

**STATE v FIJI MEDICAL COUNCIL, MINISTER OF HEALTH,
ATTORNEY-GENERAL**

ex-parte Mario Nagales Padua & Consuelo Arceo Padua

High Court Judicial Review Jurisdiction

Scott, J

19 May, 2000

HBJ 19/00S

Judicial Review – whether leave be given to review decision of Ministry of Health communicated to the Ombudsman not to reemploy applicants – whether leave be given to review decision of Fiji Medical Council as to registrability provided applicants could secure employment with Ministry of Health – whether rules of natural justice apply to applications for employment - High Court Rules O. 53 r.4

Injunction - whether applicants can remain in Fiji pending final determination of judicial review proceedings and proceedings for defamation – Immigration Act s18

The applicants sought an injunction restraining the Director of Immigration from expelling the applicants pending determination of judicial review against the Ministry's decision, and pending determination of defamation proceedings. The hearing of injunction was adjourned to enable counsel to file judicial review papers, and both matters were heard together. The plaintiff claimed two successful judicial review proceedings meant the Ministry had wrongly considered facts and matters relating to their earlier dismissal in deciding not to reemploy the applicants. The Court could not find that two other successful judicial review proceedings exonerated the applicants from charges brought against them. In argument, the applicants' counsel did not address the Court on the applicability of rules of natural justice in applications for employment and leave was granted on that ground. The applicants argued they should be allowed to stay in Fiji pending determination of proceedings and the outcome of their application to the Ministry for re-employment.

Held – (1) In the vexed circumstances of this case, the fact that the applicants did not commence within 3 months as required by the High Court Rules is not decisive;

(2) Where there is no duty on the Fiji Medical Council to register persons who are neither employed nor have a right to live in Fiji, and the applicants have not appealed the decision of the Fiji Medical Council, judicial review is not available;

(3) Where the applicants' prospects of re-employment with the Ministry of Health appear remote, the applicants have not appealed the Immigration Act and their defamation action lay dormant, there were no exceptional circumstances allowing the court to depart from the well established rule in immigration cases allowing unlawful immigrants a right to remain in Fiji.

a Application for leave to move for judicial review on the duty of an employer to a prospective employee adjourned, to allow the 2nd respondent to file an affidavit in answer. Leave of Fiji Medical Council decision is dismissed. Application for stay of Director of Immigration's deportation order is dismissed.

Cases referred to in Decision

follow *R v Chief Constable ex-parte Caverly* [1986] 2 WLR 11140

applied in *In Re: Cui Zhong Yi & Ors* [1997] HBJ 2/1997S unreported Decision of 31 January 1997

b *Samuela Matawalu for the applicants*
Sunil Kumar for the respondents

19 May, 2000.

DECISION

Scott, J

c The Applicants who are husband and wife both graduated with degrees in Medicine in the Philippines in 1970. In March 1994 they were recruited by the Ministry of Health in Fiji for contractual terms of 3 years and were posted to Labasa. They were both also issued certificates of registration by the Fiji Medical Council (the Council) for the terms of their appointment.

d In November 1995 the 1st Applicant was interviewed by the Labasa Hospital superintendent who told him that he had received a complaint against him. It appears that complaints were also made against the 2nd Applicant and the upshot was that on 6 March the Public Service Commission met to consider the complaints. On 13 March both Applicants were advised in writing that their services were to be terminated forthwith upon the payment of one month's salary in lieu of notice.

e Both Applicants brought proceedings for Judicial Review against the Minister of Health (the Ministry) which were ultimately successful. On 9 November 1998 Pathik J quashed the 2nd Applicant's dismissal (HBJ 10/96) while Fatiaki J quashed the 1st Applicant's dismissal on 11 June 1999 [HBJ 9/96]. No damages were awarded to the 2nd Applicant as she had been paid her full salary under the contract. The 1st Applicant, however, had not been paid for the period following his dismissal and he was awarded \$30,000 damages. Both contracts of employment expired on 23 March 1997.

f While the Judicial Review actions were proceeding both Applicants began investigating the possibility of being re-employed by the Ministry. On 30 November 1999, however, the Ministry wrote to the office of the Ombudsman which had been acting for the Applicants and advised it that it had been decided not to offer re-employment to the Applicants. That decision is the first decision upon which the Applicants in these proceedings seek leave to have judicial review.

g On 27 January 2000 the Director of Immigration gave the Applicants 14 days to leave Fiji. It is not disputed that they are both presently unemployed and neither holds any form of visa allowing them to continue to reside in Fiji.

On 22 February papers were filed (file No. HBC 67/2000) seeking an injunction restraining the Director of Immigration from expelling the Applicants "pending the determination of an application for Judicial Review". In a supporting affidavit the 1st Applicant explained that he had lodged an appeal to the Fiji Court of Appeal against the quantum of damages awarded to him by Fatiaki J and that there was a further action (75/95) pending in the High Court at Labasa in which he was the Plaintiff who was seeking damages for defamation connected with the allegations made against him which had led to his dismissal from his position at Labasa Hospital.

When Counsel appeared before me on 15 March Mr. Matawalu told me that the judicial review papers had not yet been filed but were to be filed that day. I adjourned the hearing of the application for an injunction to 16 May and also ordered that the judicial review leave application be heard on the same day. Although the two actions have not formally been consolidated they are closely related and accordingly it is more straightforward to give one written decision covering all the applications pending before me in both actions.

When the judicial review papers were filed on 26 April it emerged that the Applicants' were not only seeking review of the 30 November 1999 decision of the Ministry but were also seeking review or a decision of the Fiji Medical Council contained in a letter dated 6 March 00 (Exhibit T to the 1st Applicant's supporting affidavit) which is as follows:

"The Fiji Medical Council have further deliberated on the application (FMC meeting on 3/3/00) and have decided that Mr & Mrs (Drs) Padua are registrable provided they are able to secure employment with the Ministry of Health".

Two further important documents must now be noted. The first is a memorandum from the Ministry dated 8 March 00 which is Exhibit AS-1 to Ajay Singh's affidavit in opposition filed in 67/2000 (which strictly speaking is merely an interlocutory application unsupported by an action). The memorandum reads as follows:

"I am submitting a brief reply to a Court Order filed by from Mr. & Mrs. (Drs) Padua in response to their employment.

1. That the Ministry of Health is not liable and does not have any obligation to the employment of Mr. & Mrs. Padua after the decision of their judicial review and subsequent expiry of their contract in 1997.
2. That the Ministry of Health is not liable under any circumstances or on humanitarian grounds in the employment of Mr. & Mrs. Padua and this we have relayed to the Ombudsman Office.
3. That the reply to the Ombudsman Office was the decision of the Ministry of Health based on complaints received from the

Medical Superintendent Labasa Hospital for his poor work performance.

- a* 4. That based on the reports submitted by the Medical Superintendent Labasa Hospital and its own assessment of the case the Ministry of Health found it appropriate not to issue another contract to Mr. & Mrs. Padua.
- b* 5. That the Fiji Medical Council have met and decided that Mr. & Mrs. Padua are registrable (temporary and non-residen) provided they can secure employment with the Ministry of Health and at the same time obtain work permit.
6. That the Fiji Medical Council have met and their decision are given at item 5.”

c The second document is another memorandum from the Ministry dated 5 May 00 which confirms that the Applicant's have applied for vacant posts advertised by the Ministry (apparently at Lautoka Hospital) and that their applications are currently under consideration. The memorandum reads as follows:

“I refer to your recent enquiry concerning the Paduas' application for employment.

d We confirm that Dr. Padua have applied for the vacancies which was advertised in the local newspaper and Fiji Public Service Official Circular.

e Before any decision can be finalised about the officers application they are normally required to undergo a vigorous screening and short listing, a process where the most suitable applicant are selected.

f Normally the process will involve short listing of applicants to select the most qualified and meritorious officer. After this is done, it is then submitted to the Ministry of Health Staff Board for their assessment. After they (Staff Board) have analysed all the applicants they are then required to decide and submit their recommendation to the Permanent Secretary for Health for his endorsement and subsequently to the Public Service Commission and Honourable Prime Minister for his approval.

This whole process will take about 2 to 3 months at the most.

g I do hope these explanations would assist you in deliberating on Pr. Padua's case.”

Given the complex grounds to this litigation it will be convenient to summarise the three issues which are all contested and which now call for decision.

The first is whether the Applicant's should be given leave to move for judicial review of the Ministry's decision communicated to the Ombudsman on

30 November 1999 not to offer them re-employment.

The second is whether the Applicant's should be given leave to move for judicial review of the Council's determination on 6 March 00 that they were registrable provided they could secure employment with the Ministry. a

Third is whether the Applicant's should be allowed to remain in Fiji until the final determination or these judicial review proceedings and any appeals there from and the proceedings for defamation pending in the Labasa High Court.

On the first issue the Applicant's case is that the effect of the successful judicial review proceedings before Pathik J and Fatiaki J was to exonerate the Applicants of the charges against them which led to their dismissals from Labasa Hospital. It is said that the Ministry wrongly considered the allegations made against the Applicants when it decided not to offer them re-employment and that therefore the decision to refuse them re-employment was unfair and should be quashed. b

On the papers before me it is impossible to decide whether the Applicant's submission is well founded. This is because neither the Ministry's letter of 30 November 1999 (Exhibit B to the 1st Applicant's supporting affidavit in HBC 67/2000) nor the memorandum of 8 March 00 (set out above) specify precisely which facts and matters adverse to the Applicant's were considered by the Ministry nor whether those were the same facts and matters which led to the original decision to terminate their employment. c

Mr. Kumar also pointed out that the application for leave is out of time and that no excuse was offered for not commencing the proceedings within the 3 months required by RHC O 53 r 4. While Mr. Kumar is undoubtedly correct I do not think, given the vexed background of this case, that it should be decisive. d

A more fundamental difficulty for the Applicant's, as I see it, is that I do not believe that the successful judicial review proceedings before Pathik J and Fatiaki J necessary exonerate the Applicant's from the charges brought against them. Whether they in fact do or do not would, in my opinion, require a detailed examination of both judgments neither of which has been included in the papers before me. It must be remembered that judicial review proceedings are not appeals on the merits. e

Having said that, however, the application relating to the 30 November decision does raise at least the possibility that the Ministry may have taken the wrong approach to the Applicant's application for re-employment. There is as yet no evidence to contradict paragraphs 37 to 42 of the 1st Applicant's affidavit filed on 26 April. I was not addressed by Counsel on the question whether or not the rules of natural justice apply to applications for employment as opposed to dismissals and if so how far. Given these uncertainties I am not minded to refuse the first application for leave at this stage. f

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a The second application, that involving the March 2000 decision of the FMC is, however, in my view unarguable. If anything, the decision assists the applicants. There can be no duty on the Council to register persons who are neither employed in Fiji nor have a right to live here. Furthermore, as pointed out by Mr. Kumar, the Applicants have not appealed the Council's decision as is their rights under Section 28 of the Medical and Dental Practitioners Act (Cap 255) and accordingly judicial review does not lie (see e.g. **R v. Chief Constable ex-parte Caverly** [1986] 2 WLR 1140).

b The final matter is the application for a stay. Mr. Matawalu accepted that a string of High Court Judgments (some of which I cited in **In Re: Cui Zhong Yi & Ors** (HBJ 2/1997S) have hold that pending court proceedings cannot, for obvious reasons, save in the most exception circumstances, afford an unlawful immigrant a right to remain in Fiji until the proceedings are finally determined. It is also accepted that the Applicants have not appealed under the provision of Section 18 of the Immigration Act (Cap 88). Mr. Matawalu did, however, argue
c that the Applicants should, in the special circumstances of this case, at least be allowed to remain in Fiji until the outcome of their applications for employment in the Ministry referred to in the memorandum of 5 May set out above. Against the background of over 4 years litigation, some of which had favoured the Applicants, 2 or 3 months would, Mr. Matawalu submitted, make little difference.

d I have given anxious consideration to this request particularly as the High Court has twice held that the Applicants dismissals were unfair. The expense, pain and unnecessary upheaval involved in leaving Fiji only then to return if the job applications are in fact successful must be borne in mind. But it seems to me that given the Ministry's view about the Applicants expressed in the memoranda of 8 March and 5 May the reality is that the Applicants prospects of obtaining
e re-employment with the Ministry are remote indeed. And neither, in my opinion, the 1st Applicant's appeal against quantum of damages to the Fiji Court of Appeal nor his apparently dormant defamation action in the Labasa High Court provide exceptional grounds or departing from the now well established rule in immigration cases already referred to.

f In the outcome therefore I will adjourn the application for leave to move for judicial review of the 30 November 1999 decision for further argument on the duty of an employer to a prospective employee and for an affidavit in answer to be filed by the Ministry. A date for the adjourned hearing will be fixed after hearing Counsel.

g In the outcome therefore I will adjourn the application for leave to move for judicial review of the 30 November 1999 decision for further argument on the duty of an employer to a prospective employee and for an affidavit in answer to be filed by the Ministry. A date for the adjourned hearing will be fixed after hearing Counsel.

The application for leave to move for judicial review of the March 2000 decision of the Council is dismissed.

The application for a stay of the Director of Immigrations Deportation Order of 27 January 00 is also dismissed.

Application for leave of Ministry's decision is adjourned for argument; a
application for leave of Fiji Medical Council's decision is dismissed;
Application for stay is dismissed.

Marie Chan

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