

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

**JUDICIAL REVIEW NO. HBJ 11 OF 2022**

**IN THE MATTER** of an application by **JOSEPH CHRISTOPHER** 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(4)(a) and  
Section 26(1) of the 2013 Constitution.

Civil Action No. HBM 44 of 2020(S).

<b>BETWEEN</b>	:	<b>JOSEPH CHRISTOPHER</b>	<b>APPLICANT</b>
<b>AND</b>	:	<b>THE ATTORNEY GENERAL'S OFFICE.</b>	<b>1<sup>ST</sup> RESPONDENT</b>
<b>AND</b>	:	<b>THE LEGAL AID COMMISSION</b>	<b>2<sup>ND</sup> RESPONDENT</b>
<b>AND</b>	:	<b>THE HUMAN RIGHTS COMMISSION</b>	<b>3<sup>RD</sup> RESPONDENT</b>
<b>BEFORE</b>	:	Hon. Mr. Justice Mohamed Mackie	
<b>APPEARANCES</b>	:	Plaintiff appeared in person. Mr. S. Kant, for the 1 <sup>st</sup> defendant Ms. N. Mishra, for the 2 <sup>nd</sup> defendant. 3 <sup>rd</sup> Respondent absent & no representation.	
<b>DATE OF HEARING</b>	:	19 <sup>th</sup> July, 2023	
<b>DATE OF JUDGMENT</b>	:	25 <sup>th</sup> August, 2023	

**RULING**

**A. INTRODUCTION:**

1. This is an Application, by way of Notice of Motion ,preferred by the Applicant hereof ,  
namely, **Joseph Christopher** , currently at the Minimum Correction Centre , seeking for

leave to apply for judicial review against the 2<sup>nd</sup> Respondent's Board's decision made refusing Legal Aid services to him.

**B. NOTICE OF MOTION:**

2. The Notice of Motion, 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 soughed 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.*
2. *That the applicant seeks the assistance under section 7-(1), (c) of Legal Aid Act since they fill in its statutory duties is the 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 seeks the assistance under section 11-(1), (2) and S. 27-(1) of Human Rights Act 2009 that they fill 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), and (4) of the 2013 Constitution.*

**Take notice that** this application is made to seek clear 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 44 of 2020(S) in S. 14-(2)(d) and the benefit of the law in S. 26-(1), (2), (3) and (d) 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. The reliefs that the Applicant seeking are as follows:

- 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 Right has hitherto been continues to be contravened."*

### **Further Reliefs Sought (Injunction)**

- a. *“That the injunction form this Honourable court, the order to be made that the applicant should be given the services of legal practitioner;*
- b. *That the injunction form this Honourable court, the order to be made that applicant should be provided 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 26<sup>th</sup> October 2020, the Applicant lodged an Application with the 2<sup>nd</sup> Respondent Legal Aid Commission for Legal Aid for his Constitutional Redress matter bearing No; HBM 44 of 2020 that was pending before the Lautoka High Court.
6. The Applicant’s file was registered and allocated to a Legal Officer on 26<sup>th</sup> October 2022.
7. As a matter of policy, all serving prisoners may qualify for assistance under the Means Test criteria and on this basis the Applicant was granted a Means Test. In compliance with the relevant provisions of the Legal Aid Act and Internal policies governing the grant of assistance, a merit test was conducted to determine the “reasonable prospect of success” for which the Applicant provided Ms. Amrita Sharma, the legal officer, instructions with regard to his Application for Constitutional Redress.
8. Subsequently, the means Test being conducted, Mr. S. Ali, the former Director, made the decision to refuse Legal Aid assistance to the Applicant and this decision was notified to the Applicant by the letter dated 21<sup>st</sup> November 2020 marked as “SRA-1”.
9. The Applicant by his letter dated 2<sup>nd</sup> December 2020 marked as “SRA-2” made an Appeal to the Board of the 2<sup>nd</sup> Respondent to have the decision of the Acting Director refusing Legal Aid to the Applicant reviewed. The Appeal being tabled before the Board for review, same became unsuccessful as the Director’s decision refusing the Legal Aid was affirmed. The Appeal decision was to be notified to the Applicant by the letter dated 8<sup>th</sup> March 2022 marked as “SRA-3”. But, the letter was handed over to the Applicant only on 26<sup>th</sup> August 2022.
10. It is the above decision of the Board affirming the decision of the acting Director of the 2<sup>nd</sup> Respondent that has given rise to the present Application seeking leave to apply for judicial review.

**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 must be commenced by originating motion 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 23<sup>rd</sup> September 2022 to obtain leave to apply for judicial review of the decision of the Board of the 2<sup>nd</sup> Respondent Legal Aid Commission. The decision is contained in the letter dated 8<sup>th</sup> March 2022, a copy of which was provided to him only on 26<sup>th</sup> August 2022. He adduces 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 decision made by the Board. 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 3<sup>rd</sup> Respondent Human Right Commission to provide its Services to the Applicant 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 Statement, considering the fact that the Applicant is an inmate and making this Application in person, I decided 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 1<sup>st</sup> and the 2<sup>nd</sup> 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 impugned decision had been, seemingly, made on 3<sup>rd</sup> March 2022, since it was, admittedly, relayed to the Applicant only on 26<sup>th</sup> August 2022, the Application made for leave on 23<sup>rd</sup> September 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 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 Board's decision is challenged on the, purported, grounds as per paragraph 1 of the Notice of Motion: **(a)** That the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not find any solace **(b)** That the 2<sup>nd</sup> 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 3<sup>rd</sup> 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 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 1<sup>st</sup> Respondent Attorney General was that there is no any administrative decision taken by the 1<sup>st</sup> 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 1<sup>st</sup> Respondent, there cannot be an arguable case for the Applicant to seek judicial Review against the 1<sup>st</sup> Respondent. On this alone the Application does not warrant any further consideration against the 1<sup>st</sup> Respondent.

30. Further, this Court cannot by an Order of Mandamus or an Injunction direct the 1<sup>st</sup> Respondent Attorney General to order the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to provide their services or 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 1<sup>st</sup> Respondent, also does not show any defect in the manner through which the impugned decision to refuse Legal Aid was arrived at by the 2<sup>nd</sup> 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 affecting the 1<sup>st</sup> Respondent, let me consider the position with regard to 3<sup>rd</sup> Respondent Human Right Commission. Careful Perusal of the case record shows nothing about the service of the Summons on the HRC. In any event, there is no a reviewable decision made by the 3<sup>rd</sup> Respondent as well for the Court to be called upon to judicially review. Accordingly, no necessity arises to grant leave against the 3<sup>rd</sup> Respondent. Application against the 3<sup>rd</sup> Respondent has to fail necessarily.
33. The 2<sup>nd</sup> 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 2<sup>nd</sup> Respondent and it was unsuccessful. A copy of refusal letter dated 3<sup>rd</sup> March 2022 was actually handed over to the Applicant only on 26<sup>th</sup> August 2022. In fact, there is an admitted delay of around 7 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 2<sup>nd</sup> 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. This Court cannot compel the 2<sup>nd</sup> Respondent to grant Legal Aid. There is no obligation on its part to offer Legal Aid Commission to represent him when he has failed the merit Test.
37. The 2<sup>nd</sup> 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 and to waste its limited resources. The purpose of the Merit Test is justified as they are under obligation to manage the limited funds they get on the most deserving cases.
38. The fact that there was some delay in processing his Application and notifying the outcome thereof, need not necessarily qualify him for any of the reliefs prayed for by him. The delay did not prejudiced him or caused any serious harm.
39. 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*

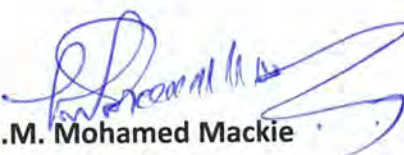
*practitioner under a scheme for legal aid" has been said often enough not to be an absolute right: State v Tanaburenisau[9]"*

40. 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents, I find that the Applicant has no arguable case. He is precluded from the judicial review process.

**H. ORDERS:**

- a. The leave to apply for judicial review declined.
- b. The Applicant's Application filed on 23<sup>rd</sup> September 2022, seeking leave for judicial review, is dismissed.
- c. I make no order as to costs.



  
**A.M. Mohamed Mackie**  
Judge

At High Court Lautoka this 25<sup>th</sup> day of August, 2023.

**SOLICITORS:**

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