IN THE HIGH COURT OF FIJI
IN THE WESTERN DIVISION
AT LAUTOKA

Judicial Review No. HBJ 08 of 2023

IN THE MATTER of the **MINISTER FOR HOME AFFAIRS & IMMIGRATION**

AND

IN THE MATTER of the **IMMIGRATION ACT** and the **IMMIGRATION REGULATIONS** and the **CITIZENSHIP OF FIJI ACT** and the **CITIZENSHIP OF FIJI REGULATIONS**

AND

IN THE MATTER of an application by **SUNG JIN LEE, NAM SUK CHOI, BYEONGJOON LEE, BEOMSEOP SHIN, JUNG YONG KIM** and **JINSOOK YOON** for Judicial Review and with other relief including an Order of Certiorari to quash the decision made by the Minister for Home Affairs and Immigration made between 01 September 2023 and/or 07 September 2023 **DECLARING SUNG JIN LEE, NAM SUK CHOI, BYEONGJOON LEE, BEOMSEOP SHIN, JUNG YONG KIM** and **JINSOOK YOON** Prohibited Immigrants using his purported discretion under section 13(2)(g) of the Immigration Act **AND** purportedly making an **ORDER** and/or **ORDERING** the removal of **JIN LEE, NAM SUK CHOI, BYEONGJOON LEE, BEOMSEOP SHIN, JUNG YONG KIM** and **JINSOOK YOON** from Fiji.

BETWEEN : **SUNG JIN LEE** currently in immigration detention and/or unlawful custody of the Respondent.

1ST APPLICANT

AND : **NAM SUK CHOI** currently in immigration detention and/or unlawful custody of the Respondent.

2ND APPLICANT

AND : **BYEONGJOON LEE** currently in immigration detention and/or unlawful custody of the Respondent.

3RD APPLICANT

AND : **BEOMSEOP SHIN** currently in immigration detention and/or unlawful custody of the Respondent.

4TH APPLICANT

AND : **JUNG YONG KIM** currently in immigration detention and/or unlawful custody of the Respondent.

5TH APPLICANT

AND : **JINSOOK YOON** currently in immigration detention and/or unlawful custody of the Respondent.

6TH APPLICANT

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

1ST RESPONDENT

AND : **THE ATTORNEY-GENERAL OF AND FOR THE REPUBLIC OF THE FIJI ISLANDS**

2ND RESPONDENT

Appearances : Mr. R. Gordon and Mr. W. Pillay for the Applicants
: Mr. Kant for the Respondents

Date of Hearing : 08 April 2024
Date of Ruling : 15 May 2024

R U L I N G

INTRODUCTION

1. Before me is a Summons filed on 27 February 2024 by the fifth Applicant, Mr. Jung Yong Kim (**"Kim"**). The Summons is supported by the following three affidavits:'

    (i) affidavit of Kim sworn on 22 February 2024.
    (ii) affidavit of Sung Jin Lee sworn on 27 February 2024.
    (iii) affidavit of Sung Jin Lee sworn on 22 March 2024.

2. The Respondents have filed an affidavit in opposition of Mr. Mason Smith sworn on 05 April 2024.

3. Mr. Ower had initially objected to Smith's affidavit being admitted in evidence unless Mr. Smith was made available for cross examination. However, the objection was withdrawn in the course of the hearing after it became clear that the State is not seriously questioning Kim's position about his being, now, a fully-fledged citizen of Vanuatu and holder of a valid Vanuatu passport.

BACKGROUND

4. On 19 January 2024, this Court granted leave to Kim and his co-applicants in the substantive application, to apply for judicial review. There are two decisions in question. Both were made on 31 August 2023.

5. The first one, by the Minister for Home Affairs and Immigration, was made under section 13(2) (g) of the Immigration Act 2003 (**"Act"**). By that decision, the Minister had deemed all the Applicants as "**Prohibited Immigrants".**

6. The second decision was made by the Permanent Secretary for Immigration immediately under section 15(1) and section 15(4) of the Act. By that decision, the Permanent Secretary had directed:

   (i) that the Applicants leave Fiji and remain out of Fiji indefinitely;
   (ii) that pending their removal, the Applicants are to be kept in the custody of immigration officials.

Stay of Decisions

7. On 01 November 2023, this Court granted a stay on the above decisions until further Orders. This Court also granted an injunction to restrain the Minister and the Permanent Secretary from taking any step to enforce the decisions.

Application to be Removed to Vanuatu

8. On 21 November 2023, the Applicant, Mr. Jung Yong Kim (**"Kim"**) filed a Summons seeking *inter alia* an Order that the he be released from the custody of the Permanent Secretary on terms and conditions deemed just, necessary or reasonable pending the hearing and determination of the review.

9. Alternatively, given that Kim had, purportedly just then recently just obtained Vanuatu citizenship, Kim in particular was seeking an Order to direct the Permanent Secretary that Kim be allowed to remove himself to Vanuatu pending the outcome of this review.

10. I note again at this juncture that these applications were filed after the stay and injunctive orders were granted on 01 November 2023 and well before the leave to apply for judicial review was granted on 19 January 2024.

Decision of this Court

11. The decision of this Court was handed down on 20 February 2024 (see **Sung Jin Lee v The Minister for Home Affairs & Immigration** [2024] FJHC 106; HBJ08.2023 (20 February 2024).

12. I did decline to grant any Order that Kim be released from custody. Rather, I chose to defer any issue about the constitutional guarantees surrounding the detention to the then pending related Constitutional Redress matter before Seneviratne J.

13. Also, since the Fiji Court of Appeal (**"FCA"**) was then deliberating on an appeal from Seneviratne J's refusal to grant *habeas corpus* on the ground that he was precluded from exercising jurisdiction by virtue of the ouster clause in section 13(2) (g) of the Immigration Act - I felt that it would be most inappropriate to grant any Orders which effect the release of Kim.

Decision of the Fiji Court of Appeal

14. On 29 February 2024, the FCA delivered its Ruling (see **Sun Jin Lee v The Director of Immigration** [2024] FJCA 31; ABU105.2023 (29 February 2024).

15. One of the main questions before the FCA was – whether the ouster clauses in section 173(4) of the Constitution or section 13(2) (g) of the Immigration Act, 2003 exclude the jurisdiction of the High Court from entertaining an application for a writ of *habeas corpus*.

16. It was argued before the FCA that the application for the writ of *habeas corpus* did not *per se* challenge the Minster's decision to declare the Appellants "Prohibited Immigrants". Rather, the *habeas corpus* application only challenged the basis of the detention by the Permanent Secretary.

17. The FCA held that the ouster clauses do not oust the jurisdiction of the High Court under Order 4 of the High Court Rules, 1988, to 'review' a complaint of detention or arrest in a general sense. Hence, the decision of the Permanent Secretary to detain is not insulated from review because no ouster clause applies to that decision.

18. The FCA then referred the *habeas corpus* application back to Seneviratne J for determination.

Decision of Seneviratne J on the Habeas Corpus Application

19. In due course, Seneviratne J would deal with the *habeas corpus* application. He eventually ruled that the detention by the Permanent Secretary was lawful. Seneviratne J then dismissed the *habeas corpus* application. That decision is now on appeal before the Fiji Court of Appeal.

INTERLOCUTORY APPLICATION NOW BEFORE THIS COURT

20. Meanwhile, the subject of the removal of Kim to Vanuatu (as sought in the 21 November 2023 Summons) has never been the subject of any judicial determination. This is what is now before this Court.

21. Section 15(6) of the Immigration Act provides:

> *(6) A person against whom a removal order has been made may be removed to the place from where the person came or to the country of which the person is a citizen, or to any other country or place to which the person consents to be removed, if the Government of the country or place agrees to receive the person.*

22. It is submitted on behalf of Kim that, in the particular circumstances of this case, and on the proper construction of section 15(6), the Permanent Secretary has no discretion but to remove Kim to Vanuatu. This submission is made on the following arguments.

Kim is a Vanuatu Citizen

23. Firstly, Kim is of South Korean origin. However, he does not have a valid passport. At some point after he instituted these judicial review proceedings, Kim did apply for, and was granted, Vanuatu citizenship.

24. Initially, the Solicitor General had raised questions about the veracity of Kim's assertion of his having obtained Vanuatu citizenship. However, this is now beyond question given the evidence adduced for and on Kim's behalf.

25. The evidence adduced include: the *certificate of citizenship* which is attached to the supporting affidavit, a copy of the *information page* of Kim's Vanuatu passport, and copies of correspondence from the Vanuatu Minister for Internal Affairs to his Fijian counterpart pertaining to the same including a request that Kim be removed to Vanuatu.

26. For the record, Mr. Green did question the absence of a *Note Verbale* from Vanuatu Government officials to their Fiji counterpart on the issue of Kim's immigration status. The

evidence suggests that a *Note Verbale* was indeed sent. What happened to it at the Ministry of Foreign Affairs in Fiji is unknown.

27. Mr. Ower submits that, while the question about Mr. Kim's removal to Vanuatu is a matter purely for the Fiji Government to consider, he presents the letter only to verify that Kim is, as a matter of fact, now a citizen of Vanuatu.

If Kim is a Vanuatu Citizen, what about his Korean Citizenship?

28. Mr. Ower submits that, as a matter of South Korean law, Kim is effectively no longer a Korean citizen. He relies on an **"expert report"** from a lawyer admitted in Korea who runs a law practice in Korea under the name and style of Barun Law. A copy of the English translation of Barun Law's advice is annexed to the supporting affidavit. According to this advice, Article 15 of the Korean Nationality Act provides that a national of the Republic of Korea shall loose his Republic of Korean nationality when he voluntarily acquires the nationality of a foreign country.

29. Accordingly, Mr. Ower invites the Court to make a finding of fact that Kim is solely a citizen of Vanuatu.

30. Notably, the State does not appear to raise any issue about this evidence. In a situation such as this, where proof of a foreign law is required to determine a material issue of fact in Fiji, the Court is required to venture into an area outside its expertise. In that light, the veracity and reliability of any expert opinion on the foreign law engaged, should, by all means, be tested to assist the Court.

If Kim is a Vanuatu Citizen, should he then be removed to Vanuatu?

31. Section 15(1) of the Immigration Act provides:

> *The Permanent Secretary may make an order directing that any person whose presence within Fiji is, under the provisions of this Act, unlawful, shall, as the Permanent Secretary may specify from the date of service of the order on such person or on the completion of any sentence of imprisonment which he may be serving, be ordered to leave Fiji or be removed from and remain out of Fiji either indefinitely or for a period to be specified in the order.*

32. Mr. Ower submits that, if the Court should now accept as a matter of fact that Kim is solely a citizen of Vanuatu, then, assuming that the Minister's decision under section 13(2)(g) is lawful, Kim should therefore either be allowed to voluntarily remove himself to Vanuatu or be removed to Vanuatu.

33. Mr. Ower submits that section 15(1) assumes that a person declared a prohibited immigrant by the Minister, assuming that the declaration is lawful, will voluntarily leave the country. The law assumes that a prohibited immigrant will obey the Removal Order of the Permanent Secretary, and remove himself out of the jurisdiction. However, should a prohibited immigrant fail to obey a Removal Order of the Permanent Secretary, only then will section 15(3), 15(4) and 15(6) apply.

34. Section 15(6) is set out above in paragraph 21. Sections 5(3) and15(4) provide as follows:

> *15 (3) A person against whom an order under this section is made may, before he leaves Fiji and while being conveyed to the place of departure, be kept in prison or in police custody, and while so kept shall be deemed to be in lawful custody.*
>
> *15 (4) An order made, and any directions given, by the Permanent Secretary under this section may at any time be varied or revoked by him.*

35. In this case, after the Minister declared the Applicants as "prohibited immigrants "on 31 August 2023, the Permanent Secretary then immediately issued the Arrest and Detention Orders under section 15(3) and 15(4). The Applicants were afforded no opportunity to voluntarily remove themselves out of Fiji.

36. Notably, there was no specific direction as to how the Applicants were to be removed. Rather, the Permanent Secretary's letter only says that they were to leave and remain out of Fiji indefinitely.

37. This, argues Mr. Ower, is exactly what Kim wants now, that is, to leave Fiji for Vanuatu and remain out of Fiji in Vanuatu indefinitely. Accordingly, Kim should now be given an opportunity to voluntarily remove himself to Vanuatu.

38. Mr. Ower draws attention to section 15(3) of the Immigration Act. This section permits the use of reasonable force in the removal of a prohibited immigrant. Removal in this sense entails taking the prohibited immigrant to a departure point (Airport or Port).

39. Similarly, to voluntarily leave Fiji, a prohibited immigrant would simply take himself to the departure point.

Power to Remove is not at Large

40. Having said all the above, Mr. Ower submits that the power to remove is not at large. Aside from the issue of the lawfulness of the detention which is not at issue in this application, but which is before the Court of Appeal in the appeal against the *habeas corpus* ruling of Seneviratne J, there are other restrictions to this power to remove.

41. One such restriction is that a person against whom a Removal Order has been issued may be removed only to a limited number of countries (see section 15(4) and section 15(6) above).

42. In terms of section 15(6), Mr. Ower submits that there is no evidence before this Court as to which country Mr. Kim had arrived from. There is also no evidence as to "any other country" which Mr. Kim may be removed to, let alone, whether the government in any of these countries is willing to receive Mr. Kim. Mr. Ower even ventures to suggest that there is no evidence that the Republic of South Korea is willing to receive Mr. Kim.

43. Accordingly, the only place where Kim may lawfully be removed to - is Vanuatu.

44. Hence, while the appeal against the refusal of Seneviratne J to grant a *habeas corpus* is being determined in the Fiji Court of Appeal, and while the Citizens Appeals Tribunal takes its normal course towards a hearing of the appeal against the Minister's decision to decline Mr. Kim's application for Fiji citizenship, and pending the hearing of the substantive Judicial Review application in this court, Kim should be removed to Vanuatu or be allowed to voluntarily leave Fiji for Vanuatu. In other words, the Permanent Secretary does not have a choice but to either allow Kim to voluntarily leave Fiji for Vanuatu or to remove Kim to Vanuatu.

"Disguise Extradition"

45. Mr. Ower submits that this application is being made on the assumption that there is no **"disguise extradition"** being carried out by the State.

46. However, he concedes that in the upcoming substantive Judicial Review hearing, one of the main points of argument to be raised by the Applicants is that the Minister is indeed executing an extradition disguised as a "removal".

47. Notably, Mr. Ower concedes that removing Mr. Kim to Vanuatu now would make his job harder at the substantive Judicial Review hearing.

THE STATE'S POSITION

Usurping the Permanent Secretary's Power (decision-maker)

48. The essence of the State's submission on this point is that, this Court should not, under the guise of preventing abuse of power, permit itself to usurp the role of the executive in the enforcement of immigration laws. After all, the Court in a judicial review matter, is only concerned with the process of decision making rather than the merits or demerits of the decision itself.

49. If this Court were to mandate the removal of Kim to Vanuatu, the Court would be usurping, and encroaching into, the role of the decision-maker (Permanent Secretary).

50. Mr. Green submits:

    (i) Kim is a prohibited immigrant.
    (ii) the Permanent Secretary has powers under section 15 of the Immigration Act to detain a prohibited immigrant pending removal. Kim is therefore being lawfully detained.
    (iii) the power given to the Permanent Secretary under section 15 to apprehend and remove a prohibited immigrant is central in the enforcement of immigration laws in Fiji. It is a crucial power vested in the executive branch of government to enable it to maintain immigration control. The power allows the use of reasonable force in the execution of the apprehension and removal process.
    (iv) this position has been confirmed by Seneviratne J's refusal to grant a *habeas corpus*.
    (v) similarly, the power to determine to which country a prohibited immigrant is to be removed, vests solely in the Permanent Secretary.
    (vi) the application seeking an Order to remove Kim to Vanuatu, if granted, would be tantamount to this Court usurping the Permanent Secretary's power.

Is it Mandatory that Kim be Removed to Vanuatu?

51. Mr. Green acknowledges that section 15(6) of the Immigration Act (see paragraph 22 above) sets out that a person against whom a removal order has been made may be removed either to the place from where the person came or to the country of which the person is a citizen or to any other country or place to which the person consents to be removed – provided the government of the country or place agrees to receive the person.

52. However, even if the Government of Vanuatu has agreed to receive Kim, the Permanent Secretary still has to entertain it as an option in the first place. In this case, the Permanent Secretary is not considering removing Kim to Vanuatu. Rather, the Republic of South Korea is the other option. This is so especially given:

(i) that South Korea is Kim's country of origin – and from where he came.

(ii) that South Korea is the country which has issued Red Notices against Kim and, to which Red Notices the Government of Fiji is responding.

(iii) that Fiji has certain international obligations under customary international law *vis a vis* the Red Notices, together with a *Note Verbale* from the Republic of South Korean Embassy in Fiji.

Abuse of Process

53. Mr. Green points out that the Applicants in this case are abusing the Court's process. They have filed multiple parallel and duplicative proceedings in this Court and in other Courts. The current proceedings in particular has no legitimate purpose.

Final Relief

54. Mr. Green submits that the relief which Kim seeks is really a final substantive relief disguised as an interlocutory relief. This adds to the argument that Kim is really abusing the process of this Court. He is not pursuing a legitimate purpose.

55. Ideally, the proper course for Kim was to, while the stay of execution is in place, apply to the Permanent Secretary to seek that he be removed to Vanuatu rather than to the Republic of South Korea.

56. Should the Permanent Secretary decline that request, Kim should then consider extending his Judicial Review application to include that ground.

57. As it is now, the Permanent Secretary has even had occasion to even properly consider the merits or demerits of the question of the removal of Kim to Vanuatu. This is so because no formal application as such was ever made to his office. In other words, he has never made a decision on the question. To therefore seek a mandamus to direct him to act accordingly is most improper and an abuse of process.

58. I am attracted by the depth of this submission. Had a request been made to the Permanent Secretary, and had the Permanent Secretary made a decision on it, perhaps this Court would then be better placed to review the reasonableness or the lawfulness of that decision – but in the substantive hearing that is.

Private Law Remedy being Improperly Pursued by Kim in these Public Law Proceedings

59. Flowing from the above, Mr. Green submits that what Kim is really pursuing by this interlocutory application is to enforce a perceived private law entitlement to be removed to a country of his own choice.

60. This in itself, is an abuse of process because public law proceedings such as Judicial Review are ill suited as a mechanism for the pursuit of perceived private law rights. By not first seeking a decision of the Permanent Secretary to remove him to Vanuatu, the pursuit of this interlocutory application is, accordingly, nothing but a pursuit of a Court Order to vindicate a private choice.

Fiji Court of Appeal

61. If this Court were to entertain the present application and Order that Kim be removed to Vanuatu, that would undermine Seneviratne J's decision in the *habeas corpus* matter. His Lordship had ruled that the detention is lawful.

62. In any event, that decision is currently on appeal before the Fiji Court of Appeal.

Removal or Extradition?

63. Mr. Green's a theoretical argument is that Fiji does not have a bilateral extradition arrangement with the Republic of South Korea. Where there is no bilateral arrangement as such, it is open to Fiji to respond to a Red Notice and remove a "wanted" person to the country which has caused the Red Notice – by exhausting the mechanism under section 13(2)(g) of the Immigration Act.

64. Again, in this regard, the choice of country to which to remove Kim (Vanuatu or South Korea), or the choice of *mechanism* to engage (to remove or extradite)– remains the prerogative of the State. The court cannot and should not usurp that choice. This is because the executive has

different factors to consider in the balancing exercise. These factors are usually a *"no go zone"* for the Courts.

65. In any event, this is not an extradition-situation. Rather, this is simply a situation where Fiji is (a) responding to some Red Notices caused by the Republic of South Korea (b) together with an assessment by a Taskforce convened to investigate the affairs and dealings of the Grace Road Group.

66. If this were the typical extradition case, the Republic of South Korea would have had to initiate the process by making a special formal request to Fiji. This has not happened in this case.

COMMENTS

67. I do note Mr. Ower's response to Mr. Green's submissions. He argues that this application is not to substitute the Court's view with that of the Permanent Secretary's. This is also not an application to engage the Court in an assessment of whether Vanuatu or the Republic of South Korea is the better choice to remove Kim to. Rather, in terms of the established facts, the only lawful action which the Permanent Secretary can do now is to remove Kim to Vanuatu. Accordingly, this Court should grant an order of mandamus to direct the Permanent Secretary to remove Kim to Vanuatu. Mr. Owers argues further that section 15(6) of the Immigration Act does not confer on the Permanent Secretary an absolute unreviewable discretion to determine what country a prohibited immigrant is to be removed to.

68. While Mr. Ower's arguments are strong, Mr. Green's submissions in response to the application, must prevail at this interlocutory stage.

69. I take into account the background as to how this case has evolved. In particular, I take into account the fact that the Applicants were instrumental in moving this Court to grant a stay and an injunction on 01 November 2023.

70. These Orders are still in force to this day. For the time being, they restrain the Permanent Secretary from acting to remove the Applicants, including Kim, out of Fiji.

71. Having said that, the whole point about the stay and the injunctive orders of 01 November 2023 was to maintain the *status quo* as it was.

72. The status quo to be maintained was/is, that the Applicants be not removed out of Fiji until all the issues are determined.

73. These issues relate to:

(i) the lawfulness or otherwise of the Minister's decision,

(ii) the question of whether or not this court has jurisdiction at all to even judicially review the process of that decision making,

(iii) the lawfulness or otherwise of the decision of the Permanent Secretary to arrest and detain the Applicants pending removal.

(iv) the question – if the Applicants are at all to be removed, to which country?

74. Flowing from the above, I must say that the granting of the stay and injunction on 01 November 2023 was founded ultimately on a compromise.

75. The Applicants on the one hand, and the State on the other, have both had to give up something important, or forfeit some entitlement, in the interim, in the interest of maintaining the status quo.

76. The State, in the interim, forfeits its entitlement to enforce the Permanent Secretary's Removal Orders in relation to the Applicants including Kim. Whether or not the State is entitled to do so eventually, is one of the many questions which must be postponed to the Judicial Review proper. When, eventually the dust settles so to speak, one shall then know where Kim will be removed, if at all he is to be removed.

77. For Kim, the entitlement he forfeits in the interim in the interest of maintaining the status quo must include *inter alia* the entitlement to be removed to Vanuatu (his new country of citizenship).

CONCLUSION

78. Against that light, for Kim to then bring this application to seek his removal to Vanuatu at this interlocutory stage, before the issues are determined, is an audaciously bold move. I am not inclined to grant the Orders sought. The application is dismissed. Costs to the State which I summarily assess at $2,500 (two thousand five hundred dollars only).

....
Anare Tuilevuka
JUDGE
15 May 2024