IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 0026 OF 2024
[Lautoka Civil Action No: HBM 40 of 2023]

BETWEEN : **1. SUNG JIN LEE**
2. NAM SUK CHOI
3. BYEONGJOON LEE
4. BEOMSEOP SHIN
5. JUNG YONG KIM
6. JINSOOK YOON

Appellants

AND : **1. THE DIRECTOR OF IMMIGRATION**
2. THE COMMISSIONER OF FIJI POLICE
3. THE ATTORNEY GENERAL OF AND FOR THE REPUBLIC OF FIJI

Respondents

Coram : **Hon. Justice Filimone Jitoko, President Court of Appeal**

Counsel : **Mr S. Ower KC, Mr N. Prasad and Mr W. Pillay for the Appellants**
: **Mr R. Green, Solicitor-General, Ms M. Faktaufon for the Respondents**

Date of Hearing : **10 June 2024**

Date of Decision : **6 August 2024**

DECISION

Background

[1] On 14 March, 2024, the Appellants filed their Notice and Grounds of Appeal against the judgment and/or Orders of Seneviratne J of the Lautoka High Court in Civil Action No: HBM 40 of 2023, of 11 March 2024 finding and/or holding that:

> *"1. The orders sought in the ex parte notice filed on 06 September 2023, which was subsequently amended are denied."*

[2] The Appellants are appealing to this Court's intervention seeking the following Orders:

> *"1. That this appeal be allowed.*
>
> *2. The judgment and Order made by the Learned Trial Judged of 11 March 2024 be set aside.*
>
> *3. An order that the 1st Appellant be discharged from the custody of the Respondents forthwith.*
>
> *4. An order that the 5th Appellant be discharged from the custody of the Respondents forthwith.*
>
> *5. A declaration and/or finding that the arrest and/or detention of the 3rd and 4th Appellants by the Respondents on or about 6th September, 2023 and their subsequent removal and/or deportation by the Respondents from Fiji to the Republic of Korea on or about 6th September 2023 was unlawful and not a proper and/or lawful exercise of the powers contained in section 15 of the Immigration Act 2023.*
>
> *6. A declaration and/or finding that the threatened and/or attempted detention and/or removal of the 2nd and 6th Appellants by the Respondents from Fiji to the Republic of Korea is unlawful and not a proper and/or lawful exercise of the powers contained in section 15 of the Immigration Act 2003.*

7. *That the Respondents pay the Appellants costs of this appeal and the costs of the High Court proceedings.*

8. *Such further or other orders as this Honourable Court deems fit, just, necessary and expedient in the circumstances."*

[3] The ex parte Notice of Motion that precipitated those subsequent proceedings was an application for *Writ of Habeas Corpus* subjiciendum, filed on 6 September 2023, by the Appellants' against the Director of Immigration and the Commissioner of Police seeking an interim injunction restraining them as well as other relevant functionaries of the Fiji Government, from removing the 3rd, 4th, 5th and 6th Appellants from Fiji. The Appellant's alleged that their arrest and detention was unlawful.

[4] Upon the Respondent's application under O.18 r.18(1)(a), the Court struck out the ex parte application, but was subsequently heard after the Court of Appeal, on appeal by the Appellants. In allowing the appeal, in its judgment of 29 February 2024 the Court of Appeal directed the High Court to hear the ex parte application. In its judgment of 11 March, 2024, the Court, dismissed the Appellants' motion and denied all the prayers it sought.

[5] The Appellants' ground of appeal are as follows:

"1. The Learned Trial Judge erred in law and/or in fact:

1.1 by ordering that he was denying the orders sought in the ex-parte notice of motion fil on 6th September 2023 which was subsequently amended when, in fact, orders had been made on 6th and 7th September 2023 in respect of that motion and a Writ of Habeas Corpus Ad Subjiciemdum in respect of the Appellants had been issued on 8th September 2023 and a Return pursuant to O.54, r.7 filed on 15th September 2023; and

1.2 therefore failing at the hearing on 1st and 4th March 2024 to deal with and/or conduct a proper hearing of the Return of the Writ of Habeas Corpus Ad Subjiciemdum pursuant to O.54, r.8 as he was required to do.

2. *The Learned Trial Judge erred in law and/or in fact by:*

   2.1 *finding that the matter proceeded "without any grounds adduced by [the Appellants] in opposition"; and*

   2.2 *failing to make findings or otherwise address or respond in any way to the extensive argument and contentions put by the Appellants' counsel that the detention was unlawful. His Lordship thereby denied the Appellants procedural fairness and natural justice; and*

   2.3 *failing to go behind the Return with a view to examining the validity of the deportation order made under s 15(1) of the Immigration Act 2003 and the Appellants' detention consequent upon it.*

3. *The Learned Trial Judge erred in law and/or in fact by not holding or determining:*

   3.1 *the power to make a deportation order under s 15(1) of the Immigration Act 2003 may only be lawfully exercised in accordance with the scope and purposes of that Act; and*

   3.2 *that to deport or remove a person to a country for the purpose of presenting that person to the law enforcement authorities of that country is outside the purpose of the Immigration Act 2003 – the powers in the Act may not be used for a "disguised extradition"; and*

   3.3 *any order under s 15(1) made by the Permanent Secretary for that purpose – a "disguised extradition" – was unlawful, and not a proper and/or lawful exercise of the powers contained in that Act; and*

   3.4 *the power to detain in s 15(4) of the Immigration Act 2003 may only be used to give effect to a lawful and valid deportation order made under s 15(1) of the Immigration Act 2003.*

4. *The Learned Trial Judge erred in law and/or fact by not finding or holding that the detention of the Appellants was and in unlawful, in that:*

4.1 His Lordship ought to have found, by drawing the inference from the affidavit material filed by the Respondents, that the purpose of the Permanent Secretary (and/or the Minister for Immigration) in ordering the deportation or removal of the Appellants on 31 August 2023 was to present the Appellants to the law enforcement authorities of the Republic of Korea; and

4.2 His Lordship therefore ought to have held that the decision by Permanent Secretary under s 15(1) was unlawful and not a proper and/or lawful exercise of the powers contained in the Immigration Act 2003; and

4.3 His Lordship therefore ought to have held that any detention of the Appellants to give effect to the unlawful deportation order made under s 15(1) was also unlawful and, not a proper and/or lawful exercise of the powers contained in the Immigration Act 2003.

5. The Learned Trial Judge erred in law and/or fact when he noted, as at 18 September 2023, that the 1st, 2nd, 3rd, 4th, and 6th Appellants "have been released and [their] application . . . is withdrawn by consent." His Lordship erred in ordering that there had been a discontinuance of the action and/or proceedings, or that the Appellants had consented to orders doing so.

6. The Appellants reserve the right to file and/or supplement their grounds of appeal and to add or remove such further or other grounds as may be advisable upon a perusal of the record."

Present Interlocutory Proceedings

Summons for Voluntary Removal and Bail Pending Appeal

[6] On the same day the Notice of Appeal was filed, Counsel for the Appellants filed a Summons seeking the voluntary removal of the 5th Applicant to Vanuatu or the 5th Appellant be removed to Vanuatu, and that the Respondents be prohibited from removing the 5th Appellant to any country other than Vanuatu. In the alternative, should the removal application be refused, for the 5th Appellant to be released on bail pending the determination of the appeal. This summons is intended, in respect of the bail application, to also apply to the 1st Appellant, Sung Jing Yee.

[7] This is the interlocutory proceedings that is filed by the Appellants for determination during the pendency of the appeal.

[8] The affidavit in support of bail and/or the "*interim removal*" to Vanuatu, was deposed by Ahrum Sang a Director/Shareholder of Grace Road Farm, a company for which both the 1st and 5th Appellants are Director/Shareholders. This was filed on 14th March, 2024 explaining that because both Appellants are detained at the Suva Correction Centre, it has been difficult to gain access to them for them to depose this affidavits.

[9] A Supplementary Affidavit was again filed by Ahrum Sang, on the same day, 14th March, 2024, to confirm that he had been given authority by the 1st and 5th Appellants to depose the affidavit and in any event, the facts that he was deposing are within his own knowledge and acquired by him in the course of administering the affairs of the company, in which all the Appellants are Directors/Shareholders of.

The Admissibility of the Ahrum Sang Affidavits

[10] The Respondents had filed their affidavit in response, through Ms Amelia Komaisavai, Director of Immigration, and at the outset, they opposed the affidavits on the ground that there was no evidence of any written authority by the Appellants for Ahrum Sang to depose it on their behalf.

[11] The admissibility issue would have been contentious, except that the Appellants had finally managed to file their own affidavits, the 5th Appellant, Jung Yong Kim on 4th June 2024, and 1st Appellant Sung Jin Lee, a day later.

Court Proceedings

[12] There are multiple and multi-layered actions initiated and presently maintained against the Respondents by the Appellants following their arrest and detention by the former,

pursuant to INTEPOL Red Notices. It is necessary to briefly outline some of these proceedings, if only to contextualise this interlocutory application.

1. Habeas Corpus ad subjiciendum

The ex parte Notice of Motion under Order 54 of the High Court Rule, originally filed on 6 September 2023 as amended on 7 September 2023 (Civil Action No. HBM 40 of 2023) was struck out by the Lautoka High Court and the appeal to the Court of Appeal, heard on 6th February 2024 and judgment deprived on 29 February, 2024 was successful. The matter returned to the High Court to hear and determine the Notice.

The High Court on 11 March 2024 heard the Appellants' ex parte Notice of Motion after hearing the Respondents' Return to the Summons. It denied the Appellants' prayers as amended without costs.

The Appellants are now appealing to this Court, the High Court's judgment of 11 March, 2024.

At the same time the Appellants have also filed an appeal to the Supreme Court against the Court of Appeal's judgment of 29 February 2024 (Civil Petition No.1 of 2024).

2. Judicial Review

This is the Appellants' application (HBJ 8 of 2023) leave to issue judicial review challenging the exercise of discretionary powers of the various functionaries of the Government in their decisions adversely affecting their status in the country.

The application was heard on 13th December, 2023, and leave was granted on 19 January, 2024. The matter is presently before the High Court.

Bail/Removal Application

[13] On 2 December 2023 the 1st and 5th Appellants had filed an application in the High Court in Lautoka, seeking in respect of both, bail, and for the 5th Appellant, an order that he be allowed to leave Fiji to go to Vanuatu, where he is a citizen.

[14] In its Decision of 20 February, 2024, the Court conceded that in respect of the legal issues raised, the matters were *sub judice* as they were either before the Court of Appeal in the Appellants' appeal against the Decision of the High Court on the habeas corpus application, or before Seneviratne J in the High Court in the Constitutional redress proceedings.

[15] It is accepted that the Court did not deal with, and therefore did not make any determination on, either of the issues of bail and removal.

[16] However in yet another summons filed by the 5th Appellant Jung Yang Kim on 27 February, 2024 the 5th Appellant sought from the High Court for an Order of mandamus directing the Permanent Secretary for Home Affairs to remove the 5th Appellant to Vanuatu.

[17] The application was, on 15 May 2024, refused, the Court noting that the judicial review application by the Appellants, including the 5th Appellant was afoot, which will ultimately decide whether the exercise of the discretionary powers of the relevant Fiji authorities had breached their rights as protected under the law.

Consideration

[18] This summons is yet another attempt by the Appellants to seek the removal of the 5th Appellant to Vanuatu, or for the release/bail with the 1st Appellant. The High Court had considered both issues in its 20 February, 2024 Decision, and held that the matters were *sub judice*, and it did not make any determination on them. The Court again re-visit the issues after the 5th Appellant filed another Summons on 27 February, 2024 seeking the

same reliefs. The Court dismissed the application on 15 May, 2024, as the issues yet to be determined by the Court of Appeal are ultimately connected to the matters of removal and bail.

Abuse of the Court Process

[19] The Respondents Counsel argued that the summons by the 1st and 5th Appellant, filed at the same time as the Appellants Notice of Appeal against the High Court judgment of Seneviratne J of 11 March, 2024, was an abuse of the court process, understanding that it was the same application filed before Tuilevuka J in HBJ 8 of 2023, and refused. The Appellants furthermore, the Respondents argue, are seeking the same remedies and that *res judicata* applies. This will be addressed later.

[20] The Appellants' Counsel in reply, submitted that *res judicata* does not apply at common law in *habeas corpus* proceedings. Counsel referred directly to the United States Supreme Court decision in **Sanders v. United States**, 373U US1 (1963) as authority for the proposition that the denial by the Court of an application for *habeas corpus* was not res judicata. The Court added: *"Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government [is] always [to] to be accountable to the judiciary for a man's imprisonment"* **Fay v. Noia** supra at 372 US402, access to the courts on *habeas* must not be thus impeded. The inapplicability of *res judicata* to *habeas*, then, is inherent in the very role and function of the writ.

[21] The Appellant counsel also referred to Australia Federal Court authority of **Al-Katab v Godwin** (2004) 219 CLR 562 on the Australian Court's long standing position that the order for bail is an interlocutory step in *habeas* proceedings and in an immigration case *"clearly we could grant bail ancillary to or as part of proceedings for habeas corpus."*

[22] Furthermore, the Appellants submitted that under section 13 of the Court of Appeal Act 1949, the Court has "*all the powers authority and jurisdiction of the High Court"* and that being so, the Court of Appeal may, if it so wishes, grant bail in *habeas corpus* proceedings.

[23] In any event, the Appellants argue, the application for bail, has not been determined by the High Court in any of the proceedings before it. Counsel submitted that it "*was proper and appropriate*" for this Court to now deal with the question of bail.

[24] In considering whether this present proceedings by way of Summons should, as the Respondents' argue, be dismissed as an abuse of the Court process, this court must be satisfied that *res judicata* applies, and/or that the multiple interlocutory proceedings filed into Court by the Appellants including the present in the Court of Appeal, seeking the same remedies and in effect amounts to re-litigating the same issues, results in oppression and injustice that would bring the administration of justice into disrepute.

[25] There are four(4) court proceedings, all in the Court below, which have a bearing on the issue.

[26] First was a Summons, filed by on 21 November, 2023, by Jung Yong Kim, the 5th Appellant, seeking an order that he be released on bail pending for hearing of the appeal after the stay had been granted n 1 November, 2023. In the alternative, the 5th Appellant sought an Order that the Permanent Secretary be directed to remove the 5th Appellant to Vanuatu, where he had recently obtained his citizenship. The Court refused to grant his release and observed that the issue on the legality or otherwise of the detention was being considered in the Constitutional Redress case before another court.

[27] The second proceedings was by way of an application by the Appellant under Order 53 of the High Court Rules for judicial review challenging the Ministers responsible for immigration (Minister) decision declaring all the six (6) Appellants prohibited immigrants and deemed them to be unlawfully in the country. The grounds the Appellants rely on to support their application were:

(i) the extradition procedures were not followed;

(ii) that no written reasons were given by the Minister for his decision;

(iii) there was lack of procedural fairness;

(iv) that the Minister misunderstood his jurisdiction and accordingly his decision was ultra vires;

(v) that the decision was irrational and lacked proportionality; and

(vi) That the Minister acted in bad faith under the dictation of the Republic of Korea.

[28] All the 6 grounds were dealt with by the Court with the assistance of Counsel's submissions. The court notes that all the grounds are standard bearers for challenging the exercise of the discretionary powers of the executive and administrative arms of government. In this instance, it is the exercise of powers under the Immigration Act, of the Minister responsible, the Permanent Secretary and the Director of the Immigration Department, that are being called into question by the Appellants.

[29] In the end, the legal issues raised, including the questions the applicability of the "*ouster provisions"* of the Act were sufficient to satisfy the Court that there was an arguable case and leave granted on 10 January, 2024.

[30] The third Summons was filed on 27 February, 2024 seeking the voluntary removal of Jung Yong Kim, the 5th Appellant, to Vanuatu or that there be an Order directing the Permanent Secretary to remove him to Vanuatu.

[31] This Court notes that submissions were made by both Counsel on the interpretation to be accorded to section 15 of the Immigration Act and specifically on the powers vested in the Minister beginning with the declaration of a person as a prohibited immigrant, the authority to detain, and the removal voluntarily or otherwise, of the prohibited immigrant from jurisdiction.

[32] The Solicitor-General, for the Respondents, submitted that the powers exercised by the Government officials under the Immigration Act, are in the exercise of executive authority, and that the court having already decided in Civil Action HBM 40 of 2023 that the detention of the Appellants was lawful, and the decision, now on appeal, it would be inappropriate if this Court, were to make any findings contrary to the decision which is now before the full Court of Appeal.

[33] In any event, Counsel argued that for this Court to substitute its own decision or opinion to that of the decision matter in judicial review proceedings, is tantamount to usurpation of the discretionary powers and authority of the executive: **Afolayan v. Director of Immigration** [2018] FJHC 1041; Judicial Review 3 of 2017.

[34] The High Court, on 15 May, 2024, in the end, dismissed the Summons, deciding that the question of the removal of the 5th Appellant to Vanuatu, will ultimately depend on related issues to be determined by the appellate courts in the appeals before them.

[35] The fourth Summons, this present interlocutory proceedings, was filed into this Court on 14 March, 2024, together with the Appellants' Notice and Grounds of Appeal, against the High Court decision of 11 March, 2024, dismissing the ex parte notice of motion of *habeas corpus* filed by the Appellants on 6 September, 2023.

[36] The Summons is filed on behalf of the 1st Appellant, Sung Jin Lee, and the 5th Appellant, Jung Yong Kim.

[37] In respect of the 1st Appellant, the Summons seeks her release on bail pending the determination of the appeal.

[38] In respect of the 5th Appellant, the Summons seek an order for him to voluntarily remove himself to Vanuatu or alternative that he be removed to Vanuatu by the Respondents, with his consent. If the removal is not granted, the 5th Appellant seeks an order for him to be released on bail pending the determination of the appeal.

[39] The affidavit of Arhum Sang filed on 14 March, 2024 and his Supplementary affidavit of even date, and the affidavit filed by the 5th Appellant on 4 June, 2024, and the Supplementary Affidavit of the 1st Appellant on 5 June, 2024, are in support of the Summons.

[40] All the affidavits are, by and large, repetitions of the legal arguments on removal of the 5th Appellant from Fiji and bail/release for the 1st and 5th Appellants that have already been raised and submitted in the High Court proceedings in HBM 40 of 2023 and HBJ 08 of 2023.

The Case for the Respondents

[41] The Respondents noted firstly, that there are two(2) appeals to the appellate Courts afoot that are relevant to the consideration of this Summons. Both appeals emanate from the same ex parte *habeas corpus* Writ application that was heard by the Lautoka High Court and struck out, on the application of the Respondents.

[42] The first of the appeals is to the Supreme Court from the judgment of the Court of Appeal of 29 February, 2024, which allowed the Appellants' appeal against the striking out, and directed the High Court to hear the Writ. The High Court heard and dismissed the writ on 11 March, 2024.

[43] The second appeal is to this Court, against the High Court judgment of 11 March, 2024, which grounds are fully set out paragraph [5] above.

[44] On the application for the removal of the 5th Appellant, the Solicitor General submitted that this matter had already been argued and decided by the High Court which had declined the order prayed for by Counsel on behalf of the 5th Appellant.

[45] Counsel contended that instead of appealing the decision of the High Court, the 5th Appellant has, by this Summons filed in the Court of Appeal on 14th March, 2024, sought the same reliefs. This was an abuse of the court processes.

[46] Counsel also raised the defence of *res judicata*, the principle enunciated in **Henderson v Henderson** (1843 – 60) All ER 378, that estops subsequent litigation of a dispute and/or an issue that had already been decided by a competent court or tribunal. The principle, furthermore, Counsel argued, embraces all other related matters consequent to the issue already decided.

[47] On the issue of bail/release of the 5th Appellant, the Respondent Counsel argued that the Bail Act does not apply to someone who has been declared as a prohibited immigrant and who has been detained under the powers of the Permanent Secretary pursuant to section 15 of the Act. The crux of the matter is whether the detention of a prohibited immigrant under section 15 is a mandatory detention requiring the detainee to be interned until removal or release.

Conclusion

[48] This Summons as this court has pointed out above is the latest interlocutory application filed by the Appellants and specifically the 1st and 5th Appellants, who are being detained, as prohibited immigrants, pursuant to the powers of the Permanent Secretary of Immigration under section 15 of the Immigration Act.

[49] The first application for removal of the 5th Appellant to Vanuatu, and bail/release in the alternative for the 5th Appellant, were filed into, and heard by, the High Court at Lautoka. In its decision of 20 February, 2024, the Court declined to grant his release from detention as the issue was being addressed in the Constitutional Redress proceedings pending before the Court.

[50] The High Court once more dealt with the twin issues of removal and bail pending appeal, in its 15 May Ruling, and the Court, after listening to the arguments of Counsel on the issues of the exercise of powers by the executive to detain, and remove, dismissed the Application.

[51] The issue of bail and especially if it should be considered as ancillary or part of the *habeas corpus* proceeding has in my view, to be dealt together with, or against, the Respondents' arguments that bail under the Bail Act does not apply to persons detained as prohibited immigrants and are held at the discretion of the Permanent Secretary of Immigration, under section 15 of the Act.

[52] Whilst the United States Courts have made clear its position on bail in a *habeas corpus* proceedings, and the Australian authorities, are pointing in the same direction, the position in this country is not altogether clear. I agree with the Respondents submission that the issue of whether the detention is mandatory and whether bail is applicable in the circumstances is still to be decided.

[53] It is my considered opinion, that notwithstanding the differences in the interpretation by Counsel on the position of the 1st Appellant as to whether or not she remains a party to the *habeas corpus*, the issue of bail in respect of both, as is the question of the removal of the 5th Appellant, are innately linked and consequential to, the determination by the appellate Courts on the issue of the extent and exercise of powers and authority that can be legitimately be exercised by the Minister responsible, the Permanent Secretary, and the Director of Immigration of the country. I had deliberately set out in full the grounds of appeal at paragraph [5] above to show that all the issues including the remedies, being sought in this Summons, are part of, or inherent in, the remedies sought in the appeal pending to this court.

[54] Finally, it is of great concern to this Court that the Appellants have been able to willy-nilly and haphazardly file Summons both in the High Court and in the Court of Appeal without recourse or due observance of the Rules. It is all very well for the Appellants' Counsel to refer to the powers of this Court to assume and exercise the powers of the High Court under general and inherent powers and jurisdiction of the Court of Appeal but it is another to ignore or bypass the clear procedures and Rules as set out in the High Court Rules.

[55] In my view, this Appellants had totally ignored the mechanisms of and the procedure of appeal as recognised under the High Court Rules and attempted to circumvent the proper procedure for the review of the High Court decision by way of appeal, and instead sought the direct intervention of this Court through interlocutory mechanisms for a re-hearing and review of the Decisions of the Court below.

[56] In the end, the Appellants' Summons seeks the same remedies that had been dealt with by the Court below and which are the subject of appeals to both this Court and the Supreme Court. It clearly amounts to an abuse of the Court processes. Accordingly, the Appellants' Summons, the Court finds, is without merit, and is hereby struck out with costs.

Order:

(1) This application is struck out.

(2) Costs of $3,500.00 is awarded to the Respondents to be paid within 21 days.

HON. JUSTICE FILIMONE JITOKO
PRESIDENT, COURT OF APPEAL