

**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.  
**1<sup>ST</sup> APPLICANT**

**AND** : **NAM SUK CHOI** currently in immigration detention and/or unlawful  
custody of the Respondent.  
**2<sup>ND</sup> APPLICANT**

**AND** : **BYEONGJOON LEE** currently in immigration detention and/or  
unlawful custody of the Respondent.  
**3<sup>RD</sup> APPLICANT**

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

**AND** : **JUNG YONG KIM** currently in immigration detention and/or unlawful custody of the Respondent. **4<sup>TH</sup> APPLICANT**

**AND** : **JINSOOK YOON** currently in immigration detention and/or unlawful custody of the Respondent. **5<sup>TH</sup> APPLICANT**

**AND** : **THE MINISTER FOR HOME AFFAIRS & IMMIGRATION** of 1<sup>st</sup> and 2<sup>nd</sup> Floor, New Government Wing, Government Buildings, 26 Gladstone Road, Suva. **6<sup>TH</sup> APPLICANT**

**AND** : **THE ATTORNEY-GENERAL OF AND FOR THE REPUBLIC OF THE FIJI ISLANDS** **1<sup>ST</sup> RESPONDENT**

**AND** : **THE ATTORNEY-GENERAL OF AND FOR THE REPUBLIC OF THE FIJI ISLANDS** **2<sup>ND</sup> RESPONDENT**

Appearances : Mr. Sharma D., Mr. Gordon R., Mr. Pillay W., Mr. Prasad N. with Ms. Fatima G. for the Applicants  
: Mr. Green R. and Mr. Kant S. for the Respondents  
Date of Hearing : 29 October 2024  
Date of Ruling : 28 November 2024

# **R U L I N G**

## **INTRODUCTION**

1. Numerous rulings have been passed down by this Court and other Courts<sup>1</sup> regarding Jung Yong Kim's and Sung Jin Lee's "situation". They are currently being detained at the correctional facilities in Natabua in Lautoka.
2. Earlier this year, Mr. Justice Seneviratne had refused a *habeas corpus* application by Kim and Lee. An appeal of that decision is pending before the Fiji Court of Appeal. Kim and Lee also filed a constitutional redress application before Seneviratne J seeking the same relief. This is now consolidated with the judicial review matter before me.
3. It is the constitutional redress application (as consolidated with the judicial review matter), seeking Kim's and Lee's release, which I deal with now.
4. Meanwhile, the hearing of the substantive judicial review matter was completed exactly a month ago on 29 October 2024 and is set for judgement in late January 2025. However, just last week, on 21 November 2024, the Office of the Attorney-General filed a Summons

seeking to adduce further evidence and for the court to temporarily stop finalizing its rulings and judgements until the application is heard and determined.

5. What I have to determine firstly is whether I can proceed with this application for release given that a *habeas corpus* appeal is pending before the Fiji Court of Appeal. If I can, the next question is whether or not I should then defer this ruling on account of the 21 November application by the Attorney-General.

## **BACKGROUND**

6. Kim and Lee are two of the six applicants who have sought judicial review of a decision of the Minister for Immigration and Home Affairs (“**Minister**”) and a decision of the Permanent Secretary for Immigration (“**Permanent Secretary**”). Both decisions were made on 31 August 2023.
7. The Minister had declared all six applicants as prohibited immigrants under section 13 (2)(g) of the Immigration Act 2003. The Permanent Secretary, acting under section 15 (1) and section 15 (4) of the Act, had issued Orders for the arrest and detention of the applicants. Kim has been in detention since **07 September 2023**. Lee has been in detention since **05 October 2023**.
8. Suffice it to say that Kim and Lee, through their lawyers, have filed multiple duplicitous applications for *habeas corpus* and constitutional redress, all seeking a Court Order that they be released from custody. They have always stated in Court through their lawyers that they are willing to abide by any terms and conditions which the Court may deem just, necessary or reasonable.
9. A particular ruling of my brother Judge Seneviratne refusing a *habeas corpus* application is pending before the Fiji Court of Appeal.
10. Also pending before the Supreme Court is an appeal against a decision of the Fiji Court of Appeal which had struck out Kim’s and Lee’s appeal against my decision in **Sung Jin Lee v Minister for Home Affairs & Immigration** [2024] FJHC 299; HBJ08.2023 (15 May 2024).
11. Meanwhile, a constitutional redress application which had been placed before Seneviratne J is now consolidated with the judicial review matter before me. The parties had sought this consolidation, apparently, based on some *obiter* comments of the Supreme Court in **Director of Immigration v Sung Jin Lee** [2024] FJSC 39; CBV0001.2024 (30 August 2024). Their Lordships had urged the parties to consolidate the various applications<sup>ii</sup> to avoid duplicity.
12. I did hear the judicial review application proper in late October. This is now adjourned to 28 January 2025 for judgement.
13. Meanwhile, a stay on both decisions of the Minister and the Permanent Secretary has been in place whilst all these processes were happening. I first granted stay on 09 October

2023<sup>iii</sup> to stop the removal of the applicants out of Fiji pending the determination of leave to issue Judicial Review. After I granted leave on 19 January 2024, I then extended the stay until the final determination of the substantive judicial review matter.

14. Notably, neither Kim nor Lee has ever been charged or convicted of any crime here in Fiji or, for that matter, and to the best of my knowledge, elsewhere in the world.

#### **REVIVING THE APPLICATION FOR RELEASE**

15. As I have stated above (paragraph 3), it is the constitutional redress application (as consolidated with the judicial review matter), which is before me now.
16. This means that I must consider afresh the question of Kim's and Lee's release from custody pending the ruling on the judicial review application.
17. I approach this from a Constitutional Redress rather than from a *habeas corpus* perspective. I do so because the constitutional redress and the judicial review matters are now consolidated before me.

#### **SECTION 44 of the CONSTITUTION**

18. Section 44 (1) and (2) of the Constitution provides :
  1. If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.
  2. The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.
19. The first thing an applicant must establish under section 44 is that a right of his under Chapter 2 of the Constitution is engaged in the particular situation in which he is caught. Following that, the applicant must then satisfy the court that the right in question has been, or is likely, to be contravened.

#### **WHAT RIGHT OF KIM'S & LEE'S IS ENGAGED?**

20. Clearly, Kim's and Lee's right to personal liberty under section 9 of the constitution is at stake. This right is also set out in Article 9 (4) of the International Covenant on Civil and Political Rights (ICCPR) which Fiji acceded to on 16 August 2018.

## **HAS THEIR RIGHT TO LIBERTY BEEN CONTRAVENED?**

21. The questions are: Are they being detained pursuant to a lawful authority? Even if they are, is their detention proportionate to the purpose to be served? Given that the Fiji Court of Appeal is yet to hear and decide on the appeal on the *habeas corpus* decision, is this Court precluded from dealing with this application, *albeit*, from a constitutional redress approach?

*Is this Court Precluded from Dealing with this Application in light of the Pendency of the Habeas Corpus Appeal before the Fiji Court of Appeal?*

22. It is generally an abuse of process to institute an application for constitutional redress when there are alternative remedies available. In such a case, the Court will usually strike out the constitutional redress application.
23. I am not inclined to treat the pending appeal before the Fiji Court of Appeal as a ground to strike out this application on account of the following factors.
24. Firstly, Kim and Lee are not convicts. They have been in detention for over 400 days in a correctional facility alongside convicted criminals.
25. Secondly, as Mr. Green revealed in Court, there is no clear indication as to when the Fiji Court of Appeal may deal with the appeal of Seneviratne J's *habeas corpus* decision.
26. Thirdly, contrary to Mr. Green's argument, I am of the view that Kim and Lee are not re-litigating the *habeas corpus* arguments before me in contravention of the principles in **Henderson v Henderson** (1843) 3 Hare 100, 67 ER 313.
27. On the above point, I note that in paragraph [14] of its judgement (**Director of Immigration v Sung Jin Lee** [2024] FJSC 39; CBV0001.2024 (30 August 2024)), the Supreme Court of Fiji offered some comments on the desirability of consolidating all the applications to avoid duplicity and to steer clear of the superfluous arguments raising *issue estoppel* and *res judicata*<sup>iv</sup>.
28. Then at paragraphs [26] and [27], the Court noted that Kim and Lee have been in continuous detention for almost a year.
29. I am of the view that the court's focus in a *habeas corpus* application is narrower from that which is required of it in a constitutional redress or judicial review application.
30. In a *habeas corpus* application, the court's only concern is about whether or not a detention complies with Fijian law. So long as the detention complies with Fijian law (e.g. that there is no jurisdictional error), the court will have no business in asking about the necessity or proportionality of that detention.

31. Proportionality however is a value embedded in Fiji's Constitution. It stems from the broader concept of fairness and ensures that actions or consequences are balanced and appropriate relative to the circumstances.

32. As the Fiji Supreme Court said at paragraph [86] in **In the Matter of a reference by Cabinet for an opinion from the Supreme Court concerning the interpretation and application of Sections 105(2) (b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji** [2024] FJSC 20; Miscellaneous Action 0001 of 2024 (28 June 2024) (hereinafter "**Reference**"):

[86] .... proportionality is a value which is embedded in the Constitution, Chapter 2 in particular. ... Proportionality analysis seeks to ensure that restrictions on rights and freedoms are justified, rather than arbitrarily imposed. The emphasis on proportionality brings section 3(1) into play:

Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

Because proportionality is one of the values underlying the Bill of Rights and Fijian society, the Court must seek to promote it or, put another way, to avoid disproportionality to the extent possible.

33. Accordingly, proportionality will be paramount in the mind of a judge dealing with a constitutional redress or judicial review matter. Even where a detention is *prima facie* lawful, proportionality allows the court to consider whether the detention is at all necessary.

34. Hence, in this case, even though the Permanent Secretary may not have committed a jurisdictional error in exercising the power available to him under section 15 (4), the Court may still enquire as to whether or not it is at all necessary to continue to keep Kim and Lee in detention while all these legal processes are happening around them.

35. I am of the view that the proportionality or necessity of Kim's and Lee's detention was outside the scope of Seneviratne J's enquiry in the *habeas corpus* application. Therefore, I do not think that the principle in **Henderson** should preclude me from dealing with the release from the vantage point of constitutional redress. In any event, as the Fiji Court of Appeal has said, the right to challenge the lawfulness of a detention, is, in itself, a standing human right<sup>v</sup>. Its hardly an abuse of process.

*Has Kim's & Lee's Right to Personal Liberty been Violated?"*

36. I must say at the outset that the stay on the decision of the Minister and the Permanent Secretary does not quash or set aside the Minister's decision. If it did, then this Court would be usurping that executive power.

37. The stay only operates to temporarily stop the processes set in motion by the State for their removal from Fiji until the review is determined.

38. Accordingly, for the time being, I accept that Lee and Kim are, technically, still *prohibited immigrants*. If Kim and Lee are still prohibited immigrants, does that not entitle the Permanent Secretary to detain them under section 15 (4)?
39. Section 15 (1) of the Immigration Act 2003 provides:
15. (1) The Permanent Secretary may make a written order directing a prohibited immigrant to leave the Fiji Islands and remain out of the Fiji Islands either indefinitely or for a period specified in the order.
40. Section 15 (4) provides:
15. (4) A person against whom an order under this section is made may, before leaving the Fiji Islands and while being conveyed to the place of departure, be kept in prison, in police custody or in any other place of custody authorized by the Permanent Secretary, and while so kept is deemed to be in lawful custody.
41. The section 15 (4) power is exercisable before the prohibited immigrant leaves the Fiji Islands and “*while being conveyed to the place of departure*”. The phrase “*while being conveyed*” suggests that the power is exercisable only if and when the Permanent Secretary is actually executing an immediate removal.
42. While Kim and Lee are technically still prohibited immigrants pending review, the stay restrains the Permanent Secretary from “*actually*” effecting their removal. That, together with the fact that their court cases are likely to be appealed right up to the Supreme Court, would thereby remove any element of “*immediacy*”.
43. As such, in my view, the Permanent Secretary can no longer justify Kim’s and Lee’s continuing detention under section 9 (1)(i) of the Constitution. This section provides in its relevant part as follows:
9. - (1) A person must not be deprived of personal liberty except -
- (i) for the purpose of ...effecting the expulsion, extradition or other lawful removal of the person from Fiji.

### *National Security*

44. Mr. Green argues that the continued detention of Kim and Lee are justifiable because they are a threat to national security. He also argues that national security matters are non-justiciable in a court of law.
45. Unless the Permanent Secretary is able to show that Kim’s and Lee’s release would immediately expose the public or the nation to the security threat which they purportedly pose, then their continuous detention may be not be justifiable. I reserve comment on this for the judicial review ruling in January 2025. For now, I proceed on the premise that the claimed threat to national security which Kim and Lee pose, is established.

46. It is suggested by Mr. Sharma that the source of that power to detain on account of the security threat which a prohibited immigrant may pose is not to be found in section 15 (4) of the Immigration Act, but elsewhere in the Act. I have not had the opportunity to thoroughly consider this point.
47. Again, I take note of Mr. Green's submission that the security concerns of the state are non-justiciable. I reserve comment on this for the judicial review ruling in January 2025.
48. As I have said, for now, I proceed on the premise that the claimed threat to national security which Kim and Lee pose is established. But what alleged security threat do Kim and Lee actually pose? Should it justify their continued detention?
49. Mr. Sharma highlights that the Affidavit of Joji Dumukoro talks about the taskforce finding that the Grace Road Group of Companies may have made some improprieties in terms of their compliance.
50. According to Dumukoro, the taskforce report released on 17 August 2023 recommends that these matters be further investigated. There is a glaring disconnect in that - while the taskforce report does not say that the applicants are, personally, a threat to Fiji, the Minister however has taken it a step further to declare the applicants prohibited immigrants as they are a "threat to Fiji".
51. Mr. Sharma argues that Kim and Lee are not a flight risk. In fact, they want to stay in Fiji. They have millions of dollars' worth of investments here. There is no reason to fear that they might be a flight risk.

### *Comments*

52. I am of the view that the purported security threat which Kim and Lee pose, does not justify their continued detention. They are not alleged to be involved in any terrorist activity in Fiji or elsewhere in the World (c.f. **Zaoui v Attorney-General** [2004] NZCA 228; [2005] 1 NZLR 577 (CA and SC).)
53. Nor are they facing or have been convicted of any serious charge in Fiji or abroad. Accordingly, there is no reason why they should continue to be detained.
54. Whatever risk they pose, could be managed by imposing conditions on their release, which they themselves have suggested from the start.
55. In saying this, I am relying on the material contained in the affidavit of Dumukoro.
56. In addition to the above, I am of the view that to continue to detain Kim and Lee indefinitely amidst all the evolving legal challenges surrounding their case, would be utterly disproportionate.
57. In **Attorney-General v Yaya** [2009] FJCA; 60; ABU 0037.2007 (9 April 2009), which was a constitutional redress case, Mr. Yaya was aggrieved when his picture and name were



published in a local daily. The publication was authorized by the Commissioner of Police to alert the public that Yaya was a person of interest in a Robbery With Violence case.

58. Was Mr. Yaya's constitutionally protected right to privacy breached by the well-intentioned and genuine publication?
59. The Court accepted that there was a public interest that offenders be apprehended and brought to justice. In an appropriate case, it will be a valid exercise of the Commissioner's statutory powers, and a legitimate pursuit of that public interest, to publish the names and details of a suspect. However, it was not enough that the Commissioner was exercising his statutory powers in pursuit of a legitimate end. The question was whether the publication was proportionate. In other words, were they "*reasonable and justifiable in a democratic society*". Is there any other less intrusive option? Does the means justify the end?
60. It was held that the Commissioner had breached Mr. Yaya's right to privacy.

### **ANALYSIS**


61. The question is whether keeping Kim and Lee in prolonged detention is contrary to the values that underlie a democratic society based on human dignity, equality and freedom as *per* section 3 (1) of the Constitution?
62. The right to personal liberty is fundamental. It must be protected against unlawful arbitrary detention. Accordingly, common law presumes that every imprisonment is illegal unless there is clear legal authority to detain a person.
63. To safeguard this fundamental right, the law arms anyone in detention with the right to apply for a writ of *habeas corpus*. Accordingly, no leave is required to file a *habeas corpus* application. This allows courts to swiftly review the legality of a person's detention and order immediate release if the detention is unlawful. The right cannot be denied merely because, for example, there is an alternative remedy.
64. As the Fiji Court of Appeal reminds us in **Sun Jin Lee v The Director of Immigration** [2024] FJCA 31; ABU105.2023 (29 February 2024), the right to challenge the lawfulness of detention before a court of law is, in itself, a standing human right. This right cannot be fettered even by an ouster clause<sup>vi</sup>, nor can it be regarded as an abuse of process<sup>vii</sup>.
65. As such, in every court challenge on the lawfulness of detention, the onus should fall on the State to establish the reasonableness, necessity and/or proportionality of the detention<sup>viii</sup>.

### **APPLICATION TO ADDUCE FURTHER EVIDENCE**


66. As I have stated at the outset, the Office of the Attorney-General, on 21 November 2024, filed a Summons seeking leave to adduce fresh evidence and that if I do grant leave, that I consider the fresh evidence in the judicial review and application for release before me.
67. The Summons is supported by an affidavit of Ms. Amelia Komaisavai sworn on 21 November 2024.
68. The evidence which the state wishes to adduce is that of a Ms. Jolie Ann Lee. She is a dual American and South Korean citizen who was part of the Grace Road Group until she escaped last week.
69. A copy of an unsigned statement Ms. Jolie gave to Police is attached to Komaisavai's affidavit. Ms. Jolie gives an account of the inhumane working and living conditions which members of the church are subjected to daily by the elders of the church.
70. I have considered the application against the principles laid out in **Ladd v Marshall** [1954] 1 W.L.R. 1489 (25 November 1954).
71. I would grant leave on that application to adduce further evidence but would consider that in the substantive Judicial Review matter only. In my view, the proposed additional evidence which the State wishes to adduce, assuming it is all proved, would still do little to convince me that the claimed threat to national security which Kim and Lee pose, is enough to justify their continued detention for an indefinite period.

## **ORDERS**

72. Kim and Lee have always represented in Court through their counsel that they are willing to abide by any terms and conditions of their release. Accordingly, the Permanent Secretary for Immigration is to release them upon amicable settlement with their counsel of the terms of their release. This matter is adjourned for mention in Suva on **Monday 02 December 2024 at 2.00 p.m.** to see if the parties have settled the terms of release. Failing settlement, the Court will set these in Court.
73. A production order is issued for Kim and Lee to be produced Court in Suva on Monday 02 December 2024 at 2.00 p.m. Parties to bear their own costs.

  
Anare Tuilevuka  
**JUDGE**

28 November 2024



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<sup>i</sup> See the following:

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- (i) **Sung Jin Lee v The Minister for Home Affairs and Immigration** [2023] FJHC 738; HBJ08.2023 (9 October 2023)
  - (ii) **Sung Jin Lee v The Minister for Home Affairs & Immigration** [2024] FJHC 23; HBJ08.2023 (19 January 2024)
  - (iii) **Sung Jin Lee v The Minister for Home Affairs & Immigration** [2024] FJHC 106; HBJ08.2023 (20 February 2024)
  - (iv) **Sun Jin Lee v The Director of Immigration** [2024] FJCA 31; ABU105.2023 (29 February 2024)
  - (v) **Sung Jin Lee v Minister for Home Affairs & Immigration** [2024] FJHC 299; HBJ08.2023 (15 May 2024)
  - (vi) **Sung Jin Lee v The Director of Immigration** [2024] FJCA 169; ABU0026.2024 (6 August 2024)
  - (vii) **Director of Immigration v Sung Jin Lee** [2024] FJSC 39; CBV0001.2024 (30 August 2024)
  - (viii) **Sung Jin Lee v The Minister for Home Affairs and Immigration** [2024] FJHC 533; HBJ08.2023 (2 September 2024)

<sup>ii</sup> The Supreme Court had said:

[14] While it is understandable that the Respondents should wish to pursue every avenue to gain their freedom, filing numerous proceedings which raise essentially the same issues is likely to waste court time, risk causing confusion and delay, and may give rise to needless arguments about the application of doctrines such as issue estoppel and res judicata. Desirably, if multiple proceedings are thought to be necessary, they should be consolidated to the extent possible. In that connection, I note that Mr. Ower submitted to the High Court on 18 September 2023 that it would be appropriate to consolidate the habeas corpus applications with the judicial review proceedings.[12] That does not appear to have occurred, however.

.....

[28] Finally, I consider that the use of the strike out mechanism to determine the effect of the ouster clauses to have been misguided. Habeas corpus is a summary process intended to provide immediate relief for persons subject to unlawful detention. It is improbable that the ability to seek such an ancient and important remedy would be excluded by a generally worded ouster clause. The appropriate course would have been to consolidate the habeas corpus proceedings with the judicial review proceedings and ensure that they were expedited. This would have enabled consideration of the effect of the ouster clauses in light of the full legal and factual context rather than in the abstract as has occurred to date.

<sup>iii</sup> See **Sung Jin Lee v The Minister for Home Affairs and Immigration** [2023] FJHC 738; HBJ08.2023 (9 October 2023).

<sup>iv</sup> See footnote (ii) above.

<sup>v</sup> See Fiji Court of Appeal in **Sun Jin Lee v The Director of Immigration** [2024] FJCA 31; ABU105.2023 (29 February 2024): the right to challenge the lawfulness of detention before a court of law is, in itself, a standing human right. This right cannot be fettered by the ouster clauses in question, nor can it be regarded as an abuse of process.

<sup>vi</sup> (section 13 (2)(g) of Immigration Act or section 173 (4) of the Constitution).

<sup>vii</sup> As the Fiji Court of Appeal said, at paragraph [56]:

[56] An application for a writ of Habeas Corpus cannot be regarded an abuse of the process of court, it being a remedy provided for by law.

<sup>viii</sup> As the Fiji Court of Appeal said in **Sun Jin Lee v The Director of Immigration** [2024] FJCA 31; ABU105.2023 (29 February 2024) at paragraph [57]:

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