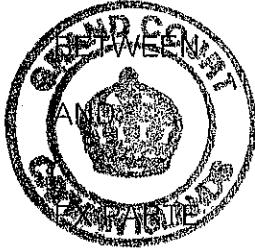


IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 68 OF 2012
L/A: LACV0019/2012



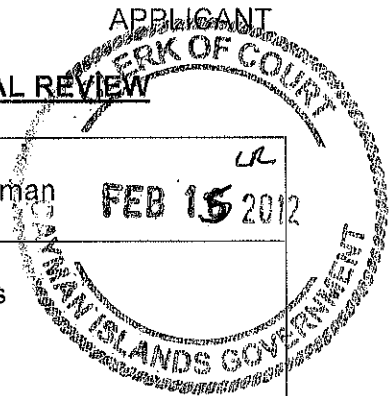
REGINA

THE MINISTRY OF FINANCE, TOURISM AND DEVELOPMENT

RESPONDENT

KISHANE MICHAEL McGAW-CARTER

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW



To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant(s)	Kishane Michael McGaw-Carter No 14 Prospect Haven Apartments Legacy Drive, George Town P.O. Box 113252 Grand Cayman KY1-1008 Cayman Islands
Judgment, order, decision or other proceeding in respect of which relief is sought	The decision of Mr Leonard Dilbert of the Ministry of Finance, Tourism and Development on 24 August 2011 to withdraw an academic scholarship awarded to the applicant under the Young Nation Builders Programme.
Relief Sought	
Judicial review to seek orders of (i) <i>certiorari</i> quashing the decision of Mr Leonard Dilbert dated 24 August to withdraw or revoke the applicant's scholarship and (ii) <i>mandamus</i> directing the Respondent to reinstate its decision to grant the applicant a YNBP scholarship to attend Trinity Christian College, and such further, consequential or other relief as this Honourable Court deems just.	
Name and address of applicant's attorneys, or if no attorneys acting, the address for service of the applicant	Bodden & Bodden Attorneys-at-Law (Litigation) 81 West Church Street, West Bay PO Box 742 Grand Cayman KY1-1303 Our Ref: 1223-0001/PM
Signed <i>Bodden & Bodden</i>	Dated 15 February 2012

GROUNDINGS ON WHICH RELIEF IS SOUGHT

THE FACTS

1. The Applicant seeks leave to apply for judicial review of the decision of Mr Leonard Dilbert of the Ministry of Finance, Tourism and Development ('Respondent') on 24 August 2011 to withdraw an academic scholarship awarded under the Young Nation Builders Programme ('YNBP') on the basis that the decision was an unlawful frustration of the Applicant's expectation that the Respondent had agreed to fund his intended course of study at Trinity Christian College commencing in August 2011.
2. The Applicant is an 18 year old Caymanian male who was accepted to study a Theology degree at Trinity Christian College ('Trinity') on 25 August 2010. The Applicant was resident in Tampa, Florida since the age of 7 years due to his Caymanian mother relocating to the USA in order to pursue a degree in accounting. However, in recent years, medical care required by his mother and ongoing litigation involving a dispute over the family home in the Cayman Islands has prevented his family from permanently relocating back to the Cayman Islands.
3. On or around 7 April 2011, the Respondent awarded the Applicant a YNBP academic scholarship to attend Trinity pursuing a Theology degree course for the 2011/2012 academic year. Particulars of the scholarship and relevant funding were detailed in a Letter of Commitment ('commitment letter') dated 7 April 2011. The commitment letter was later amended on 12 May 2011 to take into account the fact that the Applicant required return air travel from Tampa to Chicago (the city nearest to Trinity) as opposed to travel from Grand Cayman to Chicago.
4. Following receipt of the amended commitment letter which was duly signed, the Applicant and his mother prepared for his attendance at Trinity for the 2011 fall semester by funding various expenses which were not covered by the scholarship.
5. At some point after the Applicant had been awarded the YNBP scholarship, the Applicant enquired with the Respondent about the possibility of changing his academic major from Theology to English Education. This request generated a series of e-mails between the Applicant and the Respondent's Senior Strategic Advisor, Leonard Dilbert. The e-mail correspondence culminated in a meeting between the Applicant and Mr Dilbert on 23 August 2011, after which

it was indicated by Mr Dilbert in an e-mail to the Applicant of the same date that his request could be accommodated subject to the receipt of confirmation from Trinity that the proposed change to his academic major would not present a difficulty and would have no impact on tuition or other aspects of the course.

6. The letter of acceptance requested by Mr Dilbert was immediately provided in an e-mail sent directly from Trinity to Mr Dilbert on the same date. The letter from Trinity confirmed that the Applicant's proposed change could be accommodated.
7. On 24 August 2011, two days before the Applicant was set to depart for Trinity and less than 24 hours after Mr Dilbert's e-mail of 23 August 2011 which gave no indication that the Applicant's scholarship was in jeopardy, Mr Dilbert sent an e-mail to the Applicant revoking the earlier grant of the YNBP academic scholarship largely on the basis that the Applicant's Florida residence (which apparently made the Applicant ineligible for the grant of a YNBP scholarship) was in Mr Dilbert's view 'glossed over' during the application process.
8. Despite appeals on 2 September and 7 October 2011 to Mr Dilbert to reconsider his decision to revoke the Applicant's scholarship, no response was received from Mr Dilbert or the Respondent.

JUSTICIABILITY AND STANDING

9. Judicial review is confined to matters of public, as opposed to private law as set out in the leading cases of *O'Reilly v Mackman* [1983] 2 AC 237 and *R v Panel on Takeovers and Mergers, Ex parte Datafin PLC and Anor* [1987] 2 WLR 699. The courts will not seize jurisdiction to review an administrative action or decision if the matter involved is essentially one of private law.¹
10. In order for a decision to be subject to judicial review, either the source of the decision maker's power should come from statute or subordinate legislation,² or the function performed by the decision maker should be one of a public nature. It is clear that on either test, the Respondent's decision is amenable to judicial review.

¹ Although it may be arguable in this case that the 'Letter of Commitment' dated 12 May 2011 may have constituted a contract between the Ministry and Kishane, ultimately, the existence of a private cause of action does not (by itself) make judicial review inappropriate – see *Corporation of London v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1765 and paragraph [3-059] of De Smith's *Judicial Review* (Sixth Edition)

² Lloyd LJ in *R v Panel on Takeovers and Mergers, ex parte Datafin Plc* [1987] 2 WLR 699 at 722 [G] – [H]

11. YNBP academic scholarships are awarded as part of the Cayman Islands Government's Nation-Building Programme, and a statement made by the Honourable Premier of the Cayman Islands (and under whose Ministry the YNBP scholarship is administered) on 3 August 2011 made clear that the YNBP is part of the current government's Nation-Building Programme and commitment to "*young Caymanians who [wish] to further their education but [do] not have the financial means to do so.*"³
12. Furthermore, funding for the Government's Nation-Building Programme (which includes the grant of YNBP academic scholarships) is specifically provided for in the Cayman Islands Appropriation Law.⁴ Consequently, although the source of the Respondent's power to grant academic scholarships under the Nation-Building Programme does not derive from statute, expenditure made under the Nation-Building Programme is provided for by statute and therefore the Respondent's discretion to award YNBP academic scholarships (as part of the Nation-Building Programme) has the necessary 'statutory underpinning' to qualify as a decision of a public nature. Therefore, in administering the grant of YNBP academic scholarships, the Respondent is clearly exercising a public function.
13. It is therefore submitted that decisions made by the Respondent as administrators of the YNBP academic scholarship grants are amenable to judicial review.
14. It is further submitted that the Applicant clearly has standing as required by Order 53 (7) of the Grand Court Rules, as the decision made by the Respondent directly affected the Applicant by depriving him of the benefit of being granted an academic scholarship to attend Trinity Christian College.

³ Excerpt from statement made by Premier of Cayman Islands on 3 August 2011 about the Nation-Building Programme's scope and purpose.

⁴ The Appropriation (July 2010 to June 2011) Law, 2010 approved funding under heading TP 52 "Promotion of Nation Building and Church-Based Support" of up to KYD\$4,300,000. It has been reduced in the Appropriation (July 2011 to June 2012) Bill, 2011 to KYD\$3,069,492

RELEVANT GROUND OF REVIEW:
FRUSTRATION OF A LEGITIMATE EXPECTATION

15. One of the principles which justify the imposition of procedural and substantive protection from the courts has been the existence of a legitimate expectation. Such an expectation arises where a decision maker has led a person or class of persons to believe s/he will receive or retain a benefit or advantage, and “a public authority that is the object of a legitimate expectation is under a legal duty, albeit qualified, in relation to the fulfilment of that expectation.”⁵
16. In *Council of Civil Service Unions v Minister for the Civil Service*, Lord Fraser noted that a legitimate expectation can arise from an express promise given on behalf of a public authority, which clearly applies in the Applicant’s case:

...even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review as a matter of public law.

Legitimate, or reasonable, expectation may arise from...an express promise given on behalf of a public authority...⁶

17. In order to qualify as ‘legitimate’, an expectation should (i) consist of an express or implied representation which is unambiguous and devoid of relevant qualification, (ii) be directed to a person or class of persons (to whom the representation may reasonably be expected to apply), (iii) be induced by the conduct of the decision maker and (iv) be made by a person with actual or ostensible authority. Although detrimental reliance is not strictly necessary, it can provide evidence of the existence or extent of an expectation and can affect the weight of the expectation and the issue of fairness as it relates to the disappointment of the expectation.⁷

⁵ Stanley Burnton LJ in *R (on the application of SRM Global Master Fund LP) v Commissioners of HM Treasury* [2009] EWHC 227 at [129] and see De Smith’s *Judicial Review* (Sixth Edition) at [12-001]

⁶ [1984] 3 WLR 1174 at 1187 [D] – [E]

⁷ De Smith’s *Judicial Review* (Sixth Edition) at [12-041], [12-058]: “[Although a legitimate expectation] may be overridden by a competing public interest, ...the greater the evident detriment to the promise, the greater the countervailing weight of the public interest must be in order to override an expectation that is held to be legitimate.”

18. It is clear that on the facts of this case that all the necessary criteria are satisfied:
- a. **Unambiguous express or implied representation**
The representation was detailed in the commitment letters dated 7 April and 12 May 2011 and was clearly an express (as opposed to an implied) representation devoid of any qualification and unambiguous in nature: *"I am directed by the Premier, Hon. W. McKeever Bush, OBE, JP, to confirm that approval has been granted for the award of scholarship funding...to support your completion of a degree in Theology."*
 - b. **Directed to a person (or class of persons)**
The commitment letters were both clearly addressed to the Applicant at his Tampa, Florida address. Clearly, the nature of the representation meant that it was only capable of being addressed to one person.
 - c. **Induced by the conduct of the decision maker**
Again, this criterion is satisfied as the assurance was made by the Respondent, and not by another body seeking to bind the Respondent by a representation or assurance made to the Applicant.
 - d. **Made by a person with actual or ostensible authority**
The commitment letters were signed by the Chief Officer of the Respondent, so there is no reason to presume that the Respondent's Chief Officer (the most senior civil servant in a government ministry) would not have had actual authority to make the representation confirming that the Applicant had been granted an academic scholarship.
19. Although not necessary to establish a legitimate expectation, it is plain that the Applicant placed considerable reliance on the representation contained in the commitment letters as he took all the necessary steps to prepare for his attendance at Trinity for the 2011 fall semester. This included the funding of various expenses related to air travel, student visa fees, payment of a student housing deposit and purchasing clothing, housing and other supplies which were not covered by the scholarship. Thus, the Applicant's conduct in preparing for his 2011 fall semester attendance at Trinity therefore goes some way to establish that he was led to believe that and understood that the Respondent would be bound by the assurances and representations detailed in the letters of commitment.

20. The Respondent reinforced this belief by subsequently remitting the Applicant's first semester fees to Trinity and preparing the cheque which represented the remainder of funds necessary to pay for the Applicant's books, transportation and other expenses awarded under the terms of the scholarship [**Exhibit KMC-12**]. In addition, up until the day before the Respondent revoked the Applicant's scholarship, the YNBP administrator continued to send the Applicant e-mail correspondence relevant to 'YNBP Scholars' including payment request and other forms necessary for the administration of the scholarship [**Exhibit KMC-13**].
21. It is therefore submitted that a legitimate expectation which was capable of reliance by the Applicant was created when the Respondent executed the letters of commitment dated 7 April and 12 May 2011.
22. Once a legitimate expectation is established, the relevant decision maker cannot ignore its existence and must carefully weigh the expectation against any legitimate reasons the decision maker may have to frustrate or disappoint the expectation, which can, if the power is improperly exercised, amount to an abuse of the decision maker's power.⁸ Ultimately, it must be assessed whether the decision maker can establish an overriding public interest which would justify the frustration or disappointment of the expectation.
23. The Applicant relies on the English Court of Appeal's decision in *R v North and East Devon Health Authority, ex parte Coughlan (Secretary of State for Health and another intervening)* [2000] 3 All ER 850 ('*ex parte Coughlan*'), which is instructive on the issue of whether the frustration of a legitimate expectation can amount to an abuse of power. The Court of Appeal was asked to decide whether a health authority could revoke its promise to the appellant (a severely disabled woman) of a 'home for life' in a care home which provided specialist care.
24. It was held in *ex parte Coughlan* that the court could utilise a '*supra Wednesbury*' standard of review where the court would examine the relevant circumstances and decide for itself whether the decision was fair. The English Court of Appeal held that the '*supra Wednesbury*' standard of review was appropriate in cases where a lawful promise induced a legitimate expectation of a substantive benefit, giving the promise or representation the character of a contract.⁹

⁸ De Smith's Judicial Review (Sixth Edition) at [12-042].

⁹ *Ex parte Coughlan* at 871 [57], 872 [59]

25. In *ex parte Coughlan*, the Court of Appeal found three key features which justified the court's review of the matter on a '*supra Wednesbury*' basis: (i) the importance of what was promised to the appellant, (ii) the fact that the promise was limited to a few individuals giving the promise or representation the character of a contract¹⁰ and (iii) "*the fact that the consequences to the health authority of requiring it to honour its promise [were] likely to be financial only.*"¹¹ The Court of Appeal confirmed that:

*The court's task in all these cases is not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise. The critical question is by what standard the court is to resolve such conflicts.*¹²

26. There are at least two features which the Applicant has in common with the appellant in *ex parte Coughlan*: (i) the promise or assurance was made to the Applicant only, therefore giving the promise the nature of a contract, and (ii) the consequences to the Respondent of requiring it to honour its promise to the Applicant are, like the health authority in *ex parte Coughlan*, financial only. Although the promise or assurance did not relate to a basic human right (such as the promise of a home for life in *ex parte Coughlan*), the Respondent's decision to revoke his scholarship is a serious matter with potentially detrimental consequences for the Applicant's education and future development. For the Applicant, the ability to obtain a good level of education (particularly in circumstances where he is through no fault of his own ineligible for other financial assistance and lacks the financial resources to fund tertiary education) is plainly a matter of monumental significance.
27. Neither the Applicant nor his mother was advised of any necessary eligibility criteria beyond the information requested from the Applicant and/or Trinity. It was presumed by the Respondent that the Applicant was *prima facie* eligible for the grant of the YNBP academic scholarship, and moreover, all documentation requested by the YNBP administrator was duly provided by the

¹⁰ Contrast with *R v Department of Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 where the Court of Appeal held that a pre-election statement (which potentially applied to thousands of people) about the availability of the 'assisted places scheme' for students could not form the basis of a legitimate expectation.

¹¹ *Ex parte Coughlan* [2000] 3 All ER 850 at 872 [59 – f]

¹² *Supra*, n 11, at 873 [65 – j]

Applicant, his mother and/or Trinity. This is supported by an e-mail dated 10 February 2011 from the YNBP administrator to Trinity, which suggested that the Applicant had all but been approved for the grant of the scholarship [Exhibit KMC-5].

28. Despite Mr Dilbert's assertion in his e-mail of 24 August 2011 [Exhibit KMC-10] that the fact that the Applicant was ordinarily resident in the United States was 'glossed over' in earlier communications, and cited this fact as the main reason the scholarship was withdrawn, it is unclear how the Respondent came to this conclusion when the letters of commitment were addressed to him at his Florida mailing address. Further, the Applicant's mother clarified that the Applicant was resident in Florida in an e-mail exchange on 3 February 2011 with the YNBP administrator following a request for clarification of the Applicant's permanent address by the Respondent's Chief Financial Officer [Exhibit KMC-4].
29. Whilst it is clear why the Respondent would seek to limit the grant of academic scholarships to young persons who are Caymanian and/or ordinarily resident in Cayman (part of relevant public interest considerations and necessary parameters), we submit that it cannot be asserted that the Applicant's Florida residence was obscured when confirmation regarding the Applicant's overseas residence was provided by the Applicant's mother and the commitment letters which form the basis of the Applicant's legitimate expectation were addressed to the Applicant at his Florida mailing address. There is no evidence which suggests (whether expressly or by implication) that the Applicant or his mother concealed or misrepresented the fact of his Florida residence to the Respondent.
30. It is not accepted that the Ministry of Finance had any or any clear eligibility criteria for the YNBP scholarship at the time the Applicant was considered. The sequence of events suggests to new or revised eligibility criteria being imposed after the date the Applicant was awarded the YNBP scholarship.
31. Further or alternatively, even if it is established that there existed eligibility criteria at the time the Applicant was being considered for the YNBP scholarship and local residence was one such criterion, it was incumbent on the Respondent to ascertain prior to deciding whether to offer the Applicant the YNBP scholarship whether he satisfied any eligibility criteria (to the extent they existed) and to ensure that the Applicant was made aware of such criteria prior to moving forward with the application process.

32. In any event (and with full disclosure by the Applicant's mother of the Applicant's residence in Florida), the Respondent made the decision to award the Applicant the YNBP scholarship on or around 7 April 2011, thereby creating from that date a legitimate expectation of a substantive benefit.
33. Consequently, it is submitted that not only did the Applicant have a legitimate expectation, but in the circumstances of this case there was no demonstrable overriding public interest which would justify the Respondent's decision to frustrate the Applicant's legitimate expectation of an academic scholarship to pursue a degree course at Trinity. We therefore respectfully invite the court to review the 'correctness' of this decision on the '*supra Wednesbury*' basis as outlined in *ex parte Coughlan*.

DELAY

34. Order 53, Rule 4 stipulates that an application for leave to apply for judicial review shall be made within 3 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.*"
35. As Mr Leonard Dilbert's decision to revoke the Applicant's scholarship was made on 24 August 2011, it must be conceded that an application for leave to apply for judicial review of this decision should have been made on or before 23 November 2011.
36. Immediately following the decision to revoke the Applicant's scholarship, e-mails were sent by his mother's attorney (in an unrelated matter) to Mr Dilbert on 2 September 2011 and 7 October 2011 inviting him to reinstate the Applicant's scholarship. Whilst the Applicant awaited a response from Mr Dilbert (which never materialised), attempts to apply for several other local scholarships have to date been unsuccessful or funding in those scholarships is limited to required course books and other ancillary expenses.
37. Bodden & Bodden Litigation were instructed in this matter on 12 January 2012, following which it became clear that the Applicant required a certificate for legal aid, which was granted on 9 February 2012. A letter inviting the Respondent to reconsider the decision made on 24 August 2011 to withdraw the Applicant's scholarship was sent on 7 February 2012. Save for an acknowledgment of receipt, no response has been received to that letter.

38. There is limited authority on what constitutes good reasons for undue delay, but it is pointed out in paragraph 16-054 of De Smith's Judicial Review (Sixth Edition) that time taken to obtain legal aid (although it is no way suggested that the legal aid application in this matter took an inordinate amount of time to be processed) and the importance of the point of law or issue at stake are good reasons to extend the period within which an application for leave to apply for judicial review should be made.
39. In the circumstances of this case, it is respectfully submitted that the delay is not particularly significant (it is now just over 5 months since the decision was made – in *R v Stratford on Avon District Council, Ex parte Jackson* [1985] 1 WLR 1319 the court granted leave where the delay was approximately 9 months), and there is an important point of law at stake: whether a government authority is entitled to frustrate the legitimate expectation of a scholarship recipient on the basis that eligibility criteria (which were not in any event made clear at the start of the application process) were not met when the scholarship has already been awarded and both parties have acted in reliance and in pursuance of the assurance.
40. We therefore respectfully invite this Honourable Court to extend the period within which this application ought to have been made pursuant to Order 53, Rule 4 of the Grand Court Rules.

Dated this 15th day of February 2012

Philippa McFarlane
Bodden & Bodden Litigation

The Applicant's Attorneys request a hearing of this application for leave to apply for judicial review pursuant to Order 53, Rule 3 (3) of the Grand Court Rules.