

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 031 OF 2023

BETWEEN : SEREMAIA MUDURA

Applicant

AND : ASC MR BUSELE

1st Respondent

MR ALEVIO

2nd Respondent

COMMISSIONER OF CORRECTION

3rd Respondent

MELI SANIBULUTI & SAIMONI BALEWAI

4th Respondent

ATTORNEY-GENERAL'S OFFICE

5th Respondent

Appearances : Applicant in person

Mr V Ram for the Respondents

Hearing : 3 May 2024

Judgment : 20 September 2024

JUDGMENT

(Application for Leave for Judicial Review under O.53, r.3)

[1] The Applicant, Mr. Seremaia Mudura, is an inmate at the Naboro Maximum Correction Centre. Mr Mudura was previously at the Medium Correction Centre but was transferred to the Maximum Centre in punishment for a transgression. Mr Mudura

applies for judicial review from the decision by Corrections to transfer him to the Maximum Centre.

- [2] Mr Mudura must first obtain leave of the Court to apply for Judicial Review under O.53, r.3 of the High Court Rules 1988. The question for determination is whether leave should be granted.

Background

- [3] It is unclear how long Mr Mudura has been serving at Naboro Prison. He says that he was previously in the Maximum Centre until sometime in 2023 at which time he was transferred, due to his good behaviour, to the Medium Centre. He says that he was in the Medium Centre for only four months, until July 2023, when he was transferred back to the Maximum Centre.
- [4] The circumstances that led to the more recent transfer pertain to the detection of contraband, being a mobile phone, at the Medium Centre. Two inmates were charged in respect to the use of the phone. It appears that the phone was found in D5 cell. Mr Mudura occupies this cell with other inmates. According to the internal Corrections charge sheet for Mr Mudura, the phone was found on Mr Mudura. Mr Mudura says, however, that it was found on the floor and he believes it was thrown into the cell by the two inmates that have been charged. Mr Mudura says that as a result of this incident, the officers in charge (being the First and Second Respondents) made a decision to transfer him back to the Maximum Centre. This occurred on or about 13 July 2023.
- [5] Mr Mudura was not happy with the transfer and says that he tried to organise a review of the decision with the two officers in charge but they would not permit this to occur.
- [6] Mr Mudura says that he has, therefore, taken matters into his own hands. On 15 August 2023, when he appeared before the Magistrates Court, he cut his arm with a razor blade. He says he did this out of desperation to raise attention to his transfer.

Present proceedings

- [7] Mr Mudura filed these proceedings on 7 September 2023 by way of an Ex-Parte Summons, a supporting Statement and an affidavit. He seeks leave to apply for judicial review of the decision by Corrections dated 13 July 2023 transferring him back to the

Maximum Centre. He disputes that he had any involvement with the mobile phone found in his cell. He states that he was in cell D5 with three prisoners and that he had nothing to do with the phone. He contends that Corrections have not conducted a proper investigation and the decision to transfer him is based on inadequate evidence. Further, Corrections has failed to comply with the prescribed procedure for determining prison offences. By way of relief, he seeks orders returning him to the Medium Centre. He also seeks damages for the conditions he has endured at the Maximum Centre since his return, including missing out on his twice weekly visits.

[8] The respondents filed a Notice of Opposition on 27 November 2023. The respondents argue that, firstly, Mr Mudura has not properly sought leave under O.53, r.3 and, secondly, Mr Mudura has failed to exhaust his available remedies, being a review to the Commissioner under reg 17 of the Corrections Service Regulations 2011.

[9] Mr Mudura filed a Reply on 26 January 2024. He contends that he has tried to review the transfer but has not been permitted by Corrections to do so.

[10] At the hearing, Mr Mudura reiterated his concern about Correction's investigation of his alleged role with the contraband. He stated that Correction's decision to transfer him back to the Maximum Centre was not in writing but advised to him verbally. He says he has requested the officer in charge to convey his complaint about his transfer to the Commissioner, but the officer in charge has refused to do so. Mr Mudura seeks a determination, if leave is granted, by this Court that his transfer is unlawful.

Decision

[11] Pursuant to O.53, r.3(2) and (3) an applicant must file a notice in Form 32 seeking leave to apply for judicial review. The Applicant has instead filed an Ex-Parte Summons supported by a Statement. He also supplies an affidavit attesting to the truth of his Statement. Mr Mudura is self-represented and for this reason some allowance will be made. I will treat Mr Mudura's Ex-Parte Summons as the requisite notice. Subrule (5) provides that leave shall not be granted unless '*the applicant has a sufficient interest in the matter to which the application relates*'.

[12] In *Sharma v The President of the Republic of Fiji* [2023] FJHC 18 (26 January 2023) Amaratunga 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)

“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.”

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:

- (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.*

[13] 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.*

[14] The respondents oppose leave on the basis that Mr Mudura has failed to file the proper application and has an alternative remedy available by way of a review under regulation 17 of the Corrections Service Regulations 2011.

[15] In light of Mr Mudura’s contention at the hearing that he has tried to avail himself of the right of review but not been allowed that opportunity, I directed counsel for the respondents to file an affidavit providing details of the decision made by Corrections to transfer Mr Mudura to the Maximum Centre in July 2023 as well as the following information:

...what Corrections say are the events that happened in relation to the transfer. When did it happen? Why did it happen? How was it conveyed to Mr Mudura, just verbally or in writing? And whether he has been given an opportunity to have it reviewed by the Commissioner and what the process is for that...¹

[16] An affidavit was filed for Alevio Turaganivalu on 4 September 2024. Mr Turaganivalu is employed with Fiji Corrections Service. He confirmed that Mr Mudura was transferred to the Maximum Centre on about 13 July 2023 ‘*after he was found in possession and concealing a contraband*’. Mr Turaganivalu further deposes:

5. The Applicant was also disciplined for inflicting self-injuries on himself which led to the decision to transfer him back to the

¹ Transcript of hearing on 3 May 2024.

Maximum Corrections Centre on the directive of the 3rd Respondent.² I further state that inmates involved in smuggling contrabands are transferred to the Maximum Corrections Centre which also applied to the Applicant.

6. That the Applicant's transfer to the Maximum Correction Centre was made in accordance with section 5(1) (c) of the Corrections Service Act 2006 where the Commissioner have the control of all prisoners and may allocate them to such prisons as he or she sees fit.

7. I further state that the Applicant has the remedy under section 17 of the Corrections Service Regulations 2011 whereby, if the Applicant is aggrieved by the decision of the 1st and 2nd Respondent to transfer the Applicant from Medium Correction Centre to Maximum Correction Centre, the Applicant has the alternative remedy to review the decision of the 1st and 2nd Respondents decision by the 3rd Respondent.

[17] I had, of course, directed the respondent to provide details of the review process and specifically what has happened to Mr Mudura's application for review that he says he has made. This information has not been provided.


[18] In light of the failure by the respondent to provide the information I cannot be satisfied that Mr Mudura has been permitted an opportunity to review the decision he complains of and/or that the Commissioner has complied with the requirements and process prescribed under Part 4 of the Corrections Service Regulations 2011. The argument by the respondents that Mr Mudura has an alternative remedy can only succeed if Mr Mudura is permitted an opportunity to avail himself of that remedy. I had hoped to be informed on the status of Mr Mudura's review but remain in the dark.

[19] In light of the above, my orders are as follows:

- i. Leave is granted to Mr Mudura to apply for judicial review.

² I am unable to reconcile this statement with the earlier statement that Mr Mudura had already been transferred to the Maximum Centre after being found in possession of the contraband.

- ii. Costs to be in the cause.



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D. K. L. Tuiqereqere
JUDGE

Solicitors:

Attorney General's Office for the Respondents