

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 06 of 2020

IN THE MATTER of an application by **SUSHILA**
S.KRISHNASWAMY for Judicial Review under Order 53 of
the High Court Rules 1988

-and-

IN THE MATTER of an application by Sushila S. Krishnaswamy for a Judicial Review and within other reliefs including an Order of Certiorari, to quash the Decision purported to be made by the **DIRECTOR OF IMMIGRATION** and/or **THE PERMANENT SECRETARY FOR IMMIGRAITON** on or about 24th March, 2020.

BETWEEN:

SUSHILA S. KRISHNASWAMY

APPLICANT

AND:

1. THE PERMANENT SECRETARY FOR IMMIGRATION

2. DIRECTOR OF IMMIGRATION

3. THE ATTORNEY-GENERAL OF FIJI

RESPONDENTS

Counsel

Applicant: Mr Toganivalu. D
Respondents: Ms Solimailagi. O & Ms Ali. N

Date of Hearing

: 09.08.2020

Date of Judgment

: 19.11.2020

JUDGMENT

INTRODUCTION

1. This is an application seeking leave for judicial review. Applicant was a Vice Chancellor, of a University in Fiji. She was not a citizen of Fiji and was a permit holder pursuant to

her employment contract for inter alia, to work and to reside in Fiji, issued by second Respondent for three years from 26.7.2019. Applicant had left Fiji on or around 22.3.2020, during a partial lockdown was in operation in Greater Lautoka area where she worked and or resided. She had remained, overseas since then, and was declared a 'prohibited immigrant' for indefinite period by Prime Minister who is the Minister in charge of Immigrations in terms of Section 13(2)(g) of Immigration Act 2003. Respondents objected to the jurisdiction of court in terms of Section 173(4)(d) of Constitution of the Republic of Fiji. Immigration Act (Amendment) Promulgation 2008 (Promulgation No 3 of 2008) amended Section 13(2)(g) of Immigration Act 2003, which made a decision of Minister in terms of said provision of law be "*final and conclusive and shall not be questioned or reviewed in any court*". Such an ouster clause in any Act of parliament does not oust jurisdiction for Judicial Review, but Court of Appeal in One Hundred Sands Ltd v Attorney General of Fiji [2017] FJCA 19; ABU27 & ABU31.2015 (decided on 23 February 2017) Full Court held that jurisdiction for leave to appeal for Judicial Review is excluded in terms of Section 173 of Constitution of the Republic of Fiji of all decisions irrespective of any time restriction, covered under a Decree or Promulgation etc. made during the period stated therein. (i.e. 5.12.2006 to 6.10.2014). The decision taken under Section 13(2)(g) of Immigration Act 2003, was a decision taken in terms of Promulgation No 3 of 2008, and it introduced ouster clause of Section 13(2)(g) of Immigration Act 2003. The Court of Appeal held that all decisions taken in terms of Decree, Promulgation etc. are excluded from jurisdiction of court, even without ouster clause, irrespective of time such decisions. In terms of that decision, irrespective of there is an ouster clause such as Section 13(2)(g) of Immigration Act 2003 introduced by Promulgation No 3 of 2008, or not, jurisdiction of court for judicial review of any decision taken, under Section 13(2)(g) of Immigration Act 2003, is manifestly, ousted from court. When the Applicant was declared a person who was prohibited immigrant, in terms of Section 13(2)(g) of Immigration Act 2003, such person cannot enter to Fiji lawfully in terms of Section 13(1)(b) of Immigration Act 2003 or reside lawfully in Fiji if already within the country. In the circumstances her permit to reside in Fiji was overridden by said pronouncement made '*notwithstanding*' other provisions in Immigration Act 2003. Hence in spite of Applicant's permit issued under Immigration Act 2003, pursuant to her employment contract, she remained a 'prohibited immigrant'. So no leave for judicial review is granted regarding cancellation of permit, which was superfluous. There cannot be a valid permit to remain in Fiji once that person is declared a 'prohibited immigrant' and permission to reside *ipso facto* invalid. Leave for judicial review is refused for want of jurisdiction in terms of Court of Appeal decision which interpreted Section 173 of Constitution of the Republic of Fiji.

FACTS

2. On the 24.5.2019, the Applicant had accepted the offer and the terms and conditions of her employment contract to be Vice Chancellor of a University in Fiji.
3. On 26.7.2019, the Applicants contract for the position of Vice Chancellor at the

University commenced.

4. On 17.9.2019, the Department of Immigration had written a letter to the Council of the University approving their application for the Applicant's work permit for a period of three years. On that permit Applicant resided in Fiji and worked in terms of her employment contract.
5. Applicant left Fiji on or around 22.3.2020 when there was partial lockdown of Greater Lautoka area due to a pandemic caused by COVID 19. Restriction of movement of people were imposed to curtail the spread of pandemic.
6. On 19.3.2020, the Prime Minister, made a public announcement that the greater Lautoka area would be on lockdown from 20.3. 2020 due to the first COVID-19 patient in Lautoka Hospital.
7. On 24.3.2020, the Applicant had been informed by the Pro Chancellor of the University of Fiji, who had received a letter from Second Respondent, that her work permit had been cancelled and that she had been declared a prohibited immigrant for an indefinite period in terms of Section 13(2)(g) of Immigration Act 2003.
8. The Applicant filed this application for leave to apply for Judicial Review pursuant to Order 53 Rule 3 of the High Court Rules 1988 on 24.6.2020. The Applicant was seeking the following reliefs in prospective juridical review and leave was sought for that,
 - a) "An order for *Certiorari*, to remove the said decision of the Respondents whereby they purported to cancel the work Permit of SUSHILA S. KRISHNASWAMY on 24th March, 2020 as the Vice Chancellor of University of Fiji, and the same be quashed.
 - b) An order for *Certiorari*, to remove the said decision of the Respondents whereby they purported to classify the Applicant as a Prohibited Immigrant to Fiji for an indefinite period without consultation, and the same be quashed.
 - c) A declaration, in any event that the Respondents jointly and/or severally exceeded and/or did not properly exercise their jurisdiction and/or acted *ultra vires* and/or made errors of law and/or acted unreasonably and/or irrationally and/or acted in breach of the legitimate expectations of the Applicant in purporting to cancel the work permit and classifying her as a Prohibited Immigrant to Fiji for indefinite period on the ground of breaching the work permit conditions.
 - d) An order for *Mandamus* that the Respondents by itself, its servants and/or agents commences the proceedings against the Applicant to prove the claim

and whether the Applicant was charged and on what grounds the work permit was cancelled and the Applicant was banned from Fiji.

e)”

ANALYSIS

9. This application is supported by the Affidavit of Applicant sworn and filed on 24.6.2020. The Applicant also filed an Affidavit in Reply of Sushila S. Krishnaswamy sworn and filed on 30.7.2020. Respondent filed an affidavit in opposition 23.7.2020.
10. Applicant in the affidavit in support at paragraph 13 admitted that she heard Prime Minister in his 2pm announcements that she was prohibited from entering Fiji.
11. Prime Minister in terms of Ministerial Assignment published on Government Gazette of 23.1.2019 was the minister in charge of the subject of Immigration under which the Department of Immigration functions.
12. Apart from her first-hand experience in listening to Prime Minister’s announcements on 23.3.2020, she was notified by an email from Pro Chancellor of the University, that she was declared a ‘prohibited immigrant’ in terms of Section 13(2)(g) of Immigration Act 2003 from a letter of second Respondent. This letter of second Respondent was dated 24.3.2020, a day after Minister for Immigration, had publicly announced Applicant as a person prohibited from entering Fiji.
13. Letter of second Respondent, received by Applicant through an email, was issued *inter alia* stated that Applicant was declared as ‘prohibited immigrant’ in terms of Section 13(2)(g) of Immigration Act 2003.
14. Section 13(2)(g) of Immigration Act 2003 was amended by Immigration Act (Amendment) Promulgation 2008 (i.e Promulgation No 3 of 2008) which was gazetted on 26.2.2008.
15. Accordingly a decision taken in terms of Section 13(2)(g) of Immigration Act 2003, was a decision taken in terms of Promulgation No 3 of 2008.
16. Decisions taken in terms of Promulgations, Decrees, Declarations etc made during 5.12.2006 to 14.10.2014 are ousted from the jurisdiction of Courts in terms of Section 173(4)(d) interpreted by Full Court of Court of Appeal.
17. Section 173 of the Constitution of the Republic of Fiji states

“(4) Notwithstanding anything contained in this Constitution, no court or tribunal

(including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy, in any proceeding of any nature whatsoever which seeks or purports to challenge or question-

(a) the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;

(b) the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;

(c) any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, for being inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution; or

(d) any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.”

18. Court of Appeal in *One Hundred Sands Ltd v Attorney General of Fiji* [2017] FJCA 19 held, that ouster of jurisdiction in terms of Section 173(4)(d) of Constitution of the Republic of Fiji applies to decisions taken after first sitting of Parliament under this Constitution. This means all decisions taken without any time restriction are ousted from jurisdiction of judicial review by courts.
19. This means that jurisdiction for judicial review is permanently ousted for decisions taken in terms of Promulgation, Decree or Declaration etc made between 5.12.2006 to 14.10.2014, which was the date of first parliament, under ‘this Constitution’.
20. Section 13 (2)(g) was amended by Promulgation No 3 of 2008. This introduced an express ouster clause which reads

‘Provided that notwithstanding anything contained in this Act, the decision of the Minister made under this paragraph shall be final and conclusive and shall not be questioned or reviewed in any court.’

21. Applicant was declared a prohibited person in terms of Section 13(2)(g) by Minister in charge of the subject of Immigration through public announcement . This is an undisputed fact (see paragraph 13 of affidavit in support), on 23.3.2020 and this was informed through a letter on following day on 24.3.2020 by second Respondent.
22. In terms of Court of Appeal decision One Hundred Sands (supra), all decisions made pursuant of a Promulgations made between 5.12.2006 to 14.10.2014 are ousted from jurisdiction of judicial review. So the decision taken under Section 11(2)(g) of Immigration Act 2003 cannot be separated from Promulgation No 3 of 2008.
23. Promulgation No 3 which amended Section 11(3)(g) of Immigration Act 2003, introduced an ouster clause to any decision taken in terms of said provision of law.
24. Promulgation No 3 of 2008 was published in government gazette on 26.2.2008 and it was signed on 26.2.2008 by the President, hence any decision taken in terms of such promulgation is ousted from scrutiny through judicial review , in the application of ratio of Court of Appeal decision in One Hundred Sands (supra)
25. Court of Appeal in One Hundred Sands (supra) Full Court (Chandra JA Dr. Guneratne JA, Lechamwasam JA) held that Section 173 of Constitution of the Republic of Fiji, ‘*provides for the exclusion of jurisdiction in the widest possible terms*’. Accordingly, there is no restriction to time of the making of decision in order to be ousted from jurisdiction of courts.
26. In the circumstances when the Promulgation itself contains ouster of jurisdiction, any decision made in terms of Section 13(2)(g) of Immigration Act 2003 is excluded from judicial review .
27. In this instance Section 13(2)(g) expressly oust the jurisdiction of court.
28. Section 13 (2)(g) of the Immigration Act 2003, states:

(1) A person who-

(g) a person who prior to or after entry into Fiji, as a result of information received from any country through official or diplomatic channels, or from any other source the Minister considers reliable, **is deemed by the Minister to be a person who is or has been conducting himself or herself in a manner prejudicial to the peace, defence, public safety, public order, public morality, public health, security or good government of Fiji provided that and notwithstanding anything contained in this**

Act, the decision of the Minister made under this paragraph shall be final and conclusive and shall not be questioned or reviewed in any court:" (emphasis added)

29. The Applicant states at paragraph 13 of her Affidavit in Support that she heard the Prime Minister publicly announce that she was banned from Fiji, on 23.3.2020. The decision to ban the Applicant from Fiji which was publicly announced was also supported by the Prime Minister's written statement which was also released on 23.3.2020 which was annexed to the affidavit in opposition. Prime Minister had strongly expressed his displeasure of the conduct of certain peoples who violated emergency lockdown measures. They were to contain the spread of pandemic and had mentioned about Applicant as VC of University, and had warned that strict punishment for all such violators including her.
30. This gives a clear indication to masses that all violators of emergency measures imposed, would be dealt severely, irrespective of the status of such people.
31. Such measures cannot be considered unreasonable considering the highly contagious nature of the pandemic and its global impact on health and economy of a country. These are policy decisions left for the government of the day, in order to protect the citizens, and economy of the country.
32. At paragraph 9 of the Affidavit in opposition of first Respondent stated he was advised by the Prime Minister on 23.3.2020, that the Applicant was banned from coming back into Fiji.
33. In terms of admissions by Applicant contained in paragraph 13 of the affidavit in support and also above statements contained in the affidavit in opposition of first Respondent there is no merit in the argument that Minister in charge of the subject of Immigration had not taken a decision in terms of Section 13(2)(g) of Immigration Act 2003 to declare Applicant as prohibited person.
34. The Prime Minister, in his capacity as the Minister responsible for the Immigration Act 2003, considered the Applicant's conduct as a person who had acted in a manner prejudicial to the public safety and public health of Fijians.
35. This means that the Applicant became a 'prohibited immigrant' by virtue of being deemed to have conducted herself in manner prejudicial to the public safety and public health of Fijians, by the Prime Minister pursuant to section 13(2)(g) of the Immigration Act 2003.
36. The Prime Minister's decision to declare the Applicant as prohibited immigrant, pursuant to section 13(2)(g) of the Immigration Act 2003, is in spite of all other provisions contained in Immigration Act 2003. This is '*non obstinate*' provision, which means that

- Section 13(2)(g) of Immigration Act 2003 takes precedence or priority over all other provisions in Immigration Act 2003. So in a case of conflict, any consequence from this provision shall take effect, over any other provisions in said Act.
37. The importance with non-obstinate nature of Section 13(2)(g) of Immigration Act 2003, is that decision taken under said provision overrides in a conflict over any other provision under same Act. This is relevant to this application as Applicant had a permit issued under provisions other than *non obstinate* provision and she is alleging procedural impropriety as to the cancellation of her permit.
38. In my mind this is not an issue as by virtue of declaration in terms of Section 13(2)(g) of Immigration Act 2003, any permission to remain and or enter Fiji becomes ineffective and inoperative and there is no requirement to cancel the permit granted to Applicant in terms of Immigration Act 2003.
39. If such cancellation of permit allowed or is attempted it would directly conflict with declaration already made in terms of Section 12(2)(g) of Immigration Act 2003. In my mind the permit of the Applicant was overridden by declaration of 'prohibited immigrant' which is the highest form of ban under Immigration Act 2003 to restrict a person from either entering and or staying in Fiji.
40. Decision in terms of Section 13(2)(g) of Immigration Act 2003, is not affected by anything else in the Immigration Act including the procedural requirements under section 11 of the Immigration Act which is the basis of the Applicant's Leave Application is premised.

CONCLUSION

41. This court's jurisdiction to review is ousted to any decision taken under Promulgation made during 15.12.2006 to 14.10.2014 in terms of Court of Appeal (Full Court) *One Hundred Sands* (supra). Promulgation 3 of 3008 expressly ousted jurisdiction of court regarding decision taken in terms of Section 13(2)(g) of Immigration Act 2003. This Promulgation was made between the relevant time, stated above. When a person is declared a prohibited person in terms of Section 13(2)(g) that person cannot remain in Fiji irrespective of having a valid permit in terms of Immigration Act 2003. Section 13(2)(g) of Immigration Act 2003 overrides all the other provisions of the said Act. So once a person is declared a prohibited immigrant in terms of Section 13(2)(g) of Immigration Act 2003 any permission granted under Immigration Act 2003 to remain in Fiji becomes ineffective hence the cancellation of permit granted to Applicant is superfluous. Hence the process followed in cancellation of permit of Applicant cannot be challenged through judicial review. It was a *fiat accompli* once the Applicant is declared a prohibited person. Hence application seeking leave for judicial review is refused. Considering circumstances of the case I do not award any costs.

FINAL ORDERS

- a. Leave for Judicial Review is refused in *limine* for lack of jurisdiction.
- b. No costs.

Dated at Suva this 19th day of November, 2020.



.....
Justice Deepthi Amaratunga
High Court, Suva