IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0075 OF 2006S
(High Court Civil Action No. JR HBJ 011/2000L)

BETWEEN:

VINOD RAJ GOUNDAR

Appellant

AND:

THE MINISTER FOR HEALTH

Respondent

Coram: John Byrne, JA
Randall Powell, JA
Izaz Khan, JA

Hearing: Monday, 7th July 2008, Suva

Counsel: G. O'Driscoll for the Appellant
R. Green for the Respondent

Date of Judgment: Wednesday, 9th July 2008, Suva

JUDGMENT OF THE COURT

---

1. In mid 1999 Vinod Raj Goundar ("the appellant") was interviewed for the post of Assistant Statistician at Lautoka Hospital ("the Position"). He was a record clerk but had filled the Position since 16 July 1997.

2. On 31 October 2000 the appellant was informed that the fourth respondent, Kelera Boila ("Ms Boila") had been appointed to the Position. The next day the appellant appealed to the Public Service Appeals Board ("the Board") against Ms Boila's

appointment. Two days later, having received no response from the Board, the appellant filed a Notice of Motion in the High Court seeking leave to challenge Ms Boila's appointment and for a stay of the appointment in the meantime. On 3 November 2000 a High Court judge, ex parte, stayed the transfer of Ms Boila to the Position. In February 2001 a Notice of Opposition was filed on behalf of all the respondents.

3. The proceedings having in its initial stages moved with alacrity, went to sleep, until June 2002 when they were before the High Court, where directions were made for affidavits and submissions prior to a 15 July 2002 hearing. Affidavits were filed but submissions were not and it would appear that for this reason the 15 July 2002 hearing did not take place. In October 2002 counsel for the appellant informed the Court that he wished to proceed and the judge noted that the leave application was to be treated as the substantive hearing. A further timetable was set for the filing of the submissions. The matter then went from sleep to deep hibernation until, over three and half years later on 20 April 2006, counsel for the appellant wrote to the High Court stating *"our submissions on behalf of the Applicant were filed early last year ... there is some urgency in the matter hence we request your urgent attention."*

4. Submissions for the appellant had indeed been filed, though they were not dated and the Court did not date stamp them. No submissions were filed by the respondent. On 3 May 2006 Finnigan J ("the trial judge") ruled on the appellant's Notice of Motion taking into account the affidavit evidence and the appellant's written submissions. He dismissed the appellant's application for leave to bring judicial review.

5. On 31 July 2006 the appellant filed a Notice of Appeal.

6. Order 53 Rule 3(1) of the High Court Rules provides:

> *"No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule."*

7. The trial judge refused to grant the appellant leave to challenge Ms Boila's appointment for three reasons:

   First, the recommending panels gave full sympathetic and fair consideration to the merits of the appellant for the promotion to the Position;

   Second, the decision appeared to have been made by a single person, outside the process complained of, transferring a person already qualified and performing the work required by the Position. The trial judge was of the opinion that this was an administrative decision outside the scope of judicial review by the Courts.

   Third, the appeal process, assuming it was appropriate, had not been fully utilized.

8. The grounds of appeal are that the trial judge erred in:

   1. Holding that the decision was an administrative one outside the scope of judicial review;
   2. Failing to discern that the decision was made by government departments in the exercise of their powers under statute;
   3. Failing to consider the doctrine of legitimate expectation;
   4. Failing to apply the tests for leave for judicial review.

9. The evidence was that the Position was above the appellant's classification as Records Officer and, during the two years prior to advertisement when the appellant had filled the Position, he had been paid a Responsibility Allowance to reflect that fact. The appellant had been strongly recommended for the Position by the Chief Medical Officer Anaesthesia & Acting Consultant Anaesthetist at Lautoka Hospital in a letter dated 15 June 1999 and on the same day the Medical Superintendant of Lautoka Hospital wrote a lengthy and supportive recommendation as well which concluded with the words:

"I am happy to recommend that Mr Goundar be substantively appointed A.S.O Lautoka Hospital and that minimum qualification requirement for the post be waived to accommodate him."

10. On 16 June 1999 the appellant was interviewed by a panel of three at the Ministry of Health Quarters in Suva. One was a Chief Hospital Administrator, the second was the Hospital Secretary of Lautoka Hospital and the third was the Statistics Officer from Headquarters. The chair person issued a report on 30 June 1999 stating that the appellant and the only other person interviewed both had difficulty answering the questions posed to them and did not seem to have an all round knowledge of the operations concerned. The appellant's two year experience in the Position was taken into account. The Panel recommended that neither officer be promoted and that the vacancy be re-advertised later.

11. Sixteen months later Ms Boila was appointed to the Position.

The Test for Leave for Judicial Review – Ground 4

12. The appellant contends that the test for leave for judicial review is whether the judge is satisfied that the material before him or her discloses that there is an arguable case, and that only a brief hearing, often ex parte, is required: ***Inland Revenue Commissioners v National Federation of Self-employed*** [1982] AC 617 at 644.

13. The appellant's complaint seems to be two-fold.

14. The first complaint is that the trial judge has, in reaching his decision, conducted an in-depth, albeit ex parte, hearing. However it seems to this Court that if a trial judge undertakes a thorough examination of the material before him in deciding whether or not there is an arguable case, this, by itself, cannot be an error, especially where the appellant has filed extensive written submissions.

15. The appellant's second complaint is that because the trial judge decided to reject the leave application, the appellant should have been invited to put further oral submissions in response, and that absent this he was denied natural justice. This Court disagrees. The trial judge had before him forty seven pages of written submissions from the appellant. The trial judge decided the application without written or any submissions from the respondents. It can't be said that there was any denial of natural justice in these circumstances. In effect the appellant is submitting that the Court must, unless it is going to grant leave, give in effect a draft judgment and give the appellant an opportunity to change the court's mind. This submission is rejected.

Grounds 1 & 2

16. The decision of the trial judge was a discretionary one, as the appellant at page 17 in its 45 page written submission before the trial judge acknowledged.

17. An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears that some error has been made in exercising of the discretion and a substantial wrong has occurred: ***House v The King*** [1936] 55 CLR 499

18. It seems to this Court that each of the three reasons that the trial judge gave for refusing leave would justify refusing leave, and that the first reason given by the trial judge, namely that the recommending panels gave full sympathetic and fair consideration to the merits of the appellant for the promotion to the Position, was on the evidence open to the trial judge and, by itself, was a sufficient ground for the trial judge in the exercise of his discretion to refuse leave.

19. This Court therefore does not have to consider grounds 1 & 2 in the Notice of Appeal, which seem to fall out of the second reason of the trial judge.

Legitimate Expectation – Ground 3

20. In relation to the doctrine of legitimate expectation, there can be no legitimate expectation to be appointed to a position for which the applicant is not qualified, whether or not he has been performing the same role as someone qualified for the position ordinarily performs.

21. A rural hospital might lack a doctor. It does not mean that a nurse, through want of a doctor performing all the tasks that a doctor would otherwise perform, can have a legitimate expectation to be appointed a doctor. The trial judge was entitled to consider that the appellant, not being qualified for the Position, would not be able to successfully argue legitimate expectation.

Delay

22. This Court finds in addition, that the failure of the appellant, for nearly three years (from June 2002 when they were first ordered, to "early 2005", when he says his submissions were filed) to prosecute the matter (and a further year to write to the Court), would in itself have been a ground for refusing leave.

Leave to the Court of Appeal

23. Section 12(2) of the Court of Appeal Act provides that in civil cases: *"No appeal shall lie (e) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court"* except in certain specified cases.

24. Section 20 of the Court of Appeal Act provides that a single judge of appeal may exercise the powers of the Court to give leave to appeal.

25. It ought to seem obvious that an appeal against a High Court judge's decision to refuse or give leave to seek judicial review would need the leave of the Court of Appeal. The very fact that the trial judge is, according to the authorities, entitled to deal with the application ex parte and on a *"quick perusal of the material then available"* (**Inland Revenue Commissioners** [supra at 644A], and that the trial judge's decision is discretionary, impels this view. How can it be appropriate for a party dissatisfied with such a decision to automatically have the right to appeal, with all the time and costs that a full appeal involves ?

26. It is unanswerable, and the law in Fiji was, until 2004, that an order refusing leave for judicial review was an interlocutory order . Unfortunately in that year a decision of the Court of Appeal reversed the earlier authority and threw the law of Fiji into confusion. The time has come for the Court of Appeal to re-state the earlier and true position namely that:

> ***A judgment or order by the High Court to grant or refuse leave, whether leave for judicial review or otherwise, is an interlocutory decision and therefore any appeal to the Court of Appeal from such High Court judgment or order requires the leave of the Court of Appeal.***

27. All judgments are either final or interlocutory though it is sometimes difficult to define the borderline with precision.

28. In England the test whether an order is interlocutory or final depends on the nature of the application (***White v Brunton*** (1984) QB 570) and not on the nature of the order as eventually made.

29. In Australia the courts have taken an *"order approach"*, so that the order appealed from, not the nature of the application before the trial judge, is determinative. So in Australia for example, an order refusing to grant a declaration is interlocutory but the grant of a declaration is a final order.

30. In Fiji the Court of Appeal in ***Suresh Charan v Shah*** (1995) 41 FLR 65 [Kapi, Thompson, Hillyer JJA] held that refusal by the High Court to grant leave for Judicial Review is an interlocutory order. The Court of Appeal further held that for the orderly development of the law in Fiji it was generally helpful to follow the decisions of the English courts unless there were strong reasons for not doing so and accordingly adopted the *"application approach"*.

31. That decision was followed in ***Shore Buses Ltd v Minister for Labour*** FCA ABU0055 of 1995, a case of dismissal of proceedings for want of prosecution.

32. In ***Jetpatcher Works (Fiji) Ltd v The Permanent Secretary for Works & Energy & Ors*** [2004] Vol 1 Fiji CA 213, [Ward P, Eichelbaum, Gallen JJA] the appellant filed an application for judicial review of a decision of the Major Tenders Board. The appellant appealed to the Court of Appeal. The respondent took the preliminary objection that the appeal was not properly instituted because it required leave.

33. The Court of Appeal overruled ***Suresh Charan v Shah*** (supra) and **Shore Buses** (supra) and held that the *"order approach"* was the correct approach in Fiji. The Court sought to distinguish the earlier cases on the facts (in both **Suresh Charan** & **Shore Buses** the appellants had other remedies) but the Court's reasoning is not clear.

34. The vice in the *"order approach"* is that where leave to appeal has not been obtained the parties may not know whether or not it was required until the case comes on for hearing before the Court of Appeal and a close examination of the order and its effect can be argued.

35. It seems to this Court that the *"application approach"* is the correct approach for the reasons stated in ***Suresh Charan v Shah*** and for the additional reason of legal certainty.

36. As a matter of fundamental principle a court ought not overrule itself unless there are compelling grounds for doing so but this is what the Court in **Jetpacker** (supra) did. In overruling **Jetpacker** supra) the Court is restating the law as it was, but more importantly it is doing so to return legal certainty to the law of Fiji. This is especially important in 2008 where it has been some years since the Fiji Law Reports were published where decisions of this Court cannot always be readily accessed by practitioners. Practitioners and litigants need to know with certainty whether a decision is interlocutory and therefore whether an appeal from that decision needs leave.

37. This is the position. Where proceedings are commenced in the High Court in the Court's original jurisdiction and the matter proceeds to hearing and judgment and the judge proceeds to make final orders or declarations, the judgment and orders are not interlocutory.

38. Every other application to the High Court should be considered interlocutory and a litigant dissatisfied with the ruling or order or declaration of the Court needs leave to appeal to that ruling order or declaration. The following are examples of interlocutory applications:

1. an application to stay proceedings;

2. an application to strike out a pleading;

3. an application for an extension of time in which to commence proceedings;

4. an application for leave to appeal;

5. the refusal of an application to set aside a default judgment;

6. an application for leave to apply for judicial review.

39. This decision will be drawn to the attention of the Court of Appeal Registry.

40. The orders of the Court are:

1. The appeal is dismissed.

2. The appellant is to pay the respondents' costs as taxed or otherwise agreed.

Byrne, JA

Powell, JA

Khan, JA

Solicitors:

Iqbal Khan and Associates, Lautoka for the Appellant
Office of the Attorney General Chambers, Suva for the Respondent