IN THE COURT OF APPEAL, FIJI ISLANDS
APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0059 OF 1999S
(High Court Civil Action No. HBJ 12 of 1999)

BETWEEN:

BENI NAIVELI

Appellant

AND:

THE STATE
THE DISCIPLINED SERVICES COMMISSION

Respondents

Coram: Reddy J R, President
Barker, JA
Davies, JA

Hearing: 20 February, 2002, Suva

Counsel: Messrs. V.M. Mishra and R. Prakash for the Appellant
Mr. S. Kumar for the Respondents

Date of Judgment: 21 February 2002

JUDGMENT OF THE COURT

This appeal against the refusal by a High Court Judge to grant leave to commence judicial review proceedings provides out another example of the additional time and expense which parties may incur as a result of the requirement of 0.53 1.3(1) that such leave is required.

In Fiji Airline Pilots'Association v. Permanent Secretary for Labour and Industrial Relations (Civil Appeal No. ABU0059U of 1997, judgment 27 February 1998), this Court made the following comment on the requirement of 0.53 r.3(1) of the High

Court Rules that leave be obtained from the High Court before any application for judicial review be entertained by that Court:

> *".....the requirement for leave can lead to delay and uncertainty for which there is dubious justification in the assured need to filter out vexatious and hopeless claims. Other jurisdictions have no difficulty in allowing review applications to proceed without leave."*

Again in Nivis MotorA Machinery Company Ltd. v. Minister for Lands and Mineral Resources (Civil Appeal No. ABU0017 of 1998, judgment 13 November 1998) a differently- constituted Court agreed with the Fiji Airline Pilots dictum in these words:

> *"As the Court in the Fiji Airline Pilots' (Casey, Kapi and Dillon JJA) pointed out, other jurisdictions cope adequately with judicial review applications without a leave requirement. Such is the experience in Australia and New Zealand of the members of the Court hearing this appeal. Allegedly trivolous applications are there met with strike-out applications which are promptly considered by the Court. It could be more appropriate that judicial review practice in the Fiji Islands be modelled on practice in other Pacific jurisdictions than on United Kingdom practice. Many members of Bench and bar in Fiji received their legal education in Australia or New Zealand. Several members of this Court and of the Supreme Court come from those jurisdictions: they are familiar with the practice there in administrative law matters. We suggest respectfully that consideration be given to abolishing this leave requirement which could be accomplished by a rule change."*

The apparent response of the Rules Committee to this Court's comments in the Nivis Motors case was on 3 December 1998 to add the following sub-rule to R.53:

> *"(9) Upon granting leave the Court may, if satisfied that such a course is justified, direct that the grant shall operate either forthwith or conditionally as an entry of motion under rule 5(4) and may then proceed to Judgment on the application for judicial review or may give such further directions as may be warranted in the circumstances."*

Whilst this addition to R.53 was useful, the Rules Committee does not appear to have addressed the fundamental issue as to why Fiji should follow the English procedure and require leave to issue judicial review proceedings. The members of this Court respectfully adopt the statements quoted above in the Fiji Airline Pilots and Nivis Motors cases.

In the present case, appellant applied for leave to issue judicial review proceedings on 8 March 1999. The Respondent filed an objection on 26th March 1999. On 12 May, 1999, Pathik J. granted leave to the appellant to withdraw his application and to file a fresh one without further filing fee. The Respondent filed an affidavit on 23 August 1999 in opposition.

On 1 September 1999 Fatiaki J. heard the application for leave in Chambers. He considered counsel's legal arguments and indicated, at the end of the hearing, that he would refuse leave. On 19 November 1999 he issued reasons for his decision. On 30 November 1999 (against the Respondent's opposition) the Judge gave the appellant leave to appeal to this Court. The grounds (as stated in the sealed order were:) "that there are competing interpretation (sic) of Regulation 24 of Police Service Regulation (sic) that requires to be resolved."

It has taken until February 2002 for this appeal to be heard. Unless certain procedural steps are taken, as the Court will recommend, all this Court can do, if it considers that leave should be granted, is to grant leave. The application for judicial review would then go back to Fatiaki J. who would, no doubt, consider that the legal interpretation he offered in the judgment under appeal was correct. He would then be faced with another application for leave to appeal from the appellant who could then, only if an application for leave to appeal were to be granted, return this Court for a ruling on the substantive legal issue which clearly arises for determination and which had exercised Fatiaki J.

The above narrative of the numerous iterations and delays this case has had to endure in the court system can be traced to the requirement for leave. If there had been no such requirement, Fatiaki J. could have heard the detailed arguments which he did from counsel: his judgment on those arguments would have resulted in a ruling on the substantive issues and any appeal to this Court would have been based on those substantive issues. The saving of time expense and emotion to the parties is easy to see. The necessity for an early resolution of this case is all the more important because of a history, extending over 11 years.

It was on 18 March 1991 that the appellant was interdicted on half-pay from the Police Force. He was subsequently convicted of a criminal offence on 12 June 1992. Since then there have been appeals on the criminal case and a successful application for

judicial review when Scott J. on 4 August 1995, held that the Respondent's efforts to dismiss the appellant from the Police Force had been premature. The Judge ordered indemnity costs against Respondent. A subsequent appeal against that order was unsuccessful and after further minor skirmishes, the Respondent purported to dismiss the appellant from the Police on 21 July 1998, refusing to give reasons for its decision.

Fatiaki J. in effect decided the substantive question of law in favour of the Respondent; namely, that the Respondent has power summarily to dismiss a gazetted Police Officer who has been convicted of a criminal offence in the absence of a disciplinary enquiry conducted in accordance with Part VIII of the Police Service Commission Regulations ('The Regulations'). For the reasons given, the Judge considered that Regulation 24 provides an avenue for the dismissal of a gazeted Police Officer without the need or any disciplinary enquiry. For this reason, the Judge was "**.....more than satisfied that the application for judicial review was doomed to fail on the merits and accordingly leave was refused.**"

In his reasons for judgment, Fatiaki J. noted the contrary view on the Regulations taken by Scott J. in the previous judicial review proceedings between the parties. Without going into detail, this Court considers that the views of Scott J. are certainty worthy of consideration and that there is a far from easy exercise in statutory interpretation which should come before this Court for determination.

The application for leave to issue judicial review proceedings should have been granted. Even though there have been some rule changes, nothing has altered the test for granting leave articulated in Nivis Motors following Fiji Airline Pilots in these words:

> *"The first ground of appeal, however, raised an important question on the Judicial review procedure. It is clear that Fatiaki J. went into the merits of the Association's case in some depth. The Appellant submitted that this was inappropriate in what was merely an application under Order 53 r.3 (1) of the High Court Rules for leave to issue review proceedings. The basis 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] AC617 at 644. This principle was applied by this Court in National Farmers' Union v. Sugar Industry Tribunal and Others (CA 8/1990; 7 June 1990).*
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> *In R. v. Secretary of State for the Home Department ex p.Rukshanda Begum (1990) COD 107 (referred to in 1 Supreme Court Practice 1997 at pp.865 and 868) Lord Donaldson MR accepted that an intermediate category of cases existed where it was unlcear on the papers whether or not leave should be granted, in which event a brief hearing might assist, but it should not become anything remotely like the hearing which would ensue if the parties were granted leave."*

Clearly, there was an arguable case for review because of Scott J.'s comments in the earlier case. Fatiaki J. should have granted the application and placed the parties on a tight timetable towards a substantive hearing. This Court expresses no view at this stage as to whether his view of the Regulations or Scott J.'s is the correct one. We note that the stated reason for Fatiaki J's. grant of leave to appeal was the existence of conflicting decisions.

The Court therefore considers that it should try to overcome the procedural obstacles in the way of its considering the legal question on the merits. Because of the delays extending over many years, the members of the Court who are apprised of the issues are prepared to make time available next week. Counsel are prepared to co-operate to that end.

The Court is prepared to allow the appeal and grant leave to the appellant to commence judicial review proceedings. Counsel should immediately join in an application to Fatiaki J. under s.15 of the Court of Appeal Act (Cap.12) inviting the learned Judge to reserve for consideration by the Court of Appeal by way of case stated by him a question of law. The question of law is whether the Respondent has power summarily to dismiss a gazetted Police Officer who has been convicted of a criminal offence in the absence of a prior disciplinary hearing in accordance with Part VIII of the Police Service Commission Regulations." The Court invites, Fatiaki J. to make such an order on a consent application. If he does, then the case stated under s.15 of the Court of Appeal Act can be heard by the Court on Tuesday, 26 February 2002 at 11:30 a.m.

The Court notes that Fatiaki J. declined to dismiss the application before him on the grounds of the appellant's delay. The Respondent has given notice that it wishes to cross-appeal that aspect of the Judge's decision. Although this aspect will not fall for consideration on a case stated argument under s.15 of the Court of Appeal Act, this Court can see little scope for an argument that the Judge exercised his discretion to excuse any delay on a wrong basis. The Respondent should be reminded of the well-known principle

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that an Appellate Court will not interfere with the exercise of a judicial discretion except on limited grounds which do not appear to exist here.

The appeal is allowed and leave to issue judicial review is granted. Appellant is awarded costs of $500 plus disbursements as fixed by the Registrar.

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Reddy J R, President

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Barker, JA

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Davies JA

FIJI COURT OF APPEAL

Solicitors:

Messrs. Mishra Prakash and Associates. Suva for the Appellant
Office of the Solicitor General, Suva for the Respondent