

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Judicial Review No. HBJ 5 of 2025

BETWEEN : BARBARA PAULINI BRIAR MALIMALI
Applicant

AND : THE PRESIDENT OF THE REPUBLIC OF FIJI
First Respondent

THE PRIME MINISTER OF THE REPUBLIC OF
FIJI
Second Respondent

THE ATTORNEY-GENERAL OF FIJI
Third Respondent

Appearances : Ms T Waqanika & Mr S Savu for the Applicant
Mr E Tuiloma, Ms G Naigilevu & Mr P Nawaikula for
the Respondents

Hearing : 14 July 2025

Judgment : 21 July 2025

JUDGMENT

(Application for Leave for Judicial Review under O.53, r.3)

- [1] The applicant, Ms Barbara Malamali, has had her appointment as Commissioner of Fiji Independent Commission Against Corruption (FICAC) revoked. The revocation was communicated to Ms Malimali on 2 June 2025 (**the decision**). The decision was made by His Excellency the President of the Republic of Fiji (**the President**) on advice from

the Honourable Prime Minister of the Republic of Fiji (**the Prime Minister**). Ms Malimali seeks judicial review of the decision.

- [2] Ms Malimali must first obtain leave of the Court to apply for judicial review under O.53, r.3 of the High Court Rules 1988. The question for determination is whether leave should be granted and if so granted whether the applicant is entitled to a stay on the decision.

Background

- [3] On 4 September 2024, Ms Malimali received a letter from the President appointing her Commissioner of FICAC. The letter of appointment expressly stated that the appointment was made by the President *‘in exercise of powers granted to me by Section 5 (1) and (3) of the Fiji Independent Commission Against Corruption Act 2007 and Chapter 5, Part B, Section 115 (12) of the Constitution and having received the recommendation of the Judicial Services Commission, after it had consulted the Attorney General’*. The Terms and Conditions of her appointment were annexed to the letter and included at clause 7, *‘Removal for Cause: Procedure for removal of Commissioner shall be the same as what is prescribed for removal of Judges in Section 112 of the Constitution of the Republic of Fiji’*. It appears that Ms Malimali commenced work as the Commissioner about this time.
- [4] In or about October 2024, a Commission of Inquiry was established by the President to inquire into the appointment of Ms Malimali. Justice David Ashton-Lewis¹ was appointed Commissioner of the Commission of Inquiry. The hearings commenced in January 2025 and a report was subsequently prepared by the Commissioner and presented to the President in May 2025.
- [5] On 29 May 2025, Ms Malimali received a letter from the President. The letter read in part:

Pursuant to sections 81(2) and 82 of the Constitution of the Republic of Fiji (‘Constitution’) and upon receipt of the advice of the Honourable Prime Minister, you are hereby suspended forthwith, with pay as Commissioner of the Fiji Independent Commission Against Corruption (FICAC), pending investigations by the Fiji Police Force into allegations raised against you in the

¹ Justice Ashton-Lewis is on Fiji’s Supreme Court.

Final Report of the Commission of Inquiry appointed to enquire into your appointment as FICAC Commissioner.

- [6] Ms Malimali deposes in her affidavit dated 4 June 2025 that she learned on social media on 2 June 2025 that her suspension had been rescinded and her appointment as Commissioner had been revoked. Later the same day, in the evening, a decision letter was delivered to Ms Malimali's solicitor formally advising her of the revocation. The letter from the President dated 2 June 2025 reading:

My letter to you dated 29 May 2025 was sent to you in error and is to be disregarded and replaced with this letter.

Pursuant to sections 81(2) and 82 of the Constitution of the Republic of Fiji ('Constitution') and upon receipt of the advice of the Honourable Prime Minister, your appointment as Commissioner of the Fiji Independent Commission Against Corruption (FICAC) is hereby revoked with immediate effect.

- [7] Two days after receiving the revocation letter, Ms Malimali filed the present proceedings seeking leave to apply for judicial review of the decision.

The present proceedings

- [8] Ms Malimali has filed a Notice of Motion, Application and supporting affidavit in support of leave to apply for judicial review. In her supporting affidavit, Ms Malimali deposes that her suspension and termination were unlawful as only the Judicial Services Commission (JSC) are authorised to advise the President on such matters, not the Prime Minister. She also claims that she has been denied natural justice. Ms Malimali states that at the time of filing these proceedings she had not yet been provided with a copy of the Report of the Commission of Inquiry and not provided any opportunity to respond to the findings or allegations against her. She states that the public termination of her employment, on social media, has caused her substantial reputational and emotional harm and led to cyber bullying.
- [9] The relief sought by Ms Malimali from the judicial review proceedings are orders quashing the revocation decision, a declaration that the revocation is unlawful, reinstatement to her position as Commissioner of FICAC, and damages.

- [10] On 10 June 2025, Ms Malimali filed a Supplementary Affidavit in respect to interviews conducted by Justice Ashton-Lewis for an Australian radio station on 29 May and 6 June 2025. The Commissioner was speaking about the Commission of Inquiry and his report for the President. A number of remarks by the Commissioner are set out in Ms Malimali's affidavit. Mr Malimali contends that the remarks raise questions about a number of matters pertaining to the Commission of Inquiry and the Commissioner, including the Commissioner's impartiality.
- [11] The respondents filed a Notice of Opposition on 12 June and an affidavit in opposition for Josefa Mainavolau² on 27 June. Mr Mainavolau denies a number of assertions in Ms Malimali's original affidavit³ and contends that the President did have power to revoke Ms Malimali's appointment on the advice of the Prime Minister.
- [12] Ms Malimali filed an affidavit in reply on 4 July 2025.

Hearing of application for leave to apply for Judicial Review

- [13] On the morning of the hearing, the respondents filed a summons to vacate the hearing. The supporting affidavit deposed to the fact that the parties were '*currently engaged in discussions with a view to amicably settle the matter*'. The respondents sought an adjournment for 1 month to permit the settlement discussions to continue.
- [14] Ms Waqanika informed the Court that the applicant did not consent to any application to vacate the hearing. She confirmed that the parties had had settlement discussions but indicated that these communications had not borne fruit. As the applicant did not consent to any adjournment, I declined the respondent's application.

Decision

- [15] Pursuant to Order 53, rule 3(2) and (3) an applicant must file a notice in Form 32 seeking leave to apply for judicial review. Subrule (5) provides that leave shall not be granted unless '*the applicant has a sufficient interest in the matter to which the application relates*'.

² A State Solicitor with the Attorney-General's Office.

³ He does not address Ms Malimali's supplementary affidavit.

[16] In *Nair v Permanent Secretary of Education* [2008] FJHC 140 (11 February 2008) Scutt J set out the considerations for the court to consider for the grant of leave at 4:

In an application for leave to apply for judicial review, the Court must ask:

- *Does the applicant have sufficient interest in the application;*
- *Is the decision susceptible to judicial review – that is, is it of a private or public nature;*
- *Is the decision non-reviewable in accordance with the terms of the **Public Service Act 1999**;*
- *Are alternative remedies available to the applicant and, if so, have they been pursued by the applicant;*
- *Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case.*

[17] In *Sharma v The President of the Republic of Fiji* [2023] FJHC 18 (26 January 2023) Amaratunga J discussed in more detail what sufficed in respect to demonstrating an arguable case. His Lordship stated:

13. *In Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 643–644 held, (Per Lord Diplock)

“The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into matter at any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him, leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which is it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”

14. *In this application Applicant is not only seeking to review the final decision that terminated him from his post but also five additional decisions relating to the same process of termination taken before he his termination.*

15. *In Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations (Civil Appeal No. ABU59u of 1997s, 27 .2. 1998), the Court of Appeal, held,*

“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..”

16. *Supreme Court in Matalulu v Director of Public Prosecutions [2003] FLR 129, (at pages 144-145) held that:*

“It is not an occasion for a trial of issues in the proposed proceedings. That having been said, the judge considering the grant of leave is entitled to have regard to a variety of factors relevant to the purpose of the rule, these include:

- (1) Whether the proposed application is frivolous or vexatious or an abuse of the process of the court.*
- (2) Whether the application discloses arguable grounds for review based upon facts supported by affidavit.*
- (3) Whether the application would serve any useful purpose, e.g. whether the question has become moot.*
- (4) Whether there is an obvious alternative remedy such as administrative review or appeal on the merits which has not been exhausted by the applicant.*
- (5) Whether a restrictive approach to the grant of leave is warranted because the decision is one which is amenable to only limited judicial review.”*

Further held,

“But where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are manifestly untenable, then leave should not be granted.”(emphasis added)

17. *Accordingly the factors to be taken in to consideration at the stage of leave seeking judicial review cannot be precisely stated but, the guiding principle is that leave should be refused when there is no prospect of success at the hearing such as untenable legal argument on the face of it and it would be waste of time and resources to grant leave for judicial review.*⁴

Application for leave to apply for judicial review

- [18] The respondents accept that Ms Malimali has sufficient interest in the application and that there is no obvious alternative remedy. The only matter for the Court to consider in respect to whether Mr Malimali ought to be granted leave to apply for judicial review, is whether the applicant has an arguable case. Are the applicant’s legal and factual assertions manifestly untenable? Am I able to conclude on the material before me that she has no prospect of success?
- [19] The substantive issues that arise in this case are:
- i. Whether the President was permitted to revoke Ms Malimali’s appointment on the advice of the Prime Minister? The applicant frames this question on the basis that her employment was terminated – she relies on clause 7 of her terms and conditions. The respondents, however, draw a distinction between termination and revocation of appointment, contending that the latter occurred here.
 - ii. Whether Ms Malimali was denied natural justice prior to the decision of 2 June 2025?

⁴ My emphasis.

- iii. Whether the Prime Minister acted reasonably, when advising the President, in reliance on the findings and recommendations of the Report of the Commission of Inquiry?

- [20] Section 82 of the Constitution prescribes where the President may exercise his powers. The President *'acts only on the advice of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case'*.
- [21] Section 5 of the Fiji Independent Commission Against Corruption Act 2007 provides that the Commissioner is appointed by the President on advice from JSC following consultation by JSC with the Attorney-General.
- [22] The respondents accept that the President is not empowered to unilaterally revoke the appointment of a Commissioner for FICAC. The respondents argue that *'ordinarily'* the President *'must act only on a valid recommendation from the JSC'*. That appears to be common ground between the parties although the applicant argues that the President must act on the advice/recommendation of JSC in every case – in other words there is no exceptions.
- [23] The respondents argue that the President was permitted here to act on the advice of the Prime Minister. The reasoning for this proposition appears to be as follows:
- i. The findings and recommendations of the Commission of Inquiry justified the revocation of Ms Malimali's appointment as Commissioner.
 - ii. The Commission of Inquiry also raised concerns about JSC such that *'JSC was constitutionally paralyzed'*.
 - iii. In such circumstances, the Prime Minister was a *'legitimate temporary substitute'* for JSC.
 - iv. The wording of s 82 of the Constitution permitted the Prime Minister to stand in the shoes of JSC in such circumstances. The respondents rely here on the principle of constitutional necessity.

- v. The fact of the Commission of Inquiry, and its hearings, afforded Ms Malimali her opportunity to be heard.

[24] I need not decide the substantive issue at this time. It suffices that the applicant demonstrate that she has an arguable case. I am satisfied that she does. A plain reading of the legislation confers the power on JSC to advise the President on the appointment of the Commissioner of FICAC. It naturally follows that revocation of the appointment must also be on the advice of JSC. The respondent argue that the particular circumstances here permitted the Prime Minister to stand in the shoes of JSC and instead advise the President. There is, however, no express provision to this effect.

[25] The applicant's case is, at least, arguable and she should therefore have an opportunity to fully argue the matter. A further reason to grant leave is that the issue in this case is novel - it has not previously been determined by the judiciary.

Application for stay of decision of 2 June 2025

[26] On the granting of leave to apply for judicial review, where relief sought includes an order for certiorari, the Court has power to grant a stay of the decision that is the subject of the judicial review. Ms Malimali seeks a stay on the basis that the President and the Prime Minister have, allegedly, clearly acted unlawfully. She contends that if a stay is not granted she will continue to suffer the financial consequences of the alleged unlawful decision.

[27] In *Sharma v The President of the Republic of Fiji* (supra), the High Court was not prepared to grant a stay where the applicant had been suspended from his position as Solicitor General. Granting a stay in such circumstances runs the risk of the court interfering with the function of important institutions before the court is in receipt of all material information and before the court has made any substantive findings. I am not prepared to do so here.

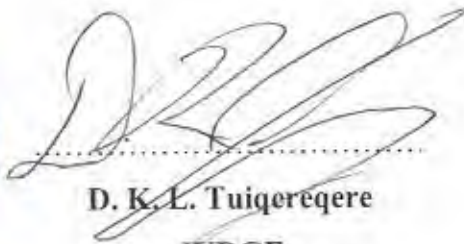
Orders

[28] Accordingly, my orders are as follows:

- i. Leave is granted to the applicant to apply for judicial review of the decision of 2 June 2025.

- ii. The application for stay of the decision of 2 June 2025 is declined.
- iii. The applicant is entitled to costs summarily assessed in the amount of \$1,500 to be paid by the respondents within 28 days.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Waqanika Law for the Applicant

Attorney General's Office for the First, Second & Third Respondents