IN THE SUPREME COURT OF FIJI
ORIGINAL JURISDICTION

MISCELLANEOUS PETITION NO. MISC 01 of 2024

IN THE MATTER of Section 91(5) of the Constitution of the Republic of Fiji.

IN THE MATTER of a reference by Cabinet for an opinion from the Supreme Court on matters concerning the interpretation and application of sections 105(2) (b), 114(2), 116(4) and 117(2) of the Constitution of the Republic of Fiji.

Coram	:	**The Hon. Justice Brian Keith** **Judge of the Supreme Court**
		The Hon. Justice Terence Arnold **Judge of the Supreme Court**
Counsel	:	**Mr. F. Haniff for the Solicitor General** **Mr. A. J. Singh & Ms. P. D. Prasad for Justice Alipate Qetaki** **Mr. P. Sharma for the Fiji Human Rights and Anti - Discrimination Commission** **Mr. R. K. Naidu for the Fiji Law Society** **Mr. Mohammed Saneem in Person** **Ms. G. Fatima for Mr Aiyaz Sayed-Khaiyum**
Date of Hearing	:	**24 April, 2024**
Date of Ruling	:	**26 April, 2024**

RULING

[1] This is the judgment of the Court, to which both of us have contributed.

Introduction

[2] By an Originating Motion dated 5 April 2024, the Cabinet sought the opinion of the Supreme Court, under section 91(5) of the Constitution of the Republic of Fiji, on whether a legal practitioner found by the Independent Legal Services Commission to have engaged in "unsatisfactory professional conduct or professional misconduct" within the meaning of section 121(1) of the Legal Practitioners Act 2009 is to be regarded as having been "found guilty of any disciplinary proceeding involving legal practitioners" within the meaning of various sections of the Constitution. The context in which that opinion was sought relates to the appointment of John Rabuku to the office of Director of Public Prosecutions and Alipate Qetaki to the office of Judge of the Court of Appeal. Their eligibility for appointment had been questioned in some quarters.

[3] At a previous hearing, the Court ordered the Reference to be served on Mr Rabuku and Justice Qetaki, as well as on the Fiji Law Society and the Fiji Human Rights and Anti-Discrimination Commission. Mohammed Saneem, the former Supervisor of Elections, and Aiyaz Sayed-Khaiyum, the former Attorney-General and Minister for Justice, have each applied to join in the proceedings as interveners. This judgment relates to those applications.

Test for intervention

[4] There is nothing in the Supreme Court Rules which identifies the test to be applied when determining whether someone should be permitted to intervene in a matter proceeding in the Supreme Court. In these circumstances, the High Court Rules and the Court of Appeal Rules apply: see rule 31 of the Supreme Court Rules. There is nothing in the Court of Appeal Rules on the topic. Both Mr Saneem and Mr Sayed-

Khaiyum apply to intervene pursuant to Ord 15 rule (6)(b)(i) and (ii) of the High Court Rules.

[5] In our opinion, these rules are of little help: they relate to the joinder of *parties* whereas a reference to the Supreme Court under section 91(5) of the Constitution does not have parties in the conventional sense. Such a reference is more akin to an application for judicial review because, like an application for judicial review, it is asking the Court to rule on the legality of a decision in public law – in this case the decision to appoint Mr Rabuku and Justice Qetaki to their respective offices. The test for the standing of interested participants in applications for judicial review is set out in Ord 53 rule 9(1) of the High Court Rules: any person who appears to the Court to be a proper person to be heard.

[6] This is to be contrasted with the test for *bringing* an application for judicial review in Ord 53 rule 3(5) of the High Court Rules, namely that the applicant must have a sufficient interest in the matter to which the application relates. Almost all of the authorities relating to standing – whether in Fiji or elsewhere – are cases concerned with the standing of someone who wants to *bring* an application for judicial review, not cases concerned with the standing of someone who seeks to intervene in existing proceedings. And there is no case in a comparable jurisdiction, so far as we know, which relates to the standing of someone who wants to intervene in a case proceeding in the highest appellate court in its original as opposed to its appellate jurisdiction, where that jurisdiction arises from a constitutional provision empowering the government to seek a definitive ruling on the proper interpretation and application of other constitutional provisions. In this respect, we are in uncharted territory.

[7] There has been an increasingly benevolent approach to standing in recent years. One important trend has emerged. It is nowadays less important for a prospective intervener to show that they are directly affected by the outcome of the case. Their interest can be much broader than that. For example, the courts have recognised that "the law must somehow find a place for the disinterested, or less directly interested,

citizen in order to prevent illegalities in government which otherwise no-one would be competent to challenge": Wade and Forsyth, *Administrative Law*, 9th ed, page 680. By that route, interested pressure groups have been allowed to intervene in cases which raise, for example, difficult questions of social policy or ethical issues.

[8] At the same time, though, the courts have focused much more than in the past, not merely on whether the prospective intervener has an interest in the outcome of the case, but also on the extent to which they would be able to assist the court. There are many instances of that in the reported cases. In *Re Northern Ireland Human Rights Commission (Northern Ireland)* [2002] UKHL 25 at para 32, Lord Woolf said that whether intervention should be permitted would "frequently … depend upon whether the intervention will assist the court itself to perform the role upon which it is engaged". In *Lecretia Seales v Attorney-General* [2015] NZHC 828 at para 46, Collins J said that "in a proceeding involving issues of general and wide public importance, leave to intervene may be granted when the Court is satisfied that it would be assisted by the intervener". Indeed, the Supreme Court itself has said something very similar. In *Vakalalabure v The State* [2006] FJSC 3, the Court said at para 118: "Courts of final appeal that permit intervention generally look to satisfy themselves that the prospective intervener can contribute information or submissions beyond the ken of the parties."

[9] With these considerations in mind, we address Mr Saneem's application first.

Mr Saneem's application

[10] Mr Saneem claims to have standing for two reasons. The first is that he has recently been charged with a criminal offence which he claims was sanctioned by Mr Rabuku in his capacity as Director of Public Prosecutions. He contends that a finding that Mr Rabuku was not eligible to hold that office would have an impact on his own criminal proceedings. Analytically, that argument raises two different issues. One is whether Mr Rabuku was eligible for appointment. The other relates to the validity of any decisions he made following his appointment but before any ruling that he had not been eligible for appointment. Mr Saneem may be a proper person to be heard on the

latter issue (which does not arise on the Reference), but that does not necessarily mean that he is a proper person to be heard on the former issue (which is the only issue which arises on the Reference).

[11] We do not doubt that Mr Saneem has a keen interest in the outcome of the Reference. A finding that Mr Rabuku was ineligible for appointment is the first matter which has to be established if Mr Saneem is to be able to question the validity of the decision to sanction the laying of the criminal charge against him. If having a keen interest in the outcome of the Reference was the proper test, it would, of course, be appropriate for Mr Saneem to be allowed to intervene. Indeed, that would apply to anyone affected by any decision made by Mr Rabuku or in his name during the period in which he held the office of Director of Public Prosecutions. We would not shirk from permitting Mr Saneem to intervene if the test was whether someone has an interest in the outcome of the Reference, even if that meant that very many people in a similar position could intervene as well.

[12] However, even if that is the test for *bringing* an application for judicial review, we do not believe that simply having an interest in the outcome of the Reference is the correct test for someone seeking to intervene in existing proceedings – let alone proceedings of the nature in this case. In our view, the real question is whether someone in Mr Saneem's position as a person affected by a decision made by Mr Rabuku during his tenure as Director of Public Prosecutions has anything particular to contribute to the debate, and which might help the Court resolve the issue on which its opinion has been sought.

[13] That brings us to the second basis on which Mr Saneem claims to have standing. That is that "as a former Chief Registrar", he is "able to assist the Court with the practical aspects of the application of the provisions of the Legal Practitioners Act". That arises because the Chief Registrar of the High Court has a defined role to play in the investigation of complaints against legal practitioners and in disciplinary proceedings against legal practitioners before the Independent Legal Services Commission.

Mr Saneem says that as Chief Registrar he was responsible for the Legal Practitioners Unit, which is the unit which provided lawyers to present the case against legal practitioners at hearings before the Commission.

[14] Having said that, as we understand Mr Saneem's affidavit, he was never confirmed in the substantive post of Chief Registrar, and was only in post for a very short while between late 2012 and sometime in 2013. We regard it as questionable whether the narrow issue which the Reference raises requires the Court to be informed of the practical aspects of the application of the provisions of the Legal Practitioners Act. But should that become necessary, that information can be given to the Court by counsel for the Cabinet on the Reference, and the legal teams of the persons and bodies who have been served with the Reference.

[15] In any event, it would hardly be appropriate for that information to be provided only by a former Acting Chief Registrar who has his own reasons for wanting the Court to rule that Mr Rabuku was not eligible for appointment. That echoes the thinking of the Supreme Court in *Vakalalabure* at para 118. One of its concerns about allowing the application to intervene in that case was that "a cloud hovers over [the] objectivity" of the prospective intervener.

[16] There is one other matter we should mention. Mr Saneem says that he had been considering applying for judicial review of what he claims to have been Mr Rabuku's decision to sanction the charge against him. That would have been on the basis that Mr Rabuku's ineligibility for appointment meant that he could not exercise any of the powers accorded to the Director of Public Prosecutions. Mr Saneem contends that his application for judicial review would be fatally undermined if on this Reference the Court ruled that Mr Rabuku had been eligible for appointment. That is perfectly true. But it merely reinforces the point that Mr Saneem has a keen interest in the outcome of the Reference. It does not help on whether he has some special knowledge or expertise which would inform the debate about whether Mr Rabuku was ineligible for

appointment. For these reasons, Mr Saneem's application to intervene in the Reference is refused.

Mr Sayed-Khaiyum's application

[17] Mr Sayed-Khaiyum's application to be joined as an intervener is based on several grounds, the two most important being:

a. First, because of his background as a former Attorney-General and Minister for Justice under various governments from 2007, he has extensive experience of both the Judicial Services Commission's appointment process and, more particularly, the background to the drafting and adoption of the 2013 Constitution. Mr Sayed-Khaiyum submitted that the Court would be assisted by his legal submissions in relation to the philosophy, background, drafting, purpose, application and intended interpretation of the Constitution.

b. Second, because he is facing a criminal charge sanctioned by one of the public officers referred to in the Reference, the Director of Public Prosecutions, he has a particular interest in the issues raised by the Reference.

In her submissions in support of Mr Sayed-Khaiyum's application, Ms Fatima emphasised the first of these grounds.

[18] In relation to the second ground, we do not see Mr Sayed-Khaiyum as being in any different position from Mr Saneem or, indeed, anyone else affected by decisions made either by Mr Rabuku personally or in his name while acting as Director of Public Prosecutions. For the reasons already given in relation to Mr Saneem, we would not grant him leave to intervene on that ground.

[19] Turning to the first and more significant ground, there are, of course, situations where a court seeking to interpret a statute will look at some types of background material. In a constitutional setting, an obvious example of this is the United States, where

members of the Supreme Court often refer to sources such as the Constitutional Convention of 1787, the Federalist Papers and the framers' contemporary writings when interpreting the United States Constitution.

[20] However, there are several reasons why such an approach would not be appropriate in this case.

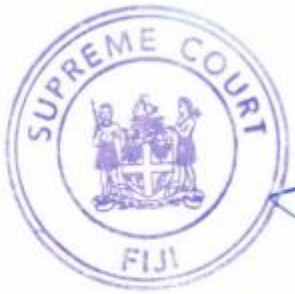
[21] First, we are concerned in this Reference with a specific aspect of the Constitution, namely the interpretation and application of section 105(2)(b) of the Constitution, specifically, the reference to a person not having "been found guilty of any disciplinary proceeding involving legal practitioners …". We think it unlikely that there will be much, if anything, in the background that could assist with the interpretation of that particular requirement. We acknowledge that the Constitution requires that those appointed to a number of offices must meet the qualifications for appointment as a judge and that there may well be some background as to why that requirement applies in relation to those offices. But that does not bear on the fundamental issue of interpretation raised by the Reference.

[22] Second, as we understand it, the Fijian Constitution of 2013 was not the result of the type of public process that preceded the adoption of the United States Constitution. Rather, it was the work of a relatively small group of officials, of which Mr Sayed-Khaiyum was one. If we were to grant him leave to assist the Court with matters of background, we would have also to seek input from other members of the group. This is particularly so because Mr Sayed-Khaiyum, no matter how hard he tries, cannot be dispassionate given his personal interest in the outcome of the Reference. Allowing evidence of this type would be inconsistent with the nature of a reference, which is by way of case stated: see rule 27 of the Supreme Court Rules.

[23] In the result, then, we refuse Mr Sayed-Khaiyum's application for leave to intervene.

[24] ***Orders of the Court***

The applications of Mohammed Saneem and Aiyaz Sayed-Khaiyum for leave to intervene in the Reference are refused.



The Hon. Justice Brian Keith
Judge of the Supreme Court

J.

The Hon. Justice Terence Arnold
Judge of the Supreme Court