IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0001 of 2024
Court of Appeal No. ABU 105 of 2023

BETWEEN	:	**THE DIRECTOR OF IMMIGRATION** ***1st Petitioner***
		THE COMMISSIONER OF FIJI POLICE ***2nd Petitioner***
		THE ATTORNER GENERAL OF AND FOR THE REPUBLIC OF THE FIJI ISLANDS ***3rd Petitioner***
AND	:	**SUNG JIN LEE** ***1st Respondent***
		NAM SUK CHOI ***2nd Respondent***
		BYEONG JOON LEE ***3rd Respondent***
		BEOMSEOP SHIN ***4th Respondent***
		JUNG YONG KIM ***5th Respondent***
		JINSOOK YOON ***6th Respondent***
Coram	:	**The Hon. Justice Terence Arnold** **Judge of the Supreme Court**
		The Hon. Justice William Young **Judge of the Supreme Court**
		The Hon. Justice Alipate Qetaki **Judge of the Supreme Court**

Counsel	:	**Mr. R. Green, Ms. O. Solimailagi and Mr. Y. Naidu for the Petitioners**
	:	**Mr. S. Ower KC, Mr. R. Gordon, Mr. N. Prasad and Mr. W. Pillay for the Respondents**
Date of Hearing	:	**12 August, 2024**
Date of Judgment	:	**30 August, 2024**

JUDGMENT

Arnold, J

Introduction

[1] On 31 August 2023, following receipt of Red Notices from Interpol, diplomatic notes from the Government of Korea and (apparently) advice from a Task Force, the Minister of Home Affairs and Immigration declared the Respondents to be "prohibited immigrants" under s 13(2)(g) of the Immigration Act 2003. On the same day, the Permanent Secretary of Immigration issued orders under section 15 of the Act for the removal of the Respondents from Fiji. Some of the Respondents were then arrested and detained.[1]

[2] By two applications on 6 and 7 September 2023, the Respondents sought writs of habeas corpus under Order 54, citing the Director of Immigration, the Commissioner of the Fiji Police and the Attorney-General (the Petitioners in this Court). The writs were sought against the Director and the Commissioner. In addition, the Respondents sought interim orders preventing their removal from Fiji. The Petitioners applied to strike out the Respondents' applications under Order 18, on the basis of "ouster" clauses in section 173(4)(d) of the Constitution of the Republic of Fiji and (in relation to the Minister's decision) in section 13(2)(g) of the Act.[2]

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1 As I understand the present position, two of the Respondents are in detention, two have been removed to South Korea, one is at liberty in Fiji but at risk of being detained, and the sixth has not been found.

2 Section 13(2)(g) provides that the Minister's decision "shall be final and conclusive and shall not be questioned or reviewed in any court".

[3] The Petitioners were successful in the High Court.[3] The High Court Judge struck out the Respondents' habeas corpus applications and made a costs order in favour of the Attorney-General. The Respondents appealed. The Court of Appeal allowed the appeal and set aside the High Court's judgment.[4] The Court ordered the High Court to hear the Respondents' applications for habeas corpus "within seven days from today" (ie, from 29 February 2024).

[4] The High Court held that hearing on 4 March 2024 and judgment was issued on 11 March 2024.[5] The applications seeking the issue of writs of habeas corpus against the Director of Immigration and/or the Commissioner of Police were denied.

[5] On 1 March 2024, the Petitioners filed a petition seeking leave to appeal the Court of Appeal's decision. Then, by notice dated 5 August 2024, the Petitioners advised that they wish to withdraw their petition. The Respondents oppose the withdrawal of the petition.

[6] When the matter was called in this Court on 12 August 2024, we heard argument from the Solicitor-General in support of the Petitioners' application and from Mr Ower KC for the Respondents in opposition. During the course of the hearing, the Respondents foreshadowed an application for an extension of time to file their own petition for leave to appeal to this Court against the Court of Appeal's decision. The grounds of the petition are:

> A. The Learned Justices of Appeal, in allowing the Appeal, ought to have held that the jurisdiction of the High Court of Fiji in the matter was not ousted or excluded by section 173(4)(d) of the Constitution of the Republic [of] Fiji as that section, on its proper construction, did not apply to a decision made after the date that Parliament first sat under the Constitution (6 October 2014) and/or any decision made under s 13 of the Immigration Act 2003.
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> B. The Learned Justices of Appeal, in allowing the Appeal, ought to have held that the jurisdiction of the High Court of Fiji in the matter was not ousted or excluded by s 13(2)(g) of the Immigration Act 2003 as that section, on its proper construction, should be construed:

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3 *Sung Jin Lee v Director of Immigration* Civil Action No. HBM 40 of 2023, 27 October 2023.
4 *Sung Jin Lee v Director of Immigration* [2024] FJCA 31.
5 *Sung Jin Lee v Director of Immigration* Civil Action No. HBM 40 of 2023, 11 March 2011.

a. by reason of ss 2(2), 3(2) and 7(3) of the Constitution, when read in light of s 13 (1)(f), (g) and (i) of the Constitution, and/or

b. by reason of the common law of Fiji and s 7(4) of the Constitution,

such that the term "decision" in that section means a decision that was not made in excess of jurisdiction.

[7] The Petitioners oppose the Respondents' application, partly on procedural grounds and partly on the basis that the issues are better resolved in other proceedings the Respondents are pursuing.

Other proceedings

[8] I briefly summarise the other proceedings the Respondents have initiated in this matter.[6]

[9] On 15 September 2023, the Respondents filed a notice of motion seeking redress under section 44 of the Constitution, the respondents in the proceedings being the Minister for Home Affairs and Immigration and the Attorney-General ("the Constitutional Redress proceedings").[7]

[10] The Respondents sought a number of interim orders to prevent their removal from Fiji. As part of their final relief, the Respondents sought a declaration that the "ouster" clause in section 13(2)(g) of the Immigration Act was inconsistent with section 16(1)(c) of the Constitution and a declaration that the Minister's decision designating them as "prohibited immigrants" was also inconsistent with the Constitution. It is unclear what has occurred in these proceedings to date, although I understand that there is a hearing scheduled for 18 October 2024.

[11] On 20 September 2023, the Respondents filed an application for leave to issue judicial review proceedings in relation to the decisions of:

(a) the Minister of Home Affairs and Immigration to declare the Respondents "prohibited immigrants"; and

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6 This is not a full account of the various proceedings. It has been difficult with the time and material available to identify everything that has occurred.

7 *Jung Yong Kim v Minister for Home Affairs and Immigration* Constitutional Redress Application No. HBM 43 of 2023.

(b) the Permanent Secretary for Immigration to order their removal from Fiji and their detention in custody until removal.

[12] Several of the Respondents applied for, and were granted, interim stays to protect their positions. In the context of those proceedings, two of the Respondents, Jung Yong Kim and Sung Jin Lee, sought to be released on conditions. In the alternative, Mr Kim asked to be permitted to go to Vanuatu, where he had recently acquired citizenship. On 19 January 2024, the High Court granted the Respondents leave to pursue judicial review claims[8] and on 20 February 2024 held that the issue of whether the Respondents should be released on terms was best left to be dealt with in Constitutional Redress proceedings.[9] The High Court denied Mr Kim's application to be removed to Vanuatu in a decision dated 15 May 2024.[10] We were advised at the hearing that the judicial review proceedings are to be heard on 4-5 October 2024.

[13] On 14 March 2024, the Respondents filed an appeal against the High Court's decision of 11 March 2024 (ie, the decision following the hearing ordered by the Court of Appeal). In conjunction with that appeal, the Respondents filed a summons seeking the voluntary removal of Jung Yong Kim to Vanuatu and, in the alternative, seeking that he be granted bail. Bail was also sought for Sung Jin Lee. In a decision dated 6 August 2024, the President of the Court of Appeal struck the summons out as an abuse of process, on the basis that the same application had been made in other proceedings and dealt with in the courts below.[11]

[14] While it is understandable that the Respondents should wish to pursue every avenue to gain their freedom, filing numerous proceedings which raise essentially the same issues is likely to waste court time, risk causing confusion and delay, and may give rise to needless arguments about the application of doctrines such as issue estoppel and res judicata. Desirably, if multiple proceedings are thought to be necessary, they should be consolidated to the extent possible. In that connection, I note that Mr Ower submitted to the High Court on 18 September 2023 that it would be appropriate to consolidate the

8 *Sung Jin Lee v Minister for Home Affairs and Immigration* [2024] FJHC 23.
9 *Sung Jin Lee v Director of Immigration* [2024] FJHC 106.
10 *Sung Jin Lee v Director of Immigration* [2024] FJHC 299.
11 *Sung Jin Lee v Director of Immigration* Civil Appeal No. ABU 26 of 2024, 6 August 2024.

habeas corpus applications with the judicial review proceedings.[12] That does not appear to have occurred, however.

Discussion

[15] A petitioner in a civil case is free to withdraw a petition prior to the commencement of the hearing of the application. The Court, however, retains jurisdiction to deal with incidental matters such as costs. In principle, therefore, the Petitioners are entitled to withdraw their petition. This case is unusual in that the Respondents oppose withdrawal of the petition and seek an extension of time to file their own petition.

[16] The issue of the effect of the so called "ouster" clauses is undoubtedly a significant one. Accordingly, it is important to be clear about the effect of the Court of Appeal's decision. Jameel JA, with whom the other members of the Court agreed, held:[13]

> … the High Court erred in refusing to entertain the application for a Writ of Habeas Corpus, based on the ouster clauses in section 173(4) of the Constitution and section 13(2)(g) of the Immigration Act, 2003, through the means of the Striking Out procedure contained in O.18, r.18 of the High Court Rules, 1988.

As I read it, the effect of this finding is that the ouster clauses do not bar *any* form of review of the impugned decisions. Rather, what remains in contention is the extent or scope of any available review.

[17] However, there may be some confusion about the precise effect of the Court of Appeal's judgment. Jameel JA also said:[14]

> The essence of the submission of the Appellants was that the application for the writ of Habeas Corpus did not per se challenge the Minister's decision, but instead challenged the basis of the detention. In other words, the initial decision of the Minister to declare the Appellants "Prohibited Immigrants" was not under challenge. It was the subsequent decision to arrest and detain, which was under challenge.

Elsewhere in the judgment, the point is made that the habeas corpus application did not challenge the Minister's decision under s 13(2)(g) but only the sequel to the Minister's

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12 *Sung Jin Lee v Director of Immigration*, above n 4, at para [23].
13 *Sung Jin Lee v Director of Immigration*, above n 4, at para [53].
14 *Sung Jin Lee v Director of Immigration*, above n 4, at para [36].

decision, ie, the Permanent Secretary's order for removal under s 15 of the Immigration Act.[15]

[18] The Court of Appeal's judgment could possibly be interpreted as meaning that the Respondents cannot now challenge the Minister's decision to declare them "prohibited immigrants" on the basis of the doctrine of res judicata as discussed in *Henderson v Henderson*.[16] However, that would be a misunderstanding of the position.

[19] In his submissions to the Court of Appeal, Mr Owers acknowledged that the underlying decisions of the Minister and the Permanent Secretary were not in issue at the hearing because the habeas corpus applications had been struck out on the basis of the two ouster clauses. Given that determination, the validity of the decisions underlying the Respondents' detention had not arisen for consideration in the High Court. Mr Owers made it plain, however, in both his written and oral submissions, that the Respondents' position was that the underlying decisions could properly be examined in the context of the habeas corpus applications, and it was the Respondents' intention to make this argument in the habeas corpus proceedings should the matter be returned to the High Court. But that stage had not then been reached.

[20] As I discuss further below, there are difficulties in utilising the habeas corpus procedure to challenge not simply the legality of a detention but also the underlying decisions which gave rise to that detention. Be that as it may, the position has now moved on to such an extent that some re-evaluation is necessary.

Going forward

[21] As the foregoing account indicates, at the same time as the habeas corpus applications naming the Petitioners were filed in respect of their detention, the Respondents sought leave to issue judicial review proceedings challenging the underlying decisions of the Minister and the Permanent Secretary. The judicial review proceedings are to be heard in the High Court in early October 2024. Given that, in principle at least, the two ouster clauses addressed by the Court of Appeal do not preclude the possibility of judicial

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15 *Sung Jin Lee v Director of Immigration*, above n 4, at paras [67] and [72]-[74].

16 *Henderson v Henderson* [1843-60] All ER Rep 378.

review of the decisions underlying the Respondents' detention, it will be up to the court hearing the judicial review applications to determine whether review is permissible and, if so, to what extent.

[22] In accordance with the modern trend, an "ouster" clause is unlikely to be interpreted as precluding judicial review of *any* exercise of a particular statutory power of decision; however, such a clause may affect the *nature* of any allowable review. For example, while an ouster clause may not prevent a court from reviewing a decision which fails to take account of mandatory statutory criteria, it may limit the extent to which natural justice considerations apply. In short, this is an area where the context, both legal and factual, matters.

[23] Accordingly, while I acknowledge that the writ of habeas corpus is a vital feature of common law systems of justice and that its importance should not be diminished, I consider that the judicial review proceedings in relation to the underlying decisions have distinct advantages over habeas corpus proceedings at this stage.[17]

[24] Applications for habeas corpus involve a summary process and are matters to which the courts must give priority. They are directed primarily at those detaining the applicant rather than at those whose decisions precede or result in that detention. Moreover, habeas corpus applications are not well-suited to the type of detailed evaluation of the underlying discretionary decisions that is required before such decisions can be said to have been reached improperly. Nor do they lend themselves to the type of nuanced argument and analysis that may be necessary to determine the proper scope of any review. By contrast, applications for judicial review do allow for the type of evidential and other processes that will enable a proper consideration of both the arguments as to the permissible scope of review and the propriety of any reviewable discretionary decisions leading to detention.

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17 See, for example, the helpful discussion of habeas corpus and judicial review in *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 (CA) at para [30] and following. It should be noted, however, that New Zealand has legislation governing habeas corpus - the Habeas Corpus Act 2001 - and that leave is not required to issue judicial review proceedings, which means that applications for judicial review can be dealt with more expeditiously than in jurisdictions where leave is required.

[25] Consequently, I consider that the issues in this matter are best dealt with in the judicial review proceedings. Accordingly, I would:

(a) accept the Petitioners' decision to withdraw their Petition and would award the Respondents costs of $10,000 in relation to that;

(b) refuse the Respondents' application for an extension of time to file their own Petition and would make no order for costs in relation to that.

Two concluding observations

[26] As the foregoing account of the procedural background indicates, one of the Respondents, Mr Kim has made several applications either to be allowed to go to Vanuatu, where he has citizenship, or to be released on conditions. Ms Lee has also applied to be released on conditions. These applications have been refused, either outright or because the applications were considered to be better dealt with in the context of other proceedings. Consequently, Mr Kim and Ms Lee remain in detention, as they have been for almost a year.

[27] The problem of periods of detention in immigration-related matters becoming drawn out as a result of lengthy court proceedings is not unique to Fiji. There have been similar occurrences in New Zealand. The decision of the New Zealand Supreme Court in *Zaoui v Attorney-General* is an example of the way the problem was addressed there.[18] It may be of some relevance in Fiji.

[28] Finally, I consider that the use of the strike out mechanism to determine the effect of the ouster clauses to have been misguided. Habeas corpus is a summary process intended to provide immediate relief for persons subject to unlawful detention. It is improbable that the ability to seek such an ancient and important remedy would be excluded by a generally worded ouster clause. The appropriate course would have been to consolidate the habeas corpus proceedings with the judicial review proceedings and ensure that they were expedited. This would have enabled consideration of the effect

[18] *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA and SC).

of the ouster clauses in light of the full legal and factual context rather than in the abstract as has occurred to date.

Young, J

[29] I have read in draft the judgment of Arnold J. I agree with the orders he proposes and his reasons. I do, however, wish to add a few remarks of my own.

[30] The strike out application in the High Court was dealt with by the Judge on the basis that the scope of the ouster clauses relied on by the State parties[19] meant there was no need to engage with the substance of the arguments to be advanced by the present respondents (the "Grace Road parties") by way of challenge to the decisions under ss 13 and 15 of the Immigration Act 2003. As noted by Arnold J at [22] of his judgment, this is not consistent with current judicial approaches to ouster clauses under which their application is dealt with in the context of the particular challenges advanced.

[31] The approach contended for by the State parties and accepted by the High Court meant that there was an abstract quality to the issues that were addressed in the Court of Appeal. There was no substantial focus on the challenges that the Grace Road parties signalled in relation to the ss 13 and 15 decisions. Rather the question was whether the ouster clauses operated to bar *in limine* any and all challenges that might conceivably be advanced - or, in more colloquial terms, were a complete show-stopper, precluding any need to assess the challenges that had been signalled by Mr Ower KC.

[32] When the Court of Appeal judgment is read in the context of the submissions that had been advanced to it by Mr Ower, it is clear that it rejected the argument of the State parties that the ouster clauses were an *in limine* bar to any challenge to the ss 13 and 15 decisions. I agree entirely with Arnold J's analysis of the judgment and its effect.

[33] My impression is that a motivation for the Grace Road parties seeking an extension of time to appeal against the Court of Appeal judgment was concern that the State parties might, in subsequent rounds of this litigation, raise res judicata or abuse of process

[19] By which I mean, the Director of Immigration, the Commissioner of Fiji Police and the Attorney-General.

arguments based on the Court of Appeal judgment. As Arnold J's judgment shows, there are passages in that judgment that, if read in isolation, suggest that the s 13 decision was not challenged. These passages, together with the stance taken by the Solicitor-General in argument before us, mean that the Grace Road parties' concern was understandable. However, Arnold J's contextual analysis of the Court of Appeal judgment means that the basis for their concern has now fallen away. To put this more specifically, the proceedings before, and the judgment of, the Court of Appeal provide no basis for res judicata or abuse of process arguments against the Grace Road parties.

[34] For the reasons just given, I see no point in the proposed appeal. Further, as the Grace Road parties were entirely successful in the Court of Appeal, as we construe its judgment, there is nothing in that judgment that is relevantly adverse to them so as to provide a basis (or target) for appeal.

[35] I have two other, related, comments:

a. Two of the Grace Road parties have been in custody for nearly a year. This has been without charge or trial. So personal liberty is seriously at stake. Procedural imbroglios carry the risk of distracting attention from the important issues the case involves. Such imbroglios should be avoided.

b. I think it was unwise of the Court of Appeal to direct that that the habeas corpus proceedings be dealt with on a stand-alone basis. All proceedings in the High Court (and thus the judicial review and constitutional redress proceedings) should have been dealt with at the same time in the High Court. That ship has now sailed in relation to the habeas corpus proceedings. But it is not too late for the judicial review and constitutional redress proceedings to be dealt with together. And when those proceedings are heard, I think that it is important that the Judge not become distracted by any res judicata and abuse of process arguments associated with the habeas corpus proceedings and judgment. Such argument as may be advanced must be dealt with. But the merits of the challenges should also be fully addressed.

Qetaki, J

[36] I have read the judgment of Honourable Justice Arnold in draft. I agree with it, the reasoning and the orders.

Orders of the Court

1. *The Petitioners having stated that they wish to withdraw their Petition, the Petition is dismissed.*

2. *The Petitioners are to pay the Respondents costs in the amount of $10,000.*

3. *The Respondents' application for an extension of time to file a Petition for leave to appeal is denied.*