

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

**Civil Action No. HBM 12 of 2018**

**BETWEEN** : GUSTON FREDRICK KEAN

**APPLICANT**

**AND** : THE ATTORNEY-GENERAL'S OFFICE

**RESPONDENT**

**Appearances** : Applicant in person  
: Mr. Vishal Chauhan for the respondent

**Hearing** : Wednesday, 12<sup>th</sup> February, 2020

**Decision** : Monday, 8<sup>th</sup> June, 2020

**DECISION**

**[A] INTRODUCTION**

- (01) The applicant, a prisoner, serving a term of 14 years imprisonment at Maximum Correction Centre, alleges that his constitutional right to visitation under Section 13(1) (k) of the Constitution of Fiji [**Constitution**] was violated by the Supervisor, Lautoka Correction Centre, on 11<sup>th</sup> and 28<sup>th</sup> December, 2017. The applicant seeks damages for violation of his constitutional right.
- (02) The applicant also seeks an interpretation on visitation rights of detained persons.
- (03) The applicant applies for constitutional redress by way of notice of motion and affidavit. The applicant primarily relies on Article 44(1) and 44(3) of the Constitution.
- (04) The applicant filed this constitutional redress application on 15/03/2018. The applicant's notice of motion and the supporting affidavit was served on the Attorney-General.
- (05) The application for constitutional redress was strongly opposed by the Attorney-General. The Attorney-General filed an affidavit in opposition through Mr Apakuki Qura, the Deputy Superintendent of Corrections, Officer in Command, Fiji Correction Service.

- (06) On Wednesday, 12<sup>th</sup> February 2020, the matter was taken up for hearing. The applicant and the Attorney-General presented oral submissions.

**[B] CONSIDERATION AND THE DETERMINATION**

**Whether the applicant's visitation right is breached?**

- (1) The applicant averred that on two occasions, i. e, 11<sup>th</sup> and 28<sup>th</sup> December, 2017 he was denied visiting rights with his brother. The applicant contends that his right to visitation under Section 13 (1) (k) of the Constitution has been breached.
- (2) The respondent flatly rejected this contention stating "*there were no visits or attempted visits on 11<sup>th</sup> or 28<sup>th</sup> December 2017*".
- (3) The annexure marked AQ-1 (referred to in the affidavit of Mr. Apakuki Qura, the Deputy Superintendent of Corrections) is a copy of minutes kept in relation to the applicant's movements and requests both kept at the Maximum Correction Centre and at the Lautoka Corrections Centre. AQ-1 proves that there was no request by the applicant for visitation.

The applicant did not, or was unable to produce documentary evidence to refute the respondent's stance that "*there were no visits or attempted visits on the 11<sup>th</sup> or 28<sup>th</sup> December, 2017*".

- (4) I find and hold that there were no visits or attempted visits by the applicant's brother on the 11<sup>th</sup> and 28<sup>th</sup> December, 2017. It therefore concludes that the applicant's right to visitation under Section 13(1)(k) of the constitution has not been breached. Consequently, the respondent is not liable to pay any damages to the applicant.
- (5) It is critical to note that no complaint has been lodged by the applicant alleging the denial of his constitutional right to visiting.

**[C] ALTERNATIVE REMEDY**

- (1) Assuming that there has been a breach of the applicant's visiting rights, an adequate alternative remedy is available to the applicant.

The applicant's constitutional redress application was filed pursuant to article 44(3) of the constitution.

Article 44(3) provides;

- (3) *The High Court has original jurisdiction-*

- (a) *to hear and determine applications under subsection (1); and*
- (b) *to determine questions that are referred to it under subsection (5), and may make such orders and give such directions as it considers appropriate.*

It is pertinent to note Article 44(1) and 44(4) of the constitution;

- (1) *If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.*
- (4) *The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it considers that an adequate alternative remedy is available to the person concerned.*

**Therefore, the Court has discretionary power to refuse relief under Article 44(4) of the constitution if an adequate alternative remedy was available.**

- (2) As far as the allegation that he was denied visiting rights with his brother is concerned, the applicant could have complained to the visiting justice or written to the Chief Magistrate instead of seeking constitutional redress. Section 44 of the Prisons Act requires weekly visits to prison by Resident Magistrates. Under Regulation 157 of the Prison Regulations the Magistrate, amongst other things are required to hear and inquire into complaints by prisoners and ensure that any abuse which come to their knowledge are brought to notice of the Controller. Regulation 158 contains powers of visiting justices. These empower a visiting justice to visit every cell, inspect and test the quality of food, inquire into complaint or request by a prisoner and even inquire into the state of prison buildings and report to Controller if there is need for repairs.
- (3) The applicant has an adequate alternative remedy. Therefore, the constitutional relief was premature and inappropriate and that the application was an abuse of process of the Court. It is for these reasons the application for constitutional redress is dismissed and relief refused.
- (4) **In the matter of an application for constitutional redress by Josefa Nata<sup>1</sup>, Singh J** declared:

*"...the Constitution provides that a Court may refuse to grant relief if adequate alternative remedy is available to the person concerned". The*

<sup>1</sup> Civil Action No. HBM 35 of 2005

*Redress Rules do not provide a parallel procedure to be invoked where alternative remedy is available. To use the Constitutional Redress process as a substitute for normal procedure is to devalue the utility of this Constitutional remedy. Mere allegation of constitutional breach was insufficient to invoke this remedy – Harrikissoon v. Attorney General – (1979) 3 WLR 62.*

- (5) The judgment of the Court of Appeal in Abhay Kumar Singh v Director of Public Prosecution and Anor<sup>2</sup>, cited Lord Diplock in Harrikissoon v A.G<sup>3</sup> as follows:

*The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court..., the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.*

- (6) In Abhay Kumar Singh v D.P.P. and the Attorney General (supra) it was held:

*“we note that the privy council has constantly laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the Rules of Law which the constitution is designed to uphold and protect.”*

- (7) In Aiyaz Ali v Attorney General<sup>4</sup> (supra) Singh J. made the following observations:

*“An isolated incident of assault is an offence under the Penal Code and may also be subject of damages in tort. To elevate these under the evocative banner of abuse of human rights is really an abuse of process. The redress Rules do not provide a parallel process where other remedies are available. To use the constitutional redress process as a substitute for normal procedure is to devalue the utility of this constitutional remedy. The applications under the Redress Rules are not a short cut or a system to by-pass existing mechanisms in law. Section 41*

<sup>2</sup> (2004)FLR 297 at pg 306;

<sup>3</sup> [1980] AC 265 at pg 268

<sup>4</sup> (2005)FJHC, HBM 0079 of 2004

*(of the then 1997 Constitution) is not an Aladin's cave which contains all the remedies for all the ills and the Redress Rules the magical words "open sesame, which are keys to those remedies".*

**Interpretation of Section 13(1)(k) of the Constitution**

- (8) As stated the applicant brought this action for constitutional redress against the warden/supervisor, alleging that his constitutional rights were violated when prison officers did not allow his brother to visit him on two particular dates namely 11<sup>th</sup> and 28<sup>th</sup> December 2017.
- (9) The applicant relied on section 13(1) (k) of the constitution and contended that he has an absolute right to communicate with and visited by his brother and the family members or next of kin. This branch of the applicant's argument assumes that section 13(1) (k) of the constitution supports the "**absolute right**" for which he contends.
- (10) On the other hand, Counsel for the respondent said with some force that there is no "absolute" right to visiting.

I acknowledge the force in that proposition.

- (11) Section 13(3) of the constitution reads;

*Rights of arrested and detained persons*

*(13)(3) - A person who is deprived of liberty by being detained, held in custody, or imprisoned under any law retains all the rights and freedoms set out in this chapter, except to the extent that any particular right or freedom is incompatible with the fact of being so deprived of liberty.*

- (12) It therefore appears clear that the constitution does not entrench an absolute right to visiting. The applicant's right under section 13 (1) (k) of the constitution is qualified by the words "*except to the extent that any particular right or freedom is incompatible with the fact of being so deprived of liberty*". The privilege of visitation is subject to ; (1) Fiji Correction Service Commissioner's Orders No- 017 and (2) discretion of prison authorities, provided visitation policies of prison meet legitimate penological objectives.
- (13) **I conclude that arrested and detained persons have no absolute constitutional right to visitation.**

## COSTS

- (14) The applicant seeks costs of \$800.00 on first visit and \$500.00 for the second alleged visit by his brother.
- (15) I held at paragraph (4) above that there were not visits or attempted visits by the applicant's brother on the 11<sup>th</sup> and 28<sup>th</sup> December, 2017.

Therefore, the claim is dismissed.

## ORDERS

- (1) I declare that the constitutional right to visit granted by Section 13(1)(k) of the constitution is not absolute.
- (2) The application for constitution redress is refused and dismissed.
- (3) I make no order as to costs.



**At Lautoka,  
Monday, 8<sup>th</sup> June, 2020**

  
08/06/2020  
**Jude Nanayakkara**  
[Judge]