IN THE HIGH COURT OF FIJI
AT SUVA CENTRAL DIVISION
CIVIL JURISDICTION

Civil Action No. HBJ 18 of 2023

BETWEEN: **ULAIYASI GLEN RADIKE**

APPLICANT

AND: **DIRECTOR LEGAL AID**

RESPONDENT

Date of Hearing	**:**	**30 November 2023**
For the Applicant	**:**	**In Person**
For the Respondent:		**Ms Henao**
Date of Decision	**:**	**23 February 2024**
Before	**:**	**Levaci, SLTTW Acting Puisne Judge**

JUDGEMENT

(APPLICATION FOR LEAVE FOR JUDICIAL REVIEW)

PART A - BACKGROUND

1. The Applicant had filed an amended Affidavit together with a Motion seeking Leave for Judicial Review under Order 53 of the High Court Rules.

2. The Application stems from the refusal of Director Legal Aid Commission (hereinafter referred to as "DLAC") to approve legal representation of the Accuse after he had initially withdrawn his instructions from DLAC.

3. The reliefs sort as Orders at Leave stage by the Applicant is as follows:

(i) An order for Certiorari to remove the decision of the DLAC made on the 9th of May 2023 into this Honorable Court and that same be quashed;
(ii) A Declaration that the DLAC has acted unfairly and/or abused his discretion under the Constitution of Fiji and/or exceed his jurisdiction;
(iii) Further Declarations or other reliefs as this Honorable Court deems just.

4. The Grounds for these reliefs are as follows:

a. The DLAC exceed his jurisdiction in giving directive to the Applicant declining legal aid representation when there were merits in the applicants appeal case in AAU 005 of 2019;
b. That DLAC has breached the rules of natural justice in not giving the Applicant the opportunity to be heard before giving his Directive;
c. That the DLAC abused his discretion under the Constitution as follows:

i) He took into consideration irrelevant matters; and
ii) He did not take into consideration relevant matters; and
iii) He acted wrongly and/or in bad faith and/or unreasonably.

PART B: AFFIDAVIT

5. The Applicant had filed a Statement and Affidavit in Support of his application for Leave for Judicial Review.

6. In his Affidavit the Applicant deposed that:

"3. That I am currently a convicted prisoner and serving a term of imprisonment of 14 years of life sentence.
4. That being unsatisfied with the judgment of the High Court of Lautoka, I felt being prejudiced due to the erroneous of the trial judge onto my unlawful conviction. I then filed an application of appeal to the Fiji Court of Appeal at Suva and now it has been granted up for full bench for further determination.
5. That being a lay, unskilled and uneducated litigant in law and legal court proceedings. I filed an application for seeking legal representation to the Legal Aid Commission on the 1st of February 2023.

6. That I had applied for counsel from the Legal Aid Commission - for reasons than I was a poor man and a convict and could not afford to pursue justice on the strength of my own resources.
7. That on the 15th February 2023, I received corresponding letter from the Director Legal Aid Commission informing me that the application nor want of legal aid representation had been refused. Whereof annexed hereto and marked [DK-1].
8. That the 14th day of February 2023 I had also send a letter to the Director Legal Aid Commission concerning my request for kind assistance and for personal audience with the Director in which he has not complied with. Whereof annexed and marked [DK-2] is the true copy of the said request which was returned back to me and marked 17th May 2023, by a legal aid officer named Ms Talei Kean while vising her clients at Maximum Correction Centre.
9. That on the 2nd day of March 2023 I filed an appeal to the Board of Legal Aid for reconsideration of the decision made by the Director of Legal Aid Commission in refusing y application for seeking Legal Aid Assistance. Marked hereto and marked [DK-3].
10. That on the said 17th day of May 2023 during the visitation of the said Legal Aid Officer Ms Talei Kean, I was also handed the letter from the Director of Legal Aid Commission signed on behalf of the Board of Legal Aid in that legal aid had refused to provide legal and representation to the Applicant due to lack of merits. Annexed hereto and marked [DK-4].
12. That the Director of Legal Aid Commission's decision is wrong in law when he failed to make a proper assessment regarding the merits of the application together with the request and documents provided.
13. That the Director Legal Aid Commission's decision is wrong, where in my first refusal letter dated 15th February 2023 that I have to satisfy the commission on the reasonable prospect of success in my matter, but how can this be possible when I am just a lay unskilled and uneducated litigant in law and legal court proceeding and even seeking advice from them.
14. That the Board members did not even at least consider to visit me to discuss and give me an opportunity to be heard on the merits of the application be forgiving their decision."

7. The Director Legal Aid Commission prepared an Affidavit in response as follows-

"7. On the 2nd of February 2023 the Applicant lodged an Application to the Commission for legal assistance in his Criminal Appeal matter, being Action No AAU 05 of 2019 before the Court of Appeal.

8. The Applicants file was registered and allocated to Mr Michael Fesaitu, who was then principal legal officer on the 3rd of February 2023.
9. AS a matter of policy, all serving prisoner s may qualify for assistance under the Means Test criteria and on this basis, the Applicants means was granted. However in compliance with the Legal Aid Act and internal policies governing grant of assistance, the Applicants case file, being a Criminal Appeal file, underwent a Merits Test. The Merits Test is conducted to determine the 'reasonable prospect of success' in the matter.
10. The Applicant had issued a latter of request which was accompanied by a letter from the Fijian Corrections Service dated 27th of January 2023.
11. Subsequently a merits test was undertaken and the former Director then made a decision to refuse assistance to the Applicant. The Applicant informed of his right to appeal my decision to the Legal Aid Commission Board.
21. A letter had been received by the Applicant seeking an audience with the former Director that was dated the 2nd of February 2023. This letter had accompanied his initial application for Legal Aid Assistance.
22. The basis of the Applicants letter was to seek Legal Aid assistance in providing him a Counsel of his choice on pro bono to represent him in an appeal before the Full Court of Appeal.
23. The Legal Aid Act under section 11 clearly outlines the Commissions's role in arranging services from private legal practitioners and in accordance with the section, has a panel of private legal practitioners under the Commissions brief out scheme.
24. Nevertheless, the Applicant was afforded due process when his application for assistance was considered in compliance with the Legal Aid Act, its internal policies and standard operating procedures.
25. I verily believe the applicant was afforded due process when his application for assistance was considered with Legal Aid Act, its internal policies and standard operating procedures."

PART C: SUBMISSIONS BY PARTIES

8. In their oral submissions the Applicant argued that he had an absolute right to be defended and to obtain a legal representative. He admitted he had followed all procedures to seek for legal representation from LAC. LAC had failed to provide a lawyer. The assessment leading to their decline was not properly done as they had applied the same process applied to the merits test. He opined that they had refused as he had earlier withdrew from instructing a lawyer appointed by them whom he felt was incompetent.

9. The Respondent argued that in the 5 tests under leave applications in Order 53 of the High Court Rules, there is no arguable case for the Applicant as there is no absolute right for legal representation. The Applicant has misinterpreted the provisions in the Constitution. There is also no breach of natural justice as the Applicant was heard

PART D: LAW ON *LEAVE FOR JUDICIAL REVIEW AND ANALYSIS*

10. In an application for Leave to seek judicial review under Order 53 rule (5) of the Fiji High Court Rules states:

'(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates'.

11. The onus is on the Applicant to satisfy the Court the Applicant has sufficient interest in order for the Court to exercise its discretion.

12. In Commissioner of Inland Revenue Commissioners -v- National Federation of Self-Employed and Small Businesses Limited (1982) AC 617 pg 6-7 Wilberforce L.J stated as follows -

> 'R.S.C. 0.53 was, it is well known, introduced to simplify the procedure of applying for the relief formerly given by prerogative writ or order — so the old technical rules no longer apply. So far as the substantive law is concerned, this remained unchanged: the Administration of Justice (Miscellaneous Provisions) Act 1938 preserved the jurisdiction existing before the Act, and the same preservation is contemplated by legislation now pending. The Order, furthermore, did not remove the requirement to show *locus standi*. On the contrary, in r.3, it stated this in the form of a threshold requirement to be found by the court. For all cases the test is expressed as one of sufficient interest in the matter to which the application relates.'

13. Diplock LJ in Commissioner of Inland Revenue -v- National Federation of Self-Employed and Small Businesses Ltd (Supra) pg 10-11 stated –

> 'The procedure under the new Order 53 involves two stages: (1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or "threshold", stage is regulated by rule 3. The application for leave to apply for judicial review is made initially *ex parte*, but may be adjourned for the persons or bodies against whom relief is sought to be represented. This did not happen in the instant case. Rule 3(5) specifically requires the court to consider at this stage whether "it considers that "the applicant has a sufficient interest in the matter to which the application

"relates." So this is a "threshold" question in the sense that the court must direct its mind to it and form *a prima facie* view about it upon the material that is available at the first stage. The *prima facie* view so formed, if favourable to the applicant, may alter on further consideration in the light of further evidence that may be before the court at the second stage, the hearing of the application for judicial review itself.

The need for leave to start proceedings for remedies in public law is not new. It applied previously to applications for prerogative orders, though not to civil actions for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.

"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the Applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.'

14. In Wades and Forsyth on 'Administrative Law' (7th Edition, Clarence Press, Oxford, 1994) page 667 states –

'The requirement for leave, which formerly applied only to the prerogative remedies, has thus been extended to declarations and injunctions when sought for the purpose of judicial review, its justification being that it enables many unmeritorious cases to be disposed of summarily if an arguable case cannot be shown.''

What is Sufficient Interest in law?

15. Thus in R-v- Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Businesses Ltd [1980] 2 ALLER 378-399, at 389 Lord Denning explained about sufficient interest stating:

'This leaves open the question, of course, what is sufficient interest? To that I answer, as many statutes have done in similar situations, any 'person aggrieved' by the failure of a public authority to do its duty, has sufficient interest. He can come to the court and apply for a mandamus to compel it. At one time those words 'a person aggrieved' were given a restrictive interpretation, confining it to a person who had a specific legal grievance: see Re Sidebotham (1880) 14 Ch D 458, [1874-80] All ER Rep 588.

But the interpretation was overthrown in Attorney General of the Gambia –v- N'Jie [1961] 2 ALL ER 504 at 511 [1961] AC 617 at 634:

'The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because [something has been done or omitted to be done contrary to what the law requires'.

16. Thus in Wades Forsyth et al in pages 678 and in 700 -701 stated –

''Order 53, as remade in 1977, empowered the court to refuse preliminary leave, and also to refuse any remedy where there had been undue delay in making the application –but only if, in the courts opinion, granting the remedy would be likely to cause substantial hardship to, or substantial prejudice to the rights of any person or would be detrimental to good administration of justice, and in the case of certiorari three months was equivalent to undue delay.

…..The testing of the applicant's standing is thus made a two-stage process.

……On the application for leave (stage one) the test is designed to turn away hopeless and meddlesome applications only. But when the matter comes to be argued (stage two), the test is whether the applicant can show a strong enough case on the merits, judged in relation to his own concern with it. As Lord Scarman put it in R-v- Inland Revenue Commissioner National Federation of Self-Employed and Small Businesses Limited (Supra)

''The federation having failed to show any grounds for believing that the revenue has failed to do its statutory duty, have not, in my view, shown an interest sufficient in law to justify any further proceedings by the court on its application'. He added that had reasonable grounds for supposing an abuse been shown, he would have agreed that the federation had shown a sufficient interest to proceed further'.

17. In a similar matter of Guston Fredrick Kean -v- Director of Legal Aid Commission HBJ 4/19 Nanyakarra J cited State -v- Connors, ex parte Shah [2008] FJHC 64; HBJ 47.2007 (7 April 2008) where 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 raised 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".

18. Furthermore, in Proline Boating Company Ltd -v- Director of Lands [2014] FJCA159; ABU0020.13 (25 September 2014) Guneratne JA, Mutunayagam JA and Kotigalage JA, the Court of Appeal not only considered the threshold test of *Sufficient Interest* but also included additional requisites to consider at leave stage:

> [42] This is necessary in order "to eliminate frivolous vexatious or hopeless applications" that would prima facie appear to be so. (vide: **Harikissun Ltd v. Dip Singh & Ors**. [FCA Rep. 96/365].
>
> [43] These requisites in developed jurisdictions may be noted as follows:
>
> > '(1) Was there an inordinate delay in seeking Judicial review against the decisions that is complained of by an applicant?
> >
> > (2) Does that decision/emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?
> >
> > (3) What reliefs have been sought by an applicant in his/her application for leave to apply for judicial review and against whom?'

19. Thus considers these factors in turn.

Sufficient interest and Inordinate delay

20. The Applicant has sufficient interest as the Director of Legal Aid who had made the final decision as well as the Legal Aid Commission Board are both established under the Legal Aid Act.

21. Furthermore the Application was made on 30th of May 2023, 19 days after the final decision was made by the Legal Aid Commission Board on review of the Director's decision. There was no delay in filing of their application for leave for judicial review straight after the decision of the Legal Aid Commission was made known to the Applicant.

22. The Court finds there is sufficient interest by the Applicant at this stage.

Does the decision emanate from the exercise of statutory power by a public body even if disputes involving private parties are involved?

23. The decision of the Legal Aid Commission Board emanates from section 16 of the Legal Aid Act 1996. The Legal Aid Commission is a public body established by statute and therefore the exercise of statutory power is considered as an administrative decision for which is susceptible to as public law remedy and thus within the ambit of the supervisory jurisdiction of the Court.

What reliefs are sort?

24. The Applicant has sort for orders for Certiorari and Declaratory orders as well as any other orders that the Court deems just.

Has the Applicant exhausted all alternative remedies?

25. The Applicant has sort for further review of the decision with the Legal Aid Commission Board after the DLAC had refused his application. The Legal Aid Commission Board had also declined his application.

26. The Court therefore finds that he has exhausted all avenues with Legal Aid.

Is there an arguable case?

27. I refer to the case of Guston Fredrick Kean -v- Director Legal Aid Commission HBJ 4/19 which cited and applied the case of Naidu -v- Attorney General (1999) FJCA 55; ABU 0039u.98s (27 August 1999) where the Court of Appeal held that :

> *"First, in our view this application for leave ought to have been granted on papers, it was obvious from the statement of claim that an issue of significant public interest was involved. Where the plaintiff has sufficient standing, and whether the court should exercise its discretion to grant relief, are matters to be determined finally on the hearing on the application for review.*
>
> *Secondly, we emphasize that this decision is only that leave should not have been granted. This is on the basis that the plaintiff has established an arguable case in favour of the court making the declaration sort. 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 regards 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 off course applies here. This Court 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". (underlining my emphasis.

28. The Applicant is arguing that the Director Legal Aid Commission Board exceeded their jurisdiction under the Constitution as well as under the Legal Aid Act 1996 by refusing to grant his application for representation.

29. Counsel has argued there is no absolute right for legal representation.

30. Section 15 (10) of the Constitution provides:

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. (my emphasis)

31. Considering the case of Fredrick Guston Kean (Supra) and the deliberations of the very same provisions of the Constitution Nannyakarra J stated:

> "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……All factors relating to legal aid must be taken into account, including the Applicants 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 of legal aid" has been said often enough not to be an absolute right: State -v- Tanaburenisau [2005] FJHC 127."

32. In their submissions DLAC argued that as a matter of policy, all serving prisoners may qualify for assistance under the Means Test criteria and on this basis, the Applicants Means was granted. However, in compliance with the Legal Aid Act and internal policies governing grant of assistance, the Applicants case file, being a Criminal Appeal file, underwent a Merits test. The Merits test is conducted to determine the 'reasonable prospect of success' a decision was made to refuse assistance to the Applicant and he was informed of his right to Appeal to the Board which he exercised and for which the Board still upheld.

33. Given that the merits assessment was conducted by the Legal Aid Commission arriving at the decision to decline the request. The Court finds that the applicant was accorded all procedural fairness and was not unreasonable. There is no arguable case for judicial review.

34. The matters for which the Court is requested to consider has not been particularized and is only in general terms. This is not appropriate as the Court. He who comes to Court must be very clear and precise on the reliefs as well as the facts supporting these reliefs. It is unfair to the respondent who is entitled to know what is sort for.

35. Taking into consideration all the materials. The Court finds there is no arguable case before me and therefore will dismiss the application for Leave for Judicial Review.

Orders

36. **The orders are as follows:**

(1) Application for Leave for Judicial Review is dismissed;

(2) No orders as to costs.