”

Sealing of File

11. It is self-evident from the character of the underlying administrative proceedings, and in the interests of the Respondent Authority as well as the Applicant, that the file should be sealed as the Applicant properly suggests. Mr Hayden relies upon my own observations on this topic in a comparatively recent case²:

“46. I accordingly accepted the submission that a sealing Order was appropriate in the present case because, in circumstances where an application for leave to seek judicial review had been filed but not judicially considered, the open justice principle was (subject

² In the matter of Application for Leave to seek Judicial Review [2019 CILR 690].

to one caveat) not even engaged. Even it had been, the confidential nature of much of the material on the file justified a sealing Order in any event.”

12. In addition it seems obvious that a Confidentiality Order should be granted so that the proceedings (leave having been granted) can be anonymized before the originating process is entered in the public register.

Stay

13. It is equally clear that, as the Applicant contends, this is an appropriate case for the Court to direct pursuant to GCR Order 53 rule 3(10) that *“the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders”*.



**THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**