

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review No. HBJ 08 of 2018

IN THE MATTER of an Application by **SANJEET** for a Judicial Review under Order 53 of the High Court Rules 1998.

AND

IN THE MATTER of a decision made on or about the 20th September 2018 by the **MINISTER OF IMMIGRATION** whereby he purported to exercise his powers under the IMMIGRATION ACT 2003 to refuse Investors Work Permit to the Applicant.

BETWEEN: **STATE**

AND: **MINISTER FOR IMMIGRATION**

1ST RESPONDENT

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

2ND RESPONDENT

EX-PARTE: **SANJEET**

APPLICANT

Before: **Hon. Justice Kamal Kumar**

Counsel: **Mr D. Kumar for the Applicant**
Ms B. Narayan and Mr B. Sharma for Respondents

Date of Hearing: **28 December 2018**

Date of Ruling: **7 January 2019**

RULING
(Stay Application)

1.0 Introduction

1.1 On 14 December 2018, Applicant filed Application by way of Summons for following Orders:-

- “(i) The Applicant not to be removed from Fiji or the jurisdiction of Fiji by the Department of Immigration its agents or the servant until the final determination of this matter;*
- (ii) There be an unconditional stay of the decision of the Minister of Immigration dated 28th September 2018 directing the Applicant to leave Fiji within 14 days of the order and for a further order for stay of the order until the final determination of the matter;*
- (iii) Or alternatively the Applicant be given a temporary Visa to remain in Fiji until the final determination of this matter;*
- (iv) Any further order this Honourable Court deems just;*
- (v) The cost of this application be cost in the cause;*

And at the hearing of this application, the Applicant will read and rely on the affidavit of Sanjeet sworn and filed herein in support of this application.”

(“the Application”)

1.2 On 19 December 2018, parties were directed to file Affidavits and the Application was set down for hearing on 28 December 2018.

1.3 On 28 December 2018, Counsel for parties made submission (oral and written) and the Application was adjourned for Ruling on Notice.

1.4 Parties referred to and relied on following Affidavit:-

- (i) Affidavit of Applicant sworn and filed on 27 September 2018;
- (ii) Affidavit of Applicant sworn on 13 December 2018, and filed on 14 December 2018;

(iii) Affidavit of Ravineshwaran Nair sworn and filed on 24 December 2018.

2.0 Background Facts

- 2.1 On 14 December 2017, Applicant was issued with Foreign Investment Registration Certificate (“**FIRC**”) subject to certain conditions stated in FIRC and letter dated 14 December 2017, from Investment Fiji to the Applicant.
- 2.2 Subsequently Applicant applied to Fiji Immigration Department (“**FID**”) for the Permit.
- 2.3 On 22 March 2018, FID wrote to Applicant advising him that his Application for Permit has been declined on the ground that the “proposed business activity can be provided by the locals and does not warrant a foreign investor
- 2.4 By letters dated 11 and 12 April 2018, Applicant through his Solicitor appealed FID’s decision to Minister for Immigration within the prescribed time.
- 2.5 On 20 September 2018, FID wrote to Applicant advising him that his appeal has been refused by the Minister for Immigration and for Applicant to leave country within fourteen (14) days from the date of the letter.
- 2.6 On 27 September 2018, Applicant filed Application for Leave to Apply for Judicial Review of Minister’s decision which is set down for hearing on 22 January 2019.

3.0 Application for Stay of FID’s Decision

- 3.1 Counsel for the parties relied on following case authorities:-

Applicant

State v Minister for Home Affairs; Ex-parte: Fiji Times Ltd and Russel Hunter
[2000] 1 FLR 63 (“**Hunter case**”).

Respondent

State v Public Service Commissioner; Ex-parte: Epeli Lagiloa [1994] FJHC 168; HBC 16d of 1994 (10 November 1994) (“**Lagiloa case**”) and Shore Buses Ltd v Transport Control Board and Waiqanake Transport Co. Ltd [1995] FJHC 175; HBC 29d of 1995 (19 December 1995) (“**Waiqanake case**”).

3.2 Section 9(1) of the Immigration Act 2003 provides as follows:-

“The Permanent Secretary may, on application made in the approved form and on payment of the prescribed fee, issue a permit to any person who is not an exempted person, including persons entitled to enter and reside in Fiji under section 21(5) of the Constitution of the Republic of Fiji.”

3.3 It is obvious that the Permanent Secretary and the Director of Immigration has discretion to either issue or decline investor permit which decision is subject to review by Minister for Immigration on appeal pursuant to section 58 (2) of Immigration Act 2003.

3.4 Applicant by his Counsel submitted that because of the fact that Investment Fiji issued FIRC to Applicant he is entitled to Investor Permit as advertised in Department of Immigration web page which in part provides as follows:-

“(1) **Definition**

Investor Permit is granted to non-citizen investors to be engaged in a business project approved by the Fiji Islands Trade and Investment Bureau (FTIB). FTIB approval is via the issuance of a Foreign Investments Certificate (FIC). Authority is under Section 9(2)(c) of the Immigration Act, 2003;

(2) **Requirements**

- *A Fiji Trade and Investment Bureau’s investment approval letter clearly stating the shareholding structure.*

- *A certified copy of Foreign Investment Certificate issued by FTIB.*
- *A properly filled in application in the official form provided by the Immigration Department.*
- *Certified copies of the applicant's passport/s (bio-data page).*
- *Police reports in respect of the applicant from the country of citizenship and/or residence where he/she lived for twelve (12) months or more in the last ten (10) years.*
- *Medical reports conducted within three (3) months or less from the date of application.*
- *The requisite fee.”*

3.5 This Court accepts Respondents submission fact Permit is governed by Immigration Act 2003 and whereas FIRC is governed by Foreign Investment Act 1999.

3.6 In fact letter dated from Investment Fiji to Applicant (Annexure “S1” of Applicant’s Affidavit sworn on 27 September 2018) clearly states that it was mandatory for the Applicant to obtain approval from Director of Immigration for work permit (if applicable).

3.7 Since Applicant’s Application for Leave to Apply for Judicial Review is set down for hearing on 22 January 2019, before another Court, it is only appropriate that this Court does not deal with this issue in detail.

3.8 This court also takes note of the fact **Hunter case** dealt with Application for Leave to Apply for Judicial Review rather than Stay Application and as such the principle stated therein is not relevant to the Stay Application.

3.9 Respondents relied on **Lagiloa case** and **Waiqanake case** in support of their submission that Application for Stay is same as Application for Injunction which is prohibited by section 15 of State Proceedings Act 1951 (“**SPA**”).

3.10 Section 15 of SPA provides as follows:-

“15.-(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that-

(a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.

(2) The Court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.”

3.11 In **Lagiloa case** the Applicant applied to Court for an order restraining Public Service Commission from effecting termination of his employment. During the course of the proceeding the Court dealt with the Application as an Application for Stay pursuant to Order 53 Rule 3(8) of High Court Rules.

- 3.12 In **Lagiloa case** Applicant's Application was refused on the grounds that if stay was granted it would be same as granting an injunction which would offend section 15 of CPA.
- 3.13 Whilst Section 15 prohibits grant of injunction against the State and/or its officers this does not mean Court cannot grant interim stay of certain Orders if the Order will seriously affect the Applicant if he is successful in the substantive proceedings.
- 3.14 Having said that, Courts should loathe to interfere with public officers carrying out their lawful duties based on public policy and as rightly pointed by the Senior Counsel for Respondents, such discretion is to be exercised sparingly and cautiously.
- 3.15 In **Waiqanake case** Court adopted and applied the principle in respect to injunction and more so, the balance of convenience.
- 3.16 In this instance the Court have taken following factors into account in determining the Application:-
- (i) Applicant's Application for Permit was refused on 22 March 2018, and his appeal was refused on 20 September 2018;
 - (ii) Stay application was filed on 14 December 2018 (some three months after appeal was refused);
 - (iii) Applicant has been residing in Fiji without a permit and illegally from 20 September 2018, as he was to leave Fiji within fourteen (14) days from 20 September 2018;
 - (iv) Application for Leave to Apply for Judicial Review is set down for hearing on 22 January 2019 (almost four months after it was filed);
 - (v) Applicant at paragraph 19 of his Affidavit sworn on 13 December 2018, states that he has spent substantial amount of money and time. No evidence has been provided to support such a claim. In any event, if Applicant did spend substantial amount of money, without getting a

permit from FID then he did so at his own peril for which he cannot hold Respondents at ransom;

- (vi) FID has on 14 November 2018, issued Warrant of Detention and Removal Order (**“Warrant”**) against the Applicant (Annexure “R4” of Ravineshwaran Nair’s Affidavit);
- (vii) FID has not been able to execute the Warrant as Applicant is evading the Immigration Officers and FID has no knowledge of Applicant’s current residence or whereabouts as appears from paragraph 20 of Ravineshwaran Nair’s Affidavit;
- (viii) At paragraph 20 of Applicant’s Affidavit sworn on 13 December 2018, he states as follows:-

“It will be another very expensive affair for me to return to India and come back to Fiji again.”

- (ix) If Applicant finds travelling to India and then returning to Fiji, if he does get Permit would be **very** expensive affair then the Court fails to comprehend as how he has been maintaining himself in Fiji so far and how will he continue to maintain himself until the substantive application is determined by Court.

3.17 After verifying all the evidence produced in Court and hearing submissions this Court is of the view that to grant stay would tantamount to granting injunction against the State and there is nothing to suggest that Applicant will be seriously affected if he is successful in his substantive application.

3.18 This Court has no option but to dismiss the Application with costs.


3.19 In respect to Costs, this Court takes into consideration the fact that Respondents filed Affidavit in Opposition and made oral submissions with case authorities.

4.0 Orders

41. This Court makes following Orders:-

- (i) Application for Stay by the way of Summons for Stay filed on 14 December 2018, is dismissed and struck out;
- (ii) Applicant, Sanjeet is to report to Fiji Immigration Department at its Suva office by 4.00pm on Friday 11 January 2019;
- (iii) Applicant, Sanjeet do pay Respondents cost for Stay Application assessed in the sum \$1,000.00 by 4.00pm on Thursday 10 January 2019.




K. Kumar
JUDGE

At Suva

7 January 2019

SINGH & SINGH LAWYERS for Applicant

OFFICE OF ATTORNEY-GENERAL OF FIJI for Respondents