Note: The applicant shall rely on his First Affidavit, filed in support of the application in *Bilika Harry Simamba v Attorney General and Governor* CICA 36/19 and already served on both respondents.

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. GC 93 OF 2020

BETWEEN:

BILIKA HARRY SIMAMBA

APPLICANT

ATTORNEY GENERAL

1ST RESPONDENT

GOVERNOR OF THE CAYMAN ISLANDS

2ND RESPONDENT

APPLICATION FOR LEAVE TO FILE CONSTITUTIONAL PETITION (PURSUANT TO SECTION 26 OF THE CONSTITUTION) RE DENIAL OF RIGHT TO FAIR TRIAL CONTARY TO SECTION 7 OF THE CONSTITUTION

To: **THE CLERK OF THE COURT**
Law Courts Building
George Town
Grand Cayman

ATTORNEY GENERAL
4th Floor Government Administration Building
133 Elgin Avenue
P. O. Box 136
George Town
Grand Cayman KY1-9000

THE GOVERNOR
4TH Floor Government Administration Building
George Town
Grand Cayman

Name, Address and description of Applicant:

Bilika Harry Simamba
30 Fairlawn Road
P O Box 1393
Grand Cayman, KY1-1110

1. DECISION AND OMISSION IN RESPECT OF WHICH RELIEF IS SOUGHT

A systematic breach, and threat of continued breach, by the Grand Court of the applicant's rights under section 7 of the Constitution of the Cayman Islands whereby everyone has *"the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time"*. This violation crystalized in the judgement of Mr. Justice Ian Kawaley in *Bilika Harry Simamba v Cayman Islands Health Services Authority* GC 32/2014 dated 17 June, 2019 and an Amended Case Management Order dated 13 November 2019 that if the additional medical reports are not produced by 31 March, 2020, the matter *"shall be struck out and the Defendant shall be awarded costs to taxed if not agreed on the standard basis."* The judges, including Justice Mangatal, failed in the manner hereinafter appearing to accord the applicant his rights under section 7. Accordingly, relief is being sought under section 26 of the Constitution.

2. RELIEF SOUGHT:

IN RELATION TO JUSTICE MANGATAL

2.1 A declaration, in relation to Justice Mangatal (as she then was, hereinafter simply "Justice Mangatal") and the facts stated in paragraphs 22 to 33 of the applicant's first affidavit that:

(a) Her failure to deliver a judgment in the case of *Bilika Harry Simamba v Cayman Islands Health Services Authority* GC 32/2014 (the *Simamba* Case) from 3 December 2015, when she first heard the matter, to 25 October 2018, when she

recused herself (3 years and 10 months later) without delivering a judgment was a violation of the applicant's right under section 7 of the Constitution in failing to make a *"determination .....within a reasonable time"*.

(b) Her failure to deliver judgment as aforesaid was a violation of the Judicial Code of Conduct of the Cayman Islands, 9 March 2012, paragraphs 34 to 36, as read with Practice direction No. 1 of 2012 issued by the Chief Justice, which states that reserved judgments must be delivered within 2 to 3 months, unless there were extenuating circumstances and the judge concerned informs the Chief Justice in advance, this violation being due to the fact that:

(i) there were no extenuating circumstances; and

(ii) Justice Mangatal did not inform the Chief Justice that this was likely to happen.

The said Practice Direction created a legitimate expectation that a judgment would be delivered within 3 months unless item (i) and (ii) were present.

(c) The applicant, in filing a complaint to the Judicial and Legal Services Commission in May 2018 about the delayed judgement (the filing taking place after 2 years and 5 months from the date of hearing on 3 December 2015) the applicant acted reasonably considering Practice Direction 1 of 2012 and Justice Mangatal's own promise to deliver judgment in the first quarter of 2016. This promise was reiterated in paragraph 2 of her case management ruling of 19 July 2017 where she said in paragraph 2 that, *"The first hearing took place on 3 December 2015. At that time I had hoped to deliver judgment within the first quarter of 2016, but I unfortunately was not able to do so, based on the volume of work that I had at the time."*

(d) In all circumstances there was no justification in law or in fact for delay or recusal from the matter and, otherwise, for violating the applicant's rights under section 7 of the Constitution.

IN RELATION TO JUSTICE KAWALEY

2.2 A declaration that Justice Kawaley failed to act in a fair, independent and impartial manner in the following respects:

(a) He deliberately and in bad faith failed to consider, or acknowledge in specific or general terms, approximately 52 relevant cases that were cited by the plaintiff in the *Simamba* Case.

(b) In deciding the immunity matter on the basis solely or mainly on the basis that the judgement of Justice Williams in *Thompson* was not wrong in principle without entering upon an examination of the 52 cases and 7 specific arguments raised by the applicant, was in breach of paragraph 2 of the **Judicial Code of Conduct of the Caribbean Court of Justice** (the CCJ Code) and paragraph B 10 of the **Code of the Conduct for the Cayman Islands Judiciary** (the Cayman Code), both more amply quoted below, under which judges are to be solely responsible for their decisions free from external influences.

(c) In failing to take into account the case of *BDO v Governor in Cabinet* (2018) after it was brought to his attention (especially its direct contradiction of the basis upon which he was proposing to make a ruling) acted in bad faith and in breach of paragraph 2.1 of the CCJ Code whereby a judge is expected to make decisions *"in accordance with a conscientious understanding of the law"* and the Cayman Code, paragraph 34, whereby a judge *"must display intellectual honesty in the reasoning on which his or her decisions are based"*.

(d) In all circumstances of the case he did not give a reasoned judgement befitting that of a reasonably competent judge, considering the arguments and cases that were placed before him by the applicant.

IN RELATION TO BOTH JUSTICES MANGATAL AND KAWALEY

2.3 In relation to both Justice Mangatal and Justice Kawaley, a declaration that the facts set out in the applicant's first affidavit were cumulatively a violation of the applicant's rights in section 7 of the Constitution.

IN RELATION TO THE GOVERNOR

2.4 An order of mandamus against the 2nd Respondent to decide a complaint made to him by the applicant against Justice Kawaley and/or refer the matter of the "inability", "misbehaviour" or "misconduct" of Justice Kawaley to the Judicial and Legal Services Commission under section 96 of the Constitution and, if not, to give full reasons to the applicant for his decision not to do so, or has given reasons that are not adequate as required by law.

IN GENERAL

2.5 General damages, aggravated damages and exemplary damages.

2.6 Costs on an indemnity basis against Justice Ingrid Mangatal, Justice Ian Kawaley or, in the alternative, against the Judicial Department, or in the alternative, the Respondents.

2.7 Such further, consequential monetary or other relief as this Honourable Court deems just.

Date: 3 June, 2020

Bilika H. Simamba

BILIKA HARRY SIMAMBA
Applicant in Person

GROUNDS ON WHICH RELIEF SOUGHT:

(Note: for convenience, provisions of the judicial codes are repeated under the headings for both judges)

IN RELATION TO JUSTICE MANGATAL

Ground 1: Breach of judicial codes: Hon Justice Mangatal breached both the Judicial Code of Conduct (for Cayman) and the Judicial Code of Conduct (for the CCJ) in the following respects:

***Ground 1.1**: Failure to make a decision conscientiously according to law*

The **Judicial Code of Conduct of the Caribbean Court of Justice** (25 July, 2013, issued by Rt. Hon. Sir Dennis Byron, President Caribbean Court of Justice – the CCJ Code) provides in paragraph 2 as follows:

> **"Principle:**
>
> An independent judiciary is indispensable to impartial justice under law. A judge should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
>
> **Code:**
>
> 2.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and *in accordance with a conscientious understanding of the law, free of any extraneous influences*, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." (Emphasis added)

In the same vein, the **Code of Conduct for the Cayman Islands Judiciary** (9 March, 2012, issued by the Judicial and Legal Service Commission – the Cayman Code) provides in paragraph B 10 that:

> "[N]o judge can be directed as to his or her own judicial decision by any other judge. Consultation with colleagues when points of difficulty arise is important in the maintenance of standards. In performing judicial duties, however, *the judge shall be independent of judicial colleagues and solely responsible for his or her decisions.*" (Emphasis added)

When it was pointed out to Justice Mangatal that in a previous case she had proceeded to hear a matter in a case where there was a standing decision of a court of coordinate jurisdiction (on the same issue) and there was no reason for her not similarly to hear my case and decide my case, her response in continuing to refuse to make a ruling was to state in paragraph 15 of the case management ruling of 19 July 2017 that, *"It is noted that in that case that I was convinced*

that the decision was wrong". She arrived at this conclusion without hearing my full arguments and implied that she did not want to waste time on my arguments since she agreed with the judgment I was challenging. This is not a proper approach to judicial decision-making especially when I had given her a sketch and list of authorities unaddressed in *Thompson* which I intended to rely on.

By being this dismissive of all my cases and arguments, blindly assuming that Justice Williams was right, she made the assumption that I, or the cases I cited and issues raised, could not possibly offer any perspectives that could make her decide differently. In so doing, she abdicated her responsibility to decide the case *"in accordance with a conscientious understanding of the law, free of any extraneous influences"* (CCJ Code) and failed to assert her duty to *"be independent of judicial colleagues and be solely responsible for his . . . decisions".*

***Ground 1.2**: Failed to display intellectual honesty.* The Cayman Code, paragraph 34, states that a judge *"must display intellectual honesty in the reasoning on which his or her decisions are based"*. In addition to failing to decide the issues according to a conscientious pursuit of the law, Justice Mangatal displayed intellectual dishonesty by repeatedly stating that she agreed with the judgement of Justice Williams in the *Thompson* Case, finally saying so in writing in her ruling of 19 July 2017 and then, only 10 months later in *BDO v Governor in Cabinet*, she disagreed with that ruling. In the applicant's submission, this is what led her to recuse herself rather than the applicant's complaint to the JLSC. She was now in a contradiction.

***Ground 1.3**: Failure to give me a hearing.* The CCJ Code provides in paragraph 3 as follows:

> "**Principle:**
>
> Integrity is vital to the proper discharge of the judicial office.
>
> **Code:**
>
> 3.1 A judge shall ensure that his or her conduct is above reproach in the view of reasonable, fair-minded and informed persons.

3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not only be done but must also be seen to be done."

By continuing to refuse to render a ruling that she had promised and then refusing to grant me a hearing to address her on the decision in *Thompson,* which had been rendered by Justice Williams since that promise, she failed to give any appearance that justice was being seen to be done.

Ground 2: Bad faith: Justice Mangatal's refusal to grant me a supplementary hearing after the *Thompson* Case was decided in February 2016, partly on the basis that my argument that the plain meaning rule was wrongly applied by Justice Williams in *Thompson* could never be accepted by a court, and then later in *BDO v Governor in Cabinet* deciding that Justice Williams was wrong, was a mark of bad faith; at the very least it meant that she failed to listen to my arguments in conscientious pursuit of the law contrary to the Codes of Conduct aforesaid.

Ground 3: Bias: In continuing to cave to the demands of the defendant in the *Simamba* Case to keep postponing the matter without giving due consideration of the countervailing arguments such as that that the Health Services Authority (Amendment) Law 2016 was now relevant to my case, and, sometimes, in open court agreeing with the submissions of the defendant's attorney even before I addressed the court on an issue, she displayed bias, which formed part of my complaint to the JLSC.

Ground 4: Blatant and persistent refusal to follow clear authorities: In the case management hearing that led to the order of 19 July 2017 to continue waiting for the decision of the Court of Appeal, I argued to Justice Mangatal not just on the basis of the management issues but also placed in writing before her the detailed arguments that I later placed before Justice Kawaley, and summarized them for her, in the hope of persuading her that she needed to hear the whole case. She still refused, only to make a decision that agreed with those (my) arguments in *BDO v*

Governor in Cabinet 10 months later about the proper meaning of the plain meaning rule as stated above.

Ground 5: Failure to decide the case within a reasonable time contrary to section 7 of the Constitution: The Privy Council ruled in the case of *Oliveira v Attorney General of Antigua and Barbuda* [2016] UKPC 24 Privy Council Appeal No 0022 of 2015 that one year was too long for immigration authorities to take to decide a matter. The court also said that this delay entitles one to damages. Justice Mangatal did not decide my matter for 2 years and 10 months and then at that point recused herself. The Judicial Code of Conduct for the Cayman Islands Judiciary, issued by the Judicial and Legal Services Commission (2 March, 2012), states that:

> *"[36] A judge should strive to deliver reserved judgments as soon as possible and in any event within such period as may from time to time be prescribed by the Chief Justice or the President of the Court of Appeal, as the case may be. If the judge becomes aware that his or her judicial commitments (or other circumstances) may prevent him or her from delivering judgment within that time, he should alert the Chief Justice to that possibility."*

Pursuant to this provision, the Chief Justice issued Practice direction No. 1 of 2012, which states that reserved judgments must be delivered within 2 to 3 months. If not, the PD also reiterates that the Chief Justice must be informed, which neither the judge concerned or the Chief Justice say that this was done. Failure to deliver a judgement by Justice Mangatal was a violation of these precepts and section 7 of the Constitution.

GROUNDS IN RELATION TO JUSTICE KAWALEY

Ground 6: Breach of judicial codes: Hon Ian Kawaley has breached both the Judicial Code of Conduct (for Cayman) and the Judicial Code of Conduct (for the CCJ) in the following respects:

Ground 6.1: *Failure to make a decision conscientiously according to law.* The **Judicial Code of Conduct of the Caribbean Court of Justice** (25 July, 2013, issued by Rt. Hon. Sir Dennis Byron, President Caribbean Court of Justice – the CCJ Code) provides in paragraph 2 as follows:

> "**Principle:**
>
> An independent judiciary is indispensable to impartial justice under law. A judge should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.
>
> **Code**:
>
> 2.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and *in accordance with a conscientious understanding of the law, free of any extraneous influences*, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." (Emphasis added)

In the same vein, the **Code of Conduct for the Cayman Islands Judiciary** (9 March, 2012, issued by the Judicial and Legal Service Commission – the Cayman Code) provides in paragraph B 10 that:

> "[N]o judge can be directed as to his or her own judicial decision by any other judge. Consultation with colleagues when points of difficulty arise is important in the maintenance of standards. In performing judicial duties, however, *the judge shall be independent of judicial colleagues and solely responsible for his or her decisions.*" (Emphasis added)

In his ruling, Justice Kawaley (after a brief mention in paragraph 74 of my challenge to the application of the literal rule and my invoking of the maximum *generalia specialibus non derogant*) goes on to state as follows:

> "75. These summary points were then elaborated upon, primarily through statements of broad principle which do not succeed in demonstrating any serious error of approach in Williams J's analysis. The suggestion that the literal rule was applied in an old-fashioned and mechanistic manner is manifestly unsupportable in light of a fair and straightforward reading of the judgment in *Thompson*."

Justice Kawaley does not mention a single one of the 52 cases I cited aimed at demonstrating that the application of the literal rule in *Thompson v Cayman Islands Health Services Authority* (2016) 1 CILR 93 was misconceived in law. Those cases are listed in **BHS 3**. Such analysis as is undertaken does not show any real reasoning or analysis of the very detailed arguments I made. He also did not specifically address at least 7 issues, these being outlined in my letter to him dated 16 June 2019 and written before he finalized his ruling. The letter is **BHS 2** to the affidavit.

By being this dismissive of all my cases and arguments, blindly assuming that Justice Williams was right, he makes the assumption that I, or the cases I cited and issues raised, could not possibly offer any perspectives that could make him decide differently. In so doing, he has abdicated his responsibility to decide the case *"in accordance with a conscientious understanding of the law, free of any extraneous influences"* (CCJ Code) and failed to assert his duty to *"be independent of judicial colleagues and be solely responsible for his . . . decisions"*.

***Ground 6.2**: Failed to display intellectual honesty.* The Cayman Code, paragraph 34, states that a judge *"must display intellectual honesty in the reasoning on which his or her decisions are based"*. In addition to failing to decide the issues according to a conscientious pursuit of the law, Justice Ian Kawaley has displayed intellectual dishonesty by:

> (a) Not addressing the 52 cases cited in relation to the immunity issue and the 7 issues raised in relation to that, in particular, the total failure to address the issue of the Health Services Authority (Amendment) Law 2016 (Law 11 of that year) which had not been

enacted when *Thompson* was decided, and which was argued in the 1st Skeleton Arguments (pages 27, 28); I also pointed out in a 7-line paragraph commenting on paragraph 59 of this draft ruling, and also in 13-line paragraph on page 7 of **BHS 4**, all of which was before he wrote/finalized his ruling;

(b) Issuing his judgement after he had become aware, though my letter of 16 June 2019, **BHS 4**, (cited above) that the case of *Thompson v CI Health Services* Authority, which he did not want to depart from, had been disavowed by the decision of Mangatal J in *BDO v Governor in Cabinet* (2018) 1 CILR 457.

***Ground 6.3**: Failure to give me a meaningful hearing.* The CCJ Code provides in paragraph 3 as follows:

> **"Principle:**
> Integrity is vital to the proper discharge of the judicial office.
> **Code:**
> 3.1 A judge shall ensure that his or her conduct is above reproach in the view of reasonable, fair-minded and informed persons.
> 3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not only be done but must also be seen to be done."

By unilaterally cancelling the 2-day hearing, even after the defendant had expressed a lack of objection to a video link hearing, and then hearing the matter *ex parte* for 30 minutes, he failed to act in a manner that a fair minded and informed person would consider to be beyond reproach.

Ground 7: Error of Law: The Supreme Court of Canada case of *R v Sheppard* [2002] 1 S.C.R. 869, 2002 SCC 26 has ruled that failure to give meaningful reasons amounts to an error of law

which, in itself, opens the judgement open to quashing. The court has said (in paragraph 4 of the headnote) that:

> *. . . reasons fulfill an important function in the trial process and, as will be seen, where that function goes unperformed, the judgment itself may be vulnerable to be reversed on appeal.*

The Supreme Court of Canada in that case (paragraph 12 of the body of the judgement) has emphatically held, approving another judge, as follows:

> *Green J.A. held that "a failure to intervene in this case would amount to an affirmation of the use of boilerplate language in trial judgments as a means of insulating such judgments from appellate review" (p. 268). To dismiss the appeal, he thought, would encourage trial judges to deliberately structure judgments to frustrate appellate review or to mask a lazy or inadequate analysis. There was nothing here for an appellate court to scrutinize. The argument that busy trial judges should not be required in every case to provide detailed reasons did not justify giving no reasons in all cases, especially those where common sense would expect controversial aspects to be discussed and analyzed.*
>
> . . .
>
> *Failure to address these matters demonstrated that the trial judge either had failed to grasp important points or had chosen to disregard them. The verdict was unreasonable.*

The following, is also from *Sheppard* (paragraph 39 of body):

> *More recently, the Court has explored circumstances where, short of finding a verdict to be unreasonable, the trial judge's failure to articulate reasons in relation to a key issue in circumstances which require explanation could be characterized as an error of law,*

> *giving rise to a new trial (rather than, as is the case with an unreasonable verdict, an acquittal).*

The Supreme Court of Canada in *Sheppard* finally concluded that:

> *the failure of the trial judge to deliver meaningful reasons for his decision in this case was an error of law.*

Justice Kawaley's failure to give adequate reasoning and, in particular, his failure to mention or deal with the 52 cases aforementioned and the issues aforementioned is an error of law within the meaning of the Court of Appeal Law, section 5, in failing to deliver "substantial justice between the parties" and calls for the quashing of that decision on that ground alone. Failure to give reasons has also been held in judicial review matters as being an error of law making the decision liable to quashing (*R v Criminal Injuries Compensation Authority ex parte Leatherland and others* [2000] TLR, 12 October).

Ground 8: Judgement is prejudicial to the plaintiff's right of appeal: Again, the Supreme Court of Canada case of *R v Sheppard* [2002] 1 S.C.R. 869, 2002 SCC 26 states that failure to give adequate reasons prejudices the right of appeal as the losing party has no holdings to base their appeal on. It was said in paragraph 3 of the headnote that:

> *"The lawyers for the parties may require reasons to assist them in considering and advising with respect to a potential appeal."*

Further in paragraph 5 of the headnote it says:

> *Reasons perform an important function in the appellate process. Where the functional needs are not satisfied, the appellate court may conclude that it is a case of unreasonable verdict, an error of law, or a miscarriage of justice within the [legislation concerned].*

And finally regarding reasons and appeals, the Supreme Court of Canada has said (paragraph 8, headnote) that:

> *The trial judge's duty is satisfied by reasons which are sufficient to serve the purpose for which the duty is imposed, i.e., a decision which, having regard to the particular circumstances of the case, is reasonably intelligible to the parties and provides the basis for meaningful appellate review of the correctness of the trial judge's decision.*

By failing to give sufficient reasons, Justice Kawaley has prejudiced my right of appeal as he has not ruled on the overwhelming number of cases cited and issues raised. Also, his judgment on the medical and dental issue is also suspect and that too has to be quashed.

It was also further said (paragraph 16 of body of judgment) that:

> *. . . the deficiency in the reasons created significant problems of substance for the appellate court.*

The following passage from paragraph 28 of the body of the judgement in *Sheppard* is also significant:

> *The mandate of the appellate court is to determine the correctness of the trial decision, and a functional test requires that the trial judge's reasons be sufficient for that purpose. The appeal court itself is in the best position to make that determination. The threshold is clearly reached, as here, where the appeal court considers itself unable to determine whether the decision is vitiated by error. . . . The simple underlying rule is that if, in the opinion of the appeal court, the deficiencies in the reasons prevent meaningful appellate review of the correctness of the decision, then an error of law has been committed.*

Ground 9: Failure to be accountable to the public: The Supreme Court of Canada case of *R v Sheppard* [2002] 1 S.C.R. 869, 2002 SCC 26 makes it clear that accountability to the public is important. It says in paragraph 1 of the headnotes:

> *The delivery of reasoned decisions is inherent in the judge's role. It is part of his or her accountability for the discharge of the responsibilities of the office. In its most general sense, the obligation to provide reasons for a decision is owed to the public at large.*

The Supreme Court also said in paragraph 15 of the body of the judgement:

> *Reasons for judgment are the primary mechanism by which judges account to the parties and to the public for the decisions they render. The courts frequently say that justice must not only be done but must be seen to be done, . . . it is difficult to see how justice can be seen to be done if judges fail to articulate the reasons for their actions.*

By failing to address the 52 cases and at least 7 issues referred to above, Justice Kawaley has abdicated his responsibility and acted in contumelious disregard of his employment obligations and duty, as a judge, to the public.

Ground 10: Bad faith: The reasons set out above (failure to even acknowledge even one of the 52 cases cited let alone consider them in his reasoning) show that Justice Kawaley has acted in bad faith. What is more, a chain of facts, outlined in more detail in the letter before action to him that is **Exhibit BHS 5** to my first affidavit makes it clear that he had no intention to decide the matter in good faith.

First, 3 days before his draft ruling was circulated, I made him aware that he had not dealt with the issue relating to the Health Services (Amendment) Law 2016 but he still did not include it in his final ruling.

Second, I pointed out again, before his ruling was issued, that there was the decision in *BDO v Governor in Cabinet* by which Justice Ingrid Mangatal decided that she did not agree with the judgement of Justice Williams in *Thompson v Cayman Health Services Authority* but he went ahead to finalize his judgment, knowing full well that the whole basis upon which he was proposing to make the ruling had been undermined. In light of the level of bad faith shown, the judge cannot maintain any semblance of fairness.

Ground 11: Bias: The facts indicated in my 1st affidavit show bias. Further and in the alternative, there is at the very least, perceived bias, making the decision in relation to the Applicant liable to judicial review as per the principles in, among many cases, *R v Sussex Justice ex parte McCarthy* [1924] I KB 259; and *Metropolitan Properties Co Ltd v Lannon* [1969] I KB 577.

Ground 12: Unreasonableness: The decision of Justice Kawaley is *Wednesbury* unreasonable (*Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.) No reasonable judge, properly advised, would render the sort of judgment that he rendered. Failure to apply his mind or even mention the 52 cases that were cited to him and the 7 issues outlined in **Exhibit BHS 3** of my 1st affidavit (referred to above) is so unreasonable that is negates the whole idea of judicial decision–making and seriously undermines the proper perception of the judicial function.

Ground 13: Denial of the right to a fair trial under section 7 of the Constitution: In addition to what has been outlined above, Justice Kawaley has denied me the right to a trial, and he has done so in the following ways:

(a) He denied me a right to an oral hearing, I only had about 30 minutes to address him in this matter. A matter raising similar issues of immunity was argued over 8 days in the Grand Court and was set down for 4 days in the Court of Appeal, though it was not ultimately heard, the matter having been settled.

(b) My matter is well-pleaded and no part of my pleading was ever challenged. With great difficulty as a litigant in person, I obtained a medical report to cover a principal part of the suit, this being from distinguished pharmacologists in the United Kingdom, who said that I should have been warned of the side effects of the medication in issue. On that basis, I said that it was only fair that, if any additional evidence was necessary, this could be obtained as part of a general order for directions. The judge refused to allow this and insists that he will

dismiss the matter if additional evidence is not provided. Also, despite my pointing out to him that there is a matter of *res ipsa loquitar* relating to the dental part of the suit, he has glossed over this and says, effectively without examining the dental and medical records, he will summarily dismiss the matter. One would have thought that where I have provided this level of prima facie evidence, at the very least, he should have allowed the matter to proceed to directions, which I had offered to the defendant early in the suit but which he spurned. (See *Pyx Granite v Ministry of Housing* [1958] 1 QB 554; and *R v Hillingdon London Borough Council ex parte Royco.* [1974] QB 720)

Ground 14: Blatant and persistent refusal to follow clear authorities: In addition to failure to even acknowledge the 52 cases and the 7 issues referenced above, Justice Kawaley did the opposite of what he should have done in relation to the application for an "unless" order. The cases I cited to him of *Mubarak v Mubarak* Justice Bodey made it clear that: *"The sanction [of an unless order] is . . . a remedy of last resort. Inappropriate attempts to rely on it would be quickly met with censure and order for costs."* (Even Justice Mangatal had expressed to Mr. Wingrave how unusual the application was at that stage. On the audio of the hearing of 6 May 2019, Mr. Wingrave refers to this statement from Justice Mangatal.)

Other cases make it clear that this means that, before an unless order is made, the person against whom it is made must have disobeyed a previous order. In this case, the defendant applied for an unless order as a first resort (not last) after filing a defence and refused my request to agree on directions. In paragraph 39 of his ruling, the judge acknowledged that, *"In the course of the hearing the Defendant's counsel conceded that the Plaintiff was not in breach of any prior Court Orders in relation to producing expert evidence."* Despite this, which the judge also acknowledged at the short oral hearing by the judge, he did not censure the defendant or award costs in any event against the defendant.

On the contrary, he was flagged in paragraph 84 that, *"it is difficult it is difficult to see why the costs of the expert evidence issue should not logically be awarded to the Defendant in any event."* This continued with his refusal to consider the case of *BDO v Governor in Cabinet*, which

disagreed with the approach taken by Justice Williams, a case Justice Kawaley become aware of through me 9 days before the issuance of his final ruling, is further evidence of blatant refusal to follow authorities that favour me. I have no doubt that all 3 judges (Justices Smellie, Mangatal and Kawaley) would have been aware of the *BDO* Case and would likely have discussed it in the context of my case.

On the contrary, wherever there is even a doubtful and obscure authority from the English High Court favouring the defendant, such as the *Pantelli* Case, which I labored to distinguish and point out that, in any case, is not a respected authority, the judge has preferred to give it weight. Meanwhile, weighty authorities, 52 of them from the House of Lords, Canadian Supreme Court, High Court of Australia (the highest court) and other courts have been systematically ignored and gone unanalyzed.

Ground 15: Failure to decide the case within a reasonable time contrary to section 7 of the Constitution: The Privy Council ruled in the case of *Oliveira v Attorney General of Antigua and Barbuda* [2016] UKPC 24 Privy Council Appeal No 0022 of 2015 that one year was too long for immigration authorities to take to decide a matter. The court also said that this delay entitles one to damages. Justice Mangatal did not decide my matter for nearly 3 years and then Justice Kawaley made a non-decision decision. The Judicial Code of Conduct for the Cayman Islands Judiciary, issued by the Judicial and Legal Services Commission (2 March, 2012) states that:

> *"[36] A judge should strive to deliver reserved judgments as soon as possible and in any event within such period as may from time to time be prescribed by the Chief Justice or the President of the Court of Appeal, as the case may be. If the judge becomes aware that his or her judicial commitments (or other circumstances) may prevent him or her from delivering judgment within that time, he should alert the Chief Justice to that possibility."*

Pursuant to this provision, 7 March, 2012, the Chief Justice issued Practice direction No. 1 of 2012, which states that reserved judgments must be delivered within 2 to 3 months. If not, the PD also reiterates that the Chief Justice must be informed, which neither the judge concerned or the Chief Justice say that this was done.

Failure to deliver a judgement by Justice Mangatal was a violation of these precepts and the non-decision decision by Justice Kawaley is, in law, no decision at all. The violation therefore continues.

Ground 16: Blatant and persistent refusal to follow clear authorities on the medical and dental issue:

In making the ruling on the need or otherwise for medical and dental issue, Justice Kawaley has deliberately ignored authorities. This is clear from my marked-up copy of his draft ruling, **Exhibit BHS 4** to my 1st Affidavit.

Ground 17: Blatant and persistent failure to reflect all relevant facts: The judgement fails to include a number of significant facts that are in my favour and which are significant not just to the substantive case but also possible costs. These are outlined in the tracked copy of the ruling, **BHS 4**, referred to above.

Ground 18: Abuse of judicial authority: Having pointed out to Justice Kawaley that he had not dealt with the issues outlined above, he neglected or failed to deal with them despite the fact that he was not *functus officio*. I also pointed out that the lines upon which he was proposing to make his ruling were no longer valid considering that there was another matter in which Justice Mangatal had decided to disagree with Justice Williams. Despite all this, Justice Kawaley proceeded to make his ruling. But in order to restrict my right to speak about it, he decided to issue a case management order intended to ensure that he is not accountable to the public.

Ground 19: Impossible for me to get a fair trial with any judge of the Grand Court: Considering the facts set out in my 1st Affidavit in support in relation to Justice Malcolm Swift, Justice Ingrid Mangatal, Justice Kawaley himself and Chief Justice Smellie, it is now no longer possible for me to get a fair trial before any judge of the Grand Court. The Privy Council has ruled in a case relating to the Chagos Islands *In re Bancoult* that where the court system has failed at one stage of the hierarchy a litigant may go to the next court above it but I have been forced to return to the Grand Court.

Ground 20: Grand Court refused to decide the matter and then, when it had a chance to, did not give a reasoned judgement that was according to law: Also, the Caribbean Court of Justice also ruled in the case of *Omar Dacosta Holder* that since the Court of Appeal of Barbados did not hear the matter for 6 years, this amounted to a refusal of the appeal and held that they could hear the matter. By the same token, the failure of the Grand Court to rule on the matter for nearly 3 years, allocation of the matter to Justice Williams (whose decision I was challenging) and then failure of Justice Kawaley to give a reasoned decision all amount to a refusal of the Grand Court to decide the matter "according to law" as required by the Constitution and the Judicial Code of Conduct of the Cayman Islands. In particular the following words in paragraph 73 of Justice Kawaley's ruling indicate an abdication of responsibility to decide the matter:

> *"The case was argued on both sides by leading counsel. 25 cases were cited and the legislative history was explored. Other linked legislation was considered. The principles of statutory interpretation were considered and arguments that the literal meaning of section 12 was inconsistent with other parts of the Law (e.g. sections 3(3), 12A and 32(2)) were entertained and rejected."*

This was a cryptic conclusion arrived at without examining the dozens of cases specifically trying to illustrate why Justice Williams's judgement was wrong. These cases where mainly from the UK, Canada and Australia.

Ground 21: It cannot reasonably be expected that Justice Kawaley can decide the matter objectively. For that reason, it is a waste of all recourses involved in the prosecution of the matter and would also be a waste of my resources to spend thousands of dollars that will be necessary to get more medical and dental reports only to put them before a judge who clearly is making every effort to ensure that I lose. Accordingly, these are reports I can pursue once I know that I will get a fair hearing.

Ground 22: It is wrong in law to deliberately frustrate justice and then challenge the litigant to appeal the matter if they are dissatisfied. The approach of the Chief Justice and Justice Kawaley, to suggest that my only remedy is to appeal the matter is contrary to principle in that an appeal procedure assumes that the court below was acting in good faith. Otherwise, the decision is reviewable on the same basis as any decision of a public authority.

Ground 23: The 2nd Respondent has failed to make a decision and/or give reasons for the decision not to constitute a tribunal to investigate Justice Kawaley. Under section 19(2), reasons having been requested, the 2nd Respondent has failed or neglected to give reasons to comply with the level of detail enunciated in *R v Secretary of State for the Home Department ex parte Doody* (1993) 1 AC 531 or to give reasons that are adequate according to the principle in *R v Secretary of the State for the Home Department ex parte Doody* (1993) 1 AC 531, a House of Lords decision.

GROUNDS IN RELATION TO BOTH JUSTICE MANGATAL AND JUSTICE KAWALEY

Ground 24: Even if for the sake of argument the individual actions by the two judges are held not to have been a violation of section 7, cumulatively they amounted to a violation in that, after waiting for a total of 3 years 6 months for a ruling, when it came it was not a reasoned judgement taking into account all the cases and arguments advanced and failing to allow the applicant a meaningful opportunity to be heard.

Date: 3 June, 2020

Bilika H. Simamba

Bilika H. Simamba

Applicant in Person

THIS APPLICATION FOR LEAVE TO APPLY FOR A CONSTITUTIONAL PETITION is filed by Bilika H. Simamba, in person, whose address for service is 30 Fairlawn Road, George Town, Grand Cayman, P O Box 1393, Grand Cayman, KY1-1110: Email address bhsimamba@gmail.com