

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

CIVIL CASE NO. HBJ 021 OF 2023

BETWEEN : **TAFIZUL RAHMAN**
Applicant

AND : **STATE**
First Respondent

COMMISSIONER FOR FIJI CORRECTIONS
Second Respondent

HUMAN RIGHTS COMMISSION
Amicus Curiae

Counsel : **Applicant in Person**
Ms Raman & Ms Liku for 1st and 2nd Respondent
Mr P Sharma for Human Rights Commission

Hearing : **29 April 2024**

Judgment : **12 July 2024**

JUDGMENT

(Summons to strike out application for constitutional redress)

- [1] Mr. Tafizul Rahman was convicted of murder in 2005 and sentenced to life imprisonment. Since 2019, he has lodged multiple petitions with the Mercy Commission seeking a pardon. He has received little to no information regarding the status of his petitions and, therefore, has brought this claim for Constitutional Redress.
- [2] Mr Rahman seeks declarations that his constitutional rights have been infringed and an order from the Court that his petition be properly forwarded to the Mercy Commission for its consideration.

Background

[3] The material facts are these:

- i. On 20 May 2008, having been found guilty of the murder of his late wife, Mr. Rahman was sentenced to life imprisonment. He exercised his rights of appeal against conviction and sentence to the Court of Appeal and Supreme Court but was unsuccessful. The decision of the Supreme Court was issued on 24 October 2012.
- ii. On 29 May 2019, Mr. Rahman wrote to the then Acting Chief Justice inquiring about a pardon given the length of time he had already served of his sentence. The Acting Chief Justice responded on 27 August 2019 advising Mr. Rahman that his recourse was to petition the Mercy Commission under s 119(3) of the Constitution of Fiji 2013 for its recommendation to His Excellency the President to exercise the power of mercy. The Acting Chief Justice further provided:

Once you have petitioned the Commission, it will then request for a report from judge who presided over your trial or this Office if report cannot be obtained from the presiding judge.

I suggest you petition the Commission for its recommendation and upon receipt of request from the Commission, we will provide report to the Commission for its consideration.

- iii. Mr. Rahman prepared a petition for the Mercy Commission. In fact, he did so on 26 June 2019, before receiving the Acting Chief Justice's letter. Mr Rahman prepared fresh petitions on 12 December 2020 and 10 March 2021. It is not clear why he prepared multiple applications. It may be because he had a concern that the Fiji Corrections Service (FCS) was not forwarding his petitions to the Mercy Commission.
- iv. However, it does appear that the petitions, or some of them, were being received by the Attorney General's Office, which acts as the secretariat for the Mercy Commission. Mr Rahman's daughter, Ms Nashreen Rahman, has been in communication with the Attorney-General's office on behalf of her father seeking updates of her father's petitions. Ms Rahman received advice from the Attorney-General's office on 8 June 2021 that it had *forwarded his application*

to Fiji Corrections Services for their further actions' and on 29 September 2021 that the 'application was sent to Fiji Corrections Services (FCS) in Feb this year...[and it] will await the submission from them'.

- v. Later in 2021, Ms. Rahman received a letter dated 29 November 2021 from Commander F.B. Kean, the Commissioner of the Fiji Corrections Service. Commander Kean was responding to Ms Rahman's request for an update for her father. Commander Kean stated:

Pr Rahman was sentenced to life imprisonment after being convicted of murder and as of this year he has served 13 years of his sentence. We also note that on 10 March 2021 a request for pardon was submitted to the Chairperson of the Prerogative of Mercy by yourself on behalf of Pr Rahman.

The requirement to be eligible for pardon is that a person serving a sentence of imprisonment must have served 15 years before consideration will be had to any application for pardon.

In that regard, Pr Rahman will need to complete at least 15 years of his sentence before he can be considered for pardon. As of now, he is not qualified or has not satisfied the requirement to be eligible to be considered for pardon.

- vi. On 4 January 2022, Mr. Rahman filed a Motion in the High Court seeking leave to apply for judicial review. Mr Rahman wanted a determination from the High Court as to whether he was eligible to petition the Mercy Commission for a pardon under s 119(3) of the Constitution. The State filed a summons to strike out Mr Rahman's motion. Tuilevuka J issued a Ruling on 20 July 2022 determining:¹

18. It is no doubt open to Rahiman to petition the Mercy Commission. For a convicted prisoner serving a custodial sentence and who has limited access, the Prison Department is the conduit through which a petition to the Commission must pass. The Department's

¹ *Rahiman v The State* [2022] FJHC 383.

role is simply to pass such a petition on to the Commission.

19. Rahman's grievance is about the alleged failure of prison officials to refer his petitions to the Mercy Commission. I do note, though, that his affidavit in support does not mention any specific decision, nor does it name any specific officer. I am of the view that in a situation such as this, an ideal course open to Rahiman is to bring to the attention of any Resident Magistrate who is doing the rounds on the Prison Visitation program about his grievances.

20. In the final, I agree with the submission of the Office of the Attorney-General. The application is struck out.

- vii. In line with the suggestion offered by Tuilevuka J, Mr. Rahman subsequently met with a visiting Resident Magistrate on 10 August 2022. He prepared further petitions for the Mercy Commission on 27 September 2022 and 15 February 2023.
- viii. Mr. Rahman's daughter continued chasing up the matter with the Attorney-General's office. She received email advice from the Attorney-General's office on 3 July 2023 that it had *'forwarded his application to Fiji Corrections for full report on 7 July 2020...[and] we have not received a full report from Fiji Corrections'*.
- ix. Mr Rahman submitted a further petition on 31 July 2023, by my count this was his sixth petition. The Attorney-General's office informed Ms Rahman on 24 August 2023, in response to her enquiry whether it had received the recent petition, that it had received Mr. Rahman's further application for a pardon *'this week and it is in process'*. It is clear, then, that the Mercy Commission has received several of Mr Rahman's petitions between 2020 and 2023.

Present proceedings

- [4] In July 2023, Mr. Rahman filed the present proceeding by way of a Notice of Motion accompanied with a supporting affidavit from him. Mr Rahman seeks constitutional

redress under s 44 of the Constitution. He seeks declarations that the respondents have infringed his constitutional rights in the following respects:

- i. By imposing a minimum tariff of 15 years before being eligible for consideration of a pardon by the Mercy Commission.
 - ii. By denying him access to the Mercy Commission when the Fiji Corrections Service failed to forward his petitions to the Commission.
- [5] Mr. Rahman seeks an order directing the Fiji Corrections Service to forward his petition to the Mercy Commission within 21 days. He also seeks non-pecuniary damages for the previous failures by the Fiji Corrections Service. Finally, he also seeks an order compelling the Attorney-General's office to forward his petition to the Mercy Commission for a decision within a reasonable time.

- [6] The respondents have filed a Summons to strike out Mr Rahman's Motion on the basis that, firstly, it was filed outside of the statutory limit of 60 days, as required under r 3(2) of High Court (Constitutional Redress) Rules 2015. Secondly, that Mr Rahman has an adequate alternative remedy available to him, as per s 44(4) of the Constitution. An affidavit for the respondents, filed for Mr. Alevio Turaganivalu dated 2 February 2024 deposes, amongst other things, that Mr. Rahman's petition of 29 January 2023 *'was sent to the Mercy Commission and I am advised by the Secretariat that his application is in process, and I verily believe the same to be true'*.

Submissions of the parties

- [7] Ms Liku and Ms Raman provided the following:
- i. Mr Rahman has adequate alternative remedies in the form of his appeal from his original sentence (which he exercised) or judicial review.
 - ii. Mr Rahman's petition of 15 February 2023 was received by the Mercy Commission and, thus, the issue in contention is moot.
 - iii. The respondents argue that there is no evidence that Mr Rahman made any earlier petitions for a pardon. That argument clearly cannot be correct as evidenced by the emails from Attorney-General's office in 2021 confirming it was then processing Mr Rahman's applications not to mention Commander

Kean's confirmation in his letter of 29 November 2021 that Mr Rahman's petition of 10 March 2021 had been received by the Mercy Commission.

- iv. Relying on the premise that Mr Rahman has only lodged the one petition, being the petition of 15 February 2023, the respondents argue that the Notice of Motion for Constitutional Redress has been filed outside of the requisite 60 days under the High Court (Constitutional Redress) Rules 2015.
- v. The process for consideration of a petition was explained to me at the hearing. It appears that on receipt of a petition, the secretariat processes the same as follows:
 - Fiji Corrections Service is asked to supply several reports, including a status of the prisoner's incarceration, a psychological report and a medical report.
 - The secretariat seeks a report from the Judge that sentenced the prisoner or the Chief Justice.
 - The Mercy Commission then considers the available reports.
 - Any recommendation of a pardon is presented to His Excellency the President.
 - If the Mercy Commission declines the petition this is communicated to FCS who in turn informs the prisoner.

[8] Mr Sharma expressed concern with the lack of transparency with the process as it has pertained to Mr Rahman's petitions. His concerns were as follows:

- i. Mr Rahman has not received an acknowledgment of any of his petitions. It is, therefore, unclear which petitions have been received by the Mercy Commission.
- ii. Equally, the Mercy Commission has not provided adequate updates on the status of the processing of the petitions. Mr Rahman is not aware which petitions are still active, which if any have been declined and the reasons for any declination.

[9] Mr Rahman has filed affidavits dated 27 January 2023² (in support of the Motion), 16 November 2023 and 29 April 2024. His written submissions are dated 18 April 2024. His arguments are summarized as follows:

- i. That pursuant to s 119(3) of the Constitution, the Mercy Commission is required to consider a petition from any convicted person.
- ii. The Supreme Court in *Khan v State* [2009] FJSC 6 (12 February 2009) stated that a petitioner is eligible for consideration of a pardon after serving 10 years.
- iii. The Fiji Corrections Service has no power to impose any tariff on a prisoner and, thus, Commander Kean's imposition of a minimum period of 15 years is unlawful.
- iv. The 60-day limitation under the High Court (Constitutional Redress) Rules 2015 does not preclude his claim.
- v. A number of prisoners who have served less time than Mr Rahman have been pardoned. He has, therefore, not been treated equally as required under the Constitution.

Decision

[10] An applicant who believes that his or her rights under Chapter 2 of the Constitution have, or is likely to be, contravened may apply to the High Court under s 44 of the Constitution for redress. Section 44(2) provides:

The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.

[11] Subsection (4) further provides:

The High Court may exercise its discretion not to grant relief in relation to an application or referral made under this section if it

² This must in fact be July, not January, 2023.

considers that an adequate alternative remedy is available to the person concerned.

[12] Section 119 of the Constitution reads, in part:

(1) The Commission on the Prerogative of Mercy established under the State Services Decree 2009 continues in existence as the Mercy Commission.

(2)

(3) On the petition of any convicted person, the Commission may recommend that the President exercise a power of mercy by

(a) granting a free or conditional pardon to a person convicted of an offence;

(b) postponing the carrying out of a punishment, either for a specific or indeterminate period;

(c) remitting all or part of a punishment.

(4) The Commission may dismiss a petition that it reasonably considers to be frivolous, vexatious, or entirely without merit, but otherwise -

(a) must consider a report on the case prepared by -

(i) the judge who presided at the trial;

(ii) the Chief Justice, if a report cannot be obtained from the presiding judge;

(b) must consider any other information derived from the record of the case or elsewhere that is available to the Commission;

(c) may consider the views of the victim of the offence.

(5) The President must act in accordance with the recommendations of the Commission.

....

(10) In the performance of its functions or the exercise of its authority and powers, the Commission shall be independent and shall not be subject to the direction or

control of any person or authority, except by a court of law or as otherwise prescribed by written law

...

(12) The Commission may regulate its own procedure and may make such rules and regulations as it deems fit for regulating and facilitating the performance of its functions.

[13] It is also helpful to set the following passage from the Supreme Court in *Khan v State* (supra), a decision relied on by Mr Rahman in his written submissions:

17. Counsel for the State, Mr Bulamainavalu, has helpfully drawn attention to s.115 of the Constitution. This section provides that the President, acting on the advice of the Commission on the Prerogative of Mercy, may grant to a person convicted of an offence a pardon or conditional pardon, or a respite of the execution of the punishment imposed for the offence, or substitute a less severe form of punishment or remit the whole or part of the punishment imposed. According to Mr Bulamainavalu, the Commission will consider examining a request from an offender for relief under s.115 once the offender has served 10 years imprisonment.

18. By s.64 of the Prisons Act (cap 86), the Controller of Prisons is required to report at stipulated times to Minister on the general condition of prisoners (such as the petitioner) sentenced to life imprisonment.

19. Mr Bulamainavalu has informed the Court that, according to an internal administrative directive by the Prisons Department, the Department should refer a prisoner to the Commission on the Prerogative of Mercy after the Prisoner has served ten years of his term of life imprisonment accordingly.

20. The petitioner was sentenced to life imprisonment on 23 September 2004. His case should therefore be referred to the Commission

after 23 September 2014. In the ordinary course of practice in the Prisons Department this should be done by the Department itself. It would of course be open to the petitioner, himself, to refer his case to the Commission, once he has completed serving ten years imprisonment.

21. The petitioner's release from prison, should that occur, will depend substantially on his behaviour in prison, how his personality and character develop while he is incarcerated and to what degree he is rehabilitated. These matters will be considered when a better informed decision can be made as whether it would be in the interests of society and in his interests to be released into the community

[14] In my view, Mr Rahman's application for constitutional redress cannot succeed.

[15] The primary basis for his Notice of Motion was his concern that the Fiji Corrections Service (FCS) was not forwarding his petitions to the Mercy Commission. It is obvious that the Mercy Commission secretariat has received several petitions since 2020. It is also evident that it has processed some, and possibly all, of the petitions. As such, there is no basis to make any declaration that he has been denied access to the Mercy Commission or to make any orders compelling the FCS to forward his petitions to the Mercy Commission.

[16] Mr Rahman also seeks orders compelling the secretariat to place the petition with supporting documentation before the Mercy Commission with a direction that the Mercy Commission make a decision on the petition within a reasonable time. The difficulty with making any such orders, leaving aside the fact that the Constitution does not impose any such time restrictions on the Mercy Commission, is that there is no information available regarding the status of any of Mr Rahman's petitions. It may be the case that the Mercy Commission has previously made decision on each of Mr Rahman's petitions.

[17] Mr Rahman claims that he has received unequal treatment from the Mercy Commission in that other prisoners who have served less time have been pardoned. It is simply not possible to consider any allegation of unequal treatment without receiving full information for each of the persons pardoned. Moreover, Mr Rahman's

allegation misconceives the function of the Mercy Commission. Its decision to recommend a pardon is not simply based on time served but a range of matters, such as the circumstances of the crime, genuine remorse, the prisoner's behaviour while incarcerated and the extent to which the prisoner had rehabilitated.

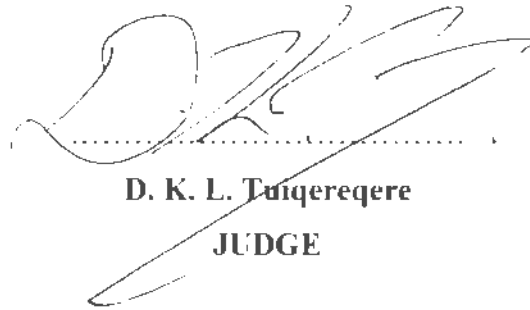
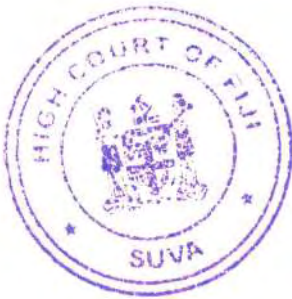
[18] That said, I do have the following concerns:

- i. As stated by the Supreme Court in *Khan v State* (supra), the predecessor to the Mercy Commission had a minimum tariff of 10 years served before it would consider a pardon for a prisoner sentenced to life imprisonment. It appears that that tariff may have subsequently been increased to 15 years. Commander Kean informed Ms Rahman of this 15 year minimum period on 29 November 2021. If there is a minimum period that is a matter for the Mercy Commission to fix, not the FCS. If, indeed, the Mercy Commission has fixed such a tariff (as I would suspect) it should be made clear by FCS that the Mercy Commission has fixed this period or, more appropriately, the Mercy Commission (or its secretariat) should be communicating this advice directly to petitioners.
- ii. If, as appears to be the case, there has been little to no communication from the secretariat to Mr Rahman on his petition then in my view this is unsatisfactory. I agree with Mr Sharma that the lack of transparency with the petition process is a concern. The Mercy Commission has powers under s 119(12) to regulate its procedures. Very little information has been supplied to the Court regarding the procedures that are currently in place to process a petition. I would have thought it entirely reasonable that a petitioner is entitled to the following:
 - Acknowledgment directly from the Mercy Commission or its secretariat of his/her petition.
 - To be able to request an update on the status of the petition and receive a timely response.
 - At the conclusion of the process, advice from the Mercy Commission or its secretariat to the petitioner on the outcome of the petition.

Orders

[19] For the reasons stated, the following orders are made:

- i. Mr Rahman's Notice of Motion is struck out.
- ii. There is no order as to costs.



D. K. L. Tuiqereqere
JUDGE

Solicitors:

Office of Attorney-General's Chambers for the 1st & 2nd Respondents