IN THE HIGH COURT OF FIJI AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBJ 2 OF 2024

BETWEEN: KELEPI SALAUCA

PLAINTIFF

AND: THE ATTORNEY GENERAL

1ST RESPONDENT

AND: THE COMMISSIONER OF FIJI CORRECTIONS SERVICES

2ND RESPONDENT

AND: THE HUMAN RIGHTS COMISSION

3RD RESPONDENT

AND: THE INTERNATIONAL HUMAN RIGHTS (UN)

4th RRESPONDENT
(Amicus Curiae)

BEFORE	**:**	**Mr. A.M. Mohamed Mackie -J.**
COUNSEL	**:**	**Applicant Mr. Kelepi Salauca- in Person.**
	:	**Mr. S. Kant – For the 1st and 2nd Respondents.**
	:	**Mr. P. Sharma – For the 3rd Respondent.**
	:	**4th Respondent – No appearance.**
HEARING	**:**	**By way of written submissions.**
WRITTEN SUBMISSIONS	**:**	**Filed by the Applicant on 12th December, 2024.**
	:	**Filed by the 1st – 2nd Respondents on 15th November, 2024.**
	:	**Filed by the 3rd Respondent on 19th November, 2024.**
RULING	**:**	**Delivered on 24th February, 2025 at 10.00a.m.**

RULING

A. INTRODUCTION:

1. This ruling pertains to the application made on 23rd July 2024 by the above-named applicant, seeking leave to apply for judicial review pursuant to Order 53 rule 3(1) of the High Court Rules 1988.

2. If leave is granted, the applicant is intending to move for the following, purported, reliefs, as per his application, which read as follows;

    1. ***AN ORDER OF MANDAMUS*** *for 1st Respondent to advise the Prime Minister and his Cabinet Ministers, the Parliament Members, and or the Government, the Exist Gainsay of Law that affects the non-parole and parole sentence that operate in Fiji from the Interim Government run by former Prime Minister and the former Attorney General and its effects, that that lawfully offends thousands of his Majesty's subjects.*

    2. ***AN ORDER OF MANDAMUS*** *for the 1st Respondent to advise the Government and the Parliament Members and his leaders that at present members and his leaders that at present, since Fiji does not have any functioning parole Board, the fixing of a non-Parole period should have no practical effect (and is a dead letter).*

    3. ***AN ORDER OF MANDAMUS*** *for 1st Respondent to advise the Parliament members and its leaders the inconsistent of section 18 of the Sentencing and Penalties Act of 2009 (Non parole) and the then (2018; date of sentence of the Applicant) exist section 27 and 28 of the Correction Service Act and thereafter the amendment made on 2019 after the error was spotted by the Supreme Court and compare it with Section 173 (3) (a) (b) (i) of the 2013 Constitution.*

    4. ***A DECLARATION*** *that the Requirements of (Section 18 of the Sentencing Penalties Act of 2009 and Section 27, 28 of the Correction Service Act) law exist when the Applicant was sentenced on 2018 is a DEAD LETTER.*

    5. ***A DECLARATION*** *that the requirements of Law (Section 18 of the Sentencing Penalties Act of 2009 and Section 27 of the Correction Services Act) that was amended on 2019 is not applicable as per Section 173(3) (a) (b) (i) of the 2013 Constitution.*

    6. ***A DECLARATYION*** *that the requirements of Law recording non-Parole period should have no practical effect due to the non-existence of functioning Parole Board.*

    7. ***A DECLARATION*** *that came into force of the 2013 is by force and not the will of the people and unfair and section 26(1) (2) and (3) of the constitution was of no effect by granting immunity at Chapter 10 of the Constitution.*

3. The grounds adduced by the applicant in support of his application are as follows.

1. *That the NON-EXISTENCE of the functioning Parole Board Lawfully affects the fixing of a Parole period.*

2. *That the fixing of non-Parole period is a dead letter and should have no practical effect.*

3. *That the coming into force of the Constitution is unfair and section 26(1) (2) and (3) is of no effect.*

Application to Strike Out:

4. The 1st Respondent, on his behalf and on behalf of the 2nd Respondent, on 23rd September 2024, filed an Inter-parte Summons to have the applicant's application for leave struck out on the ground that the same "***discloses no reasonable cause of action, is scandalous, frivolous or vexatious and it is otherwise an abuse of the process of this Court"***.

5. The said inter-parte Summons to strike out is made pursuant to Order 18 rule 18 (a) of the High Court Rules 1988.

6. Order 18 rule 18(1) (a) of the High Court Rules provides:

(1) *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-*

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court;
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) *No evidence shall be admissible on an application under paragraph (1) (a).*

7. The 3rd Respondent, namely, the Human Right Commission, by appearing through its counsel, filed its written submissions, whereby it wished to be named as an *Amicus Curiae* in this matter and supported the applicant's application for leave on the only ground that the applicant has sufficient interest.

B. THE LAW:

8. Before considering the merits of the applicant's application for leave, it is important to consider the law governing applications for striking out.

- 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 to 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".

- In **Narawa v Native Land Trust Board [2003] FJHC 302; HBC0232d.1995s (11 July 2003)** the court made the flowing observations:

  In the context of this case, I find the following statement of ***Megarry V.C. in Gleeson v J. Wippell & Co. [1971] 1 W.L.R. 510 at 518 apt:***

  "First, there is the well-settled requirement that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt. Second, Zeiss No. 3 [1970] Ch. 506 established that, as had previously been assumed, the jurisdiction under the rules is discretionary; even if the matter is

or may be res judicata, it may be better not to strike out the pleadings but to leave the matter to be resolved at the trial".

9. It appears from the aforesaid decisions that the power to strikeout a claim is a discretion conferred upon the court and the court must exercise such discretionary power with great caution and only in an exceptional cases.

C. BACKGROUND:

10. The applicant is a convict for the offence of aggravated robbery and was sentenced to 10 years, 11 months and 7 days imprisonment with the non-parole period of 9 years to be served before he is eligible for Parole, by the High Court of Lautoka on 10th July 2018 in ***State v Kelepi Salauca and Others – Criminal Case No- HAC 172 of 2018.***

Test for granting leave:

11. To grant leave to apply for judicial review, the court has to be satisfied that:

(a) The claimant has a 'sufficient interest'
(b) There is an arguable case for review;
(c) There has not been 'undue delay'.
(d) No alternative remedy is available.
(e) There should be a decision susceptible to review.

Discussion and Decision:

12. The application for leave to apply for judicial review may be determined without a hearing and where a hearing is considered necessary, the Court will hear and determine the application inter partes (see O 53, R 3 (3) (ii). In this case, the parties, including the applicant, were of consent heard by way of written submissions. The applicant and the 1st to 3rd respondents have filed their respective written submissions.

13. The applicant applies for leave to apply for judicial review. As required in R 3 (2) (i), the applicant has **NOT** attached a statement of the particulars of any susceptible decision, which he intends to judicially review. Thus, in the absence of such a decision, the applicant cannot file and maintain this application.

14. Even if there is a decision made affecting the applicant, what he has to seek is a Writ of Certiorari to review the propriety of such decision. What the applicant seeks through this application is leave to apply for 3 mandamus orders and 4 declaratory orders as stated in paragraph 2 (1) to (7) above.

15. As correctly alluded to by the learned Counsel for the 1st & 2nd respondents, this application does not speak of any decision that warrants this Court to judicially review. The applicant hereof complains about the non-functioning of the parole board and the requirements of law regarding non-parole period should have no practical effect due to the non- existence of the functioning parole board. This position of the applicant cannot be accepted for the reasons discussed below.

16. As further argued by the 1st & 2nd respondents' counsel, whether or not the parole board is functioning is not a matter of concern for this Court under this special jurisdiction of judicial review, when there is no an

administrative decision in that respect and in the absence of a process available to seek review against the principles of public law.

17. The purpose behind for the requirement of leave to apply for judicial review is found in the ***Supreme Court Practice 1999 Vol 1 on page 903 under Order 53/14/21,*** which states;

    a. *"to eliminate frivolous or hopeless applications for judicial review without the need for substantive inter-partes judicial review hearing; and*

    b. *to ensure that an applicant is only allowed to proceed to a substantive hearing if the court is satisfied that there is a case fit for further investigation at a full inter-partes hearing"*

18. The absence of a judicially reviewable decision in this matter is conspicuous. Thus, the applicant cannot call upon this court to review a decision, which is not in existence. Thus, on this ground alone, the application for leave for judicial review should be dismissed.

19. However, without prejudice to above, I now turn to the relevant tests for granting leave to apply for judicial review.

Sufficient interest:

20. 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.

21. The question of sufficient interest is to be decided in the light of the circumstances of the case before the court. In this case before me, when there is no such a decision susceptible to judicial review, the pertinent question that arises is as to what the applicant is seeking to challenge by claiming that he has interest. If there is no such a decision, there cannot be an interest for anyone for that matter.

22. Even if it is assumed that there is a decision and the applicant has some interest, it has to be judged in the light of substance of the complainant's complaint. He or she must have an arguable case before the Court for the leave to be granted. (***In R v Somerset CC, ex p Dixon [1998] Env LR 111, Sedley J*** said that provided the claimant had an arguable substantive case, leave should not be refused on the basis of lack of standing unless the claimant was a 'busybody' or a 'troublemaker'.).

23. Whether the claimant's interest is sufficient depends to some extent on the seriousness of the alleged breach of administrative law. Whatever the claimant's interest, the more serious the breach, the more likely that interest is to be sufficient. The applicant hereof, while not alluding to any decision that can be subjected to judicial review, which affects his interest, also has not shown that he has an arguable case.

24. 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.

25. The test for deciding whether a claimant has sufficient interest was considered by the House of Lords in ***R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd [1981] UKHL 2; [1982] AC 617,*** where it was held: '*That not only was standing a ground in itself upon which permission could be granted, it should also be considered at the substantive hearing after the relevant law and facts were examined in full.'* However, unfortunately, for this court to proceed to the stage of substantive hearing, the absence of a susceptible decision would be a hurdle here.

An arguable case for review:

26. Another test for granting permission (leave) has been that an applicant must demonstrate to the court upon 'a quick perusal of the papers' that there is an arguable case for granting relief (***R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Business Ltd*** (supra).

27. When considering whether there is an arguable case for granting the leave 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 leave to proceed in order to obtain the intended relief.
28. The applicant has no any decision in hand to challenge. Thus, there cannot be any ground whether arguable or otherwise to proceed further with the leave being obtained. For instance, a grievance like that the principles of natural justice and fairness were observed in breach and/ or consideration of irrelevant matters and not considering the relevant matters by the such decision making body.

29. Mr. Kant, learned counsel appearing for the 1st and 2nd respondents contends that there is no arguable case for the court to consider granting leave to apply for judicial review. Counsel drew my attention to what Honorable Justice Scutt had to say in ***State v Connor ex-parte ; Seyed Shah -Judicial Review No-HBJ 47 of 2007 (7th April 2008)*** , paragraphs 11.1 & 2 of which read as follows.

> *11.1 The principles of judicial review adopted by this Court in Fiji Public Service Association v. Civil Aviation Authority of Fiji and Attorney General of Fiji and Airports Fiji Limited (JR No. 015 of 1998L, 30 November 1998 are taken from O'Reilly v. Mackman [1983] UKHL 1; [1983] 2 AC 237, at 279 per Lord Diplock:*
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> ...' *I have widened the much-cited description by Atkin LJ in Rex v. Electricity Commissioner; Ex parte London Electricity Joint Committee Company [1920] 1 KB 171, at 205 of bodies of persons subject to the supervisory jurisdiction of the High Court by prerogative remedies ... by excluding Atkin LJ's limitation of the bodies of persons to whom the prerogative writ might issue, o 'those having the duty to act judicially'...*
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> *Wherever anybody of persons has authority conferred by legislation to make decisions [judicial, quasi-judicial and administrative only] it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded him by the rule of natural justice of fairness, viz, to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made. Therefore, as a most basic principle, an application for judicial review must show on the evidence, that one or more of the common law or statutory rights or obligations of the applicant has been adversely affected by the decision complained against.*
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> 11.2 *At leave stage, the threshold is low. What needs to be established is 'an arguable case' to be resolved only by a full hearing of the application for judicial review. At this stage a full review of the facts is unnecessary. Nonetheless, a court is obliged to sufficiently pursue the material provide to determine whether an applicant raises an issue arguably involving an error in law, a serious error in fact; a violation of natural justice or procedural fairness, or an excess of jurisdiction by the decision-maker the subject of the application".*

30. In ***Fiji Airline Pilots Associations v. Permanent Secretary for Labour 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 favour of granting relief."*

31. In my view, a cursory consideration of the application fails to demonstrate that there is an arguable case for granting relief. Learned counsel for the 1st & 2nd respondents maintains his stern position to the effect that there is no arguable case for the applicant, with which position this court stands fully convinced.

32. Further, the applicant's contention with regard to the inconsistencies between section 49 of the Correction Service Act and Section 18 of Sentencing and Penalties Act 2009 and Sections 27 and 28 of the Correction Services Act 2006, is not a matter for judicial review as these are statutes of Parliament and this Court has no jurisdiction to make decisions in that regard.

33. The first three (3) purported substantive reliefs that the applicant intends to apply for, by obtaining leave through this application, are in the nature of Mandatory Orders directing the 1st respondent Attorney General to advise Members of Parliament, the Ministers, the Prime Minister and the Government to attend to the so-called anomalies pointed out by the applicant.
34. This Court has no jurisdiction to make such mandamus Orders directing the 1st respondent to advise the Government or its Ministers or Members of Parliament as the applicant intends to move by obtaining leave.

35. Section 46(1) of the Constitution provides that the authority and power to make laws for the State is vested in Parliament consisting of the members of Parliament and the President, and is exercised through the enactment of Bills passed by Parliament and assented to by the President.

36. The Court has no power to enact laws or to direct the Parliament through the 1st respondent to enact laws or to look into the anomalies or inapplicability or discrepancies therein, if any, in the existing laws and/or provisions thereof. The reliefs the applicant intends to seek by way of Mandamus Orders of this nature, if granted, would in effect be amendments to the relevant legislations, for which this Court has no jurisdiction.

37. Any anomalies and/or discrepancies and/ or inconsistencies in the Statutes or inapplicability of it is a matter for the legislature and as I have stated above, the court has no power to interfere with the legislative power of the parliament. If the second respondent has acted contrary to the provision of the Corrections Service Act 2006, then the Court will have the power to go into the matter and make a suitable orders. In this matter, there is no such allegation against the second respondent. Thus, an application for the grant of leave to apply for such substantial reliefs in the nature of Mandamus Orders cannot be considered favorably.

Declaratory Reliefs:

38. The declaratory reliefs sought by the applicant with respect to the inapplicability of Section 18 of the Sentencing and Paneities Act 2009 and Section 27 and 28 of the Correction Services Act 2006 are in relation to his sentence imposed in 2018 is not within the ambit of this Court under judicial review.

39. The declaratory reliefs sought that the requirements of law regarding non-parole period should have no practical effect due to the non-existence of a functioning parole Board is also not a remedy available under judicial review.

40. Counsel for the 1st and 2nd respondent has correctly pointed out, among other things, that what laws apply to the applicant's sentence is a matter of interpretation of Criminal Law statutes and has nothing to do with the principles of public law.

41. This court also agree with the position taken up by the learned State Counsel to the effect that the grounds for judicial review adduced by the applicant are also without merit as none of the grounds bring into issue of the principles of public law. The purported grounds are matters concerning the interpretation of Criminal law statutes and the propriety of the constitution, which have nothing to do with principles of public law.

42. For the above reasons , this court holds that the applicant has not disclosed sufficient grounds to grant leave to file an application for judicial review and the matter must therefore, be struck out as it does not survive the 1st and 2nd respondents' strike out application .

Undue delay:

43. The applicant does not seek relief by way of writ of certiorari (quashing order). Therefore, the question of delay does not arise. It was not an issue in dispute.

D. CONCLUSIONS:

44. For the reasons set out above, I conclude that there is no decision made which is susceptible to review by this Court. The Applicant fails to demonstrate an arguable case for judicial review. This Court has no power or jurisdiction to grant the Orders in the nature of Mandamus against the 1st respondent. The declaratory Orders sought also should necessarily fail, if the matter proceeded with the leave being granted.

45. The application for leave hereof will not survive the application for strike out preferred by the 1st and 2nd respondents. Thus, the application for strike out should succeed and the application for leave has to necessarily fail.

46. Having an interest alone , as submitted by the learned Counsel for the 3rd respondent in his written submissions, which is not so for the reasons given above, will not qualify the applicant for leave to apply for judicial review.

47. Judicial review is a legal process to adjudicate deeds or decisions of public officials, who act in the public interest and not to address the matters brought out by the applicant in his application. Judicial review is a totally inappropriate vehicle for resolution of the perceived grievances of this vexatious applicant.

48. For the reasons adumbrated above, I would accordingly refuse to grant leave to apply for judicial review sought by the applicant.

49. The 1st and 2nd respondents' Counsel had made few appearances, filed the timely application for strike out and also filed the helpful written submissions .However, considering the circumstances, I make no orders for costs.

E. FINAL ORDERS:

a. The applicant's application for leave to apply for judicial review fails.

b. The application preferred on 15th July 2024, seeking leave to apply for judicial review, is hereby dismissed.

c. No costs ordered and the parties shall bear their own costs.

On this 24th Day of February 2025 at the High court of Lautoka.

HIGH COURT OF FIJI
LAUTOKA

A.M. Mohamed Mackie.
Judge
High Court- Lautoka.

SOLICITORS:

The Applicant appeared in person.
Hon. Attorney General for the 1st and 2nd Respondents.
Fiji Human Right and Anti-Discrimination Commission for the 3rd Respondent.
No appearance or representation for the 4th Respondent.