

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

Civil Action No. HBM 30 of 2016

BETWEEN : **MOHAMMED ARFAOUI** **Applicant**

AND : **THE DIRECTOR OF IMMIGRATION** **1st Respondent**

AND : **MINISTER FOR DEFENSE, NATIONAL SECURITY
IMMIGRATION** **2nd Respondent**

Counsel : Applicant In Person
Ms Faktafon – Office of the Attorney-General for the Respondents
Mr.Tokalau (Fiji Human Rights Commission) amicus

JUDGEMENT

BACKGROUND

1. Mohammed Arfaoui is a Tunisian national. He came to Fiji on 05 April 2015 and was given a 4 months visitor's visa upon arrival. On 17 April 2015, Arfaoui lodged an application claiming asylum with the Department of Immigration in Suva. The Department of Immigration then referred his application to the United Nations High Commissioner for Refugees in Australia for further processing and background checking.
2. In due course, the UNCHR did investigate and assess Arfaoui's claim and responded with its findings to the Director of Immigrations vide a letter dated 19 October 2015.

3. Below I reproduce in full the said letter:

Dear Mr Vuniwaqa

UNHCR's refugee status determination recommendation – Mr Mohammed Arfaoui

We refer to Mr Mohammed Arfaoui, Tunisian national, who has applied for asylum with the Government of Fiji.

A joint interview in respect of Mr Arfaoui's claim for asylum has been conducted with representatives of Fiji Immigration, and initial recommendations as to the refugee status determination (RSD) assessment of Mr Arfaoui's claims have been discussed. UNHCR has further conducted an analysis to determine whether he is entitled to protection in accordance with the UN 1951 *Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees (Refugee Convention)*.

Following careful consideration of Mr Arfaoui's claims, UNHCR considers that he does not meet the criteria for international refugee protection. Based on this assessment, UNHCR recommends that the Government of Fiji reject Mr Arfaoui's claim for refugee status.

Enclosed for your review is the RSD written assessment form with UNHCR's recommendation.

If the Government of Fiji agrees with UNHCR's recommendations, Mr Arfaoui should be advised of the recommendation, in accordance with Fiji law, and be given the opportunity to seek a review of the decision.

Should your office wish to discuss our recommendation further, we are at your disposal.

Yours sincerely

Rico Y. Saleedo
Regional Protection Officer

4. Based on the UNCHR's recommendations, the Director of Immigration then wrote to Mr. Arfaoui vide a letter dated 13 January 2016 as follows:

Mr Mohamed Arfaoui
Veiuto Road
Suva.

Dear Sir

Re: REFUGEE STATUS DETERMINATION

I am writing with regard to your application for refugee status to the Government of the Republic of Fiji Islands on 17th April 2015. Fiji is a party to the *1951 UN Convention and 1967 Protocol relating to the Status of Refugees*, and has hereby undertaken to adhere to international standards concerning refugee protection.

I regret to inform you that after a thorough assessment of your asylum claim, and careful consideration of all available information, the Government of the Republic of Fiji Islands has determined that you are NOT eligible for international refugee protection under the 1951 Refugee Convention.

Upon consideration of all the available information, including explanations you have given, the office has determined that the information you provided on relevant and important points of your claim does not determine well-founded fear or experience harm if returned to your country of nationality or habitual residence.

Further, on the basis of a thorough review of the available and generally accepted information regarding your country, it has been determined that there is not a reasonable possibility that you will suffer serious harm if you return home.

It has also been determined that there is no reasonable possibility that you would face serious threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order in your country of origin.

If you are aggrieved by this decision you may appeal in writing to the Minister for Defence, National Security and Immigration clearly stating the facts on which you think the decision should either be varied or revoked.

Your appeal submission must be accompanied by an appeal fee of \$953.00 in the form of a bank cheque and should be lodged with this office within **21 days** from the date of this letter.

Yours faithfully

Ifereimi Dakunikuila (Mr)
For Director of Immigration

5. Upon receiving the above decision, Arfaoui then wrote a letter of appeal dated 25 January 2016 to the Minister for Defence, National Security, and Immigration (“DNSI”) on 25 January 2016. I reproduce the said letter below:

Ministry of Defence
National Security and Immigration
Government Building
Suva.
25th January 2016

Dear Sir/Madam

Re: Appeal on my Refugee Status

It is with deep satisfaction I am writing to tender my appeal for the decision taken against me on my asylum. I have every reason to prove that on my return to my country, my life will be over.

You may all have heard of Tunisia after the 2011 revoke. Since then situation has never been alright. There are series of life threatening issues all over the place such as bomb blast in almost all major town and cities. A recent bomb blast dated 04th November, 2015 led to a curfew in the Capital City of Tunisia, Tunis, where 12 people were wounded and seven people were killed. There is no guarantee that any one's life is safe as the series of bombing has been occurring almost everywhere.

ISIS have forced me on several occasions to join them but I consider their act as inhumane and a breach of ALLAH's Commandments. ISIS have already forced and convinced many of the youths in Tunisia to join them and fight with them in achieving pointless objectives. Some of the people who refused to join their fight were brutally murdered or shot.

It was on these grounds that I left Tunisia to seek asylum in Fiji for the security of my life. I was scared that if I stayed back, either I would join ISIS and go against what my religion has taught me or I would have been killed in one of the bomb blasts. When people go out from their homes, they are not sure whether they will come back home in one piece or their body parts might be laying all over the places. I escaped Tunisia as for me, that place was starting to feel like hell where people had no mercy of each other.

Fear runs down my spine when I think of back home. Even though Tunisia is my home country, I really do not want to go back. Living in fear every second is not living. Just put yourself in my shoes. What would have you been feeling knowing that you that you can be blown up in shreds in just a blink of an eye? What would you have done if ISIS was forcing you to join them and kill people? Would you have been able to live with that guilt? I am sure you would have done the same thing I have done today.

I was really happy when I was sent to Fiji to seek asylum. I was really happy of the Fiji Government as they never distinguished me from other citizens of the country. I have already adapted to the life style here in Fiji. The life here in Fiji is really good and relaxing compared to the life I had back in Tunisia. I feel really safe here in Fiji as I know I have nothing to fear here. My country is my country so if I am not faced with situation as such, I see no reason to move from there and seek asylum here.

Receiving such a letter of rejection has really shocked me and has again sent me back to where I started. I again started to fear that my life is in danger if I am sent back to Tunisia. I have no words to describe how I am feeling at the moment and what I am going through. I spend hours now sitting and thinking what I will do next and what will happen to my life.

If I return back to Tunisia I am going to be forced to do what I don't like and my life will be hanging in the balance once ISIS retain me. I am a young man of good character and have never involved in any form of things that will have an effect on another man's life. And in the future, I do not want to do anything that is brutal and gives me guilt feeling. For now, all I can do is to request you to accept my status as a refugee and ensure that my life is safe.

I appreciate all you have been doing for me during my asylum seeking processes. Please just consider the dangers I will face if I go back to Tunisia.

Thanking in advance.

Mohammed Arfaoui

6. Vide a letter dated 03 August 2016, the Director of Immigration communicated the Minister's decision to Arfaoui as follows:

Mr Mohammed B H Arafoui
Veiuto Road
Suva.
Dear Sir,

RE: APPEAL APPLICATION

I refer to your appeal submission that was lodged on 08.02.2016 and regret to advise that it has been refused by the Honourable Minister of Defence, National Security and Immigration.

In view of the above you must make arrangements to leave the country within 14 days from the date of this letter as your status is now deemed illegal.

Please advise us on your travel arrangements so that your departure can be facilitated. Failure to adhere to the above will leave us no option but to initiate removal procedures.

T Savou
For Director of Immigration

7. This was followed by a Removal Order signed by the Permanent Secretary for DNSI dated 31 August 2016. The said Removal Order is reproduced in full below:

**REMOVAL ORDER BY THE PERMANENT SECRETARY FOR IMMIGRATION
NATIONAL SECURITY AND DEFENCE**

To: **Mr Arfaoui Mohammed**

Whereas you Mr Arfaoui Mohammed
of Tunisia
entered Fiji under the provision of SECTION 39 (1) OF IMMIGRATION ACT 2003,
And whereas your presence in Fiji is under the provisions of the Immigration Act, 2003,
unlawful.

NOW I, Osea N Cawaru Permanent Secretary for Defence, National Security and Immigration direct that on the expiry of ___ - ___ days from the date of the service of this order, you be removed from and remain out of Fiji indefinitely.

Dated at Suva this 31st day of August, 2016.

Permanent Secretary for Defence
National Security and Immigration

STAY APPLICATION

8. On 21 November 2016, Arfaoui filed an application before this Court seeking an Interim Stay of the Minister's decision. His grounds for Interim Stay Order are as follows:

- (i) That the Applicant is currently appealing against the decision of the Minister for Defence, National Security and Immigration.
- (ii) That the decision of the Honourable Minister for Defence, National Security and Immigration is ill-conceived as it failed to precisely analysed the situation in Tunisia.
- (iii) That the Hon Minister and Director of Immigration have both failed to follow the proper procedures in liaison with the United Nations Pacific Office regarding the status of the Applicant's application for Political Asylum.
- (iv) That both the Honourable Minister for Immigration and the Director of Immigration breached my fundamental human rights enshrined in Section 11L of the Republic of Fiji 2013 Constitution.

NO APPEAL ON FOOT

9. Notably, Arfaoui has not filed any appeal, proper. All he has filed is an application to stay the Minister's decision. I observe that he only filed a Notice of Appeal on 02 June 2017 after the hearing on his application for Stay.

OPPOSITION

10. Arfaoui's stay application is contested by the Director of Immigration and the Minister for Defence, National Security, and Immigration ("DNSI").
11. Mr Pene Suliana, a Senior Immigration Officer based in Nadi, has sworn an affidavit on 16 December 2016. In addition to all the facts stated above in paragraphs 1 to 6, he deposes as follows:

12. I wish to state that the applicant, having been issued with a removal order and on the day he was to be removed, had caused a commotion prior to boarding the aircraft. As a consequence, the flight captain denied his boarding, sighting that the applicant was a flight risk. This resulted in the applicant's detention at the Natabua Remand Centre in Lautoka.
13. The relevant authorities had since been trying to rebook the applicant for travel to his country of origin but this has proved difficult. At present, the authorities in Hong Kong have approved the applicant's transit. The refugee status determination team is currently negotiating with a travel agent in Suva to finalise the applicant's booking route.
14. in relation to the remaining paragraphs under the heading "grounds for interim stay" set out in the applicant's application, I wish to reiterate the above paragraphs and add that proper procedures have been followed by the relevant authorities in reaching the decision to refuse the applicant's claim for asylum.
15. I am further advised by counsel, and verily believe such advice to be true and correct, that the decision of the Minister responsible for immigration in refusing the applicant's claim for asylum cannot be appealed as provided for under section 58(8) of the Immigration Act 2003.

HUMAN RIGHTS COMMISSION – AMICUS

12. On 03 March 2017, the Fiji Human Rights Commission appeared for the first time for the applicant and was granted *amicus curiae*, to assist Mr Arfaoui. I am grateful to Mr. Tokalau's able assistance in both oral and written submissions.

GROUND FOR OPPOSING THE APPLICATION

13. The Office of the Attorney-General opposes Mr. Arfaoui's application on the following four main grounds:
 - (i) the stay is premature as there is no appeal on foot.
 - (ii) there is no right of appeal of the Ministers decision.
 - (iii) a stay would amount to an injunction against the state contrary to section 15 of the State Proceedings Act 1951.
 - (iv) The applicant lacks *locus standi* to apply to Court for the specific relief he seeks.

CAN STAY BE GRANTED WHEN NO APPEAL ON FOOT

14. Ms Faktaufon submits that if there is no appeal proper on foot, it would be improper to grant a stay. She relies on **Munesh Prasad v Rajesh Prasad & Ors** HBC 48 of 2014, a decision where Madam Justice Wati opined that it is:
- “procedurally improper to adjourn the stay application to allow the applicant to file his appeal If there is no appeal on foot, there is simply no basis for stay application”.
15. Mr Tokalau submits that:
- 2.1 Mr Arafaoui intends to challenge the decision of the Minister to reject his appeal from the Permanent Secretary of Defence, National Security and Immigration (Permanent Secretary) whereby Mr Arafaoui was not granted asylum status in Fiji.
 - 2.2 However, in order to be in a position to challenge the decision of the Minister in rejecting his application for asylum in Fiji, Mr Arafaoui must first get a stay order from the Honourable Court preventing the Respondent’s from deporting Mr Arafaoui.
 - 2.3 Mr Arafaoui’s entire case is two-fold when looked at holistically: the first is getting an order from the Courts whereby Mr Arafaoui is not deported and the second step is to challenge the Minister’s decision in rejecting Mr Arafaoui’s application for asylum in Fiji.
 - 2.4 The issue of whether the Minister was correct in rejecting Mr Arafaoui’s application for asylum will be dealt with once the Honorable Court has first granted Mr Arafaoui his application for a stay order because it would be prudent to first to get a stay order since presently, the Respondents are still in a position to deport Mr Arafaoui when they choose to do so.
16. An appeal application does not have to await an outcome on his stay application. He has only filed a Notice of Appeal after the hearing of Stay Application.
17. In any event, as I have discussed below, there is no right of appeal against Minister’s decision, although it is open to judicial review.
18. Arfaoui’s stay application is premised on an intention to later appeal the decision of the Minister to refuse his asylum claim. That decision was based

on a report by the United Nations High Commissioner for Refugees in Australia.

19. His claim for asylum was made under section 39 of the Immigration Act 2003, which states as follows:

Claim for asylum

39. (1) A claim is made as soon as a person signifies his intention to seek to be protected or recognised as a refugee in the Fiji Islands to an immigration officer.
- (2) Where a claim is made under subsection (1), the claimant must, in the approved form and accompanied by the prescribed fee, confirm the claim, which must include the following-
- (a) the grounds for the claim; and
 - (b) a statement explaining whether any other member of the claimants family who is in the Fiji Islands and is also seeking to be recognised as refugees in the Fiji Islands;
 - (c) the grounds, if different, for the claim by the member of the family of the claimant; and
 - (d) a current address in the Fiji Islands and any telephone number or other prescribed means of contact in the Fiji Islands, and must notify the Immigration Department of any change in the address, telephone number or other prescribed means of contact provided.
- (3) The asylum seeker must-
- (a) establish the claim; and
 - (b) ensure that all information, evidence, and submissions that the asylum seeker wishes to have considered in support of the claim are provided to the Immigration Department before the Permanent Secretary determines the claim.
- (4) For the purpose of determining a claim, the Permanent Secretary may-
- (a) seek information from any source, except that the officer is not obliged to seek any information, evidence or submissions apart from those provided by the claimant; and
 - (b) determine the claim on the basis of the information, evidence, and submissions provided by the claimant.
- (5) The Permanent Secretary must not seek any information under subsection (4) on the applicant from the authorities of the country of origin.
- (6) The Permanent Secretary may waive any fee required under this Part.

20. The application was refused by the Permanent Secretary, which refusal was then appealed to the Minister under section 58 of the Act. Section 58 states as follows:

Appeal to Minister

58. (1) In this section 'reviewable decision' means a decision of the Permanent Secretary-

- (a) refusing to issue, extend, or vary a permit under section 9;
- (b) attaching conditions to a permit under section 9(2);
- (c) cancelling a permit under section 11; or
- (d) refusing a claim or cancelling a refugee status under Part 6.

(2) When a reviewable decision is made, a person affected by the decision who is dissatisfied with it may, within 21 days after the day on which it was made, or within any further period the Minister (either before or after the expiration of the 21 days) allows, appeal to the Minister for a review by the Minister of the decision.

(3) An appeal under subsection (2) must-

- (a) be in writing;
- (b) set out the grounds of the appeal;
- (c) be accompanied by the prescribed fee; and
- (d) be lodged with the Director of Immigration.

(4) Upon receipt of an appeal, the Minister must review the reviewable decision and must within 21 days make a decision-

- (a) affirming it;
- (b) varying it; or
- (c) setting it aside and making a new decision in substitution for it.

(5) An appeal to the Minister must be accompanied by the prescribed fee unless the fee is waived under the regulations.

(6) The Permanent Secretary must notify the appellant of the Ministers decision as soon as practicable after it is made.

(7) Section 31 of the Interpretation Act may apply to an appeal under this section.

21. The Minister declined the appeal. Ms Faktaufon draws attention to the fact that section 58 was amended by the Immigration Act (Amendment) Promulgation 2008 (No. 3 of 2008) by inserting section 8 as follows:

Section 58 of the Immigration Act 2003 is amended by adding the following new sub-section after sub-section (7):

"(8) No appeal shall lie from decisions made by an immigration officer acting in accordance with the directions of, or instructions given in respect of any particular case by, the Minister."

22. She submits that a granting of stay on the basis of the applicant will appeal the decision of the Minister is contrary to Section 58 as amended by Section 8.

23. Mr Tokalau submits as follows:

2.5 The Commission humbly submits that for the Honourable Court to grant Mr Arafaoui the stay order that he seeks, the Commission draws the Court's attention to the Preamble of the Constitution which clearly states that as Fijians we shall:

“COMMIT ourselves to the recognition and protection of human rights, and respect for human dignity”

2.6 The Commission submits that the importance of this Constitutional undertaking is that a person shall treat another person as he would want to be treated and this ensures that the principles of equality and fairness are upheld in Fiji irrespective of a person's place of origin and in Mr Arafaoui's case, his citizenry.

2.7 In addition, the Commission submits that as per section 7 (1) (b) of the Constitution, the Commission draws the Court's attention to the 1951 Refugee Convention (Convention) which concerns the status of Refugees.

2.8 It is true that Fiji has not ratified the Convention, but it does not stop the Fijian courts from applying the Convention because section 7 (1) (b) of the Constitution clearly states that Fijian courts can apply international conventions if it is relevant and in Mr Arafaoui's case, the Convention is applicable.

2.9 Article 16 of the Convention states that Refugees must be provided with access to courts and this includes the right to be represented which has been fulfilled by the appearance of the Commission and the right to be afforded a fair trial which Mr Arafaoui seeks through the granting of the stay order for his deportation so as to enable him to challenge the Minister's decision.

2.10 Similarly, Article 31 of the Convention states that refugees have the right not to be punished for illegal entry into the territory of a contracting State. The reason for this particular right is that sometimes refugees do breach immigration rules to enter into a country illegally and on this note the Convention prohibits States from arbitrarily detaining refugees exclusively on the ground that the refugee is seeking asylum.

2.11 In Mr Arafaoui's case, he came to Fiji with the sole intention of seeking asylum from Tunisia and instead he has been illegally detained which is not only a direct contradiction of Article 31 of the Convention but also for what the Constitution has committed itself to.

2.12 This commitment by the Constitution is in essence, the spirit that lives and breathes within the Constitution and without it, the Constitution would be just another document with words scribbled in it and as such if the Honourable allows this contradiction to exist than the purpose of having a Constitution would be defeated entirely.

2.13 The matter that is before the Honourable Court is whether Mr Arafaoui has a right to challenge the Minister's decision to reject his application for asylum or not and the Commission humbly submits that Mr Arafaoui has the right to challenge the Minister's decision and as such he must be afforded this opportunity by the Honourable Court by being granted the stay order that Mr Arafaoui urgently and justifiably seeks.

2.14 Therefore, the Commission humbly submits to the Honourable Court that Mr Arafaoui be granted his application to stay the deportation order by the Minister as for the reasons stated in paragraph 2.5 – 2.13 and that he be granted leave to challenge the decision of the Minister in rejecting his application for asylum in Fiji.

24. If one assumes that Mr. Arfaoui has a right of appeal, which I say he has not based on section 8, then he has not been denied an opportunity to file an appeal.
25. If assuming the Minister's decision is judicially reviewable, which I say it is so, Mr. Arfaoui has not filed a judicial review application. A timely judicial review application would have been the proper course for him to follow.
26. Whenever the Court is asked to grant a stay order pending appeal, one of the factors that the Court would consider is whether there is any prospect of success of the appeal. I am not in a position to assess this when no appeal proper is afoot. Again, that is assuming that the decision is appealable, which I say is it not.
27. I accept Ms Faktaufon's argument that section 8 precludes any right of appeal of the Minister's decision.
28. Ms Faktaufon further submits as follows:
 33. One fundamental theme the respondents note from the applicant's written submissions is the application of international human rights law. The development in this aspect of law has resulted in the conventional wisdom that fundamental rights of individuals are a matter of international law. As such, treaties, international custom, general principles of law and judicial decisions create soft law.
 34. The applicant's written submissions at paragraph 2.10 makes particular reference to the 1951 Refugee Convention. Fiji is a party to the 1951 Refugee Convention and the 1967 Protocol, succeeding to both the Convention and the Protocol on 12 June 1972. This is codified in the domestic law being the Immigration Act 2003, as the statutory basis for refugee status determination in Fiji.
 35. The applicant refers particularly to articles 16 and 31. These articles state as follows:
 - "Article 16
Access to Courts
1. *A refugee shall have free access to the courts of law on the territory of all contracting States.*

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from caution *judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

...

Article 31

Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugee restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all necessary facilities to obtain admission into another country."

36. Articles 16 and 31 do in fact confer the basic minimum standards for the treatment of refugees, without prejudice to States. Such rights include access to the courts and protection of refugees from being penalised for illegal entry or stay. The 1951 Refugee Convention defines who can be considered a refugee and what rights asylum seekers and refugees are entitled to and how states are obligated to protect these rights within their own territories. The term "refugee" is defined under Article 1 to mean as follows:

"A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

37. This definition of a refugee has been adopted by our domestic law in section 38 of the Act which states as follows:

"refugee means a person who –

(a) owing to a well-founded fear of being persecuted for reasons of Race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable, or owing to such fear is unwilling to avail himself or herself of the protection of that country; or

(b) not having a nationality and being outside the country of his or her habitual residence is unable or owing to such fear, is unwilling to return to such country; ..."

38. It is also worth distinguishing an asylum seeker from a refugee; the former being a person whose claim to be protected and recognised as a refugee is pending determination. The applicant in this case was an asylum seeker at the time he was seeking refuge. However, now that his claim has been determined by the United Nations High Commissioner for Refugees (hereinafter referred to as 'UNHCR') through its Regional Representation Office in Canberra and refused; he is neither an asylum seeker nor a refugee. He is unfortunately a prohibited immigrant awaiting removal.
39. The UNHCR provides technical advice, practical guidance and operational reports to many of the State parties to the 1951 Refugee Convention. It assists in identifying persons in need of international protection through various means which includes interviewing and assessing a person's need for international protection. Having assessed the applicant's circumstances, the UNHCR determined that he did not qualify as a refugee to which the 1951 Refugee Convention applies. Its report is attached to the affidavit of Mr Pene Suliana, annexed and marked "PS-2". The applicant does not have a well-founded fear of persecution in the country of his nationality or habitual residence.
40. UNHCR's recommendation was considered by the permanent secretary and subsequently the Minister before both authorities refused the applicant's claim for asylum. The applicant has been adequately considered as not having met the inclusion criteria of the 1951 Refugee Convention and arguably, Articles 16 and 31 do not apply to him as he is neither an asylum seeker nor a refugee but a prohibited immigrant awaiting deportation.

B. STATE SOVEREIGNTY

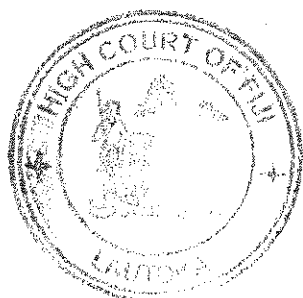
41. The applicant's written submissions at paragraph 2.8 make mention that the Constitution allows the courts to apply relevant international law. The respondents agree with this.
42. However, with due respect to the applicant's rights under international law, the line between international law and individual state sovereignty is not always clear. So while the applicant is correct to point out the obligation to international law as a response to human rights issues, the present circumstances cut across the most crucial elements of State sovereignty and that is the State's power to control its own immigration.
43. It is essential to maintain the sovereignty and territorial integrity of the nation state of Fiji and as such, a State should have justification for limiting its commitment to refugees. This could be for varying reasons. In the present circumstances, the permanent secretary and the Minister have exercised their statutory power to decline the applicant's claim for refugee status on the basis that he did not qualify as a person who required the

protection of the 1951 Refugee Convention. Such decisions are a necessary aspect of a State's sovereign right recognised in international law.

29. I agree with the above submissions.
30. In any event, the decision to decline Mr. Arfaoui's application for refugee status is based ultimately on the UNCHR's assessment of the political situation in Tunisia as well as a background check on him.
31. As I have said above, the applicant did file a Notice of Appeal after the hearing. Clearly, he only filed that after Ms Faktaufon had raised the issue of there being no appeal on foot during the hearing. His grounds of appeal are based on an allegation that the Minister had failed to:
 - (i) properly consider the political situation in Tunisia
 - (ii) conduct a background check on him
 - (iii) properly assess the application for asylum
 - (iv) consider his right to be free from cruel, inhumane and degrading treatment
 - (v) his continuance abidance of the laws of Fiji
32. As I have said, these are the things which the UNCHR had investigated and written a report on and upon which the decision to refuse Arfaoui's application was based. There is no suggestion before me that the UNCHR is ill-qualified or is ill-informed to make such an assessment. In fact, on the contrary, I think the decision to refuse Mr. Arfaoui's application is fortified by the fact that it was based on a report of the UNCHR. Furthermore, as I have said above, Section 8 provides a right of appeal (not a right to judicial review) So the Notice of Appeal is misguided in any event.

CONCLUSION

33. For all the above reasons, Mr. Arfaoui's application for stay is refused.



**At Lautoka
14 July 2017**

A handwritten signature in black ink, consisting of stylized, overlapping letters, positioned above a horizontal dotted line.

Anare Tuilevuka
JUDGE
Lautoka