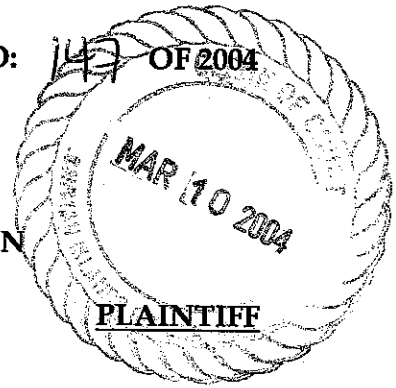


IN THE GRAND COURT
OF THE CAYMAN ISLANDS



CAUSE NO: 147 OF 2004



BETWEEN:

THE CAYMANIAN BAR ASSOCIATION
(a company limited by guarantee)

and

THE CABINET OF THE CAYMAN ISLANDS
FIRST DEFENDANT

and

THE ATTORNEY-GENERAL OF THE CAYMAN ISLANDS
SECOND 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	The Caymanian Bar Association (a company limited by guarantee)
Judgment, order, decision or other proceeding in respect of which relief is sought	a decision of the First Defendant made on 23 December 2003 purportedly to grant Caymanian status pursuant to s.20(d) of the Immigration Law (2003 Revision) to the 2,850 people listed in Gazette No.33/2003
Relief sought: A declaration that the purported grants of Caymanian status by the First Defendant to the 2,850 people listed in Extraordinary Gazette No.33/2003 dated 31 December 2003 was done unlawfully. Certiorari to quash the grant of Caymanian status by the First Defendant to the 2,850 people listed in Extraordinary Gazette No.33/2003 dated 31 December 2003	
Costs:	
Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	Miss Minakshi Jafa Bodden XIX Fort Street Chambers, Suite Seven Jack & Jill Building George Town, Grand Cayman Tel: 345-943-7000 Fax: 345-943-7001 clerks@jafabodden.com
Signed, <i>M. Jafa Bodden</i> Dated <i>gtm</i> March 2004	

SUMMARY

1. This is a challenge by way of judicial review to a decision of the First Defendant, made on 23 December 2003, purportedly to exercise its power under s.20(d) of the Immigration Law (2003 Revision) ("the Law") to make mass grants of Caymanian status ("Status") to the 2,850 people listed in Extraordinary Gazette No.33/2003 dated 31 December 2003.

2. Leave to apply for judicial review should be granted as the First Defendant's actions are unlawful for any of the following reasons.

i. Misuse of s.20(d) power - The First Defendant's decision is *ultra vires* the power conferred by s.20(d), which is intended to be used only to be an exceptional power used for a "special reason"; that is, where particular applicants having some particular unusual factor or individual characteristic outside the scope of s.22. The First Defendant's action uses s.20(d) to frustrate the purpose and operation of s.22 as the normal means of awarding Status. If 2,850 grants of Status were made in one meeting of Cabinet or in a small number of brief meetings of Cabinet, and if 1,400 grants were made in one meeting, it is impossible to understand how the First Defendant can properly have assessed whether there was a "special reason" in each such case, in accordance with s.20(d).

ii. Failure to exercise discretion / abdication of discretion - The First Defendant has failed to exercise its discretion and/or has completely abdicated its discretion in relation

to decisions in each individual grant application made under s.20(d) of the Law. The First Defendant cannot properly have assessed all relevant factors relating to each of the 2,850 applications it determined in a wholesale manner; nor could it have possibly done so in relation to the 1,400 grants it apparently made in a single meeting.

iii. Improper purpose / irrelevant factors - It has been reported that the Government gave the Opposition an opportunity to nominate potential beneficiaries of the grant of Status. If this is the case then irrelevant political factors appear to have unlawfully played a role in these decisions.

3. The Second Defendant is joined as a party in order to comply with s.11(2) of the Crown Proceedings Act (1977 Revision).

FACTS

4. The Plaintiff Caymanian Bar Association ("CBA") is a company limited by guarantee. It is a non-profit association whose objects include the promotion and protection of the interests of Caymanian attorneys.
5. The population of the Cayman Islands is approximately 48,000 and prior to the recent grants of Status the number of Caymanians in the work force was approximately 13,500. At that time there were approximately 15,000 people with work permits, of which approximately 6,000 were non-Caymanians who had been here for more than 10 years. Most of these people had been here for

between 10 and 15 years and no more than 1,000 of them had been here for more than 20 years.

6. The primary reason why there was such a significant number of long-term residents in comparison to the total population is that between 1990 and 2001 successive governments failed to set quotas for the grant of Status on the basis of residence and naturalization. In 2001 the Grand Court held that the failure by the Cabinet to set quotas over that period was unlawful, as a result of which the Cabinet set quotas for 2001, 2002 and 2003.

7. The CBA has been concerned about reports that the First Defendant has been making mass grants of Status. Despite being specifically and repeatedly asked, the First Defendant has refused to state when these recent mass grants of Status were made. From press reports (whose accuracy has not been called into question) it appears that:
 - i. In mid to late 2003 on a date or dates not known, decisions were made that Status would be granted to a large number of people, reported to be about 1,900 people, it may be (the Plaintiff does not know) that this was done in one mass grant of Status to 500 people and another mass grant of Status to 1,400 people;
 - ii. on another date not known in late 2003 another decision was made that Status would be granted to a further 540 people;
 - iii. on 23 December 2003 the First Defendant made a mass grant of Status to approximately 400 people; this is reported in an article in the 30 December 2003 edition of Cayman Net News, a copy of which is in the Court bundle.

8. On 30 September 2003 the Plaintiff wrote to the Leader of Government Business, the Hon. McKeeva Bush OBE, expressing the CBA's concern at recent reports of grants of Status to large numbers of non-Caymanians and requesting that particular information be provided so that the CBA could consider its position and what action, if any, it may wish to take.
9. No substantive response was received to that letter.
10. On 8 December 2003 the CBA's Counsel of record sent a letter to the First Defendant setting out reasons for the CBA's view that the grants of Status was done unlawfully.
11. The First Defendant has never sent a substantive response to this letter.
12. The letters referred to above are produced in the bundle herewith.
13. On 31 December 2003 Extraordinary Gazette No.33 of 2003 was published which stated that on 23 December 2003 the First Defendant made a single mass grant of Status to the 2,850 people listed in that Gazette. A copy of this Gazette is contained in the Court bundle. Even though the First Defendant is a public authority, it has declined to clarify how these decisions were made.
14. It appears that no formal assessment was carried out by the First Defendant to determine the individual personal circumstances of each of the relevant long term residents were who had applied for or were interested in acquiring Status, and in fact it seems clear that the grants were made independent of the records of and without consultation with the Immigration Department.

15. In relation to the 2,850 grants of Status, and for example the 1,400 persons to whom the First Defendant granted Status in a single day, it would have been impossible for the First Defendant properly to have considered the particular circumstances relating to each individual to determine whether a "special reason" existed to grant each of such individuals Status.
16. The Government has asserted that the Opposition PPM was given an opportunity to nominate potential beneficiaries of the grants of Status, but that the offer was declined. See the affidavit of Minakshi Jafa Bodden paras 17-18.
17. On 3 March 2004 the CBA sent a letter before action to the Government Legal Department setting out its concerns and requesting that appropriate action be taken to remedy the situation. There has been no reply.

RELEVANT LAW AND POLICY

Decision-making bodies

18. The statutory provisions that governed the grant of Caymanian status at the relevant time are contained in the Immigration Law (2003 Revision) ("the Law"). This Law has since been repealed and replaced by the Immigration Law 2003 (No 34 of 2003). However the Immigration Law (2003 Revision) is the law in force at the time of the action under challenge.

on the basis of residence and naturalisation. The system is based on points allocated according to the length of time a person has been on the Islands, their contribution, their age, health and other relevant factors. In any given year the applicants who receive the most points are granted Status, provided that the number of persons who receive Status in any given year is always less than or equal to the quota for that year.

32. As already explained, between 1990 and 2001, successive governments failed to set quotas for the grant of Status on the basis of residence and naturalisation. In 2001, the Grand Court of the Cayman Islands held that the failure to set quotas was unlawful. The Cabinet responded by setting quotas for 2001, 2002 and 2003.
33. The First Defendant has, traditionally, limited its use of the s.20(d) power by granting Status only in rare and exceptional circumstances to a small number of individuals, including former Judges, Attorneys General, Governors and athletes, who in many instances were not eligible to apply to the Board for Status because they had not resided in the Cayman Islands for 10 years.
34. However during 2003, and in particular during September and October, the Cabinet has made wholesale grants of Status directly to 2,850 persons. It appears that at one particular Cabinet meeting about 1,400 grants of Status were made. Publicly available information is very limited, but it appears that:
 - i. Many of these people had been residents for as little as 15 months and some were not resident at all.
 - ii. Recipients include Crown Counsel in the Government legal department advising the Cabinet on Status.

- iii. There was no consultation with the Immigration Department as to which long-term residents had applied for Status.
- iv. The press has reported a case in which two people were in breach of immigration laws and were about to be charged with overstaying were granted Status, a fact disclosed when they were brought before the courts.

Other

35. By article 5 of the Cayman Islands (Constitution) (Amendment) Order 2003 (UK S.I. No. 1515 of 2003) the Executive Council is renamed the Cabinet.
36. By s.11(2) of the Crown Proceedings Act all civil proceedings against the Crown shall be instituted against the Attorney-General.
37. The test for whether *permission* to apply for judicial review should be granted is whether there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing.

GROUND OF CHALLENGE

[1] Misuse of s.20(d) power

38. The First Defendant's decision is *ultra vires* the power conferred by s.20(d) of the Immigration Law (2003 Revision).
39. While the First Defendant is given a power in s.20(d) to make grants of Status, s.20(d) is intended only to be an exceptional power. The phrase "special reason" suggests some particular factor or individual

characteristic outside the scope of s.22. It cannot suffice that the individual fails to qualify under s.22. He must have some special personal characteristic which is believed to justify the award of Status in relation to the particular individual.

40. It is primarily the function of the Immigration Board to consider and make grants of Status. The Legislature, in enacting Part II of the Immigration Law, set up a specialist body to bring appropriate knowledge and experience to the task of fairly and reasonably determining grants of Status.
41. The object and purpose and text of s.22 read in context show that the normal way of acquiring Status is through a decision of the Board, and that section 20(d) is intended to be exercised only for specific reasons personal to the recipient who might otherwise not qualify under s.22. Section 20(d) cannot lawfully be used as a general means of supplementing s.22 so as to accord Status to groups or categories of persons who fail to qualify under s.22. Nor can section 20(d) be used so as to frustrate the purpose and effect of s.22 as the normal means of awarding Status.
42. If 2,850 grants of Status were made in a single or small number of brief meetings, and if about 1,400 grants were made in one meeting, it is impossible to understand how the First Defendant can have assessed whether there were "special reasons" in all such cases. The impossibility of performing such a task strongly indicates that s.20(d) is being wrongly used to supplement s.22 by the award of Status to groups or categories of persons who would otherwise not qualify for Status, or for reasons other than a detailed consideration of the personal qualities of individual recipients.

43. It also strongly suggests that the First Defendant has wrongly failed to have regard to the distorting impact on the operation of s.22, and in particular the s.22(11) factors, of such a broad exercise of the s.20(d) power.

Ground 2: Failure to exercise discretion / abdication of discretion

44. Even if (contrary to the Plaintiff's primary case) the First Defendant were lawfully able to exercise power under s.20(d) in a general manner to supplement s.22, the evidence strongly indicates that the First Defendant has not properly applied itself to the task of exercising its discretion in relation to each individual grant application in issue.
45. The requirement of a "special reason" and the legislative context of Part V of the Immigration Law require that in making decisions under s.20(d) the Governor in Council considers each potential grant of Status individually, having regard to the particular circumstances of each individual case.
46. The First Defendant cannot properly have assessed all relevant factors relating to the 2,850 applications it determined. If 1400 grants were made in a single day the First Defendant cannot have assessed whether there were "special reasons" for the grant of Status to each of the recipients. The impossibility of doing this further shows that these decisions were ones properly for the Board and not the Governor in Council.
47. The First Defendant has failed to exercise its discretion and/or has completely abdicated its discretion in relation to decisions made under s.20(d) of the Law.

Ground 3: Unlawful consideration of irrelevant political factors

48. The First Defendant has asserted that the Opposition was given an opportunity to nominate potential beneficiaries of the grant of Status. If this is the case then irrelevant political factors appear to have played a role in these decisions.

49. The discretion under section 20(d) cannot lawfully be exercised for irrelevant reasons. Political support or opposition is irrelevant to the legislative objectives of section 20(d) : cf Roncarelli v Duplessis (1959) 16 DLR (2d) 689 (Supreme Court of Canada) and R v Ealing LBC ex parte Times Newspapers Ltd (1986) 85 LGR 316, Divisional Court. The suggestion to the Opposition that they could have some of their nominees rewarded strongly suggests that irrelevant political factors have been taken into account.

Lack of candour and transparency

50. The principle of legal certainty requires transparency and accessibility in the decision-making process and candour by government. Lack of candour and unnecessary secrecy are in themselves capable of being the reason for granting judicial review (see e.g., Salih [2003] EWHC 2273 (Admin); Nadarajah [2003] EWCA Civ 1768. Thus far there has been a complete lack of transparency and openness about the First Defendant's actions and the reasons for what has occurred.

CONCLUSION

51. Leave should be granted as plainly it is at least arguable that the action challenged is unlawful for one or more of above reasons.
52. The Plaintiff also humbly requests that the Grand Court expedite its consideration of permission on the papers, and expedite the listing of the subsequent oral substantive or permission hearing.

4 March 2004

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MINAKSHI Jafa BODDEN

This Application 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)

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B E T W E E N :

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Plaintiff

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First Defendant

and

THE ATTORNEY-GENERAL OF THE
CAYMAN ISLANDS

Second Defendant

APPLICATION FOR LEAVE
TO APPLY FOR JUDICIAL REVIEW

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Cayman Islands

Ref: MJB