IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 027 OF 2023

IN THE MATTER of an application for leave to apply for Judicial Review pursuant to O.53 of the High Court Rules 1988.

BETWEEN	:	**MATAIASI NAVUGONA** **Applicant**
AND	:	**THE COMMISSINER OF THE FIJI CORRECTIONS SERVICE** **First Respondent**
		ATTORNEY-GENERAL OF FIJI **Second Respondent**
Counsel	:	**Ms M Tuiloma for the Applicant** **Ms O Solimailagi & Mr Y Naidu for the Respondents**
Hearing	:	**24 June 2024**
Judgment	:	**20 September 2024**

JUDGMENT

(Application for leave to apply for Judicial Review under 0.53, r.3)

[1] The Applicant, Mr Mataiasi Navugona, has been sentenced to 15 years imprisonment. His non-parole period is 10 years. Pursuant to s 27 and 28 of the Corrections Services Act 2006, Mr Navugona is entitled to a one-third remission of his sentence. Mr Navugona contends that the Commissioner of Fiji Corrections Service has not properly calculated his remission and that his release date is, therefore, incorrect.

[2] Mr Navugona seeks leave to apply for judicial review in order to challenge the Commissioner's calculation of his remission and seeks declaratory orders that the Commissioner's practice of calculating remissions is unlawful and ultra vires.

Background

[3] Mr Navugona is currently incarcerated at Naboro Medium Security Prison.

[4] On 22 October 2019, Mr Navugona was sentenced to 15 years imprisonment with a non-parole period of 10 years. As he was already serving a custodial sentence for another offence, his new sentence was ordered to be served concurrently with the existing one.

[5] Mr. Navugona states that the Chief Operations Officer at the prison, namely Mesulame, advised Mr. Navugona that the sentence he must serve is 13 years and 8 months. Mr. Navugona believes that his sentence with the one-third remission and non-parole period is, in fact, 10 years. As a result of the advice from Mesulame, Mr. Navugona has brought the present proceedings. He filed a Notice of Motion on 21 August 2023.[1] Mr. Navugona seeks leave to apply for Judicial Review under O.53, r.3(2) of the High Court Rules 1988. He seeks declarations that the Commissioner's '*practice of calculating the one-third remission*' is unlawful, unconstitutional and unfair. He seeks declarations compelling the Commissioner to stop the practice.

[6] The respondents have filed an affidavit in opposition from Mr. Etike Katafono, dated 26 March 2024. Mr. Katafono is the Officer in Charge for the Medium Corrections Centre at Naboro. He states:

> 5. *...the Applicant must serve a non-parole period of 10 years as per the Sentencing of the High Court...which was delivered on 22 October 2019 and as such, the Applicant will not be eligible to apply for parole until he has served his non-parole period which will expire 10 years from 22 October 2019.*

[1] The Legal Aid Commission began acting for Mr Navugona from about 30 April 2024.

6. *...the Applicant's calculation of one-third of the remission of his sentence is based on the Applicant's head sentence. I leave it to the Respondent's Counsel to make legal submissions on the applicable law on calculating the Applicant's remission of sentence in determining the date of his release from prison.*

7. *...the Applicant's early release date is calculated based on deduction of the Applicant's one-third remission of the head sentence which also could be re-determined due to any complaints of misbehaviour. In any case, the Applicant will be required to serve his non-parole period as per the Sentence.*

The process of calculating the one-third remission

[7] The head sentence and the non-parole period are determined by the court. The calculation of the one-third remission and the release date is undertaken by the Commissioner of the Fiji Corrections Service. The calculation and release process were explained as follows by the Supreme Court in *Ismail v State* [2023] FJSC 40 (26 October 2023):

[6] To explain, although s 49 of the Corrections Service Act 2006 provides for the establishment of a Parole Board, one has never been set up. Consequently, the main mechanism for early release of prison inmates is through sentence remission. Under s 27 of the Corrections Services Act, an inmate must be given a release date for the purposes of initial classification. The release date must be calculated on the basis of a remission of one-third of any sentence of imprisonment exceeding one month. Under s 28(1), the entitlement to the period of remission is dependent on the good behaviour of the inmate and may be forfeited (but later restored).

[7] There is an obvious question as to how the entitlement to the period of remission interacts with a non-parole period imposed as part of an inmate's sentence. The practice of the Corrections Service for some years has been to apply the entitlement to remission only to the sentence

remaining to be served after the non-parole period has been completed. To take Mr Ismail's case as an example, he was sentenced to 12 years' imprisonment with a non-parole period of nine years on 26 August 2014. The Corrections Service calculated the remission period only on the basis of the three years after his non-parole period was completed, so that his sentence was remitted by one year. On this approach, Mr Ismail would have to serve a total of 11 years' imprisonment, which gives a release date of 26 August 2025.

[8] However, in Kreimanis v State,[2] the Supreme Court stated that this approach was incorrect, given the language of s 27(2) of the Corrections Service Act. That subsection provides that for the purposes of initial classification "the date of release for the prisoner shall be determined on the basis of a remission of one third of the sentence ***not taking into account the non-parole period****" (emphasis added). The background to this subsection is explained in Calanchini J's judgment in Kreimanis.[3]*

[8] The initial classification, here, was a release date of 10 years. This is based on a one-third remission from a head sentence of 15 years, taking into account that the non-parole period is also 10 years. The net result is that the non-parole period and the one-third remission date are the same.

[9] As per s 28(1) of the Corrections Service Act 2006, the one-third remission is contingent on the good behaviour of the prisoner. In the event of a failure to exhibit good behaviour, the one-third remission may be forfeited in part, but also restored. The same is undertaken at the discretion of the Commissioner - there are internal avenues within the Corrections Service for a prisoner to challenge any such forfeiture.

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[2] *Kreimanis v State* [2023] FJSC 19.
[3] At [12]-[14].

Decision

[10] Pursuant to O.53, r.3(2) and (3) an applicant must file a notice in Form 32, with a supporting affidavit, seeking leave to apply for judicial review.. The Applicant has done so. Subrule (5) provides that leave shall not be granted unless '*the applicant has a sufficient interest in the matter to which the application relates*'.

[11] In *Sharma v The President of the Republic of Fiji* [2023] FJHC 18 (26 January 2023) Ameratunga J identified the following considerations for the court to consider on an application for leave under O.53:

> *13. In Inland Revenue Commission v National Federation of Self Employed and Small Businesses Ltd [1982] AC 617 643 –644 held, (Per Lord Diplock)*
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> > *"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 matter at 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. The discretion that the court is exercising at this stage is not the same as that which is it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."*
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> *14. In this application Applicant is not only seeking to review the final decision that terminated him from his post but also five additional decisions relating to the same process of termination taken before he his termination.*

15. *In Fiji Airline Pilots Association v Permanent Secretary for Labour and Industrial Relations (Civil Appeal No. ABU59u of 1997s, 27 .2. 1998), the Court of Appeal, held,*

> *"The basic principle is that the Judge is only required to be satisfied that the material available discloses what might, on further consideration, turn out to be an arguable case in favour of granting the relief. If it does, he or she should grant the application - per Lord Diplock in Inland Revenue Commissioners v National Federation of Self Employed, [1982] AC 617 at 644.."*

16. *Supreme Court in Matalulu v Director of Public Prosecutions [2003] FLR 129, (at pages 144-145) held that:*

> *"It is not an occasion for a trial of issues in the proposed proceedings. That having been said, the judge considering the grant of leave is entitled to have regard to a variety of factors relevant to the purpose of the rule, these include:*
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> *(1) Whether the proposed application is frivolous or vexatious or an abuse of the process of the court.*
> *(2) Whether the application discloses arguable grounds for review based upon facts supported by affidavit.*
> *(3) Whether the application would serve any useful purpose, e.g. whether the question has become moot.*
> *(4) Whether there is an obvious alternative remedy such as administrative review or appeal on the merits which has not been exhausted by the applicant.*

(5) Whether a restrictive approach to the grant of leave is warranted because the decision is one which is amenable to only limited judicial review."

Further held,

"But where a proposed application for judicial review depends upon grounds involving assertions of law or fact which are manifestly untenable, then leave should not be granted."(emphasis added)

17. Accordingly the factors to be taken in to consideration at the stage of leave seeking judicial review cannot be precisely stated but, the guiding principle is that leave should be refused when there is no prospect of success at the hearing such as untenable legal argument on the face of it and it would be waste of time and resources to grant leave for judicial review.

[12] Scutt J noted in *Nair v Permanent Secretary of Education* [2008] FJHC 140 (11 February 2008) at 4:

In an application for leave to apply for judicial review, the Court must ask:

- *Does the applicant have sufficient interest in the application;*
- *Is the decision susceptible to judicial review – that is, is it of a private or public nature;*
- *Is the decision non-reviewable in accordance with the terms of the* ***Public Service Act*** *1999;*
- *Are alternative remedies available to the applicant and, if so, have they been pursued by the applicant;*
- *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.*

[13] Mr Navugona takes issue with the advice from Mesulame that Mr Navugona must serve 13 years and 8 months. This is the 'decision' that Mr Navugona seeks to challenge under O.53. Mr Navugona concedes that the Commissioner does not contend, in these proceedings, that the time he must served is as allegedly conveyed by Mesulame. Indeed, the Commissioner accepts in these proceedings that the one-third remission is based on the head sentence. Despite this, Mr Navugona argues that leave should still be granted because of the fact of Mesulame's contradictory advice.

[14] Counsel for the respondents identify the initial classification date, calculated by way of the one-third remission taking into account the non-parole period, as **21 October 2029** (10 years from the date of the sentence). This date is not set in stone. It is subject to Mr Navugona's ongoing good behaviour. For this reason, the respondents argue that Mr Navugona's Motion is premature.

[15] I am satisfied that Mr Navugona's application for leave to apply for judicial review cannot succeed. The reasons are:

i. The Commissioner has not made a decision from which leave to apply for judicial review may be granted. The alleged verbal statement by Mesulame is not a decision by the Commissioner.

ii. Mr Navugona raises no arguable case. Indeed, there is no dispute between the parties for this Court to determine. The Commissioner accepts that the initial classification date, based on the one-third remission (taking into account the no-parole period), is 10 years from the date of the head sentence.

iii. There is simply no purpose served with granting leave to Mr Navugona to apply for judicial review because the practice complained of by Mr Navugona was not applied in his case. Therefore, he has no interest in the alleged practice by the Commissioner for which he complains.

Orders

[16] I make the following orders:

i. The Applicant's Motion is dismissed.

ii. There will be no order as to costs.

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D. K. L. Tuiqereqere

JUDGE

Solicitors:

Office of Legal Aid Commission for Applicant

Attorney-General's Chambers for First & Second Respondents