MR Sam

10/4/02

Extra to file in appropriate binder - Sam 11/4/02.

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 327 of 2001 - Civil

GRAND COURT CAYMAN ISLANDS

BETWEEN: ANA LUISA WARREN Plaintiff

AND: THE IMMIGRATION BOARD Defendant

Appearances:
Mrs. Sheridan Brooks-Hurst for the plaintiff
Mr. Stephen Hall-Jones for the defendant

LEGAL DEPARTMENT APR 15 2002 CAYMAN ISLANDS GOVERNMENT

JUDGMENT

1.

The plaintiff was married to a Mr. D.E. Warren on the 11th September 1980. She believed that he had undefined residential rights in the Cayman Islands, where he had lived since 1962. Both the plaintiff and her husband, despite his Anglophone name, were Honduran nationals.

2.

On the 8th October 1990, the plaintiff was granted a Certificate of Naturalisation as a British Dependent Territory citizen. Two months later,

on the 14th December 1990, she applied under Section 18 (4) now Section 17(4) of the Law for Caymanian status. The then-named 'Caymanian Protection Board" was given her Certificate of Naturalisation, her application for Caymanian status and no other document. The application was granted on the 5th February 1992.

3.

On the 1st September 1998, the plaintiff obtained a decree absolute of divorce from her husband. An Immigration Officer suggested to her (this is uncontradicted evidence) that she should apply to the Board for a ruling that her Caymanian status should continue despite her divorce, and she engaged a firm of consultants, not lawyers, to represent her before the Immigration Board. That application was made on the 28th October 1998.

4.

On the 28th March 2000, some 17 months after the application was made; surely a scandal in itself, the Board wrote a letter to the plaintiff to the effect that the purported grant of Caymanian status, which had been made to her, was *ultra vires* since it had been determined that her former husband, from whom such claim was made, did not in fact and still did not possess

Caymanian status and she was directed to apply for a work permit. An appeal was made to His Excellency, the Governor, and on the 30th March 2001, that Gentleman suggested by letter that the matter be pursued in the Courts. This I am satisfied was to deal with the moratorium in place which in the words of the Governor's letter "prohibits your client from enforcing her legal rights." That letter was written to her legal representative. I will deal with the relevance of that phrase at a later stage. It is clear that by this stage the Executive was aware that the moratorium was legally questionable.

5.

Leave was granted by Sanderson J. on the 2nd October 2000 to challenge the legality of the apparent revocation of her status and to challenge the purported moratorium. The purported moratorium had remained unchallenged from the date it was made until the date this matter came before the Courts. These proceedings were adjourned at the request of Senior Crown Counsel on his first appearance before me, as he appeared to recognise that the purported moratorium was in fact illegal and, as this Court had made clear its preliminary view on the matter to him. In the event, a notice from the Immigration Board was received by the plaintiff

informing her that a grant of Caymanian status under Section 17 (4) of the Immigration Law (2001 Revision) had been made by reason of the grant of a Certificate of Naturalisation. That decision was made between the 19th and 21st November 2001. In other words, she was granted Caymanian status on the precise grounds relied upon in her application in December 1990. I am asked to set aside the grant of leave to seek judicial review granted by Sanderson J. on the grounds that there was nothing then for the Court to decide as she had been granted Caymanian status, but this time on a solid legal foundation. It is said that there should have been a further appeal to the Executive Council rather than coming to Court, at which stage that body would have accepted Crown Counsel's advice. In view of the Governor's letter, previously referred to, this submission fails. There is before me an application on her behalf for a declaration that when the Board purported to revoke her Caymanian status they did so unlawfully. Accordingly, I reject the application made by Board for leave to be set aside and this case will proceed upon its merits. I am further urged that I should make no findings as to the legality or illegality of the moratorium as this has, in effect, by administrative means been put to one side and that I am in danger of making rulings which are obiter. I reject that submission as well. It is for this Court to deal with the assertion that the moratorium was

unlawful and to indicate the reasons why it was unlawful or not if that is the finding of the Court. In addition, there has been intense public interest arising out of the consequences of this case coming before the Court and the public are entitled to be told the reason for the Court's decisions.

6.

The terms of the purported moratorium were contained in a "Direction" made by the then Governor in Council. It read:-

> *"Whereas it is provided in Section 19(5) of the Caymanian Protection Law, 1984 that the Caymanian Protection Board shall grant Caymanian status in accordance with a quota to be fixed by the Governor and whereas by notice dated the 5th February 1985 and published in the Gazette on the 27th March 1981 the Governor fixed the annual quota therein specified (it was) and whereas a review of the Caymanian Protection Law is being undertaken and it is considered that such a revision might affect the granting of status under Section 18(1) now therefore the Governor in the exercise of the powers conferred on him by Section 71(3) of the said Law hereby directs the Caymanian Protection Board with effect from the 1st of January 1991 that the grant of Caymanian status under the quota fixed in relation to Section 18(1), as aforesaid is suspended until further notice".*

Under Section 71(3) the Governor was empowered *"from time to time to issue policy directions to the Board and the Chief Immigration Officer for their guidance in the exercise of their respective powers, duties and*

functions under this Law and it shall be the duty of the Board and the Chief Immigration Officer to put into effect and to carry out such directions."

The quota fixed was 12 per year.

7.

Despite the avowedly temporary nature of the suspension, it has remained ostensibly in force until this case challenged its legality. As previously indicated, when Senior Crown Counsel first appeared on the matter he asked for the matter to be adjourned for a fixed period of time so that the moratorium could be looked at again. It is a matter for concern that successive Administrations, save and except the present one, took no action with regard to what I shall demonstrate to be a flagrant breach of the Law.

8.

The patent illegality of the moratorium is demonstrated by its disregard for one of the foremost pillars of English and, as I shall demonstrate, Cayman Law, namely Article 1 of the Bill of Rights 1689. It provides:-

> *"That the pretended power of suspending of Laws or the execution of Laws by regall authority without consent of parliament is illegal."*

In plain English it simply means that Laws are to be obeyed and not suspended unless they are repealed.

That the Bill of Rights is part of the Law of the Cayman Islands is beyond doubt. *In Roberts-Wray, Commonwealth and Colonial Law* the learned author at page 540 et seq. recites the well-known proposition that:-

> *"British subjects who settle abroad in territory not within the jurisdiction of any civilised power take English law with them." "The colonists "carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony."The English law taken by the settlors is both the unwritten law (Common Law and Equity, and the Statute Law) in force at the time the settlement."*

Statute Law passed after the time of settlement does not automatically apply to the colony but must be extended to it. It is clear that the hard-won provisions of the Bill of Rights, including jury trial, the illegality of excessive bail and freedom of speech and assembly were as necessary to the situation of the early colonies as to any British subject in the homeland.

The Treaty of Madrid of 1670 recognised British title to colonies in the West Indies and North America and, whilst there was no Spanish settlement of the Cayman Islands, the tentative settlement of the Islands by persons of British stock was terminated by the recall of the settlers to Jamaica by the then Governor of the Island, Sir Thomas Modyford in 1671. It had proved impossible to protect the would-be settlers from the depredations of the Spanish. According to Roberts-Wray at page 847:-

> *"No serious settlement of the Islands took place until the beginning of the 18th century".*

In the official history of the Cayman Islands by Dr. Neville Williams, which is published by the Government, it is said, at page 17 that "with the 1730's we pass from the age of the pirates to the period of continuous settlement". In 1739 war broke out between England and Spain and the Governor of Jamaica, Edward Trelawny, encouraged further settlement to defend the Islands against Spanish attack.

It is clear therefore that from the 1730's, the settlers of the Islands, being British subjects, and intending to establish a permanent presence, brought with them the written and unwritten Laws of England including the Bill of Rights of 1689. In "The legal system of the Cayman Islands" by Elizabeth

W. Davis at page 90 there is a discussion as to the date at which permanent settlement occurred. The earliest possible date appears to be 1658 when Messrs Walter and Bowden arrived in Grand Cayman if their presence amounted to actual settlement, but *"if a Court requires reliable evidence the official Crown records in respect of authorised settlement of the Islands fixes the date at 1734".*

She continued:-

> *"A decision of the Grand Court upon which date is appropriate would be welcomed. A decision in favour of the earlier date would exclude major enactments of the period 1658 to 1734 from application to the Islands, whereas if the Court prefers 1734 as the date of actual settlement enactments from this interim period such as the Bill of Rights 1689 could extend to territories if they satisfy the "suitability" requirement."*

The best evidence presently available, leads me to conclude that the appropriate date is 1734 as Elizabeth W. Davis contends. As to the further test of suitability; whilst various approaches have been suggested, I prefer to follow the decision in *Cooper v. Stewart (1889) 14 A.C. 296,* a decision of the Privy Council. It was there held that "suitability" should be determined by allowing the litigant to enjoy the privilege of any English Statute which was on the English Statute book at the time of the settlement if, in years to

come the Act suited the settlers' circumstances. In Roberts-Wray (ibid) that approach is commended as it allows for the development of Courts and civil Government in the territory in question. Accordingly once such institutions were established in the Islands then the Bill of Rights applied *mutatis mutandis*. The fear expressed by Elizabeth W. Davis that the Islands might be faced with the applicability of a raft of legislation if the Courts were to follow *Cooper and Stewart* is unrealistic in view of the breadth and range of local legislation. In any event no such legislation would be considered a "superior" Act of Parliament which by virtue of Section 2 of the Colonial Laws Validity Act 1865 could not be altered by the Legislative Assembly of the Cayman Islands.

9.

It follows that the Governor-in-Council, when seeking to suspend the operation of a Law, without the consent of the legislature, was in breach of Article 1 of the Bill of Rights and that the purported direction was null and void from the date it was made. Even if the Bill of Rights had never been enacted, the "Direction" was unlawful as, on its face, it directed the Caymanian Protection Board to ignore Section 19(5) of the 1984 Law. It is outwith the powers of the Executive to issue such a direction. The

Governor-in- Council was required by Section 19(5) to fix an annual quota and once that was done, the duty of the Board was to implement it. In other words the Governor-in-Council's direction was *ultra vires*.

10.

When the plaintiff applied in December 1990 for Caymanian status, the application was made under what is now Section 17(4) of the Immigration Law (2001 Revision). The basis for that application was that she had been granted a Certificate of Naturalisation. The Board quite wrongly took the view that it could not grant status under Section 17(1), residency, or under Section 17(4) Naturalisation, due to the direction of the 2nd October 1990. The purported limitation was, on its face, limited to applications under Section 18(1) only – now Section 17(1). It therefore, of its own motion, decided to grant status under Section 18 (5)(d) of the Law namely, that the applicant was the spouse of a person who possessed Caymanian status and had been ordinarily resident in the Islands for a period of three years immediately preceding her application. At no time did the plaintiff represent herself as being married to a Caymanian. The Board appears to have jumped to the conclusion that due to Mr.Warren's Anglophone name he must have been a Caymanian! In fact, the moratorium itself was illegal as this judgment makes clear, and therefore the Board did not in fact give

lawful consideration to the application she had made. It breached the rules of natural justice by denying her the right to be heard or to make respresentations when the Board, without consulting her, changed the basis of her application. Accordingly no proper adjudication of her application took place. The Board did indeed have jurisdiction to grant or indeed to refuse to grant status under Section 17 (4) and perhaps under 17 (1) as it is not clear to me from the papers whether the plaintiff had been ordinarily resident in the Islands for 10 years prior to her application. What is clear is that her application under Section 17(4) was not properly resolved. It remained unresolved, even though a fresh application was made in the course of these proceedings, until the "fresh grant" of Caymanian status under Section 17(4) was made in the very recent past. What the Board could not do, was to do what it purported to do, namely to grant her status based on marriage to a Caymanian, as she was in fact not married to a Caymanian and had not claimed she was. The decision to do so was made on the basis of mistakes both as to fact and to law and was accordingly *ultra vires* and without legal effect. When the Board wrote to her telling her that her original grant was void, they did not of course realise that the application under Section 17(4) was still before them and was unresolved.

11.

What this Court cannot now do is to decide what the Board would have done in the event that the "moratorium" was not in place at the material time when status was granted in respect of the original application. She might or might not have obtained status. The Court cannot speculate as to whether she would have been one of the 12 selected that year on the basis of the quota previously imposed, if her case under Section 17(4) was being considered. It is not within the jurisdiction of this Court to attempt to perform an exercise which is vested in the Board alone. It follows that no damages, even if they were to be proved, can flow from the decision of the Board informing her that her original grant of status was void: it was.

12.

It would be wrong for me not to record the Court's indebtedness to the work of Mrs. Brooks-Hurst, Mr. Hall-Jones and Mrs. Sherri Bodden-Cowan, the Chairman of the Immigration Board, in putting an end to an issue which over the years has caused considerably public anxiety. A considerable number of persons have, as a result, been granted Caymanian status and the

quota of 12 per year has been back-dated to the date of the "moratorium". 132 persons were granted status under Section 17(1), residence, and 87 persons were granted status under Section 17(4), naturalisation.

13.

It was very much in the public interest, as well as the private interest of the plaintiff, that these proceedings were brought before this Court. Despite the indications of Senior Crown Counsel that the moratorium may well be illegal the plaintiff was perfectly entitled to continue these proceedings until her status was confirmed. She has succeeded in demonstrating the illegality of the moratorium and a declaration to that effect. I acknowledge that in respect of the matters dealt with on the last hearing date she has not been successful. In my discretion the Board will pay half the plaintiff's costs to be taxed if not agreed.

10th April, 2002
Judge

H.G.D. Graham