

IN THE HIGH COURT OF FIJI

CIVIL JURISDICTION AT LAUTOKA

Judicial Review HAR No. 16 of 2017

BETWEEN : SOLOMONI NAKELI

Applicant

AND : CHIEF ADMINISTRATOR OPERATION OFFICER-
MAXIMUM CORRECTION CENTRE

1st Respondent

AND: THE COMMISSIONER- FIJI CORRECTION SERVICE

2nd Respondent

AND THE ATTORNEY GENERAL

3rd Respondent

Counsel: Applicant in Person

Mr Mainavolau for Respondents

Dates of Hearing: 09th April, 2018, 16th May, 2018

Date of Decision: 16th May, 2018

DECISION

1. This is an application seeking leave to file a Judicial Review application. The application is made pursuant to Order 53 Rule (2) of the High Court Rules.
2. In his application filed on the 17th October, 2017, the Applicant seeks the following declarations and orders:

- a. An order of Certiorari to remove the decision of the Chief Administration and Operation Officer made on the 4th June, 2107, and that the same be quashed and that the Applicant be given full and correct entitlement in calculation and remission of sentences.
 - b. A declaration (if any) that the Chief Administration and Operation Officer has acted unfairly and /or abused his discretion under the Corrections Act of 2006, and
 - c. Further declaration or other relief as this honourable court may deem fit.
3. The response of the Respondents to the Judicial Review application is twofold. The first one is that the application is out of time and is contrary to requirements of High Court Rules and therefore be struck out. Secondly, they submit that the Applicant's Judicial Review application should be dismissed as it discloses no reasonable course of action.
 4. In this Decision, I would like to go only into the leave matter to decide whether this action is maintainable by virtue of the time limitation or the action has been filed out of time.
 5. Respondent's objection to leave being granted is articulated in the oral submission made to this Court by the Counsel for Respondents on 9th April, 2018. The Counsel for Respondents submits:

"Nowhere in those 10 paragraphs the applicant articulated the exact date of the decision that he is challenging, however, he has made reference to a purported decision that was made by the Chief Administration and Operations Officer and he says so in paragraph 7, if I may read this paragraph out to the Court:

'That in October 2016, I was transferred to the Maximum Correction Centre and upon requesting the Chief Administration and Operations Officer of the release date, I was informed that my discharge date have been varied and deferred to a further 18 months till November 2018'.

6. It is clear that the Counsel has made a deduction based on paragraph 7 of Applicant's affidavit, and argues that the Applicant was challenging a decision made by the 1st Respondent in October 2016.
7. However, at paragraph 9 of his application, the Applicant has sought an order quashing the decision of the 1st Respondent purportedly made on 4th June, 2017. Paragraph 9 of the Application reads as follows:

"An order of certiorari to remove the said decision of the Chief Administration and Operation Officer made on the 4th June, 2017, into this honourable Court and that the same be quashed and that the Applicant be given full and correct entitlement to calculation and remission of sentences".

8. Order 53, r. 4(2) of the Rules of High Court is applicable in calculating the time within which a Judicial Review application should be made. The High Court Rules state that a Judicial Review application should be made within 3 months from the date the subject decision was made.

" 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".

9. The Applicant filed his Application on 17th October, 2017 and therefore he is late by four months and 13 days.

10. Order 53, r. 4(1) of the Rules of High Court further provides as follows:

" subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant

- (a) Leave for making the application, or
- (b) any relief sought on the application,

if in the opinion of the Court, the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration"

11. Accordingly, this Court has discretion to enlarge the time period if the granting of the relief sought would not likely to cause substantial hardship to, or substantially prejudice the rights of any person or would not be detrimental to good administration.
12. The relief sought in the application is a remission of Applicant's sentences in accordance with Sections 27 and 28 of the Corrections Service Act of 2006 and the Sentencing and Penalties Act.
13. In my opinion, the granting of the relief sought would not likely to cause substantial hardship to, or substantially prejudice the rights of any person or would not be detrimental to good administration.
14. On 5th June 2012, the Applicant was sentenced by this Court to 7 years' imprisonment in Criminal Case No. 116 of 2011, and on the same date, in Criminal Case No. 29 of 2012, he was given a 6 years' imprisonment with a non-parole period of 4 years' (it appears that, by virtue of section 22 (1) of the Sentencing and Penalties Act, these sentences were to be served concurrently).
15. The Applicant says that, according to the impugned decision of the 1st Respondent he will be released on 18th November, 2018. His contention is that his sentence / remission has been wrongly calculated and is not in conformity with Sections 27 and 28 of the Corrections Service Act of 2006.
16. The assertion made by the Applicant is strongly refuted by the Respondents on the basis of 1st Respondent Mr Saladoka's affidavit. 1st Respondent's evidence is that the Applicant is serving the sentences concurrently and the non-parole period of 4 years is a fixed term that he must serve while the remaining sentence of 3 years will be calculated on the basis of 1/3 remission to determine his date of release.
17. It appears that this calculation is based on the current practice adopted by the Corrections Department and is reflected in the following observation made by Justice Calanchini P in *Tora v State* [2015] FJCA 20; AAU0063.2011 (27 February 2015) at P 2

"The purpose of fixing the non-parole term is to fix the minimum term that the Appellant is required to serve before being eligible for any early release. Although

there is no indication in section 18 of the Sentencing and Penalties Decree 2009 as to what matters should be considered when fixing the non-parole period, it is my view that the purposes of sentencing set out in section 4(1) should be considered with particular reference to re-habilitation on the one hand and deterrence on the other. As a result the non-parole term should not be so close to the head sentence as to deny or discourage the possibility of re-habilitation. Nor should the gap between the non-parole term and the head sentence be such as to be ineffective as a deterrent. It must also be recalled that the current practice of the Corrections Department, in the absence of a parole board, is to calculate the one third remission that a prisoner may be entitled to under section 27 (2) of the Corrections Service Act 2006 on the balance of the head sentence after the non-parole term has been served". (emphasis added).

18. However, the Supreme Court, having reviewed the said judgment of Court of Appeal, has in *Tora v State* [2015] FJSC 23; CAV11.2015 (22 October 2015)) made the following remark; at p 8, 9:

"This Court is not called upon in this case, to rule on the correctness of the current practice adopted by the Corrections Department in computing the one third remission a prisoner may be entitled to under section 27(2) of the Corrections Service Act 2006, and I do believe that Justice Calanchini P in the above quoted passages only took note of that practice without in anyway intending to endorse the same as correct in law".

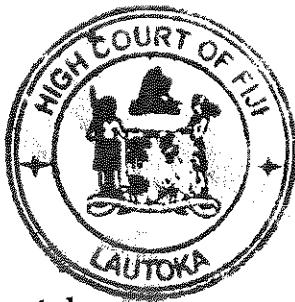
On a plain reading of section 27 of the Corrections Service Act, it appears clear to me that what is intended by sub-section (2) of that section is to determine for "the purpose of the initial classification", a date of release for each prisoner, which necessarily has to be computed on the entirety of the principal sentence imposed by court, which will then be adjusted, as provided in section 28(1) of the Corrections Service Act, dependent on the good behaviour of the prisoner.

19. In light of the above remark of the Supreme Court I am of the view that it is in the interest of justice that this Court grants leave to the Applicant to make the application for Judicial Review.

20. On the meaning of reasonable cause of action, the Supreme Court Practice (UK) 1979 Vol 1 provides:

".....A reasonable cause of action means a cause with some chance of success when only the allegations in the pleadings are considered (per Lord Pearson in Drummond Jackson v British Medical Association [1970] 1 All E.R. 1094, C.A.). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 W.B. 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak, and not likely to succeed is no ground for striking it out (Moore v Lawson) (1915) 31 T.L.R. 418, C.A.; Wenlock v Moloney [1965] 1 W.L.R. 1238 [1965] 2 All E.R. 871, C.A.)....."

21. Result: Leave granted. The Respondent is advised to file his application in accordance with O 53, r 5 of Rules of High Court. Relevant parts of Rules of High Court are provided to the Applicant for his easy reference and information.



Aruna Aluthge

Judge

At Lautoka

16th May, 2018

Counsel: Applicant in Person

Attorney General's Office for Respondents