IN THE HIGH COURT OF FIJI
AT LAUTOKA

JUDICIAL REVIEW NO. HBJ 5 OF 2018

IN THE MATTER of **CIVIL AVIATION AUTHORITY OF FIJI**

AND

IN THE MATTER of an application **by TIMOTHY JOHN JOYCE, SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED** t/a **HELI TOURS FIJI, JOYCE AVIATION (FIJI) LIMITED, TALL PINES LIMITED** t/a **PACIFIC FLYING SCHOOL** and **TANDEM SKYDIVE (FIJI) LIMITED** for a Judicial Review and with other reliefs including an Order of Certiorari to quash the decision made by the Civil Aviation Authority of Fiji (CAAF) and Mr Ajai Kumar, the Manager Corporate Services of CAAF made on the 27th December 2017 on an apparent review of the Applicants failure to comply with Safety of Aircraft Operation contrary to section 70(1) of the Air Navigation Regulation (ANR) 1981 and deeming the Applicant no longer a fit and proper person to hold or be issued an aviation document under Regulation 53 of the ANR and revoking his Fiji Commercial Pilots Licenses for aeroplanes and helicopters; deeming him no longer a fit and proper person to hold and nominated post holder position under the provisions of CAAF Standards Document and revoking the same; that he no longer be deemed to be a fit and proper person to hold any aviation

document for a period of 10 years to commence from the date of the Applicants conviction by the Nadi Magistrates Court as per section 6(1) of the Rehabilitation Act.

STATE **v** **CIVIL AVIATION AUTHORITY OF FIJI** situated at CAAF Compound, Nadi Airport, Nadi.

FIRST RESPONDENT

AJAI KUMAR, Manager Corporate Services of the Civil Aviation Authority of Fiji of CAAF Compound, Nadi Airport, Nadi.

SECOND RESPONDENT

EX-PARTE **TIMOTHY JOHN JOYCE** Lot 28, Sovereign Quays, Denarau Island, and Sunflower Hanger, Nadi, Fiji, Businessman, **SUNFLOWER AVIATION LIMITED, JOYCE AVIATION (FIJI) LIMITED** t/a **HELI TOURS FIJI, JOYCE AVIATION (FIJI) LIMITED, TALL PINES LIMITED** t/a **PACIFIC FLYING SCHOOL** and **TANDEM SKYDIVE (FIJI) LIMITED** all limited liability companies having their registered office at Ernest & Young Bhuwan Investments Limited Building, 131 Vitogo Parade, P O Box 1068, Lautoka, Fiji.

APPLICANTS

Appearances : Mr A.K. Narayan with Ms S. Lata for the applicants/applicants
Mr R. Singh for the respondents/respondents

Date of Hearing : 24 January 2019

Date of Ruling : 21 February 2019

RULING

[on stay pending appeal]

Introduction

[01] Before me is an application for stay pending appeal. The appeal is against the judgment delivered in the Judicial Review (*'JR'*) proceedings initiated by the applicants/original applicants (*'the applicants'*) against a decision of the respondents/original respondents (*'the respondents'*) concerning Mr Timothy John Joyce (Timothy), the first named applicant.

[02] On 30 November 2018, the applicants filed an *ex parte* summons supported by the affidavit of Mr Timothy (*'the application'*), seeking the following orders:

> *[1] There be a stay of execution of directions for the respondents' to go through the decision making process again and reconsidering and reaching a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested by this Honourable Court in the Judgment delivered on 26 October 2018, pending the hearing and determination of the appeal to the Fiji Court of Appeal and/or until the inter partes hearing of this application.*
>
> *[2] Alternatively, there be an order restraining the first and second respondents whether by themselves, their servants or agents otherwise and howsoever from going through the decision making process again and reconsidering and reaching a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested by this Honourable Court's in the Judgment delivered on 26 October 2018, pending the hearing and determination of the appeal to the Fiji Court of Appeal and/or until the inter partes hearing of this application.*
>
> *[3] The costs of this application abide the result of the appeal.*

[03] This application is made pursuant to Rules 26 and 34 of the Court of Appeal Rules, as amended (*'CAR'*), Orders 29 and 45, Rule 10 of the High Court Rules 1988 as amended (*'HCR'*), and the inherent jurisdiction of this Court.

[04] Having heard the *ex-parte* application on 30 November 2018, the court granted an interim stay pending the hearing of the application *inter partes*. While issuing the

interim stay, the court directed the applicants to serve the order together with all the documents on the respondents.

[05] Upon service was effected on the respondents as directed, the respondents have filed the affidavit of Mr Ajai Kumar, Manager Corporate Services of the Civil Aviation Authority of Fiji ('*CAAF*'), the second respondent sworn on 14 December 2018 in response, to which the applicants have filed the affidavit of Mr Timothy sworn on 17 January 2019 in reply/response.

[06] In support of the application, the applicants rely on the following documents:

1. *The originating motion filed on 11 July 2018;*
2. *Affidavit of Timothy John Joyce verifying facts sworn on 11 June 2018;*
3. *Affidavit in reply of Ajai Kumar sworn on 4 July 2018;*
4. *Ruling on application for leave to apply for Judicial Review delivered by this Honourable Court on 5 July 2018;*
5. *Affidavit of Ajai Kumar sworn on 19 July 2018;*
6. *Ruling on Application to seek clarification on Stay delivered by this Honourable Court on 20 July 2018.*
7. *Affidavit of Ajai Kumar in reply sworn on 30 July 2018.*
8. *Affidavit of Timothy John Joyce in response sworn on 30 August 2018;*
9. *The judgment of Judicial Review dated 26 October 2018;*
10. *Ex-parte summons for Stay Pending Appeal and Injunctive Reliefs filed on 30 November 2018;*
11. *Affidavit in Support of Summons for Stay Pending Appeal and injunctive Reliefs sworn by Timothy Joyce on 30 November 2018;*
12. *Ruling on the ex-parte application for Stay Pending Appeal dated 30 November 2018;*
13. *Order dated 3 December 2018;*
14. *Affidavit of Ajai Kumar in Reply sworn on 14 December 2018; and*
15. *Affidavit in Response of Timothy John Joyce sworn on 17 January 2019.*

[07] At the *inter-partes* hearing, I heard quality oral submissions of both parties. In addition, they have also filed their comprehensive written submissions. I was greatly assisted by their submissions. I am grateful to both counsel and their team for their great job.

Background

[08] The applicants initiated JR proceedings to judicially review a decision of the respondent made on 27 December 2017 (*'the decision'*). The decision, essentially, declares that the applicant (Mr Timothy) is no longer a fit and proper person to hold or be issued an aviation document under Regulation 53 of the Air Navigation Regulations (*'ANR'*) for a period of 10 years commencing the date of Mr Timothy's conviction by the Nadi Magistrates Court as per section 6(1) of the Rehabilitation Act. Mr Timothy was convicted and imposed a fined of $29,000.00 for flying an aircraft without a valid pilot's licence on 29 different occasions between 11 April 2015 and 20 July 2015 by the Magistrates Court on 8 December 2017. The applicant has filed an appeal against the sentence and not the conviction.

[09] The court delivered its judgment on 26 October 2018. The judgment was as follows:

1. *That Writ of certiorari (quashing order) issued quashing the respondents' decision of 27 December 2017.*

2. *That the respondents are directed to go through the decision making process again and to reconsider and reach a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested in this judgment.*

3. *That the Applicants' claim for damages is dismissed.*

4. *The respondents shall pay summarily assessed costs of $4,000.00 to the applicants.*

[10] In the course of the judgment the court [at para. 99.6] stated:

"6. The 29 breaches as summarised in the charges, in my view, are so serious as to undermine public confidence in the aviation industry and therefore a signal needs to be sent to Mr Timothy, the profession and the public, that behaviour in question is unacceptable. CAAF is entitled to exercise its discretion within the purview of the ANR and make a decision to mark the seriousness of the matter, and to send an appropriate signal to the aviation industry and the public."

[11] The applicants have lodged an appeal against the judgment, in part. The principal challenge in the appeal relates to the guidelines suggested in the judgment. The court in its judgment directed the respondents to go through the decision making process again and to reconsider and reach a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested in this judgment. In the current application, the applicants seek a partial stay on the judgment, especially on the directions, the court has given on the respondents.

[12] The applicants have formulated the following grounds of appeal to challenge the judgment, in part:

> *"1. The Learned Judge erred in law and in fact in rejecting the application of Section 14(1) of the Constitution and the rule of double jeopardy generally to the Respondent dealing with the infringement of Regulation 70(1) of the Air Navigation Regulations 1981 and/or penalising the First named Appellant again in the circumstances where:*
>
> 1. *The Respondents had already prosecuted the First named Appellant for contravention of Regulation 70(1) for the act or omission of flying an aircraft with an expired Commercial Pilots Licence;*
>
> 2. *The Respondents were dealing with the First named Appellant for breach of the same Regulations and the same acts or omissions to impose a further penalty internally;*
>
> 3. *The Respondents had already determined the First named Appellant's fit and proper status after the infringement having initially refused to permit any further renewal of the Appellant's Commercial Pilots Licence and subsequently reviewing the same during the course of the prosecution in the Magistrate's Court and after a plea of guilty thus rendering the issue under Regulation 53 a non-issue; and*
>
> 4. *The Respondents had abdicated their right to deal further with the First named Appellant internally having opted to follow the process of prosecuting him in the Magistrate's Court.*
>
> *2. The Learned Judge erred in law and exceeded his jurisdiction in having allowed the Judicial Review and thereafter proceeding to give directions/recommendations as to how the*

Respondents should deal with the First named Appellant thereby usurping the role of the Respondents and causing prejudice to the First named Appellant.

3. *The Learned Judge failed to consider the further grounds, other than those which he allowed, relied on by the Appellants for the Judicial Review and in particular that section 12F of the Civil Aviation Authority Act 1979 was unconstitutional being in breach of Section 16(1) of the Constitution which was a relevant matter and ground in the circumstances where the Learned Judge had given directions/recommendations for the Respondents to deal with the First named Appellant thereby potentially depriving him of a remedy for challenge arising from any further decision.*

4. *The Learned Judge erroneously held that no affidavit in reply was filed on behalf of the Appellants which resulted in:*
   a) *Him failing to read and consider relevant evidence before him.*
   b) *Deprived the Appellants of a fair hearing;*
   c) *Led him to issue prejudicial and erroneous directions/recommendations for the respondents to deal with the First named Appellant; and*
   d) *Caused serious prejudice to the Appellants.*

5. *The Learned Judge erred in finding that the Appellants were not entitled to damages.*

6. *The Learned Judge erred in law and in fact in not awarding indemnity costs or costs on another basis to the Appellants rather than on a summary assessment in view of all the circumstances."*

Legal Framework

[13] CAR 26 (3) states:

*"**26 (3)**Wherever under these Rules an application may be made either to the court below or to the Court of Appeal it shall be made in the first instance to the court below."*

[14] CAR 34 (1) says:

"34 (1) Except so far as the court below or the Court of Appeal may otherwise direct-

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below;

(b) no intermediate act or proceeding shall be invalidated by an appeal."

[15] Alternatively, the applicants seek an order restraining the respondents from going through the decision making process again and reconsidering and reaching a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested by the court in the judgment of 26 October 2018 pending the hearing and determination of the appeal to the Fiji Court of Appeal. For this relief, the applicants rely on HCR Order 29. It empowers the court to grant an interim injunction and such an injunction may be granted *ex parte* if the matter is one of urgency.

[16] Further, alternatively, the applicants invoke HCR O 45 Rule 10, which provides:

> *"**10**. Without prejudice to Order 47, Rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just."*

The governing principles

[17] The governing principles applicable to an application for stay pending were stated by the Fiji Court of Appeal in *Natural Waters of Viti Limited v Crystal Clear Mineral Waters (Fiji) Limited* [2005] FJCA13; ABU0011.2004S (18 March 2005) as follows [at para. 7]:

> *"[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):*
>
> *"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": **Duncan v Osborne Building Ltd** (1992) 6 PRNZ 85 (CA), at p 87.*
>
> *(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). Phillip Morris (NZ) Ltd Liggett & Myers Tobacco Co (NZ) Ltd [1977] 2NZLR 41 (CA).*
> *(b) Whether the successful party will be injuriously affected by the stay.*

(c) The bona fides of the applicants as to the prosecution of the appeal.

(d) The effect on third parties.

(e) The novelty and importance of the questions involved.

(f) The public interest in the proceeding.

(g) The overall balance of convenience and the status quo."

[18] The above principles have been adopted by Fiji courts. Recently, the Supreme Court of Fiji (His Lordship the Chief Justice Gates) approved the Natural Waters' principles in *Native Land Trust Board v Shanti Lal & Ors* (Civil Appeal CBV0009/11).

Discussion and determination

[19] The applicants have lodged an appeal in the Fiji Court of Appeal against the judgment of this court on 26 October 2018, wherein the court issued the writ of certiorari (now known as 'quashing order') quashing the respondents' decision that Mr Timothy is no longer a fit and proper person to hold or be issued an aviation document under ANR 53 for a period of 10 years from the date of his conviction as per section 6(1) of the Rehabilitation Act. On 8 December 2017, Mr Timothy was convicted, on his own guilty plea, and was imposed a fined of $29,000.00 for flying an aircraft without a valid pilot's licence on 29 different occasions between 11 April 2015 and 20 July 2015.

[20] The court quashed the decision on the ground that the respondents had failed to observe the rules of natural justice in the course of the decision making process.

[21] It is of worth to note that the appeal the applicants had lodged in the Court of Appeal is not against the whole judgment. It is against a part of the judgment. The appeal primarily concentrates on the directions and guidelines given in the judgment for the respondents to take into account when they re-investigate Mr. Timothy's conviction issue under ANR 151 and go through the decision making process again.

[22] The directions, guidelines and comments given in the judgment are as follows, in full [para. 99 of the judgment]):

"[99] I am inclined to remit the matter to the respondent for it to make a fresh decision. In doing so, I direct the respondent to go through the decision making process again. In addition, I also direct the respondent to consider the following matters.

1. *Under Reg. 151 (1) of the ANR, CAAF possesses the discretion to* ***revoke, suspend, endorse, cancel or vary the aviation document relating to such contravention*** *if a person is convicted of a contravention under the ANR. CAAF must consider* ***only*** *the penalty prescribed by Reg. 151 (1) in view of Mr Timothy's conviction of the 29 contraventions of the ANR. Imposing any other penalty which is not prescribed under Reg. 151 (1) would tantamount to ultra vires or acting without jurisdiction. In assessing the penalty CAAF has a duty to act judicially.*

2. *CAAF's decision effectively suspended Mr Timothy's fit and proper status and his ability to hold an aviation document and nominated accountable positions for 10 years. The imposition of 10-year-sanction is manifestly excessive and disproportionate in the circumstances of the case. Penalty to be imposed in view of the conviction must relate to such contraventions which Mr Timothy had been convicted of.*

3. *CAAF must consider section 16 (1) of the Constitution which guarantees the following rights:*

    (a) Every person has the right to executive or administrative action that is ***lawful, rational, proportionate, procedurally fair,*** *and* ***reasonably prompt;***
    (b) Every person who has been adversely affected by any executive or administrative action has ***the right to be given written reasons for the action;*** *and*
    (c) ***Any executive or administrative action may be reviewed by a court,*** *or if appropriate, another independent and impartial tribunal, in accordance with law."*

4. *When making a decision in the matters in issue, CAAF must consider the circumstances under which the contraventions of the ANR occurred, the aggravating and mitigating features and any previous imposition of sanction*

relating to the matters in issue. Any previous sanction imposed on Mr Timothy in respect of the same contraventions is to be deducted.

5. *The decision CAAF is going to take on the matter must follow with the written reasons for the action.*

6. ***The 29 breaches as summarised in the charges, in my view, are so serious as to undermine public confidence in the aviation industry and therefore a signal needs to be sent to Mr Timothy, the profession and the public, that behaviour in question is unacceptable. CAAF is entitled to exercise its discretion within the purview of the ANR and make a decision to mark the seriousness of the matter, and to send an appropriate signal to the aviation industry and the public."***

[23] What is disturbing the applicants is the comments the court made in the judgment. According to the applicants, the court should not have such comment as it would prejudice the applicant's case.

[24] The respondents intend to deal with Mr Timothy's conviction. The respondents have now issued a notice to Mr Timothy calling for his response before dealing with the conviction. In that notice, the respondents had quoted the above comments made in the judgment.

[25] The appeal seeks to set aside those comments.

[26] The application seeks the stay of execution, in part, namely the stay of execution of the comments in the judgment.

[27] The primary consideration in an application for stay pending appeal is whether the appeal would be rendered nugatory if a stay is refused.

[28] His Lordship Justice Calanchini, President, Court of Appeal in *Newworld Limited v Vanualevu Hardware (Fiji) Limited & Anr* (Civil Appeal ABU 76 of 2015) said [at para 16]:

"[16] The Respondent's principal objection to the granting of a stay pending appeal was that the appeal had no merit whatsoever. This Court is required to consider the bona fides of the Appellant in the prosecution of the appeal and whether the appeal involves a novel question of some importance. However, at the same time the authorities suggest that ***the merits of the appeal will rarely be considered in any detail. It is usually sufficient if an appellant has an arguable case.*** *If the appeal is obviously without merit and has been filed merely to delay enforcement of judgment then the application should be refused."* (Emphasis provided)

Double Jeopardy-Ground 1

[29] Appeal ground 1raises issue of double jeopardy and violation of section 14 (1) of the Constitution.

[30] Section 14 (1) of the Constitution states (so far as relevant):

> *'a person shall not be tried for … (b) an offence in respect of an act or omission for which that person has previously been either acquitted or convicted. '*

[31] It is submitted on behalf of the applicants that double jeopardy point is arguable as it would impact on firstly whether the matter should have been referred back at all for reconsideration and if it was then the appropriate comments that could be made in any directions if that was possible.

[32] Essence of the applicants' submission on the issue of double jeopardy is that the respondents having opted to prosecute Mr Timothy for the 29 breaches of the ANR, they cannot deal with his conviction as it would tantamount to being double jeopardy.

[33] By letter dated 15 November 2018, CAAF wrote to Mr Timothy stating that:

> *"<u>RE: Notice to Appear pursuant to section 151 of the ANR</u>*
>
> 1. *Reference is made to your letter of the 13 November 2018 addressed to the Chief Executive.*

2. *Notice is taken that your client is now appealing the decision of Honourable Justice Mr. Ajmeer Mohamed that has allowed the authority to proceed with certain enforcement actions against your client.*
3. *We are aware that your client has also appealed against the sentence passed by the Nadi Magistrates Court in the Criminal action against him which was instituted by the Authority. However we understand that your client's appeal from the decision of the Nadi Magistrates Court is not against conviction but only against sentence.*
4. *The authority is unable to accede to your clients request and will proceed with its enforcement action pursuant to Regulation 151 of the Air Navigation Regulations."*

[34] By another letter dated 27 November 2018, CAAF wrote to Mr Timothy stating that:

"RE: Notice to Appear pursuant to section 151 of the ANR

1. *We refer to your letter of the 20 November 2018.*
2. *The High Court whilst concluding its judgment has* ***directed*** *that the Authority proceed with the investigation in accordance with the suggestions and guidelines made by the Court. The High Court has directed as follows;*

   "The respondents are directed to go through the decision making process again and to reconsider and reach a decision on the issue of the first named applicant's conviction in accordance with the findings and guidelines suggested in this judgment."

3. *We also note that at paragraph 99 of its judgement the High Court has observed that;*

   "The 29 breaches as summarised in the charges, in my view, are so serious as to undermine public confidence in aviation industry and therefore a signal needs to be sent to Mr. Timothy, the profession and the public, that behaviour in question is unacceptable. CAAF is entitled to exercise its discretion within the purview of the ANR and make a decision to mark the seriousness of the matter, and to send an appropriate signal to the aviation industry and the public."

4. *In light of the above observations made by the High Court and the discretions made by it, the Authority is compelled to proceed with t is processes under the ANR."*

[35] The ANR expressly requires CAAF to act under ANR 151 (1). That Regulation provides:

> *"151. – (1) **If any person** –*
>
> *(a) **is convicted of a contravention under these regulations**; or*
>
> *(b) fails to comply with any provision of these Regulations; or*
>
> *(c) fails to comply with the conditions of any aviation document;*
>
> ***the Authority may revoke, suspend, endorse, cancel or vary the aviation document relating to such contravention.*** (Emphasis is added)

[36] In terms of ANR 151 (1), CAAF is vested with the discretion to revoke, suspend, endorse or vary the aviation document relating to such contravention is committed. It is a statutory requirement that need to be considered by CAAF, being a regulatory body.

[37] Mr Timothy has a conviction for the 29 contraventions of the ANR, where he failed to comply with Safety of Aircraft Operation Requirements contrary to ANR 70 (1). The conviction remains in force. His appeal is against the sentence only, not against the conviction. It is unlikely that the conviction would be set aside on appeal because the appeal is against the sentence only.

[38] In *Permanent Secretary for Public Service Commission v Matea* [1999] FJSC 7; CBV0009U.1998S (10 March 1999), a case referred to by applicant, the Supreme Court said:

> *"that it would be unjust to impose, in substance, double punishment for an offence which, although serious, was not work-related. Compare Ziems v The Prothnotary of New South Wales [1957] HCA 46; (1957) 97 C.L.R. 279 where it was held that in the particular circumstances the removal of a barrister's name from the Roll of Barristers was too severe a professional penalty when he had been convicted by a court of motor manslaughter and sentenced to two years imprisonment with hard labour.*

[39] In *Matea*'s case, he was school teacher and was charged with causing death by dangerous driving and driving a motor vehicle of a class which he was not

authorised to drive. He, upon his guilty plea, was convicted and sentenced to nine months imprisonment suspended for the two years; he was also fined $500, and he was disqualified for 18 months from obtaining or being in possession of a driving licence. He was then dismissed from his service after more than a year of his conviction without any giving an opportunity for Matea to put forward his case. On Judicial Review brought by Matea, the High Court ordered that the dismissal be quashed on the ground of the Commission's failure to give the respondent any opportunity to be heard and also on the ground that the penalty of dismissal was too harsh. The Court of Appeal confirmed the High Court judgment. On appeal to the Supreme Court by Public Service Commission, the Supreme Court dismissing the appeal said, as *obiter dicta* that: *He [Matea] might well also have contended that in the circumstances the criminal penalties were sufficient: that it would be unjust to impose, in substance, double punishment for an offence which, although serious, was not work-related.*

[40] Matea's case is not a definite authority for the proposition that considering a conviction of person in a subsequent proceeding such in disciplinary proceeding and in assessing an application for licence as in this case would tantamount to being double punishment.

[41] The respondents referred to me the case of *Chief Registrar v Abhay Singh* [2010] FJILSC 1 (25 January 2010); ILSC Action No. 001 of 2009, where the solicitor was convicted by the court of an offence of perverting the cause of justice upon his plea of guilt. The double jeopardy point was argued before the Commissioner. Rejecting the argument of double jeopardy, the Commissioner said [at para 24-28]:

> *"24. It is not disputed that there is a conviction for a criminal offence. The issues therefore are whether that conviction whilst being capable of amounting to unsatisfactory professional conduct or professional misconduct does in fact amount to such conduct and whether there is any substance in the submission of double jeopardy and res judicata*
>
> *25. The New South Wales Court of Appeal considered what is the proper approach to matters such as this in Law Society of NSW v Bannister (1993) 4 LPDR 24 where Sheller JA at page 7 said*

"It is sometimes said that the jurisdiction of the Tribunal and of this Court invoked by complaint against a solicitor is not to punish a solicitor but to protect the public. In New South Wales Bar Association v Evatt [1968] HCA 20; (1968) 117 CLR 177 at 183 to 184 the court referred to Clyne v New South Wales Bar Association [1960] HCA 40; (1960) 104 CLR 186 at 201 to 202 and said: "The power of the Court to discipline a barrister is, however, entirely protective, and, notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved." However the distinction between the two stated objectives of protection and punishment is blurred and can be misleading. Obviously where a barrister or solicitor has been convicted and punished for a serious offence the jurisdiction of the court to disbar the barrister or remove the name of the solicitor from the roll can be said to have nothing to do with punishment see Ziems v Prothonotary (1957) 1997 and [1957] HCA 46; 97 CLR 279 at 286. In Ex parte Brounsall (778) 2 Cowp 89, 98 ER 1385 a solicitor had been convicted of stealing a guinea and had suffered imprisonment for 9 months and also branding on the hand. On an application to strike him off the role and in answer to an argument advanced on the solicitors behalf that he had already received sufficient punishment, Lord Mansfield at 830 and 1385 said that the defendant's having been burnt on the hand was no objection to his been struck off the roll. "And it is on this principle; that he is an unfit person to practice as an attorney. It is not by way of punishment: but the Court on such cases exercises the discretion, whether a man whom they have formally admitted, is a proper person to be continued on the roll or not. "See also incorporated Law institute of New South Wales v Meagher [1909] HCA 87; (1909) 9 CLR 655 at 680. Such cases illustrate that the supervisory jurisdiction of the court and statutory bodies such as the Tribunal is directed in part to ensuring that the requirement enshrined in the Charter of Justice that persons admitted to practice as solicitors be fit and proper persons or, in the language of s16 of the Legal Profession Act 1987, of good fame and character is maintained. It follows that if a solicitor is shown not to be a fit and proper person he or she should be removed from the roll. The order for removal is not punitive but protective. Accordingly it is no answer for the solicitor to say that he or she has already been punished for the conduct which shows unfitness.

But the supervisory jurisdiction of the Court and the Tribunal is also directed to protecting the public more generally by maintaining and encouraging appropriate standards of professional behaviour."

26. At page 8 his honor went on and said

"When the jurisdiction of the Tribunal is invoked under Pt 10 Division 7 of the Act to conduct a hearing into a complaint of professional misconduct by a legal practitioner, the primary consideration is to protect the public, by preventing a person unfit to practice from holding himself or herself out to the public as a legal practitioner in whom members of the public might repose confidence. But the tribunal must also act so as to deter the offender in the future and any other practitioner minded to behave in like manner. In the

case of a solicitor these elements together or separately may call for the removal of the solicitors name from the roll or the imposition of a substantial fine. Subjective considerations which would mitigate the sentence imposed by a criminal court may be significant if the protective exercise being undertaken by the tribunal requires that they be taken in to account"

27. *When considering the purpose of the Court's jurisdiction in matters such as this the NSW Court of Appeal in NSW Bar Association v Hannan [1999] NSWCA 404 at 73 and onwards Mason P. said:*

"The facts of Ziems are totally removed from the present case. Ziems undoubtedly establishes that conviction and sentence are, not necessarily determinative. The court must look at the true fact But nothing In the judgments cast dou[b]t upon the earlier decision of In re Davis [1947] HCA 53; (1947) 75 CLR 409, in which Dixon J, with whose reasons Williams J agreed, said (at 420):

"The Bar is no ordinary profession or occupation. The duties and privileges of advocacy are such that, for their proper exercise and effective performance, counsel must command the personal confidence, not only of lay and professional clients, but of other members of the bar and of judges. It would almost seem to go without saying that conviction for a crime of dishonesty of so grave a kind as housebreaking and stealing is incompatible with the existence in a candidate for admission to the bar of the reputation and the more enduring moral qualities denoted by the expression 'good frame and character, which describes the test of his ethical fitness for the profession".

28. Later at paragraph 117 and onwards Davies MA said:

"The objective of disciplinary proceedings is the protection of the public and the maintenance of proper standards in the legal profession. In the Southern Law Society v Westbrook [1910] HCA 31; (1910) 10 CLR 609 at 619, O'Connor) said that:

"... the court in maintaining a solicitor on the roll Is holding out to the public that he is a fit and proper person to be entrusted by the public with those difficult and delicate duties and that absolute confidence which the public must repose in persons who fulfill the duties of solicitors."

In incorporated Law Institute of NSW v Meagher [1909] HCA 87; (1909) 9 CLR 655 at 681, Isaacs J said:

"There is therefore a serious responsibility on the Court a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to

that credential. It is not a question of what he has suffered in the past; it is a question of his worthiness and reliability for the future."

At least in cases where the practitioner has undergone punishment under the criminal law, the function of the court is not to punish the practitioner but to protect the public by maintaining standards in the profession. *In the New South Wales Bar Association v Evatt (1968) 177 CLR 177 at 183-4, the court said*

> *"**The power of the court to discipline a barrister is, however, entirety protective, and not withstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved.**" (Emphasis provided)*

In Ziems v The Prothonotary of the Supreme Court of NSW [1957] HCA 46; (1957) 97 CLR 279 at 297-8, Kitto J summarized the approach in this way:

> *"The issue is whether the appellant is shown not to be fit and proper person to be a member of the Bar of New South Wales. It is not cable of more precise statement. The answer must depend upon one's conception of the minimum standards demanded by a due recognition of the peculiar position and functions of a barrister in a system which treats the bar as in fact, whether or not it is also in law, a separate and distinct branch of legal profession. It has been said before and in this case the Chief Justice of the Supreme Court has said again, that the bar is no ordinary profession or occupation. These are no empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his clients confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow members of the bar, in the high task of endeavoring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. if a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the bar. Yes it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the bench and the bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that Judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the bar entails. But it will be generally agreed that there are many*

kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which did not spell unfitness for the bar; and to draw the dividing line is by no means always an easy task."

[42] Section 14 of the Constitution falls under the rights of accused persons. This section of course speaks of the plea of *autrefois acquit and convict.* By plea of autrefois convict, a defendant can claim that s/he was charged of the same crime under substantially same facts. A plea of *'autrefois acquit'* is *one* in which the defendant claims to have been previously acquitted for the same offence and thus should not be tried again.

[43] CAAF envisages to dealing with Mr Timothy's conviction of 29 contraventions of the ANR because the law permits them to do so. The statute (ANR 151) authorises CAAF to take certain action if any person is convicted of a contravention under the Regulation (ANR). Mr Timothy has been convicted of the 29 contraventions of ANR, which regulates Air Safety for the public interest. As a public functionary, CAAF is taking some action under ANR 151 as Mr Timothy has a conviction for 29 breaches of ANR. When CAAF as a regulatory body deals with the conviction, in my opinion, would not tantamount to being double jeopardy.

Directions and guidelines (Ground 2)

[44] Ground 2 deals with the directions and guidelines given in the judgment when remitting the matter back to the respondents re-investigate the issue of conviction. On this ground, the applicants challenges the directions and guidelines given in the judgment on the basis that the court has exceeded its jurisdiction in having allowed the judicial review and thereafter proceeding to give directions/recommendations as to how the respondents should deal with the first named applicant thereby usurping the role of the respondents and causing prejudice to the first named applicant.

[45] In support of ground 2, counsel for the applicants submits that the directions given by the court as to how the respondents should conduct the hearing and/or on what the hearing should be conducted went beyond to consider the matter in accordance with findings of the court. When the court actually made positive

comments it was no longer the decision of the decision maker the court had already made those decisions.

[46] Counsel for the respondents submits that the court has directed the respondents to follow and comply with ANR 151 (1) and has given guidance to the respondents in the manner in which the respondents should proceed. ANR 151 (1) by its wording alone requires the respondents to take action when an aviation holder get convicted of breaching the ANR. He further submits that the respondents, by virtue of ANR 53 (2) (b), is required to assess whether the first named applicant is a fit and proper person to hold such a licence when an application for renewal is lodged with the respondents.

[47] It was not is dispute that the court has power to issue directions and guidelines when it remit the matter for the respondents to go through the decision making process again after quashing the impugned decision.

[48] The court had not substituted as the applicants allege its own decision when giving directions and guidelines to the respondents. The court simply directs the respondents to go through the decision making process again and reach a decision within the bounds of the law. The directions and guidelines given in the judgment are beneficial to the applicant.

[49] Even in the absence of such directions and guidelines the respondents are required by the statute (151 (1) ANR) to take some action if a person is convicted of ANR breaches.

[50] I am of the opinion that the chance of success of ground 2 is diminutive.

Whether the successful party will be injuriously affected by the stay

[51] In fact, the successful party is the applicants. The decision that adversely affected Mr Timothy has been set aside. Currently, there is no adverse decision against the applicant. The question whether the successful party will be injuriously affected does not arise.

The *bona fide* of the applicants as to prosecution of the appeal

[52] This point was not in dispute. Therefore, further discussion on this point is not necessary.

The effect on third party

[53] It is submitted on behalf of the applicant that the applicant companies employees close to 80 people whose livelihood would be affected should the respondents suspend the first named applicant's licences by continuing its enforcement action under the ANR.

[54] The question of suspension does not arise as Mr Timothy's licence has expired. He has applied for renewal of his licence. Any decision that may be taken on his renewal application would be an appealable decision. He can move from there.

The novelty and importance of questions involved/the public interest in the proceedings

[55] Counsel for the applicants submits that the appeal raises both novel and important questions of law as it would determine the extent of directions or any direction ought to be given at all by a court to the original decision maker when ordering the decision maker to go through the decision making process afresh.

[56] When the court issue *certiorari* quashing the impugned decision, the court is empowered to remit the matter back to the decision maker with the direction to reconsider it and reach decision in accordance with the findings of the court (see HCR O 53, R 9 (4)). In my opinion, the issue whether or not the court could have made such directions is not a novel thing. The directions and guidelines given in the judgment would be beneficial to the applicant, for the court, by those directions, tells the respondents to act within the purview of the law that deals with any person's conviction of any aviation breach.

[57] In *Dorsami Naidu v Chief Registrar* [2011] FJCA 17; ABU0038.2010 (2 March 2011), the Court of Appeal held [at paras 21 and 37]:

"21. In judicial review cases where the administrative decision is claimed to be unlawful because of a mistake of law by the decision maker, the application may be dismissed at first instance. An appeal may be lodged and it may be said the issue of law is a matter of public interest and public importance. A stay may be applied for on the basis of this legal issue being one of public interest and importance.

...

37. I conclude that the chances of success of the Court of Appeal interfering with the findings and conclusions of the Commissioner are at best "arguable". They are well short of the special or exceptional chances required for a stay. In my opinion this application for a stay must be dismissed."

[58] In the case at hand, the applicants argued that the grounds of appeal as set out by them raise some questions of importance and public issue. However, the chances of success, in my view, are unlikely.

Balance of Convenience

[59] There is no adverse decision against the first named applicant as the impugned decision that affected his right of having an aviation licence. The question of balance convenience does not arise.

Conclusion

[60] Having considered all the affidavits evidence adduced by the parties and submissions made by their counsel, both oral and written, I come to the following conclusion.

[61] Currently, there has been no adverse decision against the first named applicant. His current pilot's licence has expired. He has made an application for its renewal. The respondents are yet to take a decision on his renewal application. Even if the respondents take an adverse decision in view of his 29 convictions, he will have his right to challenge it through other avenues.

[62] The stay would effectively preclude the respondents from exercising their statutory function permitted under ANR 151 (1). It is for the public interest the respondents should dealt with the conviction of the first named applicant as ordained in 151 (1) ANR.

[63] I am of the opinion that the appeal, especially on the ground that the court erred in fact and in law in giving directions and guidelines as to how the respondents should deal with the first named applicant's conviction, is unlikely to succeed in appeal to the Court of Appeal.

[64] In the circumstances, I would refuse to grant a stay pending appeal and order the applicants to pay the costs of these proceedings to the respondents, which is assessed at $600.00, within 21 days.

The result

1. Stay pending appeal refused.
2. Applicants shall pay summarily assessed costs of $600.00 to the respondents within 21 days.

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M. H. Mohamed Ajmeer

JUDGE

HIGH COURT OF FIJI LAUTOKA

At Lautoka

21 February 2019

Solicitors:

For the applicants: M/s A K Lawyers, Barristers & Solicitors

For the respondents: M/s Patel & Sharma, Barristers & Solicitors