IN THE HIGH COURT OF FIJI
(WESTERN DIVISION) AT LAUTOKA
CIVIL JURISDICTION

JUDICIAL REVIEW NO. HBJ 9 OF 2022

IN THE MATTER of an application by **TAFIZUL RAHIMAN** for a Judicial Review on Constitutional Question and Declaration.

AND

IN THE MATTER of Order 53, Rule 1(2)(a)-(C) and 3(2)(a)-(b) of the High Court Rules 1988 and Section 14(2)(d), Section 45(³)(a) and Section 26(1) of the 2013 Constitution.
Civil Action No. HBM 106 of 2020(S).

BETWEEN	:	**TAFIZUL RAHMAN**
		APPLICANT
AND	:	**THE STATE AG'S OFFICE**
		1ST RESPONDENT
AND	:	**THE LEGAL AID COMMISSION**
		2ND RESPONDENT
AND	:	**THE HUMAN RIGHTS COMMISSION**
		3RD RESPONDENT
BEFORE	:	Hon. Mr. Justice Mohamed Mackie
APPEARANCES	:	The Applicant in person. Mr. Kant, for the 1st Respondent. Ms. Mishra, for the 2nd Respondent. 3rd Respondent absent and no representation.
DATE OF HEARING	:	On 19th July 2023.
DATE OF JUDGMENT	:	On 25th August, 2023.

RULING

A. INTRODUCTION

1. This is an Application, by way of Notice of Motion, preferred by the Applicant hereof, namely, **Tafizul Rahman**, seeking for leave to apply for judicial review against the 2nd

Respondent's Board's decision to refuse Legal Aid services to him. He is currently serving his life term of imprisonment at the Minimum Correction Centre from the year 2008.

B. NOTICE OF MOTION:

2. The Notice of Motion filed on 20th July 2022, inter alia, states as follows ;

"That the applicant prays for leave under High Court Order 53, r3-(2) for judicial review and declaration or injunction under order 53, r1-(2)a, b, c and order of mandamus in the following grounds:

1. *That the applicant has sought all legal avenues that is the Legal Aid Commission and the Human Rights Commission and did not find any solace "thus seeking your exhortation alternative remedy" for legal representative in Action No. HBM 106 of 2020 matter.*

2. *That the applicant seeks the assistance under section 7-(1)(c) of the Legal Aid Act since they fail in its statutory duties is the applicant does not have sufficient means to engage a legal practitioner where his rights has been infringed under S. 14-(2)(d) and S.26-(1), (2), (3) and (4) of the 2013 Constitution.*

3. *That the applicant also seek the assistance under S. 11-(1)(C) and S. 27-(1) of the Human Rights Act 2009 they fail in its statutory duties under S. 12-(1), (d), (k) where the applicants rights has been infringed and S. 45-(4)(a) and S. 26-(1), (2), (3) and (4) of the 2013 Constitution.*

***Take notice** that this application I made to seek interpretation of the 2013 Constitution and seek the intervention of this Honourable Court to consider a usual question posed below.*

That if the interest of justice is required in Civil action HBM 106 of 2020(S) in S. 14-(2), (d) and the benefit of the law in S. 26-(1), (2), (3) and (4) and promoting the protection in S. 45-(4), (a) of the 2013 Constitution.

***Please take further notice** that the applicant states that he has a reasonable cause to being this action and it is not a frivolous or vexatious application.*

***Take note that** this Honourable court is bound under S. 2-(3) and (4) a, b, c of the 2013 Constitution."*

C. RELIEF SOUGHT: (Declarations)

3. As per his Notice of Motion, the Applicant seeks the following reliefs.

(a) ***"A declaration** that the applicant's right to be given legal representation has hitherto been and continues to be contravened.*

(b) ***A declaration** that the applicant's right to equal protection, treatment and benefit of the law has hitherto been and continues to be contravened.*

(c) ***A declaration** that the applicant's right to protection of Human Rights has hitherto been and continues to be contravened".*

Further Reliefs Sought: (Injunction)

(a) *"That the injunction from this Honorable court, the order to be made that applicant should be given the service of a legal practitioner;*

(b) *That the injunction from this Honourable court, the order to be made that applicant should be provided the protection of Human Rights and should be provided the assistance when complaints about contravention of human rights".*

4. The Applicant is also moving for an order of Mandamus and Mandatory injunction directing the State to order the 2nd and 3rd Respondents to provide their services to the Applicant and for the temporary stay of proceedings (or an adjournment) of his Constitutional Redress Application until a legal practitioner is appointed or assigned.

D. BACKGROUND FACTS:

5. On 20th May 2008, the Applicant was convicted by the High Court of Lautoka for a Murder and sentenced to life imprisonment.

6. His Appeal preferred to the Court of Appeal was dismissed on 12th May 2011. His leave to Appeal against the decision of the Court of Appeal was also dismissed by the Supreme Court on 24th October 2012.

7. The Applicant had a Constitutional Redress Application before Ajmeer -J (as he then was) for which the Applicant had on 15th September 2020 applied to the 2nd Respondent seeking for Legal Aid and his file was registered on 18th September 2020. (Later this Constitutional Redress matter HBM -106 of 20 was heard and dismissed by Hon. A. Tuilevuka-J on 22nd July 2022)

8. In compliance with the relevant provisions of the Legal Aid Act and Internal policies governing the grant of Legal Aid Service, a merit test was conducted and by the letter dated 26th October 2020, the Applicant was informed about the Acting Director's decision that his Application for Legal Aid has been refused and he is entitled to Appeal the decision within 3 months.

9. An Appeal was, accordingly, preferred by the Applicant to the Board of the Legal Aid Commission and same being tabled before the Board, it became unsuccessful. The Appeal decision contained in the 2nd Respondent's letter dated **6th January 2022** addressed to the Applicant, was in fact notified to the Applicant only on the 1st July 2022.

10. Being dissatisfied of the Board's decision to uphold the Director's decision to refuse Legal Aid, the Applicant has preferred this Application seeking leave to apply for judicial review. The Applicant filed this Application on 20th July 2022 along with his Affidavit in support and annexures thereto. At the hearing , no objection as to the delay was raised by the 1st and 2nd Respondents as the Appeal decision by the Board had in fact been notified to the Applicant only on 1st July 2022.

E. THE LAW:

11. The relevant law applicable to leave to apply for judicial review is the HCR, O 53, R 3, which provides:

> ***"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 Appendix 1 hereunder containing statement of-*
> *(i) the particulars of the judgment order, decision or other proceeding 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 the applicant's solicitors (if any); and*
> *(v) the applicant's 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.*
>
> *(iii) Notice of hearing of the application shall be notified in writing to the parties by the Registry.*
>
> *(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.'

F. TEST FOR GRANTING LEAVE:

12. In order to grant leave to apply for judicial review, the Court has to be satisfied, *inter alia*, that:

(a) The claimant has a sufficient interest,
(b) There has not been an undue delay.
(c) No alternative remedy is available.
(d) The decision is susceptible to review.
(e) There is an arguable case for review;

G. DISCUSSION :

13. The Applicant has made this Application on 20th July 2022 to obtain leave to apply for judicial review of the decision of the Board of the 2nd Respondent Legal Aid Commission (the Board's decision), seemingly, made on or before 6th January 2022, but notified to the Applicant only on 1st July 2022. He adduces the grounds of breach of rules of natural justice, illegality, unreasonableness and legitimate expectation.

14. It is observed that the Applicant has commenced this Application by way of a **Notice of Motion** and not by way of an **Originating Motion** as stipulated by Rule 3 (2) of the High Court Rule. Also there is no a formal statement filed along with the Application as required.

15. It is also observed that the Applicant does not seeks a writ of **Certiorari** (quashing order) to quash the 2nd Respondent's Board's decision. What the Applicant has mainly prayed for are (3) declaratory reliefs in relation to **(a) His right to legal representation, (b) His right to equal protection, treatment and benefit of law , and (c) His right to protection of Human Rights.** He alleges that the above rights have been contravened.

16. He also prays for a Mandamus order and a Mandatory Injunction directing the 1st Respondent State to Order the 2nd Respondent Legal Aid Commission to provide the services of a Legal practitioner and the 3rd Respondent Human Right Commission to provide its Services to him in his Constitutional Redress Application to promote and protect his Human Rights.

17. An application for leave to apply for judicial review may be determined on papers without a hearing and where a hearing is needed it will hear and determine the Application inter - partes (see O 53, R 3 (3) (b). In this case, the Application was heard inter partes. The mode of the Application was not seriously disputed. Though, the Application was not in Order in relation to its mode, it was without the required prayer for the relief of Certiorari, and filed without a Statement , considering the fact that the Applicant is an inmate and making this Application in person, I decide to disregard those anomalies.

Sufficient interest

18. The Court will not grant leave unless it considers that the Applicant has a sufficient interest (standing) in the matter to which the Application relates (see O 53, R 3 (5)). The requirement of standing indicates that the primary concern of administrative law is not simply to control the performance of public functions, but rather to exercise control in the interests of persons affected in particular ways. In administrative law, rules of standing are seen as rules about entitlement to complain of a wrong rather than as part of definition of the wrong.

19. The purpose of the standing rules under O 53 appears to be a mechanism for weeding out hopeless or frivolous cases at an early stage and protecting public functionaries from harassment.

20. The Applicant is the affected person by the impugned decision of the 2nd Respondent's Board. The 1st and the 2nd Respondents do not dispute this position. The decision in relation to which leave is sought for review relates directly to the Applicant. Being the subject, he is directly affected and he has standing. I am provisionally satisfied that the Applicant has sufficient interest in the matter to which the Application relates.

Undue delay (if any)

21. No objection was raised at the hearing with regard to any delay. Though, the decision had , seemingly, been made on 6th January 2022 , since it was , admittedly, relayed to the Applicant only on 1st July 2022 , the Application made for leave on 20th July 2022 , can be admitted without being caught up by the time-bar.

The availability of alternative remedy.

22. Are alternative remedies available to the Applicant? The decision sought to revise is the final decision made by the Board pursuant to an Appeal. The Applicant has no further

remedy or review of the impugned decision. The Applicant had exhausted all avenues for Legal Aid.

Is the decision susceptible for Review?

23. The Applicant has been affected by a decision, which is not private. It is an administrative decision. It is a decision susceptible to a public law remedy.

An arguable case for review

24. Another test for granting of leave to apply for judicial review is that a claimant must demonstrate to the Court upon 'a quick perusal of the papers' that there is an **arguable case** for granting relief ***(see: R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd.***

25. When considering whether there is an arguable case for granting the relief sought, the Court will not go into the matter in depth. The Court will only see, upon perusal of the papers, whether there is an arguable prima facie case for granting the relief.

26. The decision is challenged on the, purported, grounds as per paragraph 1 of the Notice of Motion: **(a)** That the 2nd and 3rd Respondents did not find any solace **(b)** That the 2nd Respondent by failing to provide legal Aid pursuant to Section 7 (1) (c) of the Legal Aid Act infringed his rights guaranteed under Section 14(2) (d) and Section 26 (1),(2) , (3) and (4) of the 2013 Constitution. **(c)** That the 3rd Respondent by not providing assistance under Section 11 (1) (2) and Section 27 (1) of the Human Right Act 2009, breached their Statutory duties under section 12, (h), (k) and infringed Section 45 (4) (a) and section 26 (1), (2), (3) and (4) of the 2013 Constitution.

27. It was forcefully argued on behalf of the 1-2 Respondents that there is no an arguable case for the Court to consider granting of leave to apply for judicial review.

In ***Fiji Airline Pilots Associations v. Permanent Secretary for Labor and Industrial Relations [1998] FJCA 14,*** the Court of Appeal said:

> *"That the basic principle is that the judge is only required to be satisfied that on the material available and disclosed is what might, on further consideration, turn out to be an arguable cause in favor of granting relief."*

28. The stern position taken up by the leaned Counsel for the 1st Respondent Attorney General was that there is no any administrative decision taken by the 1st Respondent affecting the Applicant, thus the Application is frivolous, vexatious and an abuse of the process of Court . In this regard Learned Counsel relied on the principles laid down by the Supreme Court in ***Matalulu & Anor v Director of Public Prosecutions [2003] 4 LRC 712.***

29. As there is no decision made by the 1st Respondent, there cannot be an arguable case for the Applicant to seek judicial Review against the 1st Respondent. On this alone, this Court

finds that the Application does not warrant any further consideration against the 1st Respondent.

30. Further, this Court cannot by an order of Mandamus or injunction direct the 1st Respondent Attorney General to order the 2nd and 3rd Respondents to provide their assistance to the Applicant as prayed for by the Applicant in his Notice of Motion.

31. It is also to be observed that the Applicant, while not alluding to any decision made by the 1st Respondent, also does not show any defect in the manner through which the impugned decision to refuse Legal Aid was arrived at by the 2nd Respondent.

Scutt J in State v Connors, ex parte Shah [2008] FJHC 64 stated:

> *"...as was said in Sitiveni Ligamamada Rabuka and Commission of Inquiry into the Deed of Settlement Dated 17 September 1993; In re Anthony Stephens v. Attorney-General of Fiji (JR No. 26 of 1993, 4 May 1995):*
>
> *"This Court is not concerned with a review of the decision which the commission reached at the Inquiry but simply with a review of the manner or process in which the decision was reached. It is the decision-making process employed by the Commission of Inquiry in reaching its decision which is the primary concern of this Court"*

32. While ruling out the possibility of granting leave against the 1st Respondent, let me consider the position with regard to 3rd Respondent Human Right Commission. Careful perusal of the case record shows nothing about the service of the Summons on HRC. In any event, there is no reviewable decision made by the 3rd Respondent as well for the Court to be called upon to judicially review. Accordingly, no necessity arises to grant leave against the 3rd Respondent as well. Application against the 3rd Respondent has to fail necessarily.

33. The 2nd Respondent Legal Aid Commission had conducted a 'Merit Test' and being dissatisfied of the Applicant's eligibility to receive Legal Aid, refused to provide the same and it was duly informed. Then the Applicant Appealed to the Board of the 2nd Respondent and it was unsuccessful. This was communicated after around 6 months on 1st July 2022. In fact, there is an admitted delay of around 6 months' time in informing the decision. But, the Applicant does not complain that the delay had caused any prejudice to him. He does not complain about the manner in which the Merit test was conducted.

34. 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 real prospects of success in the matter in relation to which legal assistance is sought."*

35. The Commission seems to have duly conducted the Merit Test and found that there is no prospect of success in his Application. The Applicant does not find any fault with the manner in which the impugned decision by the 2nd Respondent was arrived at. There is no

breach of Natural Justice as the Commission's assessment was conducted based on the instructions obtained from the Applicant.

36. I have taken judicial notice of the final decision dated 22nd July 2022 pronounced by Hon. A. Tuilevuka-J in the Constitutional Redress Application No- HBM 106 of 2020 filed by the Applicant against the State, in respect of which the Legal Aid was sought from the 2nd Respondent. In that Ruling, it has been correctly observed that the Applicant was in an attempt to revisit his Criminal case Murder trial from the point of Police investigation till the final decision by the Supreme Court.

37. The aforesaid Constitutional Redress matter, ie. HBM 106 of 2020 now stands dismissed. Thus, no purpose will be served, even if the leave is granted, in the absence of the very matter for which the Legal Aid was sought. However, there is no an arguable case for the Applicant. In any event, a pertinent question arises as to how the 2nd Respondent Legal Aid Commission can be compelled and expected to go before a Court of law for an unmeritorious Application and argue on the Applicant's behalf, who has exhausted all his remedies in the system. This Court cannot extend its helping hand to the Applicant.

38. This Court cannot compel the 2nd Respondent to grant Legal Aid. There is no obligation on its part to offer Legal Aid and represent him when he had failed the merit Test.

39. The 2nd Respondent has limited resources. Hence they cannot be ordered to 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. The purpose of the Merit Test is justified as they are under obligation to manage and spend the limited funds they get on the most deserving cases.

40. The fact that there was some delay in processing his Application and in notifying the outcome thereof, need not necessarily qualify him for any of the reliefs prayed for by him. The Applicant at that time material was serving his 14th year of life term, having exhausted all his remedies. There was no need for an urgent consideration and the delay did not prejudiced him or caused any serious harm.

41. In ***Kean v Director of Legal Aid Commission [2019] FJHC 905; HBJ4.2019 (20 September 2019)*** Hon. Jude Nanayakkara-J (as he then was) had, inter- alia, made the following observations, with which I am inclined to agree.

> *"In compelling the Commission to represent a person who has already been denied Legal Aid assistance based on the internal eligibility criteria, the Court would be opening the floodgates for future Applicants which will place resource constraints on the Commission and its ability to regulate its own affairs".*
>
> *"(ix) It is worth mentioning that, the Courts can point out that the administration of Justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of Justice, but the Courts cannot compel the legislature and the executive government to provide legal representation at public expense. Nor can the Courts declare the legal representation at public expense. Nor can the Courts declare the*

existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. And there is the Legal Aid Act 1996 in Fiji, which lays down the circumstances in which legal aid may be provided, those circumstances involving considerations which extend beyond the interests of justice in the particular case. But the interests of justice cannot be pursued in isolation. There are compelling demands upon the public purse which must be reconciled and the funds available for the provision of legal aid is necessarily limited. In my opinion, to declare such an entitlement by the Court without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions".

"The constitutional right granted by Section 15(10) of the Constitution is determined by the requirement of "the interest of justice". It therefore appears clear that the Constitution does not entrench an absolute right to legal assistance at public expense irrespective of the circumstances of the particular case. The applicant's right under Section 15(10) of the Constitution is qualified by the words "if injustice would otherwise result". The constitutional right does not permit every impoverished person to call upon the State to provide legal assistance at public expense. All factors relating to legal aid must be taken into account, including the Applicant's monetary circumstances and need for legal assistance in the particular circumstances. The right "to be given the services of a legal practitioner under a scheme for legal aid" has been said often enough not to be an absolute right: State v Tanaburenisau[9]"

42. On consideration of all the material before me, and taking into account the relevant authorities, written submissions tendered and the oral submissions made at the hearing, by the Applicant and Counsel for the 1st and 2nd Respondents, I find that the Applicant has not demonstrated an arguable case. He is precluded from the judicial review process.

H. ORDERS:

a. The leave to apply for judicial review is declined.

b. The Applicant's Application filed on 20th July 2022, seeking leave for judicial review is dismissed.

c. No order as to costs.

HIGH COURT OF FIJI

A.M. Mohamed Mackie
Judge

At High Court Lautoka this 25th day of August, 2023.

SOLICITORS:

For the Applicants:	**In Person**
For the 1st Respondents:	**Attorney-General's Chambers.**
For the 2nd Respondent:	**Legal Aid Commission.**
For the 3rd Respondent:	**No representation.**