

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

CIVIL ACTION NO. HBJ 10 OF 2020

IN THE MATTER of an application by Peni Tuilaselase, convicted serving prisoner presently detained at the Maximum Corrections Centre (Hereinafter called the “Applicant”) for a Judicial Review.

IN THE MATTER of a Decision of the Director of Legal Aid Commission dated 19th May 2020 (Hereinafter called the “Respondent”).

BEWEEN: **PENI TUILASELASE** of Maximum Corrections Centre, Serving Prisoner

APPLICANT

AND: **DIRECTOR OF LEGAL AID COMMISSION**

RESPONDENT

Counsel : Applicant: In Person
: Respondent: Ms Mishra N & Mr Skiba K
Date of Hearing : 23.03.2021
Date of Judgment : 04.10.2021

JUDGMENT

INTRODUCTION

1. This is an application seeking leave to file judicial review of a decision of Respondent’s refusal to represent him for an application in Supreme Court. Applicant was seeking extension of time to file leave to appeal against sentence affirmed by Court of Appeal. This application was filed by him *in person*. Applicant is a serving prisoner and his application in the Supreme Court was assessed by Acting Director of Legal Aid Commission and conveyed

to him in writing. Dissatisfied with that decision Applicant had also sought review of that decision in term of Section 14 of Legal Aid Act 1996, without success. He is seeking leave for judicial review against that decision.

FACTS

2. Applicant along with some others were convicted for a criminal offence after trial and sentenced for fourteen years of imprisonment on 16.5.2014.
3. On 8.6.2015 Applicant obtained leave to appeal from single judge of Court of Appeal, against conviction and sentence. For this application Legal Aid Commission represented Applicant.
4. Full Court of Court of Appeal, dismissed the Appeal against conviction and sentence for all the accused, and Legal Aid Commission represented Applicant for this hearing.
5. After dismissal of appeal against conviction and sentence Applicant made a separate application seeking leave to appeal to Supreme Court¹ against conviction only. Other co-accused sought leave to appeal against, decision of Court of Appeal and they were all dismissed for lack of merits.
6. Applicant, in *person* made an application seeking special leave of the Supreme Court against the conviction only. (see paragraph 4 of Supreme Court decision of 15.4.2015).
7. This application seeking special leave against conviction was dismissed by Supreme Court² and the final orders read:
 - a. "The Petitioner's application for special leave to appeal against his conviction dismissed.
 - b. The conviction and sentence imposed upon him by the High Court are affirmed."
8. After this Supreme Court's determination rejecting special leave, Applicant again applied to Legal Aid Commission seeking assistance in his application filed in *person* seeking enlargement of time to Appeal against Sentence to Supreme Court.
9. Applicant was informed on 3.7.2019 that his request for Legal Aid was approved subject to additional material relating to means if required for re assessment as to financial means.
10. In the affidavit in opposition, it was stated that above approval was on the basis of 'Policy' as all serving prisoners might qualify for assistance.

¹ Tuilasele v State [2019] FJSC 2; CAV0025.2018 (25 April 2019)

² Tuilasele v State [2019] FJSC 2; CAV0025.2018 (25 April 2019)

11. After informing the Applicant of the said approval for Legal Aid the file was assigned to senior counsel to handle and after obtaining further instructions it was decided not to proceed with the application seeking extension of time to seek special leave to appeal against sentence only. Applicant was advised accordingly by counsel.
12. Applicant did not agree with the said advice hence Acting Director of Legal Aid Commission had exercised 'merits test' compliance and had written to Applicant on 22.1.2020 that he cannot be represented by Legal Aid Commission, in Supreme Court.
13. The Applicant had a right to seek a review Section 14 of in terms of Legal Aid Act 1996 and he had applied for that.
14. By letter dated 18.5.2020 Applicant was informed that his request to review the decision not to represent him by Legal Aid Commission was unsuccessful.
15. He was informed that decision by Acting Director of Legal Aid Commission that they cannot represent him thereafter, hence to collect any documents he submitted.
16. On 1.12.2020 Applicant had filed the present application in terms of Order 53 of High Court Rules 1988 against the decision of 'Legal Aid Commission'.

ANALYSIS

17. Court of Appeal in *Proline Boating Company Ltd v Director of Lands* [2014] FJCA 159; ABU0020.2013 (25 September 2014) held,

"The Criteria necessary for the granting of leave to apply for Judicial review

[20] These criteria may be classified as follows:

(a) Mandatory Statutory Requirements.

(b) Other requisites developed largely judicially given the fact that, as opposed to a direct appeal, judicial review is a remedy that is subject to the exercise of judicial discretion."

18. At the outset it is noted that there technical deficiencies in the application filed *in person*, but I will deal them at the end for convenience. The statutory requirements though necessary and important, they should not be considered as 'mandatory' to refuse leave for judicial review, if there are merits in the application exercising discretion of the court.

19. I am mindful that this judicial review application is filed *in person* who is serving in prison, who lacked legal skills to understand highly technical requirements in a judicial review application.
20. In Court of Appeal³ (Full Court) analyzed the scope of leave of the court in judicial review in following manner,
Lord Donaldson M.R. in **R v. Monopolies and Mergers Commission, ex parte Argull Group** [1986] 1 WLR 763 indicated the following approach when stating that:

"The first stage test, which is applied upon the application for leave, will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddling busybody. If, however, an application appears otherwise to be arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be re-applied as a matter of discretion on the hearing of the substantive application. At this stage, the strength of the applicant's interest is one of the factors to be weighed in the balance. ..."

[86] Lord Donaldson's approach was endorsed by Purchas L.J. in **R v. Department of Transport, ex parte Presvac Engineering Ltd** (1992) 4 Admin. L.R. 121 when after considering extensively the decision of the House of Lords in the National Federation case (1981, supra). His Lordship said:

"Personally I would prefer to restrict the use of the expression locus standi to the threshold exercise and to describe the decision at the ultimate stage as an exercise of discretion not to grant relief because the applicant has not established that he had been or would be sufficiently affected."

[87] The emphasis laid by Purchas L.J. *"on the discretion of the Court in relation to the extent of the interest of the application after leave has been granted."* (emphasis is mine) has been academically commended. (See: Judicial Review of Administrative Action, De Smith, Woolf and Jowell, 5th ed. Sweet & Maxwell, at p.124)"

21. Applicant is the person directly affected by the determination, by the 'Board' of the Legal Aid Commission which reviewed and affirmed the decision not to represent him in Supreme Court. (see paragraph 16 of affidavit in opposition). I could not find word 'Board' in Legal Aid Act 1996 and had used the word in this judgment as an alternate to 'Commission' which is defined under Section 3 of Legal Aid Act 1996.
22. Respondent had also taken preliminary objection as to this application not being filed within three month time period in terms of Order 53 rule 4 (1) and (3) of High Court Rules 1988. For this Applicant had annexed a document that indicated he had earlier filed a purported

³ Proline Boating Company Ltd v Director of Lands [2014] FJCA 159; ABU0020.2013 (25 September 2014)

application seeking juridical review. Document was filed in the High Court Registry on 21.7.2020. There were no details on that why his previous application was not pursued.

23. Perusal of the initial application also revealed that there were no respondents named though it stated that he was seeking Judicial Review of a decision made by Director of Legal Aid Commission. Later in a letter written to the Registrar, Applicant had stated that his lack of necessary legal knowledge was the reason for failure to name a Respondent.
24. So I would not deal with the preliminary issue of application being filed outside time period and leave this to be dealt later as expiration of time period stated in Order 53 rule 4(2) *ipso facto* not a reason for rejection of leave in the exercise of discretion of court.
25. The most of the facts stated affidavit in support were not disputed (See paragraphs 22 and 23 of affidavit in opposition of Respondent).
26. Respondent had filed an affidavit in opposition, and contents in paragraphs 7 to 13 were admitted by Applicant in affidavit in reply (see paragraph 3 of the affidavit in reply of Applicant).
27. So the facts contained in the affidavit in reply were not disputed and considered as undisputed facts relating to this application.
28. Applicant had made this application *in person* seeking to quash the decision conveyed to him on a letter dated 18.5.2020 refusing his application to review the decision of Respondent.
29. Respondent had conducted a 'merit compliance assessment' and refused to appear in Supreme Court. In the communication dated 22.1.2020, Applicant was informed about the decision not to represent.
30. Section 9 of Legal Aid Act 1996 states
 "9. The Commission may in relation to any matter or class of matters require any person applying for legal assistance to satisfy it that that person has reasonable prospects of success in the matter in relation to which legal assistance is sought."
31. So, there is no obligation on the part of Legal Aid Commission to represent all requests of serving prisoners without assessing them. Serving prisoners, may pass the preliminary threshold when they are seeking legal assistance or advice. That does not mean any request for unmeritorious applications and or if such requests are apparent abuse of process, they should rubber stamp such requests without considering merits of such applications.

32. According to affidavit in opposition Applicant's request to represent him in Supreme Court to seek extension of time for leave to appeal against sentence was, first taken by a lawyer of Legal Aid Commission. Despite legal advice, applicant insisted representation.
33. Before that Applicant was represented by Legal Aid Commission in Court of Appeal where both conviction and sentence was appealed. Court of Appeal had affirmed both conviction and sentence.
34. Legal Aid Commission has limited resources hence they cannot satisfy every person who seeks their assistance. Apart from that there is an obligation on the part of Legal Aid Commission not to waste its limited resources hence the requirement to assess the merits of an application.
35. What is found wanting in this case from the material supplied to me at this juncture is lack of transparency from Respondent in the decision making process, in line with the statutory provisions of Legal Aid Act 1996.
36. A person who is dissatisfied with the decision of Respondent, may seek review in terms of Section 14 of Legal Aid Act 1996 and it states

"Review of decisions

14.-(1) A person who is a legally assisted person or an applicant for legal assistance may request by notice in writing to the Commission a review of any decision made pursuant to the provisions of this Act relating to such person.

(2) The Commission shall comply with such request, provided it is made within three months of the making of the decision.

(3) This Section shall apply only to decisions made by an employee of the Commission, or a Committee appointed by the Commission.

(4) A review of a decision undertaken pursuant to this Section shall be undertaken by the Commission or a Review Committee.

(5) Where a decision is reviewed pursuant to this Section, a Review Committee appointed pursuant to Section 15 or Commission as the case may be may:

(a) confirm that decision; or

(b) vary that decision; or

(c) set aside that decision and substitute its own decision for that decision.

(6) A person requesting a review of a decision pursuant to this Section shall be entitled to make such written submissions in support of that request as he or she may think fit, **but shall not be entitled to be heard in person or by Counsel in relation to that request.**

(7) Subject to Section 16, a decision of the Commission or a Review Committee made pursuant of this Section **shall be final.**

(8) The Commission or Review Committee, as the case may be, which has reviewed a decision pursuant to this Section shall advise the person who has requested such review of its decision in writing, and shall, **if requested, provide a short written statement of the reasons** for that decision to the person.”(emphasis is mine)

37. Applicant had made a request to review the decision of Respondent in terms of the above section, and this was also rejected by the ‘Board’ in accordance with the affidavit in opposition.
38. There were no reasons granted either in the letter of 22.1.2020 or on letter of 18.5.2020.
39. There was no evidence of Applicant seeking reasons for the said decision of the ‘Board’ that reviewed the decision conveyed to the Applicant, but in my mind in this context it should have given in first communication made on 22.1.2020 by Respondent. Without reasons how can a person know ‘merits’ were assessed.
40. Legal Aid Commission as a corporate body that represent cannot be required to make unmeritorious applications to court. Applicant was represented in Court of Appeal and there after he had appeared in person in Supreme Court to seek special leave against conviction. Apart from that, accused had also sought special leave to appeal against conviction and sentence and this was dismissed too.
41. It is a statutory provision to review decision of the Respondent’s decision not to represent Applicant. The merit test under section 9 and review of that decision subsequently under Section 14 are all statutory provisions that can be reviewed.
42. Section 14 (7) of Legal Aid Act 1996, stated that the decision taken by the Commission (i.e Board) ‘final’. That does not exclude jurisdiction of court for judicial review, especially when the reasons for the refusal are not known to the court contained in the affidavit in opposition.

See, (*R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, [2020] AC 491, [2019] 4 All ER 1, and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; [1969] 1 All ER 208; [1969] 2 WLR 16)

43. High Court Rules 1988 contained provisions of law to be complied they are dealt below

a. Relief sought against whom?

Applicant initially made a purported application seeking judicial review without naming a part at all. Subsequently, due to directions given he had named a Respondent. This is the person who had informed in writing on 22.1.2020 that Applicant was not successful in 'merit test'. Applicant had subsequently made an application seeking review this decision in terms of Section 14 of Legal Aid Act 1996 and the said determination was informed to Applicant on 18.5.2020. So the relief sought should have been against this decision of Legal Aid Commission. Though this is an error on the part of Applicant I do not consider as fatal error considering circumstances of this case. Respondent was represented by counsel of Legal Aid Commission and they had access to all the circumstances of this case. I make a direction to the Applicant to make Legal Aid Commission for completeness.

b. Order 53 rule 3 of High Court Rules 1988 stated that Form 32 in Appendix 1. This format was not followed by the Applicant and considering the circumstances I do not consider that as a fatal error. It will not serve any purpose if I give a direction to the Applicant do comply with that provision considering circumstances of this case. In my mind there is discretion left with the court to grant leave to judicial review considering interest of justice, as in this case where Applicant was refused legal representation by Legal Aid and he is a serving prisoner who lacked access to legal counsel due to limitations inherent in the situation.

c. The main grounds that can be deduced from the application filed are failure to follow rules of natural justice. This goes to the fact that no reasons were given either in letter dated 22.1.2020 or 18.5.2020. There were no evidence as to when and how the decision to review was taken and who constituted 'Board' that reviewed the decision of 22.1.2020 even in the affidavit in opposition. So how could Applicant comply with the provisions contained in Order 53 rule 3 (a) (i) of High Court Rules 1988? In my mind this had also to some extent misled the Applicant not to name Legal Aid Commission as party and to seek their decision to review.

44. In my mind there are 'arguable case' for the Applicant to seek judicial review irrespective of some technical deficiencies in the Application. Applicant is directed to make the decision making body which is Legal Aid Commission a party. There are allegations of failure to comply with rules of natural justice and Respondent had not been able to counter such allegations in the affidavit in opposition. Hence leave is granted for judicial review conveyed to the Applicant by letter dated 18.5.2020 by Legal Aid Commission.

45. Considering that the Plaintiff is unrepresented attention is drawn to the provisions contained in Order 53 rule 5 of High Court Rules 1988 and the requirement to file a motion in terms of said Order within 14 days from today.

FINAL ORDERS

- a. Applicant is granted leave to file Judicial Review against decision conveyed to him by letter of 18.5.2020.
- b. Applicant is directed to make Legal Aid Commission a respondent to this application.
- c. No order as to costs.

Dated at Suva this 4th day of October, 2021.



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Justice Deepthi Amaratunga
High Court, Suva