IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO : ABU0054 OF 1996S
(High Court Civil Action No.HBJ 25 of 1995S)

BETWEEN:

VICTOR JAN KAISIEPO — APPELLANT

-AND-

THE MINISTER FOR IMMIGRATION — RESPONDENT

Mr S. Matawalu for the Appellant
Mr S. Banuve for the Respondent

Date and Place of Hearing: **6 November, 1997, Suva**
Date of Delivery of Judgment: **14 November, 1997**

JUDGMENT OF THE COURT

This is an appeal from the judgment of Byrne J. given on the 18 October 1996 at Suva. The appellant had applied to the High Court for judicial review of the decision of the respondent, stated to have been made on 25 October 1995, dismissing his appeal against the refusal of the Permanent Secretary to grant him a work permit for employment with an organisation named the Pacific Concerns Resource Centre, an incorporated society. Byrne J. refused the application.

For reasons which will become apparent it is not necessary to canvas all the facts of this matter. A very brief statement will be sufficient to make clear why the Court has arrived at the conclusion it has.

On the 3rd May 1995 the Pacific Concerns Resource Centre applied to the Director of Immigration for a work permit for the appellant, who had been appointed an Assistant Director of the Centre. Thereafter there were some discussions between the Director of the Centre and officers of the Immigration Department, as well as some correspondence between them. The appellant and his family arrived in Fiji.

By a letter dated 20 July 1995, the Director of the Centre was informed that the appellant's application for a work permit had not been approved. It went on to say that if aggrieved by the decision, an appeal could be made to the Minister responsible for Immigration.

An appeal was promptly made to the Minister, which was supported by various groups and organisations in Fiji. There were some conversations with officers of the Department.

It appears the Director of the Centre was informed that the Department was not legally obliged to give any reasons as to why the application had been refused. The Director, however, states that he put it to the officer in the Department with whom he was speaking that to have any chance of having the appeal considered favourably he needed to know at least some of the difficulties associated with the application. He states he was informed that one of the reasons was the Department's concern as to the way in which the appellant had acquired a Dutch passport.

The Director of the Centre then wrote a letter to the Minister in support of the appeal and, in particular, dealing with the appellant's Dutch citizenship issue. On the 25 October 1995, a letter was sent to the Centre from the Department stating the appeal had been carefully considered by the Minister. It went on to say "I regret to advise it has been dismissed." The letter was signed by some person "for Director of Immigration" and endorsed with an Immigration Department seal.

The appellant, having obtained leave from Pain J. pursuant to Order 53 Rule 3(5), applied for judicial review of the Minister's decision to dismiss the appeal. It sought orders of Certiorari, Mandamus and a Declaration as well as asking for damages. The grounds of the application were numerous and included a denial of natural justice, on the grounds of not giving a fair hearing and bias, taking into consideration irrelevant matters, failing to take into account relevant matters, acting unreasonably, not giving regard to or taking into account the legitimate expectations of the applicant and failing to give reasons for the decision. In effect, the appellant raised almost all imaginable grounds available in administrative law to challenge the decision but did not make clear what matters were relied upon to support the individual grounds. This is an unacceptable procedure when seeking judicial review. We add, that adopting this scatter-gun approach is inimical to the applicant's prospects of success for the Court is left unclear as to what are the important issues in the case.

The application for judicial review was heard by Byrne J. in August and September 1996 and with laudable promptness he gave a judgment, dealing principally with the natural justice ground, which he held had not been established, and the two grounds of legitimate

expectation and lack of reasons, both of which he rejected. He held further that he found no evidence to support any other grounds raised and so refused the application for judicial review.

When the appeal was called before us, Mr Matawalu, the appellant's counsel, sought an adjournment on the grounds that he had been advised early that morning that some kind of settlement or resolution of the issue was in hand following discussions with the Minister. The content of the discussions seemed vague and the evidence of them hearsay. We asked Mr Banuve, for the respondent, if he consented to an adjournment but he informed the Court that he had received no instructions from the Respondent and the Department on the matter. It appeared that Mr Matawalu had not even spoken to him of his intention to make the adjournment application. We adjourned the Court for fifteen minutes to enable Mr Banuve to take instructions. When the Court resumed, Mr Banuve informed us that the Department was unaware of any suggested resolution of the matter and so he opposed the adjournment. In these circumstances, we refused the application. We record that we find the course followed here by the appellant quite unacceptable. Mr Matawalu should at the very least have raised the matter with Mr Banuve as soon as he became aware of the alleged discussions with the Minister and given him the opportunity of taking instructions from the Department. The Court's time would not then have been wasted in the way it was.

The Court then called upon Mr. Matawalu to proceed with his submissions. He was loath to do so. The Court would ordinarily have concluded that the appeal was not being pursued and would probably have dismissed it without calling upon Mr Banuve. However, in preparing for the hearing members of the Court had come upon an aspect of the matter which

had not been raised by the appellant in the Court below which appeared to be fundamental to the validity of the proceedings.

An appeal from the decision of an immigration officer lies to the Minister, in terms of s.18 of the Immigration Act (Cap.88), who may, in his discretion uphold, vary or revoke the decision. It is clear therefore that the Minister himself must exercise his discretion and either uphold, vary or revoke the decision, for there is no provision for him to delegate his power. The papers before the Court do not show that the Minister himself ever considered the appeal and, in his discretion, upheld the decision. The notification that the appeal had been dismissed came from the Department, as referred to earlier in this judgment, and the only other information as to the Minister's part in the procedure followed came from the Director of Immigration, Mr John Tevita, who made an affidavit. In his affidavit he deposed that "..... it was only following a very careful consideration of his case and deliberation of all important related factors by the Minister that a decision was made to dismiss the Applicant's appeal."

Then in the last paragraph of the affidavit Mr Tevita went on to say this:

> ***"The Applicant was given opportunity to appeal my decision. A thorough investigation was again carried out by the Department taking into account all points raised by him and all considerations relevant to an application of this nature, some of which are noted above, the result of which persuaded me to reject his appeal."***

Mr Tevita was cross-examined on his affidavit and asked about the above passage in his affidavit. In reply he said it was not his decision but the Minister's to reject the

appellant's appeal. We asked Mr Banuve, if he could point to any material in the record which showed that the Minister had himself considered the matter but he was unable to do so.

It appears to us that this is a fatal defect. On the face of it there appears to be an undisposed of appeal to the Minister. There certainly does not appear to be before us a decision by the Minister, made in accordance with the statutory provisions, to which an order for certiorari could apply. In our view, though such an order was not included in the application for judicial review, the Court should make a declaration that there is an undetermined appeal from the Permanent Secretary to the Minister and that it is his duty to consider and determine that appeal in accordance with s.13 of the Act.

The foregoing is sufficient to dispose of this appeal but, as was indicated at the hearing, we give an indication of how the appeal to the Minister should be dealt with by the Permanent Secretary and the Minister to ensure that procedural fairness is satisfied. It is helpful to bear constantly in mind the principles enunciated by Lord Mustill in Doody v. Secretary of State for the Home Department (1995) 3 All ER 92 at 106 where he said

> ***"What does fairness require in the present case? My Lords, I think it unnecssary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following :-***
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> ***(1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.***
>
> ***(2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.***

> *(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.*
>
> *(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.*
>
> *(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both.*
>
> *(6) Since 'the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

This case related to the issue of the Home Secretary's powers in relation to prisoners serving mandatory and discretionary life sentences of imprisonment but the principles have general application. We are satisfied that, broadly speaking, they have application to decisions made under the Immigration Act and, in particular, the fifth and sixth. We do not think that decisions made by authorised persons under the Immigration Act are exempt from the scrutiny of the Courts or from its orders. The first principle postulated is general in application and thus decisions made under the Immigration Act must be made in a manner which is fair in all the circumstances. In deciding what is fair, particular regard will be had to the third and fourth principles.

In our view an appropriate course to be followed is as follows:

1. On an appeal being lodged against the Permanent Secretary's decision he should prepare a memorandum for the Minister setting out the factual position relating to the applicant and his reasons for refusing the application. Supporting or verifying material should be annexed. The reasons do not have to be in great detail but must be sufficiently full for a proper understanding of them to be gained. Matters of state policy of a confidential nature, for example, international relations need only be referred to as state policy relating to international relations or as the case may be. There must be sufficient for the person concerned to know broadly the area so that he can make such representations as he thinks proper and submit relevant documentary evidence, if any is available.

2. A copy of the Permanent Secretary's memorandum or the gist of it should be supplied to the appellant and he be given a reasonable time to prepare and make any submissions upon it that he wishes. If he contends there are any factual errors, and the Permanent Secretary accepts that there are, he may correct them and notify the appellant of the changes made.

3. All the papers should then be put before the Minister to make his decision.

4. The Minister's decision should be recorded and communicated to the appellant in a document signed by the Minister or which is a copy of the Minister's decision including his signature.

In passing we note that the Permanent Secretary "is the Director of Immigration." The Act refers to the Permanent Secretary but no doubt the Director of Immigration fills the same role. It would be desirable in view of the terminology in the Act that steps are taken to ensure that the Director of Immigration is also formally appointed as Permanent Secretary and that in exercising his powers under the Act he does so in the name of the Permanent Secretary unless it be that there is some statutory provision to cover the changed terminology of which we are unaware.

There will be a Declaration that the appellants appeal to the Minister from the decision of the Permanent Secretary is yet to be determined and should be considered by him and determined promptly. To that extent the appeal is allowed.

There will be no order for costs.

Ian Barker JA

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Sir Ian Barker
Judge of Appeal

I.R. Thompson JA

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Mr Justice I.R. Thompson
Judge of Appeal

R. Savage JA

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Mr Justice R. Savage
Judge of Appeal

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