

THE COURT OF APPEAL, FIJI
[ON APPEAL FROM THE HIGH COURT]

Civil Appeal No. ABU 050 of 2021
(Suva High Court Judicial Review No. HBJ 06 of 2020)

BETWEEN : **SUSHILA S. KRISHNASWAMY**
Appellant

AND : 1. **THE PERMANENT SECRETARY FOR IMMIGRATION**
2. **DIRECTOR OF IMMIGRATION**
3. **THE ATTORNEY-GENERAL OF FIJI**
Respondents

Coram : Dr. Almeida Guneratne, P

Counsel : Ms. N. Tikoisuva for the Appellant
: Ms. P. Singh for the Respondents

Dates of Hearing : 19th April, 2023.

Date of Decision : 2nd June, 2023

DECISION

[1] This is an application seeking leave to appeal (out of time) the judgment of the High Court dated 19th November, 2020 which refused judicial review.

The background facts in brief

[2] The Appellant had a contract of employment as Vice-Chancellor of the University of Fiji with effect from 26th July, 2019 for a period of three years. (Thus, the contract was to run until 25th July, 2022) The Appellant admittedly was not a citizen of Fiji and was a “*work permit holder.*”

[3] During the period of her contract, the Appellant left Fiji on 22nd March, 2020 and remained overseas when she was declared “*a prohibited immigrant*”

(which was at a time there was a “lockdown” due to the COVID-19 pandemic and her contract was still subsisting) on the basis that her work permit had been cancelled.

- [4] Consequently, “*the Appellant*”, filed leave to apply for judicial review pursuant to Order 53 Rule 3 of the High Court (Act) Rules on 24th June, 2020.

The grounds on which the Appellant sought leave to apply for judicial review

- [5] Such leave was sought on the principal basis that, she could not have been regarded as “*a prohibited immigrant*” in terms of Section 13 (2) (g) of the Immigration Act, 2003 given the facts which I have recounted at paragraph [3] above.

The response of the High Court to the Appellant’s “application”

- [6] The Learned High Court Judge, having traversed the legislative history beginning from the Immigration Act of 2003 and finally coming down to Section 173 of the Constitution of Fiji, upon the “*Ouster Clause*” contained therein eventually held that, he had no jurisdiction to entertain the application and refused leave to apply for judicial review.

Discussion

- [7] To begin with “*an ouster clause*”, contained in a statute (or the Constitution) prima facie ousts the jurisdiction of a court to review a decision of a statutory authority.

- [8] However, such an “*ouster clause*” needs to be viewed as against the concept of “*the rights of an affected party*”.

The principles established in that regard

- [9] It was way back in the year 1951 that, Lord Denning in Exp. Gilmour held that an ouster clause contained in the words “*final and conclusive*” [1957] 1 Q.B.574 may be “*final and conclusive*” for purposes of an appeal, but, that will not shut out “*judicial review*”

[10] Prior to that, the House of Lords in R v Electricity Commissioners [1924] 1 K.B. 171 had paved the way for “*an affected party*” to seek judicial review culminating in the seminal decision in Ridge v Baldwin [1964] AC. 40. That was as a result of the rejection of the doctrine of classification of functions.

[11] In that progressive development came the celebrated decision of the House of Lords in the Anisminic Case [1969] 2 AC 147 followed by CCSU v. Minister for the Civil Service [1985] A.C 374

The resulting position when statutory decisions are challenged on the basis of “*ultra-vires*”

[12] Consequently, while no doubt, there was the said “ouster clause” which the High Court went on, there were other considerations that needed to address such as:

- (a) *The circumstances in which the Appellant, after leaving Fiji had not returned in compliance with the work permit, was not that, a relevant consideration the Respondents ought to have considered, when they took their decision to cancel the Appellant's “work resident permit?”*
- (b) *The said permit being still in force, was it not in violation of her legitimate expectations to continue to work for the balance period of her contract?*
- (c) *Furthermore, had the Respondents properly addressed their minds to the interpretation that ought to have been put on Section 13 (2) (g) of the Immigration Act (2003 as amended) read with Section 173 (4) (d) of the Constitution of Fiji?*
- (d) *Consequently, had those relevant questions been asked by the Respondents could they have upheld the “ouster clause?”*
- (e) *Did the Respondents apply the principles laid down in the authoritative precedents in the decisions referred to in paragraphs [9] to [11] above, in as much as, each and every question raised in (a) to (d) above affected “the jurisdiction” of the Respondents, the principle being, an ouster clause will only protect a decision given within jurisdiction.*

[13] There may be other incidental issues arising in this case which I shall not comment on, for the reason that, I was inclined to grant leave to apply for judicial review against the impugned decision of the High Court on what I have said in paragraph [12] above. I shall leave it open to the parties to advance their arguments before the Full Court on whatever other incidental issues.

[14] However, apart from what I have articulated in paragraph [13] above, I also reserve for the consideration of the Full Court the question the Appellant has raised in the context of Section 173 of the Constitution, as to whether the ouster clause in relation to decisions during 5th December, 2006 and the first sitting of Parliament on 14th December, 2014 apply to or they do not apply to decisions after the first sitting of Parliament.

Re: The present application by the Appellant being an out of time application

[15] The Appellant has adduced reasons for the delay at paragraph 4.4 of the written submissions dated 20th September, 2022. I accept that the delay has been satisfactorily explained. I have also no hesitation in holding the view that there is merit in this matter justifying the Full Court's consideration (vide: NLTB v Khan, CBV 2 of 2013, 15th March, 2013 per Gates, P. (SC)

[16] Accordingly, I proceed to make the following orders.

Orders of Court:

1. *The application seeking leave to appeal the judgment of the High Court dated 19th November, 2020 is allowed.*
2. *There shall be no order for costs.*



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Hon. Justice Almeida Guneratne
PRESIDENT, COURT OF APPEAL

Solicitors:

Toganivalu Legal Barristers & Solicitors for the Appellant
Attorney-General's Chambers for the Respondent