

IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

MISC ACTION NO. HBM 56 OF 2019

IN THE MATTER of an
application under section 44 (1)
of the Constitution of the
Republic of Fiji for constitutional
redress.

BETWEEN : OLANREWAJU AFOLAYAN

APPLICANT

AND : THE PERMANENT SECRETARY FOR IMMIGRATION

FIRST RESPONDENT

AND : THE ATTORNEY GENERAL OF FIJI

SECOND RESPONDENT

Appearances : The applicant in person
: Ms M. Faktaufon with Mr J. Mainavolau for the respondents

Date of Hearing : 02 March 2020

Date of Ruling : 04 March 2020

R U L I N G

[on constitutional redress]

- [01] This is an application for constitutional redress.
- [02] Mr Olanrewaju Afolayan a Nigerian national (the '*applicant*'), filed an application in person in this court for constitutional redress. He has supported his application by an affidavit sworn by him on 13 December 2019 (the '*application*').
- [03] He has made this application under s. 44 (1) of the Fijian Constitution 2013 (the '*Constitution*').
- [04] In his application (Form HCCR 1), he states that: "*I am still in remand custody and I am a good citizen of Nigerian, of which I did not know of the procedure in to follow until I was advised by a visiting Justice (Nadi Magistrate) to fill the application. I have been kept here in the Lautoka Remand Centre for the pass[sic] 12 months without any progress or any attempts to remove me out Fiji within 96 hours.*"
- [05] In his supporting affidavit, the applicant alleges:
1. *That on 20 November 2018, around 7pm to 8pm, unknown three immigration officers came to his rented house, informed him to detain and put him in next available flight to remove him out of country and drive him to their office at Nadi.*
 2. *That on 20 November 2018, he was kept in Namaka Police Station till the following morning. In the morning two immigration officers with two police officers came and drove him to Lautoka Remand Centre with no criminal charges or offence.*
 3. *That on 21 November 2018, they drove him to Immigration Detention Centre (safe house) located at Votualevu, Nadi and he spent two nights there with no food provided for him to survive.*
 4. *That on 23 November 2018, he raised issues about not providing food then they drove him to Lautoka Remand Centre.*
 5. *That his wife sent message via email to Director of Immigration about his passport expiring in January 2019.*
 6. *That Immigration Officers did not care about health despite his complaint.*
 7. *That his detention is contrary to the Constitution of Fiji Section 13(1) (f) (i) (j) (k).*
 8. *That he seeks constitutional redress for the restoration of his human rights, freedom, liberty and justice to seek help from the court for pardon and to be freed from custody*

which has caused him so much pains and damage emotionally, physically, mentally and health wise from 23 November 2018.

- [06] The applicant seeks to be released from the prison as he is a law-abiding citizen. He says he does not deserve to be kept here without a court order nor date. His main complaint is that he has not been taken to court at any time ever since 23 November 2018 till date and he does not have any court date nor court case. This breaches his rights enshrined under sections 13 (f) and 9 (3) (a) (d) of the Constitution.
- [07] The respondents had filed an affidavit of Mr Deepak Karan, Immigration Manager, Western Division in opposition. In his detailed affidavit, Mr Karan states the circumstances under which he was kept under detention warrant and removal order dated 6 June 2017. This is a removal order that was issued by the Permanent Secretary for Immigration under section 9 (2) A of Immigration Act 2003. The applicant has filed an affidavit in reply to the respondents' responding affidavit.
- [08] The applicant could enter and work in Fiji under a short term (6 months) work permit which expired on 23 October 2016. The permit only allowed the applicant to be employed by Ravudra Holdings. However, the applicant in violation of his permit began employment with Signs & Signs as early as August 2016. Because of his violation of the condition of the permit, his permit was revoked. He thus became a prohibited immigrant.
- [09] I need to reproduce certain paragraphs of the respondents' affidavit in order to explore the circumstances that led to the issuance of the detention and removal order by the Permanent Secretary. The respondents in their affidavit states [at paragraphs 3 to 10]:
- 3.1 *On 29 April 2016, the applicant was allowed to enter and work in Fiji under a short term work permit ('permit') which expired on 23 October 2016, the permit only allowed the applicant to be employed by Ravudra Holdings;*
 - 3.2 *The Department was made aware that the applicant was in clear violation of his permit when, as early as 26 August 2016, he began employment with Signs & Signs;*

- 3.3 *The applicant's violation also meant that his permit was revoked, he was no longer the holder of a valid permit and as such had become a prohibited immigrant pursuant to the Immigration Act 2003;*
- 3.4 *There was no assurance made to the applicant that he would be permitted to stay in Fiji as he is a prohibited immigrant;*
- 3.5 *On 9 June 2017, a detention warrant and removal order was executed for his detention and subsequent removal from Fiji;*
- 3.6 *On 16 July 2017, after attempts to locate the applicant, the Department of Immigration ('Department') was able to track the applicant to a church premises following which the applicant was lawfully detained at a safe house to await removal from Fiji;*
- 3.7 *On 21 July 2017, the applicant through his then solicitors, Aman Ravindra Singh Lawyers, initiated proceedings in Judicial Review No. 3 of 2017 ('2017 proceedings') and obtained an order of the High Court for a stay of the detention warrant and removal order pending the outcome of the 2017 proceedings;*
- 3.8 *The applicant was therefore released from lawful custody;*
- 3.9 *On 29 October 2018, the High Court dismissed the 2017 proceedings, ordered costs against the applicant and revoked the stay on the detention warrant and removal order ('2018 court orders').*
- 3.10 *On 6 November 2018, the High Court sealed its 2018 court orders and the same was served on the applicant's solicitors;*
- 3.11 *Since 29 October 2018, despite being aware of the 2018 court orders the applicant failed to make any attempt to present himself to the Department in order for the Department to remove him from Fiji;*
- 3.12 *Consequently, the Department approached the applicant on 20 November 2018, to effect the detention warrant and arrange for the applicant's removal; and*
- 3.13 *The applicant has always been aware of the purpose for his detention and intended removal from Fiji;*
- 4.1 *Since 29 October 2018, despite being aware of the 2018 court orders the applicant failed to make any attempt to present himself to the Department in order for the Department to remove him from Fiji;*

- 4.2 *Consequently, on 20 November 2018, the Department approached the applicant, but he failed to cooperate with the Department;*
- 4.3 *The applicant also refused to surrender his mobile phone and continued to argue with boarder police and with the Department's officials;*
- 4.4 *As a result and pursuant to the detention warrant, the applicant was detained in police custody as allowed under the Immigration Act 2003;*
- 4.5 *On 21 November 2018, the applicant was then temporarily detained at a safe house however he continued to refuse to hand over his mobile phone or cooperate with the Department;*
- 4.6 *As a result of the applicant's conduct, the applicant was then presented to the Lautoka Remand Centre on 23 November 2018, for further detention;*
- 4.7 *However, on 23 November 2018, the supervisor of the Lautoka Remand Centre requested for the issuance of a fresh detention warrant;*
- 4.8 *Although a fresh detention warrant was not required, the Department complied and as such a detention warrant and removal order was executed on 23 November 2018;*
- 4.9 *The lawful detention warrant and removal order enabled the detention of the applicant at the Lautoka Remand Centre; and*
- 4.10 *The applicant, at all times, was provided with food and no record of complaints or requests were received by the Department during his detention in police custody or while at the safe house.*
- 5.1 *The applicant is and has always been aware that he is a prohibited immigrant who has breached the laws of Fiji;*
- 5.3 *The applicant is, and has always been, aware that he is in contempt of the 2018 court orders as he had failed to pay costs ordered against him and failed to immediately produce himself to the Department following the revocation of the stay on the 2017 detention warrant and removal order issued against him;*
- 5.4 *The applicant was strongly suspected of being part of a scamming network in the Pacific region and was deported from Samoa; and*
- 5.5 *The applicant continued to remain unlawfully in Fiji as a prohibited immigrant and according to the Immigration Act 2003, is liable to be removed from the country.*

- 6.1 *In December 2018, while trying to arrange for the applicant's travel itinerary, the Department was misled by the applicant who had informed that he had lost his passport;*
- 6.2 *The Department proceeded to conduct a search of the applicant's place of residence in Fiji;*
- 6.3 *At the same time, the Department initiated arrangements for the issuance of emergency travel documents by the Nigerian High Commission ('NHC') in Canberra;*
- 6.4 *The Department also, on 13 December 2018, tried to engage the assistance of the International Organization of Migration ("IOM"), however this was unsuccessful as the IOM required the Department to revoke the removal order which was not an option as the applicant is a prohibited immigrant;*
- 6.5 *On 9 January 2019, when the NHC in Canberra was not forthcoming with the Department's request for the issuance of the applicant's travel documents, the Department attempted to arrange with airlines for the applicant's removal with travel documents issued by the Department;*
- 6.6 *In the process of these arrangements with the airlines, the applicant informed that he had discovered his passport which he says he found in his Bible while in detention, by this time the applicant's passport had already expired on 15 January 2019;*
- 6.7 *The arrangements with the airlines to remove the applicant on travel documents issued by the Department was unsuccessful; and*
- 6.8 *The Department had no option but to continue to pursue the NHC in Canberra to issue emergency travel documents for the applicant, unfortunately the NHC was not forthcoming in issuing its own citizen travel documents, circumstances of which have been further explained in paragraph 10 herein.*
- 7.1 *No records of requests or complaints were received by the Department in respect of the applicant's health; and*
- 7.2 *The Department is unaware of any requests or complaints in respect of the conditions of his detention or his health at the Lautoka Remand Centre and in any event, any request or complaints must be raised with the management of the Remand Centre specifically with the officer in charge.*
- 8.0 *That the applicant is misleading the court. On 12 September 2018, the Department did not remind or detain the applicant as there was a stay on the detention warrant and removal order from 21 July 2017 to 29 October 2018. Even when the stay on the*

detention warrant was revoked on 29 October 2018, the applicant was allowed, but failed to immediately, present himself to the Department to be removed.

- 9.1 *I reiterate that the applicant has been detained by a lawful detention warrant as he remains a prohibited immigrant under the Immigrating Act 2003;*
- 9.2 *The applicant is not the holder of a valid permit and is a person against whom a removal order is in force;*
- 9.3 *I am advised by counsel and verily believe such advice to be correct, that the applicant's detention in the Lautoka Remand Centre pursuant to the detention warrant is lawful and no charge or court order is required to be made for such detention;*
- 9.4 *I am aware that the applicant has already, unsuccessfully, challenged the decision by the Director of Immigration and Minister of Immigration to refuse him a work permit in the 2017 proceedings;*
- 9.5 *I am advised by counsel, and verily believe such advice to be correct, that the executive decision to issue the detention warrant and removal order against the applicant, and essentially his status as a prohibited immigrant, cannot be challenged by the applicant in these constitutional redress proceedings; and*
- 9.6 *I am aware that the Department has made every reasonable effort to return the applicant as there is no intention of keeping the applicant detained indefinitely.*
- 10.2 *In March 2019, the Department continued to make its own arrangements with Fiji Airways Limited for the return of the applicant via Singapore – the Department had been waiting on the airlines approval for the applicants travel;*
- 10.3 *I had been verbally informed by the airline that the applicant (who was also being removed with one other Nigerian national) would only be allowed flight with at least two official escorts;*
- 10.4 *On 24 May 2019, I personally initiated direct contract with our consular officer in Australia in order to arrange with the NHC in Canberra;*
- 10.5 *Again, no response was received from the NHC in Canberra;*
- 10.6 *On 17 June 2019, I again followed up with Mr Sefanaia Korovou, a Protocol Officer with the Ministry of Foreign Affairs in order to arrange with the NHC in Canberra for the issuance of emergency travel documents for the applicant;*
- 10.7 *My email was acknowledged by Mr Korovou on 18 June 2019;*

- 10.8 *On 7 August 2019, the Department received communication from the NHC in Canberra informing that they had received the request for issuance of travel documents to the applicant;*
- 10.9 *The NHC also request for certain information which can be observed in their communications;*
- 10.10 *Upon following up with the NHC in Canberra, the same responded on 11 September 2019, requesting for a phone interview with the applicant;*
- 10.11 *Simultaneously, arrangements were being made for approval from the Fiji Corrections Service to facilitate this request;*
- 10.12 *During this time the Department was also working on the removal of two other Nigerian nationals who were in the country unlawfully and had refused to leave and on 21 November 2019, at the Department's expense, these two Nigerian nationals were removed from the country;*
- 10.13 *On 6 December 2019, despite having not received the date and time for the phone interview from the NHC, the Department made another request to the Fiji Corrections Service to facilitate the phone interview between the NHC and the applicant;*
- 10.14 *Approval was subsequently obtained from the Fiji Corrections Service to conduct the phone interview.*
- 10.15 *On 16 December 2019, our consular officer in Australia had also informed that an officer from the NHC in Canberra would provide a date and time for the phone interview;*
- 10.16 *Unfortunately, the NHC in Canberra had not immediately provided a date and time for the phone interview;*
- 10.17 *On 17 December 2019, I had spoken with the consular officer of the Fiji High Commission ('FHC') in Canberra who had informed me that they would be providing feedback from NHC on 18 December 2019;*
- 10.18 *Again, unfortunately no response was received from the NHC – there had been numerous follow ups by the Department with both the FHC and directly with the NHC;*
- 10.19 *On 6 January 2020, the Department through Mr Isoa Ratuvasu had directly contacted the NHC in Canberra reiterating the need to repatriate the applicant who was without travel documents;*

- 10.20 *Multiple requests were made on 7 January 2020, by Mr Ratuvasu for the intervention of the NHC;*
- 10.21 *On 7 January 2020, at 3.18 pm, the NHC finally responded requesting for the arrangement of a phone interview with the applicant on 8 January 2020 at 11 am (Canberra time);*
- 10.22 *The phone interview between the NHC and the applicant was also concluded on the same day;*
- 10.23 *Between 10 to 13 January 2020, and following the NHC's phone interview with the applicant, it was reiterated to the NHC that the Department was awaiting the issuance of the emergency travel documents in order to remove the applicant from Fiji.*
- 10.24 *On 13 January 2020, the NHC informed that they were reworking on the request for the issuance of the travel documents;*
- 10.25 *The Department has been simultaneously liaising with the airlines to arrange and allow for the applicant's return home once the travel documents are issued, arrangements were also made for escorting officers;*
- 10.26 *On 16 December 2019, I also tried to arrange for the option of the applicant traveling with an issued Fiji certificate of identity via Singapore;*
- 10.27 *However, on 3 January 2020, this option was denied by the onward carrier from Singapore;*
- 10.28 *On 15 January 2020, we again followed up with the NHC;*
- 10.29 *The NHC's social secretary requested the Department for certain documentation which had already been provided in 2018, the Department again provided the same documentation;*
- 10.30 *Despite several follow ups with the NHC, the NHC has yet to issue the applicant's travel documents;*
- 10.31 *On 7 February 2020, after numerous attempts, I am aware that His Excellency Mr Luke Daunivalu, Fiji's High Commissioner to Australia was able to communicate directly with the Acting Head of Mission of the NHC in Canberra, Mr Remmy Martins Nwafor for the NHC's prompt facilitation of the issuance of travel documents to the applicant;*
- 10.32 *I am also aware that the NHC had indicated that they would be able to facilitate the issuance of an emergency travel certificate once an itinerary is provided;*

10.33 *The Department is again arranging for the travel itineraries based on the recent indication of the NHC; and*

10.34 *The Department will not be able to remove the applicant unless the NHC issues the appropriate travel documents to the applicant.*

- [10] Even in January 2020, after this application was filed, the respondents had taken reasonable efforts to obtain an emergency travel document for the applicant from the Nigerian High Commission in Australia to enable them to send the applicant to Nigeria, his own country.
- [11] The immediate removal of the applicant has become complicated as a result of the applicant's passport expiry in January 2019.
- [12] The applicant has been detained under the detention and removal order since 23 November 2018.
- [13] It will be noted that the applicant's passport had expired nearly 2 months after the removal order.
- [14] Although the applicant has been under detention and removal order since 23 November 2018, he has filed his application for constitutional redress to the court on 13 December 2019, i.e. some 11 months after his detention awaiting removal from Fiji.
- [15] The time limit for an application for constitutional redress is within 60 days.
- [16] The High Court (Constitutional Redress) Rules 2015 ("*HCCRR 2015*"), Rule 3(2) says:
- "Rule 3 (2) An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period."*
- [17] The applicant had filed his application after some 11 months from the date when the matter at issue first arose. As far as the applicant is concerned, the matter at issue first occurred on 23 November 2018 when he was detained under the detention and removal order. In his application, he states that since he has been

kept in the Lautoka Remand Centre for the past 12 months without any progress or any attempts to remove him out of Fiji, he could not file his application within 60 days. He states so with the view to bring his case within exceptional circumstances for the court to allow his application despite delay.

- [18] On the facts, it appears to me that the applicant did not cooperate with the Immigration Officers to remove him as early as possible. The applicant had told the officials that he has lost his passport and later informed that he had found his passport from his Bible. His passport had expired in the meantime. As I said earlier, the expiry of his passport had rendered his removal difficult for the Immigration despite reasonable attempts. It seems that the Immigration had made diverse attempts to obtain an emergency passport for the applicant, and still they are unable to get one.
- [19] When the matter came on for hearing, Ms Faktaufon informed the court that the respondents tried their level best to send the applicant to Nigeria, However, the Nigerian High Commission in Canberra had refused to issue emergency travel documents to the applicant as the matter is before the court, and she submitted that the respondents would try to get another travel document, and undertook and assured the court that the respondents will remove the applicant within 14 days.
- [20] The court put the respondents' undertaking to send him to Nigeria within the next 14 days to the applicant. He then said he is willing to go to his country, Nigeria. He further told the court that he would like to go to Australia as his wife resides there, and upon enquiry with the applicant, the court found out that he did not possess valid visa and travel document to enter Australia.
- [21] The Constitution empowers the High Court to grant redress for infringement of human rights and to make such orders and such directions as it considers appropriate (see: The Constitution, section 44 (3)).
- [22] Redress may refer either to the act of setting right an unjust situation, or to satisfaction sought or gained for a wrong suffered.
- [23] The immediate removal of the applicant to his own country, Nigeria would set right the situation or satisfy the applicant as he is willing to go to Nigeria.

[23] The respondents had given undertaking to the court that they will send the applicant to Nigeria within the next 14 days after obtaining an emergency travel document from the Nigerian High Commission at Canberra, Australia.

[25] I, having considered the application, the affidavits of both parties, the arguments advanced by the parties and the undertaking given by the respondents, order and direct the respondents to send the applicant to Nigeria within 14 days from the date of this ruling after obtaining an emergency travel document from the Nigerian High Commission at Canberra, Australia. In my opinion, that would be the appropriate order the court could make in the circumstances of the case. I would make no order as to costs.

The result

1. The respondents shall remove the applicant, Olanrewaju Afolayan to Nigeria forthwith after getting an emergency travel document from the Nigerian High Commission at Canberra, Australia. In any event, no later than 14 days from the date of this ruling.
2. The respondents then file a report in court as to what measures they had taken to implement this direction within 14 days from the date of this ruling.
3. There shall be no order as to costs.

M.H. Mohamed Ajmeer
4/3/20

M.H. Mohamed Ajmeer

JUDGE



At Lautoka

4 March 2020

Solicitors:

Office of the Attorney General for the respondents