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

Judicial Review No. HBJ 08 of 2023

IN THE MATTER of the **MINISTER FOR HOME AFFAIRS & IMMIGRATION**

AND

IN THE MATTER of the **IMMIGRATION ACT** and the **IMMIGRATION REGULATIONS** and the **CITIZENSHIP OF FIJI ACT** and the **CITIZENSHIP OF FIJI REGULATIONS**

AND

IN THE MATTER of an application by **SUNG JIN LEE, NAM SUK CHOI, BYEONGJOON LEE, BEOMSEOP SHIN, JUNG YONG KIM** and **JINSOOK YOON** for Judicial Review and with other relief including an Order of Certiorari to quash the decision made by the Minister for Home Affairs and Immigration made between 01 September 2023 and/or 07 September 2023 **DECLARING SUNG JIN LEE, NAM SUK CHOI, BYEONG JOON LEE, BEOMSEOP SHIN, JUNG YONG KIM and JINSOOK YOON** Prohibited Immigrants using his purported discretion under section 13(2)(g) of the Immigration Act **AND** purportedly making an **ORDER** and/or **ORDERING** the removal of **JIN LEE, NAM SUK CHOI, BYEONGJOON LEE, BEOMSEOP SHIN, JUNG YO**

BETWEEN : **SUNG JIN LEE** currently in immigration detention and/or unlawful custody of the Respondent.

1ST APPLICANT

: **NAM SUK CHOI** currently in immigration detention and/or unlawful custody of the Respondent.

2ND APPLICANT

: **BYEONGJOON LEE** currently in immigration detention and/or unlawful custody of the Respondent.

3RD APPLICANT

: **BEOMSEOP SHIN** currently in immigration detention and/or unlawful custody of the Respondent.

4TH APPLICANT

: **JUNG YONG KIM** currently in immigration detention and/or unlawful custody of the Respondent.

5TH APPLICANT

: **JINSOOK YOON** currently in immigration detention and/or unlawful custody of the Respondent.

6TH APPLICANT

AND : **THE MINISTER FOR HOME AFFAIRS & IMMIGRATION** of 1st and 2nd Floor, New Government Wing, Government Buildings, 26 Gladstone Road, Suva.

1st RESPONDENT

AND : **THE ATTORNEY-GENERAL OF AND FOR THE REPUBLIC OF THE FIJI ISLANDS**

2ND RESPONDENT

Appearances : Mr. Ower KC, Mr. R. Gordon, Mr. W. Pillay and Mr. Prasad for the Applicants

Date of Hearing : 04 June 2024
Date of Ruling : 02 September 2024

R U L I N G

(Application to cross-examine Minister)

INTRODUCTION

1. The background to this case is set out in my earlier Rulings[1]. On 19 January 2024, this court granted leave to the applicants to apply for judicial review. The substantive judicial review application is set for hearing from 03 to 05 October 2024.

2. The two decisions under review were both made on 31 August 2023. The first one, by the Minister for Home Affairs and Immigration, was made under section 13(2) (g) of the

[1] See **Sung Jin Lee v The Minister for Home Affairs & Immigration** [2023] FJHC 738; HBJ08.2023 (9 October 2023); **Sung Jin Lee v The Minister for Home Affairs & Immigration** [2024] FJHC 23; HBJ08.2023 (19 January 2024); **Sung Jin Lee v The Minister for Home Affairs & Immigration** [2024] FJHC 106; HBJ08.2023 (20 February 2024); **Sun Jin Lee v The Director of Immigration** [2024] FJCA 31; ABU105.2023 (29 February 2024); **Sung Jin Lee v Minister for Home Affairs & Immigration** [2024] FJHC 299; HBJ08.2023 (15 May 2024).

Immigration Act 2003 (**"Act"**). By that decision, the Minister deemed all the Applicants as *"Prohibited Immigrants"*. The second decision immediately followed the first one. This one was made under section 15(1) and section 15(4) by which the Permanent Secretary had ordered that the applicants be arrested and detained for the purpose of removal from Fiji.

3. There is a stay order of this court which currently restrains the removal of the applicants from Fiji pending the determination of this case.

4. There is also an appeal pending before the Supreme Court of Fiji which may touch on the question as to whether or not the ouster clause in section 13 (2)(g) of the Immigration Act completely bars this Court from reviewing the Minister's decision.

5. What is before me now is a Motion by the applicants dated 30 May 2024 and filed on the same day seeking an Order that the Minister and the Permanent Secretary be directed to attend court so that they may be cross-examined on their respective affidavits.

APPLICANTS' POSITION

No Written Reason

6. Mr. Ower highlights that the Minister did not give the applicants any written reason for his decision. This offends section 16 (1) (b) of the Constitution. This section gives *"every person who has been adversely affected by any executive or administrative action ... the right to be given written reasons for the action"*.

31 August 2023 Letter

7. While the Minister failed to provide any written reasons to the applicants, he did write a letter to the Permanent Secretary on the same day of the decision by which he said that his decision was based on two Diplomatic Notes issued in 2018 by the Embassy of the Republic of Korea (**"Embassy"**), and some Red Notices by Interpol dated 31 July 2018 (**"Notes and Notices"**).

8. Mr. Ower submits that these Notes and Notices were already long expired at the time of the decision. The Minister therefore could not lawfully base any decision on these.

9. In any event, if the decision was based on the Notes and Notices, then the Minister was in fact executing an extradition using his powers under section 13 (2) (g) of the Immigration Act. This is an unlawful use of the power.

10 November 2023 Affidavit

10. While the letter of 31 August 2023 ascribes the Minister's decision to the Notes and Notices, an affidavit which the Minister swore on 10 November 2023 asserts that the decision was based on a report of a certain taskforce (**"*Taskforce Report*"**). The *Taskforce* was convened in 2023 to investigate matters of security and good governance in relation to the nine companies which are part of the Grace Road Group, following concerns raised by the Embassy. This *Taskforce Report* has never been disclosed to anyone to this day.

Inconsistency - Questions of Fact & Legal Consequences

11. There is, *thus*, an inconsistency between the letter of 31 August 2023 and the affidavit of 10 November 2023.This has generated the following issues of fact and law:

Q: what factor(s) did the Minister really take into account when he made the decision to declare the applicants illegal immigrants?

Q: did he just take into account the Notes and Notices? Did he only take into account the Taskforce Report?

Q: whether the Minister did exercise his power under section 13 (2)(g) for an improper purpose?

Q: whether the Minister's decision was irrational and lacked proportionality?

31 August 2023 Letter – "Disguised Extradition"- Improper Purpose

12. *Improper purpose* is when a decision maker exercises a statutory power which is lawfully available to him, but for a purpose not authorized under the same statutory provision.

13. Mr. Ower submits that, if one were to scrutinize the Minister's decision purely on the basis of the 31 August 2023 letter, the conclusion would be that the Minister did exercise his section 13 (2)(g) power for an *improper purpose*.

14. The Minister's 31 August 2023 letter is a *contemporaneous document*. It was written on the same day of the impugned decision. In terms of the law of evidence, this letter should be ascribed the highest probative value.

15. The letter reveals that the Minister was really responding to the Notes and Notices when he made the decision in question.

16. In other words, the Minister was actually responding to the request of the government of the Republic of South Korea to the remove and return the applicants to South Korea to face prosecution. Hence, the Minister was executing a *"disguised extradition"*. This is an improper purpose and an abuse of his powers under the Immigration Act. An extradition can only be lawfully carried out under the provisions of the Extradition Act 2003.

17. In addition, the use of the section 13 (2) (g) power to extradite circumvents and deprives the applicants of an opportunity to resist extradition which the Extradition Act avails them.

Lawful Purpose under Section 13 (2) (g)

18. Mr. Ower submits that the Minister may only declare a person a prohibited immigrant under section 13 (2)(g) if the person is, or has been, conducting himself in a manner *"prejudicial to the peace, defence, public safety, public order, public morality, public health, security or good government of the Fiji Islands"* (**"threat to Fiji"**).

10 November 2023 Affidavit – "Taskforce Report"

19. The Minister's 10 November 2023 affidavit highlights the *Taskforce Report* as the basis of the Minister's decision to declare the applicants prohibited immigrants.

20. If the *Taskforce Report* was to be accepted as the sole reason for the impugned decision, then the Minister, arguably, acted within his power under section 13 (2)(g) when he declared the applicants *prohibited immigrants*. The proviso is that the *Report* must contain information which entitled the Minister to deem the applicants a threat to Fiji.

21. However, the *Taskforce Report* has never been disclosed to the court or to the applicants. It is anyone's guess as to whether or not there really was a *Report*, let alone, whether it contains information sufficient for the Minister to deem the applicants a threat to Fiji.

Why the Minister Needs to be Cross-Examined?

22. The court, it is argued, needs to ascertain which of the two accounts represents the truth. Only after this is established, will the court be able to assess the rationality and proportionality of the impugned decision.

23. If the court does not grant leave, then, at the hearing, the respondents will lead evidence from the Minister's 10 November 2023 affidavit. This is a self – serving and non-contemporaneous document which relies heavily on the fictitious *Taskforce Report*.

24. In that light, it is imperative that the Attorney-General ensures that the Minister is available for cross-examination. If the Minister cannot avail himself for cross-examination, then his affidavit should not be received into evidence by this court at the substantive hearing.

STATE'S POSITION

Minister Ready to respond to any Query

25. Mr. Green submits that the applicants have not been clear as to what information they require. The Minister is ready to clarify any uncertainty which the applicants may have, if these are properly raised.

Only in Exceptional Cases!

26. It is submitted that judicial review proceedings are meant to deal with issues expeditiously on the paper. To allow cross-examination may prolong the proceedings. Accordingly, a court will only allow cross-examination in exceptional cases.

27. Furthermore, the court does not normally investigate whether a decision was correctly made on the merits. Rather, the focus is on the process by which decisions were made.

28. It is submitted that, because section 13 (2) (g) allows the Minister to receive and rely on information from a wide range of sources (including the Red Notices, Diplomatic Notes and Taskforce Report) on which to rest a decision, this case is not such an exceptional one because there is no issue of fact at play.

Wide discretion under section 13 (2) (g)

29. Section 13 (2)(g) of the Immigration Act allows the Minister to take into account:

> *"…….information received from any country through official or diplomatic channels or from <u>any other source</u>* [he] *considers reliable"*.

30. The wording of section 13 (2) (g) casts the net wide, so to speak, for the Minister.

31. Apart from *information* from official or diplomatic channels, the Minister may also receive *information* from a wide range of other sources he considers reliable before he exercises his power under section 13 (2) (g).

32. These other sources include Red Notices, Diplomatic Notes, or a *Note Verbale* from the Korean Embassy. It also includes the *Taskforce Report*. Each one of these is sufficient on its own, to support a Ministerial decision under section 13 (2) (g). It goes without saying that the Minister may take into account a combination of two or more of these factors.

No Issue of Fact to Determine!

33. As such, there is no issue of fact for the court to resolve. There would only be an issue of fact if, for example, one of the two conflicting accounts which the Minister has given, is essential to his power under section 13 (2)(g) – while the other was not.

34. Because of the wide discretion under section 13 (2)(g), the Minister was perfectly entitled to base his decision either on the reasons stated in his 31 August 2023 letter (i.e. the Red Notices and Diplomatic Notes), or, on the reason stated in his affidavit of 10 November 2023 (i.e. the *Taskforce Report*), or both.

35. By any account, the Minister was entitled to *"deem"* that the applicants were a threat to Fiji, and, to declare the applicants "prohibited immigrants" accordingly under section 13 (2)(g).

Why the Minister should <u>not</u> be Cross-Examined?

36. For the above reasons, the applicants should pursue the information they require through an appropriate discovery process such as *interrogatories*, rather than by an application to cross-examine the Minister.

Ouster Clause / Reviewability of Executive Decisions Relating to National Security!

37. Mr. Green submits that this court cannot yet consider any question relating to the cross-examination of the Minister until it has determined the primary issue as to whether or not the ouster clause in section 13 (2)(g) is a complete bar to a review of the Minister's decision.

38. Even if the section 13 (2)(g) ouster clause is not a complete bar, the *Taskforce Report* contains sensitive national-security information which this court cannot second-guess. The Minister cannot be compelled to disclose the *Taskforce Report* to the court or to the applicants.

<u>LAW</u>

39. Order 53 Rule 8 (1)[i] and Order 38 Rule 2 (3)[ii] of the High Court Rules, when read together, gives the Court power to order that a deponent attend court for cross-examination on his affidavit, in a judicial review proceeding.

40. However, Order 53 Rule 8 (2) provides that this Rule (i.e. Order 53 Rule 8) is without prejudice to any statutory provision or rule of law restricting the making of any order against the State[iii].

41. The following two questions arise: (1) when will the Court Order that a deponent be cross-examined on his affidavit in a Judicial Review proceeding? (2) notwithstanding, is there any statutory provision or rule of law which restricts the making of any order against the State in this case?

WHEN WILL THE COURT ORDER THAT A DEPONENT BE CROSS-EXAMINED ON HIS AFFIDAVIT IN A JUDICIAL REVIEW PROCEEDING?

42. Judicial Review proceedings are meant to be expeditious[iv]. They are normally conducted on evidence in the affidavits filed. Normally, such proceedings are considered unsuitable for resolving disputes of fact[v].

43. That judicial review proceedings are ill-suited for resolving factual disputes, is rooted in the notion that Parliament, by statute, entrusts to the decision-maker (executive) the task of finding facts. Ultimately, this is supported by the doctrine of separation of powers.

44. Accordingly, a court conducting judicial review will be loath to usurp the executive's fact-finding role, warning itself that it is not an appeal body, or, that, while it wants to make sure that it has all the facts that were before the decision maker at the time of the decision, it should not review an executive decision on its merits[vi], or, that it should not substitute its own view with that of the decision maker's[vii].

45. As such, because the aim of every cross-examination is to discredit and test the veracity of a witness, and to assert an alternative account of facts, a judicial review court will be wary that, to allow cross-examination is to risk having to re-examine the facts found by the decision-maker, and substituting its own view of the merits of the decision[viii].

Only if Justice of the Case Requires Cross-Examination

46. However, in exceptional cases, and if the interest of justice requires it[ix], the court will exercise its discretion under Order 53 Rule 8 to order that a deponent be cross-examined[x].

47. The Fiji Court of Appeal cautions in **Anuradha Charan** (supra) that while cross-examination appears to be more easily allowable now than in the past, leave should only be granted whenever the justice of a particular case so requires[xi].

48. In **State v Minister for Lands & Mineral Resources, *ex parte* Nivis Motors & Machinery Co Ltd** [2001] FJHC 263; HBJ0033S.1997S (14 March 2001), Madam Justice Shameem said that while it is important that the court is fully and accurately informed of the material that was before the decision-maker while making the decision[xii], cross-

examination should be allowed only "*where affidavit evidence will not resolve an issue, and where the evidence will relate to the decision-making process"*[xiii].

49. In the above case, Shameem J refused an application to cross-examine the Minister on the following reasoning:

> *The question of whether the Minister in this case considered the Traffic Designs Report is clearly a matter to be considered on affidavits. The Minister said he did consider the report, but was advised to proceed as planned. The questions of the reasonableness of that decision, and the relevance of the report, are not matters for oral evidence. They are matter for legal argument and submissions.*
>
> *Similarly, if the Minister mistook the size of the roundabout, then the Applicant must show this in affidavit form. An expert may show this in an affidavit.* ***If the affidavit is disputed the Respondent may file another affidavit on that point in reply.*** *I see no reason why a witness must give oral evidence on the construction of a report which the court can look at in the course of legal submissions after all affidavits have been filed.*

IS THERE ANY STATUTORY PROVISION OR RULE OF LAW WHICH MAY RESTRICT THE MAKING OF ANY ORDER AGAINST THE STATE?

50. Mr. Green's submissions on this point are summarized in paragraphs 21 and 22 above. If the ouster clause in section 13 (2)(g) ousts the jurisdiction of this court from reviewing the Minister's decision, then this court cannot proceed any further with the substantive hearing, let alone, entertain the application to cross-examine the Minister.

51. Even if the section 13 (2)(g) ouster clause does not apply in this case, the question would then arise as to whether or not the Minister may be cross-examined on the *Taskforce Report* or even produce it in court, on account of it purporting to contain sensitive matters pertaining to national security, and also as to whether or not the ouster clause in section 173 (4) of the constitution applies in this case.

52. The gist of Mr. Ower's submissions, as I gather, is that the section 13 (2) (g) power only becomes exercisable upon the prior establishment of a jurisdictional fact (or precedent fact). Unless there is information before the Minister from an acceptable source to entitle him to deem the applicants a threat to Fiji, the Minister cannot declare them prohibited

immigrants. In other words, the deeming power under section 13 (2) (g) is enlivened only by the existence of such information, from such source[xiv].

COMMENTS

53. The application to cross-examine the Minister asserts that the 31 August 2023 letter and the 10 November 2023 affidavit are in conflict and are not consistent in how they account for the reason behind the impugned decision.

54. The subtext in this assertion (in my view) is that the *Taskforce Report* mentioned in the 10 November affidavit, is an afterthought and a ploy to *fill in the gap(s)* so to speak and to bring the Minister's actions to compliance with section 13 (2)(g).

55. I am prepared to take judicial notice[xv] of the fact that the *Taskforce* was reportedly set up around February and March 2023[xvi]. This was some five or six months before the impugned decision. Whether the said *Taskforce* really did complete an investigation and a *Written Report* before the impugned decision, is another matter. This can be answered by the Minister by way of interrogatories. Whether the *Report*, if any, is at all discoverable, I leave open to application.

56. Mr. Green has submitted all along that the Minister in fact took both factors into account when he made his decision, as he is entitled to under section 13 (2)(g). Accordingly, there is no conflict or inconsistency to resolve by cross-examination.

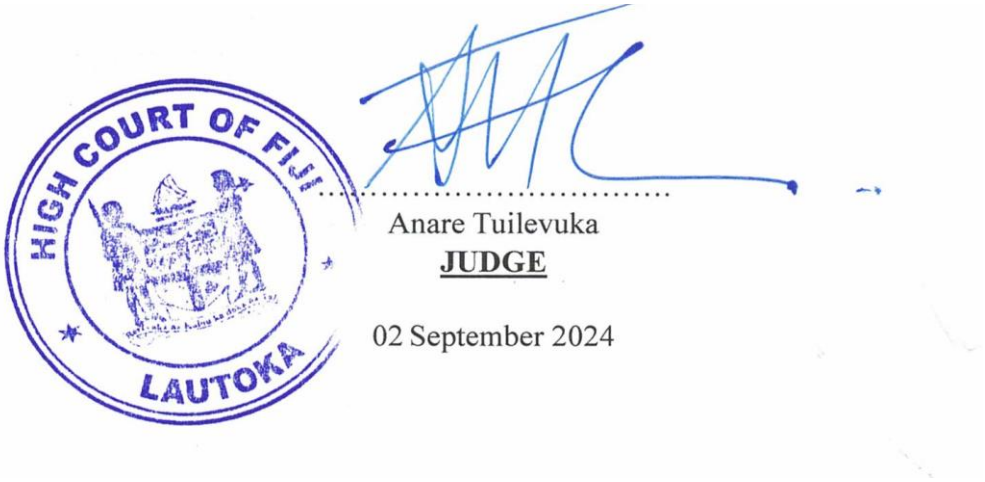
57. I agree! In my view, mindful of the caution against allowing cross-examination in judicial review, the more appropriate course for the applicants to resolve their queries, is to come by way of interrogatories.

58. However, before the Minister may submit to any interrogatories, the question as to whether or not the ouster clauses apply on the facts of this case must first be resolved. For this, I await the decision of the Supreme Court which I understand is due shortly. Otherwise, the applicants should be at liberty to file an Order 33 type application pursuant to Order 53 Rule 8 to determine the ouster clause issue, and the discoverability of the *Taskforce Report*, as a preliminary point.

ORDERS

59. The application to cross-examine the Minister is dismissed with costs to the respondents which I summarily assess at $2,500-00 (two thousand and five hundred dollars) only.

60. The matter is adjourned to 03 October 2024 at 8.30 a.m. for hearing on the substantive judicial review application.



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[i] Order 53 Rule 8 (1) provides:

> The Court may hear any interlocutory application in proceedings on an application for judicial review. In this paragraph "interlocutory application" includes an application for an order under Order 24 or 26 or Order 38 rule 2(3), or for an order dismissing the proceedings by consent of the parties.

[ii] Order 38 Rule 2 (3) provides:

> In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit .... but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[iii] Order 53 Rule 8 (2) provides:

> This rule is without prejudice to any statutory provision or rule of law restricting the making of an order against the State.

[iv] in **Anuradha Charan -v- Public Service Commission and 2 others** Civil Appeal No. 2 of 1992, the Fiji Court of Appeal warned that allowing cross-examination may prolong judicial review proceedings which are meant to be expeditious:

> The danger of interlocutory proceedings of this nature is the tendency to prolong proceedings that are, by their very nature, intended to be expeditious....

[v] see **Anuradha Charan** (supra).

[vi] in **State v Public Service Commission, *ex parte* Govind** [1994] FJHC 165; Hbj0012.1993s (7 November 1994), Mr. Justice Scott observed:

> Orders for cross-examination will only very rarely be made since it is the procedure adopted by the administrative body which is in question not the correctness or merits of the decision reached.

In **State v Minister for Lands & Mineral Resources, *ex parte* Nivis Motors & Machinery Co Ltd** [2001] FJHC 263; HBJ0033S.1997S (14 March 2001), Madam Justice Shameem said that it is important that the court is fully and accurately informed of the material that was before the decision-maker at the time the decision in question was made.

[vii] In **Anuradha Charan** (supra), the Fiji Court of Appeal said:

> *... and the risk that it leads to the temptation to decide matters of fact that are not relevant. Many recent cases whilst admitting the need for some relaxation of the old strict rule warn of these risks.*

[viii] Lord Diplock said as follows in **O'Reilly v Mackman** [1983] UKHL 1; (1983) 2 AC 237 at 282:-

> *It may well be that ..... it will only be upon rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review. The facts, except where the claim that a decision was invalid on the ground that the statutory tribunal or public authority that made the decision failed to comply with the procedure prescribed by the legislation under which it was acting or failed to observe the fundamental rules of natural justice or fairness, can seldom be a matter of relevant dispute upon an application for judicial review, since the tribunal of authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the court in the exercise of its supervisory powers except on the principles laid down in **Edwards v. Bairstow** [1955] UKHL 3; [1956] A.C. 14, 36; and to allow cross-examination presents the court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament."*

[ix] in **O'Reilly v Mackman** [1983] UKHL 1; (1983) 2 AC 237, Lord Diplock said at 282 that: -

> *It may well be that ..... it will only be upon rare occasions that the interests of justice will require that leave be given for cross-examination of deponents on their affidavits in applications for judicial review.*

[x] In **Anuradha Charan** (supra), the Fiji Court of Appeal said:

> *It is clear that, by Order 53 rule 8, the Court may grant interlocutory relief including an order under Order 38 rule 2(3) for oral examination of the maker of any affidavit in the proceedings.*

[xi] The FCA (supra) said:

> *Recent cases suggest there is a trend to allow oral examination more easily than previously but such a course must still be regarded as exceptional……*
>
> *…….leave to cross examine deponents should be allowed whenever the justice of the particular case so requires.*

[xii] Shameem J said:

> *It is important the Court is fully and accurately informed of the material that was before the decision-making body at the time the decision impugned was made but a Court allowing cross examination must be careful to avoid the temptation to step from the consideration of that to examination of the merits of the decision.*

[xiii] Shameem J said:

> *... leave to adduce oral evidence should be exercised with care, lest the court venture into the merits of the decision, rather than the process of the decision making, that the discretion should be exercised where it is just to do so, and where affidavit evidence will not resolve an issue, and where the evidence will relate to the decision-making process.*

[xiv] (see **Timbarra Protection Coalition** (1999) 46 NSWLR 55, 63–4 [37] (Spigelman CJ); **Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources** (2007) 243 ALR 784, 800–1 [59] (Stone J).

[xv] As the Fiji Court of Appeal said in **Digicel (Fiji) Ltd v Fiji Rugby Union** [2015] FJCA 84; ABU21.2014 (12 June 2015)

> [66] Judicial Notice of facts no doubt is a substitute for evidence.
> [67] Archbold in Criminal Pleading, Evidence and Practice, 2011:
> **(Sweet & Maxwell)** cites with approval the principle relating to judicial notice as stated in **Mullen v. Hackney** L.B.C. [1997] 1 W.L.R.. 1103, CA (Civ. Div) thus:
>
> "Courts may take judicial notice of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is

unnecessary' and local courts are not merely permitted to use their local knowledge, but are to be regarded as fulfilling a constitutional function if they do so." (Archbold, at p.1365 (supra)

[xvi] See for example https://fijilive.com/taskforce-to-investigate-grace-road/; https://www.fijitimes.com.fj/minister-kamikamica-investigations-into-grace-road-group-not-a-witch-hunt/