Re CAO JUAN WEN

HIGH COURT — REVISIONAL JURISDICTION

SCOTT J

6 September 2002

[2002] FJHC 27

Citizenship and migration — detention — application for disqualification — expiration of working permit — judicial review proceedings — writ of habeas corpus — Administration of Justice Act 1960 — High Court Act (Cap 13) s 18 — Immigration Act (Cap 88) ss 15(1), 15(3).

The Applicant sought for the disqualification of the judge in hearing the application for habeas corpus and removal order on the ground of bias. The Applicant was detained by the Immigration Department due to the expiration of his working permit. He sought his immediate release from prison on the grounds that his detention was unlawful and that he possessed a valid and subsisting work permit. He then filed an ex parte notice of motion for a writ of habeas corpus ad subjiciendum.

Held — (1) When an Applicant files related applications or makes several applications at the same time, it is long standing and prudent in High Court registry practice that the several applications are placed before the same judge if possible. If for whatever reason this is impossible or impractical, a judge before whom a subsequent application is placed is routinely advised that a previous application has already been assigned to another judge. Files relating to the same subject matter are frequently kept together even if some files have already been disposed of. The reasons for this established registry practice are obvious and need not be elaborated.

(2) The court must ascertain all the circumstances if the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased. The material circumstances will include an explanation given by the judge under review as to his knowledge or appreciation of those circumstances.

Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, considered.

Application dismissed.

Cases referred to

Amina Koya v State Criminal Appeal No CAV 2/97; *CCF and Ors v Speed and Ors* HBC 119/01S; *Ganga Ram and Anor v Reginam* Criminal Appeal No AAU46/83; *K R Latchan Brothers Ltd v Sunbeam Transport Ltd* Civ App 45/83; *Ratu Ovini Bokini v State* (1999) 45 FLR 273; *R v Resident Magistrate, Ex parte Veitata* (1977) 23 FLR 171; *R v Secretary of State for Home Department, Ex parte Chaudhary* [1978] 3 All ER 790; [1978] 1 WLR 1177; *Re Saidur Rahman* [1996] COD 465; The Times, 24 December 2006, cited.

Arab Monetary Fund v Hashim and Ors (No 8) The Times, 4 May 1993; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, considered.

Porter v Magill [2002] 2 WLR 37, followed.

S. Matawalu for the Appellant

S. Sharma with *Z. Sahu Khan* for the Respondents

Decision

Scott J. On 22 August 2002 the Applicant herein filed proceedings for judicial review HBJ 22 of 2002S. In a supporting affidavit a self-described businesswoman Nora Mar deposed that the Applicant was detained at Korovou Prison. She stated that the Applicant had previously held a work permit. When the permit expired in July 2000 he applied for its extension but the application was refused. After the refusal he managed to obtain extension of the permit with the assistance of a bailiff named Jitend. Unfortunately the Immigration Department took the view that the permit obtained by Jitend had been forged. On 6 August 2002 the Permanent Secretary for Immigration made a removal order against the Applicant under the provisions of s 15(1) of the Immigration Act (Cap 88).

Under the provisions of s 15(3) of the Immigration Act the Applicant was then detained in Korovou Prison pending his removal from Fiji.

On 19 August the Applicant presented a petition to the Permanent Secretary for Immigration requesting him to reverse his decision that he be removed from Fiji. Not withstanding the presentation of the petition the Applicant was not released from detention.

On 22 August the Applicant's then solicitors Messrs Vuetaki filed an ex parte motion seeking an interim stay of the removal order and an order that the Applicant immediately be released. In view of the contents of the supporting affidavit and s 15(3) I declined to make an order for the Applicant's release without giving the Permanent Secretary an opportunity to be heard. I adjourned the application for hearing inter partes on 29 August.

On 26 August the present application was filed. It was an ex parte notice of motion for a writ of habeas corpus ad subjiciendum. The Applicant is the same person as the Applicant in HBJ 22/02. It is supported by an affidavit by Nora Mar who is the same person who filed the supporting affidavit in HBJ 22/02. In her affidavit Nora Mar states that the Applicant's work permit was renewed until April 2004. Notwithstanding the renewal, on 20 August immigration officers detained the Applicant, took him to Suva Prison and told him that he was to be deported. Nora Mar seeks the Applicant's immediate release from prison on the grounds that his detention was unlawful and that he possesses a valid and subsisting work permit. Although the affidavit was sworn on 26 August, four days after the affidavit sworn in HBJ 22/02, no mention was made of the previous proceedings or of any suggestion that the Applicant's work permit had been forged.

Where related applications are filed or where the same Applicant makes several applications at the same time it is long standing and prudent High Court registry practice that the several applications are placed before the same judge if possible. Where for whatever reason this is impossible or impractical a judge before whom a subsequent application is placed is routinely advised that a previous application has already been assigned to another judge. Files relating to the same subject matter are frequently kept together even if some files have already been disposed of. The reasons for this established registry practice are obvious and need not be elaborated. In accordance with this practice the present application was placed before me for consideration.

On 29 August Mr Vuetaki withdrew the application for judicial review HBJ 22/02. The next case to be called was the present. Mr Matawalu appeared for the Applicant and Mr Sharma appeared for the State. Mr Sharma told me that he had only become aware of this application because he happened to be present for the now withdrawn judicial review proceedings 22/02.

In the circumstances which included my knowledge that the Applicant was detained consequent to a removal order (a fact not disclosed by Nora Mar in her second affidavit) I declined to order the Applicant's immediate release. Instead I ordered that the papers be served on the State, gave leave to file evidence in response and adjourned the hearing of this application to the earliest date available, 4 September.

On 4 September Mr Matawalu told me that he had a preliminary application to make. He told me that he was making it reluctantly but on his client's instructions. He asked me to disqualify myself from hearing the application for habeus corpus on the grounds of bias. As put by Mr Matawalu his client had "an apprehension" that I was biased as a result of certain remarks said to have been made by me on 29 August. The remarks which Mr Matawalu attributed to me were:

> *I take judicial notice of the matters included in the affidavit filed in support of the now withdrawn application for Judicial Review.*

As it happens, I made an albeit fairly brief note of what I said on 29 August. According to my note which is consistent with my recollection I made no mention at all of the affidavit in HBJ 22/02 and certainly did not say that I took "judicial notice" of its contents. What I noted was:

> *I am also aware of JR proceeding HBJ 22/02.*

Judicial notice "covers the provisions of the law, which is not a matter of evidence at all and the acceptance of facts without admission or proof". *Phipson on Evidence*, 12th ed, at para 47.

An affidavit is a written declaration or statement of facts confirmed by the oath or affirmation of the party making it. Although judicial notice may be taken of the existence of an affidavit judicial notice may not be taken of the truth of the facts asserted in the affidavit unless they are first proved, usually by reason of the absence of a challenge to them by the opposing party. Both in the present case and the judicial review proceedings the Applicant was seeking his release from detention pending removal from Fiji. If not certain then it was at the very least highly likely that the State would oppose the applications. The facts alleged in the affidavits were almost bound to be disputed. It seems to me simply absurd to suggest that a judge would indicate that he had taken judicial notice of the contents of an affidavit almost certain to be disputed.

If the basis of the apprehension advanced by Mr Matawalu was unclear its source is no mystery for the simple reason that the Applicant was not himself present on 29 August when it is alleged that I made the remarks complained of: Mr Matawalu obviously told the Applicant himself. In these circumstances it is especially worth bearing in mind that a client's instructions are never themselves sufficient to justify an application for the removal of a judge on the ground of bias or apparent bias. Counsel's duty to the court and to the wider interests of justice require that counsel should not lend themselves to making such applications unless they are conscientiously satisfied that there is material upon which the application can properly be brought. [see *Arab Monetary Fund v Hashim and Ors (No 8)* The Times, 4 May 1993].

The appropriate test for bias or apprehended bias has been much discussed and has generated much case law. Fiji cases included *Ganga Ram and Anor v Reginam* CA 46/83; *K R Latchan Ltd v Sunbeam Transport Ltd* Civ App 45/83; *Ratu Ovini Bokini v State* (1999) 45 FLR 273 and *CCF and Ors v Speed and Ors* HBC 119/01S. Mr Matawalu must be taken to have knowledge of all these cases together with the leading case in Fiji which is *Amina Koya v State* (Criminal Appeal No CAV 2/97) in which the Supreme Court considered the slightly different approaches which have been taken in England, Australia and New Zealand. In Australia "the test is whether a fair minded but informed observed might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case". In England "the House of Lords … decided that the test to be applied … is whether in all the circumstances of the case there is a real danger or real likelihood, in the sense of possibility, of bias".

The Supreme Court agreed with the New Zealand Court of Appeal in *Auckland Casino Ltd v Casino Control Authority* (1995) 1 NZLR 142 that there is "little if any practical difference between the two tests … at least in their application to the vast majority of cases of apparent bias. This is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias".

Since *Koya* the English Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 has again revisited this question and, most relevantly for Fiji, it did so in the light of Art 6 of the 1953 European Convention for the Protection of Human Rights and Fundamental Freedoms which has been imported into English Law by virtue of the Human Rights Act 1998.

Article 6 reads:

> *Right to a fair trial*
>
> *In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

It will be noted that the words of the article are strikingly similar to the wording of s 29 of Fiji's Constitution the relevant parts of which read:

> *Access to courts or tribunals*
>
> *(1) Every person charged with an offence has the right to a fair trial before a court of law.*
>
> *(2) Every party to a civil dispute has the right to have the matter determined by a court of law or, if appropriate by an independent and impartial tribunal.*

In *Medicaments* (above) the English Court of Appeal made a "modest adjustment" to the previous English approach to bring it into line with the European Convention and "the test applied in most of the Commonwealth and Scotland". The new test is as follows:

> *The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased.*
>
> *The material circumstances will include an explanation given by the Judge under review as to his knowledge or appreciation of those circumstances.*

This test has now been approved and followed by the House of Lords in *Porter v Magill* [2002] 2 WLR 37.

What then, are this circumstances in this case?

So far as I was able to make sense of Mr Matawalu's submission it was that since I was aware, and indicated that I was aware, not only of the affidavit of Nora Mar filed in this application for habeas corpus but also of the withdrawn judicial review proceedings 22/02, a fair minded and informed observer would conclude that there was a real possibility or danger that I was biased. In other words that I had:

> *An attitude of mind which [would prevent me] from making an objective determination of the issues [which I have] to resolve.* [see *Medicaments* above.]

In my opinion this submission is unsustainable. The habeas corpus proceedings have now reached the stage that the affidavit of Nora Mar has been answered by an affidavit by Navendra Prasad, the Director of Immigration. This affidavit is in the terms which might have been expected if it had been filed in answer to the affidavit of Nora Mar filed in the judicial review proceedings. Not surprisingly, Navendra Prasad in para 25 of his affidavit refers to the affidavit of Nora Mar filed in the judicial review proceedings. If Mr Matawalu wishes to apply to answer Mr Navendra Prasad's affidavit then it is likely that he will be given an opportunity to do so.

When all the evidence has been presented it will be the duty of the judge to evaluate the evidence and to decide whether in all these circumstances (a) that the respondents have established that the removal order and detention order are prima facie both good and if so whether (b) the Applicant has discharged the burden upon him to show that he is being unlawfully detained. [see *R v Secretary of State for Home Department, Ex parte Choudahry* [1978] 3 All ER 790; [1978] 1 WLR 1177.]

Mr Matawalu seemed to be suggesting either that by discontinuing the judicial review proceedings (proceedings which, it may be noted, are more suited to the circumstances in which the Applicant finds himself — *Re Saidur Rahman* [1996] COD 465; *The Times*, 24 December 1996) somehow Nora Mar's first affidavit would be undone, withdrawn or kept from becoming known to the presiding judge in the habeas corpus proceedings.

A moment's thought would make it clear that this could not possibly be the case if only because a previous affidavit relating to the same application, the same work permit, the same removal order and deposed by the same affiant was clearly likely to be referred to by the Respondent to this application, as has in fact proved to be the case. The detention and removal of an alleged illegal immigrant is a very serious matter and no court would make a determination on the various issues raised without the fullest inquiry into the circumstances.

It will also be remembered that the Administration of Justice Act 1960 (applied in Fiji by s 18 of the High Court Act — Cap 13) enables repeated applications for habeas corpus to be made but only where fresh evidence is adduced in support of a subsequent application. This must mean that evidence previously considered is placed once again before the judge considering the fresh application. If the logic of Mr Matawalu's submission were to be accepted such a procedure would be impossible.

It is perhaps also worth repeating that in a small jurisdiction like Fiji it frequently occurs that a judge or magistrate is aware of facts detrimental to a party appearing before him. That is no ground for his removal for bias: see *Regina v Resident Magistrate Ex parte Taniela Veitata* (1977) 23 FLR 171.

In my view the application that I disqualify myself was wholly without merit and should not have been made. During the last two years many reckless, wrong and wholly unsubstantiated allegations of bias have been made against the High Court bench in Fiji. Most were apparently based on ignorance of the law coupled with a reliance on malicious tittle tattle. As pointed out in *Arab Monetary Fund* (above) applications for disqualification on the ground of bias should not be made without proper grounds. The wider interests of justice demand that confidence in the judiciary should not be undermined by spurious allegations of impropriety. I was surprised that a member of the bar of Mr Matawalu's standing made an application of this sort in these circumstances. It is dismissed.

Application dismissed.