IN THE FIJI COURT OF APPEAL AT SUVA
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0032/97S
(High Court Civil Action No.HBJ0009/96)

BETWEEN:

MARIO NAGALES PADUA

Applicant/Appellant

AND:

PUBLIC SERVICE COMMISSION

Respondent

In Chambers: The Hon. Justice I.R. Thompson

Hearing: 30 April, 1998

Counsel: Mr. M. Raza for the Appellant
Mr D. Singh for the Respondent

Date of Decision: 7 May, 1998

DECISION IN CHAMBERS

The applicant is seeking leave to appeal against an order of Pain J. refusing leave to apply for judicial review. The application for that leave was made in June 1996; it was heard on 14 November 1996; Pain J. gave his decision in respect of it on 6 May 1997. The order was sealed on 20 May 1997. The applicant filed an appeal against it on 11 June 1997. As the order was interlocutory (Charan v. Suva City Council (Civil Appeal No.29 of 1994)), leave to appeal is required. That leave was not sought until ten days ago, after a change of solicitors. It is a sorry tale of delay in respect of a matter which, because of the nature of judicial review, required to be dealt with expeditiously.

The applicant was brought to Fiji from the Philippines by the respondent in 1994 to work as a medical practitioner in a hospital. He was then employed under a contract of service between himself and the respondent. The contract provided for his appointment to come to an end by effluxion of time, by either party giving notice to the other or by dismissal for misconduct or the breach of any terms of the contract. On 20 March 1996 the Medical Superintendent of Labasa Hospital, where the applicant was working in the course of his employment, handed him a letter dated 13 March 1996 with the respondent's letterhead and signed on behalf of the Secretary for the Public Service.

That letter was as follows:

"Termination of Appointment

The Public Service Commission, after considering the complaints raised against you for unethical conduct and unsatisfactory performance has decided at its meeting of 06 March 1996 that your appointment in the service be terminated forthwith.

In accordance with Clause 8(b) of your Agreement of Service you will be paid one month salary in lieu of this notice and will also be required under Clause 10, to refund to Government, 1/3 of the cost of passage paid in respect of yourself, wife and your children in transporting you to Fiji for commencement of duties under this Agreement of Service.

The Permanent Secretary for Health and Social Welfare is also advised to take necessary action regarding your termination."

Clause 8(b) of the contract provided:

"8. Without prejudice to the provision of paragraph 10 (relating to dismissal) Government may terminate this Agreement:
.....

[b] at any time by giving in lieu of the notice aforesaid, one month's basic salary; and
....."

Clause 10 provided:

> *"10. If after reasonable inquiries the appropriate Service Commission is satisfied that the officer has been guilty of misconduct or a breach of any term of this Agreement the officer may be summarily dismissed and upon such dismissal all rights and advantages reserved by him under this Agreement shall cease and he will be required to refund to Government the whole or such portion as the Government may decide of the cost of the passages paid in respect of himself, his wife and children (if any) under the terms of this Agreement by the Government and any other expenses incurred in transporting the officer, his wife and children (if any) to Fiji for the purpose of entering the service of the Government under this Agreement. Similarly the officer may be required to refund the whole, or proportion of the cost of passages of his wife and family if they have preceded him back to the country from which he was recruited in accordance with Clause 4(d)."*

In Korovulavula v. Public Service Commission (1994) Civil Appeal No. ABU0006 of 1994 this Court examined the provisions of the Fiji Service Commissions and Public Service Decree 1987, the Fiji Service Commisisons and Public Service (Amendment) Decree 1987 and the Public Service Commission Regulations 1987 and was satisfied that the Commission had authority to offer to any person a contract for a fixed period. It noted that Regulation 26 expressly provided that, where an officer was employed on contract, his appointment was to be terminated in accordance with the terms of the contract. I am similarly satisfied that the respondent was authorised to enter into the contract of service with the applicant and that, as in Korovulavula, the applicant held a public office in the Public Service of Fiji, but did so on special terms as set out in the contract of service.

Pain J. gave full reasons for refusing the applicant leave to apply for judicial review. He found that any claim which the applicant might have was founded in private law and not in public law, so that judicial review was not available. In doing so he noted that in

Korovulavula this Court had held that, although the respondent was a statutory body, the contract of service into which it had entered with Mr. Korovulavula wholly governed the relationship between them and there was no justification for importing into it by implication a term that public law principles applied. He concluded that that was the situation in respect of the contract between the respondent and the present applicant.

In Korovulavula this Court held further that, although the relationship between the parties was governed by the contract, the respondent had a discretion whether or not to terminate Mr Korovulavula's appointment and that, in view of the nature of the respondent's functions, the exercise of the discretion could be the subject of judicial review. In the circumstances of that matter the Court concluded that the discretion had not been validly exercised. The reason for that was that the respondent decided to terminate Mr Korovulavula's appointment because he had not complied with his Minister's directions but those directions had not been unlawfully given. The Court, therefore, decided that respondent's exercise of its discretion should be judicially rescinded.

Pain J. considered whether in the instant matter the applicant had placed before him evidence that the respondent might not have exercised in good faith and for the public good its discretion to terminate the applicant's appointment. The evidence before him consisted of an affidavit sworn by the applicant (to which were exhibited copies of the contract of service, a statement made by him to the police, "Incident Report" and the letter terminating his appointment), an affidavit sworn by the Secretary of the respondent (to which were exhibited two written reports by the Medical Superintendent at Labasa Hospital) and an affidavit in reply

sworn by the applicant. Having examined that evidence Pain J. concluded that the respondent's decision to exercise its rights under the contract of service was not made in good faith and for the public good could not be sustained, even on a prima facie basis. He held, therefore, that the applicant had "not raised, within the limited confines of the public law issue arising in this case, a sufficiently arguable case to warrant a full investigation at a substantive hearing".

I have read the whole of the evidence which was before Pain J. - and further affidavit evidence of the applicant which, although filed in support of his application for leave to appeal, introduces without leave further evidence relevant to the application made to Pain J. The evidence throughout has been to the effect that a number of allegations were made against the applicant in respect of the performance of his professional duties and that the Medical Superintendent of Labasa Hospital eventually decided that the applicant was not a satisfactory employee and that it was in the public interest to dispense with his services, and recommended accordingly to the respondent. The applicant's evidence was that those allegations were false and malicious. The reports of the Medical Superintent however, disclose that he had frequently counselled and warned the applicant but to no avail.

There is certainly no evidence that the respondent itself exercised otherwise than in good faith its discretion to terminate the applicant's appointment. On the other hand, it could not be held that it did not do so in the public interest if the reports of the Medical Superintendent on which it relied were not made in good faith. However, there is no evidence of bad faith on his part.

The purpose of requiring leave to be obtained before an application of any type can be made to a court is to ensure that there is a proper basis for the application and that the application is a proper way of proceeding. The requirement in 0.53 r.3 of the High Court Rules that leave be obtained before application for judicial review is made is intended to eliminate frivolous, vexatious, hopeless or unduly delayed applications. One situation where an application for judicial review is hopeless is where the subject matter of the intended application does not come within the scope of public law but is a matter of private law. Upon an application for leave the judge's function is not to determine the merits of the intended application; however, it is necessary for him to examine the evidence set out in the papers before him in order to decide whether, if leave is granted and the facts alleged are established, there will be an arguable case that the applicant is entitled to a public law remedy. It may sometimes be necessary for him to conduct a brief hearing to enable him to come to that decision (Fiji Airline Pilots Association v. The Permanent Secretary for Labour and Industrial Relations (Civil Appeal No. ABU0059U of 1997S)). When the High Court hearing an application for judicial review by which an injunction or damages have been sought decides that such relief should not be granted on that application, i.e. there is no public law basis for it, 0.53 r 9 (5) enables the Court to order that the proceedings are to continue as though begun by writ. But, where from the start it is clear that no public law issue will be properly raised by the application, 0.53 r. 9(5) affords no reason for granting leave to apply for judicial review and to seek that relief in those public law proceedings.

There is nothing in the evidence to cast doubt on the correctness of Pain J.'s decision. There is, I am satisfied, no reasonable prospect that the appeal will succeed if leave

to appeal is granted. This is not, therefore, a proper case for granting such leave. I would add that Mr Raza informed me that the applicant had not yet commenced private law proceedings for breach of contract. If he seriously wishes his dispute with the respondent to be decided by a court, he should do so without further delay.

The application for leave to appeal is dismissed; the applicant is to pay the respondent's costs of the application.

I.R. Thompson

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Mr. Justice I.R. Thompson

Solicitors:

Messrs. Mehboob Raza & Associates for the Applicant/Appellant
Office of the Attorney-General for the Respondent