IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 72 of 1981

Between:

ELIZABETH MARY SCHRAMM — Appellant

and

1. THE ATTORNEY-GENERAL OF FIJI
2. THE MINISTER OF LABOUR, INDUSTRIAL RELATIONS AND IMMIGRATION

Respondents

M.M. Patel for the Appellant
J.R. Flower for the Respondents

Date of Hearing: 29th March, 1982
Delivery of Judgment: 2nd April, 1982

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from an order made in Chambers by the Acting Chief Justice on the 3rd November, 1981, dismissing an application by the appellant for leave to apply for an Order of Certiorari.

There appears to have been an extraordinary amount of procedural confusion in the Supreme Court. The appellant's application was made by a document headed Ex Parte Motion - in accordance with the provisions of Order 53 of the Rules of the Supreme Court (as replaced by the Supreme Court (Amendment) Rules 1981) which in its new form brought in the concept of the judicial review

in relation to mandamus, prohibition and certiorari. It was supported by a Statement setting out the name and description of the applicant, the relief sought and the grounds; it was also supported by an affidavit.

This was in accordance with the requirements of Rule 3(1) of the Order which provides that no application for judicial review shall be made unless the leave of the Court has been obtained in accordance with the rule. Rule 1 provides that applications for orders of mandamus, prohibition or certiorari shall be made by way of an application for judicial review.

Having correctly commenced the proceedings ex parte in this way it seems that notice of the application was given to the Minister of Labour, Industrial Relations and Immigration and to the Attorney-General, and, while the motion was headed Ex Parte Motion, as we have stated, it was described as a Notice of Motion in the endorsement of the address for service. When the matter came on for hearing, the respondents (i.e. the Attorney-General and the Minister) were represented by Mr. Flower and the appellant by Mr. Patel, who both now appear in this Court.

It will be convenient at this stage to state the main facts as put forward in the Statement and affidavit of the appellant.

The appellant was born on the 14th September, 1939 in Australia. In 1969 she was admitted as Member of the London Royal College of Obstetrics and Gynaecology and obtained a gold medal. In 1980 she was elected as Fellow of the Royal Australian College of Obstetrics and Gynaecology. From the 6th September, 1970, she had been employed by the Government of Fiji at the Colonial War Memorial Hospital, Suva, in the following positions :

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(i) Clinical Tutor in Obstetrics and Gynaecology between 6th of September 1970 upto June 1973 then later promoted to Senior Clinical Tutor.

(ii) As Senior Clinical Tutor employed on local conditions from the 7th of October 1973 to the 6th of December 1976.

(iii) On same conditions as a Consultant Obstetrician/Gynaecologist from the 18th of March 1977 to the 18th March 1979.

(iv) Re employed as Consultant Obstetrician/ Gynaecologist on local conditions from the 14th of May 1979 to the 14th of May 1981.

She was further appointed temporarily as a Senior Clinical Tutor (Obstetrics/Gynaecology) Fiji School of Medicine in the Public Service with effect from the 9th October, 1981.

On the 12th February, 1981, the appellant, who states her intention of continuing to reside in Fiji, applied for Fiji citizenship; she is a Commonwealth citizen and relied upon section 5 of the Fiji Citizenship Act (Cap. 87 Ed. 1978) which reads :

"5 - (1) Subject to the provisions of this section, the Minister may cause any Commonwealth citizen, or British protected person, being a person of full age and capacity, to be registered as a citizen of Fiji upon making application therefor in the prescribed manner and satisfying the Minister -

(a) that he is of good character;

(b) that he has an adequate knowledge of the English language or any other language current in Fiji and of the responsibilities of a citizen of Fiji;

(c) that he has lawfully resided in Fiji throughout the period of seven years immediately preceding the date of his application, during which period he has not been absent from Fiji for a period or periods amounting in all to more than eighteen months;

(d) that he intends, if registered, to continue to reside in Fiji.

(2) The registration of a person under the provisions of this section shall not take effect until such person has renounced in the prescribed manner any other citizenship which he may possess and takes the prescribed oath or affirmation of allegiance."

By a letter dated the 14th April, 1981, the appellant was informed that her application was not approved. The text is as follows :

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14.4.81

Dr. Mary Elizabeth Schramm,
Colonial War Memorial Hospital,
SUVA.

Dear Madam,

I have been directed to refer to your application for registration as a Fiji Citizen and regret to inform you that the application has not been approved.

Attached herewith are your cancelled Australian Passport Nos. H764926 and G586347.

Yours faithfully,

Sgd. A. Qera

for Permanent Secretary for Labour, Industrial Relations and Immigration."

The relief sought by the proceedings and the grounds relied upon are set out in the appellant's Statement, as follows :

"2. The relief sought is for Judicial Review :

(a) for a declaration that the applicant is eligible and/or is entitled to be registered as a Fiji Citizen under the Fiji Citizenship Act, 1971;

(b) for an Order to remove into this Honourable Court the decision of Permanent Secretary for Labour Industrial Relations and Immigration acting for or on behalf of the Minister for Immigration and Labour;

(c) alternatively for an Order requiring the Permanent Secretary for Labour Industrial Relations and Immigration acting for or on behalf of the Minister for Immigration and Labour to register the applicant as a Fiji Citizen under the Fiji Citizenship Act, 1971.

And that all necessary and consequential directions be given.

3. The grounds upon which the said relief is sought are :

(a) The Permanent Secretary for Labour Industrial Relations and Immigration acting for or on behalf of the Minister for Immigration and Labour was wrong in law in holding that the applicant did not qualify to be registered as a Fiji Citizen under section 5 of the Fiji Citizenship Act 1971 having regard to the facts set forth in the applicant's affidavit;

(b) The said decision is wrong in that no reason has been given for refusal, having regard to the fact that the applicant submitted her application in the Prescribed form.

(c) That the said decision is wrong in laws because once the Applicant had satisfied all the requirements mentioned in section 5(1)(a)(b) and (c) of the Fiji Citizenship Act 1971 then the Minister had no further discretion left in him but to allow registration as Fiji Citizen to the Applicant.

In the premises the applicant is entitled for a Judicial Review of the said decision."

The present appeal is limited in scope by the nature of the proceedings in the Supreme Court. We have indicated that they were concerned with whether leave should be given to make an application for certiorari. All that happened at the hearing, according to the note of the learned Judge, is that Mr. Patel supported the application and said they had complied with the requirements. Mr. Flower relied upon section 18 of the Fiji Citizenship Act. That completed the argument, which, even allowing for the abbreviation incidental to notes, could not be described as a lengthy one. The learned Judge dismissed the application saying - "Court has no jurisdiction to review Minister's action in view of section (omitted but agreed to be 18) of the Fiji Citizenship Act."

It seems obvious that the parties and the Court were treating the matter as if leave to make the application had already been given. This was not so, and there was no jurisdiction to proceed without it. Nevertheless the above Order was made and the present appeal has ensued.

Section 18 of the Fiji Citizenship Act is as follows :

> "18. The Minister shall not be required to assign any reason for the grant or refusal of any application under this Act the decision on which is at his discretion; and the decision of the Minister on any such application shall not be subject to any appeal or review in any court."

If this section applies with full force the learned Judge was clearly right in his decision. There would be no point in giving leave to contest the matter further. The grounds of appeal put forward challenge it as follows :

"1. That the learned Trial Judge erred in law and in fact :

(a) In holding that he had no jurisdiction to hear the application due to section 18 of the Fiji Citizenship Act.

(b) In holding that the Minister had a discretion even though if His Lordship had jurisdiction to hear such application."

We will deal first with Ground 1(b). The argument is that in the circumstances the Minister had no discretion but was compelled to grant the application, because the appellant in her affidavit had shown that she had complied with all the requirements of paragraphs (a), (b), (c) and (d) of the section. We do not agree with this submission. Such matters as length of lawful residence may be capable of being put beyond doubt, but the Minister must be satisfied as to knowledge of the responsibilities of a citizen of Fiji, of intention to remain in Fiji and of good character any of which can involve discretion. Also we think that when section 18 says "the decision on which is at his discretion" it is considering a type of application, a type in which he is enabled to say yes or no rather than types to which he must say yes, or must say no, if certain facts are proved. This ground of appeal fails.

Ground 1(a) is a different matter. Section 18 is what is called an "ouster" clause. We do not need to go into the law in detail but will quote from the judgment of the Privy Council in Attorney-General v. Ryan [1980] A.C. 718, 730, as it was concerned with an ouster clause in the same terms (section 16 of the Bahamas Nationality Act, 1973) as the Fiji section 18. Their Lordships said :

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"It is by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision-making authority, under this Act the Minister, had jurisdiction to make. If in purporting to make it he has gone outside his jurisdiction, it is ultra vires and is not a 'decision' under the Act. The Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers, may, in appropriate proceedings, either set it aside or declare it to be a nullity: Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147.

It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in Spackman v. Plumstead District Board of Works (1885) 10 App.Cas. 229, 240: 'There would be no decision within the meaning of the statute if there were anything ..... done contrary to the essence of justice.' See also Ridge v. Baldwin [1964] A.C. 40.

Their Lordships, in agreement with all the judges in the courts below, would therefore conclude that the ouster clause in section 16 of The Bahamas Nationality Act 1973 does not prevent the court from inquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and is ultra vires."

Whether these principles are relevant in the present circumstances depends first upon whether this is a case in which natural justice must be observed. This is not a matter to be decided at this stage in this Court. It involves questions of fact and law and must in the first instance be decided by the Supreme Court.

Secondly there is the question of fact whether any departure from the principles of natural justice actually occurred in this case. That again is a matter which can only be decided by the Supreme Court after all relevant facts have been put before it. While there was

some discussion as to the facts at the hearing of the appeal before this Court they remain entirely a matter for the Supreme Court and it is not for us to attempt to make findings upon them. It should have been for the learned Judge to consider these questions, had counsel brought them to his attention, in order to enable him to come to a proper decision as to the effect and applicability of section 18 of the Fiji Citizenship Act.

In these circumstances the question is what order this Court should make. In the absence of an order giving leave under Order 53 the proceedings were ineffectual to determine whether any judicial review should take place. Justice, we think, requires that an opportunity of remedying this defect should be accorded and for that purpose the matter must be remitted to the Supreme Court. While we desire to avoid multiplicity of proceedings, we doubt if we have power to dispense with the obtaining of leave. The applications could nevertheless be heard together, if desired, and we trust that the order we propose to make will facilitate that end.

The appeal is allowed to the following extent. The judgment in the Supreme Court is set aside and the application is remitted to the Supreme Court for re-hearing ab initio on the basis that the applications for leave and for judicial review be heard together. The appellant will have liberty to file further affidavits within 30 days of the delivery of this judgment and the respondents also have leave (if desired) to file affidavits within the like period of 30 days or within 15 days from the delivery of any affidavit by the appellant. Liberty to all parties to apply to a Judge of the Supreme Court.

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There will be no order for costs on this appeal.

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Vice President

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Judge of Appeal

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Judge of Appeal