

IN THE HIGH COURT OF FIJI AT SIVA

CIVIL JURISDICTION

Judicial Review No. HBJ 01 Of 2019

IN THE MATTER OF an application by **NANISE BALE** aka **NANISE KAMIKAMICA** and
FIJIAN TEACHERS ASSOCIATION for Judicial Review under Order 53 of the
High Court Rules 1988.

And

IN THE MATTER of Decision purported to be made by the **PERMANENT SECRETARY**
EDUCATION and/or **HEAD OF HUMAN RESOURCES OF THE MINISTRY OF**
EDUCATION and/or **MINISTER OF EDUCATION** and/or
MINISTRY OF EDUCATION on or about
2nd January, 2019.

BETWEEN

1. **NANISE BALE** aka **NANISE KAMIKAMICA**
2. **FIJIAN TEACHERS ASSOCIATION**

APPLICANTS

AND

1. **PERMANENT SECRETARY OF EDUCATION**
2. **HEAD OF HUMAN RESOURCES OF THE MINISTRY OF EDUCATION**
3. **MINISTER OF EDUCATION**
4. **MINISTRY OF EDUCATION**

RESPONDENTS

Counsel : Mr S. Valenitabua for the Applicant
Ms R. Pranjivan & Mr B. Sharma for the Respondents

Date of Hearing : 21st February, 2019

Date of Ruling : 08th March, 2019

RULING

(On the application for leave to file an application for Judicial Review)

- [1] The applicant made this application seeking leave to file an application for judicial review challenging the decision of the respondents to transfer out of Yat Sen Primary School to Korociriciri Primary School and also the decision of the respondents to appoint an officer from the Human Resource office of the Ministry of Education as the Head teacher of Yat Sen Primary School.
- [2] The applicant's case briefly is that she and the Ministry of Education entered into an employment contract on 29th November, 2018 which came to effect of 09th January, 2019. During the Christmas season the applicant had been in her village in Thaveuni and when she came back on 04th January, 2019 she had received a telephone call from the Human Resources Office of the Ministry of Education asking her to collect the transfer letter.

- [3] It is the position of the 1st respondent that the Ministry is committed to managing employee transfers in a fair and equitable manner and this policy will in turn improve transparency and accountability in the management process of transfers and improve fairness to all employees. The 1st respondent also states in her affidavit in opposition that employee transfers within the Ministry must be managed in the context of the Ministry's workforce planning, meeting the current and future needs of school communities and providing stability and predictability for the student, parents and school management. In her affidavit she further states that where possible, the personal needs of employees are taken into consideration.
- [4] In deciding whether to grant or refuse leave to file an application for judicial review the court will be guided by the following principles of law.
- [5] The test for whether permission should be granted remains whether an arguable case has been shown, although now the court will be aware of the defendant's case. Consideration of the defendant's case – even if only in summary – will surely sometimes lead to the conclusion that the claimant's case is unarguable, thus leading to the denial of permission in cases in which would otherwise be granted. These changes have been criticised as unlikely to lead more efficient procedure and as being unfair to the claimants. Although some lawyers find even the most obvious propositions 'arguable', the grant of permission requires 'a realistic prospect of success'. Permission may also be refused because of delay or the availability of an alternative remedy or because the claim is premature. [*Administrative Law by Wade and Forsyth, 10th Edition, Pages 555 & 556*].
- [6] In **State v Connors, ex parte Shah** [2008] FJHC 64; HBJ47.2007 (7 April 2008) it was held:

At leave stage, the threshold is low. What needs to be established is 'an arguable case' to be resolved only by a full hearing of the application for judicial review. At this stage a full review of the facts is unnecessary. Nonetheless, a court is obliged to sufficiently pursue the material provide to determine whether an applicant raises an issue arguably involving an error in law, a serious error in fact; a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application.

These observations of the High Court cited with approval by the Court of Appeal in the case of **Maisamoa v Chief Executive Officer for Health** [2008] FJCA 41; ABU0080.2007S (10 July 2008).

[7] In the case of **Nair v Permanent Secretary for Education** [2008] FJHC 140; HBJ02.2008 (11 February 2008) it was held:

In an application for leave to apply for judicial review, the court must ask:

Does the applicant have sufficient interest in the application;

1. Is the decision susceptible to judicial review – that is, is it of a private or public nature;
2. Is the decision non-reviewable in accordance with the terms of the Public Service Act;
3. Are alternative remedies available to the applicant and, if so, pursued by the applicant;
4. Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case?

[8] In the transfer letter it is indicated that the transfer was done pursuant to the terms and conditions of the employment. As I have stated above on the day this letter was signed that is 02nd January, 2019 the employment contract between the applicant and the Ministry of Education has not come into force. The question therefore arises for determination whether the respondents were correct in effecting this transfer relying on the terms and conditions of the said contract of employment.

[9] Another issue that needs the attention of the court is whether the word “department” found in clause 12 of the employment contract includes another school.

[10] These are two of many other issues arising out of the transfer of the applicant by the 1st respondent. At this stage I will not embark upon the exercise of determining these issues but in my view these are sufficient for the court to grant leave to file an application for judicial review.

[11] Order 53 rule 8 of the High Court Rules 1988 provides:

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

- (1) 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;
- (2) 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.

[12] The relief sought is an order of certiorari to have the order of the respondents to transfer the applicant to another school and also the transfer of an officer from the Human Rights Office of the Ministry as the Head Teacher of the Yat Sen Primary School. The court is of the view that the nature of the application and the circumstances which led the applicant to bring this application to court warrant the stay of the transfer order of the respondents until the final determination of this application.

ORDERS

1. Leave to file an application for judicial review is granted.
2. The order made by the respondents transferring the applicant to Korociriciri Primary School is stayed until the final determination of this application.




Lyone Seneviratne

JUDGE

08th March, 2019