

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Action No. HBJ 13 of 2019

IN THE MATTER of an application for judicial review by Josua Natakuru,
Prisoner at maximum Correction Centre, Naboro
(hereinafter referred to as the Applicant)

AND

IN THE MATTER of a decision by the Duty officer and Supervisor
Western Division for a prison charge, tribunal proceedings and
punishment made on the 7th day of September 2019
(hereinafter referred to as the Respondents).

BETWEEN

JOSUA NATAKURU, Maximum Correction Centre.

APPLICANT

AND

COC JOJI KOTAMALAVU, Custodial officer, Natabua Correction Centre.

FIRST RESPONDENT

AND

COA ROMANU, Duty Officer, Natabua Correction Officer.

SECOND RESPONDENT

AND

ASC ALVIO, Supervisor Western Division, Natabua Correction Centre.

THIRD RESPONDENT

Counsel : Applicant in person
Ms. Ali S. with Ms. Ali N. for the Respondents

Date of Hearing : 25th January 2021

Date of Ruling : 25th February 2021

RULING

(Leave to apply for Judicial Review)

[1] This is an application pursuant to Order 53 rule 2 of the High Court Rules 1988 seeking leave to apply for judicial review.

[2] The applicant intends to seek the following orders if leave is granted:

- (a) A declaration that it was Wednesbury unreasonable to have the 2nd respondent appoint the 1st respondent as the applicant's court escorting officer after the applicant had complaint against the 1st respondent's defiance of a court directive for telephone communication to the applicant's legal counsel.

- (b) A declaration that it was Wednesbury unreasonable to have the 3rd respondent re-appoint the 1st respondent as the applicant's court escorting officer after the instruction not to have the 1st respondent as the escorting officer was made by the complaint raised by the applicant by the Chief Officer Operation as the immediate supervisor of the 2nd respondent.
- (c) A declaration that it was Wednesbury unreasonable to have the 3rd respondent to preside over the Tribunal proceeding due to his involvement in reversing the decision by the Chief officer Operations by reinstating the 1st respondent as the Courts Escorting officer.
- (d) A declaration that the 3rd respondent had not allowed adequate time to the applicant to read the charge and prepare his defence and was thereby not within jurisdiction in hearing the charge against the applicant.
- (e) A declaration that it was Wednesbury unreasonable to have the 2nd respondent as the prosecuting officer determining and reading out the summary of facts when he was involved in appointing the 1st respondent as the applicant's escorting officer, despite the applicant's complaint.
- (f) A declaration that the 3rd respondent had exceeded jurisdiction and/or was Wednesbury unreasonable when he refused to recuse himself in the applicant's application to defer his plea and have it taken it before another Presiding Officer due to his involvement by reinstating the 1st respondent as the escorting officer after the applicant's complaint.
- (g) A declaration that it was Wednesbury unreasonable that the 3rd respondent had failed to ask the applicant during the tribunal proceedings whether or not he wished to exercise his right to cross-examine COC Narodamu after he had given evidence in chief as required in Regulation 14, Sub-Regulation (3)(e) of the Correction Service Regulation 2011.
- (h) A declaration that the 3rd respondent was not within jurisdiction and/or exceeded jurisdiction when he interrupted and stopped applicant's cross-examination of COC Narodamu when the applicant questioned the location of the 3rd respondent at the material time of the alleged offence to establish the 3rd respondent's involvement in the alleged fabricated charge.

- (i) A declaration that the 3rd respondent was not within jurisdiction and/or exceeded jurisdiction when he imposed one month loss of remission of sentence with recommended transfer to the Maximum Correction Centre without a thorough examination of the case against the applicant.
- (j) A declaration that the 3rd respondent was not within jurisdiction when he imposed a punishment of recommended transfer to the Maximum Correction Centre which is not authorised to impose under approved punishments in Regulation 16, Sub-Regulation (2) of the Correction Service Regulation 2011.
- (k) A declaration that the 3rd respondent was biased in preferring to hear and preside over the tribunal proceedings on a charge that he ordered to be fabricated basing on his reinstating the 1st respondent to escort the applicant after the written complaint of the 1st respondents previous defiance of a court order for telephone communication by the applicant with his legal counsel.
- (l) Certiorari to issue quashing decisions of 3rd respondents forfeiting one month remission of applicant's sentence of imprisonment and recommended transfer to the Maximum Correction Centre.
- (m) Stay of respondent's sentence of one month loss of remission of sentence and recommended transfer to the Maximum Correction Centre.
- (n) Other declarations or mandamus orders as the Honourable Court may decide.

[3] The brief background of the matter according to the applicant is as follows. The learned Magistrate of the Sigatoka Magistrate's Court, on an application made by the applicant made orders to escort him to the office of the Legal Aid Commission to take a phone call to his lawyer and the receptionist dialed the number of the applicant's lawyer and in response received a text message to return the call in five minutes. However, the escorting officer Joji Kotabalavu refused his request. The applicant also alleged that the escorting officer verbally abused him and defied the court order.

[4] Assistant Superintendent of Corrections, Alevio Turaga in his supplementary affidavit explains as follows what transpired at Lautoka Corrections Centre on 06th September 2019:

- (a) the applicant was to be escorted to the Sigatoka Magistrate's Court from the Lautoka Corrections Centre in the Fiji corrections Service escort vehicle to attend his case;
- (b) prior to being escorted, the applicant submitted the name of the correction officer that he preferred to escort him to the said court;
- (c) while seated in the vehicle, which was parked at the Lautoka Corrections Centre, the applicant suddenly jumped off the vehicle and started screaming at the Corrections officers, uttering abusive and disruptive words, after he found out that the Corrections Officer, Joji Kotobalavu, was going to escort him and not the one he had preferred;
- (d) when I intervened the disorderly behavior of the applicant, the applicant screamed at me and repeated the abusive words; and
- (e) the applicant kept resisting in a disorderly manner to be escorted by the assigned Corrections Officers and also questioned me, in a loud and disorderly tone, on why the Corrections Officers were consuming the food ration of the prisoners.

[5] On the same day, 06th September 2019 this officer had called the Commissioner of Corrections and lodged a formal complaint. On 07th September 2019 the Commissioner had instructed the officer to transfer the applicant to the Maximum Corrections Centre.

[6] In these proceedings the applicant intends to challenge the decision of the tribunal on the ground that tribunal did not follow the rules of natural justice, in that;

- (i) the 2nd and 3rd respondents not allowing the applicant adequate time to read the charge and not allowing the applicant access witness's statements in order to adequately and properly prepare his defence ;
- (ii) 3rd defendant not recusing himself in the applicant's application to defer his plea and have it taken before another presiding officer due to his immediate involvement in reinstating the 1st respondent as escorting officer despite the applicant's written complaint against the 1st respondent to the officer in charge dated 3rd August 2019 and to the Commissioner of Correction dated 9th August 2019;

- (iii) 3rd respondent interrupting and stopping the applicant's cross-examination of COC Narodamu to establish the 3rd respondent's location and involvement in the fabricated offence in question;
- (iv) 3rd defendant imposing 1 month remission of sentence and recommended transfer to the Maximum Correction Centre without a thorough examination of the case against the applicant;
- (v) 3rd respondent recommended transfer to the Maximum Correction Centre which is not an approved punishment that he is authorised under Regulation 16, Sub-Regulation (2) of the Correction Service Regulation 2011;
- (vi) 3rd respondent not asking the applicant whether or not he wishes to cross-examine COC Narodamu after he gave evidence as required in Regulation 14 Sub-Regulation (3)(e) of the Correction Service Regulation 2011; and
- (vii) 3rd respondent not asking the applicant and not giving a proper opportunity of presenting his defence as required under Rule 30(2) of the Minimum Rules for the Treatment of prisoners and Procedure under Regulation 14 Sub-Regulation (3)(f) of the Correction Service Regulation 2011.

[7] At the hearing the learned counsel for the respondents submitted that the relief sought by the applicant is moot since the decision of the Tribunal has already been dismissed by the Commissioner and the learned counsel also submitted that the Commissioner has the power under Corrections Service Act 2006 to transfer inmates from one prison to another.

[8] Section 5(1)(c) of the Corrections Service Act 2006 provides:

The Head of the Fiji Corrections Service shall be the Commissioner of Fiji Corrections Service, who shall –

...

(c) have the control of all prisoners and may allocate them to such prisons as he or she sees fit;

[9] The submission of the applicant is that the Commissioner in deciding to transfer him to the Maximum Corrections Centre relied on the findings of the tribunal.

[10] According to the Minute of the Tribunal (AT 1) the Commissioner of Corrections had received the decision of the Tribunal on 12th September 2019 but applicant was transferred to Maximum Corrections Centre on 10th September 2019 on the orders of the Commissioner of Corrections. Therefore, it cannot be said that the order of the Commissioner of Corrections was based on the findings of the Tribunal.

[11] In the case of **Matalulu v Director of Public Prosecutions** [2003] FJSC 2; [2003] 4 LRC 712 (17 April 2003) the Supreme Court held:

The judge granting leave to issue judicial review proceedings has a discretion once a sufficient interest is shown by the applicant. That discretion must be informed by the evident purpose of Ord 53. 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, eg 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.

The question whether there are arguable grounds for review is not to be determined by the resolution of contestable issues of law. 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. The submission was made on behalf of the appellants that leave to issue judicial review proceedings should be granted wherever a 'potentially arguable case' is disclosed. We do not understand the full significance of the

term 'potentially arguable'. It cannot be used to justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen.

[12] As submitted by the learned counsel for the respondents there is no order for this court to review. The applicant sought not to challenge the decision of the Commissioner of corrections to transfer him to the Maximum Correction Centre and the Commissioner of Corrections is not a party to these proceedings. For these reasons the application of the applicant is liable to be refused.

ORDERS

1. The application for leave to apply for judicial review is refused.
2. There will be no order for costs of this application.

Lyone Seneviratne

JUDGE

25th February 2021