

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE MATTER OF GCR ORDER 53.R5

AND IN THE MATTER OF AN APPLICATION BY MS. KATTINA ANGLIN

CAUSE NO: G169 OF 2020

Legal Aid No. 109 of 2020

BETWEEN :-

KATTINA ANGLIN

PLAINTIFF

-and-

THE GOVERNOR OF THE CAYMAN ISLANDS

DEFENDANT



NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on _____ at _____ or as soon thereafter as counsel can be heard, by counsel on behalf of Kattina Anglin for the following relief, namely;

1. An order of *certiorari* to review and quash the Governor's action.
2. A declaration that the Governor's action was unlawful.
3. Such further or other relief as this Honourable Court shall deem appropriate.
4. Costs.

AND FURTHER TAKE NOTICE that the grounds of this application are:

INTRODUCTION

1. The Plaintiff, Ms Kattina Anglin (“KA”), applies for judicial review of an action of the Defendant, the Governor of the Cayman Islands, who on the 4th September 2020 purported to use section 81 of the Cayman Islands Constitution Order 2009 (“the Constitution”)¹ to cause the enactment of the Civil Partnership Law 2020 (“the CPL”). This action followed the Court of Appeal’s decision in *Cayman Islands v Day & Bush*, CICA No. 9 of 2019,² in which the Court declared the law of the Cayman Islands to be incompatible with section 9 of the Cayman Islands Bill of Rights (“BOR”). This incompatibility placed the United Kingdom in violation of Article 8 of the European Convention on Human Rights (“ECHR”).³
2. This application is brought under Order 53 of the Grand Court Rules (1995 Revision).⁴
3. In summary, KA submits that:
 - i. The Governor erred in law by using section 81 to enact the CPL. The nature of the CPL is beyond the scope of the Governor’s responsibility as defined by section 55 of the Constitution.
4. KA seeks the following relief:
 - ii. An order of *certiorari* to review and quash the Governor’s action.
 - iii. A declaration that the Governor’s action was unlawful.
5. From the outset, it should be noted that this claim does not concern whether or not individuals of the same sex have or should have the right to marry or be joined in civil partnership in the Cayman Islands. It is purely focused on the issue of whether the Governor has acted in error of law and in excess of his powers by seeking to use

¹ Tab 15

² Tab 7 [KA3]

³ Tab 16

⁴ Tab 20

section 81 to pass the CPL. In other words, the question is whether this was the appropriate and lawful route to bringing this legislation into force.

FACTUAL & PROCEDURAL BACKGROUND

6. This claim for judicial review seeks to challenge the action of the Governor, who on the 4th September 2020 used his reserved powers under section 81 of the Constitution to assent to the CPL and eleven consequential pieces of legislation. The background is contained within the First Affidavit of Kattina Anglin.⁵ A summary follows below.
7. It is well known that there has been litigation before the Grand Court and the Cayman Islands Court of Appeal ("the CICA") regarding whether individuals of the same sex have the right to marry.
8. On the 7th November 2019, the CICA made the following declaration in *Day* at paragraph 117:⁶

"In recognition of the longstanding and continuing failure of the Legislative Assembly of the Cayman Islands to comply with its legal obligations under section 9 of the Bill of Rights

And in recognition of the Legislative Assembly's longstanding and continuing violation of Article 8 of the European Convention on Human Rights,

IT IS DECLARED THAT:

Chantelle Day and Vickie Bodden Bush are entitled, expeditiously, to legal protection in the Cayman Islands, which is functionally equivalent to marriage."

⁵ Tab 4

⁶ Tab 7 [KA3]

9. Following this declaration, the Domestic Partnership Bill 2020 ("DPB") was introduced to the Legislative Assembly ("LA"). It was intended that, if passed, the DPB would lead to compliance with the CICA's declaration.
10. On the 29th July 2020, the DPB was defeated in the LA.
11. On the 5th August 2020, Baroness Sugg, acting on behalf of the United Kingdom's Secretary of State, instructed the Governor to use section 81 of the Constitution for the following purpose:⁷

"After giving this matter due consideration, I approve, on behalf of the Secretary of State, the use of your powers under section 81 of the Cayman Islands Constitution to: (i) publish in a Government Notice bills on domestic partnerships which is in compliance with the Court of Appeal's judgement of 7 November 2019; and (ii) assent to the bills on behalf of Her Majesty 21 days after its publication. As well as serving as Secretary of State approval under section 81 of the Cayman Islands Constitution, please treat this letter as instructions addressed to you on behalf of Her Majesty (as referred to in section 31(2) of the Cayman Islands Constitution) to act in the manner described above."

12. On the 10th August 2020, the bill was published pursuant to the Secretary of State's instruction. Under section 81, a bill must be published at least 21 days before the Governor may assent to it (see paragraph 35 below).
13. On the 14th August 2020, the Governor issued a Statement on the Domestic Partnership Bill, in which he said:⁸

"The Court also made it clear that, should the Cayman Islands Legislature fail to act to rectify the situation, the UK should recognise its responsibility for ensuring that the Cayman Islands complies with its responsibilities under the Constitution and its international obligations.

⁷ Tab 8 [KA4]

⁸ Tab 10 [KA6]

Ensuring compliance with international obligations falls squarely within my responsibilities under section 55(1)(b) of the Constitution.”

14. On the 4th September 2020, the 21 days having elapsed, the Governor assented to the CPL.

15. On the same date, the Governor provided a statement,⁹ in which he said that his consultation with the Premier and others led him to conclude that there was no prospect of the DPB coming back to the LA, or being successfully passed if it did.

16. In explaining his decision to invoke section 81 to pass the CPL, the Governor said:

“The UK therefore had no option but to step in to ensure we comply with the rule of law and international obligations under the terms of the European Convention on Human Rights.

[...]

we are required to do is provide a legal framework functionally equivalent to marriage for same sex couples, from which heterosexual couples will also be able to benefit, should they so choose. That is necessary to comply with our own courts and our Constitution.”

Pre-Action Conduct of the Parties

17. On the 3rd September 2020 KA was granted legal aid for this application.¹⁰

18. On the 4th September 2020, KSG Attorneys sent a letter before action to the defendant.¹¹

19. On the 21st September 2020, the Attorney General’s Chambers provided a letter of response.¹²

⁹ Tab 11 [KA7]

¹⁰ Tab 12 [KA8]

¹¹ Tab 13 [KA9]

¹² Tab 14 [KA10]

20. On the 17th November 2020, the application for leave to apply for judicial review came before the Hon. Justice Williams. Judgment was reserved, and was ultimately delivered on the 20th November 2020. In that judgment, Williams J granted leave on Ground 1, and refused leave on Ground 2.¹³

GROUNDS FOR JUDICIAL REVIEW

GROUND 1 – The use of section 81 for this purpose is in error of law because the CPL is not within the scope of the Governor’s special responsibilities

21. It is submitted that the Governor fell into error of law when he sought to use his reserved power under section 81 of the Constitution to enact the CPL. This is because the enactment of the CPL is not “*necessary or desirable with respect to or in the interests of any matter for which he [...] is responsible under section 55*”. This error of law renders the decision and the resulting legislation a nullity.

22. It is submitted that the Governor’s action should be quashed and declared unlawful.

The Governor’s Reserved Legislative powers

23. The Governor’s Reserved Legislative powers are granted in the Constitution pursuant to sections 81 and 55. Under section 81 of the Constitution:¹⁴

“81. Governor’s reserved power

81. If the Governor considers that the enactment of legislation is necessary or desirable with respect to or in the interests of **any matter for which he or she is responsible under section 55** but, after consultation with the Premier, it appears to the Governor that the

¹³ Tab 3, paragraph 47

¹⁴ Tab 15, page 43

Cabinet is unwilling to support the introduction into the Legislative Assembly of a Bill for the purpose or that the Assembly is unlikely to pass a Bill introduced into it for the purpose, the Governor may, with the prior approval of a Secretary of State, cause a Bill for the purpose to be published in a Government Notice and may (notwithstanding that the Bill has not been passed by the Assembly) assent to it on behalf of Her Majesty; but the Bill shall be so published for at least 21 days prior to assent unless the Governor certifies by writing under his or her hand that the matter is too urgent to permit such delay in the giving of assent and so informs a Secretary of State.”

24. Section 81 only permits the Governor to cause the enactment of legislation that is necessary or desirable with respect to or in the interests of any matter for which he is responsible under section 55. It is therefore necessary to look at the areas of executive responsibility granted to the Governor under section 55:¹⁵

“55. Special responsibilities of the Governor

(1) The Governor shall be responsible for the conduct, subject to this Constitution and any other law, of any business of the Government with respect to the following matters—

(a) defence;

(b) external affairs, subject to subsections (3) and (4);

(c) internal security including the police, without prejudice to section 58;

(d) the appointment (including the appointment on promotion or transfer, appointment on contract and appointment to act in an office) of any person to any public office, the suspension, termination of employment, dismissal or retirement of any public officer or taking of

¹⁵ Tab 15, page 31

disciplinary action in respect of such an officer, the application to any public officer of the terms or conditions of employment of the public service (including salary scales, allowances, leave, passages and pensions) for which financial provision has been made, and the organisation of the public service to the extent that it does not involve new financial provision.”

25. The CPL does not relate to any of those four categories, being a law providing for civil partnership in the Cayman Islands.

26. The Governor has stated that “*ensuring compliance with international obligations falls squarely within my responsibilities under section 55(1) (b) of the Constitution.*”¹⁶

27. It is submitted that this is incorrect. Conversely, the Constitution seeks to distinguish between external affairs and compliance with international obligations.

The distinction between External Affairs and compliance with international obligations

28. “External affairs” is not defined in the Constitution. It is submitted that in this context it must mean international relations with foreign countries and bodies of foreign countries. This can be gleaned from the references in section 55(4) and (5) to bodies such as the Caribbean Community, the Association of Caribbean States, the United Nations Economic Commission for Latin America and the Caribbean, and the European Union.¹⁷

29. As to whether “external affairs” includes compliance with international obligations, it is submitted that section 78 of the Constitution assists on that question. It implies that the two are distinct.

30. Section 78 gives the Governor power to reserve for the signification of Her Majesty’s pleasure any bill which appears contrary to prescribed categories. Section 78 states:¹⁸

¹⁶ Tab 10 [KA6]

¹⁷ Tab 15, page 32

¹⁸ Tab 15, page 42

“Assent to Bills

78.—(1) A Bill shall not become a law until—

- (a) the Governor has assented to it in Her Majesty’s name and on Her Majesty’s behalf and has signed it in token of his or her assent; or
- (b) Her Majesty has given Her assent to it through a Secretary of State and the Governor has signified Her assent by proclamation.

(2) When a Bill is presented to the Governor for his or her assent, he or she shall, subject to this Constitution and any instructions addressed to him or her by Her Majesty through a Secretary of State, declare that he or she assents or refuses to assent to it or that he or she reserves the Bill for the signification of Her Majesty’s pleasure; but, unless he or she has been authorised by a Secretary of State to assent to it, the Governor shall reserve for the signification of Her Majesty’s pleasure any Bill which appears to him or her, acting in his or her discretion—

- (a) to be in any way repugnant to, or inconsistent with, this Constitution;
- (b) to determine or regulate the privileges, immunities or powers of the Legislative Assembly or of its members;
- (c) to be inconsistent with any obligation of Her Majesty or of Her Majesty’s Government in the United Kingdom towards any other State or any international organisation;**
- (d) to be likely to prejudice the Royal prerogative;
- (e) to affect any matter for which the Governor is responsible under section 55; or**
- (f) to affect the integrity or independence of the public service or of the administration of justice.

(3) Before refusing assent to any Bill, the Governor shall explain to the members of the Legislative Assembly why he or she proposes to do so, if necessary in confidence, and shall allow those members the opportunity to submit their views on the matter in writing to a Secretary of State.”

31. If “external affairs” (as a matter of responsibility under section 55) included consistency with international obligations, then section 78(2)(c) would be superfluous. The two are distinct matters.

The position in the BVI and TCI

32. On whether “external affairs” includes compliance with international obligations, it is instructive to consider the position in the Constitutions of the British Virgin Islands (“BVI”) and the Turks and Caicos Islands (“TCI”).

33. Section 72 of the TCI Constitution¹⁹ grants the Governor the reserved power to enact legislation necessary or desirable “*for the purpose of securing compliance with an international obligation*”. Unlike in the Cayman Islands, that reserved power does not extend to the enacting of legislation with respect to or in the interests of external affairs.

34. Notwithstanding section 72, section 37(b)²⁰ of the TCI Constitution *does* give the Governor executive responsibility with respect to external affairs.

35. It should be noted that section 73 of the TCI constitution (which shares the same title and is equivalent to the “Assent to Bills” provision under section 78 of the Cayman Islands Constitution), also distinguishes matters that are “*inconsistent with any international obligation*” (section 73(2)(c)) and any “*matter for which the Governor is responsible under section 37*” (section 73(2)(d)), which, as stated above, includes external affairs.

36. The TCI constitution therefore also appears to distinguish the two concepts.

37. Similarly, section 81 of the BVI Constitution²¹ specifically allows the Governor to invoke reserved power “*for the purpose of complying with any international obligation applicable to the Virgin Islands*”. However, as with TCI, the Governor is responsible for external affairs under section 60(1)(a) of the BVI Constitution, but has no power to enact legislation in regard to them under section 81.²²

¹⁹ Tab 17, page 31

²⁰ Tab 17, page 20

²¹ Tab 18, page 41

²² Tab 18, page 33

38. It is therefore submitted that the distinctions identified in both the TCI and BVI Constitutions support the proposition that external affairs and compliance with international obligations are distinct. If the two concepts could be subsumed into one, then it is unclear why they are separated in the constitutions.

39. Had it been intended that the Governor of the Cayman Islands should have a reserved power to enact legislation to comply with an international obligation, it is submitted that the draftsmen of the Constitution would have expressly included it, as is seen in the TCI and BVI Constitutions. All three Constitutions came into effect within a close time period (BVI 2007, Cayman Islands 2009, TCI 2011). Given that they mirror each other in many respects, it is unrealistic to infer that the draftsmen of the Cayman Islands Constitution were not cognisant of the TCI and BVI Constitutions.

The appropriate legislative route is section 125 of the Constitution

40. It is submitted that the Governor was not entitled to use section 81, and that the appropriate means of legislating for the CPL was for Her Majesty to legislate by Order in Council using section 125 of the Constitution, as provided for by section 5(1) of the West Indies Act 1962.

41. Section 5(1) of the West Indies Act 1962²³ states:

"5. Power of Her Majesty to provide for government of certain West Indian colonies

(1) Her Majesty may by Order in Council make such provision as appears to Her expedient for the government of any of the colonies to which this section applies, and for that purpose may provide for the establishment for the colony of such authorities as She thinks expedient and may empower such of them as may be specified in the Order to make laws either generally for the peace, order and good government of the colony or for such limited purposes as may be so specified subject, however, **to the reservation to Herself of power to make laws for the colony for such (if any) purposes as may be so specified."**

²³ Tab 19

42. The purposes of those reserved powers are stated in section 125 of the Constitution:²⁴

“Power reserved to Her Majesty

125. There is reserved to Her Majesty full power to make laws for the peace, order and good government of the Cayman Islands.”

43. Section 125 grants a practically unlimited scope to legislate by Order in Council. In *R (Bancoult) Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, Lord Hoffman said at 486D:²⁵

“[T]he words “peace, order and good government” have never been construed as words limiting the power of a legislature. **Subject to the principle of territoriality implied in the words “of the territory”, they have always been treated as apt to confer plenary law-making authority.** For this proposition there is ample authority in the Privy Council: *R v Burah* (1878) 3 App Cas 889; *Riel v The Queen* (1885) 10 App Cas 675; *Ibralebbe v The Queen* [1964] AC 900) and the High Court of *Australia Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1. The courts will not inquire into whether legislation within the territorial scope of the power was in fact for the “peace, order and good government” or otherwise for the benefit of the inhabitants of the territory. So far as *Bancoult (No 1)* departs from this principle, I think that it was wrongly decided.”

The Governor’s Position

44. In its letter of response dated the 21st September 2020, the AG’s Chambers states that:²⁶

²⁴ Tab 15, page 61

²⁵ Tab 21

²⁶ Tab 14 [KA10]

“external affairs” in section 55(1)(b) would extend to the circumstances leading to the enactment of the Civil Partnership Law, namely, the Legislative Assembly’s continuing breach of section 9 of the Bill of Rights and Article 8 of the Convention in failing to provide persons of the same-sex with legal status that is functionally equivalent to marriage. This also amounts to a breach of the UK’s obligations under Article 8 of the Convention. Accordingly, the enactment of the Civil Partnership Law which seeks to give effect to the rights of same-sex persons (and others) under section 9 of the Bill of Rights, falls squarely within the Governor’s remit for external affairs in section 55.”

45. It is submitted that this is incorrect. As stated in the preceding paragraph of the AG’s letter, it is the United Kingdom, not the Cayman Islands, that is the signatory and State Party to the ECHR. Though the ECHR is extended to the Cayman Islands by the United Kingdom, the Cayman Islands is not a member state of the Council of Europe and is not itself party to the ECHR. It is the United Kingdom, not the Cayman Islands, that can bring applications to the European Court of Human Rights.

46. For that reason, any breach of the ECHR by the Cayman Islands is not an external affair of the Cayman Islands, but an external affair of the United Kingdom. It is the United Kingdom, not the Cayman Islands, that owes the obligation to the ECHR.

47. In those circumstances, the CPL is plainly not relevant to the external affairs of the Cayman Islands (distinct from, for example, relationships between the Cayman Islands and the Caribbean Community). If it is relevant to an external affair of the United Kingdom, then it should be the United Kingdom who remedy the inconsistency through section 125, rather than the Governor through section 55.

Conclusion on Ground 1

48. It is submitted that the Governor fell into error of law when he purported to use section 81 to enact the CPL. The CPL does not fall into the remit of “external affairs” or any other area of responsibility under section 55. The appropriate route to legislate is through an Order in Council under section 125 of the Constitution.

CONCLUSION

49. On the basis of the above, it is submitted that this claim should succeed.

50. The Plaintiff asks that the Court grant the relief sought.

Dated this 27th day of November 2020

Filed this 7th day of December 2020

A handwritten signature in black ink, consisting of the letters 'KSG' in a stylized, cursive font. The signature is positioned above a horizontal line.

KSG Attorneys