IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. HBM 7 of 2018

IN THE MATTER of an application for Constitutional Redress pursuant to Sections 44(1) and 119(3) & (4) of the Constitution of the Republic of Fiji.

BETWEEN

MOHAMMED SHAFIL KHAN

APPLICANT

AND

THE ATTORNEY GENERAL

FIRST RESPONDENT

AND

THE COMMISSIONER OF CORRECTIONS

SECOND RESPONDENT

AND

THE OFFICER IN CHARGE (Medium Corrections Centre)

THIRD RESPONDENT

Counsel	:	Applicant – In person. Mr. A. Prakash with Ms. P. Singh for the Respondents.
Date of Hearing	:	31st March, 2018
Date of Judgment	:	12th June, 2018

JUDGMENT

[1] On 23rd September, 2004 the applicant was sentenced to life imprisonment. The applicant made an application for leave to appeal out of time to the Court of Appeal against his conviction which was refused and he made an application for Special Leave to Appeal against the decision of the Court of Appeal. Paragraph 20 of the judgment of the Supreme Court it is stated:

> 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 opened to the petitioner, himself, to

refer his case to the Commission, once he has completed serving ten years imprisonment.

[2] The applicant alleges that he made an application earlier and this is the second application. It is not in dispute that the Prisons Department did not refer the matter to the Mercy Commission.

[3] The respondents made an application pursuant to Order 18 rule 18(1) (a)(b)(d) of the High Court Rules 1988 to have the application struck out.

[4] One of the grounds on which the striking out of the application was sought was that the application of the applicant was time barred.

[5] Rule 3 of the High Court (Constitutional Redress) Rules 2015 provides:

> (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-
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> *(a)* Claiming a declaration;
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> *(b)* Praying for an injunction;
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> *(c)* Claiming or praying for such other order as may be appropriate.
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> (2) An application under paragraph (1) must not be admitted or entertained after 60 days from the date when the matter at issue first arose unless a Judge finds there are exceptional circumstances and that it is just to hear the application outside of that period.

[6] The period of 60 days in terms of the above rule begins to run from the day the matter at issue first arose. The High Court (Constitutional Redress) Rules came into force on 05th March 2015. The mater at issue first arose when the applicant completed ten years in prison that was on 23rd September 2014. The question arises whether these Rules have the retrospective effect which cannot be summarily decided.

[7] The learned counsel submitted that since the applicant has an adequate alternative remedy this application cannot be maintained.

[8] Order 18 rule 18(1) of the High Court Rules 1988 provides:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the court;
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[9] In **Carl Zeiss Stiftung v Rayner & Keeler Ltd** (No 3) [1970] Ch 506 it was held that the power given to strike out any pleading or any Part of a pleading under this rule is not mandatory but permissive, and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending plea.

In **Drummond-Jackson v British Medical Association** [1970] 1 W.L.R. 688; [1970] 1 All ER 1094 it was held;

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

In the case of **Walters v Sunday Pictorial Newspapers Limited** [1961] 2 All ER 761 it was held:

It is well established that the drastic remedy of striking out a pleading or, part of a pleading, cannot be resorted unless it is quite clear that the pleading objected to, discloses no arguable case. Indeed, it has been conceded before us that the Rule is applicable only in plain and obvious cases.

[10] The fact that the applicant had an adequate alternative remedy does not come within the purview of the four grounds set out in Order 18 rule 18(1) of the High Court Rules. The application of the applicant is not scandalous, frivolous or vexatious nor is it an abuse of the process of the court. The other two grounds set out in the said Rule have no application to this matter.

[11] The question whether the applicant has an adequate alternative remedy is a matter that has to be decided at the hearing of the substantive matter and it cannot be decided summarily.

[12] For these reasons the court makes the following orders:

1. The application for striking out is refused.
2. No order for costs.

HIGH COURT OF FIJI SUVA

Lyone Seneviratne

JUDGE

12th June 2018