

IN THE HIGH COURT OF FIJI

CIVIL JURISDICTION

AT LAUTOKA

Judicial Review HBM No. 07 of 2015

BETWEEN : **State**

A N D : **WESTERN DIVISION SUPERVISOR OF CORRECTIONS** empowered under the Prisons Act Cap 86 and or the Prisons and Corrections Act 2006 to hear and determine proceedings against prisoners in relation to prison offences.

1st RESPONDENT

A N D : **COMMISSIONER OF FIJI CORRECTION SERVICES** as appointed under the Prisons and Corrections Act 2006

2nd RESPONDENT

EX-PARTE : **SALENDRA SEN SINHA** of Naboro Maximum Prison, Prisoner

APPLICANT

Appearances

Mr S Krishna, o/i of Vuataki Law, Barrister & Solicitor for applicant

No appearance for respondents

EXTEMPORE RULING

- [1] This is an application for leave for judicial review.
- [2] By application filed 10 April 2015, the applicant seeks leave of the court to apply for judicial review of the decision of the Supervisor of Correction, Western Division, 1st respondent given after 23 December 2014 and confirmed by the Commissioner of Fiji Correction Services, 2nd respondent in January, 2015 convicting the appellant of

smuggling an affidavit out of Lautoka Prison and sentencing him to loss of three months remission and the relief sought is a prerogative order in the nature of writ of certiorari quashing the aforesaid decision on the grounds that, (i) the respondents had acted without and/or exceeded jurisdiction, (ii) Wednesbury unreasonableness and (iii) bias. The application is supported by an affidavit sworn by the applicant.

- [3] The leave application is made pursuant to O. 53, r.3 (2) of the High Court Rules 1988, as amended (HCR). That rule provides as follows:

'Grant of leave to apply for judicial review (O.53, r.3)

- 3.-(1) *No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.*
- (2) *An application for leave must be made upon filing in the Registry:*
- (a) *a notice in Form 32 in the Appendix hereunder containing statement of-*
 - (i) *particulars of the judgment order, decision or other proceedings in respect of which judicial review is being sought;*
 - (ii) *the relief sought and the grounds upon which it is sought;*
 - (iii) *the name and description of the applicant;*
 - (iv) *the name and address of applicant's Solicitors (if any); and*
 - (v) *the applicant address for service;*
 - (b) *an affidavit which verifies the facts relied on.*
- (3) (i) *Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.*
- (ii) *The **Court may determine the application without a hearing** and where a hearing is considered necessary the Court shall hear and determine the application inter partes (Emphasis provided).*
- (iii) *Notice of hearing of the application shall be notified in writing to the parties by Registrar.*
- (iv) *Where the Court determines the application without a hearing the Registrar shall serve a copy of the order of the Court on the applicant.*
- (4) *Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the relief sought and the grounds thereof to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.*

- (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.*
- (6) *Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*
- (7) *If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*
- (8) *Where leave to apply for judicial review is granted, then-*
- (a) *If the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;*
- (b) *If any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.*
- (9) *Upon granting leave the Court may, if satisfied that such a course is justified, direct that the grant shall operate either forthwith or conditionally as an entry of motion under rule 5 (4) and may then proceed to Judgment on the application for judicial review or may give such further directions as may be warranted in the circumstances.'*
- [4] O.53, r.3 (3) (ii) of the HCR invests discretion with the court to determine the application for leave for judicial review without a hearing.
- [5] The Fiji Court Appeal in **Richard Krishna Naidu v Attorney-General** [1999] ABU 39/98 (apf HBJ 7/98S) 27 August 1999 held that:
- 'This approach is appropriate when the application for leave is considered with or without a hearing. Although the rules now provide that the application is not required to be dealt with ex parte, we consider that an opposed determination inter partes should still be the exception rather than the rule. In the normal course, the application for leave should be dealt with on the papers. Otherwise there is a risk that there will in effect be two hearings (and possibly two appeals), a process which will delay the final resolution, increase the costs, and occupy additional court time. Also, there is an understandable temptation for the Judge to determine the central issue at a stage when all the evidence may not be before the court, and that issue may not have been full*

(sic) argued. Indeed for these reasons, good arguments can be advanced in support of the proposition that leave should not be required at all. It is not in New Zealand, in Scotland, nor in at least some if not all States in Australia. If an application is brought that is frivolous, vexatious, or irresponsible, or by a person who cannot possibly have the slightest interest, an opposing party can always move to have the application struck out.'

- [6] I therefore, acting under O.53, r.3 (3) (ii) and exercising the discretion provided in that rule, proceed to determine the leave application without a hearing in order to minimize the delay that would be entailed by double hearing.
- [7] The application for leave filed in the Registry contains in Form 32 a statement of the particulars of the decision in respect of which judicial review is being sought. It seeks an order in the nature of writ of certiorari as relief to quash the decision on the grounds of jurisdiction, unreasonableness and bias. The application gives name, description and address of the applicant. The application provides all the details required under O.53, r.3 (2) (a) of the HCR. The applicant has complied with the requirements of that rule.
- [8] The applicant has filed an affidavit verifying the facts relied on. Copies of the application for leave and the affidavit in support have been served on the respondents. The applicant thereby had complied with the requirement of O.53, r.3 (2) (b) of the HCR. I am satisfied that the application for leave has been filed in compliance of rule 3.
- [9] I am mindful that the court may, under O.53, r.4, refuse to grant leave for the making of the application or any relief sought on the application if the court considers that there has been undue delay in making the application for judicial review. The application for judicial review seeks an order of *certiorari* to remove the conviction for the purpose of quashing it. Then O.53, r.4 (2) becomes applicable. Rule 4 (2) provides as follows:

*'(2) In the case of an application for an **order of certiorari to remove** any judgment, order, **conviction** or other proceeding for the purpose of quashing it, the **relevant period** for the purpose of paragraph (1) is **three months after the date of the proceeding.** (Emphasis provided)'*

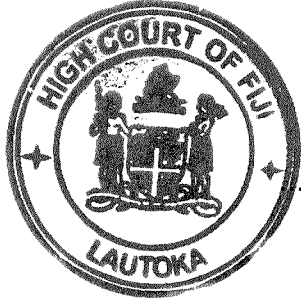
- [10] The applicant states that he was convicted by the Tribunal and sentenced to one month loss of remission and in January 2015 (No date provided) the Commissioners of Fiji Correction Service after reviewing the Tribunal's decision added a further loss of two months remission which means that he lost a total remission of three month. The application for leave has been filed on 10 April 2015.
- [11] In **Caswell v Dairy Produce Quota Tribunal for England and Wales** [1990] 2 AC 738, it was held that:
- "Questions of delay are best dealt with in depth at the substantive hearing."*
- [12] On the papers, I would determine that the application for leave has been filed within three months after the proceeding to which this application relates.
- [13] The applicant has shown that he has been affected by the decision in question hence he has sufficient interest in the matter.
- [14] I, upon perusal of the papers, am satisfied that the application discloses a prima facie an arguable case on merits on each ground for relief. I accordingly grant leave to apply for judicial review on the ground of (i) jurisdictional error, (ii) unreasonableness and (iii) bias.
- [15] The applicant has sought an order of *certiorari*. The grant of leave therefore will operate as a stay of proceedings to which the application relates until the determination of the application pursuant to O.53, r. 8 (a) of the HCR.

Final outcome

- (i) Leave is granted to apply for judicial review on the grounds of (i) jurisdictional error, (ii) unreasonableness and (iii) bias.

(ii) The grant of leave will operate as a stay of sentence until the determination of the application.

(iii) The Registrar will serve a copy of this order on the applicant.



M H Mohamed Ajmeer

M H Mohamed Ajmeer
Judge

At Lautoka

22 April 2015