

IN THE HIGH COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

Judicial Review No. HBJ 08 of 2018

IN THE MATTER of an Application by
SANJEET for a Judicial Review under Order
53 of the High Court Rules 1998.

AND

IN THE MATTER of a decision made on or
about the 20th September 2018 by the
MINISTER OF IMMIRATION whereby he
purported to exercise his powers under the
IMMIGRATION ACT 2003 to refuse Investors
Work Permit to the Applicant.

STATE: v MINISTER FOR IMMIGRATION

1ST RESPONDENT

ATTORNEY GENERAL & MINISTER FOR JUSTICE

2ND RESPONDENT

EX-PARTE: SANJEET

APPLICANT

DECISION

*[Amended Application for leave to apply for Judicial Review
pursuant to Order 53 Rule 3(2) High Court Rules 1988]*

BEFORE: Hon. Mr Justice Vishwa Datt Sharma

COUNSELS: Mr. M. A. Khan - for the Applicant
Ms. Bhavna Narayan with Mr. Sharma B - for the Respondents

Date of Decision: 01st July 2019 @ 9.30am

INTRODUCTION

- [1] This is the Applicant's amended application filed on 12th December 2018 seeking leave to apply for Judicial Review. It seeks to judicially review the decision of the Minister for Immigration, the 1st Respondent given on 20th September, 2018, refusing an appeal by the applicant [Sanjeet] for the grant of a (work) permit notwithstanding the grant of Foreign Investment Registration Certificate [FIRC] to the applicant on 14th December, 2017.
- [2] The Application is made in Support of an Affidavit deposed by the Applicant on 27th September, 2018, which verifies the facts relied upon by the Applicant.
- [3] The Application is made under Order 53 Rule 3(2) of the high Court Rules, as amended ["HCR"].
- [4] The Respondents have filed an affidavit of Ravineshwaran Nair [Senior Immigration Officer] sworn on 27th December 2018. The Respondents oppose the application for leave to apply for judicial review and rely on the prayers sought in the Notice of opposition filed on 15th November 2018.
- [5] At the hearing, the parties made oral submissions and furnished court with their respective written submissions.

Background Facts

- [6] On 14th December 2017, the Applicant was issued with Foreign Investment Registration Certificate ("FIRC") subject to certain conditions stated in FIRC and letter dated 14 December 2017, from Investment Fiji to the Applicant.
- [7] Subsequently Applicant applied to Fiji Immigration Department ("FID") for the Permit.
- [8] On 22 March 2018, FID wrote to Applicant advising him that his Application for Permit has been declined on the ground that the "proposed business activity can be provided by the locals and does not warrant a foreign investor
- [9] By letters dated 11 and 12 April 2018, Applicant through his Solicitor appealed FID's decision to Minister for Immigration within the prescribed time.
- [10] On 20 September 2018, FID wrote to Applicant advising him that his appeal has been refused by the Minister for Immigration and for Applicant to leave country within fourteen (14) days from the date of the letter.
- [11] On 27 September 2018, Applicant filed Application for Leave to Apply for Judicial Review of Minister's decision which is set down for hearing on 22 January 2019.
- [12] On 14th December 2018, the applicant filed Summons for Stay of the Minister For immigration's decision.
- [13] The Court on 07th January 2019 dismissed and struck out the application for stay. Further, the court ordered him to report to the Fiji Immigration Department, Suva by 4pm Friday 11th January 2019 and ordered him to pay costs of \$1,000.
- [14] The Applicant left Fiji on 9th January 2019 without reporting to the FID at the Suva Office as per the Court order.
- [15] The FID pursuant to section 13 (2) (a) and 11 (8) of the Immigration Act 2003 issued a prohibited immigrant notice on 9th January 2019 to the Applicant which prohibits the Applicant from entering Fiji until 9th January 2020 ("Annexure 2" in the Evidence of Compliance of Court Order filed on 23rd January 2019).

Relief Sought

- [16] The Applicant sought for the following relief-
- (a) An Order of Certiorari to remove the decision of the 1st Respondent made on 20th of September, 2018 to refuse the Applicant's Investors Work Permit into this Honourable Court and the same to be quashed and/or set aside.
- (b) A Declaration in any event that the 1st Respondent has acted unfairly and/or against the rules of Natural Justice and/or arbitrarily and/or unreasonably and/or acted in breach of the Applicant's Legitimate Expectations and/or made errors of law or exceeded his jurisdiction in purporting to refuse the

Applicant's Investment Work Permit.

- (c) A Declaration that the Applicant is entitled to the Investor's Work Visa and or an order to enforce such declaration.
- (d) That the applicant not to be removed from Fiji or jurisdiction of Fiji by the Department of Immigration its agents or servants until the final determination of this matter.
- (e) That there be an order for abridgement of time for the service and the hearing of this application.
- (f) Damages.
- (g) Further Declarations or other relief as to this Honourable Court may deem just; and
- (h) Cost of this action on an indemnity basis.

The Grounds of Relief

[17] The Grounds upon which the Applicant seeks reliefs against the First Respondent are:

- (a) The 1st Respondent acted unfairly, in error of law and in breach of the Rule of Natural Justice in purporting to refuse the Applicants Investor's Work Permit without taking into consideration the fact that the Applicant had been granted a foreign Investors Certificate by Investment Fiji and had satisfied all requirements for such investment under the polies of the government and the law in Fiji.
- (b) The 2nd Respondent failed to take into account the following relevant matters:
 - (i) The Applicant had applied for and had been granted a Foreign Investment Certificate by Investment Fiji.
 - (c) The 2nd respondent's decision made on 20th September, 2018 in all of the circumstances, was unreasonable, arbitrary, unfair and in breach of natural justice in that the decision maker did not take into consideration the fact that the applicant had satisfied the criteria for investment in Fiji and had such an approval.
 - (d) The 2nd Respondent has made errors of law in the interpretation of the powers of refusal under the Immigration Act 2003.
 - (e) The 2nd Respondent exceeded his jurisdiction.
 - (f) The 2nd Respondent has acted contrary to the legitimate expectations of the Applicant.

THE LAW

[16] The relevant law applicable to leave to apply for judicial review is the *HCR, O 53, R 3 (2) of the High Court Rules, 1988*, which provides:

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

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

(2) An application for leave must be made *ex parte* and must be supported-

- (a) by a statement, setting out the name and description of the applicant, the name and address of his barrister and solicitor (if any), the relief sought and the grounds on which it is sought, and
- (b) by affidavit, to be filed before the application is made, verifying the facts relied on.

Test for Granting Leave

[17] To grant leave to apply for judicial review, the court has to be satisfied that:

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

ANALYSIS AND DETERMINATION

- [18] The Applicant herein is seeking leave to apply for Judicial Review of the decision of the Minister for Immigration [1st Respondent] made on 20th September, 2018 refusing an appeal by the Applicant for the grant of a (Work) Permit for the Applicant notwithstanding that the Applicant was granted with a Foreign Investment Registration Certificate [FIRC] on 14th December 2017.
- [19] The Applicant further contends that the 1st Respondent acted unfairly in error of law and in breach of the rules of Natural Injustice in purporting to refuse the Applicant's permit without taking into consideration the fact that the Applicant was already granted with the Foreign Investment Registration Certificate [FRIC] by Investment Fiji.
- [20] Further, the Applicant has satisfied all the requirements for such investment under the policies of the government and the laws of Fiji.
- [21] However, the Respondents opposed the application and in summary submitted:
- (a) That the affidavit evidence provided by the Applicant is insufficient in proving an arguable case because it lacks proof that there was any breach of the rules of Natural Justice or error of law.
 - (b) Further there was no breach of the rules of natural justice pursuant to Section 10 of the Immigration Act 2003, the 1st Respondent went exercising his power to refuse to grant an Investor Permit to the Applicant complied with Section 10 of the Immigration Act 2003 in that the reasons as to why Investor Permit was not granted was given to the Applicant and the Applicant was also duly informed of his right to appeal the decision.
 - (c) The Applicant had duly exercised his right to appeal and the 1st Respondent in Response to the Applicant's appeal informed him that his appeal was refused by the Minister of Immigration.
 - (d) That there is no evidence to support the allegations of the Applicant that the 1st Respondent was biased or took into account irrelevant matters or failed to take into account relevant matters or acted unreasonably or in bad faith. The rule of natural justice was therefore not breached in this case as the Applicant was duly afforded his rights and which the Applicant had accordingly exercised.
- [22] With above in mind, I will now apply the test for grant of leave to determine whether the Applicant should be granted leave to apply for Judicial Review.

Undue Delay

- [23] It can be ascertained from both counsels' oral and written submissions, that there is no issue raised in respect to this requirement.

Order 53, Rule 4 (2) of the High Court Rules 1988 deals with undue delay and refers particularly to Certiorari where the application for Judicial Review should be made within three months timeframe.

In the instant case, the 1st Respondent on or about the 20th September 2018 refused an Investor Work Permit to the Applicant. The application for Judicial Review was initially commenced and filed by the Applicant on 12th September 2018 and subsequently amended on 12th December 2018 which was within the three months' timeframe as was required in terms of *Order 53, Rule 4 (2) of the High Court Rules 1988*.

Sufficient Interest

- [24] The Applicant must show that he has sufficient interest in taking out the Judicial Review proceedings.
- [25] One of the thresholds the Applicant has to meet pursuant to *Order 53 Rule 3(5) of the High Court Rules, 1988*, is 'Standing', (Sufficient Interest). According to this rule, the court will not grant leave unless it considers that the

Applicant has a sufficient interest in the matter to which the application relates.

- [26] The Applicant was currently the Director of Vaidhanta Traders Pte Limited. He applied to Invest Fiji for a **Foreign Investment Registration Certificate** [FIRC] which was accordingly granted to him on 14th December 2017 subject to certain conditions being fulfilled.
- Subsequently, in terms of his proposed business activities, the Applicant applied for an **Investor Permit** with Immigration office, Fiji, which was **refused** on 22nd March 2018.
- [27] Based on the refusal letter, the Applicant lodged an **Appeal** with the Minister for Immigration (1st Respondent).
- On 20th September 2018, the Applicant received a **response** letter from the Director Immigration's Office informing him that his **Appeal** to the Minister for Immigration for a **work permit** has been **refused**.
- [28] The decision of the Minister for Immigration was now sought by the applicant to be **judicially reviewed** since it terminated the Applicant's application for the grant of permit.
- [29] Taking above into consideration, I am at this stage satisfied that the Applicant has the '**Locus standi**' (**Sufficient Interest**) in the current matter before this court to which the application relates and seeks determination.

Arguable Case for Review

- [30] The application before court is for leave to apply for judicial review. At leave stage the threshold is low.
- [31] The Applicant at this stage of proceedings is required to establish that he has an '**arguable case**' only to be resolved by the court at a full hearing of the application for Judicial Review.
- [32] In *CIVIL APPEAL NO: ABU0059u OF 1997S* (High Court Judicial Review No. HBJ 15 of 1997)- *FIJI AIRLINE PILOTS ASSOCIATION v THE PERMANENT SECRETARY FOR LABOUR AND INDUSTRIAL RELATIONS* it was said-

*"The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application - per Lord Diplock in *Inland Revenue Commissioners v National Federation of Self Employed*, [1982] AC 617 at 644. This principle was applied by this Court in *National Farmers' Union v Sugar Industry Tribunal and Others* (CA 8/1990; 7 June 1990). In *R v Secretary of State for the Home Department ex p. Rukshanda Begum* (1990) COD 107 (referred to in 1 *Supreme Court Practice* 1997 at pp. 865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed where it was unclear on the papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing which would ensue if the parties were granted leave."*

In this matter, it was unclear on the papers whether or not leave should be granted. Therefore, the application for leave to apply for judicial review was heard inter-parties in terms of *O 53, R 3(3) of the High Court Rules, 1988*.

- [33] The Applicant herein challenges the Minister for Immigration's (1st Respondent) decision of 20th September 2018 refusing an **Investment Work Permit** to the Applicant on the grounds of:
- (i) **Breach of Principles of natural justice and fairness;**
 - (ii) **consideration of irrelevant matters and not considering the relevant matters such as: the Applicant was granted with FIRC and satisfied the instance criteria imposed by Investment Fiji**
- [34] The Applicant submitted to court whether the statutory requirement within the **Immigration Act 2003** was met when the 1st Respondent's decision was made, raises an **arguable issue** to be dealt with within the **Judicial Review**.
- [35] The Respondent's contention is that there is no evidence by the Applicant to support the allegations made that -

- (a) The 1st Respondent was biased or took into account irrelevant matters or failed to take into account relevant matters, or acted unreasonably or in bad faith;
- (b) The rule of natural justice has therefore not being breached in this case as the Applicant was duly afforded his rights and which the Applicant exercised.
- [34] The Respondents submitted that the affidavit furnished by the Applicant is insufficient in proving an arguable case because it lacks proof that there was any breach of the rules of natural justice or error of law.
- [35] In support of the Respondent's contention, the Counsel cited to court the case of *Kaisiepo v Minister of Immigration* [1996] FJ Law Rp 37; [1996] 42 FLR 206 (18 October 1996). Byrne J in handling a matter similar to this case in that it involved refusal of a work permit, stated the following at page 215-
- "This is because in my judgment the law governing this case is well settled and certainly has been since the decision of the English Court of Appeal in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch.149.
- "I consider that law may be summarised in the following propositions:
- (i) Any Sovereign nation has the right to decide whom it will admit or refuse admissions to its borders;
- (ii) The decision to admit any person to a Sovereign nation is an executive decision and normally not subject to judicial review.
- [36] In the instance case, it is important that I bear in mind the background facts of this case [as set out at paragraphs 6-15 hereinabove] in terms of what had actually transpired in this case of the Applicant from the time the Applicant made an application for foreign Investment Registration Certificate [FIRC] until his subsequent departure from Fiji Islands:
- [37] In light of the above background facts, I now make reference to *Section 9 (1) of the Immigration Act 2003* which is of relevance to this case:
- Issue, extension or variation of permits
- '9. (1) The Permanent Secretary may, on application made in the approved form, and on payment of the prescribed fee, issue a permit to any person who is not an exempted person, including persons entitled to enter and reside in the Fiji Islands under section 16 of the Constitution.'
- [38] The Permanent Secretary for Immigration and Director of Immigration has the discretion to either issue or decline Investor Permit in terms of *Section 9(1) of the Immigration Act 2003*.
- Further *Section 4(4) of the Foreign Investment Act 1999* is also relevant to this case:
- (4) The grant of a certificate to foreign investor does not relieve the foreign investor of the duty to secure any approval from any other relevant authority that may be necessary for the activity proposed.
- [39] However, it must be borne in mind that -
- (i) The grant of an Investor Permit is governed by the *Immigration Act 2003*; and
- (ii) Whereas, the grant of a FIRC is governed by the *foreign Investment Act 1999*.
- [40] Therefore, when applying for an Investor Permit the *Immigration Act 2003* should be read together with the *Foreign Investment Act 1999*
- Obviously, a careful reading of the above-mentioned acts would show to establish that the grant of a FIRC to the Applicant does not guarantee the grant of an Investor Permit to the Applicant.
- [41] However, initially, the Applicant made an application to Investment Fiji for a Foreign Investment Registration Certificate [FIRC] in order to carry out certain business activity which was issued to him on 14th December 2017 but subject to certain mandatory conditions of FIRC to be met by the Applicant.

One of the mandatory conditions of FIRC apart from other conditions required the Applicant to obtain a work permit from the Department of Immigration. (Annexure 'S1' dated 14th December 2017 in the Applicant's affidavit filed 27/09/2018 refers),

- [42] The Applicant failed to meet and fulfil certain conditions stipulated by FIRC and this resulted in the refusal of grant of the Investor Permit to the Applicant.
- [43] The Fiji Immigration Department then wrote to the Applicant on 22nd March 2018 and advised him that his application for an Investor Permit had been declined on the ground that the 'Proposed Business Activity can be provided by the locals and does not warrant a foreign investor. (Annexure marked 'S3' in the Applicant's Affidavit of 27/09/2018). The Applicant was furnished with a written reason for the decline of his Investor Permit. Therefore, the Applicant cannot say that he was not informed of the reason as to why the Investor Permit was declined.
- [44] I am able to further ascertain from the affidavit of opposition deposed by Ravineshwar Nair filed on 27th December, 2018, that even the Applicant did not fulfil a further condition of FIRC to register his company Vaidhanta Traders Pte Limited with the Registrar of Companies office. Further, the search revealed that the Applicant's company was also not incorporated under the laws of Fiji, but the application was approved for reservation of name only.
- [45] Subsequent to the refusal of grant of Investor Permit, the Applicant through his solicitors by letters dated 11th and 12th April 2018 appealed FID's decision to the 1st Respondent in terms of the provisions of *section 18 of the Immigration Act, 2003* (Annexure marked 'S4' in Applicant's Affidavit of 27/09/2018 refers).
- [46] On 20th September 2018, Fiji Immigration Department (FID) wrote to the Applicant advising him that his appeal has been refused by the 1st Respondent and also directed the Applicant to leave the country within fourteen (14) days from the date of letter (annexure marked 'S5' in the Applicant's affidavit filed on 27th September 2018 which is the copy of the Refusal of Appeal Letter from FID)
- [47] The Applicant did not comply with the instructions set out in the 20th September 2018 letter issued by FID. Therefore, the Permanent Secretary for Immigration subsequently had to issue a Warrant of Detention and Removal Order dated 13th November 2018 against the Applicant (annexure marked "RN1" in the Respondents' Affidavit filed on 27th December 2018).
- [48] On 27th September 2018, the Applicant filed an application for Leave to Apply for Judicial Review from the decision of the 1st Respondent.
- [49] On 14 December 2018, the Applicant filed a Summons for Stay of the decision of the Minister of Immigration dated 20th September 2018 directing the Applicant to leave Fiji within 14 days.
- [50] The said application for stay was heard before the then Honourable Mr. Justice K. Kumar and was dismissed and struck out with costs of \$1,000.00 on 07th January 2019. The Applicant was further ordered to report to FID in Suva office by 4.00 pm on Friday 11th January 2019.
- [51] The Applicant left Fiji on 9th January 2019 without reporting to the FID at the Suva Office as per the Court order.
- [52] The FID pursuant to section 13(2)(a) and 11(8) of the Immigration Act 2003 issued a prohibited immigrant notice on 9th January 2019 to the Applicant which prohibited the Applicant from entering Fiji until 9th January 2020 ("Annexure 2" in the Evidence of Compliance of Court Order filed on 23rd January 2019).
- [53] The Applicant had complaint of Breach of Principles of Natural Justice and fairness. Further that the Respondents took into consideration irrelevant matters and not considering the relevant matters such as; the Applicant was granted with FIRC and satisfied the instance criteria imposed by Investment Fiji.
- [54] However, I have given a careful consideration to the facts of this case, affidavit evidence filed herein coupled with the oral and written submissions of the parties to the proceedings.
- [55] The Applicant is to blame himself for not complying and satisfying certain conditions set out by FIRC. This non-compliance by the Applicant had resulted in the decline of his Investor Permit by FID.
- [56] The Applicant should have known better that the grant of certificate to a foreign investor does not relieve the foreign investor of the duty to secure any approval from any other relevant authority that may be necessary for the

activity proposed.

- [57] Subsequently, the Applicant had duly exercised his right of Appeal to the Minister for Immigration (1st Respondent) which also was accordingly declined and the Applicant was furnished with the reasons for the decline.
- [58] Upon the perusal of the Applicant's affidavit evidence filed in court, it reveals that it is insufficient in establishing an arguable case for the Applicant since it lacks prove that there was any Breach of Rules of Natural Justice and or error of law.

CONCLUSION

- [59] To sum up, on the facts and circumstances of the current case, I find that there is no basis for the grounds that either there was a denial of Natural Justice nor that the Respondents have taken into consideration irrelevant matters and not taking into consideration the fact that the Applicant was granted with FIRC.
- [60] The Applicant was given a fair hearing from the very time of the initial grant of FIRC to that of exercise of the Applicant's right to Appeal the decision and furnished with the reasons for Decline of the Investor Permit on both occasions.
- [61] Further, I find that the applicant had failed to demonstrate any arguable case for the grant of Leave to apply for Judicial Review.
- [62] Therefore, the relief sought by the Applicant for grant of Leave to apply for Judicial Review is accordingly refused.
- [63] The Matter has been pending before me since November, 2018. On each and every adjournment, the Respondents represented by Counsel have appeared and filed affidavit evidence in opposition together with the oral and written submissions.

It is only appropriate that in the circumstances the Respondents are entitled to costs which I summarily asses at \$1,000 to be paid within 14 days timeframe.

THE RESULT

- [a] Leave to apply for Judicial Review is refused.
- [b] Applicant to pay to the Respondents a sum of \$1,000 as summarily assessed costs within 14 days' time frame.
- [c] Orders accordingly.

Dated at Suva This 01st Day of July 2019




VISHWA DATT SHARMA
JUDGE

Cc: Singh & Singh Lawyers, Suva
Office of the Attorney General, Suva.