IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

CIVIL ACTION No. HBJ 10 of 2020

BETWEEN: **PENI TUILASELASE**

APPLICANT

AND: **LEGAL AID COMMISSION**

RESPONDENT

Counsel: The Plaintiff *In person*

Mr. Skiba K and Ms Cobona M for the Respondent

Date of Judgment : 18.7.2025

JUDGMENT

INTRODUCTION

[1] Applicant was granted leave for Judicial Review (Interlocutory Decision) against decision conveyed by Respondent refusing to represent him in Supreme Court in terms of Order 53 rule 3 of High Court Rules 1988.

[2] Applicant was an inmate in prison after conviction and Respondent is statutory body that provides legal representation for *'impoverished'* persons including inmates upon a request and after evaluation of certain factors formulated by Respondent including availability of resources. So Respondent is a statutory body that exercises discretion to represent persons including inmates in the prison. The decision of Respondent to refuse representation has statutory underpinnings and can be subjected to judicial review.

[3] According to affidavit in support Respondent had stated that Respondent is not required to give reasons for their refusal in terms of Legal Aid Act 1996 hence leave should be granted against Interlocutory Decision. Respondent has an opportunity to submit further on this issue as well as reasonableness of its decision before final determination of judicial review. So it is futile to grant leave against this Interlocutory Decision.

[4] It is rare to grant leave against interlocutory decisions unless there is shown *'substantial injustice'* to the Respondent from refusal to judicial review.

[5] Accordingly, Respondent's Application for leave to appeal against the interlocutory decision granting leave to judicial review is struck off. The stay of these proceedings is also struck off for obvious reasons

FACTS

[6] Applicant along with some others were convicted for a criminal offence after trial and sentenced for fourteen years of imprisonment on 16.5.2014.

[7] On 8.6.2015 Applicant obtained leave to appeal from single judge of Court of Appeal, against conviction and sentence. For this application Legal Aid Commission represented Applicant.

[8] Full Court of Court of Appeal dismissed the Appeal against conviction and sentence for all the accursed, and Legal Aid Commission represented Applicant for this hearing.

[9] After dismissal of appeal against conviction and sentence Applicant made a separate application seeking leave to appeal to Supreme Court against conviction only. Other co-accused sought leave to appeal against, decision of Court of Appeal and they were all dismissed for lack of merits.

[10] Applicant, in person made an application seeking special leave of the Supreme Court against the conviction only. (see paragraph 4 of Supreme Court decision of 15.4.2015).

[11] This application seeking special leave against conviction was dismissed by Supreme Court[2] and the final orders read:

> "The Petitioner's application for special leave to appeal against his conviction dismissed.
>
> The conviction and sentence imposed upon him by the High Court are affirmed."

[12] After this Supreme Court's determination rejecting special leave, Applicant again applied to Respondent seeking assistance in his application filed in person seeking enlargement of time to Appeal against Sentence to Supreme Court.

[13] Applicant was informed on 3.7.2019 that his request for Legal Aid was approved subject to additional material relating to means if required for re assessment as to financial means.

ANALYSIS

[14] Respondent is established as a statutory body by Legal Aid Act 1996 and it has statutory as well as well as constitutional obligations in terms of Chapter on Bill of Rights of Constitution of Republic of Fiji. Section 6 of Legal Aid Act 1996 states the statutory duties in the following terms;

> **[LA 6] Duty of Commission**
> **6**
> **(1)** The Commission shall provide, subject to the resources available to it, legal assistance to impoverished persons.
> **(2)** A person shall be deemed to be impoverished if that person is unable to reasonably afford the cost of legal services.

[15] In the affidavit in opposition, it was stated that approval for representation for Applicant in Supreme Court, was on the basis of 'Policy' as all serving prisoners may qualify for assistance.

[16] After informing the Applicant of the said approval of Respondent, the brief of Applicant was assigned to senior counsel to handle and after obtaining further instructions it was decided not to proceed with the application, and this was advised to the Applicant.

[17] Acting Director of Respondent, had exercised 'merits test' compliance and had written to Applicant on 22.1.2020 that Applicant cannot be represented by Respondent.

[18] The Applicant had a right to seek a review of Respondent in terms of Section 14 of Legal Aid Act 1996, and he had applied for that. By letter dated 18.5.2020 Applicant was informed that his request to review the decision was unsuccessful.

[19] On 1.12.2020 Applicant had filed the application seeking leave for judicial review, in terms of Order 53 rule 3 of of High Court Rules 1988 .

[20] From the affidavit in support seeking leave against Interlocutory Decision states at paragraph 32 as

'….a substantial injustice will occur if leave to appeal is not granted as the judgment incorrectly construes that the commission did not provide the Respondent with adequate reasons for the commission refusing (sic) assistance when in fact the Commission strictly complied with the Legal Aid Act 1996.

[21] It further stated that reasons would be given when such a request is made in writing by an aggrieved party in terms of Legal Aid Act 1996. It failed to state the '*substantial injustice'*. In fact there is no injustice for Interlocutory Decision.

[22] This is not a matter that was finally disposed at leave stage and the threshold for judicial review is different from allowing grant for review.

[23] Granting leave for judicial review, the court had observed that reasons for refusal based on 'merit test' was not provided to court. When a decision is subjected to review the merits of that can be considered when the reasons are provided, not otherwise. Respondent is not precluded from providing the reasons before hearing of Judicial Review.

[24] Respondent's grounds for seeking leave as stated in paragraph 40 of the affidavit in support of summons seeking leave against Interlocutory Decision are dealt briefly as follow

i. Error of law regarding threshold for granting judicial review and statue barred-
   At the stage of Interlocutory Decision Applicant needs to prove arguable case which is not frivolous, and this threshold passed.
ii. Interpretation of Legal Aid 1996-
   This is allowed at hearing and no need to stay and allow leave to appeal.
iii. Legal Aid Commission being made a Respondent is the correct position as statutory body in terms of Section 4(2)(e) of Legal Aid Act 1996. Court can direct all necessary parties are served and made parties in terms of Order 53 rule 3 (3)(a) of High Court Rules 1988.
iv. There is no merits in the allegation that Respondent was not heard as Respondent had filed an affidavit in response and oral submissions were made by counsel represented Respondent, at the hearing before Interlocutory Decision.
v. Facts were not misconstrued as there were no dispute as to the facts and this was clearly stated in the Interlocutory Decision. The respondent failed to state which fact was 'misconstruing'.
vi. The appeal ground that judicial discretion was not properly exercised is without merit. Respondent is a statutory body that is required to exercise its discretion reasonably and subject to judicial review.

Granting leave for judicial review is interlocutory and Respondent can submit evidence before final determination of judicial review.

[25] Court of Appeal in *Lakshman v Estate Management Services Ltd* [2015] FJCA 26; ABU14.2012 (27 February 2015) (Per Basnayake JA) held,

> "The test for allowing leave in an interlocutory appeal: The question for determination in this case is, as enunciated in a series of judgments, whether the learned Judge had applied the law correctly in relation to leave to appeal applications and/or made a substantially wrong decision in refusing leave which has caused grave prejudice to the appellant, thus causing a miscarriage of justice. This is what the appellant has to show this court.
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> [39] In *Niemann v Electronic Industries Ltd.* [1978] VIC Rp. 44' [1978] VR 431 (28 Feb 1978) the defendants sought (by summonses) an order that the action be dismissed for want of prosecution. The primary judge dismissed the two summonses. Mclnerney J said in appeal that they are interlocutory orders which involve the exercise of the primary judge of a judicial discretion to grant or refuse the relief sought. In the same case Murphy J said; "The principles applicable in a Court of Appeal, when sitting on appeal from a discretionary order or judgment, have been the subject of much judicial learning. Those principles appear in civil cases to be conveniently summarised in *Australian Coal and Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) 94 CLR 621, where at p. 627, Kitto, J. States: "I shall not repeat the references I made in *Lovel v Lovel* [1950] HCA 52; ((1950) [1950] HCA 52; 81 CLR 513, at pp. 532-4) to cases of highest authority which appear to me to establish that the true principle limiting the manner in which the appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting on a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations or making a mistake as to the facts. Again the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. *House v R* [1936] HCA 40; (1936) 55 CLR 499 at pp. 504-5" (emphasis added).

[40] Murphy J said that in order to grant leave, the appellant must established first, "that the discretion of the learned trial judge has been miscarried in one way or another." Murphy J mentioned the cases of *Perry v Smith* [1901] ArgusLawRp 51; (1901) 27 VLR 66; *Dowson v Drosophore Co* (1895) 12 R138, *Hawkins v Great Western Railway* (1895) 14 R360 at 361, 362, and said, "The English authorities emphasized the need to show clearly on an application for leave, that if leave is not given, an injustice will otherwise be done. In Hawkins' case Lord Esher, MR said: "In my opinion it was intended by the legislature that there should be no appeal unless, upon motion to this Court, the Court should be as nearly clear as it possible can be without actually hearing the appeal that injustice will be done unless leave to appeal is given." Reference was also made to Rigby LJ in the same case that, "It is only where a patent mistake is pointed out, or where it is made clear that there is some injustice which ought to be remedied, that leave should be granted." Murphy J also cited the following passage in *Perry v Smith* (supra) at pg 68, "The onus lies on the party who applies for that leave to satisfy the Court of Appeal that the decision of the primary judge was wrong, and in addition to that he has to satisfy the court that substantial injustice will be done by leaving that erroneous decision un-reversed. Now that is what the counsel for the appellant has to do in this case."

[41] Murphy J also mentioned the case of *Darrel Lea (Vic.) Pty. Ltd. V Union Assurance Society of Australia Ltd.,* [1969] Vic Rp 50; [1969] VR 401 where the court relied on William J in *Perry v Smith* (supra) and held that "It is plain, as William J., said, from the terms of the section that the legislature was expressing an intention in the words used that appeals from interlocutory orders should not be permitted except in special circumstances. If on the facts of any particular case a plain injustice has been done by the making of a wrong order, then undoubtedly the Full Court would intervene and grant leave". The court required in that case for the plaintiff to satisfy two conditions to succeed, that is; "First, that the decision of the learned Judge was wrong and second, that a substantial injustice would be done by allowing the erroneous decision to stand."

[42] Lord Atkin stated in *Evans v Bartlam* [1937] AC 473 at 480, "while the appellate court in the exercise of its appellate power is in no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other

grounds the decision will result in injustice being done it has both the power and duty to remedy it".

[43] In In re the Will of FB Gilbert (deceased) 46 NSW 318, a distinction was drawn between procedural and substantive law while exercising discretion. Jordan CJ (at pg. 323) held that, "As pointed out by this court in In re Ryan (1923) 23 S.R. 354 at 357; 20 Austn Digest 81) there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion while determining substantive rights. In the former class of cases, if tight rein were not kept upon interference with the orders of the judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal. But an appeal from an exercise of a so-called discretion which is determinative of legal rights stands in a somewhat less stringent than those adopted in matters of practice or procedure. Leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow" (emphasis added).

[44] Herring, CJ held in *Tidswell v Tidswell* (No. 2) [1958] Vic Rp 95; [1958] VR 601 (6 August 1958) that, "In cases where there is an appeal from the exercise of discretion by a primary judge, the manner in which it should be determined by a Court of Appeal is governed by established principles, which were clearly stated by Dixon, Evatt and McTiernan, JJ, in *House v R* [1936] HCA 40; (1936) 55 CLR 499, at pp. 504-5 in a passage that Latham, CJ, set forth in his judgment in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513 at pp 518-9. The passage reads: "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising discretion. If a judge acts upon a wrong principle, if he allows extraneous or irrelevant maters to guide or affect him, if he mistakes the fact, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the material for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or

plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred".

[26] So the threshold for Respondent to succeed in this application for leave to appeal is high. As stated and analyzed the grounds contained in paragraph30 of the affidavit in support of leave to appeal against Interlocutory Decision are unmeritorious for the reasons given earlier.

[27] UK White Book 2025 Part 54 which deals with permission for judicial review state;

> "Test for granting permission
> Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence (*R. v Legal Aid Board Ex p. Hughes* [1992] 5 Admin. L.R. 623, *R. v Secretary of State for the Home Department Ex p. Rukshanda Begum and Angur Begum* [1990] Imm. A.R. 1: [1990] C.O.D. 107. In essence, the court will need to be satisfied that there is an arguable ground of review which has a realistic prospect of success and where there is no discretionary bar to a remedy such as delay or an alternative remedy. See *Sharma v Brown-Ant*oine [2007] 1 W.L.R. 780 at [14(4)], *Simone v Chancellor of the Exchequer* [2019] EWHC 2609 (Admin) at [112], and *Ramdass v Minister of Finance* [2025] UKPC 4 at [5], [29]….."
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> "….**The purpose of the requirement for permission is to eliminate at an early stage claims which are hopeless, frivolous or vexatious** and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration. The requirement that permission is designed to:
> "… prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending although misconceived" *R. v Inland Revenue Commissioners* Ex p. *National Federation of Self-employed and Small Businesses Ltd* [1982] A.C. 617 (at 642 per Lord Diplock)." (emphasis added)

[28] Respondent stated that statutorily it was required to provide reasons for decision to Respondent only when requested, but this does not apply to this application before the court where Respondent had failed to provide reasons for its decision which is vital for determination for reasonableness in the exercise of discretion.

[29] UK White Book 2025 Part 54.4 also indicates some instances where leave for juridical review can be refused.

> "Permission may also be refused, for example, if the claim is academic or if the claimant has not, in fact suffered any injustice. Section 31(3C) of the Senior Courts Act 1981 provides that permission to apply for leave must be refused where it is highly likely that the outcome for the claimant would not be substantially different: see *Gathercole v Suffolk CC* [2020] EWCA Civ 1179; [2021] P.T.S.R. 359 at [35]–[43]. Permission may also be refused if the claim raises an abstract question that would have to be decided on the basis of hypothetical facts: see *R. (Counsel General for Wales) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 118, [26]–[33] per Nicola Davies LJ."

[30] The above grounds are not applicable to this action as this application for judicial review is neither academic nor does it raise abstract question. The issue raised by Applicant may have wider application for all prospective '*impoverished*' persons. The procedural fairness and reasonableness in decision making process including reasons or outcome are factors to be considered at the hearing. These are important public law issues involving rights under Bill of Rights in the Constitution of the Republic of Fij.

[31] It is also noteworthy that Order 110 Of High Court Rules 1988 also deals with the right to represent a party in civil action through *'legal aid'*.[1] This provision has no direct application for the matter before this court but is a matter for consideration of Respondent in appropriate situation (eg in determination of representation in civil action). It is also noteworthy that Applicant is proceeding this application in civil division *in person* in a complex area of law such as Judicial Review, where determination of correct parties is an important determination at the stage of granting leave for judicial review in terms of Order 53 rule 3(3)(a) of High Court Rules 1988. If all parties necessary for the determination is made court can direct necessary party to be notified and or

[1] Order 110 rule 8 of High Court Rules 1988 states,

> **Legal aid may be made available (O 110, R 8)**
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> **8** In special circumstances, and subject to the availability of public funds for the purpose, legal aid may be granted to any party or intending party to any proceedings in the High Court but only upon the specific authority of the Chief Justice to be obtained in each case.

added. Accordingly direction was made at the time of granting leave to make Respondent a party as the statutory obligation was on Respondent.

[32] Respondent's duty to represent '*impoverished*' persons is not an absolute one as it is subject to the availability of resources. This is understandable considering the economic progress of Fiji and inability to provide legal services to all persons. This fact was considered in the Interlocutory Decision. So the duties of Respondent needs to be shaped with resources available in a reasonable manner.

[33] Respondent's duties needs to be interpreted in terms of Chapter on Bill of Rights in Constitution of Republic of Fiji and the decision to represent a party and assessment of such party as 'impoverish' required reasonable exercise of discretion.

[34] So a person aggrieved by discretionally decision of Respondent may seek leave of the court for intervention by way of judicial review. By granting leave the door is not closed for the Respondent to provide further evidence and or submissions at hearing of judicial review.

[35] Respondent in the affidavit in opposition failed to provide the reasons for its decision not to represent Applicant in Supreme Court. This was sufficient ground, and the application is not frivolous and arguable. So the discretion of the court is properly exercised.

[36] Without reasons court is unable to consider the reasonableness of the 'merit test' which disqualified Applicant as a person to be represented by Respondent.

[37] Court of Appeal in *Lakshman v Estate Management Services Ltd* [2015] FJCA 26; ABU14.2012 (27 February 2015) (Per Calanchani P) held,

> "long established view expressed in this and other jurisdictions that an appellate court will not readily grant leave to appeal from an interlocutory order or judgment arising from the exercise of a judicial discretion [**Fong Sun Development –v- Minson Fiji Ltd** (unreported CBV 7 of 1997; 1 March 1998)]. Secondly, it has been said that even if it shown that the interlocutory decision was wrong, it will not be overturned unless substantial injustice would result should it be allowed to stand (**Nieman –v- Electronic Industries Ltd** [1978] VicRp 44; [1978] VR 431). In this case there has been no error by the learned Judge in the exercise of his discretion. Furthermore, in any event there is no injustice in allowing the Respondent to pursue his private law claim

against the Appellant by way of a trial on the pleadings and evidence in the High Court. It is for that reason that I agree with Basnayake JA that leave should be refused and the appeal dismissed.

[38] Accordingly, there is no substantial injustice to Respondent granting leave for judicial review against decision of Respondent's refusal to represent Applicant. So, this application failed.

[39] It is axiomatic that refusal to grant leave to appeal against Interim Decision results the refusal of stay of proceedings. So the application for stay the judicial review is also struck off.

Final Order

a. Application for leave to appeal against interlocutory order granting leave for judicial review is struck off.

b. No order for costs.

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Deepthi Amaratunga
Judge

At Suva this 18th day of July, 2025.

Solicitors
In person

Legal Aid Commission