

**Re KAMAL MUSTAFA AND AN APPLICATION UNDER ORDER 54 OF THE HIGH COURT RULES FOR A WRIT OF HABEAS CORPUS AD-SUBJUCIENDUM**

5 HIGH COURT — CIVIL JURISDICTION

SINGH J

2 October 2002

10 [2002] FJHC 90

**Citizenship and migration — deportation — application for habeas corpus — status of prohibited immigrant — conviction for criminal trespass — overstaying of visitor’s visa — Immigration Act (Cap 88) ss 9(5), 11(2)(a), 11(2)(b).**

15 Kamal Mustafa (the Applicant) is a Canadian citizen and visited Fiji in 1999. He was deported and was declared a prohibited immigrant for being convicted of criminal trespass and overstaying his visitor’s visa. His common law wife filed for the application for a writ of habeas corpus. Applicant submitted that his constitutional right was violated.

20 **Held** — (1) Once the prohibited immigrant status of the Applicant is established, it enables the permanent secretary to exercise his powers to remove the person from Fiji and to keep him in custody or in prison pending deportation. Such powers are conferred on the permanent secretary under the Immigration Act. The Applicant is therefore lawfully detained pending deportation.

(2) The mere fact the Applicant had commenced legal proceedings in Fiji did not provide a ground for stay of removal order.

25 (3) The Constitution protects the rights of husband and wife under legal marriage and not to de facto relationships. The Applicant therefore does not have a locus standi under the Constitution. Even if the applicant were lawfully married to a Fiji citizen, it does not ipso facto open automatic sliding doors to entry into Fiji. He still has to comply with the conditions governing entry and residence. He still has to apply and obtain a permit before he can enter and reside in Fiji.

30 (4) The Applicant was a prohibited immigrant. His arrest and detention are lawful. The mere fact that the Applicant had a de facto relationship with a Fiji citizen does not exempt him from the provisions of the Immigration Act. De facto relationships and even legal marriages are not a short cut to entry and residence in Fiji nor can they be used to circumvent the provisions of the Immigration laws.

35 Application dismissed.

No cases referred to.

*K. Maraiwai* for the Applicant

*E. Tuiloma & O. Oji* for the Respondent

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**Judgment**

**Singh J.** This application for a writ of habeas corpus was commenced by one Jainul Nisha the common law wife of Kamal Mustafa who was a prohibited immigrant. I shall call him the Applicant in the judgment.

45 **Facts**

This Applicant’s present name is Kamal Mustafa. Previously he was known as Peter Klaus Krohn. He is a Canadian citizen. He had visited Fiji in 1999. He was then deported from Fiji on 3rd February 1999 and was declared a prohibited immigrant for two reasons:

- 50 (a) being convicted for the offence of criminal trespass;  
 (b) for overstaying his visitor’s visa.

On 27th July 2002, he arrived in Fiji from Los Angeles on an Air Pacific flight. He carried a Canadian passport bearing the name Kamal Mustafa. He was issued with 1 month's visitor's visa. He later applied for an extension and was granted an extension of visitor's visa till 26th October 2002.

5 All the time when the visitor's visa was issued at Nadi Airport and at the time of the later extension it was not known that Kamal Mustafa was the same person as Peter Klaus Krohn.

10 It appears that either by coincidence or at the instigation of Jainul Nisha's lawful husband, two Immigration officers who had helped deport the Applicant in 1999, located the Applicant in Tacirua, Suva and took him into custody. It was then realised that Kamal Mustafa was the same person as Peter Klaus Krohn. This led to arrest and detention of the Applicant.

### Issues

15 It is not in dispute that the Applicant had been deported from Fiji on 3rd February 1999. He had been declared a prohibited immigrant pursuant to s 11(2)(a) and (b) of the Immigration Act (Cap 88).

20 Section 9(5) of the Immigration Act empowers an Immigration officer to cancel "*a visitor's permit if he is satisfied that the visitor is not a person to whom a visitor's permit ought to have been issued...*"

The Applicant's prohibited immigrant status had not been uplifted. He should have been well aware of his status as a prohibited immigrant before he set foot in Fiji on 26th July 2002. His entry into Fiji was therefore unlawful. This led to cancellation of his visa.

25 Once the prohibited immigrant status of the Applicant is established, it enables the permanent secretary to exercise his powers to remove the person from Fiji and to keep him in custody or in prison pending deportation. Such powers are conferred on the permanent secretary under the provisions of s 15(1) and (3) of the Immigration Act, which reads as follows:

30 15 —

(1) *The Permanent Secretary may make an order directing that any person whose presence within Fiji is, under the provisions of this Act, unlawful, shall, as the Permanent Secretary may specify from the date of service of the order on such person or on the completion of any sentence of imprisonment which he may be serving, be ordered to leave Fiji or be removed from and remain out of Fiji either indefinitely or for a period to be specified in the order.*

(2) *An order made under this section shall be carried into effect in such manner as the Permanent Secretary may direct.*

(3) *A person against whom an order under this section is made may, before he leaves Fiji and while being conveyed to the place of departure, be kept in prison or in police custody, and while so kept shall be deemed to be in lawful custody.*

The Applicant is therefore lawfully detained pending deportation.

45 Counsel for the Applicant submits that the Applicant now wishes to appeal against the unreasonableness of the decision to deport him in 1999. I must say the Applicant had 3 years to do that and he did nothing about it. Further the mere fact that an Applicant wishes to appeal against the decision to remove him is in itself not a good ground for stay of removal order. In *Estrella Trufil & Others v The Director of Immigration* (1997) 43 FLR 1, Lyons J emphasised that the mere fact  
50 the Applicant had commenced legal proceedings in Fiji did not provide a ground for stay of removal order.

The Applicant further submits that his constitutional right under s 38 of the 1997 Constitution has been violated. Section 38(1) reads:

*Every person has the right to equality before the law.*

5 “Equality before the law” means equality before the law of the land. If the Applicant were to have his way, that is not equality. He is asking for a preferential treatment on the basis that the immigration laws of Fiji are waived against him and he should be allowed to stay in Fiji despite the fact that he is a prohibited immigrant.

10 Finally, the Appellant submits that he is married to a Fiji citizen and therefore entitled to enter and remain in Fiji by virtue of s 16(b) of the 1997 Constitution. That section reads:

(a) *The following persons may enter and reside in the Fiji Islands so long as they*  
15 *comply with conditions prescribed by Parliament governing entry and*  
*residence.*

(b) *a foreign wife or widow or foreign husband or widower of a citizen.*  
[Underlining is mine for emphasis.]

The Applicant has two hurdles to overcome. First, is he the husband of a Fiji citizen? Jainul Nisha deposed that she is the common law wife of the Applicant.  
20 The acting Principal Immigration Officer annexed a marriage certificate of the parties issued by Mount Roskill Islamic Trust Incorporation, Auckland, New Zealand. It is not issued by Registrar of Marriages. That document is not proof of a legal marriage. That marriage certificate incorrectly states Jainul Nisha’s status as divorced. Counsel conceded in court that she is not divorced and she is  
25 still married to one Rahiman Shah but is intending to divorce him.

This court can hardly elevate de facto relationships to the level of a legal marriage.

The Constitution is talking of legal husband and legal wife. The Applicant therefore does not have a locus standi under s 16(b) of the Constitution.

30 Second, even if the Applicant was lawfully married to Jainul Nisha, a Fiji citizen, it does not ipso facto open automatic sliding doors to entry into Fiji. He still has to comply with condition governing entry and residence. He still has to apply under s 8 of the Immigration Act and obtain a permit before he can enter and reside in Fiji.

35 It is obvious that the Applicant was a prohibited immigrant. Therefore, I find both his arrest and detention are lawful. The mere fact that the Applicant had a de facto relationship with a Fiji citizen does not exempt him from the provisions of the Immigration Act. De facto relationships and if I may add even legal marriages, are not a short cut to entry and residence in Fiji; nor can they be used  
40 to circumvent the provisions of the immigration laws of this land. The application for habeas corpus is therefore dismissed. I cannot see how any order for costs can be enforced against the Applicant so I order no costs.

*Application dismissed.*

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