

IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

JUDICIAL REVIEW CONSOLIDATED NO. HBJ 4 & 5 OF 2020

IN THE MATTER OF CIVIL AVIATION AUTHORITY OF FIJI

AND

IN THE MATTER of an application by **DAVID LEO JOHN SIRIANNI** for a Judicial Review and with other reliefs including an Order of Certiorari to quash the decision made by the Acting Chief Executive dated 31st August, 2020 and the order of the Enforcement Compliance Committee for or on behalf of the Civil Aviation Authority of Fiji (CAAF) dated 1st and 6th October, 2020.

AND

IN THE MATTER of an application by **TIMOTHY JOHN JOYCE, SUNFLOWER AVIATION PTE LIMITED, JOYCE AVIATION (FIJI) PTE LIMITED t/a HELI TOURS FIJI** for a Judicial Review and with other reliefs including an Order of Certiorari to quash the decision made by the Acting Chief Executive dated 31st August, 2020 and the order of the Enforcement Compliance Committee for or on behalf of the Civil Aviation Authority of Fiji (CAAF) dated 1st and 6th October, 2020.

BETWEEN

CIVIL AVIATION AUTHORITY OF FIJI situated at CAAF Compound, Nadi Airport, Nadi

FIRST RESPONDENT

AND

THERESA O'BOYLE- LEVESTAM, Acting Chief Executive of the Civil Aviation Authority of Fiji of CAAF Compound, Nadi Airport, Nadi

SECOND RESPONDENT

AND

DAVID LEO JOHN SIRIANNI, TIMOTHY JOHN JOYCE SUNFLOWER AVIATION PTE LIMITED, JOYCE AVIATION (FIJI) PTE LIMITED t/a HELI TOURS FIJI

APPLICANTS.

BEFORE : A.M. Mohamed Mackie –J.

APPEARANCES : Ms. S. Lata, for the Applicants.
: Mr. Rupesh Singh- For the First and Second Respondents.

DATE OF HEARING : On 27th September 2022.

WRITTEN SUBMISSIONS : By the Applicants on 8th August 2022.
: By the 1st & 2nd Respondents on 30th August 2022.
: By the Applicants on 23rd September 2022 (In reply).

DATE OF JUDGMENT : On 20th July 2023.

JUDGMENT

A. INTRODUCTION

1. Before me are two consolidated Applications for judicial review preferred by the Applicants hereof by way of their respective Originating Motions dated 25th March 2021 and filed on 26th March 2021, with the prerequisite leave being obtained from my predecessor in the following terms as per his ruling dated 17th March 2021.

Orders:

“20. Leave is given to the applicants Mr Joyce and Mr Sirianni (and subject to what I have said in paragraph 16 above, to Sunflower Aviation Pte Ltd and Joyce Aviation (Fiji) Pte Ltd), to apply for judicial review of the decisions reached and the penalties imposed by the first respondent (via the Enforcement and Compliance Committee) dated 1 October 2020 as set out in paragraph 1(ii) above. The application for leave to apply for review of the decisions listed in paragraph 1(i) above is declined.

21. Costs are reserved pending the outcome of the substantive application.

22. The applicants are to make application for judicial review in terms of O.53, r.5 High Court Rules. These proceedings are adjourned for mention to the first mention date given for the substantive application”.

2. The Applicant in **HBJ 4 of 2020**, namely, DAVID LEO JOHN SIRIANNI), through his Originating Motion, claims the following reliefs :-

- (a) **AN ORDER OF CERTIORARI** to remove and quash the decision of the ECC made for or on behalf of the First Respondent dated 1st and 6th October 2020 against the Applicant (Mr David Sirianni) for the alleged offence of falsification of documents for the purpose of obtaining an aviation document contrary to section 128(2)(c) of the ANR and subsequently taking inter alia the following enforcement measures which includes suspending the Applicant's (Mr David Sirianni) commercial pilot license 2001973 (A) (H) for 6 months; the roles of the Applicant (Mr David Sirianni) as the Chief Pilot, Line Pilot and Operations Manager for SAL and Heli-Tours Fiji to be revoked; the COA of DQ-HTJ to be revoked and to re-do the test; 2 months to be deducted for the suspension pending investigation and the impact it has had on the Applicant's (Mr David Sirianni) livelihood; 1 month to be deducted for it being the first offence and the Applicant (Mr David Sirianni) to be suspended for a total period of 3 months notwithstanding sub-paragraphs 4.8.2 and 4.8.3 of the ECC's decision and the suspension period to be from 1st October, 2020 to 31st December, 2020.
- (b) **AN ORDER OF PROHIBITION** prohibiting the Respondents' from implementing or continuing to implement or otherwise giving effect and/or consideration at any time to the decision the ECC made for or on behalf of the First Respondent dated 1st and 6th October 2020 against the Applicant (Mr David Sirianni) for the alleged offence of falsification of documents for the purpose of obtaining an aviation document contrary to section 128(2) (c) of the ANR and subsequently taking inter alia the following enforcement measures which includes suspending the Applicant's (Mr David Sirianni) commercial pilot license (2001973 for 6 months; the roles of the Applicant (Mr David Sirianni) as the Chief Pilot, Line Pilot and Operations Manager for SAL and Heli-Tours Fiji to be revoked; the Certificate of Airworthiness (COA) of DQ-HTJ to be revoked and to re-do the test; 2 months to be deducted for the suspension pending investigation and the impact it has had on the Applicant's (Mr David Sirianni) livelihood; 1 month to be deducted for it being the first offence and the Applicant (Mr David Sirianni) to be suspended for a total period of 3 months notwithstanding sub-paragraphs 4.8.2 and 4.8.3 of the ECC's decision and the suspension period to be from 1st October, 2020 to 31st December, 2020.
- (c) **FURTHER OR IN THE ALTERNATIVE, A DECLARATION** (in any event) that the decisions dated 1st and 6th October, 2020 has infringed the Applicant's (Mr David Sirianni) rights to natural justice, fairness, Constitutional rights and that section 12F of the Civil Aviation Authority of Fiji Act 1979 is unconstitutional and the decision is unfair, irrational, arbitrary, unreasonable and failed to take into account relevant considerations and took into account irrelevant considerations.
- (d) **A DECLARATION** that the Applicants are entitled to damages for breach of its statutory duty/negligence/misfeasance and/or abuse of powers which are to be assessed.
- (e) Costs on a full Solicitor/Client indemnity basis.
- (f) **ANY FURTHER DECLARATIONS** or other relief as this Honorable Court may see fit.

3. The Applicants in HBJ 5 of 2020 namely, TIMOTHY JOHN JOYCE, SUNFLOWERT AVIATION PTE LIMITED, JOYCE AVIATION (FIJI) PTE

LIMITED, t/a HELI TOURS FIJI in their Originating Motion are also seeking similar reliefs as stated above, in relation to their grievances.

B. AFFIDAVITS & DOCUMENTS RELIED UPON:

4. The Applicants have relied on the contents of the Inter Partes Summons dated 15th October 2020 and filed on 16th October 2020 seeking for Leave to Apply for Judicial Review, the Statements and the Orders made on it. They also rely on the contents of the Originating Motions filed on 26th March 2021, averments in their respective Affidavits filed with the relevant annexures as stated bellow.
 - a. Affidavit verifying the facts in support sworn on 15th October 2020 by the Applicant in Application No; HBJ-5 of 2020, namely, Timothy John Joyce.
 - b. Affidavit verifying the facts in support sworn on 15th October 2020 by Susan Robyn Joyce.
 - c. Affidavit verifying the facts in support sworn on 15th October 2020 by David Leo John Sirianni, the Applicant in Application No. HBC -4 of 2020.
 - d. Affidavit of Rigamoto Aisake in reply to the Affidavit verifying facts of Timothy John Joyce sworn on 9th November 2020.
 - e. Affidavit of Rigamoto Aisake in reply to the Affidavit verifying facts of Susan Robyn Joyce sworn on 9th November 2020.
 - f. Affidavit of Rigamoto Aisake in reply to the Affidavit verifying facts David Leo John Sirianni sworn on 9th November 2020 sworn on 10th November 2020.
 - g. Affidavit of Timothy John Joyce in Response sworn on 18th November 2020.
 - h. Affidavit of David Leo John Sirianni in Response sworn on 18th November 2020.
 - i. Affidavit of Susan Robyn Joyce in Response sworn on 18th November 2020.
 - j. Supplementary Affidavit of Timothy John Joyce filed on 5th October 2021.
 - k. Supplementary Affidavit of Rigamoto Aisake in Reply filed on 5th October 2021, and

C. BACKGROUND IN BRIEF:

5. For the sake of lucidity the background facts, extracted from their pleadings, are given bellow.

1. The 1st and the 2nd named Applicants, namely Mr. David Sirianni and Mr. Timothy John Joyce, are Pilots by Profession and, at the time of the impugned decision, the 1st named Applicant was the Chief Pilot of his Applicant Company, Sunflower Aviation Ltd ("SAL") and the 2nd named Applicant was the Chief Pilot of his Applicant Company, Heli – Tours.
2. The Applicant Companies are engaged in the aviation business, which provides charters, medevacs, skydiving, public transport and other flying related services.
3. The 1st Respondent is the regulator of the Civil Aviation Operations in Fiji established under the Civil Aviation Authority of Fiji (CAAF) Act, while 2nd Respondent is the acting Chief Executive Officer of the Authority, whose duties and functions are prescribed under the CAAF Act.
4. The 2nd Applicant Company, Heli – Tours, amongst other aircrafts, owns helicopters, R44 Registration No. DQ – HTJ ("DQ – HTJ") and bearing registration No. DQ – HTM ("DQ – HTM"). In order to operate these helicopters, the Applicant companies are required to apply for a Certificate of Airworthiness ("COA") from the 1st Respondent. The COA's are valid for one year and thereafter subject to renewal.
5. The requirements and procedures for renewal are set out in Regulations 12 and 13 of the Air Navigation Regulations ("ANR") and in the Standard document – Airworthiness of Aircraft.
6. Over the years, according to the Applicants, the Respondents have accepted certain industry practices outside the scope of the renewal procedure set out in the AOA standard, which created a legitimate expectation.
7. In the Applicants' case, the Certificates of COA's for DQ – HTJ and DQ – HTM were due to expire in or around May and June, 2020 respectively. On or about 25th May, 2020, the 2nd Named Applicant piloted and conducted the flight test for DQ – HTM and the 1st Named Applicant conducted the flight test for DQ – HTJ on 2nd June, 2020.
8. One of the flight test requirements for DQ – HTM is to test the twin engines. This can be done by the way of a four minute single engine climb with one engine inoperative. In the 2nd Named Applicant's case, due to time limitations imposed by the Airports Traffic Control (ATC), he only conducted the first climb with (one engine inoperative) for 3 minutes 24 and the second engine's climb for only for 2 minutes.
9. Another requirement imposed by the Respondents (which applies to both DQ – HTJ and DQ – HTM) is to test the helicopter's radio from 20 nautical miles. Applicants say, from past practices, pilots have conducted this check within 10 nautical miles and there has been no issues taken by the Respondents. In the Applicants case, both radio tests were conducted within 10 nautical miles.

10. The renewal Applications together with flight test results for both the helicopters were prepared, compiled and lodged with the 1st Respondent by SAL's Quality Assurance Manager, Mr. Albert Murray, an Engineer approved by the 1st Respondent to, amongst other things, undertake and ensure compliance with the COA renewal procedures.
11. On or about 28th July 2020, the 2nd Named Applicant was called for a meeting by the 1st Respondent's officer regarding some anomalies noted in the flight test forms submitted to the 1st Respondent for DQ – HTJ and DQ – HTM.
12. On 5th August, 2020, the 2nd Named Applicant, was issued with a suspension letter by the 1st Respondent advising him that he had made false and misleading entries and paperwork in the form of CAAF Aircraft Radio Flight Test Report and the CAFF Check Flight Certificate for the purpose of obtaining a Certificate of Air Worthiness for AS355 DQ – HTM. The 2nd Named Applicant's, Commercial Pilot licenses for both helicopter and areoplanes were suspended pending an investigation by the Authority under section 151 (3) of the Air Navigation Regulations ("ANR").
13. In view of the suspensions, the Applicant companies operations were grounded and accordingly flights and other charters had to be cancelled. Similar suspension letter was also issued to the 1st Named Applicant.
14. An Appeal was lodged with the 2nd Respondent against the decisions dated 5th August, 2020 made by the 1st Respondent suspending the license and moved to uplift the suspension.
15. The anomalies for DQ – HTM was that the figures noted for the four minute climb was incorrect (since the helicopter did not complete the four minute climb) and that the test report did not state that the climbs had been abridged. The 2nd Named Applicant claims that he had not checked these figures filled in the forms by the observer and had only signed the first page to say that no defects were revealed during the test.
16. Another anomaly for both DQ – HTJ and DQ – HTM was that the forms had incorrectly noted the distance as 20 nautical miles for the radio test, when in fact both helicopters had only travelled 10 nautical miles. Applicant's position is that it was a regular practice that the radio test is conducted within the training area which is 10 nautical miles.
17. Applicants say that the Respondents regarded the above anomalies as a serious safety concern and that it was in the public interest to suspend the licenses and ground the helicopters pursuant to regulations 151 (4) of the ANR.
18. A representation was made to the 2nd Respondent by the Applicant's solicitors, AK Lawyers, in respect of the Memo, addressing the grounds of appeal and a further letter

was sent to the Respondent to uplift the suspensions since the investigations were over. The 2nd Respondent decided the suspension to remain. The Applicants complain that no justification or reasons were given as to why the suspension was necessary and/or how it affected the public safety.

19. The Applicant's Lawyers again requested the 2nd Respondent to clarify her powers to continue with the suspension when the investigations had been completed. The 2nd Respondent replied saying that the investigation process would be completed once CAFF's Enforcement Compliance Committee ("ECC") makes its final decision.

20. On 31st August, 2020, a Notice to Appear (before the ECC) together with some disclosures including an infringement Report were served on the Applicants. It was alleged that the Applicants had breached regulation 128 (2) (c) of the ANR which states:

"A person shall not provide false or misleading information to the Authority for the purposes of obtaining any aviation document".

21. Applicant's Lawyers requested further disclosures from the Respondents and after exchange of several letters some of the disclosures were made and others were allegedly denied by the Respondents.

22. A hearing being finally held on 22nd September 2020 before the ECC on behalf of the 1st Respondent, with the representation of the Applicants by their Lawyers, the ECC made the impugned decision on 1st October, 2020 whereby the following penalties were imposed on the 1st and 2nd named Applicants. A further decision also was made on 6th October 2020.

A. For Mr. Timothy Joyce (the 2nd Applicant).

- (a) *The ECC now suspends Captain Timothy Joyce's commercial pilot license (200928 (A) (H) for 6 months;*
- (b) *The roles the Caption Timothy Joyce holds as the Chief Pilot, Check and Training Pilot, Line Pilot and COA Test Pilot for Heli Tours Fiji are revoked.*
- (c) *Revoke the Certificate of Airworthiness and re – do the tests for DQ HTM;*
- (d) *2 months is deducted for the suspension pending investigation and the impact it has had on his livelihood; and*
- (e) *Captain Timothy Joyce will be suspended for a total period of 4 months notwithstanding sub – paragraphs 6.10 and 6.11. The suspension period is from 1st October, 2020 to 31st January, 2021*

B. For Mr. David Sirianni (the 1st Applicant)

- (a) *The ECC now suspend Capt. Sirianni's commercial pilot licence (2001973 (H)) for 6 months.*
- (b) *The role of the Captain David Sirianni hold as the Chief Pilot, Line Pilot and Operations Manager for Sunflower Aviation Ltd and Heli – Yours Fiji are revoked;*

- (c) *Revoke the Certificate of Airworthiness and re – do the tests for DQ HTJ;*
- (d) *2 months is deducted for the suspension pending investigation and the impact it has had on his livelihood; and*
- (e) *A further one month is deducted given that this is Captain Sirianni's first offence; and*
- (f) *Therefore, Captain David Sirianni will be suspended for a total period of 3 months notwithstanding sub – paragraphs 4.8.2 and 4.8.3. The suspension period is from 1st October, 2020 to 31st December, 2020.*

6. It is against the above decision dated 1st October 2020 and a further decision dated 6th October 2020 both made by the Enforcement Compliance Committee (ECC) on behalf of the 1st Respondent Civil Aviation Authority (CAAF) the Applicants are before this Court seeking to judicially Review the same, with the leave being obtained as aforesaid.
7. Admittedly, the Applicants did not make an Appeal to the 2nd Respondent, the acting Chief Executive Officer (CEO), against the said decisions pursuant to section 12F of the Civil Aviation Authority Act of Fiji.

D. GROUNDS FOR SEEKING RELIEF & OPPOSITION:

8. The Applicants' grounds for review of the decisions of the 1st and 2nd Respondents , as set out in the Application for leave dated 15 October 2020, are as follows:
- a. *The decision of the second defendant on the appeal by the applicants pursuant to section 12F Civil Aviation Authority of Fiji Act 1979 (see above) against the decision of CAA on 5 August 2020 to suspend the licenses and air-worthiness certificates pending investigation was;*
 - i. *Made in breach of the rules of natural justice and the Constitution of the Republic of Fiji in that no reasons were given for the decision.*
 - ii. *Biased, or made in circumstances where the second defendant pre-judged the issues, contrary to the rules of natural justice and section 16 of the Constitution.*
 - iii. *Ultra vires in that there is no authority for continuing the suspensions beyond the time required to investigate the alleged offences.*
 - b. *The first respondent acted in breach of the principles of natural justice and fairness in not affording a fair hearing when, among other things*
 - i. *It did not allow Mr. Joyce and his representatives to cross-examine or question the witnesses.*
 - ii. *It failed or refused to disclose documentary materials relied on by the CAA, including:*

- *An audio recording of the meeting between CAA investigators and the applicants on 28 July 2020,*
 - *Technical logs, Engine Log Books, Aircraft Log Books, Work Packs/Check Packs, Personal Flying Log Books and Flight Certificate Records,*
 - *Certificate of Airworthiness (renewal) form AW101H and supporting forms submitted for aircraft owned by a rival operator (the applicants believe that this information will disclose the CAA accepting the very practices that are the basis of the complaints against the applicants).*
 - *Charge sheets including a statement of the offences alleged, and particulars of the offences,*
 - *The enforcement policy manual of the CAA, or the relevant extract from the CAAF Personal Policies Administration Manual that deals with the composition and processes of the Enforcement Compliance Committee (noting that this does not appear to have any statutory or regulatory authority)*
- iii. *It failed to give a right to a hearing during the investigative stage.*
- c. *The respondents failed to provide the applicant companies with an opportunity to be heard prior to suspending the Certificates of Airworthiness of DQ-HTJ and DO-HTM,*
 - d. *The respondents dealt with the rights of the Applicant companies without laying any charges or allegations against them,*
 - e. *The respondents failed to consider relevant factors and took into account irrelevant factors pertinent to the issues (listed in the application),*
 - f. *In finding the alleged contraventions proved against the applicants, the respondents made errors of law in that they misconstrued the provisions and effect of Regulations 128(2)(c) and 151 of the Air Navigation Regulations,*
 - g. *The manner and conduct of the investigation and decision-making process of the respondents against the applicants was procedurally unfair, biased, pre-judged, unreasonable, delayed and flawed from inception,*
 - h. *The respondents breached the applicants' right to a fair hearing by taking into account guidelines from the Sentencing and Penalties Act and in any event without affording them a right to a further hearing in mitigation after finding the charges were made out against them prior to imposing the sentences/penalties/suspensions.*
 - i. *The respondents' decision was biased and/or predetermined and not made independently and/or after an independent enquiry (particulars set out in the application include reference to the lack of any warning to the applicants prior to interview, the participation of the Legal Enforcement Manager in the deliberations of the CAA at all levels both as an adviser and a decision-maker, a past history of antipathy between the applicants and certain members of the CAA investigative team who nevertheless participated in this investigation and decision-making processes, the failure of CAA to interview Mr. Albert Murray (who the applicants say was the author of the infringing reports).*
 - j. *The respondents' decisions were in breach of the applicants' constitutional rights and were arbitrary, disproportionate and improperly made,*
 - k. *Section 12F of the Civil Aviation Authority of Fiji Act 1979 in providing an appeal to the second respondent is unconstitutional, being in breach of section 16(1)(a) – (c) of the Constitution,*

1. *The decisions of the respondents to revoke the pilots licenses and the airworthiness certificates was unreasonable, irrational and/or capricious*

9. In opposition to the Application, the Respondents' Counsel has submitted that;

- (a) *In so far as the applicants seek to review the interim decisions of the 1st Respondent CAA (the decision of 5 August 2020 to suspend the licenses and certificates pending investigation, and the decision of the 2nd respondent pursuant to section 12F of the Act to uphold that decision), those decisions have been superseded by the final decisions of the ECC/CAA (the 1st Respondent) of 1 October 2020, and there is no point in reviewing the earlier decisions.*
- (b) *The applicants have a right under s12F of the Act (see above) to appeal the decision of 1 October 2020 to the second respondent, and should be required to exhaust those appeal rights before applying for judicial review.*
- (c) *For the same reason – availability of an alternative remedy – the applicants' argument that the s.12F is in breach of the Constitution, cannot be sustained.*
- (d) *There were no legal, procedural or factual errors made by the respondent in coming to the conclusions, and imposing the penalties/sanctions it did.*

E. ANALYSIS:

10. By upholding the objection taken up by the 1st & 2nd Respondents' Counsel at the leave hearing in terms of paragraph 9 (a) above, my predecessor has correctly observed in his ruling about the futility of reviewing the initial interim decision made by the 1st Respondent on 5th August 2020 suspending the license and the certificates of the Applicants, and the subsequent decision of the 2nd Respondent made on 31st August 2020 by upholding the said decision pursuant to an Appeal.
11. Thus, in the event this court decides to exercise its Revisionary jurisdiction on the propriety of the subsequent decisions of the 1st Respondent dated 1st and 6th October 2020, no necessity would arise for this Court to go into the earlier decisions of both the Respondents on the suspension of license, as those decisions have been replaced by the said final decisions of the 1st Respondent made on 1st and 6th October 2020.
12. Thus, the decisions sought to be revised hereof through this exercise is none other than that of the 1st Respondent CAAF/ ECC made on 1st and 6th October 2020.

13. Learned Counsel for both the parties have made oral submissions and filed extensive written submissions as well, together with number of local and foreign authorities to substantiate their respective positions. I am thankful to both the counsel and their teams for their hard work.
14. The arguments advanced by both the learned counsel through their oral and written submissions revolve around the main issues, i.e. the availability of an alternative remedy, the alleged inadequacy of it, the substantive grounds for reviewing the decisions of the 1st Respondent and the reliefs sought by the Applicants.
15. Counsel for the Respondents mainly relies on the availability of the alternative remedy, as provided by the section 12F, to justify the dismissal of the Application, while the Counsel for the Applicants relies on the allegation of bias as an exceptional circumstances, which they claim to be prevailing due to the Applicants' embroilment in number of similar litigations with the Respondents. The Applicants adduce this as a ground for seeking judicial review, without resorting to the Appeal procedure. The Applicants seem to be in an apprehension that, due to the unfavorable outcome of previous litigations with the Respondents, an Appeal to the 2nd Respondent CEO would not be fairly dealt with.
16. Learned Counsel for the Applicants, during the hearing, while admitting the availability of an alternative remedy under section 12F, argued that they did not Appeal the decision of the 1st Respondent dated 1st & 6th October 2020 to the 2nd Respondent, owing to the presence of bias and moved to rely on it as an exceptional circumstances to warrant the judicial review by the Court. Counsel urged further that the Applicants need clarification and declaration by the Court.
17. Conversely, counsel for the Respondents argued that the Applicants are required to exhaust the alternative remedy pursuant to section 12 F of the Act , and the judicial review has no place if an Appeal procedure is provided, which in relation to this matter is still available unutilized by the Applicants.

Appeal against Authority decisions

12F. any person who is aggrieved by the Authority's decision on the refusal, withdrawal, revocation, variation or suspension of an aviation document may appeal to the Chief Executive for the review of the Authority's decision."

18. Citing number of authorities, Counsel for the Respondent argued further that if an alternative remedy is provided, it should be resorted to first before proceeding to

judicial review, serve with an exceptional circumstances, in which case an Appeal procedure can be bypassed.

19. One of the main argument advanced on behalf of the Applicants to justify their move for judicial review was on the basis that the alternative remedy provided under section 12 F ,among other things , was in breach of section 16(1) (c) of the constitution of Fiji , was inadequate , ineffective and impractical and as a result , there were exceptional circumstances that permitted the Applicants to proceed directly with the Judicial review. Hon. A. Stuart, in his leave ruling has correctly ruled out this argument for the reason stated in paragraph 14 thereof and stated that he is not granting leave to apply for judicial review on the basis of the argument that the section 12F is unconstitutional. Thus, the Applicants cannot rely anymore on this, purported, ground of unconstitutionality of the Section 12F of the Act as an exceptional circumstances.

20. It is also alleged on behalf of the Applicants that the 2nd Respondent CEO is not an independent and impartial person to deal with the Applicant's Appeal as required under section 16 (1) (c) . They allege inter- alia,

- a. That the CEO was in total control of the Applicant's matter , that is , from the investigation stage up to the decision making by appointing the investigators who reported back to and advised her
- b. That the CEO prejudged the matter, thus there is no point in Appealing to her.
- c. While she was dealing with the Applicants, she demonstrated bias.
- d. She had conflict of interest.

F. LAW:

21. In considering whether there is an obvious alternative remedy, which has not been exhausted by the Applicant , Pathik J *in State v Ministry of Labour & Industrial relations , Ex parte Fiji Mine Workers Union [1999] FJHC 32; HBj0001 d . 1998s (14 May 1999)* said

The Courts have held that judicial review will not be granted where 'appeal' is available except in exceptional circumstances. In R v BIRMINGHAM CITY COUNCIL ex parte FERRERO LTD CA [1993] All E.R. 530 TAYLOR LJ at page 538 said:

'Accordingly, in the present case, there was available an appeal specifically provided by Parliament to enable a party aggrieved by a suspension notice to challenge it. The appeal was at least as expeditious, if not more so, than judicial

review. It was more suited than judicial review to the resolution of issues of fact. The statutory scheme leant in favour of up-holding the notice unless the goods were shown to be safe; but, should they turn out on appeal or otherwise to be safe, any aggrieved party was entitled to compensation'.

22. Also in *R v EPPING AND HARLOW GENERAL COMRS., Ex p GOLDSTRAW* [1983] 3 All E.R. 257 SIR JOHN DONALDSON MR stated at 262]:

'It is a cardinal principle that, save in the most exceptional circumstances, [the judicial review jurisdiction] will not be exercised where other remedies were available and have not been used'.

23. The law was correctly stated in the speech of Lord Evershed in '*Ridge v Baldwin*' Lord Evershed referred to;

"A danger of usurpation of power on the part of courts... under the pretext of having regard to the principles of natural justice.... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity of putting his case."

24. Therefore, the judicial review is concerned, not with the decision, but with the decision-making process. Lord Brightman in "*Chief Constable of the North Wales Police v Evans*" said; *unless that restrictions on the power of the court is observed, the court will under the guise of preventing the abuse of power, be itself guilty of usurping power.*

25. Lord Templeman in '*Reg v Inland Revenue Commissioner, Ex-parte Preston*]' said;
"Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which is no reasonable tribunal could have reached, or abuse its powers."

26. In *State v Public Service Commission, Ex parte Nair* [2007] FJHC 100; HBJ 02.2007 (30 March 2007) Pathik J had this to say.

"The law is clear. Except in exceptional circumstances, the courts will not review proceedings of inferior tribunals until a final decision is reached. Here the proceedings have only reached the investigatory stage. It is granted that disciplinary powers must be exercised under the rules of natural justice but the High Court will not by its intervention take away statutory powers entrusted to a body or authority: State v. PSC ex-parte: Peniasi Kunatuba - HBJ 18 of 2002".

"A court may in its discretion refuse to grant leave to apply for judicial review or set aside leave previously granted if an adequate alternative remedy exists or if such remedy existed but the applicant failed to utilize it: R. v. Secretary for State for the Home Department, ex-parte: Swati - 1986 1 WLR 477. The existence of an unused statutory right of appeal can be a strong reason to refuse leave or refuse relief at the end of a hearing. The court normally looks at the nature of the case before it, and whether the alternative remedy is suitable to resolve it. Judicial review is a remedy of last resort".

27. It is a cardinal principle of law that save in the exceptional cases, judicial review jurisdiction should not be exercised where other remedies are available and have not been used: **Regina v. Secretary of State for the Home Department, Ex parte Swati [1986] 1 WLR 477** and **R v Epping and Harlow General Commissioners, ex parte Gold straw**.

G. COMMENTS:

28. That Appeals procedure is an alternative remedy which should have been pursued by the Applicants. They deliberately avoided it and now want that the decision be judicially reviewed.

29. For the reasons given bellow, I find no exceptional circumstances adduced that could compel this Court to exercise its revisionary jurisdiction to judicially review the decisions of the 1st Respondent. It is a known fact that the Respondents employs, manage and, control so many people and their activities under the same Act, with the public safety being the prime concern. If someone is to bypass the procedure of resolving the grievances in the manner provided under the Act, the purpose of the Act would be defeated and the provisions of Order 53 of the HCR will be misused.

30. The allegation of bias or partiality is an easiest weapon to be procured by a litigant seeking to bypass a particular forum or an adjudicator, when the presence of such bias is only a mere apprehension and not explicitly established. Unless the allegation is such a strong one, with concrete evidence to substantiate it, no favorable consideration will be given for such a move.

31. It is not proper for this court to lay its hand on an administrative function that is to be performed by the 2nd Respondent in terms of the section 12 F of the statutory provisions, unless there is a compelling reason for this court to play its role by way of judicial review.

32. It is true that when the Applicants preferred their Appeal to the 2nd Respondent in relation to the interim decision made by the 1st Respondent on 5th August 2020 suspending the license and other certificates, the 2nd Respondent did not stay or suspend the operation of that decision for temporary suspension. But, the 1st Respondent, when imposing penalties against the Applicants, after the substantial hearing of the matter, propriety of which the Applicants seek to challenge, the 1st Respondent CAAF/ ECC seem to have been very considerate and lenient enough to mitigate the penalties to a considerable extent. Had the 2nd Respondent exerted her influence on the 1st Respondent in its functions as alleged by the Applicants, this leniency in sentencing would not have been shown.
33. It is also to be observed, through the case record, that when the Application for leave was filed and yet to be taken up for the hearing, the Respondents, through a Memorandum of Agreement, were amenable to have a stay order issued on 21st October 2020 (consent order) suspending the operation of decisions made by the 1st Respondent suspending the license and certificates of the Applicants. These, in my view, are good gestures on the part of the Respondents towards the Applicants. Nothing serious has so far happened for the Applicants to have avoided the 2nd Respondent in making an Appeal under Section 12 F of the Act.
34. The 2nd Respondent has so far not played her role in exercising her jurisdiction on an Appeal being preferred against the substantial decision made by the 1st Respondent. Therefore, it is premature to level allegations such as that the 2nd Respondent (CEO) is bias, unfair in dealing with the Applicants. No one knows or can predict what awaits for the Applicants before the 2nd Respondent at the disposal of the Appeal, if there be an Appeal. The Applicants can resort to the Court if they are dissatisfied with the outcome thereof.
35. The submissions made on behalf of the Respondents to the effect that “...*the aviation is a specialist field, which requires technical knowledge, which is available with the 2nd Respondent and disputes of this nature ought to be placed before the Authority first under the Act*”, is also a convincing, which ought not to be disregarded.
36. I may be permitted to quote what our Court of Appeal had to say, among other things, in relation to the license for the Pilots, in the judgment dated 4th March 2022 in **Appeal bearing No: ABU 130 of 2018 , (High Court HBJ No. 5 of 2018)** involving the same parties hereof. Paragraphs 24 and 28 state as follows.

“[24]. Issuance of licenses is an important process in air navigation regulation designed to minimize risks to passengers and cargo by ensuring only trained professionals are eligible to fly aircrafts. An inquiry into the failure to renew a license held by the 1st Respondent, the regulatory body for air navigation in Fiji would necessarily involve many other elements relevant to air navigation beyond the physical and mental fitness of a person, which a court of law may not be qualified to determine due to a lack of expertise. Therefore, the 1st Respondent should be at liberty to make a determination in the inquiry, un-fettered by any guidelines issued by a court of law”. (Emphasis mine)

“[28] Therefore, while I am in full agreement with the remainder of the learned High Court Judge’s decision, I am of the view that this case has to be remitted to the 1st Respondent for a fresh inquiry without any conditions or guidelines attached. Given the statutory power and the requisite expertise it possesses, the 1st respondent is best placed to conduct a free, fair, and unbiased inquiry”. (Emphasis mine)

37. The Applicants could have appealed the decisions of the 1st Respondent to the 2nd Respondent acting CEO under section 12F and, depending on the outcome thereof, could have activated this review mechanism subsequently. In previous litigations between these parties, I have found only a single occasion where bypassing of the CEO, the 2nd Respondent, was allowed, which was on consideration of the non-appointment of an **Independent Tribunal** in place of the 2nd Respondent. This was treated as an exceptional circumstance. The appointment of an Independent Tribunal was necessitated as a result of the allegations of bias against the **then** CEO by the Applicant Mr. Joyce. Vide - *State v Civil Aviation Authority of Fiji, ex parte Joyce* [2018] FJHC 1055; HBJ5.2018 (26 October 2018) The 2nd Respondent in the present matter is a different officer, who is yet to perform her substantial duty once an Appeal is preferred under section 12F of the Act.

CONCLUSION:

38. For the reasons stated above, I agree with the Respondent’s Counsel that no exceptional circumstances have been adduced by the Applicants and the allegation of bias levelled against the 2nd Respondent is unwarranted and it will not constitute an exceptional circumstances. The Applicant could not have resorted to judicial review without exhausting the alternative remedy of Appeal pursuant to Section 12F of the Act. I understand that there is no time limit under section 12F for the Applicants to commence and continue with an Appeal, if they wish to do so. Granting of leave to commence judicial review does not necessarily mean that the Application for judicial review should be favorably considered.

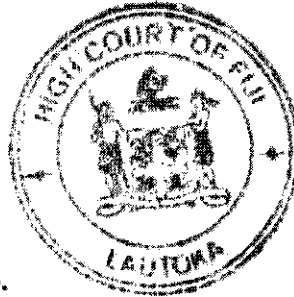
The Respondents have moved for indemnity costs. However, considering the circumstances, I decide to order the Applicants to pay \$1,500.00 each (total \$3,000.00) unto the Respondents being the summarily assessed costs.

FINAL ORDERS:

- a. Both Applications for judicial review fail.
- b. The Originating Motions filed on 26th March 2021 are hereby dismissed.
- c. The Applicants are ordered to pay a total sum of \$3,000.00 (\$ 1,500.00 each) unto the Respondents, being the summarily assessed costs.



A.M. Mohamed Mackie.
Judge.
High Court (Civil)
Lautoka.



On this 20th day of July 2023.

1. **Solicitors:** Messrs. A.K. Lawyers. Barristers and Solicitors or the Applicants.

: Messrs. Patel & Sharma. Barristers & Solicitors for the Respondents.

