IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 724 OF 2003

BETWEEN: BARRY VICTOR RANDALL

PLAINTIFF

AND: THE HONOURABLE CHIEF JUSTICE
OF THE GRAND COURT OF THE CAYMAN ISLANDS

DEFENDANT

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)	Barry Victor Randall
Judgment, order, decision or other proceeding in respect of which relief is sought	Decisions by the Defendant communicated by letters dated August 5 and October 1, 2003 from the Clerk of the Grand Court of the Cayman Islands
Relief Sought The Defendant, in the exercise of his administrative functions pursuant to section 3 of the Legal Aid Law (1999 Revision), grant legal aid to the Plaintiff for Grand Court Cause No. 354 of 2003 short title ***Barry Victor Randall v Attorney General of the Cayman Islands et al*** in the Grand Court of the Cayman Islands	
Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Miss Minakshi Jafa Bodden, Counsel 19 Fort Street, Suite Seven Jack & Jill Building George Town Grand Cayman PO Box 31450 SMB Tel: 345 943 7000 Fax: 345 943 7001 Email: clerks @jafabodden.com
Signed M Jafa Bodden Counsel for the Applicant	5 NOV 2003 Dated

Summary

1. This is a challenge by way of judicial review to decisions of The Honourable Chief Justice of The Grand Court of The Cayman Islands, acting in his administrative rather than judicial capacity making executive decisions as to the provision of legal aid in the Grand Court. By letters dated August 5 and October 1, 2003 the Defendant refused to grant legal aid to the Plaintiff.

2. Leave to apply for judicial review should be granted as the Defendant has erred in law in the following ways.

    i. He has misapplied the statutory test by wrongly adding a discretionary stage and wrongly applying some balancing of public against private interests, whereas the Legal Aid Law (1999 Revision) ("the Law") and Legal Aid Rules 1997 ("the Rules") are cast in mandatory terms and provide for no such discretionary stage or balancing of interests.

    ii. Rule 12 of the Rules is *ultra vires* the Act. The Act provides for only one form of criteria, being means criteria, and does not authorise the merits criterion in Rule 12. There are very sound policy reasons why the Court itself should not be administering

merits criteria in cases before it. Such an arrangement would be unworkable.

iii. The Defendant's decision is a perverse one.

Facts

3. The facts are set out in the accompanying affidavit and accordingly are not repeated here.

Relevant law

4. The statutory basis for the system of civil and criminal legal aid in The Cayman Islands is the Law.

5. Section 3 provides, *inter alia*, that:

> "Where it appears to any court before whom there appears any person –
> (a) …
> (b) who desires to take or defend legal proceedings in the Grand Court,
> that such person has not the means to instruct a legal practitioner to advise or represent him in any relevant proceedings, it shall grant to such person a certificate entitling him to free legal aid … "

6. Section 6 provides that "The Chief Justice may, subject to the approval of the Governor, make rules prescribing the fees to be paid to legal practitioners and for the better carrying out of this Law".

7. The rules made pursuant to s.6 of the Law are the Rules. Part III sets out rules for applications for legal aid in civil proceedings.

8. By r.12 (1) a certificate shall be granted if "the Court" is satisfied that the applicant appears to have a reasonable prospect of success on the merits.

9. There is no definition of "the Court" in the Rules. Note "court" (small 'c') is defined in the Law as "a court of competent jurisdiction and includes a person presiding over such court".

10. The Defendant is amenable to an action for judicial review. Judges of superior courts are only immune from actions for judicial review in relation to decisions taken in the exercise of their jurisdiction as superior courts. Where a judge or officer of a superior court is exercising some other statutory function judicial review lies in relation to the exercise of those statutory functions.

11. It appears from r.12(1) and its context that while the Defendant in this case makes the decision as "the Court", he does so in exercise of an administrative function pursuant to duties of executive decision-making conferred by the Legal Aid Law, rather than as a judge exercising the jurisdiction of the Grand Court as a superior court of record.

12. The test for the grant of permission to apply for judicial review (as opposed to the substantive judicial review hearing) is that the Plaintiff need only have an arguable case: ***R v Secretary of State, ex parte Begum*** [1990] Crown office Digest 107.

Grounds of challenge

GROUND 1: WRONG TEST

13. The Defendant applied the wrong test in reaching his decision, erroneously believing he had discretion and balancing of public interests.

14. The letter of 1 October 2003 communicating the Defendant's decision states "my discretion which is fundamentally one of balancing the public interest …". This is wrong.

15. Section 3 of the Law casts a duty upon the court in mandatory terms ("it shall grant") where particular criteria relating to means are satisfied.

16. The Law contains no further discretionary stage, and no further balancing of interests.

17. Even in the Rules the decision is in a mandatory matter (r.12 (1), "A certificate shall be granted …"), with no further balancing of interests.

18. The absence of a second discretionary stage is logical and sensible. The decision is made by the Court. It is not for court – which is the same court as that which ultimately hears the case – to embark on policy decisions as to resource allocation, particularly where there is no such material before it on this issue. Further, this is not a matter for the judiciary. Decisions as to resource allocation are classic executive functions.

19. Further, the nature of this supposed discretion and balancing of public against private interests is wholly unclear. What are the class of cases where an applicant has prospects but an application is "out-balanced" by weightier considerations? Where is the justification for such an approach in either the Act or Rules?

20. An obiter comment of Malone C.J. in ***W v G*** 1990-91 CILR 138 at 140 states that although the legal aid legislation makes no provision for a merits test, "the inherent jurisdiction of the court which gives to the court the right to prevent an abuse of process would entitle it to make such an enquiry".

21. This obiter comment confuses judicial and executive powers exercised by the Court. The Court has inherent jurisdiction over its judicial functions. However its executive powers relating to the provision of legal aid are conferred by statute only. The Court has no "inherent jurisdiction" over administrative or executive decisions regarding matters of resource

allocation. It has a limited decision-making function as conferred by statute, to satisfy itself as to the means of litigants seeking legal aid.

22. The nature and workings of this supposed "inherent jurisdiction" over matters of administrative or executive decision-making are entirely unclear. Does it mean the Court has inherent jurisdiction to over-ride legal professional privilege and demand the provision of opinions and communications with counsel on the merits of cases before it? What is a judge to do with information learned about the views of a party's legal advisers as to the weaknesses of their own case, or doubts about the strength of particular witnesses it may be calling?

23. The Court possesses inherent jurisdiction over certain of its judicial functions, but there is no "inherent jurisdiction" over its statutory executive functions.

24. The Defendant has erred in law in misconstruing the test he had to apply, and has wrongly added a layer of discretion and balancing of public and private interests which is nowhere to be found in the Law or Rules, both of which are cast in mandatory terms.

GROUND 2: RULE 12 ULTRA VIRES THE ACT

25. Section 3 of the Legal Aid Law (1999 Revision) provides that the Court "shall grant" a certificate of legal aid.

26. The 1997 Rules purport to impose a further requirement by which people may be denied legal aid notwithstanding that they meet the criteria in s.3 of the Legal Aid Law and notwithstanding that by s.3 the Court is mandatorily obliged to grant legal aid.

27. The rule-making power in s.6 of the Legal Aid Law only empowers the Chief Justice to "make rules prescribing the fees to be paid to legal practitioners and for the better carrying out of this Law". It cannot be "for the better carrying out of this Law" to promulgate rules that are inconsistent with a mandatory direction in that Law. The Law provides that people who meet the means criteria shall be granted legal aid. It is not *intra vires* s.6 for the 1997 Rules to provide for circumstances whereby people that meet such means criteria do not receive legal aid.

28. This result is a sensible one in practice. The Legal Aid Law is designed to only have one type of eligibility criteria, being means. All of the Law is structured around the means criteria: see, e.g., ss.4, 7. The Law does not include merits criteria. This is hardly surprising given that it provides that the system will be administered by the Court itself.

29. In a legal aid system that utilises merits criteria, the applicant for legal aid would be expected to candidly state both the strengths and weaknesses of the client's case. This clearly cannot be done in a system administered by the court itself, and in which decisions are taken by the judges of the court who will then be hearing the case.

30. Further, in a legal aid system utilising merits criteria the legal aid officer would discuss the case with the claiming solicitor. The legal aid officer may have a particular concern about an aspect of the case, and ask for clarification on that aspect (e.g. "is the solicitor sure claim B is not time barred? what witnesses would the solicitor propose to call to substantiate allegation D?"). Such discussions would be privileged and never be before the court. It would clearly be unworkable to have a system administered by judges of a superior court which led to those judges becoming embroiled in the sort of discussions and negotiations required for the administration of a legal aid system utilising merit-based criteria.

31. It clearly puts the Court in an impossible position if it is required to make contentious *administrative* decisions regarding the merits of the cases the Court will later be hearing. It is wholly wrong that the Court should be making such decisions on merits-based criteria (as opposed to means-based criteria) in its administrative capacity.

GROUND 3: PERVERSITY

32. It is irrational that the Chief Justice could consider that a person who has been imprisoned for 34 months when not convicted of any offence has no prospect whatsoever of a claim for wrongful imprisonment or any other form of civil claim.

33. The Plaintiff accepts that his underlying civil action raises complex areas of law, and some of the allegations will be more difficult to substantiate than others. However the Plaintiff, conscious of this, had already raised the issue of the potential need to amend the pleadings. The Defendant saw no need to inquire as to the nature of any such amendments, and effectively took the position that *any* civil claim by the Plaintiff against these parties would be so unsustainable that he need not even inquire into the nature of any such proposed amendments.

Conclusion

34. Leave should be granted as it at least arguable that one or more of the aforementioned errors have occurred.

5th November 2003

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This Application for Leave to Apply for Judicial Review was filed by XIX Fort Street Chambers of Minakshi Jafa Bodden, George Town , Grand Cayman Attorneys-Law and Counsel for the Applicant whose address for service is c/o XIX Chambers aforesaid. (MJB)