

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Judicial Review No. 32 of 2023

IN THE MATTER of an application by **DESHWAR KISHORE DUTT** currently detained at Maximum Corrections Centre, Naboro (hereinafter referred to as “**the Applicant**”) for a Judicial Review

AND

IN THE MATTER OF a decision by the Officer in Charge, the Supervisor of the Corrections Centre, Naboro and the Acting Commissioner of the Fiji Corrections Services made on the 14th of July 2023 to transfer the Applicant to Maximum Corrections Centre, Naboro (herein after referred to as the Respondents.)

BETWEEN: **DESHWAR KISHORE DUTT**

APPLICANT

AND: **KALIVATI BUSELE**, former officer in Charge at Maximum Correction Centre currently officer in charge, Suva Remand Centre

1st RESPONDENT

AND: **ALEVIO TURAGA** Supervisor of Corrections of Naboro Corrections Complex, Naboro

2nd RESPONDENT

AND: **SALOTE PANAPASA** – Acting Commissioner of Corrections, Fiji Corrections Service National Headquarters, 60 Gordon Street, Suva

3rd RESPONDENT

AND: **THE OFFICE OF THE ATTORNEY GENERAL** Level 7, Suvavou House, Victoria Parade, Suva.

For the Applicant: In person

For the Respondents: Mr. Chauhan

Date of Hearing: 2nd October 2024

Date of Ruling: 13th November 2024

APPLICATION FOR LEAVE TO APPEAL FOR JUDICIAL REVIEW

1. This is the application for leave to Appeal for Judicial Review filed by the Applicant on the 7th of September 2023 filing the Ex Parte Notice of Motion (later directed to be heard Inter Partes) and affidavit in support of Deshwar Kishore Dutt.
2. In addition to the application for leave for judicial review, the Applicant has also sought injunctions and substantive reliefs as well as constitutional redress applications.
3. This is an application for judicial review pursuant to Order 53 Rule 3 of the High Court Rules 1988 and it is not appropriate to address the other remedies sought in this Ruling. This Court will only rule on the administrative law remedies sought. For the other remedies sought, he should file a separate constitutional redress application.
4. The application is made pursuant to Order 53 Rule 3 of the High Court Rules seeking a judicial review of a decision made by the 1st Respondent on the 21st day of April 2023 to transfer him from the Medium Corrections Centre, Naboro to the Maximum Corrections Centre.
5. He had gotten into an altercation with another inmate, Joseph Sham Narayan. According to the Applicant, Narayan was responsible for spreading rumours that he was intending to escape.
6. He maintained that these rumours were false and were meant to affect his privileges and his security rating and was based solely on the jealousy of the other inmates. At that time he had a Medium Security rating with privileges for his own including the

use of a radio, magazines, additional phone calls and special visitation from his mother and access to almost any part of the Medical Centre.

7. The Applicant only admits that he placed his fingers to Joseph Shyam Narayan's left cheek. Narayan then reported the incident to the Joinery Officer Vuniwai. Mr. Vuniwai questioned him about the incident and he then took both the Applicant and Joseph Shyam Narayan to the Duty Officer, Mr. Diloi.
8. The Applicant and Narayan reconciled before Mr. Diloi, and he was then sent to his cell for the rest of the day. Later the next day, the first Respondent ordered that the Applicant be transferred to Maximum Correction Centre, as there is an allegation that he intended to escape.
9. He contends that he was transferred to the Maximum Corrections Centre by the 1st and 2nd Respondents without charging him for an offence or prison breach or without any Tribunal being held to determine the veracity of the bogus allegations made against him by another inmate.
10. The Applicant was then placed in the Punishment RCB Block in confined spaces and with restricted rations and loss of privileges.
11. His wife has made attempts to visit him however she has been unable to get in touch with him. She has also lodged complaints with the Human Rights Commission however nothing has come from this. He has therefore instituted these proceedings to seek the Court's assistance to challenge the Respondents' decision to remove his privileges and transfer him from the Medium Corrections Centre to the Maximum Corrections Centre.
12. The matter was first called on the 4th of October 2023 and the Court made directions for the office of the Attorney General to be informed.
13. The Court then made directions for the Respondents to file their affidavit in opposition.

The Opposition for Leave

14. The Respondents filed the affidavit of Kalivati Busele deposed on the 28th of December 2023. Busele is the 1st Respondent and he was the Officer in Charge at the Naboro Maximum Correction Centre at the time in question.

15. He offers the following grounds for not granting leave: -

- (a) On the 13th of July 2023, the Applicant had threatened and assaulted another inmate namely Joseph Shyam Narayan and this incident was recorded in the Fiji Corrections Occurrence Book.
- (b) The inmate Joseph Shyam Narayan gave a statement,
- (c) There was also a statement by CO73036 Josaia Vuniwai as he was present at the time of the incident.
- (d) The Applicant's statement was also recorded and he was interviewed under caution. The statement and the record of interview under caution were both tendered.
- (e) The Corrections Officers conducted an investigation and a report was compiled and the 1st Respondent sent the Report to the Commissioner of Corrections. The report concluded that the Applicant was at fault and that he be transferred to the Maximum Correction Centre with loss of privileges.
- (f) The Respondents submit that the Commissioner of Corrections had directed the transfer pursuant to her (then) powers under section 30 (3) (d) of the Corrections Service Act 2006. The relevant provision provides as follows: -

“(3) Prisoners may be removed from a prison to:

- (a) a court, upon the order of a judicial officer, or when the attendance of the prisoner at court is otherwise required which shall be determined by the officer in charge;
- (b) a hospital or facility providing medical services, at the order of a Medical Officer or medical practitioner appointed under section 15(2);

(c) a psychiatric hospital or institution, in accordance with the procedures prescribed in any law relating to mental health;

(d) any other prison, on the order of the Commissioner;

(e) any other safe place determined by the Commissioner (which shall be deemed to be a prison for the purposes of this Act) in the event of a risk of contagious or infectious disease within a prison, at the order of the Commissioner, or in the event of an emergency at the order of a Divisional Supervisor or officer in charge; and

(f) to any other place in accordance with Commissioners Orders.”

(g) The Respondents state that the Applicant’s wife was not unfairly denied any visitation privileges and she was advised of the proper procedures to follow to be able to visit him.

(h) The Respondents therefore submit that the application for leave for judicial review is baseless and frivolous and must be struck out.

16. The matter was then fixed for the hearing of the Leave application on the 2nd October. Parties made oral arguments supplemented by written submissions. The matter was then adjourned for Ruling

Analysis

17. An application for leave for judicial review is provided for at Order 53 of the High Court Rules 1988 specifically Order 53 Rule 3 (1) and (2), 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 commenced by originating motion and must be supported by affidavit stating the facts relied on.

18. One of the leading authorities is the case of Proline Boating Company vs Director of Lands [2014] FJCA 159; ABU 0020 of 2013 (25 September 2013) where the Court of Appeal provided the following: -

“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 has been or would be sufficiently affected."

19. In Matalulu vs Director of Public Prosecutions [2003] FJSC 2; [2003] 4 LRC712 (17 April 2003), the Supreme Court made the following findings with respect to leave for judicial review: -

“(ii) The judge considering the grant of leave to issue judicial review proceedings has a discretion, once a sufficient interest is shown by the applicant. That discretion has to be informed by the evident purpose of Ord 53. It is not an occasion for a trial of issues in the proposed proceedings. The judge is entitled to have regard to a variety of factors relevant to the purpose of the rule. These include:

- (1) whether the proposed application is frivolous or vexatious or an abuse of the process of the court;
- (2) whether the application discloses arguable grounds for review based upon facts supported by affidavit;
- (3) whether the application serves any useful purpose;

(4) whether there is an obvious alternative remedy, such as administrative review or appeal on the merits, which has not been exhausted by the applicant...” (Emphasis added)

20. In this instant and also at the hearing, the Court had inquired with the Applicant whether he had sought a review of this decision to transfer him and remove his privileges, he had responded that he had not.

21. In perusing the Correction Service Act 2006, section 39 (4) makes it clear that a review of such disciplinary decisions lies with the Commissioner of Corrections. The relevant section provides: -

“39 (4) Where any proceeding is heard and punishment is imposed by a Divisional Supervisor or officer in charge, the Commissioner may review the matter and overturn the decision or impose an alternative punishment, not exceeding those prescribed in subsection (2).”

22. The Applicant has an alternative remedy that he has not exhausted, therefore judicial remedy is not available to him at this stage.

23. Leave for judicial review is refused.

24. Each party will bear its own costs.

25. So ordered



A handwritten signature in black ink, consisting of a large, stylized loop and a vertical stroke.

Mr. Justice U. Ratuveli
Puisne Judge