IN THE HIGH COURT OF FIJI
AT LAUTOKA

JUDICIAL REVIEW NO. HBJ 5 OF 2018

IN THE MATTER of **CIVIL AVIATION AUTHORITY OF FIJI**

AND

IN THE MATTER of an application **by TIMOTHY JOHN JOYCE, SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED** t/a **HELI TOURS FIJI, TALL PINES LIMITED** t/a **PACIFIC FLYING SCHOOL** and **TANDEM SKYDIVE (FIJI) LIMITED** for a Judicial Review and with other reliefs including an Order of Certiorari to quash the decision made by the Civil Aviation Authority of Fiji (CAAF) and Mr Ajai Kumar, the Manager Corporate Services of CAAF made on the 27th December 2017 on an apparent review of the Applicants failure to comply with Safety of Aircraft Operation contrary to section 70(1) of the Air Navigation Regulation (ANR) 1981 and deeming the Applicant no longer a fit and proper person to hold or be issued an aviation document under Regulation 53 of the ANR and revoking his Fiji Commercial Pilots Licenses for aeroplanes and helicopters; deeming him no longer a fit and proper person to hold and nominated post holder position under the provisions of CAAF Standards Document and revoking the same; that he no longer be deemed to be a fit and proper person to hold any aviation document for a period of 10 years to commence from the date of the Applicants conviction by the Nadi Magistrates Court as per section 6(1) of the Rehabilitation Act.

STATE **v** **CIVIL AVIATION AUTHORITY OF FIJI** situated at CAAF Compound, Nadi Airport, Nadi.

FIRST RESPONDENT

AJAI KUMAR, Manager Corporate Services of the Civil Aviation Authority of Fiji of CAAF Compound, Nadi Airport, Nadi.

SECOND RESPONDENT

EX-PARTE **TIMOTHY JOHN JOYCE** Lot 28, Sovereign Quays, Denarau Island, and Sunflower Hanger, Nadi, Fiji, Pilot and Businessman, **SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED** t/a **HELI TOURS FIJI, TALL PINES LIMITED** t/a **PACIFIC FLYING SCHOOL** and **TANDEM SKYDIVE (FIJI) LIMITED** all limited liability companies having their registered office at Ernest & Young Bhuwan Investments Limited Building, 131 Vitogo Parade, P O Box 1068, Lautoka, Fiji.

APPLICANTS

Appearances : Mr A. K. Narayan (Jr) with Ms V. Buli for the applicants
: Mr R. Singh for the respondents
Date of Hearing : 20 September 2018
Date of Submissions : 20 September 2018 (by the applicants & respondents)
Date of Decision : 26 October 2018

JUDGMENT

Introduction

[01] This is an application for judicial review, with leave to apply for judicial review being granted on 05 July 2018, the decision of the second respondent dated 27 December 2017 (*'the application'*). The decision disqualifies the applicant, Timothy John Joyce from holding any aviation document for a period of 10 years (*'the decision'*). In arriving at the decision, the second respondent has considered the applicant's conviction of 29 counts of failure to comply with Safety of Aircraft Operation requirements contrary to section 70 (1) of the Air Navigation Regulation 1981 (*'ANR'*).

[02] The application is supported by the affidavit of Timothy John Joyce, the applicant sworn on 11 June 2018 (*'the supporting affidavit'*). The second respondent has filed the affidavit of Ajay Kumar sworn on 09 July 2018, in response to the supporting affidavit (*'responding affidavit'*). It will be noted that the applicant did not file any affidavit in reply to the responding affidavit filed by the second respondent.

[03] The applicants seek the following relief:

[i] ***AN ORDER OF CERTIORARI*** *to remove and quash the decision of the First and Second Respondents' dated 27 December 2017, purporting to review the First Named Applicants failure to comply with Safety of Aircraft Operation contrary to section 70(1) of the Air Navigation Regulation (ANR) 1981 and deeming the Applicant no longer a fit and proper person to hold or be issued an aviation document under Regulation 53 of the ANR and revoking his Fiji Commercial Pilots Licenses for aeroplanes and helicopters; deeming him no longer fit and proper person to hold and nominated post holder position under the provisions of CAAF Standards Document and revoking the same; that he no longer be deemed to be fit and proper person to hold any aviation document for a period of 10 years to commence from the date of the Applicants conviction by the Nadi Magistrates Court as per section 6(1) of the Rehabilitation Act;*

[ii] ***AN ORDER OF PROHIBITION*** *prohibiting the Respondents' from implementing or continuing to implement or otherwise giving effect to decision dated 27 December 2017, purporting to review the First Named Applicant's failure to comply with Safety of Aircraft Operation contrary to section 70(1) of the Air Navigation Regulation (ANR) 1981 and deeming the Applicant no longer a fit and proper person to hold and nominated post holder position under the provisions of CAAF Standards Document and revoking the same; that he no longer be deemed to be fit and proper person to hold any aviation*

document for a period of 10 years to commence from the date of the Applicants conviction by the Nadi Magistrates Court as per section 6(1) of the Rehabilitation Act;

[iii] ***FURTHER OR IN THE ALTERNATIVE, A DECLARATION*** *(in any event) that the decision of the Respondents' made on 27 Decembers 2017, has infringed the First Named Applicants rights to natural justice, fairness, breach of the First Named Applicant's Constitutional rights and section 12F of the Civil Aviation Authority of Fiji Act 1979 is unconstitutional and the decision is unfair, irrational, arbitrary and unreasonable;*

[iv] *The Respondent's pay damages to the Applicants to be assessed;*

[v] *Costs on a full Solicitor/Client indemnity basis;*

[vi] ***ANY FURTHER DECLARATIONS*** *or other relief as this Honourable Court may see it fit.*

[04] At the hearing, the parties made oral submissions and tendered their respective written submissions. I am grateful to counsel for their extensive written submissions. I was greatly assisted by their submissions.

The Background

[05] Background facts can largely be taken from the affidavit filed by the parties and from counsel's submissions in the course of the hearing before me.

[06] Mr Timothy John Joyce (Joyce), the first named applicant is the Chief Pilot, Chief Executive Officer, Director and shareholder of the second to the fifth applicants ('*the companies*'). He is fully involved in all operations of the applicant companies.

[07] Civil Aviation Authority of Fiji ('*CAAF*'), the first respondent has the function of regulating the safety of civil aviation operations in Fiji by, among other things- issuing certificates, licences, approvals, registrations and permits after appropriate inspection, audit and examination; developing and promulgating appropriate, clear and concise aviation safety standards and doing any other thing which the Authority deems necessary for the enforcement of aviation safety.

[08] Ajai Kumar, the second respondent is the Manager Corporate Services of CAAF and was Acting Chief Executive of CAAF at the material time.

[09] On 26 February 2016, CAAF prosecuted Joyce with the charges of 29 counts of failure to comply with Safety Aircraft Operation Requirements contrary to section 70(1) of the Air Navigation Regulation 1981(*'ANR'*) at the Nadi Magistrate's Court. Initially, Joyce pleaded not guilty to the charges. Subsequently, the charges were amended and Joyce pleaded guilty to amended charges (Now he says the contraventions had resulted from an unintentional oversight). The learned Magistrate, considering his mitigation, imposed him a fine of $1,000.00 on each count on 8 December 2017. Joyce has filed an appeal against the sentence, which is still pending.

The charges

[10] The 29 charges filed in the Magistrates Court against Joyce by the respondent are contraventions of section 70 (1) of the ANR (failure to comply with Safety Aircraft Operation Requirement) on a number of occasions.

[11] In the meantime, on 27 December 2017, the respondents by a letter dated 27 December 2017, informed Joyce that due to his conviction and the sentencing at the Nadi Magistrates Court, it had decided to deem him no longer fit and proper person to hold or be issued with an aviation document, aviation nominated post holder, revocation of his Commercial Pilots License (Aeroplanes) (*"CPL (A)"*) and Commercial Pilots Licence (Helicopter) (*"CPL (H)"*). The letter also advised Joyce that he is deemed not fit and proper to hold any aviation document for a period of 10 years and that the 10 years is the rehabilitation period. He was also advised of his right to appeal under section 12F of the Civil Aviation Authority of Fiji Act 1979 (*'CAAFA'*) in the same letter.

[12] This decision of 27 December 2017 has been signed by the second respondent in his position as the Manager Corporate Services on behalf of CAAF.

Appeal under Section 12F

[13] Joyce lodged an appeal under section 12F of the CAAFA on 17 January 2018. This appeal was filed in accordance with and pursuant to the requirements of CAAF's circular.

[14] On 6 February 2018, Mr Netava Waqa, CAAF's Chief Executive ("*CE*") at the time proposed that an independent Tribunal be appointed by him to preside over the 12F appeal in light of the allegations of bias against him by Joyce.

[15] As a result, on 19 February 2018, a joint approach was made to the former Judge, Mr Jiten Singh, to hear the appeal. An agreement and Terms of Reference was also drawn up and executed by the parties and a hearing was scheduled for 14 April 2018. On 9 April 2018, Mr Jiten Singh informed the parties that he may not be the appropriate person to hear the appeal due to the potential conflict.

[16] Thereafter, the parties agreed to appoint Mr Chen Young as the suitable alternative. Mr Young accepted the appointment and provided timelines to both parties for an anticipated hearing at the end of the May.

[17] On 11 May 2018, solicitors for the respondent advised that Mr Young and Mr Joyce's solicitors that CAAF did not have authority to pay Mr Young's fees and suggested that the parties appoint another alternative tribunal.

[18] The applicants allege that the respondents unilaterally withdrew from the agreed alternative appointee for the tribunal on the basis that Mr Young's fees were beyond CAAF's scope of approval. This has led the applicants to file an application for leave for a Judicial Review of the respondents' decision dated 27 December 2017.

[19] The Application for Leave to apply for judicial review was heard on 5 July 2018 when the court, have found that he has sufficient interest in the matter and an arguable case at the leave stage, made the following orders:

1. Leave to apply for judicial review granted.

2. This (granting of leave) shall operate as a stay on the decision of the respondent delivered on 27 December 2017.

[20] The impugned decision was made on 27 December 2017. The application for leave to apply for judicial review of that decision was filed on 12 June 2018. It will be noted that the application for leave was made some 6 months after the decision was made. The respondent did not raise the issue of delay at the leave stage. The only objection to the leave being granted was that the applicants' had not exhausted their right of the appeal under section 12F of the CAAFA.

[21] Consequent to the stay on the decision, Mr Joyce applied for the renewal of both of his Commercial Pilots Licences. The respondents refused to process the application on the basis that the stay granted on 5 July 2018, did not extend to the renewal of the applicant's licences. Thereafter, the respondents filed an *ex-parte* application on 20 July 2018, seeking clarification of the orders made on 5 July 2018. On 20 July 2018, the court delivered a ruling clarifying that Mr Joyce would be entitled to apply for the renewal of his licences in view of the stay.

[22] The applicants seek to judicially review the decision on the following grounds:

(a) The Respondents' acted in breach of the principles of natural justice and fairness.

(b) The Respondents' had failed to make a disclosure of the charge or information or results of any investigation with respect to the matter they were reviewing to accord a proper hearing to the First Named Applicant.

(c) The decision by the Respondents' deeming the Applicant no longer a fit and proper person to hold or be issued an aviation document under Regulation 53 of the ANR and revoking his Fiji Commercial Pilots Licences for aeroplanes and helicopters; deeming him no longer a fit and proper person to hold and nominated post holder position under the provisions of CAAF Standards Document and revoking the same; that he no longer be deemed to be a fit and proper person to hold any aviation document for a period of 10 years to commence from the date of the Applicants conviction by the Nadi Magistrates Court as per section 6(1) of the Rehabilitation Act is unreasonable and irrational, and/or capricious.

(d) *The Respondents' decision was in breach of the Constitutional rights of the Applicants and was arbitrary and improperly made and/or against the rule of double jeopardy.*

(e) *The Respondents' decision was ultra vires their powers having abdicated their rights to deal with the First Named Applicant at the Authority level to the Nadi Magistrate's Court by way of private prosecution which had concluded the matter to sentencing with the penalties prescribed for the offences charged.*

(f) *The First and Second Respondent failed to consider relevant factors and took into account irrelevant factors pertinent to the issues.*

(g) *The Respondents decision is biased and/or predetermined and not made independently and/or after an independent enquiry.*

(h) *Section 12F of the Civil Aviation Authority of Fiji Act 1979 in providing an appeal to the Second Respondent is unconstitutional being in breach of section 16(1) (a), (b) and (c) of the Constitution of Fiji.*

The Law

[23] Order 53 of the High Court Rules 1988, as amended ('*HCR*') sets out the cases appropriate for judicial review, which provides:

> *"1 (1) An application for an order of mandamus, prohibition or certiorari shall be made by way of an application for judicial review in accordance with the provisions of this Order.*
>
> *(2) An application for a declaration or an injunction may be made by way of an application for judicial review ,and on such an application the Court may grant the declaration or injunction claimed if it considers that having regard to –*
>
> (a) *the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;*
>
> (b) *the nature of the persons and bodies against whom relief may be granted by way of such an order, and*

(c) *all the circumstances of the case, it would be just and convenient for the declarations for injunction to be granted on an application for judicial review."*

Standing

[24] The primary concern of the administrative law is not simply to control the performance of public functions but rather to exercise control in the interest of persons affected in particular ways. That is the reason the law requires that a claimant seeking to challenge performance of public function by way of judicial review must have sufficient standing (or *locus standi*). Standing is not normally a requirement for bringing a *'private law claim'*-for instance, a claim in tort or for breach of contract-against a public functionary.

[25] The HCR, O 53 R 3, introduces a sufficient standing rule applicable to all judicial review claims brought under that Order, namely that the claimant was required to have *'a sufficient interest in the matter to which the application relates'* (O 53, R 3 (5)).

[26] At the leave stage, I found that the applicant has sufficient interest in the matter to which the application relates.

[27] In *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd* [1982] AC 617, Lord Diplock expressed the view:

> *"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."* [Emphasis supplied]

[28] House of Lords in Inland Revenue Commissioners said:

> *"It was wrong to treat standing as a preliminary issue for determination independently of the merits of the complaint. 'In other words, the question of sufficient interest can not, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context [at 630D (Lord Wilberforce). Lords Diplock and Scarman agreed, Lord Fraser disagreed]' It is not simply a point of law to be determined in the abstract or assumed facts-but upon the due appraisal of many different factors revealed*

by the evidence produced by the parties, few if any of which will be able to be wholly isolated from the others' [at 656D (Lord Roskill)]"

[29] In *R v Secretary of State for Foreign and Commonwealth Affairs ex p World Development Movement Ltd* [1995] 1 WLR 386, at 395 Rose LJ held that:

> *'standing should not be treated as a preliminary issue, but must be taken in the legal and factual context of the whole case'.*

[30] After the House of Lords' decision in Inland Revenue Commissioners, the testing of an applicant's standing is thus made a two-stage process. On the application for permission [leave] (stage one) the test is designed to turn away hopeless or meddlesome applications only. But the matter comes to be argued (stage two), the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it. As Lord Scarman put it (at 654H; likewise at 644D (Lord Diplock)): *"The federation , having failed to show any grounds for believing that the revenue has failed to do its statutory duty, have not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application."*

[31] The respondents did not put in dispute the applicant's standing in the matter at either stage-stage one or stage two.

[32] At this stage (stage two), I have considered the evidence and argument put forward by both parties and I am satisfied that the applicant has a strong enough case on merits in relation to his own concern with it.

Delay

[33] Dealing with the delay in applying for relief, the HCR, Order 53 Rule 4, provides:-

> ***"Delay in applying for relief** (O 53 R 4)*
>
> *4 (1) Subject to the provisions of this Rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under Rule 3 is made after the relevant period has expired, the Court may refuse to grant -*
>
> *(a) leave for the making of the application; or*

(b) any relief sought on the application,

if, in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(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 of or the purpose of paragraph (1) is 3 months after the date of the proceeding.

(3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

[34] The decision under review was made on 27 December 2017. The applicant filed his application for leave to apply for Judicial Review on 12 June 2018, which is some 6 months after the decision. At the leave stage, I said the issue of delay, if any, could be fully argued at the substantive hearing stage.

[35] The relief sought includes an order of *certiorari* (quashing order) to remove the decision. In that case, the applicant must have made his application within 3 month after the date of decision (see O 53, R 4 (2)).

[36] As I said, the applicant has made his application for leave to apply for judicial review of the decision some 6 months after the decision was made.

[37] The applicant in his affidavit explains the delay in making the application for Judicial Review. He states that:

a) The process of appeal is provided in CAAF's circular. The appeal is to be filed within 14 business days. He filed a timely appeal on 17 January 2018.

b) CAAF's CE at the time Mr Waqa disqualified himself in light of allegations of bias.

c) The CE then advised the applicant that his office would appoint an independent tribunal to hear the appeal. The applicant informed that the independent tribunal would have to be one agreed to by the parties. As a

result, the parties entered into an Agreement and Terms of Reference and appointed Mr Jiten Singh to hear the appeal under 12F on 14 April 2018. On 9 April 2018, however, Mr Jiten Singh recused himself from hearing the appeal on the ground of potential conflict of interest.

d) Thereafter, on 1 May 2018, the parties agreed to appoint Mr Young and Mr Young expressed his willingness and indicated that he would be able to hear the appeal by end of May.

e) The respondents refused to continue and proceed with Mr Young hearing the appeal on 11 May 2018. The applicant treated this breach as a repudiation of the agreement for referral to an independent tribunal.

f) The applicant says the delay of 5 months was caused by the respondents' conduct.

[38] In light of the above background, Ms Buli of counsel for the applicants submits that there was an initial delay by the CE in responding and providing directions on the appeal and that it was only when the applicants' solicitors followed up, the CE replied that an independent tribunal was to hear the appeal.

[39] The Fiji Court of Appeal in *Harikisun Ltd v Singh* [1996] FJCA 15; ABU0019.1995S (4 October 1996) cited with approval Lord Diplock's statement on the test on delay to be considered at the substantive hearing:

> *"The first sub-paragraph (a) plainly refers to the leave application only. Once leave has been granted what is before the court is the substantive application for review and so no question of refusing to grant leave could arise. On the other hand sub-paragraph (b) can only apply to the substantive review application because the Court cannot grant or refuse any relief sought in judicial review at the application for leave stage. In our view the words following sub-paragraph (b) "if in the opinion of the Court, the granting of the relief sought would be likely to cause etc" apply to sub-paragraph (b) only. This again follows from the wording. It is only on the hearing of the substantive application for review that the Court can grant the relief sought; it certainly cannot do so at the application for leave stage. Thus the questions of substantial hardship, prejudice to rights and detriment to good administration, which depend upon "the granting of the*

relief sought", are matters for the Court on the substantive review application, not on the application for leave which is concerned with delay, and the reason for it, in bring the action. There are other differences in the discretion exercised by the Court at the leave stage as compared with the substantive hearing stage. See Lord Diplock in Inland Revenues Commissions v National Federation and Self Employed and Small Business Ltd (1982) AC 617 at 644.

[40] In *State v Transport Control Board* [2000] FJLawRp 36; [2000] 1 FLR 106 (25 May 2000), Justice Shameem (as she then was) allowed the application for certiorari and quashed the decisions of the respondents despite the delay of 5 months on the basis that the delay was justifiable and there was no hardship to the respondent and no adverse effect to good administration.

[41] In the matter at hand, the delay was largely caused by the respondents themselves. There is no complaint that the granting of the relief sought would likely to cause substantial hardship to the respondents or would be detrimental to good administration. In the circumstances, I would proceed to hear the application and consider the relief sought by the applicants despite the delay of 6 months after the decision was made.

Decisions open to judicial review

[42] Only decisions or actions which are made in a public law context are subject to judicial review. Even if a body may in some circumstances be susceptible to judicial review, not every decision will be reviewable. There must be a decision with a public law element sufficient to justify judicial review (*R v BBC, ex parte Lavelle* [1983] 1 WLR 23).

[43] The CAAF is a public body and it operates as an integral part of public statutory scheme of regulation or service provision. Its function is regulated by a network of statutory provisions relevant to its activities.

[44] It was not in dispute that the CAAF's decisions are susceptible to judicial review.

[45] I will now turn to the grounds on which the judicial review is sought.

Breach of natural justice and fairness

[46] As a matter of settlement, Mr Singh of counsel for the respondent before the commencement of the hearing informed the court that the respondents would agree to set aside the decision on the ground that the applicant was not accorded an opportunity to put forward his side of the case and that the respondents would commence a fresh hearing on the issue of the applicant's conviction for failure to comply with the Safety of Aircraft Operation requirements contrary to s. 70(1) of the Air Navigational Regulation (ANR) 1981. However, Mr Narayan did not agree to this suggestion. He told the court that the applicant wants to proceed with the hearing as setting aside of the decision would not settle the issue as there is a claim for damages.

Procedural impropriety

[47] The issue is whether there was any procedural impropriety when the respondent reached the decision.

[48] Procedural impropriety is concerned with the procedure by which a decision is reached, not the ultimate outcome. In order to prove procedural impropriety the claimant must show the decision was reached in an unfair manner. If there is no statutory framework which expressly stipulates the relevant procedural requirements, there are applicable common law rules under this head, namely:

(a) Rule against bias, which requires the public body to be impartial and to be seen to be so; and
(b) The right to a fair hearing whereby those affected by a decision of a public body are entitled to know what the case is against them and to have a proper opportunity to put their case forward (see *Blackstone's Civil Practice 2011* at p. 1164).

[49] A decision made or action taken by a public body should not infringe express procedural rules outlined in primary or secondary legislation (*R v Lambeth London Borough Counsel, ex parte N* [1996] ELR 299).

[50] The important source of procedural norms is section 16-(1) of the 2013 Constitution, which provides (in part) that:

"Subject to the provisions of this Constitution and such other limitations as may be prescribed by law-

- *(a) every person has the right to executive or administrative action that is* ***lawful, rational, proportionate, procedurally fair,*** *and* ***reasonably prompt;***
- *(b) every person who has been adversely affected by any executive or administrative action has* ***the right to be given written reasons for the action;*** *and*
- *(c)* ***any executive or administrative action may be reviewed by a court,*** *or if appropriate, another independent and impartial tribunal, in accordance with law." (Emphasis provided).*

[51] Lord Templeman in *R v Inland Revenue Commissioners, Ex parte Preston* (1985) A.C. 835 AT 862 where he said:

> *"****Judicial review is available where a decision-making authority*** *exceeds its powers, commits an error of law, commits a* ***breach of natural justice,*** *reaches a decision which no reasonable tribunal could have reached, or abuses its powers."* (Emphasis supplied)

[52] The above statement was quoted in *State v Arbitration Tribunal, ex parte Air Pacific Ltd* [2013] FJHC 134; Judicial Review 35.2008 (22 March 2013).

[53] Quoting Lord Diplock in O' Reilly (infra), Justice Pathik in *State v Permanent Secretary for Education & Technology, Ex parte Tuimoal* whilst dealing with the grounds of breach of natural justice stated:

> *"****The Lord Diplock*** *in* ***O'Reilly v Mackam*** *(1982) 3 ALL E.R. 1124 at 1126-1127 said that the observance of 'the rules of natural justice means no more than to act fairly towards him in carrying out their decision-making process, and I prefer so to put it'.*
>
> *The content of the rules of natural justice are customarily summarized by reference to two maxims:-*
>
> - *(a) audi alteram partem (the opportunity to be heard); and*
> - *(b) (memo debit esse judex in propria sua causa (no man should be a judge in his own cause – the "ant-bias" rules).*

These rules are examined only if the state conferring the relevant power either expressly or by necessary implication does not exclude the rules of natural justice.

There are many cases on the subject of natural justice. They cover all questions which relate to the manner in which a decision is reached and one of the things here is whether a person or body affected by a decision has been given a fair opportunity to make representation. Much will depend on the facts and circumstances of the case and largely relate to the nature of the rights affected and what procedures are necessary to give the affected party a proper opportunity to fairly put his case. When there is potential for adverse findings which may seriously affect a party, then one of the things that may be involved is to give an "oral hearing".

[54] In *Ridge v Baldwin* [1964] AC 40, Lord Reid said that anybody having the power to make decisions affecting rights was under a duty to give a fair hearing.

[55] If a person's livelihood or reputation is at stake that person deserves a proper hearing.

[56] No decision unfavourable to any one ought to be made without that person being given a chance to make a case, and in this way to participate in the decision making process (*G. Maher, 'Natural Justice as Fairness' in N. McCormick and P. Birks (eds), The Legal Mind (Oxford, 1986), ch.6).*

[57] In *Permanent Secretary for Public Service Commission v Matea* [1998] FJCA 23; Abu0016u.98s (29 May 1998), where the Public Service Commission had power (in terms of the Regulations) to dismiss an officer for being convicted of an offence, the Fiji Court of Appeal stated:-

> *".... The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilized legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instructions setting up the deciding body requiring that such a person be hard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or*

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> *".... The requirement that a person be given a fair opportunity to be heard before a body determines a matter that affects him adversely is so fundamental to any civilized legal system that it is to be presumed that the legislative body intended that a failure to observe it would render the decision null and void. If there are no words in the instructions setting up the deciding body requiring that such a person be hard the common law will supply the omission. It will imply the right to be given a fair opportunity to be heard. While the legislative body may exclude, limit or*

displace the rule it must be done clearly and express by words of plain intendment. The intention must be made unambiguously clear…"

[58] The respondents' decision, undoubtedly, adversely affected the applicant's profession and his business. In other words, his livelihood was at a stake. In the circumstances, he deserved a proper hearing and was entitled to a fair hearing. The right to fair hearing means that those affected by a decision of a public body are entitled to know what the case is against them and to have a proper opportunity to put their case forward. The respondents, as a public body which acts and makes decisions in public law context, were under a duty to give proper opportunity to the applicant to put his case forward. Admittedly, by failing to adhere the proper procedure as outlined in the Constitution or established by law or the common law principle of natural justice, the respondent had denied a fair hearing to the applicant. The applicant has the constitutional right to administrative action that is lawful, rational, proportionate, procedurally fair, and reasonably prompt. On the facts, I find that the respondent had acted in breach of the applicant's Constitutional right to administrative justice as guaranteed under section 16 (1) of the Constitution.

No reasons for the decision

[59] The respondents in their letter ("TJJ-5") only states:

"*… based on your conviction and sentencing by the Nadi Magistrates Court …*", CAAF had decided that it deemed the first named applicant not fit and proper to hold any aviation document or nominated accountable positions for a period of 10 years. Consequently first named applicant's CPL (H), CPL (A) PPL (A) and PPL (H) were suspended for 10 years and he could not hold the nominated positions for the Applicant companies.

[60] It is submitted on behalf of the applicants that: the respondents have not explained why the previous suspension from 28 September 2015 until 26 July 2016 was insufficient and there had to be further suspension; there was no explanation provided in the respondents' letter of 27 December 2017 to justify the suspension of 10 years; the first named applicant does not know why such excessive penalties were imposed on him when the only reason he was flying without a valid flying licence was because he had overlooked to tick a checklist

box when completing the licence renewal forms; an administrative body ought to give reasons for its decision; the first named applicant had a right to know was being punished twice for the same offence; there was no reference made to the period of suspension already served by the first named applicant; and the decision does not state what factors were taken into account.

[61] When a decision affects the rights and livelihood of a person it is all the more reason that the tribunal should give reasons for its decision (see *Dewa v University of the South Pacific* [1996] FJHC 125; Hbj0007j.1994s (4 July 1996), Pathik J).

[62] The Fiji Court of Appeal in ***Rajendra Nath v Madhur Lata,*** at page 5 of the judgment stated the following:

> *"In various commonwealth jurisdictions over recent years, there have been several cases on the duty of Courts and administrative tribunals to give reasons for their decisions especially where the unsuccessful party has a right of appeal. In some situations there is statutory requirement to give decisions.........But even where there is no such requirement, there is authority that such a requirement is to be implied.*
>
> ....
>
> ....
>
> *In **R v V Awatere,** (1982) 2 NZLR 644 that Court was prepared only to hold that, in the absence of a statutory requirement give reasons, it must be always good judicial practice to provide a reasoned decision and that judges should always do their conscientious best to provide reasons which can be regarded as adequate to the occasion"*

[63] It is seen that the decision is devoid of sufficient reasons for the decision. It does not explain how such a decision is made against, and there is no explanation as to the factors taken into consideration in arriving at the decision. It does not even say why 10 year sanction was imposed on the first applicant. The letter sent to the first applicant simply states that: *"... based on your conviction and sentencing by the Nadi Magistrates Court ..."* CAAF had decided that it deemed the first named applicant not fit and proper to hold any aviation document or nominated accountable positions for a period of 10 years.

[64] Section 16 (1) (b) of the Constitution clearly says that every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action.

[65] The respondents' decision adversely affects the applicants. Therefore, the respondents were, under the Constitution, obliged to give written reasons for their decision. The fact that the first named applicant was given full disclosures during the Magistrate's Court proceedings has no application. What was required is the reason for the decision which the respondents had failed to give. On the facts, I find that the respondent had failed to give sufficient reasons for their decision.

Double Jeopardy

[66] Let me now address the issue of double jeopardy.

[67] In this regards, the applicant submits that following the sentence the respondents further punished the applicant by deeming him not fit and proper to hold any aviation document and accountable positions for ten years. The applicants rely on sections 14 (1) of the Constitution and 12D of the CAAF Act.

[68] Section 14 (1) of the Constitution provides that: *'a person shall not be tried for ... (b) an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.'*

[69] The CAAF Act, section 12D, states:

> *"Infringement notices*
>
> *(1) An authorised person may serve an infringement notice on a person if it appears to the authorised person that the person has not complied with –*
>
> *(a) the improvement notice; or*
> *(b) any provision of this Act and its regulations.*
>
> *(2) An infringement notice is a notice to the effect that, if the person served does not wish to have the matter dealt with by a court, the person may pay, within the time and to the person specified in the notice, the prescribed fixed penalty.*

(3) If the person to whom the infringement notice pays the full amount of the prescribed fixed penalty for the alleged offence, the person is not liable to any further proceedings for the alleged offence.

(4) Payment under this section is not be regarded as an admission of liability for the purpose of, nor should it in any way affect or prejudice, any civil claim, action or proceedings arising out of the same occurrence.

(5) The amount of a penalty prescribed under this section for an offence shall not exceed the prescribed fixed penalty. "

[70] It was open to the respondents to deal with the contravention of section Regulation 70 (1) of the ANR either way-by issuing infringement notice or by prosecuting in the Magistrate's Court.

[71] In this case, the respondents opted to prosecute the first named applicant in the Magistrate's Court on 29 breaches of Reg. 70 (1) of the ANR. Before prosecuting the first named applicant, he was not dealt with by way of infringement notice. Section 12D (3) specifically states that if the person to whom the infringement notice issued pays the full amount of the prescribed fixed penalty for the alleged offence, the person is not liable to any further proceedings for the alleged offence.

[72] The first applicant was not prosecuted having dealt with by infringement notice. He has been dealt with by way of prosecution only, and not by both courses of action. Double jeopardy would arise when a person is tried again for same offence for which that person has previously been either acquitted or convicted. In the matter at hand, the first named applicant was prosecuted in the Magistrate's Court for 29 contraventions of Reg. 70 (1) of the ANR. He was not tried again for the contraventions. The respondents considered his conviction when they arrived at the impugned decision. Pursuant to Reg. 151 (1) of the ANR, the conviction of the first applicant becomes relevant when the CAAF assess a person's suitability to hold any aviation document. In the circumstances, I would hold that issue of double jeopardy does not arise.

Relevancy of conviction

[73] The CAAF is an aviation regulator. Under the ANR, Reg. 53 (2), it is required to assess the fit and proper status of an individual before issuing any aviation documents such as licence, rating and approval. Reg. 53 (2) (b) provides:

> *53.-(1) A person shall not perform any duty or exercise any function for which a licence, or rating is required under this Part unless he or she is the holder of an appropriate licence, or rating authorising him or her to perform that duty or exercise that function.*
>
> *(2) The Authority may, in accordance with the provisions of this Part, grant or renew the licences and ratings specified hereunder subject to such conditions as it thinks fit, and upon being satisfied that an applicant therefore is a fit and proper person to hold the licence or rating applied for and is qualified by reason of his or her knowledge, experience, competence, skill and is physically and mentally fit to act in the capacity to which the licence or the rating relates -*
>
> *(a) Private Pilot's Licence (balloons, aeroplanes and helicopters)*
>
> *(b) Commercial Pilot's licence (aeroplanes and helicopters)".*

[74] Reg. 151 (1) of the ANR makes a conviction of a contravention under the ANR relevant when the respondents consider the issuance of any aviation documents. That regulation provides:

> *"Revocation, suspension or cancellation of aviation documents*
>
> *151. – (1) If any person –*
>
> *(a)* ***is convicted of a contravention under these regulations****; or*
>
> *(b) fails to comply with any provision of these Regulations; or*
>
> *(c) fails to comply with the conditions of any aviation document;*
>
> ***the Authority may revoke, suspend, endorse, cancel or vary the aviation document relating to such contravention.***
>
> *(2) The Authority may only revoke, suspend, endorse, cancel or vary such aviation document if –*
>
> *(a) reasonable doubt exists as to the safety of the operation in question; and*

(b) the aviation document holder has been given a reasonable opportunity to be heard after investigations.

(3) Notwithstanding sub regulation (2), the suspension of any aviation document before investigations may only be utilised if suspension is necessary in the public interest.

(4) Immediately after the suspension before investigation, the Authority shall conduct an enquiry into the matter and by the quickest possible time inform the aviation document holder of the results of such investigation.

(5) The Authority shall inform the aviation holder in writing of the reasons for such revocation, suspension, endorsement, cancellation or variation.

(6) The suspension, revocation or cancellation of the aviation document may not be lifted until the contravention has been rectified.

(7) Once the suspension, revocation or cancellation has been lifted, the Authority may endorse remarks or vary the particulars of the aviation document.

(8) Any person who continues to operate despite the revocation, suspension or cancellation of their aviation document commits an offence and is liable upon conviction to the penalty set out in regulation 157."

[75] For the above reasons, in my judgement, the first named applicant's conviction of 29 contraventions under the ANR is relevant when the respondents assess the first applicant's suitability to hold any aviation documents.

Damages

[76] Another issue to be determined by the court in these judicial review proceeding is whether the applicants can seeks damages arising from any matter to which the application relates.

[77] The HCR, Order 53, Rule 7, provides:

"7 (1) On an application for judicial review the Court may, subject to paragraph (2), award damages to the applicant if-

"2.80 - A claim for damages may be attached to a claim for JR. The Court may award damages to the applicant if he has joined a claim for damages with his JR claim and the court is satisfied that if the claim had been made in an action begun by the claimant at the time of his making the JR claim he would have been awarded damages."

[83] Essentially, the above quotation echoes O 53, R 7 (1) (b) of the HCR.

[84] Further the statute itself ought to give rise to a right of claim for damages. There is no such instance here. The Court will have to look at the purpose of the legislation. In *Rowley v Secretary of State for Work and Pensions* [2007] 1 WLR 2861 at paragraph 73 Dyson LJ states as follows on the issue;

"73 – I accept, of course, that the mere fact that there is an alternative remedy is not necessarily a reason for denying the existence of a common law duty of care. It is important to see how comprehensive a remedy is provided and to consider it in the context of the statutory scheme as a whole. Ultimately, what has to be decided is whether, having regard to the purpose of the legislation, Parliament is to be taken as having intended that there should be a right to damages for negligence. The more comprehensive the remedy provided by Parliament, the less likely it is that Parliament is to be taken as having had that intention."

[85] However more significantly the Court at paragraph 91 and 92 stated;

"91 – Finally, I should mention Mr Giffin's wider submission that no duty of care should be imposed on the Secretary of State because the 1991 Act gives no right of action for breach of statutory duty or failure to exercise a statutory power. Mr Giffin made extensive reference to Stovin v Wise [1996] AC 923 and Gorringe v Calderdale MBC [2004] UKHL 15, [2004] 1 WLR 1057.

92 – Mr Giffin relies in particular on passages in the opinions of Lord Hoffmann to submit that there is no duty of care either in respect of the duty to make maintenance assessments or the statutory power to collect and enforce maintenance payments. As regards allegations that the Secretary of State failed to perform his statutory duty properly, Mr Giffin submits that what the claimants are seeking to do is to impose on him a common law duty of care in circumstances where there is no private law right to sue for breach of statutory duty: there are no grounds for recognising an exception to the general rule that a common law duty of care does not exist in such circumstances. As for the allegations that the Secretary of State

failed to exercise his statutory powers properly, Mr Giffin submits that there are no exceptional grounds for holding that the policy of the 1991 Act requires compensation to be paid to person who suffer loss because the power was not exercised or was not exercised properly."

[86] The Singapore Court of Appeal in ***Tan Juay Pah v Kimly Construction Pte Ltd [2012] 2 SLR 549***, referring to the guideline for ascertaining the common law duty of care in negligence, said:

> *"The party seeking to establish that a private right of action exist for breach of statutory duty must show that Parliament in imposing the statutory duty in question to protect the members of a class, intended those members to have such a right of action. Here, it must also be borne in mind that such right is not immediately established just because a statute is intended to protect a particular class of persons. Ordinarily, sometimes more is required to demonstrate a statutory intention to confer a private right of action. In matters where the statute's objective is to protect the public in general, exceptionally clear language will be required before the intention to confer a private remedy for a breach of statutory duty can be established."*

[87] I would like to adapt a paragraph (5.5.1.1 at page 94) from Administrative Law by Peter Cane (4th Ed), which deals with monetary remedy in judicial proceedings. The paragraph reads:

> ***"5.5.1.1 Damages a Private Law Remedy***
>
> *Unlike the declaration and the injunction, which are private law remedies (i.e. remedies for the redress of private law wrongs) which have been extended to redress public law illegality, damages is a purely private law remedy. What this means is that* ***in order to obtain an award of damages it is necessary that the claimant has suffered a 'private law wrong' such as a tort or a breach of contract****. Damages cannot be awarded simply on the basis that a governmental body has acted illegally. The relevance of the remedy in public law is that public functionaries can commit private law wrongs, and so damages is a remedy available against public functionaries. For example, damages for breach of contract can be obtained against a government department. Conversely, whereas a* ***declaration or injunction is available to restrain a breach of natural justice or to declare the invalidity of a decision made in breach of the rules of natural justice, damages are not available for breach of natural justice***

[94] In general, *'Judicial Review'* refers to control of public decision making in accordance with the rules and principles of administrative law.

[95] In appeal proceedings, the court may substitute its own decision on the matters in issue for that of the body appealed from. In the review proceedings, on the other hand, the court's basic power is to 'quash' the challenged decision, that is, to hold it invalid. If any of the matters in issue have to be decided again, this must be done by the original deciding authority and not by the supervising court. If the authority was under a duty to make a decision on the matters in issue between the parties, this duty will revive when the decision is quashed, and it will then be for the authority to make a fresh decision. It is also open to the court, in appropriate cases, to issue an order requiring the authority to go through the decision making process again. Another course open to the court when it quashes the decision of a governmental body is to remit the matter to the agency with a direction to reconsider it in accordance with the findings of the court (*Administrative Law by Peter Cane* (4th Ed), page 28 and 29).

[96] Pathik J in *State v Arbitration Tribunal, Ex parte Hussein* [2006] FJHC 116; Judicial Review 1 of 2004 (23 February 2006) stated:

> *"Judicial review is concerned* ***"not with the decision but with decision making process. Unless that restriction on the power of the Court is observed, the Court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power"(Lord Brightman in Chief Constable of the North Wales Police v Evans*** *[1982] 1 W.L.R. 1155 at 1173]. Further in that case* ***Lord Hailsham*** *at 1160 commented on the purpose of the remedy under Order 53 as follows this is apt:*
>
> .....
>
> ***"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuse its powers."***
>
> .....
>
> *One of the purposes of the* ***judicial review*** *is to ensure that an applicant is given a* ***fair treatment*** *by the decision-making body in question. The* ***judicial review***

jurisdiction is supervisory in nature. The court confines itself to question of legality when reviewing a decision".

[97] Mr Singh invites me to remit the matter to CAAF for it to make a fresh decision after going through the decision making process again if the court decides to quash the decision. He cites the case authority of *State v Public Service Commission, Ex parte Bola* [2004] FJHC 320; HBJ0027J.2003S where Pathik J held:

> ***"Where the relief sought is an order or certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may in addition to quashing it, remit the matter to the court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.***
>
> *I therefore quash the decision and remit it to the Public Service Commission and direct it to* ***reconsider*** *the penalty aspect with the provisions of* ***Reg.22*** *in mind* ***in accordance with the findings of the Court."***

[98] I see force in Mr Singh's submission, for CAAF was under a duty to make a decision on the matter in issue between the parties, then the duty will revive when the decision is quashed, and it will then be for CAAF to make a fresh decision.

[99] I am inclined to remit the matter to the respondent for it to make a fresh decision. In doing so, I direct the respondent to go through the decision making process again. In addition, I also direct the respondent to consider the following matters.

1. Under Reg. 151 (1) of the ANR, CAAF possesses the discretion to **revoke, suspend, endorse, cancel or vary the aviation document relating to such contravention** if a person is convicted of a contravention under the ANR. CAAF must consider **only** the penalty prescribed by Reg. 151 (1) in view of Mr Timothy's conviction of the 29 contraventions of the ANR. Imposing any other penalty which is not prescribed under Reg. 151 (1) would tantamount to *ultra vires* or acting without jurisdiction. In assessing the penalty CAAF has a duty to act judicially.

2. CAAF's decision effectively suspended Mr Timothy's fit and proper status and his ability to hold an aviation document and nominated accountable positions for 10 years. The imposition of 10-year-sanction is manifestly excessive and disproportionate in the circumstances of the case. Penalty to be imposed in view of the conviction must relate to such contraventions which Mr Timothy had been convicted of.

3. CAAF must consider section 16 (1) of the Constitution which guarantees the following rights:

   (a) *Every person has the right to executive or administrative action that is* ***lawful, rational, proportionate, procedurally fair,*** *and* ***reasonably prompt;***
   (b) *Every person who has been adversely affected by any executive or administrative action has* ***the right to be given written reasons for the action;*** *and*
   (c) ***Any executive or administrative action may be reviewed by a court,*** *or if appropriate, another independent and impartial tribunal, in accordance with law."*

4. When making a decision in the matters in issue, CAAF must consider the circumstances under which the contraventions of the ANR occurred, the aggravating and mitigating features and any previous imposition of sanction relating to the matters in issue. Any previous sanction imposed on Mr Timothy in respect of the same contraventions is to be deducted.

5. The decision CAAF is going to take on the matter must follow with the written reasons for the action.

6. The 29 breaches as summarised in the charges, in my view, are so serious as to undermine public confidence in aviation industry and therefore a signal needs to be sent to Mr Timothy, the profession and the public, that behaviour in question is unacceptable. CAAF is entitled to exercise its discretion within the purview of the ANR and make a decision to mark

the seriousness of the matter, and to send an appropriate signal to the aviation industry and the public.

Costs

[100] The applicants ask for indemnity costs. In my opinion, the applicants as winning parties are entitled to costs of these proceedings. However, I do not think I should grant costs on indemnity basis. An award of reasonable costs would do justice in this case. I would summarily assess the costs at $4,000.00.

The outcome

1. Writ of *certiorari* (quashing order) issued quashing the respondents' decision of 27 December 2017.

2. The respondents are directed to go through the decision making process again and to reconsider and reach a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested in this judgment.

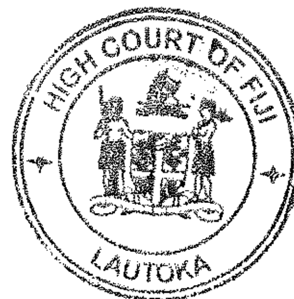
3. Applicants' claim for damages is dismissed.

4. The respondents shall pay summarily assessed costs of $4,000.00 to the applicants.

.... 26/10/18

M. H. Mohamed Ajmeer

JUDGE



At Lautoka
26 October 2018

Solicitors:
For the applicants: M/s A K Lawyers, Barristers & Solicitors
For the respondents: M/s Patel & Sharma, Barristers & Solicitors