

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

CIVIL JURISDICTION

Judicial Review No: HBJ 4/19

IN THE MATTER OF AN APPLICATION
by Guston Fredrick Kean, Serving Prisoner
having being presently detained at Minimum
Correction Centre (hereinafter called the
Applicant)

AND

IN THE MATTER of a decision of the
Acting Director of Legal Aid Commission
made on the 20th of November 2018.
(Hereinafter called the Respondent)

BETWEEN : **GUSTON FREDRICK KEAN** of Medium Correction Centre,
Naboro, Serving prisoner.

APPLICANT

AND : **DIRECTOR OF LEGAL AID COMMISSION**

RESPONDENT

Appearances : **Applicant in person**
(Ms) Salote Nasedra for the respondent

Hearing : **Friday, 05th July 2019**
Ruling : **Friday, 20th September 2019**

RULING

(A) INTRODUCTION

- (i) This is the applicant's application seeking leave for 'judicial review' of the decision of the Acting Director, Legal Aid Commission, and dated 20.11.2018 dismissing an appeal from the decision of the Legal Aid Commission rejecting the application for Legal aid assistance.
- (ii) The application is made pursuant to Order 53, rule 3 of the High Court Rules, 1988.

(iii) The applicant seeks the following remedies and reliefs in the substantive application;

- a. *An Order of certiorari to remove the said decision of the Acting Director of the Office of the Legal Aid Commission made on the 20th day of November 2018, into the Honorable Court and that the same be set aside and that a Counsel be assigned under a scheme for Legal Aid Commission.*
- b. *An Order that Legal Aid Commission provide free Legal Representation under a scheme for Legal Aid Commission.*
- c. *A Declaration (in any event) that the Director of Legal Aid Commissioner has acted unfairly and or abused his discretion under the Constitution and or exceeded his jurisdiction.*
- d. *Further Declarations or other reliefs and Orders as the Honourable Court may deem fit, expedient and necessary in the circumstances of the case.*

(iv) The grounds on which the reliefs are to be sought were;

- a. *That the Acting Director of legal Aid Commission has exceeded his jurisdiction of giving directive to the Applicant in refusing to provide Legal Aid representation and assistance.*
- b. *That the Acting Director of Legal Aid Commission has breached the rules of natural justice in not giving the Applicant the opportunity to be heard before giving his directive.*
- c. *That the Acting Director of Legal Aid Commission has abused his discretion under the constitution.*
 - i. *He took into consideration irrelevant matter; and*
 - ii. *He did not take into consideration relevant matters; and*
 - iii. *He acted wrongly and or in bad faith and/or unnecessary*

(B) THE BACKGROUND

- (i) The applicant has applied unsuccessfully to the Legal Aid Commission for Legal Aid Assistance in his application for Constitutional Redress and had also been unsuccessful in seeking reconsideration of the Acting Director's refusal pursuant to the review procedures available under the Legal Aid Act, 1996. It is this which has triggered the present application.
- (ii) However, any review against a decision of the Acting Director is considered by the Legal Aid Commission itself or a Committee of the Legal Aid Commission and not by an independent tribunal, as is provided in the Legal Aid Scheme elsewhere.

The applicant has no further review of the decision. Therefore, the applicant had exhausted all avenues for Legal Aid.

- (iii) The application for leave was heard inter-partes, the papers having been served on the respondent with the “**Pickwick**” principle¹. This has provided a better basis for making this initial decision. Generally, leave applications should be determined on the papers².

(C) **DISCUSSION**

- (i) Counsel for the respondent tendered written submissions in support of her case. I am grateful to counsel for those lucid and relevant submissions and the authorities therein collected which have made my task less difficult than it otherwise might have been. I may add that the submissions are careful and competent. If I do not refer to any particular submission that has been made, it is not that, that I have not noted that submission or that that submission is not relevant; it is simply that; in the time available, I am not able to cover in this decision every point that has been made before the Court.
- (ii) Before I address myself to the application seeking leave for judicial review, I pause here to consider the proper purpose of the remedy of judicial review, what it is and what it is not. The law was correctly stated in the speech of Lord Evershed in ‘**Ridge v Baldwin**’³. Lord Evershed referred to;

“a danger of usurpation of power on the part of courts... under the pretext of having regard to the principles of natural justice.... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity of putting his case.”

- (iii) Therefore, the judicial review is concerned, not with the decision, but with the decision-making process. Lord Brightman in “**Chief Constable of the North Wales Police v Evans**”⁴ said unless that restrictions on the power of the court is observed, the court will under the guise of preventing the abuse of power, be itself guilty of usurping power.
- (iv) Lord Templeman in ‘**Reg v Inland Revenue Commissioner, Ex-parte Preston**’⁵ said;

“Judicial review is available where a decision-making authority exceeds its powers, commits an error of law, commits a breach

¹ Pickwick International Inc (GB) Ltd v Multiple Sound Distributors Ltd and Another, (1972) 3 ALL.E.R. 384

² Nivis Motors & Machinery Company Ltd v Minister for Lands & Mineral Resources, (1998) FJCA 42, Naidu v Attorney-General, (1999) FJCA 55.

³ (1963) 2 ALL.E.R. 66 at 91, (1964) AC. 40 at 96

⁴ (1982) 3 ALL. E.R. 142 at p 154

⁵ (1985) A.C. 885 at 862

of natural justice, reaches a decision which is no reasonable tribunal could have reached, or abuse its powers.”

- (v) This is an application pursuant to Order 53, Rule 3(2) of the High Court Rules, 1988 for leave to apply for judicial review.

The test for whether leave should be granted remain whether an arguable case has been shown, although now the court will be aware of the defendant's case. Consideration of the defendant's case – even if only in summary – will surely sometimes lead to the conclusion that the claimant's case is unarguable, thus leading to the denial of permission in cases in which would otherwise be granted. These changes have been criticised as unlikely to lead more efficient procedure and as being unfair to the claimants. Although some lawyers find even the most obvious propositions 'arguable', the grant of permission requires 'a realistic prospect of success'. Permission may also be refused because of delay or the availability of an alternative remedy or because the claim is premature.

[**Administrative Law by Wade and Forsyth, 10th Edition, pages 555 & 556**].

In **State v Connors, ex parte Shah**⁶ it was held:

At leave stage, the threshold is low. What needs to be established is 'an arguable case' to be resolved only by a full hearing of the application for judicial review. At this stage a full review of the facts is unnecessary. Nonetheless, a court is obliged to sufficiently pursue the material provide to determine whether an applicant raises an issue arguably involving an error in law, a serious error in fact; a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application.

These observations of the High Court cited by the Court of Appeal in the case of **Maisamoa v Chief Executive Officer for Health**⁷

In the case of **Nair v Permanent Secretary for Education**⁸ it was held:

In an application for leave to apply for judicial review, the court must ask.

Does the applicant have sufficient interest in the application;

1. Is the decision susceptible to judicial review – that is, is it of a private or public nature;
2. Is the decision non-reviewable in accordance with the terms of the Public Service Act;

⁶ [2008] FJHC 64; HBJ 47.2007 (7 April 2008)

⁷ [2008] FJCA 41; ABU 0080.2007S (10 July 2008)

⁸ [2008] FJHC 140; HBJ02.2008 (11 February 2008)

3. Are alternative remedies available to the applicant and, if so pursued by the applicant;
4. Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case.

***The applicant's interest:** The answer here must be 'yes', the applicant has a sufficient interest in the application. The decision in relation to which leave is sought for review relates directly to the applicant. He is its subject. He is directly affected. He has standing.

***Is the decision susceptible to judicial review:** The applicant has been affected by a decision which is not private. It is an administrative decision. It is a decision susceptible to a public law remedy.

***Are alternative remedies available to the applicant:** The applicant has no further review of the decision. The applicant had exhausted all avenues for Legal Aid.

- (vi) Does the material available disclose an arguable case favouring the grant of the relief sought, or what might, on further consideration, be an arguable case? I now turn to the first ground upon which the relief is sought.

An arguable Case: Does Mr. Kean have an arguable case? Here, I observe the statement made by the Court of Appeal in **Naidu v. Attorney General**⁹.

First, in our view this application for leave ought to have been granted on the papers. It was obvious from the statement of claim that an issue of significant public interest was involved. Whether the plaintiff had sufficient standing, and whether the court should exercise its discretion to grant relief, are matters to be determined finally on the hearing of the application for review.

Secondly, we emphasise that this decision is only that leave should have been granted. This is on the basis that the plaintiff has established an arguable case in favour of the Court making the declaration sought. It will be for the court hearing the substantive action to determine whether the Minister acted outside his powers, and whether in those circumstances and having regard to the interests of the plaintiff in the proceedings, any relief should or should not be granted. On those issues we have expressed no concluded view:

That of course applies here. This Court has made no determination as to whether the case put forward by the applicant is more than an arguable case. It is that question only which the Court must address at this stage. The first ground is in these terms;

“That the Acting Director of Legal Aid Commission has exceeded his jurisdiction of giving directive to the Applicant in refusing to provide Legal Aid representation and assistance”.

⁹ (1999) FJCA 55; ABU 0039u.98s (27 August 1999).

- (vii) The applicant in arguing ground (1) submitted that; (Reference is made to page (4) of the Transcript of hearing)

“.....My Lord, my ground that by that the Director of the Board exceeded or abuse their jurisdiction under the Constitution that my Lord, they did not accord and unfortunately to be heard to be given a time to represent myself in the Trial in that Board where we have yet to be given”.

- (viii) On the other hand, Counsel for the respondent submitted that the Legal Aid assistance is not an absolute right. Counsel for the respondent elaborated on this on page (08), (09) and (10) of the written submissions filed on 20/06/2019 as follows;

“The Applicant has misinterpreted the provisions of the Constitution in that whilst Legal Aid assistance is available, it is granted in compliance with legislative and other internal provisions as provided for under the Constitution.

Section 118 of the Constitution deals with the Legal Aid Commission. The Commission is established under the Legal Aid Act 1996.

Section 18(3) (4) (5) state(3) The authority, functions and responsibility of the Commission shall be prescribed by written law, and a written law may make further provisions for the Commission. (4) The Commission may regulate its own procedure and may make such rules and regulations as it deems fit for regulating and facilitating the performance of its functions. (5) In the performance of its functions or the exercise of its authority and powers, the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law.

The Commissions prescribed written law is the Legal Aid Act 1996. It is provided for in our Act under Sections 7, 8 and 9 of the Act and is provided for by our guidelines and internal policies that Legal Aid representation is based on its eligibility criteria. In Criminal cases a means assessment only is conducted however in civil cases the right to representation is based on means and merit assessment. The merit assessment is carried out to determine the “reasonable prospect of success” in the matter. The decision to grant or refuse legal aid assistance is based on the eligibility criteria of the Commission and is done on a case to case basis keeping in mind the resources available.

It is our humble submission that whilst Legal Aid assistance is available this is not an absolute right as the Commission has legislative and constitutional provisions which allow its own affairs and procedures to determine the grant of Legal Aid assistance.

The Applicant applied for Legal Aid assistance to represent him in his civil action in Lautoka, a merit assessment was conducted and was recommended for rejection which was sanctioned by our Acting Director of the Legal Aid Commission.

The Applicant in exercising his right and filed his Appeal grounds to be heard before the Appeal Board of the Commission. The Board declined his appeal and confirmed

the decision of the Acting Director. The Applicant has no further right of appeal against the decision of the Board as per the Legal Aid Act.

The Acting Director of the Commission performs administrative and other functions as per the directives of the Legal Aid Commission Board in Compliance with legislative and other internal rules, policies and guidelines.

In compelling the Commission to represent a person who has already been denied Legal Aid assistance based on the internal eligibility criteria, the Court would be opening the floodgates for future Applicants which will place resource constraints on the Commission and its ability to regulate its own affairs.

The Acting Director did not exceed his jurisdiction of giving directive to the Applicant in refusing and declining Legal Aid representation and assistance”.

- (ix) It is worth mentioning that, the Courts can point out that the administration of Justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of Justice, but the Courts cannot compel the legislature and the executive government to provide legal representation at public expense. Nor can the Courts declare the legal representation at public expense. Nor can the Courts declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. And there is the Legal Aid Act 1996 in Fiji, which lays down the circumstances in which legal aid may be provided, those circumstances involving considerations which extend beyond the interests of justice in the particular case. But the interests of justice cannot be pursued in isolation. There are compelling demands upon the public purse which must be reconciled and the funds available for the provision of legal aid is necessarily limited. In my opinion, to declare such an entitlement by the Court without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions.

The Applicant relied on Section 15(10) of the Constitution and contended that he has an “absolute right” for legal representation at public expense. His application for judicial review concerned the Legal Aid Commission’s refusal to provide legal representation at public expense. The Applicant argued that as a result of the refusal to provide legal representation at public expense the Applicant had been denied his absolute constitutional right to legal aid representation. This branch of the Applicant’s argument assumes that Section 15(10) of the Constitution supports the “absolute right” for which he contends.

Counsel for the respondent said with some force that there is no “absolute” right to legal aid representation guaranteed by the constitution.

I acknowledge the force in that proposition.

Section 15(10) of the Constitution reads;

“The State, through law and other measures, must provide legal aid through the Legal Aid Commission to those who cannot afford to pursue justice on the strength of their own resources, if injustice would otherwise result”.

The constitutional right granted by Section 15(10) of the Constitution is determined by the requirement of “the interest of justice”. It therefore appears clear that the Constitution does not entrench an absolute right to legal assistance at public expense irrespective of the circumstances of the particular case. The applicant’s right under Section 15(10) of the Constitution is qualified by the words *“if injustice would otherwise result”*. The constitutional right does not permit every impoverished person to call upon the State to provide legal assistance at public expense. All factors relating to legal aid must be taken into account, including the Applicant’s monetary circumstances and need for legal assistance in the particular circumstances. The right “to be given the services of a legal practitioner under a scheme for legal aid” has been said often enough not to be an absolute right: State v Tanaburenisau¹⁰

(x) The second ground is in these terms;

“That the Acting Director of Legal Aid Commission has breached the rules of natural justice in not giving the Applicant the opportunity to be heard before giving his directive”.

In response, Counsel for the respondent submitted that;

- *The rules of Natural Justice was never breached by the Respondent. The Commission is not a Court of Law. The respondent makes his decision regarding Civil Cases based on their merits and their “reasonable prospect of success”.*
- *Merit assessments are based on the instructions we receive from the Applicants. There is no breach of Natural Justice as the Commissions assessment was conducted from the instructions obtained from the Applicant.*

(xi) The application for judicial review is an application complaining of the decision of the Acting Director pursuant to the review procedures available under the Legal Aid Act, 1996. The merits assessments are based on the instructions obtained from the applicant. After a careful consideration of the application together with the information and the documents provided by the applicant, his application seeking Legal Aid representation has been declined. He has appealed to the Board as to the disposition of the matter and the Board has reviewed his submissions. Following that review, the appeal was dismissed by the Board.

The applicant was accorded procedural fairness and the process was not unreasonable. There is no arguable case for judicial review.

(xii) The third ground is in these terms;

¹⁰ 2005 FJHC 127.


That the Acting Director of Legal Aid Commission has abused his discretion under the Constitution.

- (i) *He took into consideration irrelevant matter; and*
 - (ii) *He did not take into consideration relevant matters; and*
 - (iii) *He acted wrongly and or in bad faith and/or unnecessarily.*
- (xiii) The above (i), (ii) and (iii) expressed in general terms. They have not been particularized in the application for leave to apply for judicial review. It is not only placing an unnecessary burden on the Court to ask it to search through the Transcript of hearing to find out what there may be to be complained of, but it is also unfair to the respondent, who is entitled to know what case he has to meet.
- (xiv) On all the material before me, and taking into account the relevant authorities and submissions made by the applicant and Counsel for the respondent, I find that the applicant has no arguable case. He is precluded from the judicial review process.

(D) ORDERS

- (i) The application seeking leave for judicial review is dismissed.
- (ii) I make no order as to costs.




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32/09/2019
Jude Nanayakkara
Judge

At Lautoka
Friday, 20th September 2019