

**IN THE COURT OF APPEAL, FIJI**  
**ON APPEAL FROM THE HIGH COURT**

**CIVIL APPEAL NO. ABU 0025 OF 2022**  
**(Lautoka High Court HBJ: 11 of 2020)**

**BETWEEN** : **SUSHEEL DUTT**

**Appellant**

**AND** : **THE INSTITUTE OF ACCOUNTANTS**

**Respondent**

**Coram** : **Dr. Almeida Guneratne, P**

**Counsel** : **Mr I. Fa (Snr.) with Mr Fa (Jnr.) for the Appellant**  
**Mr P. Suguturaga for the Respondent**

**Date of Hearing** : **14<sup>th</sup> April, 2023**

**Date of Ruling** : **4<sup>th</sup> May, 2023**

**RULING**

[1] This is a renewed application seeking leave to appeal the decision of the High Court dated 21<sup>st</sup> April, 2021 (the decision). By that decision the High Court refused the Appellant's application for leave to seek judicial review of the Respondent's decision in cancelling the Appellant's right to practice as an Accountant.

Summary of the Reasons given by the High Court for the said refusal in its decision

[2] The High Court reasoned and concluded as follows:

Re: Whether the Applicant was given or not a fair hearing

“(i) The email correspondence between the parties it appears that the respondent had given every opportunity to the applicant to participate at the hearing. If he had any difficulty in selecting any of the methods suggested by the respondent he could have informed them about his difficulties. The Respondent has accommodated the applicant and given him sufficient time to make arrangements to participate at the hearing but for reasons best known to him he did not make use of the opportunity given to him. Therefore, the allegation that the applicant was not given a fair hearing is without merit.” (paragraph [15] of ‘the decision’).

Re: Whether there were alternative remedies available to the applicant, and if so, he had failed to pursue the same

(ii) Adverting to the provisions in Section 33(3) of the Fiji Institute of Accountants Act 1997 (“the Act”) His Lordship in the High Court reasoned as follows:

“[17] On or about 08<sup>th</sup> September, 2020 the applicant received the letter informing him that his Certificate of Public Practice had been cancelled but he did not take steps to appeal the decision of the respondent instead his solicitors wrote to the solicitor of the respondent seeking immediate reinstatement of the Certificate of Public Practice on the ground that the decision was contrary to the Act and Rules.

[18] The proper remedy available to the applicant was to appeal the decision of the Disciplinary Committee as provided for by section 33(3) of the Act but the applicant sought not to appeal. In his affidavit the applicant alleges that the disciplinary procedure laid down in the Act has not been followed by the respondent and in this regard the applicant relies on the letter dated 15<sup>th</sup> July 2020 sent by Munro Leys to the applicant’s solicitors where it says that disciplinary process described in the Disciplinary Charge has not been followed.

[19] From this letter it appears that its author has not indicated how he arrived at this conclusion. All what the letter says is his opinion and it is not based on facts.

[20] Had the applicant preferred an appeal against the decision of the respondent, he could have raised all these matters at the hearing of the appeal.

[21] *From the above it is clear that the applicant had a statutory provided remedy to challenge the decision of the respondent but he sought to bypass that remedy and came directly to this court by way an application seeking leave to apply for judicial review which he is not entitled in law to do.*

Grounds upon which the Appellant sought to assail the decision of the High Court

[3] Referring first to the grounds set out in his summons supported by affidavit, followed by his written submissions and then the oral submissions made at the hearing before me, Mr Fa (Snr.) submitted as follows which I produce below in summary:

- (i) On the factual material on record, there was no hearing at all leave alone a fair hearing for which there needed to be “*a fair opportunity for a hearing*,” in as much as, a person’s right to professional livelihood was at stake.
- (ii) Although several opportunities were given to his client to present himself (vide: the email correspondence) he had repeatedly given reasons for being unable to come to Fiji (the Covid lockdown) and even going to the extent of seeking assistance (to dispense with the PPC requirement to make himself available for “*a hearing*” before the Respondent.
- (iii) In regard to his client’s solicitors (Messrs) Munro Leys correspondence with the Respondent (clearly in Mr Fa’s submission was an act based on “*professional agency*” bringing in the issue of “*estoppel by conduct*” in a professional relationship which explained his client’s inability to have presented himself for “*the inquiry*” set down against his client.

Response of Mr Bugutunago (Counsel for the Respondent) to Mr Fa’s submissions

[4] Learned Counsel for the respondent in his response, while submitting that he was relying on his written submissions in opposing the Appellant’s present application submitted in answer to a question I posed at the hearing whether he thinks that, the Appellant was

deliberately evading an inquiry, his answer was “yes,” probably as I felt, was a cue counsel took from the comment made by the High Court referred by me in this Ruling at paragraph (2)(i) above.

#### Ensuing Determination

- [5] Having considered the Appellant’s summons (and supporting affidavit) along with the written submissions filed and oral submission made on behalf of the Appellant and the Respondent, I am convinced that there are “*arguable issues*” for the full Court to go into and make a determination thereon on the preliminary matter, whether, on the facts and circumstances of this case as recounted above, the Appellant could be regarded as having been afforded an opportunity, as dictated by the rules of natural justice, to answer the charges preferred against him by the Respondent.
- [6] Should the full Court find in the Appellant’s favour, then the Respondent’s decision would be rendered *ipso facto ultra-vires* and the other issue on which the High Court found against the Appellant would be rendered a non-issue, in as much as, “*there cannot lie an appeal against a nullity*” (an inveterate principle in Administrative (Public) Law).
- [7] On the flip side of the coin, should the full Court find against the Appellant, then too, the issue of not availing of alternative remedies would not arise.
- [8] However, should the full Court find in favour of the Applicant on the question of “*a fair opportunity for a hearing being denied*” but, whether alternative remedies had not been pursued, I leave that question for the full Court to determine while expressing my own view that, should one find an alternative remedy available to an aggrieved party on account of a decision of a public functionary, such remedy must satisfy the requirement of it being “*an expeditious remedy*” and not otherwise vide: Wade & Forsyth, Administrative Law, 6<sup>th</sup> ed. Page 712).

Further factors that impacted on my determination and final reflections

- [9] Re-visiting the email correspondence between the parties, **Mr Fa** referred to the letters of 25<sup>th</sup> March and 17<sup>th</sup> April where the hearing could not have taken place. Even by July no disciplinary proceedings could have been held. Then in August the Appellant was told that his professional right had been determined.
- [10] Furthermore, responding to Mr Suguturaga's position that, Munro Leys Lawyers had no authority to act for the Respondent, **Mr Fa** contended that the correspondence on record with Munro Leys went counter to Mr Suguturaga's position raising as to issues of estoppel (and I note the concept of Agency as well in its wake) as raised by **Mr Fa**.
- [11] On the issue of the alleged failure to pursue alternative remedies, **Mr Fa** referred to the request made by the Appellant's office as to what instructions are to be given. (vide: page 13 of the Appellant's written submissions) and consequently, given the 30 days given to seek judicial review, why the Appellant sought Judicial Review.
- [12] Finally, **Mr Fa** argued "*although the Respondent talks of a 7 day ultimatum given to respond to the charges levelled against the Appellant,*" but the issue is whether his client had been afforded a hearing to meet that ultimatum and/or a fair opportunity given to answer the charges in the facts and circumstances of the case.
- [13] Both Mr Fa and Mr Suguturaga made their respective submissions (as recounted above) on the documentary material that appear on the record for which reason I did not feel the need to refer to them in detail.
- [14] I must say at this point that, Mr Suguturaga, not prepared to throw in the towel, asked this court, how long more was his client to wait without taking a final decision on a disciplinary matter carrying the trappings of "*a public interest issue*" having given repeated opportunities to the Appellant to present and defend himself?

[15] Mr Fa’s counter to that question was, although those opportunities were given, reasons have been given why the Appellant could not avail himself of those opportunities.

[16] Consequently, in conclusion, Mr Fa submitted that, on the basis of the reasons he has advanced as recounted by me at paragraph [9] to [12] and [15] above, those reasons should have sufficed for the High Court to grant leave to seek judicial review in the first instance.

Legal Principles applicable in an application for judicial review

(A) The Substantive Application

[17] Order 53 and the attendant Rules thereunder (of the High Court Act) lays down the broad principles for “*judicial review*” (JR).

[18] Indeed, I make the observation that it is a statutory incorporation in Fiji of the English judicial classics in the realm of Public Law handed down from the time of **R v Electricity Commissioners** [1924] 1 K.B.171. **Ridge v Baldwin** [1964] AC 40 and **CCSU v. M/Civil Service** [1985] AC 374.

(B) The Procedural Conduit (the leave stage)

[19] The basic principle is that the Court in deciding whether to grant leave to seek (JR) “*is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief*” (vide: **National Farmers Union v. Sugar Industry Tribunal** etc. [1990] ABU 8/90, 7<sup>th</sup> June, 1990.

[20] That is the test I follow in this matter in which regard I accept Mr Fa’s arguments which I have articulated at paragraph [16] above of this Ruling.

[21] Before I conclude I take my mind back to a classic judicial dictum contained in the common law jurisprudence in England viz:

**“That, principles of national justice are not cast in stone”**

- [22] Where the parameters should be in the application of the said principle will depend on the particular facts and circumstances of a case.
- [23] The learned High Court Judge has taken a particular view. I as a single judge of this Court has only opinioned that, there are arguable issues to grant leave to seek Judicial Review.
- [24] Indeed, the full Court will now go into that and determine whether to allow the appeal or not of the Appellant.
- [25] On the basis of the foregoing reasons, I proceed to make the following orders.

**Orders of Court:**

- 1) *The Appellant’s renewed application seeking leave to appeal the decision of the High Court dated 21<sup>st</sup> April, 2021 is allowed.*
- 2) *The Appellant is required to take steps as required in law in terms of Rule 18 of the Court of Appeal Act to prosecute the appeal for which leave has been granted by this Ruling..*
- 3) *The Chief Registrar is directed to list the case on 30<sup>th</sup> June, 2023 to ascertain progress and to make appropriate consequential orders.*
- 4) *Taking into consideration the fact that the Appellant is abroad and the other background circumstances I make no order as to costs.*



A handwritten signature in purple ink, reading "Ida A. Guneratne".

**Hon. Justice Almeida Guneratne**  
**PRESIDENT, COURT OF APPEAL**

**Solicitors:**

Fa & Company for the Appellant  
Haniff Tuitoga for the Respondent