IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 105 OF 2023

[Lautoka Civil Action: HBM 040 of 2023]

BETWEEN : **SUNG JIN LEE**

1st Appellant

NAM SUK CHOI

2nd Appellant

BYEONG JOON LEE

3rd Appellant

BEOMSEOP SHIN

4th Appellant

JUNG YONG KIM

5th Appellant

JINSOOK YOON

6th Appellant

AND : **THE DIRECTOR OF IMMIGRATION**

1st Respondent

THE COMMISSIONER OF FIJI POLICE

2nd Respondent

THE ATTORNEY GENERAL OF AND FOR THE REPUBLIC OF THE FIJI ISLANDS

3rd Respondent

Coram	**:**	**Jitoko, P**
	:	**Jameel, JA**
	:	**Clark, JA**
Counsel	**:**	**Mr. S. Ower, Mr. W. Pillay, Mr. R. Gordon and Mr. N. Prasad for the Appellants**
	:	**Mr. R. Green, Solicitor General and Ms. O. Solimailagi for the Respondents**
Date of Hearing	**:**	**06 February 2024**
Date of Judgment	**:**	**29 February 2024**

JUDGMENT

Jitoko, P

[1] I have had the advantage of reading in draft the Judgment of Hon. Madam Justice Jameel. I am in total agreement with her reasoning and conclusion.

Jameel, JA

A. *Introduction*

[2] This is an appeal from the Judgement of the High Court, dated 27 October 2023, whereby the court struck out the application of the Appellants for inter-alia, Writs of *Habeas Corpus Ad Subjuciendum,* and made an order for costs of $3000.00 to be paid by the Appellants to the 3rd Respondent.

Factual Background and chronological sequence of events

[3] Set out below are the background facts extracted from the affidavits and supporting documents filed in the High Court.

Preceding events - 2018

[4] On 23 July 2018, INTEPOL issued Red Notices in respect of 7 Korean nationals, requesting law enforcement worldwide to locate and arrest the named persons as they were wanted for prosecution in the Republic of Korea.

The persons named were:-

1) Mr. Jung Yong Kim, (the 5th Appellant in these proceedings).
2) Ms. Sung Jin Lee, (the 1st Appellant in these proceedings).
3) Mr. Byeong Joon Lee (the 3rd Appellant in these proceedings).
4) Ms. Jin Sook Yoon.
5) Mr. Beomseop Shin, (the 4th Appellant in these proceedings).
6) Ms. Nam Suk Choi, (the 2nd Appellant in these proceedings).
7) Mr. Chul Na.

[5] Upon the circulation of these Notices, and discovery that the persons mentioned therein were resident in Fiji, a Task Force was convened in Fiji to consider the matters contained in the said notices. On 13 August 2018 a Warrant of Detention was issued by the then Permanent Secretary for Immigration, and the seven persons named in the said notices were arrested pursuant thereto. The arrests were challenged in the High Court of Lautoka in proceedings bearing number HBM.25 of 2018. However, on 16th August 2018, the Warrants of Detention were revoked by the then Permanent Secretary, and when the matter was taken up in court on 18 September 2018, court was informed that the seven persons had been released upon the revocation of the Warrants of Detention. Consequently, the applicants in that application filed Notice of Discontinuance on 20th August 2018, and thus, that matter was laid to rest.

Events from 2023

[6] On 14 February 2023 the Government of Korea issued a Diplomatic Note bearing No. KF J-23-73 renewing its 2018 request. Thereupon, the Task Force consisting of the Fiji Police, Fiji Immigration Department, Financial Intelligence Unit, Fiji Revenue and Customs Service, Ministry of Home Affairs and Immigration, and the Ministry of Justice, was re-convened to investigate matters of security and good governance relating to the said persons, and nine companies, under what is known as the "Grace Road Group", in which the said persons were involved in some way. The Task Force had presented its findings to the Minister of Immigration and Home Affairs who, upon being satisfied on advice received by him, and for the reasons set out in his Affidavit, deemed that the presence of the said persons was prejudicial to Fiji's security and good governance, in terms of the provisions of section 13(2) (g) of the Immigration Act, 2003, and that they had therefore become 'Prohibited Immigrants'. The Permanent Secretary of Immigration then exercised his discretion in accordance with section 15(1) of the Immigration Act, 2003, issued Removal Orders in respect of the Appellants, and gave directions to the Director of Immigration to give effect to the decision of the Minister, and the order of removal, resulting in the arrest of some of the Appellants.

[7] On or about 6 September 2023, the 1st and 2nd Appellants were arrested and detained by officers of the Fiji Police and the Department of Immigration. Upon the arrests being made, the Appellants instituted proceedings in the High Court, for securing their release.

The High Court Proceedings

(i)The Ex Parte Notice filed on 6 September 2023

[8] By *Ex Parte* Notice of Motion filed on 6 September 2023, supported by the affidavit of Seung–Cheol Lee, the 1st Appellant (Original 1st Plaintiff), and 2nd Appellant (Original 2nd Plaintiff), applied to the High Court of Lautoka for Writs of *Habeas Corpus ad subjiciendum* under Order 54 of the High Court Rules, 1988, citing the Director of Immigration as the 1st Defendant, (now the 1st Respondent), the Commissioner of Fiji

Police as the 2nd Defendant (now the 2nd Respondent) and the Attorney General of the Republic of Fiji Islands, as the 3rd Defendant, (now the 3rd Respondent).

[9] The Orders sought by the Appellants by *Ex Parte* Notice of Motion filed on 6 September 2023 in the High Court, were as follows:

> *"1. Forthwith a Writ of Habeas Corpus Ad- Subjudiciendum issue against:*
>
> *a. The Director of Immigration Fiji and/or*
> *b. The Commissioner of Fiji Police and/or*
> *c. Such other person as the Court or Judge may direct.*
>
> *2. Alternatively and/or further the Court of* (sic) *Judge make such other or further Orders under Order 54 Rule2 of the High Court Rules.*
>
> *3. An Interim Injunction restraining the Director of Immigration and/or the Commissioner of Fiji Police and /or Airports Fiji Limited and/ or Civil Aviation Authority of Fiji and/or Air Pacific Limited and/or Fiji Airways and/ or Air Terminal Services of Fiji and/ or their officers, employees, servants, agent and/or workmen and/or such other person or persons, entities and/or Government Institutions from removing and/or causing to remove and/or assisting in the removal of Sun Jin Lee and/or Nam Sook Choi from Fiji and/or the jurisdiction of Fiji and /or beyond the borders of Fiji in and/ or by an aircraft, vessel, ship and/ or by any means, form method and/ or manner whatsoever until further Order of Court and/ or until the return of the Writ of Habeas Corpus Ad Subjiciendum.*
>
> *4. Costs of this application be paid by the Defendant(s).*
> *5. Such other Order(s) or further Orders that the court deems just, equitable, expedient and necessary in the circumstances.*
>
> *AND UPON THE GROUNDS contained in the affidavit of SEUNG CHEOL LEE of Villa 222, Hibiscus Drive, Navua, Director /Shareholder.*

[10] On 6th September 2023, upon hearing Counsel for the applicants, the learned High Court Judge made order issuing Writs of Habeas Corpus in respect of the 1st and 2nd Appellants, and granted the Interim Order sought in paragraph 3 of the said *Ex Parte* Notice of Motion restraining the removal of the Appellants from Fiji. This Order of court was served on an Immigration Officer at the Nadi Airport around 8.00 p.m. that night, and as a result, the removal of the 1st and 2nd Appellants from Fiji, was restrained. However, since there was no restraining order against the removal of the 3rd and 4th Appellants, they were removed and deported from Fiji on 6th September 2023, and thereafter the application in respect of the 3rd and 4th Appellants became academic.

(ii) The Amended Ex Parte Motion filed on 7 September 2023.

[11] On 7th September 2023, an Amended *Ex Parte* Notice of Motion was filed, pursuant to Orders 3, 8, 15, 29, 32 and 54 of the High Court Rules, seeking to add Byeonjoon Lee as the 3rd Plaintiff, (now the 3rd Appellant), Beomseop Shin as the 4th Plaintiff, (now the 4th Appellant), Jung Yong Kim, as the 5th Plaintiff, (now the 5th Appellant) and Jinsook Yoon, as the 6th Plaintiff, (now the 6th Appellant).

[12] On 7th September 2023, the Amended Notice of Motion was supported on the strength of the Affidavits of Seung Cheol Lee and Ah Rum Song, seeking the identical reliefs as had been sought in the Original *Ex Parte* Motion filed on behalf of the 1st and 2nd Appellants, but by this Amended Notice, they sought to add the 3rd to 6th Appellants as Plaintiffs, in respect of the Interim order restraining the authorities from removing the added Plaintiffs from the jurisdiction of Fiji.

[13] Upon hearing Counsel for the Plaintiffs on 7 September 2023, the learned High Court Judge granted the Orders sought in paragraphs 1, 2, and 5 of the Amended Notice of Motion. By this Order the 3rd to 6th Appellants were joined as Plaintiffs in the said proceedings, Writs of Habeas Corpus was issued in respect of the 3rd to the 6th Appellants, (Copy record 258-260), the restraining order was issued, and court then adjourned the matter to be Mentioned on 18 September 2023.

The Return and the Opposing Affidavit of the 1st Respondent

[14] In accordance with O.54, r.6 of the High Court Rules,1988 the Orders of court and the Notice of Writ was served on the 1st Respondent, returnable on 18th September 2023. On 15 September 2023, the 1st Respondent filed a Return to the Summons deposing *inter alia* that: the Appellants had been arrested and were detained in her custody under Removal Orders as they had been deemed by the Minister to be Prohibited Immigrants, the 3rd and 4th Appellants were no longer in her custody, and the 1st and 2nd Appellants had been released from her custody around 5.00 a.m. on 7 September 2023. The release of the 1st and 2nd Appellants was based on the Order made by the High Court on 6th September 2023, referred to above.

[15] On 15 September 2023, the 1st Respondent filed an Affidavit in Opposition to the Affidavit of Seung- Cheol Lee filed on 6 September 2023, and the Affidavit of Ah Rum Song filed on 7 September 2023. The matters contained in the Opposing Affidavit of the 1st Respondent, were verified by exhibits in support of the justification for detention. The 1st Respondent had annexed to her Affidavit documents marked AK 1 to 6.

[16] Documents marked AK 1 to AK 4 filed with the 1st Respondent's Affidavit, were the documents relating to the 2018 proceedings, *viz*, the Red Notices, the Warrants of Detention, and the Revocation of the Warrants of Detention. Annexed as "AK 5" to the 1st Respondent's Affidavit, were copies of Diplomatic Notes bearing reference numberKFJ-18 -143 dated 21 September 2018, reference number KFJ-18-148 dated 21 September 2018 and reference number KFJ- 23-73 dated 14 February 2023. The Diplomatic Note No.KFJ-23-73 dated 14 February 2023, appeared to be the most recent intimation of its previous request by the Government of Korea.

[17] In her Affidavit in Opposition, the 1st Respondent deposed that on 31 August 2023, she received a letter from the Minister for Immigration and Home Affairs stating that; he had considered the Diplomatic Notes and Red Notices, he was satisfied that the presence of the Appellants was prejudicial to the country's security and good governance, and that they

had thus become Prohibited Immigrants pursuant to section 13(2) (g) of the Immigration Act 2003, and that the Permanent Secretary was to exercise his power under section 15 of the Immigration Act 2003. She also deposed that on 31 August 2023, the Permanent Secretary for Immigration issued Removal Orders, and subsequent Notices of Detention (annexed as AK7) in respect of six Korean Nationals.

[18] On 6 September 2023, the operation to remove the persons named as Prohibited Immigrants was undertaken by the Immigration Department, with the assistance of the Fiji Police Force and Police Officers from Korea. The orders were executed in respect of the 1st, 2nd, 3rd and 4th Respondents, and they were escorted to the Nadi International Airport, but the 1st and 2nd Appellants were denied boarding because the restraining Order made by the High Court on 6 September 2023 had been served at or around 8 p.m. on an Immigration Officer at the airport, and therefore it was only the 3rd and 4th Appellants who had been deported. The 1st Respondent deposed that pending deportation, the Appellants were detained lawfully.

The Opposing Affidavit filed on behalf of the 2nd Respondent.

[19] On 15 September 2023, Inspector Akoila Rokotua Officer-in-Charge of INTERPOL Fiji, in filed an Affidavit in Opposition to the Affidavits filed by Seung Chol Lee (in support of the Appellants' Ex Parte Notice of Motion filed on 6th September 2023), and the affidavit of Ah Rum Song (in support of the Amended *Ex parte* Notice of Motion filed on 7 September 2023). In this Affidavit he referred to the Red Notices circulated in 2018, and that he was part of the Task Force that looked into the Red Notices in 2018, that on receipt of multiple Diplomatic Notes by the Government of Korea, the most recent one being dated 14 February 2023, the Task Force was reconvened in 2023. He also deposed that he accompanied the Immigration Officers to execute the Removal Orders on the 1st and 2nd Appellants, however their removal was restrained by the Order of the High Court (made on 6 September 2023). However, three Fijian and Korean Police officers and the deponent, accompanied two of the Prohibited Immigrants to Korea, and they returned to Fiji on 9 September 2023.

The Affidavit of the Minister

[20] The Minister of Home Affairs and Immigration deposed in his affidavit filed on 15 September 2023 that: he was advised by his Permanent Secretary that Fiji ought to comply with the Red Notices issued by INTERPOL in respect of the deportation of six Korean Nationals, work was being undertaken by an investigation team to confirm the number of valid permit holders, and those that need to be classified as Prohibited Immigrants, further investigations will be conducted into statutory offences alleged to have been committed, the said persons had allegedly been involved in other statutory offences, and that he was satisfied that the presence of the Prohibited Immigrants (which included all the Appellants) is prejudicial to Fiji's security and good governance, in terms of the provisions of section 13 of the Immigration Act, 2003. Therefore, on 31 August 2023, he issued a declaration in terms of section 13(2) (g) of the Immigration Act, 2003, deeming them to be Prohibited Immigrants.

The 3rd Respondent's Inter -Partes Summons to Strike- Out Appellant's "Action"

[21] On 15 September 2023, three days before the date scheduled by court for the case to be Mentioned, the Respondents filed *Inter- Partes* Summons, (copy record 416) under Order 18(1) (a) of the High Court Rules 1988, and moved that the court hear the defendants for an order to "*strike- out the within action as the same discloses no reasonable cause of action on the ground that section 13(2) of the Immigration Act 2003 expressly excludes the jurisdiction of the court from questioning or reviewing the decision of the Minister".* The Respondents stated that; "*the inter partes summons to strike out is made pursuant to Order 18(1)(a) of the High Court Rules 1988 and pursuant to the inherent jurisdiction of court."*.

[22] On 22 September 2023, the Respondents filed Amended Inter Partes Summons for Striking out, "*the action as the same discloses no reasonable cause of action on the ground that section 173(4) of the Constitution and /or section 13(2) (g) of the Immigration Act 2003 expressly excludes the jurisdiction of the court from reviewing the decision of the Minister"*.

Proceedings of 18 September 2023

[23] When the application was taken up on 18 September 2023, all parties were represented by Counsel. Mr. Ower, K.C. informed court that as of that date, only the 5th Appellant was in custody, the Appellants had filed applications for Judicial Review and Constitutional Redress in addition to the applications for Habeas Corpus and submitted that it would be appropriate to consolidate the application for Habeas Corpus with the application for Judicial Review.

[24] Mr. Ower, K.C. also informed court that the 1st, 2nd and 6th Appellants had been released but that there were in place Removal Notices in respect of them. The Order of Court of 18 September 2023, as reflected in the Judge's Notes reveals that the applications of the 1st, 2nd, 3rd, 4th and 6th Appellants were "*withdrawn by consent*."

[25] The Learned Solicitor General submitted to court that the 1st Respondent had filed a Return to the writ, 3 of the detainees had been released, and the interlocutory injunction issued should be dissolved and the application discontinued, because the application now relates only to the 5th Appellant and moved court to hear the application for Habeas Corpus.

[26] Mr. Ower, K.C. informed court that his client disputes the facts in the Return filed by the 1st Respondent and sought permission to file Affidavits in reply. Accordingly, the court granted time for the Appellants to file Affidavits in Opposition within three days and granted the Respondents three days thereafter to file Affidavits in Reply, and fixed the Hearing for 29 September 2023.

[27] On 22 September 2023, an Affidavit was filed by Ah Rum Song in support of the application for the release of the 5th Appellant. On 25 September 2023, an Affidavit in Opposition was filed by the Permanent Secretary of Home Affairs and Immigration. Annexed to this Affidavit were Diplomatic Notes No. KFJ-18-143, dated 18 September 2018, No. KFJ-18-148 dated 21 September 2018 and KFJ-23-73 dated 14 February 2023.

Proceedings of 29 September 2023

[28] When the application was taken up on 29 September 2023, both Counsel agreed to proceed only in relation to the Summons to Strike-Out the Appellants' application for writs of Habeas Corpus.

[29] In the High Court the learned Solicitor General submitted that: the application for the writ of Habeas Corpus in this case "*discloses no reasonable cause of action*", the jurisdiction of the High Court is excluded and ousted by the provisions of section 173(4) (g) of the Constitution and section 13(2) (g) of the Immigration Act 2003, which provides that the decision of the Minister made under section 13 (2) (g) of the Immigration Act, 2003 is final and conclusive and shall not be questioned or reviewed in any court, the Appellants had failed to make the Minister and the Permanent Secretary parties, and that the Minister's Order has not been challenged in this Habeas Corpus proceedings.

[30] It was also the submission of the learned Solicitor General that the application for a writ of Habeas Corpus was effectively an application to review the Minister's decision which is precluded by a statutory ouster clause, and therefore the High Court had no jurisdiction to review, question or entertain any application relating to the Minister's decision. In response, the learned Counsel for the Appellants had correctly submitted that upon the detainee being produced in court, which had been done in this case, it was then for the Respondents to establish the legality of the detention.

[31] Thus, the effect of the submissions on behalf of the Respondents was that the ouster clauses relied upon 'ousted' the jurisdiction of the High Court to entertain the application for the writ of Habeas Corpus. In addition, and interlinked to this, was the parallel argument that the application ought to be struck out under O.18, r.1 of the High Court Rules, 1988.

[32] The thrust of Mr. Ower's submissions was that neither the provisions of section 173(4) (d) of the Constitution, nor section 13(2) (g) of the Immigration Act, 2003 excludes the jurisdiction of the High Court to entertain an application for a Writ of Habeas Corpus. The

Transcripts of the Audio Recordings of 29 September 2023 reveal that although it was scheduled to be a hearing into an application for a Writ of Habeas Corpus, in fact the arguments were confined to 'striking out' the applications for the Writs of Habeas Corpus in terms of O.18, r.18 of the High Court Rules.

[33] At the end of the day's proceedings of 29 September 2023, the interim order issued by court in terms of paragraph 5 of the Ex-Parte Summons filed on 7 September 2023, was extended up to 27 October 2023, and the court set the matter down for its Ruling.

The Judgment of the High Court

[34] On 27 October 2023, the learned High Court Judge issued his Ruling, and made order striking out the applications of the Appellants and ordered the Appellants to pay $3000.00 as costs to the 3rd Respondent.

Grounds of Appeal

[35] Being aggrieved by the Judgement of the High Court dated 27 October 2023, the Appellants have appealed on the following grounds:

1. *The learned judge erred in law and/or fact in holding that the High Court did not have jurisdiction in the action and dismissing the action, and ought to have held:*

   1.1 that, on its proper construction, Section 173(4)(d) of the Constitution did not exclude jurisdiction in proceedings challenging or questioning the decision of the Minister for Home Affairs and Immigration made on 31 August 2023 under Section 13(2)(g) of the Immigration Act 2003 in relation to the Jung Yong Kim; and

   1.2 that, on its proper construction, Section 13(2)(g) of the Immigration Act 2003 did not exclude judicial review of a decision made under that provision that has been without, or in excess of, jurisdiction.

2. *The learned Judge erred in law and/or fact in holding that the proceedings did not challenge the decision of the Minister or Permanent Secretary, and ought to have held that the application for a writ of habeas corpus in the circumstances challenged the legality of the detention of the plaintiffs which, in turn, challenged the administrative decisions that purportedly gave rise to the power of detention.*

3. *The learned judge erred in law and/or fact in holding that there was no substantive relief sought against the defendants that would give rise to interim relief, and ought to have held that the Court had jurisdiction to issue a writ of habeas corpus to transfer the custody of the plaintiffs from the control of the immigration authorities to the control of the Court pending the determination of the proceedings.*

4. *The Appellants reserve the right to file and/or supplement their grounds of appeal and to add or remove such further or other grounds as may be advisable upon a perusal of the record.*

Discussion of the Judgment of the High Court and the Grounds of Appeal

Did the High Court have jurisdiction to entertain an application for Habeas Corpus in light of the ouster clauses relied on?

[36] The essence of the submission of the Appellants was that the application for the writ of Habeas Corpus did not *per se* challenge the Minster'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.

[37] Thus, the matter for determination by this court is the applicability of the ouster clauses contained in section 173 (4) (d) of the Constitution and section 13(2) (g) of the Immigration Act 2003, to an application for a Writ of Habeas Corpus. In my view, the ouster clauses do not oust the jurisdiction of the High Court given to it under O.54.of the High Court Rules,

1988, to 'review' a complaint of detention or arrest in a general sense, as opposed to an application for Judicial Review made under O.53 of the High Court Rules 1988.

The Writ of Habeas Corpus

[38] At the hearing of this appeal, both learned Counsel drew the attention of court to several authorities, the majority of which relate to applications for Judicial Review. Therefore, it is useful to consider the purpose and scope of the procedure of Judicial Review and the remedy of the Writ of Habeas Corpus, although in view of my conclusions, it is not relevant for me to consider all of those authorities for the purpose of determining this appeal. Whilst Judicial Review and of Habeas Corpus are both Public Law remedies, and there could, in most cases be an overlap in respect of the evidence relied upon by the parties, the two remedies are historically distinct, and continue to remain distinct in terms of procedure, purpose and scope.

[39] In order to determine the matters in appeal and appreciate the submissions made by both learned Counsel, a consideration of the nature, purpose and scope of the writ of Habeas Corpus too, would provide a helpful backdrop.

[40] The expansion of the welfare State, coupled with the increase in institutions wielding public power, saw a parallel growth in the liberalization of judicial thinking, resulting in an ever-expanding canvas of Judicial Review. The growth of Human Rights instruments and the recognition and inclusion of fundamental rights in written Constitutions in most Commonwealth countries, propelled the growth of the principles of Judicial Review.

[41] Although the writ of Habeas Corpus preceded Judicial Review as a tool of controlling executive and administrative excesses, the frequency with which applications for Judicial Review were made, resulted in primacy being accorded to Judicial Review over the Writ of habeas Corpus. However, the writ of Habeas Corpus remains the speediest remedy to challenge arrest or detention.

[42] The writ of Habeas Corpus is a matter of right, in that it is granted *ex debitio justititiae,* whereas Judicial Review is available only upon the grant of leave by court, and even after leave is granted, the final remedy sought is again a matter of discretion for the court, which is entitled to refuse a remedy on the basis of discretionary bars.

[43] Unlike in an application for Judicial Review, in which the applicant must pass the discretionary bars such as rules relating to standing (having '*sufficient interest'* in the matter challenged), meeting the minimum threshold of having an arguable case, and complying with time limits, an application for a Writ of Habeas Corpus is available as a matter of right, in that the court is mandated to consider the application although the court may finally, at the conclusion of the hearing decline to release the detainee. The Writ cannot be denied, merely because there may be an alternative remedy, nor is leave required before it can be sought. It is distinct from the prerogative Writs of Certiorari and Prohibition in that, the Writ of Habeas Corpus issues as of right (and the prisoner should be released) if the detention is determined to be unlawful, provided the applicant is not seeking to subvert or circumvent the normal processes of an appeal from a conviction. When a court orders the applicant's release, that order in effect amounts to the quashing of the order of detention, and therefore Certiorari need not issue.

[44] In describing the differences between an application for a Writ of Habeas Corpus which is available as of right, and an application for Judicial Review, which is discretionary in nature, in R. **v Secretary of State for the Home Department, ex parte Khawaja,** [1984] A.C. 74 at 111,) Lord Scarman said:

> *"There are of course procedural differences between habeas corpus and the modern statutory judicial review… in the instant case the effective relief sought is certiorari to crush the immigration officer's decision. But the nature of the remedy sought cannot affect the principle of the law. In both cases liberty is in issue. 'Judicial Review' under R.S.C. Ord. 53 and the Supreme Court act 1981 is available only by the leave of the court. The writ of habeas corpus issues as of right. But the difference arises not in the law's substance but from the nature of the remedy appropriate to the case."*

[45] Accordingly, an application for a writ of Habeas Corpus can proceed independently of an application for Judicial Review. Unlawful arrest and detention can be challenged in two ways: one is by way of prosecution or an action for unlawful arrest or imprisonment, and the other is through the Writ of Habeas Corpus. The latter is a speedy and effective process, the purpose being to challenge the legality of the detention, enabling the detainee to raise all matters relating to the validity of the detention.

[46] Although the Writ of *Habeas Corpus* when issued will require the authorities to produce the detainee in court, the decision as to whether continued detention is necessary, would be a matter for the court hearing the application to determine, based on the evidence and facts contained in the form of Affidavits filed in court by the Respondents and relevant authorities.

The status of the writ of Habeas Corpus in Fiji

[47] The inclusion and recognition of the remedy of the writ of Habeas Corpus in the High Court Rules 1988, despite the existence of the ouster clause in section 173(4) of the Constitution and section 13(2) (g) of the Immigration Act of 2003, makes it clear that the Common Law remedy of the Writ of Habeas Corpus is meant to be a living component of the legal system of Fiji. Section 3 of the Constitution provides that any person interpreting or applying this Constitution must promote the spirit purpose and objects of the Constitution as a whole, and the values that underlie a democratic society based on human dignity equality and freedom. It cannot be presumed that the Writ of Habeas Corpus is or was intended to be excluded from the legal system of Fiji.

[48] Section 7(4) of the Constitution provides that when deciding any matter according to common law, a court must apply and where necessary develop the common law in a manner that respects the rights and freedoms recognised in this chapter. The writ of Habeas Corpus is a common law remedy that continues to remain in the statute book.

[49] To support their argument that the High Court lacked jurisdiction the Respondents relied on the judgment of this court in **One Hundred Sands Ltd. v Attorney General of Fiji,** [2017] FJCA 19, in which this court upheld the ouster clause in respect of a decision to revoke the applicant's Casino Gaming Licence issued under the provisions of the Gaming Decree of 2009. This court held that the impugned decision was protected under the ouster clause in section 173(4) of the Constitution.

[50] However, for the reasons set out in this judgment, I have concluded that the matter that was impugned in the High Court was not in respect of a decision made under a power "protected" by an ouster clause. Therefore, it is not necessary for this court to consider the applicability of that judgment, as well as the several other judgements on ouster clauses, adverted to by Counsel at the hearing of this appeal.

[51] There is nothing in section 15 of the Immigration Act, 2003 that mandates the Permanent Secretary to make an order directing a Prohibited Immigrant to leave and or remain out of Fiji. He is merely empowered to do so. In this case the Permanent Secretary did make an order on the request of the Minister. However, that *per se* does not convert his order, into that of the Minister, although it is indeed a sequel to the Minister's Order under section 13(2) (g).

[52] No doubt when the applicant is not only detained, but also faces the risk of deportation such as in this case, the matter assumes a different magnitude. In such a case, the court would be mindful of the balance to be struck between the liberty of the subject, and the sovereign right of a State to determine what security and good governance requires. In such cases, the release from detention may have to be coupled with an appropriate order to the relevant authority to ensure that justice is done, and that the final orders of court in challenges by way of Judicial Review, as well as the application for a writ of Habeas Corpus, are not rendered nugatory. In view of the provisions of O.54, r.3, O.54, r.5, O.54, r.7, and O.54, r.8 of the High Court Rules, 1988, and the inapplicability of the ouster clauses relied upon, in this case it was mandatory for the High Court to have heard and

determined the application for Habeas Corpus, instead of striking it out under the provisions of r.18, r.18 of the High Court Rules, 1988.

Was reliance on O.18, r. 18 of the High Court Rules, 1988, the correct basis on which to decline jurisdiction?

[53] For the reasons set out above, as well as those that will be elaborated below, I have concluded that 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.

The Scope and Ambit of the Striking Out Provisions in the High Court Rules, 1988

[54] O.18 of the High Court Rules, 1988 is titled "*Striking out of pleadings and indorsements*". The provisions pertaining to Striking Out pleadings and indorsements provides in O.18.r.1 as follows:

> *"18-(1) The court may at any stage of the proceedings order to be struck out all amended any bleeding or endorsement of any rift in the action, or anything in any pleading or in the indorsement, on the ground that-*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be,*
>
> *(b) it is scandalous, frivolous or vexatious;*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of the process of the court,*
>
> *and may order the action to be stayed or dismissed or judgement to be entered accordingly, as the case may be.*
>
> *(2) No evidence shall be admissible on an application under paragraph (1) (a).*
>
> *(3) This rule shall, so far as applicable, apply to an originating summons and the petition as if the summons or petition, as the case may be, were a pleading.*

[55] The contents of O.18, r.18(1) (a) to (d) cover situations in which the Statement of Claim does not disclose a reasonable cause of action, or the Statement of Defence does not disclose a reasonable defence, or the action is itself scandalous, frivolous or vexatious, or may prejudice, embarrass or delay the fair trial of the action, or the action is itself an abuse of the process of court. Accordingly, it cannot reasonably be contended that an application for a writ of Habeas Corpus is captured under the provisions contained therein, because it discloses no cause of action, or that the application is itself scandalous, frivolous or vexatious, or that the application may prejudice, embarrass or delay a fair trial of an action, or that it is an abuse of the process of court. Lord Pearson in **Drummond Jackson v British Medical Association** [1970] WLR 688, said that frivolous and vexatious cases are those which are obviously frivolous and unsustainable, and it is plain and obvious that there is no case for the Plaintiff, or the defence is devoid of any merit whatsoever.

[56] An application for a writ of Habeas Corpus cannot be regarded an abuse of the process of court, it being a remedy provided for by law. For an application for strike out under O18, r,18, to succeed, the Plaintiff's application to court must be an "*action,*". An application for a writ of habeas Corpus is not an '*action*' against the State, although it is no doubt an application to obtain redress, namely the redress of release from arrest or detention.

[57] Instead, as in this case, an application for a writ of Habeas Corpus, is an application seeking a remedy that is linked to the Constitutional guarantees of the liberty of the subject from freedom from arbitrary arrest and detention. In such a case, the defendant must establish the legality of the detention, not contend that the decision to detain cannot be questioned.

[58] To consider the grounds of appeal taken as a whole, and the arguments that were put forth both in the High Court as well as before this court, it is useful to set out the relevant portions of the High Court's Judgment which appear to have been the basis for declining of jurisdiction to entertain the application for a Writ of Habeas Corpus.

[59] In striking out the Appellants' application before the High Court, the court said :

> *'[5] The question for determination is whether the court has the power to ignore and disregard statutory provisions following the common law principles. There is no ambiguity in section 13(2) (g) of the Immigration Act requiring any interpretation. What the section says is the decision of the minister made under this paragraph shall be final and conclusive and shall not be questioned or reviewed in any court.*
>
> *[6] If this court disregards or ignores the above provisions it would create a very bad and unhealthy precedence where a discretion would be conferred on every court to disregard any statutory provision and make any order as it thinks fit. In my view this court has no power authority to override any statutory provision. The duty of the court is to administer justice according to law unless the statute has expressly conferred a discretionary power upon it. There is no doubt the common law judgments are useful however they are only of persuasive value and our courts are not bound by such decisions.'*

The Constitutional provisions relevant to the matter for determination

[60] With respect, the conclusions of the High Court in paragraphs [5] and [6] of the judgment do not reflect the relevant law. This conclusion is fortified by the following provisions in Chapter 2 of the Fiji Constitution entitled "*Bill of Rights"*.

Section 7(4) provides as follows:

> "*When deciding any matter according to common law a court must apply and where necessary develop the common law in a manner that respects the rights and freedoms recognized in this Chapter.*

Section 7(5) provides that:

> "*In considering the application of this Chapter to any particular law, a court must interpret this Chapter contextually, having regarded the content and consequences of the law, including its impact upon individuals or groups of individuals."*

I am mindful that whilst section 9 of the Constitution provides that a person must not be deprived of personal liberty, it also sets out nine exceptions, and that one of such exceptions is that "*(d) if the person is reasonably suspected of having committed an offence".* However, in my view this does not override the requirement for such deprivation to have been effected in accordance with law. An application for a Writ of Habeas Corpus is therefore not precluded by the provisions of law relied upon by the Respondents.

[61] In considering the contents of paragraphs [5] and [6] of the High Court judgment, there is no legal basis to ignore the following provisions of law, which appear to me to be relevant in this regard:

Section 22 (1) of the High Court Act, 1875 provides as follows:

> **"***The common law, the rules of equity and the statutes of general application which were in force in England at the date when Fiji obtained a local legislature, that is to say on 2 January 1875 shall be enforced within Fiji subject to the provisions of section 24."*

Section 23 of the High Court Act provides as follows:

> *'Such portions of the practice of the English courts as existed on 2nd January 1875 shall be in force in Fiji subject to the provisions of section 24, and accept so far as such practice may be inconsistent with any general rules of the High Court relating to practice and procedure.*

O.1, r.7 of the High Court Rules, 1988 provides as follows:

> *"Where no express provision is made by these Rules with respect to the practice of procedure in any circumstances arising in any cause or matter, then the jurisdiction of the High Court shall be exercised in conformity with the practice and procedure being adopted in the like circumstances in Her Majesty's High Court of Justice in England."*

[62] Accordingly, the above provisions of the High Court Act, 1875, O.54 of the High Court Rules, 1988, the Constitutional provisions set out in Chapter 2 of the Bill of Rights, taken in conjunction with the principles of constitutional interpretation set out in Section 3 (1) and Section 7(4) of the Constitution, point towards the irresistible conclusion that despite

the ouster clauses in section 173(4) of the Constitution, and section 13(2) (g) of the Immigration Act, 2003, the right to apply for a Writ of Habeas Corpus, which is of course a common law remedy that has been now statutorily recognized, remains undisturbed.

[63] Since the essence and purpose of a writ of Habeas Corpus is to determine the legality of the detention or arrest, all matters that may be raised in Judicial Review proceedings may not always be related to every order made in respect of departure from the jurisdiction. Often the applicant is not necessarily under detention, but is the subject of a deportation order, or a denial of the right of enter. In such cases, the decision of the authority would be the subject of Judicial Review proceedings.

[64] The Writ of Habeas Corpus therefore continues to remain relevant in Constitutional democracies. Most courts will be reluctant to interfere with national security concerns and matters that lie within the exclusive domain of the elected representative, and the executive branch of government, and would, in the interest of comity, defer to the views of the elected representatives. However, the Constitutional role ordained for the judiciary ought not to be abandoned under the guise of the separation of powers. In cases of Habeas Corpus and Judicial review, the role of the court is supervisory and to ensure that wide powers are not abused or exercised arbitrarily, whilst remaining cautious and refraining from imposing its own judgment on how public authorities should use powers allocated to them.

[65] In a case such as this where the applicant's initial entry appears to have been lawful and he or she is detained pending removal from the jurisdiction of Fiji, such detention can undoubtedly be the subject of an application for a writ of Habeas Corpus.

[66] The summary of Mr. Ower's arguments is that: the ouster clauses in section 173 (4) (d) of the Constitution and section 13(2) (g) of the Immigration Act 2003, do not oust the jurisdiction of the High Court in an application for a writ of Habeas corpus, the learned High Court judge erred in relying on the judgment of this court in the case of **One Hundred Sands Ltd. v Attorney General of Fiji**, [2017] FJCA 19**,** because that was a case in which this court found that the decision challenged was made under a Decree made

in 2009 which the court concluded was protected by section 173 (4) of the Constitution; and that the decision in **One Hundred Sands** (*supra*) can be distinguished from the facts of this case, because the decision impugned in this case, was not made under law that was enacted during the interregnum period.

[67] Coming back to the matter at hand, the relevance of these well-known legal principles of Constitutional and Administrative Law, must be applied to the facts of the case before this court. The Constitutional Ouster clause in section 173(4) is contained in Part D of the Constitution, titled "*Transitional*", and seeks to protect decisions made in a specific context and within a specific time frame. The ouster clause in section 13 (2) (g) of the Immigration Act 2003, seeks to give immunity to a decision of the Minister. However, since it was not the Minister's decision itself which was challenged in the application for Habeas Corpus, but a sequel to his decision, the High Court was required to determine whether the arrest and detention had been carried out in accordance with law, instead of declining jurisdiction based on the applicability of the ouster clauses, in respect of a discretion which is not 'protected' by an ouster clause.

[68] If indeed the High Court declined jurisdiction on the basis of the ouster clauses, that ought to have effectively put an end to the matter. However, what the court did was to rely on the strike out provisions in O.18 of the High Court Rules, to sustain an objection that the court lacks jurisdiction because of ouster clauses. This is an error of law.

[69] Therefore, the conclusions reached by the High Court that it had no jurisdiction to entertain an application for a writ of Habeas Corpus, is without legal basis. Accordingly, the order striking out the applications, and declining jurisdiction was an error of law, and therefore ground 1of the grounds of appeal is allowed.

Ground 2 of the grounds of appeal-

[70] The essence of ground 2 is that the learned Judge erred in holding that the Appellants had failed to cite the Minister as a party. Paragraph 7 of the judgment states as follows:

"[7] In this matter it is important to note that by their application the plaintiffs have not sought to challenge the decision of the minister or the Permanent Secretary.

[71] It appears to this court that the content of paragraph [7] of the judgment was more in the nature of an observation than a finding, as it was indeed a fact that the Minister was not a party to the proceedings. The fact that the Minister has filed an Affidavit does not render him a necessary party, although the evidence in his Affidavit may, in the discretion of the court, be considered at the hearing into the application for the Writ of Habeas Corpus under O.54 of the High Court Rules 1988. What is unclear to this court is whether the observation of the High Court on the failure to add the Minister was a reference to it being a shortcoming which compelled the court to decline jurisdiction. Taking this observation to its logical conclusion, if the Minister had been made a party, was it his decision that was under challenge? If the answer to that question is in the negative, was the failure to add the Minister of any relevance to the application Habeas Corpus? I do not see a reason to think so. Nothing in the relevant law indicates that the failure to add the Minister as a party in this case had any significance to the application in the High Court, and therefore, the failure to add the Minister as a party is not fatal to the maintainability of the Habeas Corpus application.

[72] As was submitted by the Respondents, the Minister is a party to the Judicial Review application, and correctly so, if the decision challenged in that case is the decision made under section 13(2) (g) of the Immigration Act, 2003.

[73] Mr. Ower, K.C. argues that what is under challenge here is the legality of the consequence of the written order under section 15 of the Immigration Act, 2003, and not the Minister's order *per se*. There is merit in this submission.

[74] In my view, what is significant and decisive of the matter for determination by this court, is that the ouster clauses relied on by the Respondents and upheld by the High Court are not relevant because the decision to detain and remove Prohibited Immigrants made under

section 15, is not 'protected' by an ouster clause. What was required to be considered by the High Court in the application for a writ of Habeas Corpus, was only the legality of the detention of the Appellants effected in pursuance of the decision of the Permanent Secretary, under section 15 of the Immigration Act, 2003, which is not 'protected' by an ouster clause. Therefore, the reliance on the ouster clause in section 173(4) of the Constitution and section 13(2)(g) of the Immigration Act, 2003 and the judgment of this court in **One Hundred Sands** (*supra*),to decline jurisdiction is an error of law. Ground 2 of the grounds of appeal is therefore allowed**.**

Ground 3: Is an application for a restraining order misconceived in an application for a writ of Habeas Corpus?

[75] The Appellants challenge that part of the judgment of the court which holds as follows:

> *"[14] Interim injunction is a relief that cannot be granted solely or independently without any final or substantive relief a party who has not sought any substantive relief has no right in law to seek an interim injunction as it cannot be a relief by itself but is only a mechanism to assist to protect final relief".*

[76] The relief sought in the Ex Parte Notice of Motion filed on 6 September 2023, and the Amended Ex Parte Notice of Motion filed on 7 September 2023, an *"interim injunction*" restraining the authorities specified in the respective Notices, from removing, causing to remove or assisting in the removal of the Appellants from Fiji until the return of the Writ of *Habeas Corpus Ad Subjiciendum,* relied on section 15 (2) of the State Proceedings Act which provides as follows:

> "*The court shall not in any civil proceedings grant any injunction nor make any order against an officer of the state if the effect of granting the injunction or making the order would be to give any relief against the state which could not have been obtained in proceedings against the State".*

The learned High Court Judge also considered the *dicta* of Lord Denning in **Hubbard & Another v. Vosper & Another** [1972] 2 Q.B.at 84 which is set out below:

> *"In considering whether to grant an interim injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose restraint upon the defendant but leave him free to go ahead… The remedy by way of interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."*

[77] As has been stated above, when the Ex Parte Notice of Motion filed on 7 September 2023 was heard by the learned High Court Judge, it was only Counsel for the Appellants who was present. On support of the Ex Parte Notice of Motion on 7 September 2023, the learned High Court Judge granted Orders 1, 2 and 5 contained in the said Notice. Order 5 was the Order restraining the authorities named therein from removing or causing to remove the persons detained from being removed from the jurisdiction of Fiji until the return of the Writ. The Writ was served on the 1st Respondent on 8 September 2023, and September 2023, the 1st Respondent did not remove the corpus from the jurisdiction of Fiji, and it was for this reason that even when the application was taken up on 18 September 2023, as well as 29 September 2023, the Order made by court on 7 September 2023, was complied with, and the restraining order was extended until 27 October 2023.

[78] It is trite law that in an application for an interim injunction, the burden of proof is on the Plaintiff to establish that he has made out a *prima facie* arguable case with a reasonable possibility of success, there is a serious issue of law to be tried, that irremediable mischief will be caused to him unless the interim order is granted, that he suffers or is likely to suffer an infringement of a legal right, damages would not be an adequate remedy, and that the refusal of the interim relief render the final judgment nugatory and futile, should the Plaintiff eventually succeed in the action. It is the combination of these factors which are

in equity, amalgamated to require the court to look beyond, and gauge for itself, whether on the facts and evidence presented, an Interim order must be made.

[79] In exercising its powers under O.54 of the High Court Rules 1988, the court must consider the effect of failing to make a meaningful interim order. It would be useless and futile for the applicant to eventually be deprived of the legal effect of an order made in his favour, if an appropriate interim order is not made by court. The issue of an interim restraining order whilst issuing a Writ of Habeas Corpus, is not to be compared to an interim injunction. It is incumbent on the court to make an interim order that meaningfully maintains the subject matter or the *status quo* that existed before the need arose to invoke the jurisdiction of the court arose, if that is a protectable right.

[80] Further, in this case, the High Court did grant the interim relief sought when it made order on 7 September 2023, and extended the said order on 18 September 2023, and on 29 September 2023 up to 27 October 2023, until it finally 'struck out' the application of the Appellants. Therefore, the holding of the High Court that unless substantive relief is sought, no interim injunction can be granted, is not relevant to an application for a Writ of Habeas Corpus. Therefore ground 3 of the grounds of appeal, is allowed.

Conclusions

[81] The provisions of sections 7(1) and (4) of the Constitution, sections 22(1) and 23 of the High Court Act, 1875, and O.54 of the High Court Rules, 1988, the High Court, guarantee the right to apply for a writ of Habeas Corpus. The impugned order of the Permanent Secretary was not protected by an ouster clause. Therefore, the High Court erred in striking out the applications based on the ouster clauses in section 173(4) (d) of the Constitution and section 13(2) (g) of the Immigration Act, 2003, purportedly under the provisions of O.18, r.18, of the High Court Rules, 1988. For the reasons set out above, the appeal is allowed, and the judgment of the High Court dated 27 October 2023, is set aside.

Clark, JA

[82] I have read in draft the judgment of Jameel JA. For the reasons Her Honour gives I too allow the appeal and make the orders that are made.

Orders of the Court

1. *The Appeal is allowed.*
2. *The Judgment of the High Court dated 27 October 2023 is set aside.*
3. *The High Court is directed to hear and determine, within 7 days from today, the application of the Appellants made in terms of the provisions of Order 54 of the High Court Rules, 1988.*
4. *The parties will bear their own costs.*

Hon. Mr. Justice Filimone Jitoko
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL

Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL