

**REGINALD ALAN LYNDON v LEGAL AID COMMISSION and Anor**

HIGH COURT — CRIMINAL JURISDICTION

5 SINGH J

21 February 2003

[2003] FJHC 323

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**Citizenship and migration — detention — application to declare the decision unconstitutional — extradition of a non-Fiji citizen — whether a non-Fiji citizen is entitled to legal aid — whether application for legal aid was premature — equality and right to services of a legal practitioner — 1997 Constitution ss 27(1)(e), 28, 38, 38(2).**

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Reginald Alan Lyndon is a foreigner being extradited for offences committed in the USA. He applied for legal aid under the provisions of the Legal Aid Act. His application was rejected on the ground that he is a non-Fiji citizen. He sought an application to declare the decision unconstitutional and contended that the Legal Aid Act does not require Applicants to be Fiji citizens. The Legal Aid Commission submitted that the restrictions imposed were reasonable and justifiable. Also, the application was premature as the Applicant had adequate alternative remedy and that the decision did not breach the Constitution.

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**Held** — (1) The Constitution provides that everyone has the right to recognition everywhere as a person before the law and all are equal before the law and are entitled without any discrimination to equal protection of the law. The protection of the section does not extend to equality between individuals, corporations or groups within the community. There is no obligation on them to provide equal treatment. If persons are within the jurisdiction either as citizens or visitors, these provisions apply. A person who is in Fiji is subject to its laws. He is bound to obey its laws. He cannot just ignore the laws.

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(2) The objective of the Legal Aid Act is to serve the interest of a disadvantaged group of persons that are impoverished and who are brought before the courts of this country for one reason or another. There can be instances where grave injustice could occur if legal aid is denied on grounds of citizenship. If a non-citizen accused charged with a serious offence remains unrepresented, the courts would stay or postpone the proceedings in order that a fair trial is given. That is all the court can do. It cannot force the commission to grant aid.

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(3) The Guidelines of Legal Aid Commission that a person is a Fiji Citizen before he receives legal aid infringes the equality provisions of the Constitution. In case of persons charged in Fiji with serious criminal cases, it does not override the constitutional right because of the deleterious effect. The result of non-representation could be that such a person may not be able to have a fair trial, and the proceedings being permanently stayed or adjourned for long periods.

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(4) In the case of the Applicant, he is not charged in Fiji for a criminal case nor is proceedings complex. He has an adequate alternative remedy and accordingly the interest of justice is not compelling enough that he be given the services of legal aid under a scheme of legal aid.

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Application dismissed.

**Cases referred to**

*Dietrich v R* (1992) 177 CLR 292; 109 ALR 385; *State v Timoci Silatolu* Crim Act No HAC 11 of 2001, cited.

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*R v Edwards Books and Art Ltd* (1986) 2 SCR 713; (1987) 35 DLR (4th) 1; *R v Oakes* (1986) 26 DLR (4th) 200, considered.

*G. O. Driscoll* for the Applicant.

*M. Waqavonovono* for the Legal Aid Commission.

5 *J. Naigulevu* for the State.

*J. Udit* and *Oji* for the Attorney-General.

*V. Ratuveli* for the Human Rights Commission.

**Singh J.**

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### Issues

This case concerns the application to non-Fiji citizens of the “equality” and “the right to services of a legal practitioner” provisions of the Fiji Constitution enshrined in ss 28 and 38 which for convenience are set out later in the judgment.

15 At issue is whether the guidelines as set up under the Legal Aid Act and which guidelines deny legal aid to non-Fiji citizens violate the above provisions of the Constitution.

### Nature of application

20 This is an application by Reginald Alan Lyndon under the Constitutional Redress Rules 1997. The Applicant is a foreigner. He has extradition proceedings pending against him to extradite him to the USA for offences committed in that country. He applied for legal aid under the provisions of the Legal Aid Act. His application was rejected on the grounds that he is a non-Fiji citizen.

25 By his motion the Applicant is seeking:

(a) A declaration that the decision of the Director of Legal Aid Commission to deny him legal aid on the ground that he is not a Fiji citizen is unconstitutional being contrary to ss 27(1)(e) and 38(2) of the 1997 Constitution.

30 (b) That the Director of Legal Aid Commission acted ultra vires in that the Legal Aid Act does not require that Applicants must be Fiji citizens.

(c) A declaration that to deny the Applicant legal assistance for his extradition hearing will breach s 28(1)(d) of the Constitution.

35 (d) An order for the state to provide him with legal representation in the Magistrates Court.

(e) Order that the proceedings in the Magistrates Court be stayed indefinitely until he obtains legal representation.

### Submissions of parties

40 Mr O’Driscoll for the Applicant submitted that there is nothing in the Legal Aid Act, which says that non-Fiji citizens are not entitled to legal aid. If non-citizens are denied legal aid on this basis he is discriminated against on grounds of “place of origin” — s 38(2)(a) of the Constitution. Second he submits that s 28(1)(a) of the Constitution is infringed. He submitted that the Applicant

45 is held in prison and there are inadequate facilities in the prison for the Applicant to prepare for his defence. The offence with which he is charged is serious and the Applicant would be handicapped in protecting his own interest. Mr Ratuveli who appeared for Human Rights Commission as amicus curiae submitted that the Bill of Rights provisions extend to all persons in Fiji and are not limited to Fiji

50 citizens. There are limitations in the Bill of Rights but such limitations must be reasonable and justifiable.

Ms Waqavonovono made detailed written submissions on behalf of the Legal Aid Commission. Briefly the essence of her submissions is that the Legal Aid Commission acted in accordance with the Legal Aid Act and guidelines approved by virtue of s 8 of that Act. She relied on s 38(7) of the Constitution on the basis  
5 that restrictions imposed on non-citizens are “reasonable and justifiable” in a free and democratic society. She referred to the extent of work carried out by the commission compared to the resources available to the commission.

Second, she said that this application is premature as the Applicant had adequate alternative remedy. The alternative remedy was to appeal to the full  
10 commission under s 14 of the Legal Aid Act against the director’s decision to refuse relief.

Third, she said s 28(1)(d) of the Constitution was not breached as interests of justice did not warrant that the Applicant be granted services of a legal practitioner under the scheme of legal aid.

15 Mr Naigulevu pursued the meaning of “interest of justice” in detail. He urged upon the court to look at the provisions of the Bill of Rights “contextually” that is in light of the circumstances which are before the court. He submitted that the rights of the Applicant must be balanced with the collective goals of citizens of Fiji in light of limited resources Fiji had. Seen in this light the restrictions  
20 imposed by the guidelines are reasonable and justifiable.

Mr Udit for the Attorney-General submitted that the Legal Aid Commission is given a task. He submitted that if resources afforded to the commission are not adequate, then the Legal Aid Commission must give priority to citizens of Fiji. He said the preamble refers to “common citizenship” and “give ourselves  
25 this constitution”. Ourselves are, he said, citizens of Fiji.

### Relevant constitutional and statutory provisions

A number of provisions from the Bill of Rights (Ch 4 of the Constitution) and provisions of Legal Aid Act were referred to by various parties and I therefore set  
30 out these relevant provisions at the outset. The relevant rights provisions of the Constitution are — s 28 of the Constitution which reads:

S.28(1) Every person charged with an offence has the right:

- (c) to be given adequate time and facilities to prepare a defence, including, if he or she so requests, a right of access to witness statements.
- 35 (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid.

Section 38 of the Constitution, which deals with equality, reads:

40 38(1) Every person has the right to equality before the law

(2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her:

- (a) actual or supposed personal characteristics or circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary  
45 language, economic status, age or disability ...

or on any other ground prohibited by the Constitution.

(3) Accordingly, neither a law nor an administrative action taken under a law may directly or indirectly impose a disability or restrictions on any person on a prohibited ground.

50 (7) A law is not inconsistent with subsection (1), (2) or (3) on the ground that it

- (c) imposes on persons who are not citizens a disability or restriction, or confers on them a privilege or advantage, not imposed or conferred on citizens

but only to the extent that the law is reasonable and justifiable in a free and democratic society.

### The interpretation clauses

5 The Constitution also sets out certain guidelines as to how the provisions are to be interpreted or construed. The relevant ones are — s 21(4) which reads:

In considering the application of this Chapter to particular legislation a court must interpret this chapter, contextually, having regard to the content and consequences of the legislation, including its impact upon individuals, groups or communities.

10 Section 43(2) which reads:

In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.

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### Issues of equality

The issue before the court is whether the denial of legal aid to the Applicant is a violation of his rights of equality before the law on the grounds that he is *unfairly discriminated* because of his *place of origin* — s 38(2)(a) of the

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Constitution.

Section 38(1) of the Constitution has its origins in Arts 6 and 7 of the Universal Declaration of Human Rights.

Article 6 reads:

25 Everyone has the right to recognition *everywhere* as a person before the law

Article 7 reads:

... all are equal before the law and are entitled without any discrimination to equal protection before the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.

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All of the above provisions talk of equality *before the law*. Equality before the law means equal benefits and equal protection of the law without discrimination on grounds set out in s 38(2)(a). The protection of the section does not extend to equality between individuals, corporations or groups within the community.

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There is no obligation on them to provide equal treatment. The equality provisions come into play where an individual or a group questions an Act of Parliament or regulations made under it.

Fiji having adopted the provisions of the Universal Declaration of Human Rights (UDHR) cannot just pay lip service to such provisions. I agree with

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Mr Ratuveli that the Bill of Rights applies to all persons who are in Fiji and not limited to citizens of Fiji. If persons are within the jurisdiction either as citizens or visitors, these provisions apply. A person who is in Fiji is subject to its laws. He is bound to obey its laws. He cannot just ignore our laws. Equally a person who is subject to our laws is entitled to the protection of our laws regardless of

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where he/she is from. I am fortified in my view because wherever rights were to be confined to citizens of Fiji, the word citizen is used in those sections of the Bill of Rights provisions. Section 34(1) speaks of rights of citizens to enter and remain in Fiji and subs (2) talks of rights of citizens to passport.

To read the word “person” as a citizen is to unnecessarily restrict the meaning.

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It would also do injustice to interpretation provision contained in s 3(a) which reads as follows:

... a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object;

5 A purposive approach to the interpretation of the Constitution is required and not a restrictive one. I hold therefore that to discriminate against a person on basis of citizenship (place of origin) violates s 38(1) of the Constitution.

### Legal Aid Act

10 However, s 38(7) provides a justification for imposing a limitation and that is the limitation imposed is “reasonable and justifiable in a free and democratic society”. The Legal Aid Commission has argued that the restriction of confining legal aid to Fiji citizens is justifiable. This necessitates looking into the purpose of the provisions of the Legal Aid Act 1996. The Legal Aid Act establishes a commission.

15 Section 6(1) states:

The Commission shall provide, subject to the resources available to it, legal assistance to impoverished persons.

Section 8(1) states:

20 The Commission shall from time to time formulate and make available to the public guidelines to be applied —

- (a) in determining the types of matters in which legal aid services will be provided;
- (b) in determining the eligibility of persons to receive legal assistance.

25 Section 9 provides that in considering legal aid, the commission may consider prospect of success of the case.

Pursuant to s 8 of the Act the Legal Aid Commission prepared written guidelines on 11 October 2002. However, Ms Waqavonovono informed the court that the guidelines were prepared in 1998 and presented to commission’s meeting in October 1998 and acted upon all these years.

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### Are legal aid guidelines justifiable?

The Canadian case of *R v Oakes* (1986) 26 DLR (4th) 200 discussed the meaning of the words “reasonable and demonstrably justified” in a free and democratic society. It suggested to consider whether a law measured up to the “reasonable and demonstrably justified” one has to first look at the objectives which the law or statute sets out to achieve. It said those concerns must be pressing and substantial.

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Dickson CJ at 227 expressed the first test as:

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First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant, overriding a constitutionally protected right or freedom”: *R v Big M Drug Mart Ltd*, supra, at 430 CCC, 366 DLR, 352 SCR. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

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The second step in the inquiry whether the law is reasonable and justifiable is what Dickson CJ described as the proportionality test. Under this test the court looks at what right is being infringed, the extent to which it is infringed, how far does the infringement of this right enhances the objectives or goals of the legislation.

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He expressed the second test as follows:

Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves “a form of proportionality test”: *R v Big M Drug Mart Ltd*, supra. Although, the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question: *R v Big M Drug Mart Ltd*, supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.

In *R v Edwards Books & Art Ltd* (1986) 35 DLR 1 at 41 the test was expressed as follows:

Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is, nevertheless, outweighed by the abridgment of rights.

The *Oakes* decision is the landmark case on fundamental rights and permitted restrictions on those rights. The case lays down certain propositions which may summarised as follows:

- (1) A party which relies on a restriction of a human right has to justify it, that is, the burden of proof lies on that party. It is a civil standard.
- (2) The objectives or purpose of the statute or regulations must be of sufficient importance to override a constitutionally protected right.
- (3) This means chosen to restrict the right must be reasonable and demonstrably justifiable under the three elements of proportionality test:
  - (a) measures taken must be carefully designed and rationally connected to the objective;
  - (b) there should be minimal impairment of the right in question;
  - (c) there must be a sense of balance between the deleterious effect of the measures and objective to be attained.

The objective of the Legal Aid Act is to serve the interest of a disadvantaged group of persons that is those who are impoverished and who are brought before the courts of this country for one reason or another. Prior to 1996 even those who were charged with serious offences often appeared unrepresented in trials because they could not afford a counsel. Normally the seriousness of the offence dictates the legal fees. Equally in matrimonial matters even where children were involved, parties were unrepresented and the welfare of children was sacrificed in the process. The scheme of legal aid greatly assisted deserted wives and children to seek remedies through the courts. Mr Ronald Prasad the executive officer in his affidavit disclosed the extent of applications received over the years from 1998 to 2001. Needless to say the number of cases handled by the commission has doubled over these years. It is mainly work in criminal and family law areas. The commission also handles a duty solicitor scheme under which clients are assisted with mitigation and bail applications.

His affidavit further disclosed that the commission operates on limited funds for the growing demand. One of its sources of funding was the Law Society but this funding has been diminishing and this year it has received no funding from the Law Society. The Fiji Government gives it a grant of \$250,000 for staff salary  
5 and administration costs. It basically relies on donor agencies to carry out its work.

Given the growing demand and diminishing resources, the Legal Aid Commission hardly has the monetary ability to meet demands placed upon by impoverished citizens of this country.

10 In *R v Oakes* at 228 it was said that even if the proportionality test were satisfied “it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve”.

There can be instances where grave injustice could occur if legal aid is denied  
15 on grounds of citizenship. As an example take a visitor to our shores who is attacked in the course of a robbery and in defence he kills the assailant. He is charged for homicide and is kept in custody. Should he be excluded from legal aid because he is non-Fiji citizen?

If the non-citizen accused charged with a serious offence remains  
20 unrepresented, the courts would most probably stay or postpone proceedings on the basis that a fair trial given the seriousness of charge would be impossible — *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385. That is all the court can do. It cannot force the commission to grant aid.

Having looked closely at the guidelines, I consider such extreme  
25 circumstances are met by the guidelines. In paragraph A under the heading preliminary it states:

The Commission reserves the right in its complete discretion in special circumstances to provide legal assistance to an Applicant notwithstanding that he/she is not within these Guidelines.

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### **Right to counsel**

One of those special circumstances would of course be interest of justice, which takes me to the consideration of that phrase in s 28(d) of the Constitution — the right to counsel section. This was one of the sections on which the  
35 Applicant relied. Section 28(d) of the Constitution is similar to Art 14(3) of the International Covenant on Civil and Political Rights (ICCPR). It states:

14. (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

40 (4) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the *interest of justice* so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Fiji is not a signatory to the ICCPR. However, that does not mean the courts of  
45 this country can ignore its provisions given the clear and mandatory words of s 43(2) which says “courts ... *must*, if relevant, have regard to public international law” Justice Kepa Chairperson of Human Rights Commission in his paper “Bill of Rights and Constitutional Redress” delivered at Attorney-General’s conference stated as follows:

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Fiji is unfortunately, not a State Party to ICCPR. Notwithstanding that, however, the ICCPR is still, in terms of Section 43(2) of the Constitution, “public international law



applicable to the protection of the rights set out in this Chapter.” Furthermore, it is “relevant” and therefore the Court “must” have regard to it. The distinction is between Fiji having ICCPR obligation in international law, which it has not because it is not a party, and a domestic Court having regard to the Covenant — which it is required to do by Section 43(2).

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### Interests of justice

The right to counsel both under our Constitution and Art 14 mentioned above is not an absolute right. It is subject to requirement of interests of justice. The meaning of the phrase “interest of justice so require” in s 28(d) of the Constitution was considered by Wilson J in *State v Timoci Silatolu* HAC0011 of 2001. He considered that the following factors need to be looked at in considering the interest of justice:

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- (a) the seriousness of the offence with which the Applicant is charged;
- 15 (b) the length and complexity of the case;
- (c) the potential sentence involved;
- (d) the ability or inability of the Applicant to contribute effectively to his own defence, if he was forced to defend himself.

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The Applicant in the present case has not been charged for an offence in Fiji. He has been arrested and detained for the purposes of extraditing him to the United States of America to answer charges in that jurisdiction for drug related offences. The only purpose why the Applicant has to appear in court is to consider a preliminary matter to see if there is evidence that warrants his extradition. Such inquiries are generally done not by witnesses being called but by documentary evidence. It is not a complex procedure nor is it lengthy. It normally takes a few hours. There is no need for the Applicant to cross-examine anybody. His guilt or innocence is not an issue in the extradition proceedings. That issue can only be decided by the courts in the United States. He can ask for counsel in that country if he is extradited.

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The *Silatolu* case does not assist the Applicant at all as that dealt with an accused that was charged under our domestic laws with another offender who was given legal aid but Silatolu was not. There the proceedings because of the gravity of the offence were stayed to allow the Applicant to seek legal aid, which he did and he also appealed to the commission against the director’s ruling. He had exhausted all his remedies.

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I do not consider that Wilson J intended to give an exhaustive list of factors that need to be considered when looking at the interests of justice. If I may add one also has to look at the conduct of the Applicant in the way he proposes to conduct his case.

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The Applicant in the present case had on three occasions successfully managed to get the Magistrates Court to vacate committal hearings. On the fourth hearing date he offered to leave the country under escort of the United States marshals. However he did not do that but sought legal aid to contest extradition and brought proceedings for judicial review in the High Court and appealed against the Magistrates ruling on proposed conduct of the committal proceedings. He was represented by counsel in the High Court in earlier proceedings. This is his third proceeding in the High Court. He indeed has embarked on a lengthy journey littered with litigation all the way.

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I am of the view that given the circumstances of the Applicant and the nature of extradition proceedings, the Applicant does not satisfy the interest of justice criteria.

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### Adequate alternative remedy

Ms Waqavonovono had in her submissions had also submitted that the relief should be refused on grounds that there was “adequate alternative remedy”. She says that the Applicant has failed to exhaust the remedies available to him. He could have appealed to the commission against the director’s decision not to grant him legal aid but he did not. The Applicant nowhere in his original affidavit dated 15 November 2002 says he appealed. It is only when Ronald Prasad in his affidavit (paras 20 and 21) stated that he informed the Applicant that he could appeal the director’s decision that the Applicant in reply said he did but he provided no copy of any correspondences. He says the commission probably did not receive his appeal. I agree with Ms Waqavonovono’s submission that the Applicant should have exhausted his remedies under the Legal Aid Act instead of moving the court and thereby placing added burden on time and resources both of the commission and the court.

In *Silatolu’s* case Wilson J in discussing “adequate alternative remedy” said:

... the onus is on the State to satisfy me that “an adequate alternative remedy” is available to the Applicant in the sense of an adequate remedy alternative to (and other than) constitutional redress. An example of an alternative remedy which the Court might deem relevant might be if an offer were to be made by a generous and altruistic patron or philanthropist to pay for the Applicant’s defence and if it were open to the Applicant to accept such an offer.

In the present case, the Applicant had a counsel. Four times committal hearings were vacated. He should have directed his resources and energies to contest the extradition proceedings if that is what he was really interested in. He had his adequate remedies to use his counsel to represent him in extradition proceedings but chose to postpone and prolong those proceedings and file numerous applications in the High Court — a judicial review No 43 of 2001 before Pathik J, Criminal Appeal 24 of 2002 before Byrne J and present application before me and one more Miscellaneous Action 4 of 2003 seeking Constitutional Redress where again a counsel is representing him which I was told was at the request of British High Commission. So there is a “generous and altruistic patron” to take care of his defence.

One result of Legal Aid Commission not providing services of counsel to a non-Fiji citizen charged with a serious offence is that the courts may exercise their power to stay proceedings until legal representation is available. However, the courts cannot adjourn cases indefinitely as the accused has a constitutional right to have his case heard within a reasonable time — s 29(3) of the Constitution. This would result in a vicious circle. The Legal Aid Commission refusing aid, the courts adjourning and staying proceedings and the accused’s right to early hearing being violated.

I come to the conclusion that the requirement in the guidelines of Legal Aid Commission that a person be a Fiji Citizen before he receives legal aid infringes the equality provisions of s 38 of the Constitution. In case of persons charged in Fiji with serious criminal cases it does not meet the tests set out in *Oakes* case for overriding the Constitutional right because of the deleterious effect. The result of non-representation could be that such a person may not be able to have a fair trial, and the proceedings being permanently stayed or adjourned for long periods.

In the case of the Applicant, he is not charged in Fiji for a criminal case nor are proceedings complex, and there is adequate alternative remedy and accordingly I come to the conclusion that the interest of justice are not compelling enough that he be given the services of legal aid under a scheme of legal aid.

### Conclusion

I therefore dismiss the application. However, I would answer the constitutional redress questions to which Ms Waqavonovono sought answers:

10 Question 1 — Does the requirement in the guidelines of Legal Aid Commission that a person must be a Fiji citizen before he is entitled to Legal aid infringe the provision of Section 38 of the Constitution?

Answer — Yes.

15 Question 2 — If the citizenship requirement in the guidelines infringes section 38 of the Constitution is it “reasonable and justifiable” in a free and democratic society under section 38(7) of the Constitution?

Answer — In case of those charged under the laws of Fiji for serious offences — No. In case of non-serious offences — Yes.

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*Application dismissed.*

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