# *Press Release*

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**FOR IMMEDIATE RELEASE**

## UNDERSTANDING THE JUDICIAL REVIEW OF THE GOVERNOR'S ACTIONS

**On 20 November 2020, Justice Richard Williams sitting at the Grand Court of the Cayman Islands authorised the judicial review of the Governor's implementation of the Civil Partnership Act via Section 81, which implementation had been done pursuant to instructions of the UK Secretary of State. Multiple requests by the press for information about the judicial review or a copy of the judgment were met with rejection by the court. A copy of the judgment was, however, eventually obtained from undisclosed sources and published by the press on Wednesday 21 January 2021. After the press publication, the judgment was made available on the Judicial website of the Cayman Islands.**

Two fundamental questions arise from these facts and circumstances:

- **Why was the authorisation to proceed with the judicial review kept from the public?**
- **Can a Cayman Islands judge review the Governor's actions that were taken pursuant to written instructions of the UK Secretary of State?**

Let us address these two matters in turn by asking and answering a few key questions that will help put the facts and law straight.

## 1. SECRECY OF JUDICIAL DECISIONS

**1.1. WHY IS IT THAT ONLY NOW, OVER 2 MONTHS AFTER THE DECISION OF JUSTICE WILLIAMS WAS MADE, WE ARE HEARING ABOUT ALL THIS?**

Thanks to the investigative journalism on this issue, which has elucidated this matter and made public Justice Williams's decision. Justice Williams made clear in his judgment that there is public interest in this matter and articulates this as one of the main reasons for his decision. Nonetheless, his decision has been withheld from the public. Despite requests for copies of the decision, these were all rejected by the court.

**1.2. HOW DO WE KNOW THAT JUSTICE WILLIAMS IS RESPONSIBLE FOR THIS MATTER NOT TO HAVE BEEN MADE AVAILABLE TO THE PUBLIC UNTIL NOW? COULD IT NOT HAVE BEEN A MISCOMMUNICATION WITHIN THE COURT?**

No, it was without a doubt Justice Williams's instruction not to make this matter available to the public. The Clerk of Court stated in writing on 14 January 2021 to the press that:

> *"I reached out the judge who was presiding over the Leave Application and based on indications received from the judge, the ex parte application was not made available to the public."*

Then, the Clerk of Court adds that as of 14 January 2021:

> *"we have not be[en] granted permission to place any documents in relation to this matter on the public register at this time."*

### 1.3. ARE JUDICIAL REVIEW PROCEEDINGS CONDUCTED AWAY FROM THE PUBLIC EYE?

No. It is a basic principle of justice the publicity of judicial proceedings and, more importantly publicity of judicial decisions, save for a few exceptions, none of which apply in this matter. Ordinarily, judicial review proceedings take place in public, although at the pre-issue, *ex-parte* application for leave lack of publicity is not uncommon. Once the authorisation to make an application for judicial review has been granted on an *ex-parte* basis, the Applicant is required to issue, and serve on the Governor (by the AG's Chambers) **and all other persons directly affected** (Grand Court Rules Order 53 Rule 5) an Originating Motion, which should be heard in open Court. The decision granting leave ought to have been made available to the public by then. This is particularly so because in practice, unless the Applicant or the Respondent positively identify "*all other persons directly affected*," the burden rests on those interested or affected to identify themselves to the parties or make an application to the Court for leave to intervene/participate as an interested party.

Justice Williams has been a Grand Court Judge for almost a decade and was the first judge appointed by the Governor pursuant to our current Constitution. Justice Williams ought to be aware of this practice, it is therefore extraordinary that he did not order the Court's personnel to make the decision public, especially upon being specifically asked. Furthermore, given the public interest, as declared by Justice Williams in his decision, and his intention not "*to place any documents in relation to this matter on the public register at this time*" it is questionable that Justice Williams did not at the very least order the Applicant:

- to make a search in the Civil Registrar of Civil Partnerships to identify persons that have entered into Civil Partnerships; and
- to notify all those people as interested parties.

### 1.4. WHY DID JUSTICE WILLIAMS ACT IN THIS WAY?

*Colours Caribbean* is exceptionally concerned in light of the evidence of the Clerk of Court that Justice Williams appears to have intended to keep this matter away from the public for motives which as of today remain unknown. His conduct is not befitting of a modern democracy regulated by a written constitution that creates the judiciary in which Justice Williams sits.

## 1.5. IS THERE ANYTHING THAT CAN BE DONE WITH REGARDS TO THIS BEHAVIOUR?

Justice Williams's indication to the court personal that **"the ex-parte application was not made available to the public"** and confirmation that as of 14 January 2021 the Clerk of Court **"ha[d] not be[en] granted permission to place any documents in relation to this matter on the public register"** objectively equate to prima facie **misbehaviours** pursuant to section 96 of the Constitution that must be further investigated.

Let us pause here for a second to elucidate the bleak scenario if the judicial review that Justice Williams authorised were to be successful, which, although unlikely, is possible. The immediate effect would be that the Civil Partnership Act (and related legislative amendments) would be **absolutely void and inoperative** by effect of section 2 of the Colonial Laws Validity Act 1865. The effect of this upon persons that had entered civil partnerships is that they would be void as if they had never taken place. There are some rather extreme practical consequences that would follow, e.g. residents as dependants of their civil partner may be deported, adoptions of minors may be void as if they never happened, insurance companies may stop paying insurance until this matter is finally resolved lest having paid-out wrongly; we can go on.

These are just some of the reasons why publicity of this matter was not just required as a matter of correct legal process but essential as a matter of justice, something that Justice Williams has failed to deliver. If there were any basis or justification for his actions, *Colours Caribbean* asks how it can be justifiable to prevent those persons whose lives are directly impacted and have perhaps entered into a civil partnership from knowing the details of the judgment. The Governor has the power to trigger an investigation where allegations of **misbehaviours** of a judge occur for which there is independent evidence to support them such as it is the case in the present circumstances. Those proceedings may not lead to the dismissal of Justice Williams, but they may help to clear-up any misunderstandings. The Governor will be failing in his central duty to secure **good governance** if he were to decline to use his discretionary powers to have the matter investigated because it is in the interests of the judiciary of the Cayman Islands, and Justice Williams's interest now that this matter is being reported by the international press, that the reasons for Justice Williams's decision to keep his judgment from the public for two months are investigated by an independent panel pursuant to the constitutional proceedings applicable for such cases under section 96 of the Constitution.

## 1.6. CAN JUSTICE WILLIAMS CONTINUE TO HEAR THIS CASE?

It is difficult to establish actual bias as a judge or justicet may not be questioned about extraneous influences affecting his mind, but a party who can discharge the lesser burden of proving **apparent bias** is protected without being required to show that actual bias exists. There is **apparent bias** where a judge or justice is not a party to the proceedings and does not have a financial interest in its outcome, but in some other way his conduct or **behaviour** gives rise to a suspicion that he is not impartial. *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132–133 (HL).

*Colours Caribbean* will consult with local counsel to inquire about this possibility in the present proceedings. It goes without saying that any judge that cares for the jurisdiction would step down from the case without any party requesting him or her to do so simply in light of the evidence and circumstances already made public by the local and international press.

## 2. JUDICIAL REVIEW OF GOVERNOR'S ACTIONS ON WRITTEN INSTRUCTION FROM THE UK SECRETARY OF STATE

### 2.1. WHAT DOES IT MEAN WHEN THE GOVERNOR ACTS ON "INSTRUCTION FROM THE UK SECRETARY OF STATE?"

It means that the Governor acts on an instruction made expressly pursuant to section 31(2) of the Constitution. The instruction in this instance was precise in nature. It required the Governor to legislate and it required the Governor to do so using the reserved powers under section 81 of the Constitution. The key words to this effect are in the last sentence of Baroness Sugg's letter dated 5 August 2020, which the Governor made public, where it states:

> *"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****."*

In this context, it is impossible to detach the actions of the Governor from the instruction of the Secretary of State. In other words, if the action of the Governor was illegal, it is because the instruction of the Secretary of State was illegal.

### 2.2. WHY WAS THE GOVERNOR INSTRUCTED BY THE UK SECRETARY OF STATE?

Because our legislators were unwilling to comply with legal obligations under our own Constitution, they were unwilling to comply with our own Court of Appeal and they were unwilling to comply with international law extended to the Cayman Islands. Moreover, knowingly, our legislators placed the UK Government in breach of the European Convention on Human Rights. Make no mistake, it was not the Governor that chose to take the path of legislating using section 81, he was instructed to do so. Indeed, we note that the Governor has stated publicly that it was not a position in which he chose to be.

### 2.3. COULD THE SECRETARY STATE HAVE TAKEN ANY ALTERNATIVE ACTION OR STEP?

The Secretary of State stepped in following directions of the Court of Appeal to do what the legislators of the Cayman Islands failed to do: **to bring about a legal framework for same-sex couples that was functionally equivalent to marriage**.

The Secretary of State had two options: to instruct the Governor pursuant to section 81 or to effect an Order in Council pursuant to section 125. To the extent that only one of those two options was 'legal' then it is absurd that the Court of Appeal did not clarify in its judgment which of those two options was necessary to secure compliance with the Constitution and the European Convention. Justice Williams is also embarrassing the Court of Appeal by granting leave.

## 2.4. COULD THE GOVERNOR HAVE REFUSED TO COMPLY WITH THE "INSTRUCTIONS" AND REFUSED TO PASS THE CIVIL PARTNERSHIP ACT INTO LAW?

No. The Governor had no discretion whether or not to use the reserved powers under section 81 because he is compelled to follow the instruction "*to act in the manner described above*" lest he would have needed to resign or be dismissed. **This is not because *Colours Caribbean* says so but because it's the law**–this is the view of all established and well-regarded legal authorities on these matters, particularly the seminal works of Ian Hendry and, before that, the ultimate authority on British Overseas Territories law "Commonwealth and Colonial Laws" by Sir Kenneth Roberts-Wray, page 237:

> *Though in day-to-day matters of government the Governor is the local head of the Executive,* ***he is expected, in matters of importance to the United Kingdom Government, to act in accordance with the Secretary of State's instructions. If he disagreed so strongly that he felt unable to comply, he would no doubt resign*** *and, if he were to refuse, the ultimate penalty could be dismissal;*

## 2.5. CAN THE CAYMAN ISLANDS COURTS REVIEW AND OVERRULE ACTIONS OF THE GOVERNOR?

Yes, almost always. There is, however, a highly relevant exception, this being when the Governor acts at the "*instruction of the Secretary of State*", as he has done in this instance. Again, **this is not because *Colours Caribbean* says so but because it's the law.**

Let's explain:

- Section 31(4) of the Constitution prohibits the Cayman Islands courts from enquiring into (i.e. reviewing) whether the Governor has complied with any "instruction" addressed to him.
- Section 31(4) is a standard prohibition that features in almost every constitution of the British Overseas Territories, the scope and implications of which are very well established in law. The Privy Council held in 1979 in *Kemrajh Harrikissoon v AG Trinidad and Tobago* [1979] 31 WIR 348 that these types of prohibitions (referred to as "ouster rules") when inserted into a **constitution** are **absolute**.

## 2.6. COULD JUSTICE WILLIAMS HAVE OVERLOOKED SECTION 31(4)?

One would have hoped that of all people in the Cayman Islands a judge would know the constitution very well and pay close attention to any relevant provisions. Justice Williams in fact only mentioned section 31(2) at paragraph 3 of his decision, but simply to highlight that the Governor must exercise his or her functions in accordance with the Constitution. Justice Williams then concluded a paragraph 4, quoting from the book of Ian Hendry, "British Overseas Territories Law," that:

> *"The acts of a Governor…are in principle subject to judicial review in the courts of the territory in the normal way and in accordance with the law of the territory."*

This quote is shocking and telling of Justice Williams's state of mind in that he inexplicably cut-off that quote of Ian Hendry there and omitted to quote the sentence that immediately follows it:

> *"The constitutions of the territories provide for very limited exceptions. A standard exception is that the question whether a Governor has in any matter complied with instructions from Her Majesty shall not be inquired into by any court."*

This omission by Justice Williams is compounded by the fact that **the footnote in Hendry's book to this last sentence refers specifically to section 31(4) of the Cayman Islands Constitution to illustrate the point**! In fact, throughout his whole judgment Justice Williams does not mention Section 31(4).

### 2.7. IS IT POSSIBLE FOR THE GOVERNOR TO BREACH THE CONSTITUTION WHEN FOLLOWING "INSTRUCTIONS OF THE SECRETARY OF STATE?"

No, as a matter of principle. The Secretary of State when instructing a Governor of an overseas territory is acting on behalf of Her Majesty, the Secretary of State is the mouthpiece of Her Majesty. It is a well-established legal principle that "instructions" by the Secretary of State will be deemed to be in compliance with the Constitution and the rule of law. To the extent questions arise as to any perceived illegality in respect of the "instruction" the instruction itself is reviewable and may be challenged in court. The only courts with the power (i.e. the jurisdiction) to hear such challenges and consider them are the English courts. **This is not because *Colours Caribbean* says so but because it's the law.** In *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61, the House of Lord confirmed that instructions made by the Secretary of State to the governor of an overseas territory are reviewable by the English courts "on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action".

Ian Hendry, of whom Justice Williams seems to be an avid reader, also enlightens us on this point at page 99 of his book:

> *"The courts of each territory…exercise judicial control over the executive government in the territory…executive acts in the United Kingdom in relation to the territories such as…the giving of instructions by a Secretary of State, are judicially reviewable by the UK courts."*

The instruction in this instance was precise in nature, hence it is impossible to detach the actions of the Governor from the executive instruction of the Secretary of State, which is only reviewable by the UK courts.

### 2.8. IS JUSTICE WILLIAMS ACTING IN ACCORDANCE WITH THE CONSTITUTION, FROM WHICH HIS ROLE AS A JUDGE DERIVES?

We encourage everyone to make up their own mind based upon the law, as we have endeavoured to detail succinctly in this document. *Colours Caribbean*'s answer, however, is that Justice Williams has failed in his duty to uphold and apply the law correctly.

In particular, we are especially concerned that Justice Williams, in addition to having kept his decision to grant leave inaccessible to the public, appears to have placed himself above the Constitution, in much the same way as our legislators did when they were unwilling to comply with the Constitution by rejecting the Civil Partnership Bill.

In light of our explanations above, there are some key errors of law that have occurred:

- Justice Williams acted contrary to Section 31(4) of the Constitution and failed to explain his legal justification for doing so.
- Justice Williams made an error in law by asserting that the Applicant (referred to as "plaintiff" in the judgment) had no alternative legal remedy.
- Justice Williams wrongly decided this action relates to the scope of the powers of the Governor under Section 81, failing to recognise the precise nature of the "instruction" of the Secretary of State.
- Justice Williams wrongly concluded that a Governor acting on "instruction" of the Secretary of State could nonetheless act contrary and outside the scope of the Governor's powers under the Constitution. He made an error in law by overlooking that "instructions" are always deemed to be in compliance with the Constitution and the rule of law.
- Justice Williams failed to identify that the Governor had absolutely no discretion but to act upon the "instructions" in the manner prescribed.
- Justice Williams illegally took jurisdiction of this matter, in effect assuming the role of judge of a UK court.
- Justice Williams illegally elevated his perceived public interest in the matter over and above the interests of the UK.

**2.9. NOTWITHSTANDING ALL OF THAT, CAN JUSTICE WILLIAMS CONTINUE TO DO WHAT HE IS DOING BY ALLOWING THIS JUDICIAL REVIEW TO PROGRESS?**

This question is difficult to answer but, in all likelihood, **yes**, in as much as if the Governor is not willing to "good govern" and at least initiate an investigation to clear-up any misunderstanding or, indeed, identify any illegal or even criminal misbehaviours, e.g. pursuant to Section 121 of the Penal Code, which states:

"A person who wilfully disobeys any law by doing any act which such law forbids, or by omitting to do any act which such law requires to be done, and which concerns the public or any part of the public, commits an offence and, unless the law provides some other penalty, is liable to imprisonment for two years."

**2.10. HAVE THESE MATTERS BEEN RAISED WITH THE GOVERNOR?**

Yes. *Colours Caribbean* is extremely concerned that the judiciary may be following a similar path as our legislators in wilfully an intentionally breaching the Constitution. This is an even more serious matter because the final frontier to secure the enforcement of law and of human rights is our judiciary's adherence to, and respect for, the Constitution. If any judge is permitted by the Governor to keep decisions inaccessible to the public or ignore their oath to uphold the law–any law–particularly the Constitution on points of human rights matters, for any reason, then such Governor has not only failed to secure "good governance" but is facilitating misbehaviours in as much as he chooses not to use his powers to address the situation.

## 2.11. ARE JUSTICE WILLIAM'S ACTIONS ISOLATED?

Far from it. **This appears to be an endemic problem in the Cayman Islands Government, in the Parliament and now in the Judiciary.**

There are very many documented instances of issues within the civil service at multiple levels over many years, where the law and the Constitution have been breached on matters pertaining to the rights of LGBTQIA+ people, without consequence for those that have done so. It is a matter that was publicly touched upon by a former Governor, Helen Kilpatrick, in her farewell speech in which she had the courage to urge the Government to make progress on legislation to advance the rights of LGBTQIA+ members of the Cayman Islands community.

Even the Court of Appeal made clear in its decision back in 2019 that the legislators had been shirking their legal responsibilities under the Constitution for many years. Justice Williams is now also adding the Judiciary to this list.

## 2.12. THEN WHAT IS THE SOLUTION HERE?

That's the crux of the issue. The Governor has an overriding duty to secure "good governance" and to uphold the Constitution and the rule of law. The Governor's ability to do so is now at stake in all arms of the Cayman Islands Government in matters pertaining to LGBTQIA+ rights. If he is unable to secure adherence to the law and the Constitution then the only option–and it is the option that *Colours Caribbean* has already petitioned the Governor to take–is an independent inquiry into the enshrined homophobia in the Cayman Islands government that the international press is currently describing as a "homophobic state."

At the very least, *Colours Caribbean* expects that the defence of the Governor in the judicial review process will be conducted by an independent QC from London rather than by the Attorney General's Chambers who are, as we all know, part of the legal team that has been fighting against LGBTQIA+ equality for the last 6 years. The Attorney General's Chambers has a clear conflict of interest and should cease immediately to advise the Governor on this matter.