

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

HBM No. 84 of 2019

IN THE MATTER of an Application for
Constitutional Redress and or
Interpretation;

IN THE MATTER of Section
44(1); 8; 9(G)(H); 11(1); 38(1)(2) of 2013
Constitution of the Republic of Fiji

BETWEEN: JOSEFA LUTUNATABUA

APPLICANT

AND: THE OFFICE OF THE ATTORNEY GENERAL OF FIJI

FIRST RESPONDENT

AND: THE MINISTER FOR HOME AFFAIRS

SECOND RESPONDENT

BEFORE: Hon. Mr Justice Vishwa Datt Sharma

COUNSELS: Applicant Present In Person
Ms. Chand S. for the 1st & 2nd Respondents

Date of Decision: 4th March, 2020 @ 9.30 am

DECISION

*[Constitutional Redress application filed by the Applicant
pursuant to Section 44(1) of the Republic of Fiji]*

INTRODUCTION

- [1] The Applicant's application seeks the following relief as outlined in his Notice of Motion (undated):
- (i) an Order that the Respondents Acknowledge the critical life threatening and suffering Mr Lutunatabua is currently subjected to;
 - (ii) an Order that the Respondents take immediate heed discussed by the Surgical Committee dated 6th September 2017;
 - (iii) an Order that the Applicant be released from his current prison term on medical grounds to allow him to be properly looked after by his family at home and to attend further treatment abroad as per the Surgical Multi-Disciplinary Committee Consensus.
- [2] Subsequently, on 14th November 2019, the Applicant filed an Amended Notice of Motion.
- [3] Notably, the Applicant failed to file and serve any Affidavit in Support with regards to both Notice of Motions. However, he later filed an Affidavit in Support without having the same without deposed by him and/or witnessed before a Commissioner for Oaths.
- [4] The Respondent's counsel objected to the Applicant's Amended Notice of Motion since the Application was not in compliance with Order 20 Rule 5 and 6 of the High Court Rules 1988.
- [5] The Respondent's counsel furnished court with written submissions before the commencement of the Hearing whilst the Applicant was allowed time to file and serve his written submissions (at liberty within 7 days after the conclusion of the Application Hearing).

THE LAW

- [6] High Court (Constitutional Redress) Rules 2015:
- "3(1) An application to the High Court for redress under **Section 44(1) of the Constitution** may be made by a **motion supported by affidavit** -
- (a) *claiming a declaration;*
 - (b) *praying for an injunction;*
 - (c) *claiming or praying for such other order as may be appropriate.*
- (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.*
- [7] Fiji Corrections Service Commissioners Orders 2011
Order No. 015 Early Release
- "2.2.1 Prisoners may apply to the **Central Allocation and Classification Board** for early release for the purposes of undertaking community work, paid employment or undertaking a course of education or instruction.
- 2.2 Prisoners may applying for **early release** must meet the following criteria -

- (a) the prisoner must possess a low security rating;
- (b) the prisoner must be serving the last 12 months of an effective sentence;
- (c) the prisoner will have demonstrated a good record of behaviour and prison work;..."

[8] APPLICANT'S SUBMISSIONS [Summarised]-

- Application for Constitutional Redress be allowed.
- Exceptional Circumstances is the critical condition of the Applicant.
- Medical condition justify the Order to release the Applicant.
- Recommendations of surgical multidisciplinary committee on critical health condition of the Applicant
- Applicant has exhausted the following remedies -
- Human Rights Commission
- Visiting Justice
- Commissioner of Fiji Corrections Service
- International Red Cross

[9] RESPONDENT'S SUBMISSIONS [Summarised]

Counsel representing relied on the following issues and sought for the dismissal of the Applicant's Application

(i) Limitation of Time

Rule 3(2) of the High Court (Constitutional Redress) Rules 2015 expressly provides that an application for Constitutional Redress must be filed within 60 days from the date when the matter first arose, unless the Judge finds there are exceptional circumstances and that it is just to hear the Application outside that period.

Supported by case authority of Waqabaca v. State Civil Action Number HBM 143 of 2017 - Application dismissed for the reason that it was filed nearly 1 year and 2 months after the cause of action arose.

Serevi Vanalaqi v. Director of Public Prosecutions and Attorney General of Fiji HBM 29 of 2016 - application dismissed filed way out of time by more than 5 years.

(ii) Alternative Remedy

The Application was made without first exhausting the alternative remedy and therefore is an abuse of court process. The Applicant has failed to exhaust an alterative remedy which is to make an application to the Central Allocation and Classification Board as in terms of the *Corrections Service Regulations*.

Application is misconceived and premature.

(iii) Breach of Rights

Section 44(1) of the High Court (Constitutional Redress) Rules 2015 expressly provides that a person may apply for redress if he or she considers that any provisions of the Bill of Rights Chapter has been or is likely to be contravened. In the current case, the Applicant has failed to specifically plead which of his Rights had been breached under the Bill of Rights Chapter.

The Applicant is seeking Declaratory Orders for his release on the basis of his medical condition.

THE DETERMINATION

- [10] The Applicant herein seeks for Declaratory Orders via Constitutional Redress Application for his release from prison on the basis of his medical condition.
- [11] The release herein is sought by him in order to allow him to be properly looked after by his family members and that he is able to attend to further medical treatment overseas as per the Surgical Multidisciplinary Committee Report.
- [12] The Applicant does not enlighten court either in his Application and/or at the Hearing which particular Provision/Section of the Constitution of the Republic of Fiji has been breached.
- [13] The Respondent in its written submissions takes up the preliminary objection that the Application for Constitutional Redress should be dismissed on the basis that the Application is out of time and the Applicant has not exhausted the alternate remedy available to him before filing for Constitutional Redress and therefore should not be entertained by this honourable court.
- [14] The Applicant's Constitutional Redress Application is made pursuant to Section 3(1) of the High Court (Constitutional Redress) Rules 2015.
- [15] The Applicant was granted time to file and serve his amended Notice of Motion.
- [16] He filed a Notice of Motion setting out the Orders sought herein and further states that the Grounds of his Application are those contained in his Affidavit.
- [17] There was no Affidavit filed by the Applicant in support of his initial Notice of Motion seeking the Orders thereon. An Affidavit in Support was only filed with the Amended Notice of Motion, but the Affidavit was neither deposed before the Commissioner for Oaths nor signed.
- [18] Therefore, this Court is of the view that the Affidavit in Support is not admissible into evidence for non-compliance of the High Court Rules (Order 41 of the High Court Rules 1988 refers).
- [19] For this reason, his Application for Constitutional Redress is not in conformity with Section 3(1) of the High Court (Constitutional Redress) Rules 2015.
- [20] Section 3(2) of the High Court (Constitutional Redress) Rules 2015 stipulates that an application under paragraph 1 must not be admitted or entertained after 60 days 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.
- [21] This Rule mandates and requires the court not to admit and/or entertain an Application for Constitutional Redress after the expiration of stipulated timeframe of 60 days.
- [22] The Applicant in his Constitutional Redress application via Form HCCR very clearly stated that the matter at issue and/or the event arose on 6th September 2017. He sought a Declaration that he be

released on medical grounds given a decision of a Multidisciplinary Committee Consensus dated 6 September 2017.

- [23] In this case, the Applicant's initial Notice of Motion was filed in court on 12 June 2017 and subsequently Amended Notice of Motion was filed on 11 February 2020.
- [24] Upon calculation of timeframe from the time when the matter first arose (06/09/2017) to the date of filing of this Constitutional Redress Application (12/06/2019), it is somewhat 1 year and 9 months outside the 60 days timeframe requirement of Section 3(1) of the High Court (Constitutional Redress) Rules 2015.
- [25] Further, the Applicant has failed to satisfy court with any exceptional circumstances that gave rise to him filing his Application out of 60 days timeframe in terms of Section 3(2) of the High Court (Constitutional Redress) Rules 2015.
- [26] I find as a fact that the Applicant has delayed in bringing this Application which is in contravention of the purpose of Rule 3(2) of the High Court (Constitutional Redress) Rules 2015. That is rather than filing the Application for Constitutional Redress within 60 days from the date when the matter at issue first arose and which in turn is also inline with the objective of Section 44(1) of the High Court (Constitutional Redress) Rules 2015 to bring this Application not only when the Constitutional Rights are contravened but at the very first opportunity when the same is likely to be contravened.
- [27] Upon perusal of Section 44(4) of the Constitution of the Republic of Fiji (2013), I find that it specifically provides this honourable court to exercise its discretion not to grant the relief sought in relation to an Application or referral made under the Bill of Rights Chapter if it considers that an adequate alternative remedy is available to the person concerned.
- [28] In the current application before me, I find that the Applicant has failed to exhaust the alternative remedy available to him whereby the Applicant should have made an Application to the Central Allocation and Classification Board in terms of Section 21(1)(2)(3)and(4) of the *Corrections Service Regulations*.
- [29] On his failure to exhaust the adequate alternative remedy only tent amounts his Application to be misconceived and premature respectively.
- [30] Finally and I reiterate that the Applicant's Constitutional Redress Application failed to show and establish to court any particular Section of the Constitution of the Republic of Fiji (2013) had been breached which prompted him to file this Constitutional Redress Application seeking relief as he did so herein.
- [31] For the aforesaid rationale, I have no other alternative but to decline the Constitutional Redress Application of the Applicant accordingly.

ORDERS

- (i) The Applicant's Application for Constitutional Redress is hereby declined.
- (ii) There will be no Order as to costs against the Applicant since he is incarceration.
- (iii) Orders accordingly.

DATED AT SUVA THIS 4TH DAY OF MARCH, 2020



VISHWA DATT SHARMA
JUDGE
SUVA

cc: Josefa Lutunatabua (Applicant)
Attorney General's Chambers, Suvavou House, Suva.