

IN THE HIGH COURT OF FIJI
AT LAUTOKA (WESTERN DIVISION)

Judicial Review Action No. HBJ 2 OF 2016

IN THE MATTER of an Application for
leave to apply for Judicial Review by
Ajay Kumar (**Applicant**)

AND

IN THE MATTER of the decision dated
the 04th April, 2016 by the Commissioner
of Police whereby it purported to
terminate the employment of the
Applicant from the Fiji Police Force.

BETWEEN : **AJAY KUMAR** of Togo, Nadi, Fiji Islands

APPLICANT

A N D : **THE COMMISSIONER OF POLICE**, Police Headquarters,
Laucala Beach, Nasinu

1ST RESPONDENT

A N D : **ATTORNEY GENERAL OF FIJI**, Suvavou House, Suva

2ND RESPONDENT

Appearances : Mr E Maopa for applicant

Ms M Faktaufon for respondents

Date of Hearing : 16 March 2017

Date of Ruling : 16 March 2017

R U L I N G

Introduction

[01] This is an application for leave to apply for judicial review.

[02] By his application dated and filed 21 July 2016, the applicant seeks leave to apply for judicial review of the decision of 04 April 2016 made by the Commissioner of Police ('the First Respondent') terminating the employment of the Applicant (Ajay Kumar) from the Fiji Police Force (*'the Application'*).

[03] The application is supported by an affidavit of Ajay Kumar, the applicant sworn on 21 July 2016 verifying the facts concerning the application.

[04] The application is made pursuant to Order 53 Rule 3 (2) of the High Court Rules 1988, as amended ('HCR').

[05] In opposition, the respondents have filed an affidavit of Isikeli Vuniwaqa, Assistant Commissioner of Police sworn on 2 September 2016. Precisely, the respondents oppose the application on the ground that there is an undue delay and that the applicant has admitted the allegation levelled against him while he was on UN Mission and therefore the first respondent was not obliged to follow the normal procedures to be adhered to when terminating an officer's employment.

[07] At the hearing of the application, the parties made oral submissions. In addition, they also tendered their written skeleton submissions.

Background

[08] The applicant, Ajay Kumar on his affidavit pleads as follows:

1. He joined the Fiji Police Force on the 17th March 1986. He served at the Central Police Station in Suva and in Nadi and Ba Police Traffic Department.
2. He was selected and deployed for UN Peace Keeping Mission in Liberia for one year from 23.5.13 to 23.5.14.
3. Whilst he was in Liberia there was an allegation that he had involved in criminal activity. Investigation into the allegation was conducted by the UN Mission Internal Affairs. He was not

notified of the outcome. Upon completion of the tour of duty, the Fiji Contingence returned home.

4. He was never defaulted and/or served with any charge prior to leaving Liberia and/or upon arrival in Fiji. He returned and continued his normal police duty.
5. By a memorandum dated 22 January 2015, Mr E Seibouma, the Director Human Resources and Management alleged that he (applicant) was defaulted and appeared before the UN Internal Affairs whilst he was on overseas mission in Monrovia. The Commissioner of Police demanded show cause as to why he should not be terminated from the Police for being inefficient.
6. He replied and sent the demanded show cause dated 12 February 2015 with copies of his UN Certificates for Services in the mission and other correspondences.
7. During the second week of April 2016, he heard rumours from his workmates that his termination appeared in the Force Routine Order.
8. He enquired from his superior officers in Lautoka Police Station how this could be as he was never defaulted or charged for any disciplinary offence, neither had he faced any tribunal constituted under the Police Act. He did not receive a positive reply.
9. On 13 April 2016, he was called by the Divisional Police Commander, West to attend his office to sign his termination letter. He then confirmed that his employment with the Fiji Police Force was terminated on that day. Applicant seeks leave of the court to apply for leave to judicially review the first respondent's decision to terminate the applicant's services with the Fiji Police Force.

The Reliefs Sought

[09] The application seeks the following relief:

- A. *A declaration that the decision of the 1st Respondent vide letter dated 4th April 2016 is unfair, invalid, unjust, arbitrary, void and of no legal effect.*
- B. *A Declaration that, in any event, the 1st Respondent breached the rules of natural justice and/or abused its discretion and/or exceeded its jurisdiction.*
- C. *An Order for Certiorari to remove into the High Court the decision of the 1st Respondent vide letter dated 4th April 2016 be quashed forthwith.*
- D. *AN ORDER OF MANDAMUS directing the 1st Respondent and the persons named in B & C above to reinstate and or renew the Applicant's employment contract on existing terms and conditions.*
- E. *Special damages on leave allowance on Long Service Leave (to be calculated by the Force accountant).*
- F. *General damages;*
- G. *Cost; and*
- H. *Such other or further orders the court deems just.*

The Grounds upon which relief is sought

[10] The grounds which relief is sought upon are as follows:

1. *The Applicant was never defaulted or charged and or served with any disciplinary offence.*
2. *The Applicant never appeared before the Disciplinary Tribunal/or one was convened to hear any allegation against the Applicant hence no decision of guilt for misconduct was made against him.*
3. *The Applicant was not aware that he was terminated from the Fiji Police Force with effect from 29.3.16 (as it appeared on the Force Routine Orders dated 08th April 2016), until he was called to sign the termination letter on 13.4.2016.*
4. *The letter of termination by the 1st Respondent is dated 4.4.16 is based on irrelevant matters or allegations not yet proven.*
5. *The Applicant, during the above period, he was still in effective duty and hence was never afforded natural justice.*

6. *The total leave compensation upon dismissal payable to the Applicant is in the sum of \$6,382.54. His long service leave allowance is due and owing which is to be calculated by the Police Force pay office.*

7. *The 1st Respondent is at all material times-*
 - (a) *Established his office under The Constitution of the Republic of Fiji;*
and
 - (b) *Power is vested in him by the said Constitution and the Police Act Cap 85.*

8. *The Applicant was investigated by the UN Internal Affairs whilst in overseas mission in Liberia for allegation of involving in criminal activity. The investigation was completed at the completion of the Applicant's mission in Liberia.*

9. *At no time the Applicant was defaulted or charged by the UN internal Affairs or the Fiji Police Force for the allegation. However a show cause notice was sent by E. Seibouma, The Director Human Resources Management to the Applicant dated 22nd January 2015.*

10. *The Applicant sent his show cause on 12th February 2015.*

11. *By Force Routine Order dated 8th April 2016 the termination of the Applicant was advertised and his termination was effective from 29th March 2016. However the 1st Respondent formal letter for termination was dated 4th April 2016. Applicant was not information of such termination until he was called by the Divisional Police Commander West to sign and acknowledge his termination letter on 13th April 2016.*

12. *The 1st Respondent, his agent and or servant had by passed the procedures or failed to follow the mandatory provisions provided under section 32 of the Police Act and section 13 of the Police Regulation wherein the tribunal must hear any disciplinary offence alleged against a person officer.*

13. *Further or alternatively, at no time before making the decision to terminate the 1st Respondent;*
 - (a) *Convene a tribunal;*

 - (b) *Allow the applicant;*
 - i) *To take a plea;*

- ii) *Be given access to any documentary evidence;*
- iii) *Be given evidence of any witnesses taken during the proceeding;*
- iv) *The substance and material points of the evidence must be recorded in writing;*
- v) *The right to cross examine the witness;*
- vi) *To call evidence;*
- vii) *To be assisted by a friend, or gazette officers to conduct his defence.*

The Law

[11] The relevant law in relation to leave to apply for judicial review is HCR O.53, r. 3 (2), which provides:

'Grant of leave to apply for judicial review (O.53, r.3)

3.- (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for leave must be made upon filing in the Registry: a notice in Form 32 in the Appendix hereunder containing statement of-

- (i) particulars of the judgment order, decision or other proceedings in respect of which judicial review is being sought;*
- (ii) the relief sought and the grounds upon which it is sought;*
- (iii) the name and description of the applicant;*
- (iv) the name and address of applicant's Solicitors (if any); and*
- (v) the applicant address for service;*

(a) an affidavit which verifies the facts relied on.

(3) (i) Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.

(ii) The Court may determine the application without a hearing and where a hearing is considered necessary the Court shall hear and determine the application inter partes.

(iii) Notice of hearing of the application shall be notified in writing to the parties by Registrar.

(iv) Where the Court determines the application without a hearing the Registrar shall serve a copy of the order of the Court on the applicant.

(4) Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the relief sought and the grounds thereof to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.

(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates. (Emphasis provided)

(6) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(7) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.

(8) Where leave to apply for judicial review is granted, then-

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

(9) Upon granting leave the Court may, if satisfied that such a course is justified, direct that the grant shall operate either forthwith or conditionally as an entry of motion under rule 5 (4) and may then proceed to Judgment on the application for judicial review or may give such further directions as may be warranted in the circumstances.'

Test for permission

[12] To grant permission the court has to be satisfied that:

- (a) there is an arguable case for review;
- (b) the claimant has a 'sufficient interest'; and
- (c) there has not been 'undue delay'.

Discussion and Decision

- [13] The applicant seeks leave to apply for judicial review of the first respondent's decision terminating his employment with the Fiji Police Force. The application contains a statement of the particulars of the decision in respect of which judicial review is being sought. The application seeks, among other things orders in the nature of *certiorari* (quashing order) and *mandamus* (Mandatory order) to quash the decision on the ground that the first respondent had breached natural justice and failed to follow the proper procedure in arriving at the decision.
- [14] The Court may determine the application without a hearing and where a hearing is considered necessary, the Court will hear and determine the application *inter partes*. In this case, the application was heard *inter partes*.
- [15] The application provides name, description and address of the applicant. The application also provides all the details as required in O.53, r.3 (2) (a) of the HCR. The application is in order. There was no dispute with regard to the formality of the application.
- [16] The applicant has filed an affidavit verifying the facts relied upon. This complies with O.53, r.3 (2) (b) of the HCR requirement.
- [17] The application to apply for leave to judicial review of the decision made on 4 April 2016 (which was notified to the applicant on 13 April 2016) seeks quashing orders (*certiorari*) to vacate it. Therefore, he ought to have applied for such relief within three months of the date of the decision to be reviewed. The applicant has filed his application for leave on 21 July 2016.

Sufficient interest

[18] One of the thresholds the applicant has to meet pursuant to O.53, r. 3 (5) is 'standing' (sufficient interest). According to this rule, the court will not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[19] The test for deciding whether a claimant has sufficient interest was considered by the House of Lords in ***R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd*** [1982] AC 617. The court held:

'That not only was standing a ground in itself upon which permission could be granted, it should also be considered at the substantive hearing after the relevant law and facts were examined in full.'

[20] The decision sought to be judicially reviewed terminates the applicant's employment. The decision directly interferes with the personal right of the applicant. There was no dispute over the applicant's interest in the matter. I am, therefore, satisfied that the applicant has sufficient interest in the matter to which the application relates.

Arguable case for review

[21] Traditionally, the test for granting permission has been that a claimant must demonstrate to the court upon 'a quick perusal of the papers' that there is an arguable case for granting relief (*R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* (above)).

[22] I, on the material available and without going into the matter in depth, am satisfied that there is an arguable prima facie case granting the relief sought. I accordingly grant leave to apply for judicial review on

the ground of (i) breach of natural justice, and (ii) failing to follow the proper procedures before terminating the applicant's employment.

Undue delay

[23] The court may, under O.53, r.4, refuse to grant leave for the making of the application or any relief sought on the application if the court considers that there has been undue delay in making the application for judicial review. The application for judicial review seeks an order of *certiorari* to quash the first respondent's decision terminating the applicant's employment with the Fiji Police Force. Then O.53, r.4 (2) becomes applicable. Rule 4 (2) provides as follows:

*'(2) In the case of an application for an **order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.** (Emphasis provided).'*

[24] The applicant states that the decision sought to be judicially reviewed was made on 4 April 2016, but he was informed of the decision on 13 April 2016. The applicant filed the application for leave on 21 July 2016.

[25] In *R (Anufrijeva) v Secretary of State for Home Department* [2004] 1 AC 604, the court said the date runs when notice of a decision was given to the applicant and not the date of a decision.

[26] The applicant must have filed his application for leave within 3 months of the date when he was informed of the decision. He was informed of the decision on 13 April 2016 and he filed the application on 17 July 2016. The application is late by 7 days.

[27] Ms Faktaufon, counsel appearing for the respondent submits that there has been undue delay in bringing these proceedings.

[28] If the court considers that there has been undue delay in claiming judicial review, permission to proceed with claim, or relief at the

substantive hearing may be refused if it would be likely to lead substantial hardship or prejudice or detriment to good administration.

[29] For the present purpose, I am satisfied that the relief sought on the application would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

[30] In *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738, it was held that:

"Questions of delay are best dealt with in depth at the substantive hearing."

[31] I would consider granting leave to apply for judicial review without dealing with in depth the question of delay at this leave hearing.

Conclusion

[32] For the foregoing reasons, I would grant leave to apply for judicial review on the ground of (i) breach of natural justice, and (ii) failing to follow the proper procedures before terminating the applicant's employment

The result

1. Leave to apply for judicial review granted.
2. No order as to costs.

M H Mohamed Ajmeer 16/3/17

M H Mohamed Ajmeer

JUDGE

At Lautoka

16 March 2017

