

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. **HBM 104 of 2022**

IN THE MATTER of an application for
Constitutional Redress contrary to
Section 44(1) of the Constitution 2023.

BETWEEN : **VILIAME WAQANINAVATU**

APPLICANT

AND : **THE STATE**

1st RESPONDENT

AND : **THE ATTORNEY-GENERAL**

2nd RESPONDENT

Coram : **Banuve, J**

Counsels : Applicant in Person
Attorney-General's Chambers For 1st and 2nd Respondents

Date of Hearing : 8th October 2024

Date of Ruling : 20th December 2024

RULING

A. Introduction

1. The Applicant seeks constitutional redress pursuant to section 44 of the **Constitution 2013**, premised on events that occurred between 2nd June 2021 and 6 September 2021, concerning the administration of compulsory COVID-19 vaccination without his consent, as an inmate, which he states breaches his rights as guaranteed under sections 11(1) and (3), of the Constitution.
2. The Applicant deposed and filed 2 affidavits on 17th June 2024 to support his application for constitutional redress together with written submissions dated 2nd September 2024, to further clarify his position.
3. The Respondents was content to rely on Written Submissions filed in Court on 8th October 2024, to set out its response.

B. Narration

4. The Application for Constitutional Redress was submitted on Form HCCR 1 [To be filed when Applicants do not have a lawyer], dated 2nd June 2022. Whilst the grounds for redress were not clearly set out, the primary redress issues were gleaned from the affidavits filed in support.
5. The Applicant states that as an inmate initially, at the Lautoka Correctional Center he was informed on 28th March 2021, that the COVID-19 vaccine would be administered between 31st May 2021 and 1st June 2021. Vaccination was stated not to be mandatory.
6. On 31st May 2021, the Applicant informed the vaccination team that he did not consent to being vaccinated and asserted his right as protected by section 11(1) and (3) of the Constitution.
7. The Applicant alleges that he was then subjected to mistreatment by the Prison authorities as a consequence of his decision to not consent to being vaccinated.

C. The Law

8. Section 44 of the Constitution states;

Enforcement

44(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.

9. Rule 3 of the *High Court (Constitutional Redress) Rules 2015* states;

Application for redress

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 matters 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 arose unless the judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.

D. The Position of the Parties

10. The application for redress filed by the Applicant, after a transfer to Naboro Medium Security Prison, is premised on the breach of his rights as guaranteed by sections 11(1) and (3) of the Constitution, which state;

Freedom from cruel and degrading treatment

(1) Every person has the right to freedom from torture of any kind, whether physical, mental or emotional, and from cruel, inhumane or disproportionately severe treatment or punishment

.....

(3) *Every person has the right to freedom from scientific or medical treatment or procedures without an order of the court or without his or her informed consent, or if he or she is incapable of giving informed consent, without the informed consent of a lawful guardian.*

11. In written submissions, the Applicant raise the following issues in relation to the breach of his rights pursuant to sections 11(1) and (3) of the Constitution, and rely on case authority such as *Sailosi Naba v State*- Civil Action No HAC 0012 of 2000L¹;

(i) In considering the human rights of prisoners, the State needs to bear in mind its obligations under the principle International Human Rights Conventions and the Court's intervention is dependent on the Convention's application to the right in question. In *Naba*, the Court found that the bucket system utilized at the remand facility at the Lautoka Correctional Center, as offensive and did not accord with sense of social justice and fairness our community expect in this day and age. Prisoners retain fundamental human rights.

(ii) The Applicant, has had to be forced to be vaccinated after fearing loss of life and faced with the trauma of being segregated and locked up for extensive period.

12. The Applicant seeks relief by way of;

(i) Declaration that his rights have been contravened

(ii) Compensation

13. In response, the Attorney-General on behalf of the First and Second Respondents states;

(i) The incidents complained of by the Applicant occurred approximately 9 months prior to the date the Application for Redress was filed, in contravention of the restriction in Rule 3(2) of the *High Court (Constitutional Redress) Rules* 2015. The application must be filed within 60 days of the alleged incident occurring and not 7 months outside of the said time limitation.

¹ Also *Proceeding Commissioner, Fiji Human Rights Commission v Commissioner of Police and AG-Civil Appeal No ABU 3 of 2006*

- (ii) The Plaintiff is unable to show any exceptional circumstance to justify the filing of the Application, outside the 60 day time limitation, and the excuse that was provided that he could not file a complaint in court is not reasonably acceptable. The AG relies on authority such as *Lutunatabua v AG* [2020] FJHC 186, for the proposition that Rule 3(2) mandates and requires the Court not to admit and/or entertain an Application for Constitutional Redress after the expiration of the stipulated timeframe.
- (iii) The Plaintiff had an adequate alternative remedy which he ought to have exhausted first, before filing an application for constitutional redress, that being he ought to have exercised an alternative process of filing a complaint with a visiting senior magistrate as provided for under regulation 157 of the Prisons Regulations [Cap 86] and relies on authority such as *Tawatatau v AG* [2019] FJHC 845.
- (iv) On these grounds, the AG seeks that the Application for Constitutional Redress be dismissed.

E. Analysis

14. There are 2 issues which the Court would focus on its finding.

(i) Judicial Comity

15. The Court is bound by the issue of judicial comity to follow the decision of this Court in constitutional redress cases such as *Lutunatabua v AG* [220] FJHC 186, for the proposition that Rule 3(2) of the *High Court (Constitutional Redress) Rules 2015* mandates and requires the Court not to admit and/or entertain an *Application for Constitutional Redress* filed after the expiration of the 60 day time period, as was done in this case. Further, it is bound by the decision of *Tawatatau v AG* [2019] FJHC 845 for the proposition that the Plaintiff ought to have first exhausted the remedy of filing a complaint with a visiting senior magistrate as provided for under regulation 157 of the *Prisons Regulations* [Cap 86], as a more *direct and effective* remedy of for addressing his grievance, before resorting to the Rule 3(2) of the formal redress process.

16. Modern practice exhorts that a judge at first instance will, as a matter of judicial comity, follow the rulings and decisions of other judges of coordinate jurisdiction, unless he is convinced that the judgement was wrong.²
17. The Court is of the view that the 2 earlier decisions are not wrong in their exposition of the procedural hurdles that underlie constitutional redress and the consequence of not complying with them and applied to the facts of this case, must mean that the Application for Constitutional Redress, in this instance be dismissed, also.

(ii) Section 11 of the Constitution not contravened.

18. Chapter 2 contains the Bill of Rights, and section 44 governs the special process for the enforcement of these rights, through constitutional redress. The primary right which the Plaintiff claims was infringed in 2021, was that governed by sections 11(1) and (3) of the Constitution. The Plaintiff and his advisers overlook, however, the limitation that the Bill of Rights provisions have been made subject too, as set out in section 6, sub-section 5(a)-(c) of the Constitution, which is relevant to this discussion;

“(5) The rights and freedoms set out in this Chapter apply according to their tenor and may be limited by-

(a)

(b)

(c) limitations which are not expressly set out or authorized (whether by or under a written law) in relation to a particular right or freedom in this Chapter, but which are necessary and are prescribed by a law or provided under a law or authorized or permitted by a law or by actions taken under the authority of a law.(italics for emphasis)

19. What **law** would be prescribed as a limitation to the right claimed by the Plaintiff pursuant to section 11 of the Constitution?
20. The relevant law which could be considered as limiting the right under section 11 of the Constitution would have initially been the *Health and Safety at Work (General Workplace Conditions) Regulations 2003* (the “Principal Regulations”). The Principal Regulations were repealed by the **Health and Safety at Work (General Workplace Conditions)(Amendment) Regulations 2021**, which came into force on 8th July 2021.³

² Halsbury, 4th ed, vol 26, para 580

³ Regulation 1.-(2) These Regulations come into force on the date of publication in the Gazette.

21. Whilst the parties did not discuss the application of the law, the Court, pursuant to section 21 of the *Interpretation Act [Cap 7]*, has taken ‘judicial notice’ of the application of the 2021 Regulations;

21. *All subsidiary legislation shall be published in the Gazette, shall be judicially noticed and shall come into operation on the date of such publication, or if it is enacted either in the subsidiary legislation or in some other written law that such subsidiary legislation shall come into operation on some other day then, it shall come into operation accordingly”*

As Kermode, J clarified in *AG v Parmanadan* [1968] FLR 10;

“For similar reasons I hold that the proper construction of section 21 of the Interpretation Ordinance 1967 is that all Courts are required to take judicial notice of all subsidiary legislation, without proof of its publication in the Gazette.....”

22. The Applicant specifically seeks constitutional redress for events that allegedly occurred between 2nd June 2021 and 6th September 2021, that breached his rights pursuant to section 11(1) and (3), of the Constitution, as stated in paragraph 3 of the Affidavit in Support filed on 17th June 2024;

“3. THAT from the 2nd day of June, 2021 until the 6th day of September 2021, I went through a very discontentment, painful, hurting, humiliation, degrading, severe, disappropriate experience and ill treatment of my life here in prison where my right contrary to section 11(1) of the Constitution 2013 has been violated or contravened”.

23. The right which the Plaintiff alleges to have been contravened over this period under section 11(1) of the Constitution, would be the administration of the COVID-19 vaccine, without his consent.

24. The *Health and Safety at Work (General Workplace Conditions)(Amendment) Regulations 2021*, which amended the ‘Principal Regulations’ and introduced compulsory COVID-19 vaccination in Fiji, had come into force on 8th July 2021.⁴

25. It is reasonable therefore for the Court to hold that the *2021 Regulations* were in force over the period 6th June 2021 to 6th September 2021, which the Plaintiff deposed was

⁴ Regulations 52C and D-(1) and (2)

when the alleged breach of his constitutional rights, under section 11(1) and (3) of the Constitution, occurred. Alternatively, the 2021 Regulations was in force when the Application for Constitutional Redress was filed on 2nd June 2022.

26. Were the 2021 Regulations a proportionate and a justified limitation of the Plaintiff's constitutional right under section 11 of the Constitution?
27. This Court is guided by earlier rulings on this issue in *Fijian Teachers Association v State* [2024] FJHC 431; HBM059. 2021(15 July 2024) (per Tuiqereqere, J) and *State v Minister for Employment, Ex-Parte Vasiti Toga* [2024] FJHC 39 (25 January 2024)(per Sharma, J)

“ [37] *I am, therefore satisfied that the 2021 Regulations were proportionate and justified. I note that this conclusion is consistent with the determination by Sharna J in State v Minister for Employment, Ex –Parte Vasiti Toga* [2024] FJHC 39 (25 January 2024) wherein the learned Judge was considering the application for leave for judicial review. The applicant was seeking orders that the 2021 Regulations were in breach of her rights under the Constitution. The applicant did not wish to be vaccinated as she did not believe vaccines worked. She forfeited her employment with Fiji Revenue and Customs Services and sought orders from the Court that the 2021 Regulations were invalid....Notwithstanding, Sharma, J determined⁵;

16. *No one is forcing [the applicant] to take COVID-19 vaccines nor has she identified what type of degrading treatment she has suffered.*
17. *The law clearly allows for limitation of rights of individuals in order to make a workplace safe for all other workers. Workers must consider the rights of all other workers. If an express law places a limitation on any Bill of Rights under the Constitution, it will not ...be deemed to be inconsistent with the Constitution.*
18. *Covid-19 is a reality in Fiji. Many persons have been affected by this outbreak. Vaccinations are not only being administered in Fiji. It is being developed and administered in all the developed countries in the world.*
19. *The Regulation herein are not unlawful and/or unconstitutional. Neither are they ultra vires or inconsistent with the Constitution.*

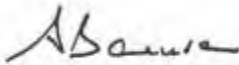
⁵ Per Tuiqereqere J

28. This Court finds that the constitutional right enshrined under sections 11(1) and (3) of the Constitution, were specifically limited pursuant to section 5 (c) of the Constitution, by law, and were not breached as claimed by the Plaintiff, by the application of this law, the *Health and Safety at Work (General Workplace Conditions)(Amendment) Regulations 2021*, which prescribed, authorized and permitted the administration of compulsory COVID-19 vaccination, even to persons like the Plaintiff who had refused consent.⁶

ORDERS:

1. **The Application for Constitutional Redress filed by the Plaintiff on 2nd June 2022 is dismissed in its entirety.**
2. **As the case raises important constitutional questions, no orders as to costs are made.**




Savenaca Banuve
Judge

At Suva
20th December 2024

⁶ There is no evidence that the Plaintiff has been exempted pursuant to regulation 52(C)(3) of the 2021 Regulations. The said Regulations uses the terms “Employer” and ‘worker’ but it is clear that it applied to persons like the Plaintiff. Even if there was some doubt about this, the 2021 Regulations clearly applied to the Commissioner of Prisons and the Correctional Services as ‘Employer’ by virtue of **regulation 52E(5)(d)**