STATE v MINISTER OF HOME AFFAIRS AND IMMIGRATION and 2 Ors; Ex parte LEE MIN WON and Anor

HIGH COURT — REVISIONAL JURISDICION

SCOTT J

25 November 2003

[2003] FJHC 30

Citizenship and migration — entry permit — application for leave to move for judicial review — applicants breached conditions of work — Foreign Investment Act 1/99 s 8(2) — Foreign Investment Regulations 1999 (LN 132/99) reg 2(K) — Immigration Act (Cap 88) (1978 ed) ss 8(1), 14, 18(1).

Applicants breached the conditions which permitted them before to live and work in Fiji. They sought an application for leave to move for judicial review the decision of the Director of Immigration not to renew their permits and the decision of the minister to disallow their appeals. The judge further ordered that steps to remove the Applicants from Fiji be stayed until final order.

Held — Applicants had not substantially, if at all, implemented the business activity which was approved before, namely the "assembly of automotive brake and clutch cables". The application "amounts to an appeal on the merits of the decisions in question and as such was not susceptible to Judicial Review".

Applications disallowed.

No case cited.

Seru for the Applicants.

Keteca for the Respondents.

Scott J. This is an application for leave to move for judicial review.

On 10 January 1996 the 1st Applicant, a Korean citizen was granted a permit to enter and reside in Fiji. The permit which was granted pursuant to s 8(1) of the Immigration Act (Cap 88–1978 Ed) was subject to the terms and conditions set out in the permit and was for the purpose of:

> holding the key post as Production Director for Automotive Cable Manufacturing Co. Ltd Suva.

On 25 February 1999 the permit was renewed to 9 January 2002.

On 1 February 1996 the 2nd Applicant who is also a Korean citizen was also granted a permit to enter and reside in Fiji. The stated purpose of the permit was:

> to hold the key post of Managing Director for Automotive Cable Manufacturing Co. Ltd Suva.

The permit was renewed on 20 May 1999 and expired on 30 January 2002.

Automotive Cable Manufacturing Co Ltd was incorporated on 13 October 1995. On 20 December 1995 the Fiji Trade and Investment Board wrote to Messrs. Vishnu Prasad & Co informing them that the company's proposal to "assemble automotive brakes and clutch cables" had been conditionally approved. A copy of the letter of approval is Ex JC1 to an affidavit filed by the 1st Respondent on 11 September 2003. It will be seen from the letter that approval was to be given for the two Applicants herein to be issued with work permits.

In January 2002 the Applicants applied for the renewal of their work permits. On 26 August 2002 the Director of Immigration declined the applications (Exhibit JMY 4 to the supporting affidavit filed on 9 May 2003). The reason given for the refusal was:

> the Company has not implemented the business activity stipulated in its Foreign Investment Certificate.

On 6 September 2002 the Applicants appealed to the minister under the provisions of s 18 (1) of the Immigration Act. A copy of the letter of appeal is Ex JMY 5 to the supporting affidavit.

On 28 April 2003 the Department of Immigration wrote to the Applicants solicitors advising them that the appeal had been rejected (Ex JMY 13). The ground for refusal was:

> there were no substantial investment been made on their business, hence the declination.

The Applicants were advised to make immediate arrangements to leave the country. Section 14 of the Act provides that:

> it shall be unlawful for any person to remain in Fiji after the expiration … of any permit issued to … him under the provisions of the Act …

By these proceedings the Applicants seek to quash the decisions of the Director of Immigration not to renew their permits to enter and reside in Fiji and to quash the decision of the minister to disallow their appeals.

On 11 June 2003 I ordered that steps to remove the Applicants from Fiji be stayed until final order.

Mr Seru suggested that the Respondents had erred in law, in procedure and in fact in refusing to allow renewal of the Applicants permits.

First, Mr Seru pointed out that the Foreign Investment Certificate the terms of which was said had been breached was not issued to the Applicants until June 2002. As this was after the permits had expired the alleged breach of the conditions of the permit could not be a ground for non renewal.

This submission lapsed when the minister clarified that the breach relied on was not breach of the certificate issued in June 2002 but a breach of the conditions of the approval letter of 20 December 1995. Apart from the breach principally relied on by the Respondents, namely the failure to engage in the business of assembling of automotive brake and clutch cables, the minister also pointed out that the Applicants had failed to provide quarterly reports to the FTIB as required by para (iii) of the approval letter and were apparently only employing three locals as opposed to the 15 who had been predicted when approval was applied for.

Mr Seru's second submission was that the approved activities having been extended in June 2002 to include the establishment of a service centre and there being nothing to suggest that the service centre had not in fact been established the Applicants' continuous presence in Fiji should be allowed since Section 8 (2) of the Foreign Investment Act 1/99 provides:—

> If—
>
> (a) a foreign investor has been granted a certificate permitting the foreign investor to carry on a business in an activity; and
>
> (b) the activity subsequently becomes a reserved activity the foreign investor may continue to carry on business in the activity as if it were not a reserved activity.

It is not in dispute that motor vehicle repair and servicing is categorised as a reserved activity by virtue of reg 2(K) of the Foreign Investment Regulations 1999 (LN 132/99).

In para 5 (b) of his affidavit the minister averred that the inclusion of a reserved activity in the June 2002 certificate was "improper and irregular". In my view that is clearly the case. Unfortunately administrative blunders of this type are not wholly unusual in Fiji however I am satisfied that the mistake cannot avail the Applicants. This is because s 8(2) does not authorise reserved activity except where it has become reserved after it has already been undertaken. Prior to June 2002 the only activity permitted to the Applicants was the assembling of automotive brake and clutch cables and it was the alleged failure of the Applicants to undertake that activity which was the reason for not renewing their permits. With respect, Section 8 (2) is not relevant to the correctness or otherwise of the Respondents decisions. The error in including the words "and establish a service centre" was, however, regrettable.

Mr Seru's next submission was based on s 34(5) of the Constitution, however the section only extends to the removal of the persons lawfully in Fiji. As already seen s 14 of the Immigration Act has the effect of rendering unlawful the continued presence in Fiji of the Applicants following the expiry of their permit. Section 34(5) of the Constitution cannot assist.

As will be seen from the affidavits and Mr Seru's helpful written submissions the most sustained attack on the Respondents' decisions was their finding, as a matter of fact, that the Applicants had not substantially, if at all, implemented the business activity which was approved in 1995 namely the "assembly of automotive brake and clutch cables".

The Applicants assert that they have invested more than $1 million in Fiji and that they have plans to expand. Their assertions are set out in detail in the appeal to the minister submitted on 6 September 2002 (Ex JMY 5) and the attachments thereto.

The minister's responses to these claims are essentially factual. He disputes the amount said to have been invested and points out that the greater part of the investment has been in an executive residence at Bayview Heights and three motor vehicles. He exhibits three photographs of the Applicant's operations which appear to be taking place in some old containers and a corrugated iron shed and suggests that they do not illustrate a $1 million investment. Most damagingly for the Applicants however, as it seems to me, the Acting Principal Immigration Officer Mr Eminoni Bola in his affidavit filed on 25 June 2003 pointed out at para 4(k) that in the second paragraph of the third page of their solicitors letter sent to the Director of Immigration on 24 October 2002 (Ex JMY 8) it was admitted that the company had not, so far, actually assembled any automotive brake or clutch cables at all. By way of further confirmation of this fact the 2nd Applicant in para 14 of his affidavit filed on 9 July 2003 averred that:

> the manufacture of automotive brake and clutch cables … is still in the company's pipeline awaiting the proper time for implementation.

In the notice of opposition filed on 27 May 2003 Mr Keteca suggested that the application "amounts to an appeal on the merits of the decisions in question and as such is not susceptible to Judicial Review". I agree.

In my opinion the suggested errors of law upon closer inspection turn out not to be errors at all. In my opinion the procedural oddities to which Mr Seru referred (see Ex JMY 7–2 para 4.0) did not in any way disadvantage the

Applicants. As has been seen the principal focus of the Applicants' arguments was the finding that as a matter of fact they had breached the conditions which permitted them to live and work in Fiji. I am however satisfied that the director and the minister were fully and entirely entitled to reach their conclusions on the materials presented to them. In all these circumstances the applications must fail. Leave to move for judicial review is refused. The stay ordered by me on 11 June 2003 is discharged.

Applications disallowed.