

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CIVIL JURISDICTION**

Civil Action No. HBM 40 of 2017

**BETWEEN** : **GUSTON FREDRICK KEAN** **APPLICANT**  
**AND** : **COMMISSIONER OF FIJI CORRECTION SERVICES** **FIRST RESPONDENT**  
**AND** : **THE ATTORNEY GENERAL OF FIJI** **SECOND RESPONDENT**  
Counsel : Applicant in Person  
Mr J. Mainavolau for the Defendant

**R U L I N G**

1. Before me is yet another Notice of Motion for Constitutional Redress filed by Guston Frederick Kean on 25 October 2017.
2. Mr. Kean seeks:  

“ an interpretation whether [he has] an absolute right to communicate with counsel in private and obtain confidential privileged legal advice”. If the answer to that first question is “yes”, Mr. Kean seeks an “Order that Correction Wardens respect the constitutional right to confidential privileged legal advice between counsel and client”.
3. In his affidavit in support sworn on 25 October 2017, Mr. Kean swears as follows at paragraphs 3 to 15:
  3. That I have two matters pending at the Magistrates Court [Civil Action No. 37 of 2017 and Civil Action No. 40 of 2017]. The respondent in both matters is the Commissioner of the Fiji Police Force.
  4. That on the 18<sup>th</sup> day of October 2017, I appeared before Magistrate of Court No. 2 at Lautoka for Civil Action No. 40 of 2017. I then sought leave of the Court to be taken to Legal Aid Commission to seek privileged legal advice and consult with counsel since I had applied legal assistance and counsel. However I was denied to communicate and consult with counsel in private and was told by Correction wardens that they will be present during counsel and client encounter.
  5. That the presence of Correction Wardens during interview with me has prejudiced me substantially in that the very essence of a consultation with a lawyer is the privacy of the consultation.
  6. That the corollary of that right to private consultation is of course, legal professional privilege.
  7. That being dissatisfied with the practice of prison wardens present during lawyer and my consultation, I raised this grievance with senior wardens. However, I was informed that they wardens had a right to be present during

8. lawyer and client consultation.
  8. That on the 20<sup>th</sup> of October 2017, I appeared before Magistrate Mr Naivalu for Civil Action No. 37 of 2017, and was directed to be taken to Legal Aid to consult and obtain privileged Legal advice.
  9. That however, I was again denied confidential privileged legal advice when correction warden presence was present in the interview room.
  10. That the presence of correction wardens during consultation with counsel violated, breached and infringed the absolute nature of legal professional privilege.
  11. The question that is sought to be challenges is whether under the constitution there exist an absolute right to counsel client confidentially to legal professional privilege.
  12. That the paradigm of this right is confidentiality the time I need confidential advice was quintessentially – that moment when it was denied to me.
  13. That it is no answer to say that my lawyer may well have been careful in what he or she said knowing the warden officer was there. The presence of the officer presented lawyer and client with the opposite of that.
  14. That I could not obtain the confidential professional legal advice because our consultation was made in the presence of the correctional wardens,
  15. That right of a fair hearing have been infringed and violated the moment my consultation with counsel was interrupted with the presence of the corrections wardens.
4. Mr. Kean is a serving prisoner. He has a string of convictions for some serious crimes to his name. He is currently incarcerated at the Maximum Corrections Centre in Naboro.
  5. Mr. Kean has also filed two civil claims in the Magistrates Court (Civil Action No. 37 of 2007 and No. 40 of 2007). These proceedings are both against the Commissioner for Police.
  6. For both proceedings, Mr. Kean had sought and obtained the leave of the presiding Learned Magistrate to be escorted to the Legal Aid Commission for legal advice.
  7. He, of course, has to be escorted to the LAC on these occasions by a Prison Officer to guard him in accordance with the standard rules and procedures pertaining to the movement of prisoners.
  8. His main point of grievance is that his every conversation with a Legal Aid counsel is always conducted in the presence of and within earshot of his supervising prison officer.
  9. An Affidavit of Superintendent Sakiusa Veiwili sworn on 30 November 2017 is filed in opposition. He deposes at paragraph 6 that “the presence of the Corrections Officer was in accordance with the provisions of the Commissioner Local Orders, a subsidiary legislation of the Corrections

Service Act 2006, in that the prisoners may be visited by a legal advisor which (sic) may be conducted in sight but not in hearing”.

10. I accept that an escorting guard is duty bound to see to it that an inmate such as Mr. Kean does not escape, or converse with any unauthorized person or receives any contraband or weapon or even cause any harm to a member of the public on such occasions when they are out of the prison complex. In addition, the personal safety of an inmate is at risk. Prison Authorities may be exposed to civil liability should harm occur to an inmate as a result of a lapse in the observation of basic escorting and supervision protocol.
11. The above are just some of the reasons why a guard is duty bound to ensure that he keeps himself at a distance and at a vantage point within sight of his charge.
12. Article 14(3) (b) of the CCPR provides that an accused person is “to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”.
13. In **CCPR General Comment No. 32**, and in referring to Article 14(3)(b), the HR Committee states:

Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter.
14. The HR Committee has found a violation of Article 14(3)(b) where discussions between an accused and his or her counsel are conducted within the presence of a third party.
15. Section 13(1)(c) of Fiji’s 2013 Constitution gives every person who is arrested or detained a right to communicate with a legal practitioner of his choice in private in the place where he or she is detained:

*Rights of arrested and detained persons*

13.—(1) Every person who is arrested or detained has the right—

(c) to communicate with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission

16. The above appears to apply to an “arrested and detained person” only, and in relation only to legal advice that the arrested or detained person may require in relation to the arrest and/or the detention.
17. Does a similar right apply to a convicted person obtaining legal advice for a civil claim?
18. I accept that conviction and incarceration must necessarily result in the reduction of certain basic rights such as freedom of movement and some privacy.
19. In common law jurisdictions, legal professional privilege protects all communications between a solicitor, barrister or attorney and his client from being disclosed without the permission of the client.
20. The privilege is that of the client and not that of the lawyer.
21. In my view, that privilege fits into the general provision of section 24 of the 2013 Constitution which protects the rights to confidentiality of information.

*Right to privacy*

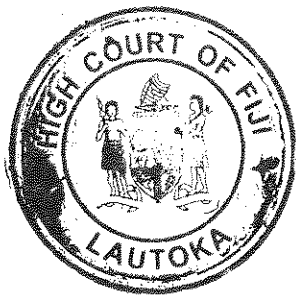
24.—(1) Every person has the right to personal privacy, which includes the right to—

- (a) confidentiality of their personal information;
- (b) confidentiality of their communications; and
- (c) respect for their private and family life.

(2) To the extent that it is necessary, a law may limit, or may authorise the limitation of, the rights set out in subsection (1).

22. However, a balance must be struck between that right of a convicted person to privacy in this regard and of course the public interest in ensuring that he is guarded and escorted at all times without compromising the risks stated above in paragraphs 10 and 11.

23. The ideal solution of course is that the officer supervising a prisoner who is obtaining legal advice must stay out of earshot but must maintain full view of everything that is going on between the legal adviser and the prisoner.
24. What distance is out of earshot range, and yet safely within full view of the interview, must depend on a variety of factors in any given case.
25. The answer to the first question that Mr. Kean seeks by his Summons is "yes". In principle, he has a right to communicate with counsel in private and obtain confidential privileged legal advice even in relation to his pending civil matters in the Magistrates Court.
26. As to the second question, I am a little loath about the bare allegations in Mr. Kean's affidavit.
27. I think that in future, any prisoner who is feels that his right to privacy and confidentiality is being compromised could make the first step towards asserting his right by voicing his or her concern to the legal counsel on the spot. I am certain that counsel will be able to work out a solution on the spot with the escorting officer.
28. That is all I am prepared to say in this case.



Anare Tuilevuka  
**JUDGE**  
18 May 2018