

**IN THE HIGH COURT OF LAUTOKA  
CIVIL JURISDICTION**

**CIVIL ACTION NO. HBM 19 of 2022**

**IN THE MATTER of an Application for  
Constitutional Redress pursuant to  
Section 44(1) of the 2013 Constitution.**

**BETWEEN** : **NAZEEM SHERAZ ALI**, Natabua Correction Facility, NATABUA.  
**APPLICANT**

**AND** : **THE DIRECTOR, LEGAL AID COMMISSION.**  
**RESPONDENT**

**BEFORE** : A. M. Mohamed Mackie –J

**COUNSEL** : Applicant in person.  
: Mr. Chand. P - For the Respondent.

**DATE OF HEARING** : 13<sup>th</sup> April 2023.

**WRITTEN SUBMISSION:** Not filed by the Applicant.  
: By the Respondent on 13<sup>th</sup> April 2023.

**RULING** : On 24<sup>th</sup> May 2023.

**RULING**

**A. INTRODUCTION:**

1. Before me is an Application for Constitutional Redress by the Applicant hereof, initially commenced by filing a Standard form HCCR 1 on 29<sup>th</sup> April 2022, in the absence of a formal Application or an Affidavit in support.
2. Subsequently, the Applicant on 26<sup>th</sup> September 2022 filed a Notice of Motion supported by his Affidavit sworn on 20<sup>th</sup> September 2022, together with annexures marked as “NSA-1” to “NSA-4” and prayed for the following reliefs against the Respondent;
  1. **A DECLARATION** that the refusal of the Legal Representative by the Respondent breached Section 13(1) (c) and 14 (2) (d) (o) of the 2013 constitution.
  2. **A DECLARATION** that the Refusal of the legal representation by the Respondent is inconsistent with Section 15 (10) of the 2013 Constitution.
  3. **A DECLARATION** that the Refusal of Legal Representation will result in the unfair hearing and unreasonable delay in the determination of the appeal which is a violation of Section 15 (1) and (3) of the 2013 Constitution.

4. ***AN INJUNCTION*** restraining the Respondent to act on Section 9 of the Legal Aid Act as it is inconsistent with the 2013 Constitution and Section 30 of the Court of Appeal Act.

**AND** for such further orders that the Honourable Court deem fit, expedient and equitable in the Circumstances of the case.

3. The Applicant's Notice of Motion states that the Application is made pursuant to section 44(1) of the 2013 Constitution of the Republic of Fiji and the inherent jurisdiction.

**B. BACKGROUND FACTS:**

4. During the time material to this Application, the Applicant was serving his life term imprisonment, after pleading guilty on 16<sup>th</sup> October 2019 to one count of Murder contrary to Section 237 of the Crimes Act 2009.
5. Being dissatisfied with the sentence, he filed the Notice of Appeal to the Court of Appeal within the Appealable period and also sent an Application for Legal Aid to the Legal Aid Commission with necessary documents.
6. On 13<sup>th</sup> December 2021 received a letter from the Legal Aid Commission under the hand of its then Acting Director, stating that his Application for Legal Aid is refused (vide annexure "NSA-1").
7. The reason adduced for refusal of Legal Aid in the said letter was based on the fact that the Applicant had failed to satisfy the Commission on the Test of reasonable prospects of success in his Appeal.
8. On 23<sup>rd</sup> December 2021, the Applicant sent an Appeal to the Board of the Legal Aid Commission against the refusal of Legal Aid to him. (Vide "NSA-2").
9. The Board, having perused the Appeal of the Applicant, upheld the decision of the Commission in refusing Legal Aid to the Applicant. This decision the Board was informed to the Applicant by its letter dated 7<sup>th</sup> June 2022. (Vide annexure "A" by the Respondent).

**Affidavit in Support:**

10. The Applicant, in addition to narrating the facts, included some of his legal arguments too in his Affidavit in support itself as follows.

***THAT*** the merit test as per section 9 of the legal Aid act 1996 is inconsistent with both the Constitution and section 30 of the Court of appeal Act. (Para 13).

***THAT*** the Legal Aid Act 1996 established the legal Aid Commission with the duty to provide subject the resources available to its legal assistance to impoverished persons as per section 6(1) of the Act.

***THAT*** Section 6(2) of the Legal aid Act states that the person shall be impoverished if he or she is unable to reasonably afford the cost of legal services.

*THAT the Legal Aid Commission applies 2 prolonged tests in considering the application. The grant of Legal Aid depends on, namely, 1) Lack of financial resources 2). The merit review conducted by the Commission.*

*THAT in spite of the merit review stated above, Section 30 of the Court of appeal Act enables the Court of Appeal to assign Counsel if it appears desirable in the interest of justice “.*

11. The Applicant further states that his Application for Legal Aid is an indication of his inability to meet the financial demand of any Counsel and based on the seriousness of the charge and the severity of the sentence associated with it and therefore necessary that the Legal Aid Commission assist the indigent state of the Applicant.

**Affidavit in Opposition:**

12. The Respondent on 21<sup>st</sup> February 2023 filed its Affidavit in opposition, sworn on 20<sup>th</sup> February 2023 by its then Director, SHAHIN RAFIQUE ALI, with annexures marked as “A” to “C”. The Applicant filed his reply Affidavit on 7<sup>th</sup> March 2023 being sworn by him on 3<sup>rd</sup> March 2023.

**C. LAW:**

13. Learned Counsel for the Respondent has drawn my attention to Sections 44 of the Constitution, to 13 (1) on Rights of an arrested and detained person, to 14 (1) on Rights of an accused person, and to Sections 7(1) and 8(1) of the Legal Aid Act of 1996, which are on means of Legal assistance and Guidelines for provision of assistance respectively.

Counsel also has made submissions about the requirement of satisfying the Merit Test on the prospect of success in the matter in relation to which legal aid is sought and on the conditions applicable in terms of section 9 and 10(1) of the Act respectively.

**D. DISCUSSION:**

14. As far as the facts averred in their respective Affidavits in relation to the events and the relevant dates material to this Application are concerned, I find that the parties are not in serious dispute. Thus, what is mainly left for this Court to decide is whether the Applicant can succeed in his Application against the Respondent as per the applicable laws, primarily on the question of time bar imposed by the relevant rules in bringing the Application of this nature.

**Preliminary Objection on Time limit.**

15. The learned counsel for the Respondent submits that the Application of the Applicant for constitutional redress is time barred and therefore, liable to be struck out.

16. The Applicant made his Application for Legal Aid on 3<sup>rd</sup> March 2021. His Application was refused by the letter dated 13<sup>th</sup> December 2021 under the hand of the then Acting Director of the Respondent. In paragraph 6 of his Affidavit in Support he admits that he received this refusal letter on 13<sup>th</sup> December 2021. The said decision was appealed to the Board of the Commission by the Applicant's letter dated 23<sup>rd</sup> December 2021 and the Board upheld the decision of refusal by the Commission and same was notified to the Applicant by letter dated 7<sup>th</sup> June 2022.
17. The Applicant's initial Application to this Court by way of Standard form HCCR -1 , was filed on 29<sup>th</sup> of April 2022, after expiry of **4 Months and 16 days** from 13<sup>th</sup> December 2021, which was the date of refusal by the Commission. Even if it is assumed that the decision was notified to the Applicant only on 23<sup>rd</sup> December 2021, as the Respondent's Counsel submits, still the Applicant was guilty of delay by **4 months and 06 days**.
18. The Applicant's formal Application by way of Notice of Motion, supported by Affidavit and the annexures thereto, was filed on 26<sup>th</sup> September 2022 and this was the Application that was served on the Respondent and opposed by them by filing their Affidavit in opposition.
19. Thus, it is observed that in the formal Application filed on 26<sup>th</sup> September 2022, the Applicant had not chosen to complain about the refusal of the Appeal by the Board, which had been notified to him by the letter dated 7<sup>th</sup> June 2022 by the Board. However, it is clear that the original Application by the Standard form was clearly out of time, exceeding 60 days from 13<sup>th</sup> December 2021, which contravenes the Rule 3 of the High Court (Constitutional Redress Rules) 2015 Rules.
20. High Court (Constitutional redress) Rules 2015 3 (1, 2) states as follows.
- (1) *An application to the High Court for redress under section 44(1) of the Constitution may be made by a motion supported by affidavit –*
- (a) *claiming a declaration;*
  - (b) *praying for an injunction;*
  - (c) *claiming or praying for such other order as may be appropriate.*
- (2) *An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue arise unless a judge finds there are exceptional circumstances and that it is just to hear the application outside that period. (Emphasis mine)*
21. In the case of ***Tokoniyaroi v Commissioner of Police [2018] FJCA 235; ABU30.2017 (30 November 2018)*** the Court of Appeal held:
- “The procedure with regard to the manner of disposal is laid down by High Court (Constitutional redress) Rules 2015. In terms of Rules 3(2) an application to High Court for redress under Section 44 (1) of the Constitution must not be admitted or entertained after 60 days from the date when the matter or issue arose unless a Judge finds there are exceptional circumstances and that it is to hear and try the application outside that period. It is the appellant who should satisfy Court that the*

*circumstances prevented him from bringing this application within the time period of 60 days”.*

22. High Court (Constitutional redress) Rules 2015 confers discretion on the court to entertain and hear an Application for constitutional redress even if it is filed out of time, if the court finds and satisfied that there are exceptional circumstances.
23. The Applicant made his original Application on 29<sup>th</sup> April 2022 after **4 Months and 16 days** from the date when the matter at issue first arose on 13<sup>th</sup> December 2021. The Applicant has not offered any explanation for this undue delay in making the Applications.
24. It is to be noted that the Applicant is seeking redress only against the decision of the Director by his letter dated 13<sup>th</sup> December 2021 and not against the decision of the Board notified on 7<sup>th</sup> June 2022. Thus, the decision challenged hereof is that of the Director, which is out of time and not against the decision of the Board.
25. Learned Counsel for the Respondent has referred to decided authorities in *Kaiviti v Deputy Registrar [2020] FJHC 280; HBM 48.2020 (27 March 2020)* and in the case of *Lutunatabua v Office of the Attorney General of Fiji [2020] FJHC 186; HBM 84 of 2019 (4<sup>th</sup> March 2020)* which I am inclined to follow in this matter.
26. The applicant is guilty of inordinate and unexplained delay in making his Application. Accordingly, I have no alternative, but to uphold the preliminary objection and dismiss the Application on this ground of Time Bar alone as no explanation has been adduced by the Applicant for his undue delay.
27. However, without prejudice to the above finding, for the sake of completeness, I shall consider the merits of this Application as well on the following points.

**Alternative Remedy:**

28. When the Applicant made his initial Application by way of Standard form HCCR -1 on 29<sup>th</sup> April 2022, he had not exhausted his alternative remedy of Appeal to the Board. When he made the subsequent formal Application on 26<sup>th</sup> September 2022, though he had already received the outcome of his Appeal to the Board on 7<sup>th</sup> June 2022, he did not challenge and/ or rely on that decision for his redress in the 2<sup>nd</sup> Application. Even if he had challenged and/ or relied on that decision for his redress, his formal 2<sup>nd</sup> Application too would have been out of time as the said 2<sup>nd</sup> Application was made only on 26<sup>th</sup> September 2022 after expiry of 3 months and 19 days .
29. Further, it is highlighted that at the time of making the Application, the he was a convicted prisoner. The relevant sections of the Constitution that the Applicant relies on and make reference to do not apply to the Applicant as those provisions only apply to Arrested or Detained persons and Accused persons.
30. The next argument advanced by the Applicant in his Affidavit was that the section 9 of the Legal Aid Act 1996 is inconsistent with the Constitution of Fiji. This contention of the Applicant is vague and unclear. He does not state as to which particular

provisions of the Constitution is in conflict with the Section 9 of the Legal Aid Act of 1996.

31. Another argument of the Applicant was that the refusal of Legal representation breached and is inconsistent with Section 30 of the Court of Appeal Act. The Section 30 of the Court of Appeal Act states the following.

***Legal assistance to appellant***

*"30. The Court of Appeal may at any time assign counsel to an appellant in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid".*

32. This Section of the Court of Appeal Act is only applicable when the Court of Appeal makes such Orders and is not applicable in respect of the Applicant's Application to the Legal Aid Commission or to the application for legal assistance by any other person/s. The application of this Section arises out of Legal Practitioner's duty to the Court and the prerogative is left to the Fiji Court of Appeal to determine on whether it is in the interest of justice that legal assistance to an Appellant ought to be ordered. The Applicant hereof cannot rely on this Section to seek redress through this Application against the Legal Aid Commission. This Section confers Jurisdiction and powers only to the Fiji Court of Appeal to make such orders on its prerogative in the interest of justice. This Section does not entitle the Applicant to seek Legal Aid from the Commission.
33. Accordingly, for the reasons adumbrated above, the Applicant's Application for constitutional redress should necessarily fail.

**E. FINAL ORDERS:**

1. The Applicant's Application for Constitutional redress fail.
2. The initial Application filed on 29<sup>th</sup> April 2022 and the subsequent Application filed on 26<sup>th</sup> September 2022 by way of Notice of Motion are hereby dismissed.

  
**A.M. Mohamed Mackie**  
Judge



At High Court Lautoka this 24<sup>th</sup> day of May, 2023.

**SOLICITORS:**

**For the Applicant:** In Person  
**For the Respondent:** Legal Aid Commission