IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ0009 OF 2004L

BETWEEN:

NIRMALAN KANESHAPILLAI
RAVIKKANTH NATHIVATHANA
SIVALINGAM NAVANEETHNAM
SELVARATHNAM PAKEETHARAN
MURUGESSU PIRATHEEPAN
Applicants

AND:

PERMANENT SECRETARY FOR IMMIGRATION
Respondent

Counsel: Mr. F.S. Koya for the Applicants
Ms. S. Tabaiwalu for the Respondent

Date of Hearing: 1 July 2004
Date of Judgment: 5 July 2004

JUDGMENT

Application

This matter comes before the court where the five applicants seek Leave to apply for Judicial Review.

Background

The five applicants arrived in Fiji at Nadi Airport on the 18th of June 2004, having previously obtained a visa, for entry into the country. The visa they obtained was subject to certain conditions. On arrival, the Immigration Officer, refused to issue an Entry Permit on the basis that the conditions attached to the visa were not met.

Those conditions were most relevantly that the five applicants have sufficient funds on them to support them during their stay in Fiji and that they have a valid passport and return airline tickets.

The five applicants say that they intended to stay in Fiji until the 1st of July 2004 and that the purpose of their visit was two fold, firstly to look at an investment in this country and secondly

for a holiday. They say that they were sponsored by Mr. Dursami Naidu, who trades as S.D's Souvenirs of Laucala Beach, Suva.

It appears from the evidence, that the applicant, Nirmalan Kaneshapillai, claims to reside in New Zealand where his wife holds permanent residency and where he claims to conduct a business known as Mathu Exports and he says that he has done business with BOB Store of Nausori in the past.

The Immigration Officer says there was no entry in this applicant's passport to evidence his entry into or exit from New Zealand. It is submitted on behalf of this applicant, the passport that he holds is new and that any relevant stamps or endorsements are in the prior document. The relevant passports have not been tendered to the court.

Following the refusal of the Immigration Officer to issue an Entry Permit, the applicants appealed to the Minister in accordance with section 18 of the Immigration Act (Cap. 88). The Acting Minister for Home Affairs and Immigration, Mr. Bale, considered the appeal and responded by letter dated 30 June 2004 which letter is annexure "A" to the affidavit of Josua Nalewabau sworn on 1st July 2004.

The Acting Minister sets out 7 grounds for refusal or rejection of the appeal. These grounds include that the applicants did not have sufficient funds to support them upon arrival in Fiji on the 18th of June 2004.

That the 1st applicant, Mr. Nirmalan Kaneshapillai, did not have any ticket for the Singapore/Colombo leg of his return journey; that following interview, the view was formed that the five applicants were not genuine visitors to Fiji; that when arrangements were made to fly them out of Fiji, they became abusive and aggressive and refused to check-in for the flight on the 19th June and then threatened the airline crew at that time; and finally that their conduct has put them in the category of undesirable visitors on account of security risks and that this conduct further confirms the conclusions earlier reached by the Immigration Official that they are not genuine visitors to Fiji.

The Law

Order 53 Rule 3(1) of the High Court Rules provides and I quote: -

> ***"No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule."***

Lord Diplock in **Inland Revenue Commissioners, ex p. National Federation of Self-Employed & Small Business [1982] A.C. 617 at 642** said and I quote: -

> ***"The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of***

> ***administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived."***

The Fiji Court of Appeal has said on occasions that it is a little anachronistic to still require leave to be sought and granted to facilitate judicial review. However, the rule prevails and leave is required.

The conditions precedent that must be satisfied to enable leave to be granted are: -

(a) An application, if for certiorari, must be made within three months of the decision sought to be reviewed;

(b) The applicant for leave must have a sufficient interest in the matter to which the application relates; and

(c) The applicant must show he has an arguable case – **Fiji Airline Pilots' Association v Permanent Secretary for Labour & Industrial Relations (Civil Appeal No. ABU0059U of 1997 – Judgment 27 February 1998).**

There is of course no issue with respect to the first two conditions. It is only the third that requires greater consideration.

In **Fiji Airline Pilots' Association v Permanent Secretary for Labour & Industrial Relations**, it was said and I quote: -

> ***"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 ensure if the parties were granted leave."***

In this matter, there has in fact been a brief hearing to enable a proper consideration of the application for judicial review.

In **Victor Jan Kaisiepo v The Minister for Immigration – HBJ0025 of 1995S**, Mr. Justice Byrne at page 15 and I quote:-

"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 summarized in the following propositions:

(1) Any sovereign nation has the right to decide whom it will admit or refuse admission to its borders.

(2) The decision to admit any person to a sovereign nation is an executive decision and normally not subject to judicial review."

As Barwick CJ said in Salemi v MacKellar (No. 2) [1997] 137 CLR at 402: -

> ***"The Parliament, by its legislation, has determined who shall fill that description. The Parliament in this legislation is dealing with a national interest of paramount importance, namely, the composition of the nation, determining who shall enter and who shall stay. The decision of those questions is not hedged, nor can it be hedged, around with principles of the kind that the judiciary are wont to consider; nor is it necessary, or convenient, or indeed desirable, that reasons be assigned for the determination of those questions."***

At page 403 he said: -

> ***"We are not here dealing with the administration of a statute or statutory instrument which on its proper construction involves judicially recognizable limitations upon the discretion confided to the body or official. We are dealing with the exercise of a fundamental national power exercisable according to government policy, for which ultimately there is responsibility to the Parliament."***

(3) The only exception to the principle that Judicial Review does not lie in such cases is when a Government gives reasons either expressly or by clear implication for refusing to admit a person to its borders or, as in the instant case, refusing to grant a work permit; then, and only then may those reason be examined by a court, and if found unsatisfactory or incorrect Judicial Review may be granted.

(4) That the grant or refusal of an entry permit amounts not to "a civil right" in the sense referred to in Article 6(1) of the European Convention on Human Rights but to a mere licence revocable at any time by executive act is supported by a number of cases based on comparable foreign statutory provisions. Article 6 says:

> ***"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."***

His Lordship went on to quote Lord Denning in **Birdi's** case (1976) 92 L.Q.R. 34 which draws a distinction between civil rights and administrative procedures such as licenses given by licensing authority.

In **Cui Zhong Yi and Huang Yihat and Jin Qin Hao – Judicial Review No. 0002 of 1997S**, Mr. Justice Scott considered similar issues and said at page 3 of his judgment and I quote: -

> ***"The second problem is that the Department of Immigration has a clear statutory duty not only to exercise its discretion but to exercise it within the fairly stringent limitations imposed by the legislation. Thus, applicants for permits must be required to show that they are able to support themselves at the time that their applications for a permit are made (see section 11(c) of the Act) and therefore promises or support from friends or family do not meet the statutory requirement."***

His Lordship further at page 4 of his judgment referred to Mr. Justice Byrne's decision in **Victor Jan Kaisiepo v Minister for Immigration** and there said and I quote:-

> ***"While I would not go quite so far as to exclude Judicial Review altogether (for example, the proviso particular to section 11(2)(g) raises some doubts) I agree that immigration cases are indeed in a category of their own."***

The Court of Appeal in the appeal from Mr. Justice Byrne's decision in **Victor Jan Kaisiepo v Minister for Immigration** being **ABU0054 of 1996S** at page 6 of their judgment said:-

> ***"It is helpful to bear constantly in mind the principles enunciated by Lord Mustill in Doody v Secretary of State for the Home Department (1995) 3 All ER 92 at 106 where he said: -***
>
> > ***What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following: -***
> >
> > ***(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.***

> ***(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.***
>
> ***(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.***
>
> ***(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.***
>
> ***(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.***
>
> ***(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."***

Their Lordships later said: -

> ***"We do not think that decisions of authorized persons under the Immigration Act are exempt from the scrutiny of the court from its orders. The first principle postulated is general in application and thus decision made under the Immigration Act must be made in a manner which is fair in all the circumstances."***

As I said earlier, the relevant legislation is the Immigration Act being (Cap 88).

Section 18 of that Act provides: -

> ***"18(1)- Any person aggrieved by a decision of an immigration officer under the provisions of this Act may appeal therefrom by petition in writing to the Minister who may, in his discretion, uphold, vary or revoke such decision."***

The applicants in the present application have availed themselves of the provisions of section 18 and have appealed to the Minister who has exercised his discretion and in doing so, has rejected the appeal.

Counsel for the applicants refer the court to the provisions of section 29 of the Constitution of the Republic of the Fiji Islands and in particular to section 29(2) which section provides: -

> ***"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."***

These provisions of the Constitution are not dissimilar and in fact are almost identical to the provisions of the European Convention on Human Rights – Article 6(1) considered by Mr. Justice Byrne in **Victor Jan Kaisiepo v Minister of Immigration.**

The fact that His Lordship's decision predates the commencement of the Constitution is, I think relevantly immaterial in the light of His Lordship's consideration of the same issue and in any event notwithstanding, I am of the opinion that the provisions of section 29(2), even if they apply don't mean that leave is not required for judicial review or that leave should be automatically granted for judicial review.

There is in fact an application to the court for the issues to be considered by virtue of Order 53 and that in itself would appear in my opinion to be compliance with section 29(2), should it be, that compliance with that section is required in these circumstances.

Counsel for the applicants refers the court to the decision of the Federal Court of Australia in **Hicks v Minister of Immigration & Multicultural & Indigenous Affairs [2003] FCA 757 (21 July 2003).** This is a decision of Mr. Justice French who is also a member of the Supreme Court of Fiji. At page 27 or paragraph 76 of his judgment, His Honour says and I quote:-

> ***"The injunction to judicial comity does not merely advance mutual politeness as between judges of the same or co-ordinate jurisdictions. It tends also to uphold the authority of the courts and confidence in the law by the value it places upon consistency in judicial decision-making and mutual respect between judges."***

Conclusion

I am of the opinion that by virtue of the tests as expressed by Mr. Justice Byrne in **Victor Jan Kaisiepo v Minister for Immigration** and by Mr. Justice Scott in **Re: Cui Zhong Yi and Huang Yihat and Jin Qin Hao** that leave for judicial review in the instant matter should be refused.

I am of the view that the decision of Mr. Justice French whilst not requiring strict adherence to a decision of another judge at first instance, is instructive as to the benefits of so doing.

Accordingly, the Orders of the Court will be:-

1. Leave to apply for Judicial Review is refused.

JOHN CONNORS
JUDGE

AT LAUTOKA
5 JULY 2004