IN THE CITIZENSHIP APPEALS TRIBUNAL OF FIJI
AT SUVA

Citizenship Appeal No. 4 of 2023

IN THE MATTER of an appeal under section 21 of the Citizenship of Fiji Act 2009 from a purported decision of the Minister of Home Affairs and Immigration and/or Director of Immigration made on 19th October 2023 and delivered by the Appellant by email dated 19 October 2023 and hand delivery thereafter.

BETWEEN: **JUNG YONG KIM** of Villa 205, Hibiscus Drive, Pacific Harbour but currently in immigration detention and/or unlawful custody of the 1st Respondent and/or the Permanent Secretary of Immigration.

APPELLANT

AND: **THE MINISTER FOR HOME AFFAIRS AND IMMIGRATION** of 1st and 2nd Floor, New Government Wing, Government Building, 26 Gladstone Road, Suva.

1st RESPONDENT

AND: **THE DIRECTOR OF IMMIGRATION** of 1st and 2nd Floor, New Government Wing, Government Building, 26 Gladstone Road, Suva.

2nd RESPONDENT

Date of Hearing :	**19th April 2024**
For the Applicant :	**Mr Owers (KC), Mr Gordon, Mr Pillai and Mr Prasad.**
For the Respondents:	**Ms Solimailagi with Mr Naidu**
Date of Decision :	**25 April 2024**
Before Quorum :	**Waqainabete - Levaci, S.L.T.T., J, Chair**
	Ms Jiuta S. - Member

RULING

(APPLICATION TO CROSS-EXAMINE THE MINISTER OF IMMIGRATION)

PART A: BACKGROUND AND APPLICATION

1. The Applicant had file a Notice and Grounds of Appeal under section 21 of the Citizenship of Fiji Act 2009 against the decision of the Minister made under section 13 (2) (g) of the Immigration Act in declaring the Applicant a prohibited immigrant and was followed through by a declaration from the Permanent Secretary on the same day ordering the applicant be detained for the purpose of their removal from Fiji.

2. The Applicant was arrested on 7 September 2023 and is now kept in the custody of the Minister of Home Affair's and Immigration. A stay order is also in existence over the decision of the Minister of Immigration to remove the Applicant from Fiji.

3. The grounds of Appeal are that:

> 1.That the Appeal to the Tribunal is by way of a re-hearing *denovo* based on the evidence and material before it and vary any decision in respect of the Appellant to be a decision granting the Appellant certificate of naturalization.
>
> 2.In the alternative, that the decision purportedly made and conveyed by a letter dated 19th October 2023 under the head of the Immigration Department is a decision that is contrary to law. And or a misapplication and/or a misinterpretation of the Act and/or ultra vires and/or in excess of jurisdiction and, therefore wrong and/or incorrect and/or unlawful and/or null and void and/or of no effect on the following grounds:
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> (a) Ultra vires – No jurisdiction
> (b) No Written reasons
> (c) Ultra vires – misunderstanding Jurisdiction
> (d) Irrationality and/or lack of proportionality
> (e) Bad Faith
> (f) The Minister had no grounds to refuse the same and was compelled in and/or by law to grant citizenship

(g) That the Appellant is of good character.

4. At the Appeal's first call over, the Tribunal gave directions for filing of Affidavits and was notified by the Appellants that a formal application was required if they sort to cross-examine the Minister of Home Affairs.

5. A Notice of Motion together with a supporting Affidavit was filed by the Appellants seeking the following orders:

1. That the hearing of this appeal be conducted by witnesses to be examined by viva voce in open Tribunal;
2. For leave that Hon. Pio Tikoduadua attend the Citizenship Appeals Tribunal at the hearing of this matter, including at the hearing of any preliminary and/or interlocutory applications, for cross-examination of his affidavit sworn and filed in this matter on 26 February 2024.
3. That the costs of this Application be paid by the Respondent.
4. Such other orders as the Citizenship Appeals Tribunal may deem fit, just, expedient, required, justiciable and necessary in the circumstances."

PART B: AFFIDAVITS

6. In support of his Motion, the Appellant deposed an Affidavit challenging the authenticity of the original Red Notices and how and from whom they were received and/or to be cross-examined in respect thereof, requiring the production of original minutes of the meetings of the alleged taskforce and their findings and reports and/or to be cross-examined in respect thereof.

7. In response to the Motion, the Respondent filed an Affidavit explaining that the Red Notices were issued to Fiji by INTERPOL on 23 July 2018, concerning the Appellant and 6 others requesting law enforcement worldwide to locate and arrest the said people of interest.

8. On 13 August 2018 Warrants of Detention were issued by the former PS Immigration, Mr Yogesh Karan and which was later revoked on 16 August 2018, 3 days thereafter.

9. In 2023 Red notices attached with Diplomatic Notes were also received from the Embassy of the Republic of Korea. These diplomatic notes were a follow up to the notices for execution of the Red Notices against the Applicants issued in 2018 which was annexed and made available to the Respondents.

10. The Respondent also deposed that further that online access to INTERPOL Red Notices is confidential and restricted to authorize.

11. A taskforce consisting of the Police, Immigration Department, Financial Intelligence Unit, FIRCA, Ministry of Home Affairs and Ministry of Justice was set up to investigate concerning the good governance and security of the nation of all the Grace Road Group of Companies owned by the Appellant.

12. The findings were presented to the Minister who then, on these recommendations determined to declare the Appellant and 5 other Korean Nationals as prejudicial to the Country's good governance and national security and therefore declared them as prohibited immigrants in accordance with section 13 of the Immigration Act.

13. The declaration and findings were made known to the Permanent Secretary in a letter dated 31 August 2023 which was also annexed.

14. On 31 August 2023 removal orders were issued by the Permanent Secretary and executed on 6 September 2023 by the Department of Immigration with Fiji Police Force and police from the Republic of Korea and on the Appellant on 7 September 2023, when his location was unknown for some time.

15. When the Appellant applied for naturalization of citizenship, the Director of Immigration assessed and found that they had failed to establish section 13 (2) of the Citizenship Act of Fiji 2009.

16. On revisionary powers, the Minister deposed that he had exercised his powers to refuse the application for naturalization of citizenship after considering the recommendations from the Processing Officer, the Managers and Director of Immigration and the Permanent Secretary of Immigration.

PART C: PRELIMINARY ISSUES

Issuance of a Subpoena

17. In addition to their formal application to cross-examine the Minister in evidence, the Appellants issued a subpoena to the Minister.

18. The Respondent raised issues over the fact that the subpoena was not in compliance with Form 5 of the Magistrate Court Rules requiring a Clerk of the Tribunal to sign on the

Subpoena rather than a Counsel. Respondents then argued that the Subpoena was defective as it had used the Form prescribed in the High Court Rules rather than Form 5.

19. The Court had perused the documents and found that the Subpoena was indeed defective. Rule 11 of the Citizenship Appeals Tribunal Rules (referred herein as CATR) required that the Magistrates Court rules be adopted and complied with where there the CATR did not suffice.

20. The Appellant thereafter filed supplementary affidavit through their Counsel to explain the reasons for adopting the said form of Subpoena.

21. The reasons were not tenable to this Tribunal as the responsibility rests with the parties to make good their application and not for the registry to direct them on the proper form or procedure.

22. On the same afternoon, the Appellants had refiled another set of Subpoenas in the correct format rectifying the initial mistake in order not to fall outside of the timelines. In re-filing, there was clear admission on their behalf that the Subpoena was incorrectly formatted.

23. The Tribunal was to determine whether or not to grant the cross-examination of the Minister. This was known at the hearing and parties were willing to adhere to these directions.

24. The Tribunal has decided to setaside the Subpoena and will explain the reasons why in its ruling.

Service of Documents

25. Rule 3 (3) of the CATR requires that the Notice of Appeal be served to the Minister of Immigration within 14 days.

26. Appellants submitted that service was made to the Minister only to be re-directed to serve the Attorney General's office. There was no contention by the Respondents regarding the manner of service.

27. The service on the office of the Attorney General is in accordance with Section 13 of the State Proceedings Act for service of documents against the State.

28. The Court therefore finds that the Minister was duly served.

Appeal afresh or Appeal re-hearing

29. Given the provisions of section 21 of the Citizenship Appeals Act 2009, the Tribunal is empowered to confirm the decision of the Minister, to review or vary the Ministers decision.

30. Henceforth, the task of the Appeals Tribunal is the firstly consider the Ministers decision and either confirm his decision or otherwise.

31. The Tribunal is then at liberty to review the Ministers decision or to vary the Ministers decision.

32. To review the Minister's decision may require the Tribunal to consider whether a full hearing by way of cross-examination of evidences is required or a determination based on affidavit evidences suffices. Either way, the Tribunal thence will exercise its powers in accordance with the Citizenship Act.

PART D: LAW

Establishment and powers of the Tribunal

33. The Citizenship Appeals Tribunal is established under section 21 of the Citizenship of Fiji Act 2009. The provision stipulates as follows:

> 21.-(1) A person aggrieved by a decision of the Minister under section 8 (9), 10,13 or 17 may, within 14 days of being notified of the decision, appeal to the Citizenship Appeals tribunal established under subsection (2) (in this section referred to as "the Tribunal").

34. Section 21(4) & (5) of the Citizenship Act 2009 empowers the Tribunal to:

> "(4) The Tribunal, in accordance with rules of procedure made by the Tribunal and approved by the Chief Justice, must hear and determine any appeal under this Decree brought before it in accordance with those rules.
>
> (5) The Tribunal may, upon appeal, confirm, review or vary the decision appealed against and may order the payment of such costs as it thinks fit."

35. Hence the Tribunal is empowered to confirm the decision of the Minister or to review or vary the decision appealed.

Rules on Hearings and the mandatory adoption of the rules of natural justice

36. Rule 7 of the CATR states:

> 7. The Tribunal **may** allow evidence to be adduced at a hearing by means of any communication facilities and in such manner as would provide for a full and proper hearing and to dispose of the appeal in an expeditious manner including –
>
> (a) Filing of affidavits and other documentary evidences;
> (b) The presentation of written and oral arguments or both;
> (c) The calling, questioning, and cross-examination of witnesses; and
> (d) The testimony of any party.

37. Rule 7 of the CATR gives the discretion to the Tribunal to allow evidence to be adduced by any form of communication facilities so as to enable a full and proper hearing.

38. The Tribunal can decide to receive affidavits or other documentary evidences or call and cross-examine witnesses.

39. When complying with the abovementioned procedures, Rule 6 of CATR directs the Tribunal not to be bound by strict rules of **evidence** provided that the Tribunal accords natural justice, retains written records of the proceedings and delivers reasons for its decisions. It reads-

> (1) In the conduct of an appeal, the Tribunal is not bound by strict rules of evidence applicable in a court of law **but must**-
>
> (a) Accord natural justice to the parties to the appeal;
> (b) Maintain a written record of its proceedings; and
> (c) Give reasons for its decisions.
> (2) In performing its functions, the Tribunal must endeavor to combine fairness to the parties with economy, informality and speed.

40. The application before the Tribunal seeks for a full hearing regarding the giving of evidences by examination and cross-examination of witnesses including the Minister's evidence.

41. The Tribunal is also mindful that in performing its functions, the administration of justice must not be sacrificed for the purposes of speed.

42. The Appellant relied upon a number of cases to highlight the principles of natural justices in Boards and Tribunals in Australia that held the decision of the Board as void where cross-examination of evidences in the hearing was not allowed. However there was no case authority regarding the calling of the Minister in particular to give evidence where it concerns immigration matters.

43. The Respondent opposed the application on the basis that the material evidentiary facts crucial to the case had already been deposed in the Affidavit and would serve no useful purpose to cross-examine the Minister because the Minister was exercising his discretionary authority. The Respondent relied upon the case of Attorney General -v- Naidu CA 22 of 2023. They then argued that the Tribunal would then be exercising matters beyond its jurisdiction and therefore acting outside of the ambit of its powers.

44. The Appellant in response argued that there was no relevance of the case of Attorney General -v- Naidu (Supra) as the Judge had considered the Attorney General's Affidavit and found that the matters deposed of had no bearing on the question of liability for contempt and no relevance to the issues for the substantial hearing.

45. The power of the Minister to exercise his discretion is an administrative act and not quasi-judicial. This was recognized in the case of Mary Schramm -v- The Attorney General of Fiji and Minister of Labour Industrial Relations and Immigration [1982] Supreme Court where Kermode J held when interpreting the provisions of the repealed Citizenship Act 1971:

> **"**The Minister in this instance was in my view acting in an administrative capacity and not in a quasi -judicial capacity."

46. It is that administrative decision which is now being appealed against for which the Tribunal must hear.

47. A number of cases were submitted by the parties which the Tribunal acknowledges, highlighting the importance of exercising natural justice by enabling parties to be heard and to cross-examine the disputed evidences.

48. One of these cases submitted by the Appellants - Major, Councilors and citizens of the City of Brighton -v- Selpon Pty Ltd [1987] VR 54 equated procedural fairness with natural justice. Vincent J held that procedural fairness required that adequate opportunity was given to parties to challenge or contradict material evidence found against them. Vincent J then cited and stated:

> "Mason J in Kioa -v- Minister of Immigration and Ethnic Affairs [1985] HCA 81; (1985) 62 ALR 321 at p.347 pointed out that the term "natural justice" in

the context of administration decision making has been essentially equated to an obligation to act fairly or to accord procedural fairness: "In this respect the expression of "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The Statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in light of the statutory requirements, the interest of the individual and the interest of the purposes, whether private or private, which seeks to advance or protect or permits to be taken into account as legitimate consideration.

….However it is clear that the minimum requirements enumerated by Lord Loreburn LC in Board of Education -v- Rice [1911] AC 179 must be satisfied. These involve, interalia, the provision of an adequate opportunity to parties in dispute to challenge or contradict material advanced against them. I do not consider that any distinction should be drawn for this purpose between whether the material is relevant to the establishment of factual situation or to the exercise of judgment or discretion.

However what may be regarded as an adequate opportunity in any given case must be dependent on a whole range of factors. These would include consideration of such matters as the nature of the dispute and the tribunal before which it arises, the character of the evidence or material involved, the manner in which the material has been adduced before the tribunal, the way in which the tribunal endeavored to inform itself, the significance of the evidence or material in the determination of the dispute, and of course, the status of the body before which the dispute has a risen as an expert tribunal. It may well be appropriate at this level to distinguish in some cases between material advanced to establish relevant facts and that which is present in support of an argument directed to the exercise of discretion or judgment, particularly when the matter arises before an expert body."
(underlining my emphasis).

49. Therefore in Barrier Reef Broadcasting -v- Minister for Post and Telecommunication and Another (1978) HCA 425-447, at 445 Aickin J held that –

"It is necessary to remember however, that cases concerned with the application of the principles of natural justice have mostly arisen in circumstances where the legislature has, in establishing a tribunal or empowering a person or body to make decisions affecting persons, omitted in

such cases to prescribe the procedure to be adopted. The question arising in such cases, as well as the applicable principles general, are stated in the judgment of Barwick CJ in Twist -v- Ranwick Municipal Council (1977) 12 ALR 379 at 382-3; 50 ALJR 193 at 194. …Here the Act lays down express requirements as to hearings and as to procedure, closely approximating the procedure usual in courts. It is not necessary to rely upon implication because the statutory provisions are both clear and exhaustive in directing the procedure in a manner which embodies the compliance with the principles of natural justice."

50. I also had the benefit of perusing English cases pertaining to the exercising of the Immigration Appeals Tribunals' powers to consider or dispense of oral hearing and cross examination of evidences put before it.

51. From these cases, the principle established was that the procedural rules or statute should clearly stipulate whether a discretion is granted to the Tribunal to dispense with oral hearings and should also enable the Tribunal to elect the appropriate procedure to adopt in hearings.

52. In R -v- Immigration Appeal Tribunal and another ex p. Jones [1988] 2 ALL ER 65-69 at 68 para c, g , e , f, g is an appeal by Mr Jones against the judgment of Simon Brown J hearing the Crown office list and dismissing the application for judicial review of the decision of the Immigration Appeal Tribunal, notified the appellant on 2 August 1985 to dismiss without an oral hearing his appeal from the decision of an adjudicator on 30 May 1985 upholding the decision of the immigration officer's refusal to grant the applicant leave to enter the United Kingdom. The Respondents appealed against decision of Justice Brown. In the Court of Appeal, Russell LJ stated:

"The question to be answered is whether the word "hearing" necessarily and in all circumstances involves an oral hearing. In my judgment it does not and in so concluding I derive support from the words of Hamilton LJ in R -v- Local Government Board e. p Arlidge [1914] 1 KB 160 at 191. The case concerned with a local government board which by virtue of the Housing, Town Planning and c Act 1909 was empowered to make rules of procedure in the determination of appeals made to it. The Board dismissed an appeal without giving the appellant an opportunity of being heard. In dissenting judgment subsequently upheld by the House of Lords Hamilton LJ said (at 191-192):

"I think therefore, that this claim is only part of the general claim for a "hearing" coram judice, for a viva voce appeal, for the right to stand in person before the judgment seat. In my opinion the question whether the deciding officer "hears" the appellant audibly addressing him or "hears" him only through the medium of his

written statements, is in a matter of this kind one of pure procedure. The taking evidence before special examiners or the examiners of the Court, shews that there is nothing universally essential in the judge's seeing and hearing the witnesses for himself…..The fact is that for such appeals are here in question one scheme of procedure may be better than the other, but both the oral and the written scheme remain rival procedures still and the Act leaves the Board free to elect between them.

In my judgment the policy of the legislation with which this appeal is concerned is to provide for a system of appeal which normally will be by way of oral hearing. However, in appropriate cases that hearing may be dispensed with by virtue of the procedural rules made under the 1971 Act. I can discern nothing in the overall structure of the statute or in any provision of it that expressly or by implication requires an oral hearing in all appeals. "

PART E: ANALYSIS

53. The Tribunal is guided by the principle stated by Lord Justice Russell in R-v- Immigration Appeals Tribunal ex parte Jones (Supra) in line with Rule 7 of the CATR and Vincent J in the case of Major, Councillors and Citizens of Brighton City -v- Selpon Pty Ltd (Supra) when cautioning itself as to the exercise of its discretion.

54. Rule 7 of the CATR gives the discretion to the Tribunal on the various means of eliciting evidence when conducting a hearing of an Appeal.

55. I find that Rule 6 and 7 of the CATR as sufficient to empower the Tribunal to exercise its discretion as to the manner in which evidence is elicited. Having said that, there is no need for the Court to consider any other law or regulation for procedural purposes.

56. Rule 7 of the CATR empowers the Tribunal the discretion to elect whether to allow for examination and cross-examination of witnesses or of receiving of affidavits. The procedure in Rule 7 does not require an oral hearing in all Appeals and can be dispensed with in appropriate cases depending on the nature of the cases involved.

57. In consideration of the current application before the Tribunal, the Respondents submissions is that the Affidavit explained that after having considered the 12 red notices, the taskforce recommendations and recommendations from other enforcement agencies, the Minister declared the Appellants as prohibited immigrants in accordance with Section 11 of the Immigration Act.

58. The Minister thereafter directed that the Application for Naturalization as a Citizen of Fiji be refused pursuant to section 13 of the Citizenship Act, having perused the recommendations by the Director of Immigration Department, based on its earlier decision to declare the Appellant and 5 others as prohibited immigrants.

59. Appellants submit that the examination of evidences or the cross-examination of evidences pertains to paragraphs 17 to 27 of the Honorable Ministers' Affidavit which explained the red notices, the taskforce meetings and the recommendations made by the different enforcement authorities to enable the Minister to arrive at his decision.

60. The basis of the Appellants application is to cross-examine the Minister as to the authenticity of the red notices and therefore derive the basis of which the red notices came about.

61. It is in the Tribunal's opinion that determining the authenticity' of red notices fell outside of the ambit of the Tribunal's jurisdiction in determining the application before it.

62. The issuance of red notices by diplomatic notes was an exchange of information pertaining to offences against foreigners within the sovereign jurisdiction of Fiji. To question the authenticity of the red notes by diplomatic notes questioned the sovereign decision of the State to accept the diplomatic notes.

63. Further to this, the Appellant has sort, in issuing the Subpoena to also require the Minister to submit documentary evidences more particularly the minutes of the taskforce meeting.

64. The Affidavit of the Respondents deposed that there was no other materials apart from that deposed of to explain how the Minister arrived at its decision.

65. The only consideration for the Tribunal is whether the material before it would have an adverse difference if oral hearing was enabled, more particularly where the Minister was to be cross-examined.

66. The Tribunal finds that although the issues raised cross-examination formed the basis of the decision, they were in no way relevant to the current application before the Tribunal as they fell outside the ambit of the jurisdiction of the Tribunal to determine. The admissible of Taskforce minutes will be determined at the hearing.

67. If for instances, for completeness sake, the Tribunal were to grant the Appellants the right of cross-examination. It would be for the Tribunal to limit the ambit of the questions to be cross-examined. In having done so, there would also be objections on the grounds of state immunity from public interest, the release of documents that are of national security.

68. Thus the crux of responses for which the Appellants seeks to be admitted or obtained from the Minster, cannot be asked as the Tribunal has ruled earlier the reasons why. Hence, what is there for the Appellants to ask and how relevant would it be to the affidavit and annexures which the Tribunal will consider? I find there is sufficient material before this Tribunal for which the credibility of the evidence can be verified by other means.

69. The Tribunal has examined itself that in exercising its discretion not to grant the application to cross-examine the Minister, would render it bias. The Tribunal finds that it does not. Exercising its discretion only for matters relevant and reasonable within its ambit of powers is appropriate and cannot be rendered as bias. And even if it were, the supervisory Courts would be in a position to say so and not the parties.

70. Therefore to enable the eliciting of evidences so as to ensure that if the Tribunal finds that the Minister had erred in law and fact, the Tribunal can review or vary the Ministers decision, the Tribunal has not completely closed off the avenue to obtain further evidences/information on behalf of the Appellants pertaining to the decision to refuse a naturalization certification.

71. The Tribunal finds that a cross-examination of the Immigration Department officer or its Director on her/his affidavit would suffice to establish the basis for which the recommendation was made for the refusal to grant naturalization certificate.

72. The Tribunal finds that apart from the issues for which the Minister cannot be cross-examined over, there are relevant pertinent issues that the Appellants may wish to cross-examine that can be verified at the hearing.

73. The Tribunal is of the view that the analysis of evidences before it will be determined at the end of the Hearing and this Ruling does not in any way from the decision of the Tribunal on the substantive issue at hand.

74. Therefore because subpoena has already been issued to the Minister by the hand of the Tribunal, it would only be correct to setaside the subpoena.

PART F: TRIBUNAL ORDERS

The Tribunal orders as follows:

(a) The Tribunal will not grant the application to cross-examine the Minister of Immigration on his affidavit but will allow for further supplementary affidavits in response to be filed by the Appellants;

(b) The Tribunal will allow for the appellant to subpoena and cross-examine the representative and/or Director of Immigration;

(c) The Tribunal will allow for the cross-examination of any of the Appellants witnesses that the Respondents have sort leave to cross-examine;

(d) That the subpoena issued to the Minister be therefore setaside;

(e) That costs be bourne by parties.

Mrs Senileba L.T.T.W. Levaci, Chair of Tribunal

Ms Senikavika Jiuta, Tribunal Member:

I hereby agree with the findings.