IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G169 OF 2020

BETWEEN:

KATTINA ANGLIN

Plaintiff

AND

THE GOVERNOR OF THE CAYMAN ISLANDS

Defendant

Appearances: **Mr. Rupert Wheeler on behalf of KSG Attorneys-A-Law for the Plaintiff**

Before: **Hon. Justice Richard Williams**

Hearing: **17 November 2020**

Judgment: **20 November 2020**

HEADNOTE

Application for leave to apply for judicial review - At the request of the Plaintiff, ex parte hearing with oral submissions made at request of Plaintiff - Test for Leave - Delay - Plaintiff's standing to bring application, consideration of public interest where no private interest - Court's power to grant partial leave if it felt that one of the pleaded grounds did not meet the arguable threshold.

JUDGMENT

1. The Plaintiff is Kattina Anglin. The Defendant is His Excellency the Governor of the Cayman Islands ("the Governor"). The application arises as described by her affidavit, sworn on 23 October 2020, in support of the application for leave. The Plaintiff requested that her application be considered with oral submissions being made at this ex parte hearing rather than on the papers. At the end of the hearing I reserved my decision and this is the reserved judgment containing the same.

The General Law, Procedure and Background

2. At this stage my function is not to determine issues that are properly raised by the affidavit that is before me. The purpose of the requirement for leave, on the other hand, 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.

3. The Governor's actions must be exercised in accordance with the Constitution, even when he is acting on instructions given by Her Majesty. Section 31 of the Constitution provides:

> *"**Functions of the Governor***
> *31. […]*
> *(2) **The Governor shall exercise his or her functions in accordance with this Constitution and any other law and, subject thereto**, in accordance with such instructions (if any) as may be addressed to the Governor by or on behalf of Her Majesty."*

4. As highlighted by the authors of the authoritative text, Hendry and Dixon, British Overseas Territories Law, 1st Edition, (Hart 2011):

> *"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."*

The Application

5. The application, filed on 28 October 2020, concerns the decision of the Governor made on 4 September 2020 when he decided to use his purported reserved powers under s.81 of the

Cayman Islands Constitution Order 2009 ("the Constitution") to enact the Civil Partnership Law 2020 ("the CPL"). It is contended that the Governor erred in law (i) by using s.81 of the Constitution to enact the CPL beyond the scope of his responsibility as defined by s.55 of the Constitution ("the s.81 ground"); and (ii) by using that section to remedy incompatibility because s.23 of the Constitution specifically reserves that power to the Legislature ("the incompatibility ground").

6. The relief sought by the Plaintiff is:

(i) An order of *Certiorari* to review and quash the Governor's action; and

(ii) A declaration that the Governor's action was unlawful.

The Facts

7. The affidavit filed in support of the application sets out the facts which the Plaintiff contends to be relevant.

8. On 14 September 2018 Chantelle Day and Vickie Bodden Bush sought declarations from the Grand Court that the Marriage Law (2010 Revision) did not conform with their rights enshrined in the Bill of Rights, Freedoms and Responsibilities ("the BoR") found at Schedule 1 in the Constitution. On 29 March 2019 the Chief Justice ruled that the BoR gave Ms. Day and Ms. Bush the right to marry and that the Governor, the Deputy Registrar of the Cayman Islands and the Attorney General of the Cayman Islands were in violation of certain rights found in the BoR. The Chef Justice ordered, pursuant to s.5 of the Constitution, certain amendments to the Marriage Law.

9. The Chief Justice's order was appealed[1] and the Court of Appeal delivered its Judgment on 7 November 2019. The Court of Appeal, whilst understanding why the Chief Justice reached the decision that he did, allowed the appeal and set aside the orders made by him. The Court of Appeal went on to repeat that the Appellant had:

> *"finally accepted that section 9(1) of the BoR requires the Legislative Assembly to provide the Respondents with legal status functionally equivalent to marriage"* and added that *"its failure to comply with its obligations under the law in that regard is woeful."*

The Court of Appeal stated that:

> *"It is difficult to avoid the conclusion that the Legislative Assembly has been doing all it can to avoid facing up to its legal obligations."*

With this in mind, the Court of Appeal deemed it appropriate to make the following declaration[2], which importantly contains no reference to any specific piece of legislation:

> *"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."*

[1] The Governor was not an Appellant.
[2] Paragraph 117 of Judgment.

10. The Court of Appeal then felt *"driven"* to make the following *"final observation"* at paragraphs 120-121 in the Judgment, namely:

> *"120. This court is an arm of government. Any constitutional settlement requires the executive and the legislature to obey the law and to respect decisions of the court. It would be wholly unacceptable for this declaration to be ignored Whether or not there is an appeal to the Privy Council in respect of same-sex marriage, there can be no justification for further delay or prevarication.*
> *121. Moreover, in the absence of expeditious action by the Legislative Assembly, we would expect the United Kingdom Government, to recognise its legal responsibility and take action to bring this unsatisfactory state of affairs to an end."*

11. As a result of the declaration, the Domestic Partnership Bill 2020 ("DPB") was introduced to the Legislative Assembly. The Bill had an unsuccessful passage, as it was defeated on 29 July 2020.

12. On 5 August 2020, Baroness Sugg, acting on behalf of the United Kingdom's Secretary of State, instructed the Governor to use s.81 of the Constitution for the following purpose:

> *"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."*

13. On 10 August 2020, the Domestic Partnership Bill was published pursuant to the Secretary of State's instruction.

14. On 14 August 2020, the Governor issued a Statement on the Domestic Partnership Bill, in which he said:

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

15. Meanwhile the Plaintiff had applied for legal aid assistance. Her certificate[3] for the present application, following a further reconsideration by the Director of Legal Aid, was granted on 3 September 2020. The grant was conditional upon the Plaintiff contributing a lump sum of CI$4,000.00 into the Legal Aid Fund by or on 7 September 2020.

16. Pursuant to s.81, the Domestic Partnership Bill had to be published at least 21 days before the Governor could assent to it. On 4 September 2020, as the 21 days had elapsed, the Governor assented to the CPL[4]. In a statement the Governor, upon reaching the view that the Legislature would fail to pass an appropriate law, explained his decision to invoke s.81 and pass the CPL as follows:

> *"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.*
> *[...]*

[3] Capped at CI$8,000.
[4] Due to views expressed during the consultation process the title Domestic Partnership in the Bill was changed to Civil Partnership in the Law.

What 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."

17. On 4 September 2020, in compliance with the Practice Direction No. 4 of 2013 Judicial Review (GCR O.53) Pre-Action Protocol for Judicial Review[5], the Plaintiff's Attorneys sent a letter before action to the Defendant. The Attorneys indicated that:

"Given the urgency of this matter we request a response by noon on 7 September 2020."

18. The Attorney General's Chambers replied on 7 September 2020, but did not provide a full letter of response until 21 September 2020. In that letter it was asserted that the Governor had acted properly and within his powers.

Applying for Leave Promptly

19. I have considered the time limits for leave. The application for leave must be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made (Order 53, rule 4(1)). The fact that an application has been made within three months does not necessarily mean that it has been made promptly.

[5] Paragraphs 8-11 Practice Direction.

20. The decision sought to be reviewed was made on 4 September 2020. The Application for Leave was filed on 28 October 2020. The application has been made within three months of the decision and pursued diligently thereafter. Even if it were to be suggested or argued that the decision was not made on the day of the Governor's assent but on 10 August 2020 when the Domestic Partnership Bill was published, this application has still made within three months of the decision.

21. When considering the issue of delay I also have regard to the fact that, although it was prior to the Governor's decision to give his assent, in anticipation of what was to follow the Plaintiff had already applied for legal aid following the Governor's statement made on 14 August 2020 that, before he assented to the Bill, there would be a consultation period running until 31 August 2020.

22. At the hearing I enquired with the Plaintiff's Counsel as to why there had been a delay in issuing the present application on 28 October 2020 after receipt of the Defendant's letter on 21 September 2020. I was informed that this was due to legal aid issues, primarily arising from the need to raise funds to comply with the condition for the Plaintiff to make the payment into the Legal Aid Fund. I was also told that, due to the novel nature of the proceedings, further research was required prior to issuing the pleadings.

23. Having considered all of the above, I am satisfied that in the circumstances of this case the application has been made promptly.

24. When I reach this conclusion concerning the issue of delay, I accept that I have not had the benefit of any representations made by the Defendant and I have only been able to read the letter of 21 September 2020 to glean his views. I note the following comment made in that letter concerning the Plaintiff's letter before action:

> *"...given the enactment of the Civil Partnership Law the remedies referred in your letter have been overtaken by events."*

I am therefore aware of the following general considerations when I determine this leave application and the potential consequences flowing from the granting of permission. If leave is given and if, at a Judicial Review hearing, an applicant establishes one of the grounds of judicial review, the Court is not bound to grant a remedy. The remedies are discretionary and there are instances where the Court may decline to grant a remedy. In a case where leave to apply was granted ex-parte without any representations from a defendant about delay, I recognise that a defendant may later submit that the Court should refuse a remedy if granting a remedy would cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration. I also note that a remedy may, exceptionally, even be refused if the claim was promptly brought if granting a remedy would cause undue prejudice to third parties or the wider public interest or if a remedy is no longer necessary because the issues have become academic or are no longer of practical significance. The Court may, of course still grant declaratory relief, particularly if the claim raises an issue which it is in the public interest to resolve and which is likely to arise in other cases.

Sufficient Interest of Plaintiff

25. The test at the leave application stage when considering whether an applicant has sufficient interest is a part of the Court's threshold exercise in excluding hopeless cases, for example where an applicant is a *"meddlesome busybody"*[6] or *"truly has no interest in the matter and is a busy-body, or a crank, or a mischief maker, or motivated by ill-will or some improper motive*[7]*."*

26. The challenge raised in relation to what is the scope of the reserve powers of the Governor under s.81 of the Constitution is a matter of great general public importance and there appears to be no case precedent on the issue in the Cayman Islands. In such cases, even if an applicant does not have a private interest in the outcome of the case, she may be properly motivated to seek a review on behalf of the wider community. This is illustrated by the guidance given in the below cases shared with the Court at the hearing by the Plaintiff in support of her application.

27. In ***R v Legal Aid Board, ex p Bateman*** [1992] WLR 711, Nolan LJ at 718B referred to:

> *"The desirability of the courts recognising in appropriate cases the right of responsible citizens to enter the lists for the benefit of the public, or of a section of the public, of which they themselves are members."*

28. In ***R v Somerset County Council, ex p Dixon*** [1998] Env LR 111, the Court stated at page 117:

[6] Per Lord Donaldson, M.R. in ***R v Monopolies and Mergers Commission, Ex p. Argyll Group plc*** *[1986] 1 W.L.R. 763 at 773.*

[7] Lewis QC, Judicial Remedies in Public Law, 4th Edition, (Sweet & Maxwell 2009) at paragraph 10.007.

"There will be, in public life, a certain number of cases of apparent abuse of power in which any individual, simply as a citizen, has a sufficient interest to bring the matter before the court".

29. In ***R v Lord Chancellor, ex p Child Poverty Action Group*** [1999] 1 WLR 347, the Court stated at 353G that public interest challenge may have the:

"essential characteristics…that it raises public law issues which are of general importance, where the [plaintiff] has no private interest in the outcome of the case."

30. I am satisfied that the Plaintiff, who has an academic grounding in the law, is not motivated to make the application for any improper motive, but because she genuinely feels the issue is of public interest. Accordingly, I find that the Plaintiff has a sufficient interest in the matter to which this application for leave relates (GCR Order 53, rule 3.7).

Availability of Alternative Remedy

31. There is no alternative remedy available to the Plaintiff.

Merits

32. As to the merits, I am only concerned with whether the Plaintiff has an arguable case. As set out in paragraph 5 above the application is brought relying on two grounds.

33. In ***Golden Accumulator Limited & Coral House Ltd v Cayman Islands Monetary Authority Cause No. 210 of 2004***[8] Henderson J, when granting leave, made the following obiter comment:

> *"I read* O.53 *of the Grand Court Rules as requiring me to grant leave generally rather than placing restrictions upon the grant of leave by, for example, limiting it only to certain grounds."*

This view is consistent with the views which Laws J expressed with a degree of frustration in ***R v Secretary of State for Transport ex p. Richmond-Upon-Thames London Borough Council*** [1994] 1 WLR 74 at 98B concerning the apparent inability of a Judge at a leave hearing in 1994 to grant leave on some grounds and not on others.

34. However, even before the Civil Procedure Rules ("the CPR") came into force in April 1999[9], relying upon the suggested Woolf reforms in England and Wales[10], Courts there felt able to take a different approach and grant partial leave. In appropriate cases the Courts have granted applicants leave to argue particular grounds only and refused permission to argue other grounds. It has been held to be desirable that the Courts should have the power to restrict the grant of leave so that only certain grounds may be argued. The benefit of this is that it will save a defendant having to file evidence to deal with points that a court

[8] Judgment delivered on 8 June 2004.
[9] It is implicit in Pt54 of the CPR that the Court is able to give permission to proceed on some but not all of the grounds relied upon.
[10] In July 1996 Lord Woolf presented his final report "Access to Justice" on a review of the then current rules and procedures of the civil courts in England and Wales.

considers unarguable and prevents the time of the court at the substantive hearing being used to deal with arguments that a judge has already indicated to be hopeless.[11]

35. The Overriding Objective in the Preamble to the Cayman Islands Grand Court Rules 1995 ("the GCR") requires the Court to liberally construe the Grand Court Rules, so including Order 53, to give effect to the Overriding Objective and *"in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits."* It does not appear that Henderson J considered the Overriding Objective[12] when making his obiter comments concerning his approach to GCR Order 53.

36. In ***R v Staffordshire County Council ex p. Ashworth (1996),*** The Times, 18 October, (1196) 4 Admin. L. Rep. 373, Turner J held that he had the power to hold an applicant bound by the decision of the leave judge to refuse to grant leave on one of the two grounds raised before that judge. Turner J remarked on page 4 B-F:

> *"One of the bugbears of civil justice…has been the seeming inability, query unwillingness, of courts to curtail proceedings within reasonable bounds. Underlying this inability or reluctance may be the fear that by so doing some meritorious point may not be advanced such that undesirably a litigant may go away from court feeling that he has not 'had his day in court'. One of the reforms advocated by Lord Woolf was that the court should not be shy about seeking to control the methods by which litigation is conducted and indeed, in a general way, it has been recognised that the court does have an inherent power or jurisdiction*

[11] However, I note that Lord Woolf in *R (Hunt) v Criminal Cases Review Commission* [2001] QB, at 114C-1114D did suggest that if claimants inform the other parties that they again seek to rely on an additional refused ground, then they could still seek the permission of the Judge to rely on them at the substantive hearing.
[12] Which became applicable from 19 November 2003, just over six months earlier.

to control its own processes. The court has of course no purposes of its own. The court's purpose is to achieve substantial justice between the disputing parties."

37. Although an *"inherent"* power to grant partial leave was exercised by some judges post ***R v Staffordshire County Council*** but before the CPR came into force, concerns still existed about marrying such an approach with the words of RSC O.53. Unlike the position that existed in England during that period, the Cayman Islands has in place the Overriding Objective which supports the Grand Court being able to take the desirable approach of granting partial leave. I am satisfied that I may grant partial leave at this hearing and am therefore able to refuse leave on one of the grounds if I deem it to be on unmeritorious grounds. The approach I take to Order 53 is influenced by the responsibilities placed on the Grand Court by the Overriding Objective, which mirrors the Overriding Objective which had been created from the Woolf reforms in England and Wales to be the guiding pillar for their civil courts. This approach is consistent with the above views of Turner J and his belief that:

"The Court should not be afraid to exercise its inherent power to control its own processes."

38. Although the test on merits is not to be an onerous one for an applicant to cross, the leave hearing still serves a purpose as an important filter. Accordingly, during the hearing I told Counsel that I would be considering the question of leave in relation to each ground separately. I informed him about my concerns about the merits of the pleaded incompatibility ground and whether that ground crossed the arguable case threshold. I indicated that if I found that it did not, I was then going to consider whether I had the power

to refuse to grant leave on that ground and to only grant leave on the s.81 ground. I added that, even if I did go on to grant leave in relation to the incompatibility ground, careful thought should be given by the Plaintiff as to whether proceeding with that ground was genuinely being pursued as it might detract from the consideration at the final hearing to be given to the s.81 ground, which was clearly the much more significant public interest ground and was her primary concern. I afforded Counsel the opportunity to comment upon my concerns and the outlined possible various approaches. Although he stated that he understood the reasons why the Court had concerns, Counsel contended that the arguable case threshold had still been met in relation to both pleaded grounds. However, it was apparent that Counsel took a rather neutral position on the issue raised about whether the Court at this hearing had the power to grant partial leave.

39. I have considered each of the two grounds separately. I am satisfied that leave to apply for judicial review should be granted to the Plaintiff based upon the s.81 ground. The arguable case test threshold has been met.

40. There is no dispute that, pursuant to s.81 of the Constitution, if the Governor concludes that the enactment of legislation is necessary in relation to any matter for which he is responsible under s.55 of the Constitution and if he believes that such legislation would not proceed through the Legislature he may, with the prior approval of the Secretary of State, introduce a bill and assent to it on behalf of Her Majesty. There is no dispute that, pursuant to s.55(1)(b) of the Constitution, the Governor is responsible for external affairs.

41. The issue in dispute arises from the United Kingdom's concern, especially after the declaration made by the Court of Appeal in the Day/Bush case, about it being in breach of international obligations and commitments arising out of the European Convention on Human Rights (the "ECHR") if legislation was not introduced to give effect to the rights of same-sex persons in compliance with s.9 BoR. The Defendant contends that addressing compliance with such international obligations:

"falls squarely within the Governor's remit for external affairs in s.53."

The Plaintiff contends that it does not and that the Governor has therefore erred in law. The Plaintiff contends that the expected and appropriate course that the Governor could have taken to impose change on the Cayman Islands would have been via an Order in Council[13].

42. There appears to be no case authority concerning the issue as to whether matters relating to obligations arising from the ECHR or any other international instrument extended to a British Overseas Territory fall within the definition of being an external affair of the relevant Territory. The exercise conducted by the Plaintiff when setting out the differences seen in the Constitutions of the Turks & Caicos Islands and the British Virgin Islands, where separate reference is made to external affairs and compliance with international obligations, highlights a possible argument that the two may be distinguished. The nature of the various arguments raised by the Plaintiff and the need for resolution of this question of substantial public importance fortify my view that leave to apply for judicial review on the s.81 ground should, and is, granted by me.

[13] Section 125 of the Constitution.

43. I am not satisfied that the leave should be given on the incompatibility ground. It is groundless and I feel it appropriate to prevent a wasteful use of Court time.

44. Section 23(1) of the Constitution provides:

> *"**Declaration of incompatibility***
>
> *23.—(1) If in any legal proceedings primary legislation is found to be incompatible with this Part, the court must make a declaration recording that the legislation is incompatible with the relevant section or sections of the Bill of Rights and the nature of that incompatibility.* [My Emphasis]
>
> *(2) A declaration of incompatibility made under subsection (1) shall not constitute repugnancy to this Order and shall not affect the continuation in force and operation of the legislation or section or sections in question.* [My Emphasis]
>
> *(3) In the event of a declaration of incompatibility made under subsection (1), the Legislature shall decide how to remedy the incompatibility."*

45. The ground is flawed because the Court of appeal did not make a declaration of incompatibility in relation to any Law or section of the law. The Court Of Appeal did not, as required in s.23 of the Constitution find that any particular law or section in a law was incompatible with the Constitution. The Marriage Law was enacted to solely legislate about marriage, such as to provide who could marry and what the procedures are. The Court of Appeal did not express a finding that the Marriage Law was incompatible with the Constitution, notably finding that there is not a right to marriage for same-sex couples under the Constitution.

46. The purpose of the declaration made by the Court of Appeal was to highlight its deep concern arising from its determination that the Legislative Assembly had failed to provide same-sex couples with legal status functionally equivalent to marriage and as such were on breach of Article 8 of the ECHR. The declaration made was that that Ms. Day and Ms. Bush were entitled to that legal protection and the Court then commented that if these protections were not afforded then the United Kingdom Government should take unspecified action to resolve the injustice. Its declaration concerning the state of affairs allowed to persist by the Legislative Assembly was clearly not a declaration that any specified piece legislation was, in part or full, incompatible with the Constitution.

Decision

47. It follows that:

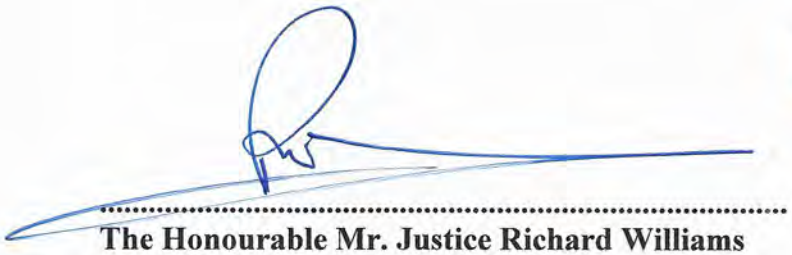
(i) Leave to apply for judicial review is granted only on the s.81 ground set out at paragraph 78.i. of the Application for Leave to Apply for Judicial Review dated 23 October 2020.

(ii) Leave is refused on the incompatibility ground set out at paragraph 78.ii. of the Application for Leave to Apply for Judicial Review dated 23 October 2020.

Further Orders

48. A copy of this Judgment should be served by the Plaintiff on the Defendant.

49. The parties should both consult with the Listing Officer to obtain a case management/directions hearing date.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT