IN THE GRAND COURT OF THE CAYMAN ISLANDS

CRIMINAL DIVISION

LEGAL AID NO. LACR 271/ 2019

IN THE MATTER OF THE LEGAL AID LAW 2015

IN THE MATTER OF AN APPLICATION FOR LEGAL AID BY THE APPLICANT CAVENNA ELLIS

AND IN THE MATTER OF AN APPEAL OF THE DECISION OF THE DIRECTOR OF LEGAL AID PURSUANT TO SECTIONS 4 AND 38 OF THE LEGAL AID LAW 2015 REVISION

TAKEN ADMINISTRATIVELY ON THE PAPERS WITHOUT A HEARING

HEADNOTE

Legal Aid Law (2015 Revision) – Sections 4 and 17 – Legal Aid Regulations (2016) *– Appeal of refusal of grant of legal aid for the purpose of an appeal - The interests of justice where lengthy sentence of imprisonment imposed.*

JUDGMENT

INTRODUCTION

1. Pursuant to s.38 of the Legal Aid Law 2015 ("the Law"), the Applicant, Cavenna Ellis appeals the refusal to grant her legal aid. Legal aid is sought for the purpose of pursuing appeals against convictions and sentences to the Court of Appeal. S.38 of the Law provides that an applicant may appeal to a judge in chambers where he is refused a legal aid certificate.

2. On the 26th February 2018, the Applicant was convicted in the Summary Court of the offences of Theft and Making a False Document. On the 1st June 2018, she was sentenced to imprisonment for three years and nine months on each offence – with sentences to run concurrently.

3. On the 31st May 2019 her appeal from the decision of the Summary Court was heard by the Grand Court. On the 12th June 2019 the Grand Court dismissed her appeal against conviction. Her appeal against sentence was allowed in part. The sentence for the offence of Making a False Statement was found to be in excess of the statutory maximum of three years and was reduced to two years' imprisonment.

4. On the 25th June 2019 the Applicant filed a notice of appeal in the Court of Appeal on the ground that the convictions are against the weight of the evidence and the sentences are manifestly excessive. In tandem the Applicant seeks permission to call her husband as a witness to two matters. These are as to the fact of her return date to work following her April 2013 vacation leave and as to a breach of the judge's rules relative to her interview with the police. The evidence is that he was present during the said interview.

CAYMAN GRAND COURT SCR

LEGAL AID APPLICATIONS

5. By the grant of legal aid certificate 216/2013, dated 2nd December 2013, the Applicant was legally aided in the course of her trial before the Summary Court. Her application for a change of counsel in the course of those proceedings was refused on the 18th September 2016. At her request made after convictions but before sentences, the certificate to trial counsel was terminated on the 28th February 2018. The Applicant indicated by letter of even date that family members would finance her defence.

6. On the 9th October 2018 after being sentenced by the Summary Court, the Applicant applied for the grant of legal aid for the purpose of appealing her convictions and sentences to the Grand Court. The basis asserted was that she had not had proper representation at the trial and trial Counsel refused to put certain evidence before the Court.

7. On the 19th October 2018 the Legal Aid Office deferred consideration of the application pending information on the substantive trial, sentence and merits of the appeal. In the interim, legal aid was granted for an opinion to be provided on the merits of an appeal.

8. An opinion was obtained on the 10th April 2019 by the Office, which was adverse to the Applicant. Legal aid was refused. The decision of the Director of Legal Aid is recorded as follows:

> *"Further to the review of the adverse opinion filed 11th April 2019 by assisted Counsel on the merits of the Appeal, legal aid is refused. Circumstances simply do not justify the expenditure of public funds in this matter."*

9. The Applicant appeared in person at the hearing of the appeal in the Grand Court on the 31st May 2019.

10. On the 15th July 2019, following the dismissal of her appeal by the Grand Court, the Applicant submitted a second application for legal aid. She now seeks the service of a duty counsel to represent her before the Court of Appeal.

11. In response to that application, she was advised by the Office by letter of even date that it could not be considered in the absence of supporting documentation. This was to include a brief outline of the merits of the appeal and a copy of the filed notice of appeal in the Court of Appeal.

12. On the 17th July 2019, the application for legal aid was refused on the basis that a previous opinion had been obtained under the number LACR 339/19. The decision of the Director of Legal Aid is recorded as follows:

> *"Upon further review of this matter, we now take note that a legal opinion was already commissioned by the Legal Aid Department and the position outlined by Counsel was accepted (LAC 339/18) and legal aid ultimately refused. We are not prepared to pay for any further opinions. Counsel listed on this new application can be provided with a copy of that opinion. Circumstances do not justify the expenditure of public funds."*

GRAND COURT - CAYMAN ISLANDS

13. On the 18th July 2019, the Applicant applied for reconsideration of the refusal. She submitted that the opinion had been provided by counsel who had initially undertaken to represent her on the appeal but had not followed through and had presented an adverse opinion without her knowledge. She relied on the Court of Appeal Rules, r.38(3) and s.10 of the Court of Appeal Law (2011 Revision) which are in the following terms:

The Court of Appeal Rules:

> *38. (1) The Registrar shall cause to be prepared and kept up to date, in such form as he thinks convenient, a list of counsel who are willing to act if and when nominated under the Law as counsel for appellants.*

(2) When legal aid is assigned to an appellant, the Court may give such directions as to the stage of the appeal at which such legal aid shall commence.

(3) The Registrar shall thereupon, subject to any special order of the Court, select from such lists or otherwise a counsel for the purpose of affording legal aid to an appellant, having regard in so doing to the counsel, if any, who represent the appellant at the trial and to the nature of the appeal.

Section 10 of the Court of Appeal Law:

10. (1) The Court may, at any time, assign counsel to an appellant in an appeal under this Part where it appears to the Court that he has not sufficient means wherewith to retain counsel and that it is necessary in the interests of justice that he should have legal aid in the preparation and conduct of his appeal.

(2) The cost of the provision of counsel for a poor appellant in any case in which counsel is assigned to such appellant by the Court in accordance this section shall be defrayed from the general revenue of the Islands up to an amount allowed by the Court.

GRAND COURT CAYMAN ISLANDS

14. On the 30th July 2019, the Applicant's request for reconsideration of the refusal to grant legal aid for the purpose of further appeal was denied. The Director's reason for refusal is recorded as follows:

> *"Further to the Applicant's request dated 17th and 18th July 2019 for reconsideration of the refusal decision, I have now considered the matter fully and reviewed the Applicant's position, the opinion previously provided, the notes on the court file regarding the appeal and decision made 12th June 2019 and the merits of the request to now appeal this matter to the Court of Appeal. We note the conviction on both charges was confirmed and sentence reduced on one charge.*

Having considered the circumstances, the merits and potential costs we are not satisfied that this matter justifies the expenditure of public funds. Furthermore, the Applicant exhibits the ability to handle this matter on their own adequately or make the necessary arrangements to do so."

15. The Applicant now appeals this decision by letter dated 30th July 2019. She states therein that she is incarcerated and does not have the means or resources to afford legal services without aid from the Government and that she is unable to progress her appeal further due to lack of finances and expertise to do so.

THE APPLICABLE PROVISIONS

The Legal Aid Law 2015 Revision

16. The Legal Aid Law 2015 Revision provides in s.4(1)(d) that legal aid may be granted for appeals in criminal matters. By s.4 (6), the grant of such aid to appellants (including applicants for leave to appeal) in appeals against conviction or sentence and respondents to criminal appeals by prosecutors is subject to sections 5, 17 and 19.

17. Section 5 is specific to civil proceedings and provides that legal aid may only be granted in such proceedings if the Director is satisfied, after making inquiries under s.16 that the applicant appears to have a reasonable prospect of succeeding on the merits of the case.

18. Section 17 is in the following terms:

17. (1) Subject to section 4, a legal aid certificate may be granted to an applicant by the Director if his disposable income is the prescribed amount or less.

(2) An applicant who -

a. is charged before a court with any Class A criminal offence; or

b. is a party to a criminal appeal before a court in connection with any such charge and satisfies the Director that there are reasonable grounds of appeal,

shall, if he qualifies for the grant of a certificate under subsection (1), be entitled as of right to have a certificate granted to him by the Director.

(3) An applicant eligible for legal aid under section 4, other than one entitled as of right under subsection (2) to the grant of a certificate, may, if he qualifies under subsection (1), be granted a certificate by the Director in his discretion and in the exercise of that discretion the Director shall, among other things, consider whether it is in the interests of justice to grant legal aid.

(4) In considering whether it is in the interests of justice to grant legal aid under subsection (3) the Director shall consider the following:

a. whether, if any matter arising in the proceedings is decided against the person, the person would be likely to lose his liberty or livelihood or to suffer serious damage to his reputation;

b. whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law;

c. whether the person may be unable to understand the proceedings or to state his own case;

d. whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the person; and

e. whether it is in the interests of another person that the person be represented.

GRAND COURT CAYMAN ISLANDS

19. It appears from this section that there are two avenues for consideration by the Director. An applicant who meets the threshold disposable income requirement and who satisfies the Director that he has reasonable grounds of appeal would be entitled as of right to the grant of a legal aid certificate.

20. Where an applicant does not satisfy the Director that he has reasonable grounds of appeal but meets the threshold disposable income requirement, the Director has a discretion whether or not to grant a legal aid certificate. In the exercise of that discretion, the Law states that the Director shall consider whether it is in the interests of justice to grant legal aid. In so doing the Director is to consider a number of matters including whether the person is likely to lose his liberty, whether the person may be able to state his own case and whether there is a substantial question of law involved.

21. It is evident from the reasons given by the Director that the Director is not satisfied as to the merits of the case and thus that the Applicant has failed to satisfy the Director that there are reasonable grounds for a further appeal. In considering this as a failure, the Director has had regard to the opinion of Counsel which was obtained and the recent decision of the Grand Court dismissing the Applicant's appeal. It is noted that notwithstanding that the opinion concluded that the sentences were appropriate, that one aspect of the sentence was found by the Grand Court on the hearing of the appeal to be incorrect in law.

22. As to the second avenue for consideration, it is unclear from the reasons provided by the Director whether the Director has, in the exercise of her discretion, specifically adverted to interests of justice considerations in this case in circumstances where the Applicant faces the loss of her liberty for a term which is not insignificant. In my view this is an important consideration in this case.

GRAND COURT - CAYMAN ISLANDS

THE INTERESTS OF JUSTICE

23. I have considered the manner in which the phrase "the interests of justice" has been approached with respect to legal aid and appeal cases in light of the Constitutional rights of citizens. Section 7 of the Cayman Islands Constitution Order 2009 provides that everyone charged with a criminal offence has a number of minimum rights. These include the right to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance and the interests of justice so require, through a legal representative at public expense provided through an established public legal aid scheme as prescribed by law.

24. Article 6 (3) (c) of the European Convention of Human Rights (ECHR) is in similar terms:

> "'*Everyone charged with a criminal offence has the following minimum rights: ...*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.*'"

25. In ***Bell v. United Kingdom***[1], the European Commission of Human Rights dismissed a complaint as to a possible breach of that article as being manifestly unfounded. The Commission found that there was no indication that in refusing legal aid the magistrate had not considered the applicable guidelines. These included considering whether the applicant was at serious risk of losing his liberty and the nature of the defence. The commission concluded that it had not been shown that the interests of justice required

[1] [1989] 11 EHRR CD83

the grant of free legal assistance noting that it was very likely that the magistrate would have deemed the case to be no more than a trivial neighbours' dispute which would not result in more than a fine for the applicant.

26. In ***Granger v. United Kingdom***[2], the Applicant had been convicted on indictment of perjury and sentenced to five years' imprisonment. He complained that he had been refused free legal aid in order to appeal his conviction. The case for the government was summarised by the Court as follows:

> *"45. The Government maintained that the Commission's conclusion was not justified by the various factors on which it had relied. In its view, the interests of justice, the evaluation whereof lay in the first place with the domestic authorities, did not require a grant of legal aid for the appeal, which it described as being 'wholly without substance' and having 'no reasonable prospects of success.' It pointed out that Mr. Granger had had full legal aid for his trial, extending to the obtaining of counsel's opinion on the prospects of an appeal, which opinion had been negative [34] ; that the Legal Aid Committee, an independent and expert body, had not been satisfied that there were substantial grounds for the appeal [35] ; that the applicant had been able to present argument at the appeal hearings [36] ; and that the case had to be seen in the context of the Scottish system in which an active role was played by the appeal court and an impartial role was expected of the Crown and where the automatic right of appeal resulted in the filing of many appeals which were without merit. [37]"*

27. The European Court of Human Rights concluded that the question of whether the interests of justice required a grant of legal aid had to be determined on the case as a whole.

28. The Court stated:

> *"In that respect not only the situation obtaining at the time the decision on the application for legal aid was handed down but also that obtaining at the time the appeal was heard are material.*

[2] [1990] 12 EHRR 469

Mr. Granger had been convicted on indictment of perjury and sentenced to five years imprisonment. There can thus be no question as to the importance of what was at stake in the appeal."

29. It was also of importance in the circumstances of that case that one of the issues which arose was of some complexity. This emerged in the course of the appeal hearing which led the appellate court to adjourn the hearing and call for a transcript of the evidence. The European Court was of the view that at that stage, there ought to have been a mechanism for review of the refusal of the grant of legal aid and for the applicant to have been assisted in arguing the issue. The Court concluded that there had been a breach of article 6.

30. In ***Boner v. United Kingdom***[3], two applicants applied to the said Court alleging a breach of their human rights on the basis that they had been refused legal aid for an appeal.

31. B had been convicted on indictment of assault and armed robbery and sentenced to eight years' imprisonment. He had been represented at trial. His counsel determined, after an initial period of uncertainty, that he could not support an application for legal aid for the purpose of an appeal. The applicant's application in person was refused.

32. M was convicted on indictment of a severe assault and sentenced to five years' imprisonment. He had legal aid for his trial. His Counsel advised that there was no basis for an appeal. New Counsel also advised that there was no basis for an appeal and M was advised by his solicitors to abandon his appeal. The Court applied the dicta in the cited case of ***Granger v. United Kingdom***[4] and held as follows in each case:

[3] [1995] SCCR 1
[4] *supra*

" 1) that although the legal issue in B's case may not have been particularly complex, to attack in appeal proceedings a judge's exercise of discretion required a certain legal skill and experience, that the fact that B was able to understand the grounds for his appeal and that counsel was not prepared to represent him did not alter the fact that without the services of a legal practitioner he was unable competently to address the court on the legal issues in the appeal and thus to defend himself effectively, and that, given the nature of the proceedings, the wide powers of the High Court, the limited capacity of an unrepresented appellant to present a legal argument and, above all, the importance of the issue at stake in view of the severity of the sentence, the interests of justice required that the applicant be granted legal aid for representation at the hearing of the appeal; and that there had been a violation of art.6(3)(c) (p.9A-E);

(3) that the fact that the legal issues in the case of M may not have been particularly complex, that he had himself formulated the grounds for his appeal and that counsel was not prepared to represent him did not alter the fact that without the services of a legal practitioner he was unable competently to address the court on the legal issues in the appeal and thus to defend himself effectively, and that given the nature of the proceedings, the wide powers of the High Court, the limited capacity of an unrepresented appellant to present a legal argument and, above all, the importance of the issue at stake in view of the severity of the sentence, the interests of justice required that the applicant be granted legal aid for representation at the hearing of the appeal; and that there had been a violation of art. 6(3)(c) (p.14A-B);"

GRAND COURT CAYMAN ISLANDS

33. The Court therefore found breaches of article 6 in both instances and stated:

> *"The situation in a case such as the present, involving a heavy penalty, where an appellant is left to present his own defence unassisted before the highest instance of appeal, is not in conformity with the requirements of article* 6."

34. De Meyer J. expressed the view that the interests of justice normally require that a person charged be assisted by an attorney and that this applies at each stage of the proceedings and even more so in the higher courts. The learned judge stated that the burden of proving that the interests of justice require legal assistance was not on the applicant. If the applicant had not waived the requirement for legal assistance, there had then to be clear and convincing evidence that the applicant *did not* require such assistance in the circumstances of the case.

35. Freeland J. agreed that there had been a violation of article 6 but expressed a slightly different reasoning. The Learned judge noted that justice should not only be done but must also be seen to be done and stated:

> *"On the other hand, even if, as I believe, no substantive injustice has been established, that does not dispose of the question whether, in the words of subparagraph (3)(c) of article 6 , 'the interests of justice' required that Mr Boner should be given free legal assistance for the hearing of his appeal. As we were reminded in argument, justice should not only be done, it should also be seen to be done. The appeal raised a legal issue concerning the exercise of the trial judge's discretion and Mr Boner's conviction had led to the imposition of a sentence of eight years' imprisonment. As regards the view taken by Mr Boner's solicitors and counsel and by the Legal Aid Board of the prospects of success of an appeal, lawyers may of course disagree; and it was clear from the pleadings of the Government themselves that there have been cases in which legal aid has been refused, yet counsel has subsequently appeared for an appellant and won his appeal. More importantly, the Crown was represented at the hearing of the appeal (as it is in all comparable cases) by counsel who was present and able to advance a legal argument if called upon by the court to do so. Admittedly he was not called upon; but that might be simply because the absence of legal assistance left Mr Boner unable to persuade the court that he had an argument which required a response. Given that there was a legal issue to be addressed on Mr Boner's appeal and that, having regard to the severity of his sentence, so much was at stake for him, I am satisfied that his lack of legal representation for the hearing, when counsel for the Crown was present, produced at least the appearance of injustice."*

36. The Learned Judge therefore concluded on balance that in the interests of justice, B should have been granted free legal assistance for the hearing of his appeal.

37. In the case of ***R. v. Oates***[5], the English Court of Appeal adverted to the decisions in the European Court and noted the distinction between an appeal and an application for leave to appeal:

> *"Mr. Sapsford, in an attempt to make good that submission, took the court to a considerable number of authorities, to not all of which it is necessary to refer, dealing with appeals against conviction, where, for reasons which are readily understandable to this court, the European Court of Human Rights at Strasbourg has repeatedly held that article 6(3)(c) requires that an appellant should be legally represented, on the hearing of an appeal, particularly where there are complex*

[5] [2002] 3 Costs L.R. 375

issues involved or where the liberty of the subject is involved. Mr. Sapsford also took us to ***Benham v United Kingdom*** *(1996) 22 EHRR 293, where a similar principle is to be found enunciated in relation to representation at a trial before magistrates, which may lead to loss of liberty. He was not, however, able to point to an enunciation of such a principle in relation to an application for leave to appeal as distinct from the hearing of the appeal itself."*

ASSESSMENT

38. With respect to appeals from the decision of the Grand Court exercising an appellate jurisdiction, an appeal lies of right against sentence and for any ground of appeal which involves a question of law alone. Section 29 of the Court of Appeal Law (2011 Revision) deals with further appeals and provides:

> *"29. (1) Any person, including the prosecutor, aggrieved by any judgment given or made by the Grand Court in the exercise of its appellate or revisional jurisdiction, whether such judgment has been given or made upon appeal or revision from a court of summary jurisdiction or any other court, board committee or authority exercising judicial powers, and whether or not the proceedings are civil or criminal in nature, may appeal, subject to this Law, to the Court on any ground of appeal which involves a point of law alone, or against sentence but not upon any question of fact."*

GRAND COURT CAYMAN ISLANDS

39. In the instant case there are no details as to a ground of appeal in law but there is an appeal against sentence on the basis that it is manifestly excessive. The issue is whether it is in the interests of justice for the Applicant to be granted legal aid at this stage. This in light of the entirety of the background in this matter including that not only is there an adverse legal opinion on the merits but there is the fact that the Grand Court on the hearing of the Applicant's appeal gave due consideration to the matter and dismissed the appeal of the Applicant.

40. The concern which is foremost in my mind is that the Applicant was not represented on the appeal before the Grand Court. Despite her abilities as noted by the Director, it is difficult to say that it can be concluded with confidence that she was able on the hearing of that appeal to articulate, present and frame every possible legal argument and submission which could have been made and to properly challenge as she so wished, the exercise of the discretion of the Learned Magistrate to admit inculpatory evidence. This is not an observation on the merits of the case but on *the opportunity* which the Applicant might have had to be legally advised on the making of the appeal and to present her best case to the appellate court.

GRAND COURT - CAYMAN ISLANDS

41. There is now a clear and detailed judgment from the Grand Court which found no merit in the appeal against convictions. I have considered whether this alters the position such that it can be said conclusively that the interests of justice do not require that the Applicant be granted legal aid for the purpose of a further appeal. I have some disquiet about arriving at such a conclusion given the absence of representation at that hearing and would respectfully adopt the reasoning of the Learned Judge in the cited case of ***Boner v. United Kingdom:***

> *"Admittedly he was not called upon; but that might be simply because the absence of legal assistance left Mr. Boner unable to persuade the court that he had an argument which required a response.*

42. While the above cited cases relate to breaches of Convention rights, they do provide guidance on the factors to be taken into account when considering a grant of legal aid in the interests of justice with respect to an appeal. There is clear similarity between the factors considered in these cases and the statutory factors in the Legal Aid Law. Both include a consideration of the fact of the possible loss of liberty of an Applicant.

43. In this case, the Applicant is facing a sentence of imprisonment of three and a half years following a conviction for dishonesty in a small community. The consequences for her are serious indeed. The case involves evidence of fraud which by its very nature requires detailed assessment and involves some complexity. The Applicant was not assisted prior to or during the appeal hearing before the Grand Court and may not have been able to formulate detailed and cogent legal arguments on appeal. The jurisprudence referred to above suggests that the merits of the case ought not to be the primary deciding factor in determining whether a grant of legal aid for an appeal should be made and that interests of justice considerations are of importance.

44. My concluding view is that in line with the cited cases and the circumstances of this particular case, including the fact that the Applicant was denied assistance prior to and at the hearing before the Grand Court, that the interests of justice require that some assistance be provided to the Applicant for the purpose of considering and making a further appeal.

45. I would therefore grant the appeal against the refusal of legal aid for these reasons. The Director may consider in the exercise of her discretion, making the assistance granted subject to any appropriate terms or conditions.

Dated this the 23rd day of September 2019

Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court