## IN THE MATTER OF HAROON ALI SHAH

[HIGH COURT, 1989 (Palmer J) 16 June]

Revisional Jurisdiction

*Judicial Review- whether there exists a right to renew an application for judicial review following the dismissal of a similar application on the same grounds.- High Court Rules 1988 Order 53*

An application for leave to move for judicial review was dismissed by the High Court. Subsequently the applicant sought to renew his application before another Judge of the High Court on the same grounds. Dismissing the application the High Court HELD: that leave to move having already been refused by the High Court there was no basis upon which the High Court could entertain a renewal of the application on the same grounds.

Cases cited:

*Eshugbayi Eleko v. Nigeria Government (Officer Administering)* [1928] AC 459
*In re Hastings (No. 3)* [1959] 1 Ch 368
*In re Kray* [1965] 1 Ch 736
*Rex v. Electricity Commissioners* [1924] 1KB 171
*The State (Dowling) v. Kingston (No. 2)* (1937) I R 699

*K.R. Bulewa* for the Applicant

Application for leave to move for judicial review.

**Palmer J**:

Haroon Ali Shah s/o Roshan Ali Shah, Barrister and Solicitor of Lautoka was charged on 7.6.88 with two offences:-

1. Neglect to prevent a felony;
and
2. Concealing unlawfully imported arms and ammunition.

A preliminary enquiry involving the applicant and 20 other persons charged with associated offences was held in the Magistrates Court at Lautoka, on 30.1.89. On 14.3.89 all 21 accused were committed for trial. The applicant is seeking to challenge the order of committal by way of Judicial Review. He is seeking orders of certiorari mandamus and prohibition on a substantial number of grounds. However, for the reasons which will appear I do not need to consider the merits.

The application before me is headed: "Notice of Renewal of Application for Leave to Apply for Judicial Review." The Affidavit in support states and Counsel confirms, that the same application by the applicant for leave to apply for Judicial Review was heard by Mr.Justice Sadal in Lautoka and was refused on 28.3.89.

The applicant is now seeking to renew this application before me. This is a novel proposition. Counsel for the Plaintiff submitted: one, that in habeas corpus one
A can go from Judge to Judge and two, that all prerogative writs are of the same nature and that therefore this application may be renewed although it has already been dismissed once. The only authority cited for the second proposition is Rex v. Electricity Commissioners [1924] 1KB 171. However, that case is of no assistance to the applicant. In it the Court of Appeal recites (p.204) the fact that writs of certiorari and prohibition are "part of the process by which the Kings
B Courts restrained Courts of inferior jurisdiction from exceeding their powers." On p.206 Atkin L.J. said "I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage."

That statement goes nowhere near supporting the proposition that there is no difference between those writs and the writ of habeas corpus and I have been referred to no authority to support it, nor am I aware of any. In my view it is
C perfectly clear that the former and the latter are totally different. They serve quite different purposes, involve different considerations and employ different procedures. Both in Fiji and in England the former fall under Order 53 and the latter under Order 54.

For reasons which will become apparent I go on to consider whether the practice
D as to habeas corpus for which the applicant contends in fact exists. In support of this limb of his argument he has cited Eshugbayi Eleko v. Nigeria Government (Officer Administering) [1928] AC 459.

The relevant passage in that case was described by Lord Gardiner, L.C. as obiter in In re Kray [1965] 1Ch 736, 743.

E It was also mentioned in In re Hastings (No. 3) [1959] 1Ch. 368. I now turn to that case.

Hastings had applied for a writ of habeas corpus to a Divisional Court (as is required under the English rules) presided over by Lord Goddard C.J. That Court refused the writ on the merits. Hastings later (after an unsuccessful appeal) made
F a fresh application for the writ on the same grounds and the same evidence to a Divisional Court of the Queens Bench Division differently constituted and presided over by Lord Parker, C.J. That Court having found that it had no jurisdiction on the ground that the same application had already been decided by the Divisional Court, Hastings then applied to a Divisional Court of the Chancery Division.

G Vaisey, J. said at p. 375:-

> "In the second application for a writ of habeas corpus, the earlier application to a Queens Bench Divisional Court presided over by Lord Goddard having been refused, Lord Parker C.J. considered the position as it had been in the past and was in the present. He pointed out that the old practice by which the applicant for a writ of habeas corpus could go from court to court until he got satisfaction

quite obviously had been abrogated by the fact that since the year 1873 there had only been one court so that there could be no question of going from court to court. (Section 3 of the Supreme Court of Judicature Act, 1873, now section 1 of the Supreme court of Judicature (Consolidation) Act, 1925). A

There then came the further question, which Lord Parker C.J. considered, whether in fact the practice of going from judge to judge still subsisted, and there is no doubt that a certain amount of judicial authority would seem to point to the fact that that is still an existing right. Lord Parker C.J. thought that it was not, and he explained the ancient practice by the necessity of finding someone to deal with a case during vacations. In those days a far greater part of the year was taken up by law vacations than it is at present, and when the courts were not sitting in banc if relief was wanted, it was necessary to apply to a judge, because that was the only way of ascertaining the will of the judicature. But Lord Parker thought that, having regard to modern conditions, that right had been practically abrogated. B C

Lord Parker, in his judgment, came to this final conclusion. He said: " ..... the applicant, having already once been heard by a Divisional Court of the Queen's Bench Division" - that being, of course, the previous hearing before Lord Goddard and two judges - "is not entitled to be heard again by another Divisional Court of the same Division." D

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Indeed, as Lord Parker has ruled with, I think perfect accuracy, as soon as the Divisional Court of the Queen's Bench Division has come to its conclusion there is an end of the matter, and, as I observed yesterday it always has to be remembered that our orders are not orders of any particular Division or any particular Divisional Court; our orders are orders of the High Court. How we, judges of the High Court, could be heard to override, overrule, or otherwise interfere with a judgment which was the result of the hearing by the Divisional Court, or how we could be heard to say that the conclusion of that court, and its order - an order of our own court, the only court which exists, the High Court of Justice -was wrong, and that something else should be done, is beyond my comprehension. F G

When the Queen's Bench Divisional Court, acting strictly under the rules, came to its conclusion that finally disposed of the application of this applicant for the issue of a writ of habeas corpus, I cannot see how this court, or how we, as judges, could possibly be heard to stultify a decision of the court of which we are ourselves constituent parts: we are all of us judges of the High Court. I cannot see how

we could be heard to contradict an order which has been made for us in our name, and by the only court which has jurisdiction in this matter."

Harman J. at p. 379 said this:-

"I concur in the conclusion at which my brother has arrived. It is always sad to be stripped of an illusion, but I, like I expect, most lawyers, have grown up in the belief that in cases of habeas corpus the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional court last year in this very case. The decision was based upon this, that there never had been such a right. There bad been a right to go from court to court; there had been a right in vacation to go from judge to judge, for the simple reason that the court was not sitting in banc; but there had never been a right in term time to go from one judge to another when the court to which the application should properly be made was available.

Mr. Butter, for whose argument I, for one, am much indebted, said that the clou of his case was this, that there still was this right to go from judge to judge and that if that were not so the whole structure would come to the ground. He naturally relied very strongly upon the decision of the Privy Council in Eshughayi Eleko v. Officer Administering the Government of Nigeria, ( ante ) and no doubt if Lord Hailsham's observations there are justified there is much to be said for the existence of the right. But I must confess that my belief in that judgement was very much shaken by the Irish case of The State (Dowling) v. Kingston (No. 2), (1937 IR. 699) and the very cogent judgment of FitzGibbon J. in it, referred to by Lord Parker C.J.

The judgment of the Queen's Bench Divisional Court made good that this supposed right was an illusion. If that be right the rest follows. Nobody doubts that there was a right to go from court to court, as Vaisey J. has already explained. But there are no different courts now to go to. The courts that used to sit in banc have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by R.S.C., Ord. 54 r.1, to Divisional Courts of the Queen' s Bench Division, and that is the only place to which a suppliant may go.

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In my judgment this application therefore is precluded by the absence of the ancient but imaginary right to go round and round

> and round from judge to judge when the term is in progress. There never was such a thing; there is not now; and this applicant, having had the judgment of the High Court, cannot have another one."

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It may be of interest to note that subsequently statutory recognition was given to the effect of these pronouncements, by the Administration of Justice Act 1960 which in effect prohibited a second application on the same ground and evidence.

Although I have expressed the view that the writ of habeas corpus and the other prerogative writs are not of the same kind I have gone on to consider the position in relation to habeas corpus because this discloses that the applicants attempt to renew his application is in any event founded on an analogy which does not exist.

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There is of course only one High Court of Fiji and the dicta in Hastings must be of equal application here.

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I was told by Counsel that Justice Sadal determined the matter on the merits. It has not been suggested that there is any fresh evidence. Therefore, as Harnam J. said, the applicant, having had the judgments of the High Court, cannot have another one. And, as I said, nothing has been advanced to show that there is a right to make a second application on the same facts in respect of a Judicial Review.

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For these reasons the application is refused.

*(Application dismissed.)*

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