



**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE
CAYMAN ISLANDS**

**CICA (Civil) Appeal No. 0006 of 2022
(Formerly Cause No. G 0169 of 2020)
LACV 0109 of 2020**

BETWEEN

KATTINA ANGLIN

Appellant

-and-

THE GOVERNOR OF THE CAYMAN ISLANDS

Respondent

COLOURS CARIBBEAN

Intervener

On the Papers:

**The Rt. Hon. Sir John Goldring, President
The Hon. Sir Richard Field, Justice of Appeal
The Rt. Hon. Sir Alan Moses, Justice of Appeal**

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APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL

Goldring JA, (President)

Leave to appeal to the Judicial Committee of the Privy Council

1. By Notice of Motion filed on 24 August 2023, the Proposed Appellant has applied for leave to appeal to the Judicial Committee of the Privy Council (“the JCPC”) in respect of the

Certificate of Order of 4 August 2023 dismissing her appeal. The issue for the Court of Appeal in the underlying case was whether the judge in the Grand Court was correct in deciding that the Governor of the Cayman Islands was entitled to exercise his reserve power under section 81 of Schedule 2 of the Cayman Islands Constitution Order 2009 (“the Constitution”) to assent to the Civil Partnership Act 2020 (“the CPA”) and, more specifically, whether he could lawfully ‘*consider*’ that the enactment of the CPA was ‘*necessary or desirable with respect to or in the interests of*’ external affairs, a matter for which the Governor is responsible under s.55(1)(b) of the Constitution.

2. S.3(1) of the Cayman Islands (Appeals to the Privy Council) Order 1984 (“the 1984 Order”) provides:

(1) Subject to the provisions of this Order, an appeal shall lie as of right from decisions of the Court to Her Majesty in Council in the following cases—

- (a) final decisions in any civil proceedings, where the matter in dispute on the appeal to Her Majesty in Council is of the value of £300 sterling or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards;*
- (b) final decisions in proceedings for dissolution or nullity of marriage; and*
- (c) such other cases as may be prescribed by any law for the time being in force in the Cayman Islands.*

3. As the Court of Appeal of the Cayman Islands observed in *Essar Global Fund Limited and Essar Capital Limited v Arcelormittal North America Holdings LLC* CICA, 6 May 2021:

“It is...relevant to quote the test which the JCPC itself applies when considering applications for permission to appeal, which is set out in paragraph 3.3.3(a) of Practice Direction 3 to the Judicial Committee (Appellate Jurisdiction) Rules 2009:

“Permission to appeal is granted-

- (a) in all cases for applications that, in the opinion of the Appeal Panel, raise an arguable point of law of general public importance which ought to be considered by the Judicial Committee at that time bearing in mind that the matter will already have been the subject of judicial decision and may already have been reviewed on appeal.”*

4. The Proposed Appellant, who has no direct interest in the outcome of any appeal, submits that she is raising a point of law of great general or public importance: that she, in common with every citizen of the Cayman Islands, has an interest in ensuring that laws of general application are *intra vires* and that the point of law she is raising is arguable. She also submits that to deny her a right of appeal would be a violation of s.16 of the Constitution (the non-discrimination provision).

Background

5. The CPA was enacted following the decision of the Court of Appeal (subsequently upheld by the JCPC) in the case of *The Deputy Registrar and the Attorney-General v Day and Bush* [2020(1) CILR 99], in which the court made a declaration to the effect that:

“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.”

6. The CPA was enacted on 4 September 2020. Over the past three years, many couples and families have relied upon it to organise their lives, and those of their children and dependents. The Act has not been legally challenged by the Government of the Cayman Islands.

The judgment of the Court of Appeal

7. In response to submissions which are in essence repeated by the Proposed Appellant in the present application, the Court, having observed (at §48), that the issue was whether under the Constitution the enactment of the CPA was ‘*a matter with respect to external affairs*’ for which the Governor had responsibility, found (at §49) that:

“The words...are not difficult to understand. Their meaning, as Mr Hickman on behalf of the Respondent put it, is plain and obvious. A matter with respect to external

affairs encompasses any matter with respect to the international relations or affairs of a territory, as Hendry and Dickson observed. The circumstances in which the CPA was enacted are not disputed. The Government of the Cayman Islands was in breach of its international obligation to abide by the ECHR, in consequence of which the Government of the United Kingdom was answerable at the suit of residents of the Cayman Islands, and in respect of any proceedings which might be brought before the European Court of Human Rights. Setting the plain and obvious meaning of the words against those undisputed facts leads in my view to the inevitable conclusion that the breach by the Cayman Islands Government of its international obligations was a matter with respect to external affairs. To succeed in her appeal, the Appellant must show that under the Constitution it was intended to carve out from that plain and obvious meaning, the breach of an international obligation.”

8. The Court, having rejected the Proposed Appellant’s submissions for the reasons set out in the judgment, finally stated (at §70):

“It seems...clear that on any proper analysis this application for judicial review was bound to fail. Moreover, it was brought by an applicant who had no direct interest in the outcome. Given her (inevitable) concession that the CPA could have been enacted by an Order in Council, Mr Potts’ description [on behalf of the Intervener] of the proceedings as an academic exercise is not without substance. It is also of note, again as Mr Potts observed, that no challenge to the Governor’s use of s.81 has been brought by the Cayman Islands’ Government. The unfortunate consequence of the proceedings has been years of uncertainty for those who entered civil partnerships in the understandable belief that the CPA was lawful.”

Whether the court should grant leave

9. In my view, this proposed appeal does not raise an arguable point of law of great general or public importance which ought to be considered by the JCPC. I say that for several reasons.
10. First, all the issues now raised by the Proposed Appellant have been comprehensively considered by two courts which were entirely consistent in their rulings. Their legal reasoning was orthodox and conventional.

11. Second, as is set out above, the meaning of the words ‘*a matter with respect to external affairs*’ is, as the Court said, plain and obvious. The arguments relied upon by the Proposed Appellant to the contrary effect were without merit. Fresh consideration of their meaning by the JCPC is not warranted.
12. Third, it is indisputably the case, as the parties to the appeal accepted, that the Government of the United Kingdom had unfettered legislative power (by Order in Council) to remedy an incompatibility with the Constitution, effectively rendering the proposed appeal academic in terms of its potential impact on the laws of the Cayman Islands.

The discrimination argument

13. As presently material, s.16 of the Constitution states that:

“(1) Subject to subsections (3), (4) (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.

(2) In this section, “discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.

(3) No law or decision of any public official shall contravene this section if it has an objective and reasonable justification and is reasonably proportionate to its aim in the interests of defence, public safety, public order, public morality or public health.

(4) Subsection (1) shall not apply to any law so far as that law makes provision...

...(d) whereby persons of any such description of grounds as is mentioned in subsection (2) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is objectively and reasonably justifiable in a democratic society and there is reasonable proportionality between the means employed and the purpose sought to be realised.”

14. The Proposed Appellant submits that to grant a right of appeal in relation to property disputes involving a value as low as \$300, but to deny it to what she describes as constitutional challenges such as the one brought by her is discriminatory. As I understand her submission, made by reference to authorities under the equivalent provision of the European Convention on Human Rights (article 14), the Proposed Appellant's argument amounts to this. Her appeal rights are part of the trial process and fall within article 6 of the ECHR (s.7 of the Constitution). A person with a low value claim does not need leave to appeal to the JCPC. Such a person's status enables an appeal by right. However, all litigants before the Court of Appeal have a common interest in an appeal procedure that enables them to challenge a judgment with which they are dissatisfied. There are no obviously relevant differences between appellants with a right to appeal a low value claim, and those with what she describes as a constitutional claim, which, when considered objectively, can justify a difference in treatment between them. It cannot be said there is less public interest in an appeal because it is worth less than £300. Those with a claim such as she has have accordingly been discriminated against.
15. I do not accept the Proposed Appellant's submissions.
16. The 1984 Order is a United Kingdom Order in Council made pursuant to s.1 of the United Kingdom Judicial Committee Act 1844. Its provisions, which are unambiguous, have been considered in many decisions of the Privy Council, in none of which has it been suggested that the provisions are discriminatory. That is unsurprising.
17. Underlying the Proposed Appellant's argument appears to be the assumption that a refusal of leave to appeal means the 'end of the road' as far as the proposed appeal is concerned. However, by s.22 of the 1984 Order, on a refusal of leave by the Court of Appeal, she may seek special leave from the JCPC. If she is right in her submissions in respect of the underlying case, such leave will be granted.
18. Moreover, assuming this proposed appeal falls within the ambit of s.7/article 6, and that s.16/article 14 is therefore engaged, the legislature is in my judgment plainly entitled to distinguish as between different types of appeal, particularly where a third appeal is under consideration. It is entitled to recognise that the interests in the appeals of all appellants are not the same. Implicit in the Proposed Appellant's submissions is the proposition that the legislature is not entitled to set rules restricting rights of appeal in certain types of cases or that all applications

for leave to appeal in cases of judicial review which touch upon the Constitution, should be granted. That cannot be the case.

19. In short, it is my view that this aspect of the Proposed Appellant's submissions is wholly without merit.

Costs

20. I see no reason why, if the Proposed Appellant no longer has the benefit of a Legal Aid Certificate, she should not pay the Respondent's costs. If she retains such a Certificate, I would make no order for costs. (As the Intervener's attorneys are acting on a *pro bono* basis, they are presently unable in the Cayman Islands to claim any costs, whether or not the Proposed Appellant retains a Certificate).

Moses, JA

21. I agree.

Field, JA

22. I also agree.