

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **CRIMINAL DIVISION**

3
4 **LACR0130/2020; CACR 1/2019 (Ind. 100/2017)**

5
6 **IN THE MATTER OF THE LEGAL AID ACT 2015**

7
8 **AND IN THE MATTER OF AN APPEAL AGAINST THE DECISION OF THE**
9 **DIRECTOR OF LEGAL AID PURSUANT TO SECTIONS 4 AND 38 OF THE LEGAL**
10 **AID ACT 2015 REVISION**

11
12 **AND IN THE MATTER OF AN APPLICATION BY THE APPLICANT DAVID KARL**
13 **LOBO**

14
15
16 **TAKEN ADMINISTRATIVELY ON THE PAPERS WITHOUT A HEARING**



21 **HEADNOTE**

22 *Legal Aid Act (2015 Revision) – Sections 38, 21(3) and 24(1) and (2) -*
23 *Reconsideration of Legal Aid application - Issues arising: complex legal aid*
24 *case, right to legal assistance.*

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28
29 **JUDGMENT**
30

- 1 1. The Applicant applied for an extension of his Legal Aid Certificate (LAC) to cover
2 an appeal against his conviction and sentence on the 22nd December 2016.
- 3 2. The appellant seeks to appeal the Director of Legal Aid’s decision not to grant the
4 extension of legal aid in order to engage foreign lead counsel in respect of the CACR
5 1/2019 (Ind. 100/2017) before the Cayman Islands Court of Appeal (CICA).

6 **THE FACTUAL CONTEXT OF THE APPEAL AGAINST THE DIRECTOR’S DECISION**

- 7 3. An initial application for Legal Aid was granted to the Appellant on the 5th of May
8 2020 – LACR 130/2020. This grant was subject to a cap of \$5000.00 only, not to be
9 exceeded without further grant or approval.
- 10 4. On the 2nd of June 2021, the CICA ordered that the matter be listed for hearing at the
11 next session of the Court.
- 12 5. On the 21st July 2021, the Legal Aid Director (hereinafter ‘the Director’) received
13 correspondence from the appellant who attached correspondence addressed to his
14 counsel. The Director then wrote to the Appellant’s counsel on 26th of July noting
15 the contents of the correspondence and the directions from the CICA.
- 16 6. The Director requested “*a substantive response from Listed Counsel on the matter*
17 *to better appreciate the issues at hand and whether there are any pending extension*
18 *applications for consideration.*”
- 19 7. The application for extension of Legal aid so that the appellant could have the
20 assistance of Queen’s Counsel was made by counsel for the appellant on the 23rd
21 August 2021. Counsel referred to the correspondence received by the Director from
22 the appellant on the 21st July 2021 and stated further:



1 *“The basis of the application is set out by Mr. Lobo. However most significant*
2 *is the allegation made by Mr. Perez Ruiz regarding [PM]¹”.*

3
4 Counsel went on to state:

5
6 *“The allegations being made in the grounds of appeal are not complex.*
7 *However, the need for external counsel will arise in this limited way. There is*
8 *going to be an exploration of the relationship between a particular member of*
9 *the bar and [PM]. For this reason and this reason only it is asked that Mr. Lobo*
10 *is represented by queens (sic) counsel at an appeal hearing...”*

11
12
13 8. Counsel also indicated that an additional reason for ‘alternative counsel’ was because
14 counsel was suffering the ill effects of COVID-19.

15
16 9. This application for an extension was refused. On the 23rd August the Director
17 responded as follows:



18 *“Legal Aid Extension: Refused*

19 *Further to reviewing counsel’s request dated 23rd August 2021, the Assisted*
20 *Person[s] correspondence dated 10th August 2021 and reviewing the matter*
21 *generally the threshold for the appointment of Lead Counsel (foreign or local)*
22 *had not been met I[n] accordance to the law. While it is accepted that the issues*
23 *raised may be considered sensitive, it is not considered complex in terms of s24*
24 *of the Legal Aid Act. It would seem the Crown is being represented by local*
25 *Crown Counsel and the Assisted Person current Listed Counsel – Ms. Fosuhene,*
26 *is considered a senior capable Attorney at the local bar and this appeal matter*
27 *is well within her capabilities having handled such sensitive matters previously.*

28
29
30 *However, having regard to counsel’s current situation, if she can identify an*
31 *attorney at her firm or other suitable Listed Counsel to support her on the day*
32 *of the hearing and provide us with an estimate of time required for counsel to*
33 *prepare, review [the] matter and attend the 4 hour appeal hearing with Ms.*

¹ Anonymised

1 *Fosuhene, we will consider adding another local counsel to assist. Counsel shall*
2 *revert to the Director on or before the 26th August 2021 with the details if this*
3 *option is accepted.”*
4

5 10. The appellant made a request for a reconsideration of the Director’s decision to
6 refuse the extension of legal for lead counsel on the 24th of August 2021. On the 25th
7 of August 2021 the appellant wrote to the Director outlining the reasons why he
8 submitted that his application had met the threshold “that deems the matter [appeal]
9 complex” pursuant to s.24 of the **Legal Aid Act**. The appellant wrote:

10
11 (a) *The commission of the offence to which the case relates has given rise to*
12 *national publicity and widespread public concern and has prejudiced my*
13 *case. My appeal hearing alone will give rise to national publicity and*
14 *widespread public concern, given that I was previously employed as a*
15 *Customs Officer. Also, the fact that the ex-Director of Public*
16 *Prosecutions and Attorney Alexander Davies have allegedly conspired to*
17 *induce a witness to testify.*

18 (b) *A successful defense to the charges requires highly specialist knowledge.*
19 *A lead counsel with the experience to successfully argue the allegations*
20 *made in the affidavit and unravel the complexities in and of itself is*
21 *undoubtedly necessary to prove that my conviction was unsafe.*

22 (c) ...

23 (d) ...

24 (e) ...

25 (f) ...

26 (g) *The offence attracts a sentence exceeding ten years. In my case, the*
27 *sentence attracted a sentence of 16 years, which is exceedingly*
28 *excessive.”*



1 11. On the 31st August 2021, the application for reconsideration was deferred. The
2 Director stated as follows:

3 *“Legal Aid Extension (reconsideration of QC): Deferred.*

4 *Further to the Assisted Person's response received 24th and 25th August 2021,*
5 *the Director's observes that Listed Counsel has not responded to the offer*
6 *provided of assistance of a second local Attorney for the hearing and other*
7 *matters. While note is taken of the detail response of Mr. Lobo, the Director*
8 *expects Listed Counsel to also address the issue. As we take note that the matter*
9 *is listed for hearing on the 3rd September 2021 and Mr. Wainwright from the*
10 *ODPP is listed as representing the Crown at the hearing.*

11
12 *Further to the detailed decision and proposal made 23rd August 2021, the*
13 *Director seeks a substantive response from Ms. Fosuhene on the matter, as we*
14 *are advised that the Crown is not using a Lead Counsel (foreign or local), the*
15 *position was properly considered previously and the hearing is scheduled for*
16 *this week. The response of counsel is requested so that the Director can properly*
17 *reconsider the request.”*

18
19
20 12. In her response to the Director, counsel for the appellant noted:

21 *“It is asked that there be limited grant of legal aid for Mr. Lobo to be represented*
22 *by QC who can be briefed by me but as any QC may be able to attend via zoon*
23 *for any hearing the costs could be minimized as the only additional cost would*
24 *be the call fee and the cost of the work permit.”*



25
26 Counsel offered that *“an experienced QC should be able to grasp the nettle rather*
27 *quickly... and then deal with the matter in short order when it comes to court.”*

28
29 13. Subsequent to this response from counsel for the appellant, the application for
30 reconsideration, was refused on the 1st September 2021. The Director set out the
31 following reasons.



1 “1. *The current case before the Court of Appeal and additional allegations*
2 *of possible collusion is not deemed complex in nature. This point may*
3 *have been accepted by counsel {23rd August 2021), as she advised in*
4 *email correspondence, "The allegations being made in the grounds of*
5 *appeal are not complex. However, the need for an external counsel will*
6 *rise in this limited [way].There are going to be exploration of the*
7 *relationship between a particular member of the defence bar and Mr.*
8 *Moran". We believe at the Court of Appeal level, this matter can be*
9 *adequately addressed in a manner by Counsel or the Court without the*
10 *need for a foreign lead Counsel. The issues are sensitive in nature but*
11 *not complex.*

12
13 2. *The Legal Aid Act limits the Director's ability to provide a foreign lead*
14 *counsel save and except in certain circumstances and this matter does*
15 *not reach that threshold for a foreign lead counsel. Section 21(3) stated,*
16 *"The Director shall not approve the engagement of foreign counsel to*
17 *conduct any legal aid case unless such case is a complex one and it is*
18 *not possible to assign the services of a generally admitted attorney-at-*
19 *law because - (a) every reasonable effort has been made to obtain the*
20 *services of a listed attorney-at-law for the assisted person; and (b) there*
21 *is no generally admitted attorney-at-law on the Islands who is willing*
22 *and able to advise or represent that person. Neither the Assisted Person*
23 *or (sic) Counsel has adequately addressed this matter. There are senior*
24 *Attorneys available at the local bar who do not have a close working*
25 *relationship with the Attorneys mentioned, that if possible can assist*
26 *with this matter. The Director was not provided with a list of local*
27 *Attorneys who have been approached and rejected the brief.*

28
29 3. *In determining whether the matter was complex, the Director reviewed*
30 *section 24(2) and in this case, three criteria was not found or accepted*
31 *(the Assisted Person's correspondence dated 25th August 2021 noted but*
32 *point (b) not accepted.*

33
34 *In all circumstances the expenditure is not a justified public expense at*
35 *this stage and the Director has made reasonable proposals for the Listed*



1 THE STATUTORY CONTEXT OF THE PRESENT APPLICATION

2
3 18. Sections 21(2) and (4) of the Legal Aid Act state as follows:

- 4
5 ”21. (2) *The Director shall not approve the engagement of foreign*
6 *counsel to conduct any legal aid case unless such case is a*
7 *complex one and it is not possible to assign the services of a*
8 *generally admitted attorney-at-law because-*
9 *(a) every reasonable effort has been made to obtain the*
10 *services of a listed attorney-at-law for the assisted*
11 *person; and*
12 *(b) there is no generally admitted attorney-at-law on the*
13 *Islands who is willing and able to advise or represent*
14 *that person.*
15 (3) ...
16 (4) *For the purposes of this section, “foreign counsel” means an*
17 *attorney- at-law of a Commonwealth jurisdiction who is*
18 *engaged from outside of the Islands to undertake legal aid*
19 *services in the Islands pursuant to this Law.”*
20
21

22 19. Section 24 of the Act states:

- 23
24 “24. (1) *The Director may procure, by contract, legal aid services on*
25 *behalf of assisted persons in certain criminal cases which he*
26 *determines, in accordance with subsection (2), to be complex*
27 *legal aid cases.*
28 (2) *In determining whether a matter is a complex legal aid case the*
29 *Director shall take into account whether the case satisfies at*
30 *least three of the following criteria -*
31 *(a) the commission of the offence to which the case relates*
32 *is likely to give rise to national publicity and*
33 *widespread public concern;*
34 *(b) a successful defence to the charges requires highly*
35 *specialist knowledge;*
36 *(c) the elements of the offence are of a technical nature*
37 *and a successful defence requires an attorney-at-law*
38 *with the relevant technical legal knowledge;*
39 *(d) the elements of the offence involve an international*
40 *dimension;*
41 *(e) a successful defence against the charges requires a*
42 *combination of legal, accountant, investigative and*
43 *other expert skills;*
44 *(f) the charges are based on allegations of terrorism;*
45 *(g) the offence attracts a sentence exceeding ten years;*
46 *(h) the offence is of a violent or sexual nature involving*
47 *multiple victims; or*
48 *(i) the offence involves complex financial or legal*
49 *transactions or records.”*
50



1 COURT'S CONSIDERATION AND DETERMINATION

2
3 20. Section 21(2) is mandatory in nature. The Director cannot engage foreign counsel
4 to conduct a legal aid case unless the two aspects of subsection 2 are satisfied. In
5 the reasons for her decision the Director addressed each of aspect of the subsection
6 – the complexity of the case and the efforts to engage a listed or generally admitted
7 attorney at law – as follows:

8
9 *The complexity of the case*

10
11 21. The Director found that the appellant's case was not complex in nature. She relied
12 specifically on the indication in correspondence addressed to the Director on the 21st
13 July 2021 from the appellant's then counsel, Ms. Fosuhene, that "*the allegations*
14 *made in the grounds of appeal are not complex.*" Counsel, Ms. Fosuhene expressed
15 further that: "*the need for external counsel will arise in this limited way. There is*
16 *going to be an exploration of the relationship between a particular member of the*
17 *bar and Mr. Moran. For this reason and this reason only it is asked that Mr. Lobo*
18 *is represented by queens counsel at an appeal hearing...*"

19
20 22. The Director also addressed s.24(2) of the Act in seeking to determine whether the
21 case was a complex one. Section 24(2) stipulates:

22 *"In determining whether a matter is a complex legal aid case the Director shall*
23 *take into account whether the case satisfies at least three of the following*
24 *criteria..."*

25
26
27 23. The Director considered whether the 3 criteria that the appellant had suggested in his
28 letter of 25th August 2021, together met the threshold for his case to be deemed
29 complex. The Director accepted that while (a) and (g) of s.24(2) were satisfied, she
30 was unable to agree with the appellant that s.24(2)(b) was also satisfied; s.24 (2)(b)



1 being that “*the successful defence of the charges require highly specialist*
2 *knowledge*”.

3
4 24. I am satisfied that there is nothing to support the appellant’s suggestion that the
5 successful defence to the charges requires highly specialist knowledge. There was
6 nothing before the Director from which she could have made that finding. Indeed
7 what was before her from Ms. Fosuhene was an indication that the need for external
8 counsel would only arise in a very limited way and that in essence it was only
9 because of the nature of the relationship to be explored that foreign counsel was
10 being sought at all.

11
12 25. I have reviewed the criteria in s.24(2). There is no other criteria apart from (a) and
13 (g) which applied to the appellant’s case. I am satisfied that the legal aid Director
14 was correct in her conclusion that the Appellant’s case did not satisfy at least three
15 of the criteria stated in s.24(2). This coupled with the response from Ms. Fosuhene
16 was sufficient for the Director to find as she has done that this was not a complex
17 case.

18
19 **Efforts to engage a listed or generally admitted attorney at law**

20
21 26. Once the Director had determined that the appellant’s case was not complex, she
22 could not move to engage the services of a foreign attorney pursuant to s.21(3).
23 However, The Director also addressed the second stricture imposed by s.24 (2)
24 efforts to engage a listed or generally admitted attorney at law.

25
26 27. The Director noted in the reasons for her decision on the reconsideration that
27 “*neither the Assisted Person [the Appellant] or Counsel has adequately addressed*
28 *this matter.*” The Director stated that she had not been provided with “*a list of local*
29 *attorneys who have been approached and rejected the brief.*”

1 28. I note from the Chronology above that the Appellant, by letter dated the 13th of
2 September 2021, wrote to the Director attaching a list of approved legal aid attorneys
3 whom he had contacted with regard to his appeal and their responses. Of the thirty-
4 one attorneys that he contacted only one attorney indicated that she was willing to
5 represent Mr. Lobo.

6
7 29. What is of particular importance however is, that by this date the appellant had
8 already appealed the Director's decision of the 1st of September 2021 pursuant to
9 s.38 of the **Legal Aid Act**. The appeal was now to be dealt with by a Judge of the
10 Grand Court. The Director could not alter her decision on the reconsideration. The
11 Director was correct to conclude that, at the time of her reconsideration of her
12 decision, there was nothing before her of the appellant's or his Counsel's efforts to
13 secure the services of a listed attorney-at-law nor was there any indication that there
14 was no generally admitted attorney willing and able to advise or represent the
15 appellant.

16
17 30. The two mandatory conditions imposed by s.21(3) before engaging the services of a
18 foreign counsel were therefore not satisfied. The Director was correct to confirm
19 her initial decision which was that in those circumstances the application for the
20 extension of legal aid to cover the costs of a foreign lead counsel should be refused.
21 The Director acted according to the provisions of s.21(3) as read with s.24(2).

22
23 31. The appeal against the refusal of the Director to extend the Legal aid Certificate to
24 cover the cost of a foreign lead counsel is dismissed.





1 **FURTHER CONSIDERATIONS**

2
3 32. It remains that the appellant needs counsel to assist him with his case before the
4 CICA. The appellant has a constitutional right as a person of insufficient means, and
5 where the interests of justice require to be represented at public expense.²

6
7 33. In her reasons for refusing the extension of legal aid for foreign lead counsel, the
8 Director noted that “*Listed Counsel has not adequately explored highly experienced*
9 *senior local or even regional attorneys that may have been able to assist.*” The List
10 attached to the appellant’s letter of 13th of September detailing his efforts locally may
11 satisfy part of the Director’s concerns. The Appellant is now without counsel since
12 Ms. Fosuhene was granted leave to come off record by the CICA.

13
14 34. Ms. Ryan has given an indication that she is willing to assist the appellant but only
15 if lead counsel is assigned to handle the appeal. I take from this that Ms. Ryan
16 believes that she may not have the requisite experience to deal with this matter before
17 the CICA.

18
19 35. In the interests of justice, and without intending to set any precedent in this regard,
20 there is a course that may be adopted in this case. The Director may consider that a
21 further factor affecting complexity exists on the facts of this case. This further factor
22 could be that “*there are particular circumstances of the case which merit*
23 *consideration as one of the criteria to be satisfied under s.24(2) of the Act.*”

24
25 36. The particular, and if I may observe, unusual circumstances, are as follows:

26
27
28
29

² Section 7 (2)(d) of the Cayman Islands Constitution Order 2009.

- 1 i. The Director accepts from evidence presented to her by the appellant that:
- 2
- 3 (a) the appellant has made every reasonable effort to obtain the services of
- 4 a listed attorney-at-law and;
- 5 (b) there is no generally admitted attorney-at-law on the Islands who is
- 6 willing and able to advise or represent the appellant.
- 7
- 8 ii. The only attorney willing to assist the appellant is an attorney who has indicated
- 9 that she would be unable to assist unless she has lead counsel as she may be too
- 10 inexperienced to properly represent the appellant, on her own, before the CICA
- 11 although the issues in the case may be sensitive not complex.
- 12

13 37. If the Director, having considered all of these factors, finds that these particular

14 circumstances in this case lead her to say that the case is one to be considered under

15 s.24(2) of the Act in the manner that I have outlined at paragraph 33 above, and the

16 Director also finds that there are at least two other matters listed in the said criteria

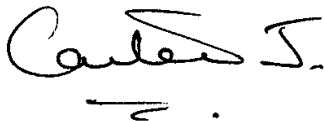
17 under s.24(2) that she accepts applies in this case, it may not be inappropriate for the

18 Director to consider whether, taken together, they lead her to conclude that the matter

19 is complex.

20

21 **Dated this the 15th October 2021**



22

23 **Mme. Justice Marlene Carter**

24 **Acting Judge of the Grand Court**

25