IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

JUDICIAL REVIEW APPLICATION
NO. 06 OF 2018

BETWEEN	:	**SOLOMONI NAKELI** **(APPLICANT)**
A N D	:	**THE CHIEF ADMINISTRATION AND OPERATION OFFICER OF MAXIMUM CORRECTIONS CENTRE** **(FIRST RESPONDENT)**
A N D	:	**THE ATTORNEY GENERAL OF FIJI** **(SECOND RESPONDENT)**
Counsel	:	Applicant in person Mr. Josefa Mainavolau for the Respondents (A.G's Chambers)
Date of Hearing	:	Tuesday, 07th August 2018
Date of Ruling	:	Friday, 24th August 2018

RULING

(1) The applicant applies for leave to seek **Judicial Review** pursuant to Order 53, r.3 of the High Court Rules, 1988, by way of Notice of Motion and Affidavit.

(2) The applicant claims the following declarations and orders;

a) *An Order of Certiorari to remove the said decision of the Chief*

Administration and Operations Officer made on the 4th, June 2017, into this Honourable Court and that the same be quashed and that the applicant be given full and correct entitlement to calculation and remission of sentences.

b) *A Declaration (in any event) that the Chief Administration and Operations Officer has acted unfairly and/or abused his discretions under the Corrections Act of 2006 and Commissioners Orders, and or exceeded his jurisdiction.*

c) *Further declaration or other reliefs as this Honourable Court may deem fit.*

(3) The grounds on which the relief was sought;

a) *That the Chief Administration and Operations Officer has exceeded his jurisdiction of giving directive to the applicant that the applicant calculation of sentence has being varied and discharge date extended to a further 16 months.*

b) *That the Chief Administration and Operation Officer's directive is inconsistent with the Sentencing Ruling of the Trial court and repugnant with the statutory law on the calculation of sentence.*

c) *That the Chief Administration and Operation Officer abused his discretion under the Correction Act of 2006, Commissioner's Order and the Constitution of Fiji in that;*

(i) *He took into consideration irrelevant matter and*
(ii) *He did not take into consideration relevant matters*
(iii) *He acted wrongly and/or in bad faith and/or unnecessarily.*

(4) In his affidavit supporting the **Notice of Motion**, the applicant deposed that;

1. *THAT I am the applicant in this matter and have full authority to swear this Affidavit.*

2. *THAT the content of this Affidavit are true in so far as they are within my personal knowledge and they are true to the best of my knowledge, information and belief, as such is derived from the relevant laws of the State.*

3. *THAT the First Respondent action is causing the Applicant mental and spiritual torture and this violates his constitutional right to be free from any form of mental torture.*

4. *THAT the First Respondent fail to release the Applicant last year which is the year of discharge that was informed to the Applicant by the Administration on the 5th June 2012.*

5. *THAT now the First Respondent has severely breached and violated their own law by disturbing the sentence initially passed by the High Court.*

6. *THAT now the Respondent affected to my sentence their new practice which was not gazette by the Parliament and without legality.*

7. *THAT this practice they are calculated the remission from the head sentence to the non-parole period which directly abuse the Correction Act Section 27 (2).*

8. *THAT the Respondent practice is unjust and without legality as the Supreme Court of Fiji mention it on Bogidrau Judgment,* ***Bogidrau vs State Criminal Petition*** *No. CAV 0031 of 2015 on Paragraph (12), (15), (16).*

9. *THAT the First Respondent fail to discharged the Applicant and in doing so has wrongfully and unlawfully detained the Applicant.*

10. *THAT the Applicant was filed out of time for 1 month due to the letter I was writing to Commissioner and the Chief Justice for confirmation but unfortunately it was suppressed by the Administration.*

11. *THAT after knowing that the Applicant letters was suppressed by the Administration, the Applicant then file a Judicial Review to the High Court.*

12. *THAT the Applicant believes that this Court has unlimited jurisdiction under (Section 100) Subsection (3) of the Constitution and the Applicant seek the Court to interpret the confusion in the calculating of my sentence.*

(5) The application for leave is vigorously opposed by the Respondents. The Respondent did not file an Affidavit in Opposition. The Respondents argued that there has been undue delay in making the application for Judicial Review. The

Respondents invited this Court to exercise its discretion in summarily dismissing the application for leave.

(6) The applicant was servicing a long sentence of imprisonment which even now has not expired. On 05th June 2012, the applicant was sentenced by the High Court to seven (07) years imprisonment in Criminal Case No: 116 of 2011, and on the same date, in Criminal Case no: 29 of 2012, he was sentenced to six (06) years imprisonment with a non-parole period of four (04) years.

(7) In the 'Notice of Motion', the impugned decision of the First Respondent is put this way;

> *"..... 2017 whereby he gave a directive to the Applicant pursuant to his powers order in declining and refusing the applicants full calculation and remission of sentences."*

(8) The applicant seeks an Order quashing the impugned decision of the First Respondent made on 04th June 2017. The applicant alleges that;

> *a) That the Chief Administration and Operations Officer has exceeded his jurisdiction of giving directive to the applicant that the applicant calculation of sentence has being varied and discharge date extended to a further 16 months.*
>
> *b) That the Chief Administration and Operation Officer's directive is inconsistent with the Sentencing Ruling of the Trial court and repugnant with the statutory law on the calculation of sentence.*
>
> *c) That the Chief Administration and Operation Officer abused his discretion under the Correction Act of 2006, Commissioner's Order and the Constitution of Fiji in that;*
>
> *(iv) He took into consideration irrelevant matter and*
> *(v) He did not take into consideration relevant matters*
> *(vi) He acted wrongly and/or in bad faith and/or unnecessarily.*

(9) As I understand the submissions of the applicant, the relief sought in the application is a remission of applicant's sentences in accordance with Section 27 and 28 of the Corrections Services Act, 2006 and the Sentencing and Penalties Decree.

(10) This is the Second application filed by the applicant for leave challenging the decision of the First Respondent. Initially, the High Court in Judicial Review Application No: 16 of 2017, granted leave and the applicant was ordered to file his application in accordance with Order 53, r.5 of the High Court Rules, 1988. But the applicant failed to follow the procedure and the time limit imposed on the applicant under Order 53, r.5(3) and (4) and as a result, the Judicial Review proceedings under Order 53, r.5 was dismissed and struck out.

(11) The applicant's first application for leave to seek Judicial Review was filed on 17th October 2017. The Court granted leave on 16th May 2018. The substantive application under Order 53, r.5 was dismissed on 30th July 2018 for his failure to observe the time limit imposed. The applicant's Second application for leave to seek Judicial Review was filed on 31st July 2018.

(12) The impugned decision was made by the First Respondent on 04th June 2017.

(13) Order 53, r. 4(2) of the Rules of High Court is applicable in calculating the time within which a Judicial Review application should be made. The High Court Rules state that a Judicial Review application should be made within 3 months from the date the impugned decision was made.

> *"in the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding".*

(14) There is not the slightest doubt that the applicant is late and it is a matter of more than a year rather than months and days. Whenever there is a failure to act promptly or within three months there is "undue delay".

(15) As I mentioned earlier, an application "for leave to apply" for Judicial Review should be made within three (03) months of the events giving rise to the application. Failing such challenge within the applicable time limit, public policy expressed in the maxim *"Ominia praesumuntur rite esse acta"*, requires that after

the expiry of the time limit it should be given all the effects in law for a valid decision.

(16) In **O'Reilly v Mackman** [1983] 2 AC 237 at 280 Lord Diplock said:

> *"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."*

In **Anuradha Charan v. Public Service Commission and Others,** Civil Appeal No – 02 of 1992, decided on 19th November 1993, the Court observed:

> *"In a world of burgeoning bureaucracy and use of administrative powers by an increasing number of official bodies, judicial review is an essential means of redress. The special procedures are designed for a relatively straight forward and prompt determination of the case."*

(17) Order 53, r.4(1) of the Rules of High Court provides as follows:

> *"subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant*
>
> *(a) Leave for making the application, or*
> *(b) any relief sought on the application,*
>
> *if in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration"*

(18) Accordingly, this Court has discretion to enlarge the time period if the granting of the relief sought would not likely to cause substantial hardship to, or

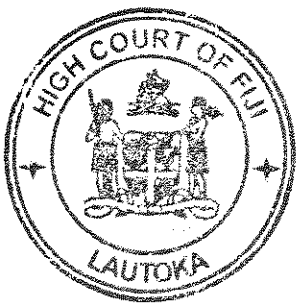
substantially prejudice the rights of any person or would not be detrimental to good administration.

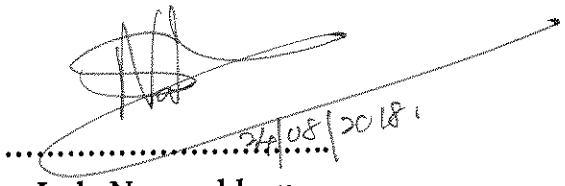
(19) No suggestion has been made that substantial hardship or substantial prejudice was likely to be caused by the grant of the relief sought.

Even if there was, here, undue delay, in order to find detriment to good administration the court has to be satisfied that there is evidence of detriment. The evidence is required to be on affidavit. The Respondent did not file any material. It cannot be inferred from mere passage of time. The test for detriment to good administration is higher and the burden of proving such detriment to good administration lay squarely on the Respondents and they have fallen far short.

(20) **ORDER**

Leave granted.





Jude Nanayakkara
Judge

At Lautoka
Friday, 24th August 2018