IN THE COURT OF APPEAL ON APPEAL FROM THE SUPREME COURT OF THE REPUBLIC OF VANUATU

APPEAL CASE NO.1 OF 1993

IN THE MATTER OF : THE CONSTITUTION OF THE REPUBLIC OF VANUATU

A N D :

IN THE MATTER OF : THE BROADCASTING AND TELEVISION ACT NO.3 OF 1992

THE BUSINESS LICENSE (AMENDMENT) ACT NO. 4 OF 1992

BETWEEN : THE ATTORNEY GENERAL OF THE REPUBLIC OF VANUATU

- Appellant

A N D : PRESIDENT FREDERICK KARLOMUANA TIMAKATA - President of the Republic of Vanuatu

- Respondent

JUDGMENT OF THE COURT (GIBBS, AND LOS JJA)

Mr Merkel QC and Mr Maquire for the Appellant
Mr Flick for the Respondent

The Constitution of the Republic of Vanuatu provides, by Article 16 (3), that when a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within two weeks. However, sub-article 4 of article 16 goes on to provide as follows :-

> "If the President considers that the Bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court for its opinion. The Bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution."

On the 29th June 1992 the President, who had been presented with a number of Bills for his assent, referred 3 Bills to the Supreme Court for its opinion under sub-article 4. The reference was heard by the learned Chief Justice, who held that two provisions, namely section 3 (6) of the Broadcasting and Television Bill 1992 and

section 8 A(2) of the Business Licence (Amendment) Bill 1992 were inconsistent with article 5(1)(d) of the Constitution.

The Broadcasting and Television Bill 1992 ("The Broadcasting Bill") provided, by section 3, for the establishment of the Vanuatu Broadcasting and Television Corporation, which was to consist of members not less than 5 and not more than 7 appointed by the Prime Minister, on the recommendation of the Council of Ministers, from amongst persons appearing to him to be qualified by reasons of certain specified experience. Section 3(2) enables the Prime Minister to appoint a Chairman and a Deputy Chairman of the Corporation from amongst the members of the Corporation. Section 3(3) provides that a person shall be disqualified from being appointed or continuing as a member of the Corporation if he is or becomes a member of Parliament or a member of a Local Government Council or a member of a Municipal Council or if he exercises a position of responsibility within a political party or if he is or becomes the owner, a partner, a director, manager or a major shareholder of or in any business which has a business transaction with the Corporation. By section 3(4) every member of the Corporation unless he vacates office under sub-section 7 shall hold office for such period not exceeding 3 years as is specified by the Prime Minister and shall be eligible for re-appointment. Section 3(5) allows members of the Corporation to resign by giving notice in writing to the Prime Minister. Section 3(6) of the Bill was in the following terms :-

> "The Prime Minister may if he thinks it expedient to do so, remove any member from office without assigning any reason therefor and such removal shall not be called in question in any Court."

Section 3(7) provides that the office of the Chairman, the Deputy Chairman and a member of the Corporation shall be vacated if he becomes of unsound mind, or becomes a bankrupt, or resignes or is removed under section 3, or has been absent without the leave of the Corporation, or is convicted of an offence involving dishonesty, fraud or moral turpitude or is otherwise unfit or unable to discharge the functions of a member. Section 4 provides for the payment of allowances to members of the Corporation. As sections 10 and 11 make clear, the Corporation performs important public functions.

The Business Licence (Amendment) Bill of 1992 ("The Licensing Bill") inserted in the Business Licence Act a new section, section 8 A, as follows :-

> "1. Notwithstanding any other provisions in this Act, the Minister in his discretion may -
>
> (a) refuse the issue or renewal of any licence under this Act; or
> (b) at any time revoke any licence issued under this Act.
>
> 2. The Minister may not give any reasons for the refusal or revocation referred to in sub-section 1 and such refusal or revocation shall not be challenged in any Court in any proceedings whatever."

Under the Business License Act, with some exceptions no one may carry on a business without a licence. "Business" is widely defined for the purposes of that Act; It means "any lawful form of trade, commerce, profession, craftsmanship, calling or other activity carried on for the purpose of gain, provided that a person shall not be deemed to carry on a business in respect of which his sole gain is by way of salary or wages."

The Learned Chief Justice held that the fact that the provisions of section 3(6) of the Broadcasting Bill and section 8 A(2) of the Licensing Bill were unconstitutional made the whole of both Bills unconstitutional. However he accepted as correct the submission made by both parties before him that in the event that he should find only parts of the Bills to be unconstitutional he would be authorised under the Constitution itself to take whatever steps were necessary to render the Bills constitutional. He accordingly directed as follows :-

1. That the following words in section 3 (6) of the Broadcasting Bill be removed :-
   "without assigning any reason therefor and such removal shall not be called in question in any Court"

2. That the whole of section 8 A(2) of the Licensing Bill be removed.

From this decision the Attorney General has appealed. The question that arises is whether the Learned Chief Justice was correct in holding that the words which he directed be removed from the Bills were inconsistent with the Constitution of the Republic of Vanuatu. The provisions of the Constitution on which counsel for the President relied in argument before us were sub-article 5(1)(d) and 5(1)(j). Those provisions are as follows:-

> "1. The Republic of Vanuatu recognises that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedom of others and to the legitimate public interest in defence, safety, public order, welfare and health -
>
> ..... (d) protection of the law;
>
> ..... (j) protection for the privacy of the home and other property and from unjust deprivation of property
>
> ....."

Sub-article 5(2) of the Constitution states that the protection of the law shall include certain specified rights in criminal matters, but that provision is clearly not exhaustive. Article 53 of the Constitution entitles any one who considers that a provision of the Constitution has been infringed in relation to him to apply to the Supreme Court for redress and gives the Supreme Court jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

The provisions of the Article 5 of the Constitution must be given a generous interpretation : See Ong Ah Chuan v Public Prosecutor [1981] AC 648 at 670. Clearly a right to the protection of the law must include a right to invoke the jurisdiction of the Courts to enforce the rights of the citizen. There is no justification for restricting the Constitutional provision so that it ensures that a citizen may approach the Courts to seek the protection only of rights conferred by the Constitution; the protection of the law extends to all rights conferred by the law. The Parliament has power, subject to the Constitution, to take away or modify rights, but while a right exists the citizen may apply to the Courts to protect it. However the right to the protection of the law given by Article 5 (1)(d) is wider than a right to seek legal redress. The decision of the Privy Council in Ong Ah Chuan v Public Prosecutor provides useful guidance as to the meaning of the words "protection of the law" in Article 5 (1)(d). Their Lordships there said, at pp 670-1 :-

> "In a Constitution founded on the Westminster Model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordship's view refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties ....."

However their Lordships went on to hold that a statute which raised a rebuttable presumption that possession of a quantity of a controlled drug was for the purpose of trafficking did not conflict with any fundamental rule of natural justice. The Constitutional provision considered in that case did not call for the perpetuation of technical rules of evidence and permitted modes of proof of facts precisely as they stood at the date of the commencement of the Constitution: See at p 671. It appears from that decision that a provision such as article 5(1)(d) not only prevents the Parliament from ousting the jurisdiction of the Courts, but also prevents the Parliament from abrogating those principles of natural justice which may rightly be regarded as fundamental. That does not means that all the rules which governed the exercise of administrative functions at the date of the commencement of the Constitution are necessarily preserved forever. Subject of course to the Constitution, the Parliament of Vanuatu is given plenary powers by article 16 (1) of the Constitution, and in the exercise of those powers it may repeal or alter existing law : See article 95 of the Constitution. Article 5 (1)(d) prevents the Parliament from altering only those rules of natural justice which are truly fundamental.

At first sight it appears abundantly clear that the provisions of the Broadcasting Bill and the Licensing Bill which oust the jurisdiction of the Courts are inconsistent with the Constitution. Article 5(1)(d) guarantees a right of access to the Courts whereas the provisions of the Bills deny it.

Mr Merkel, for the Appellant submitted that the provisions of the Bills may be read down in a way that would render them consistent with the Constitution. In support of this argument he relied on section 9 of the Interpretation Act which is in the following terms:-

> "1. Every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution the latter provision shall prevail.
>
> 2. Where a provision in an Act conflicts with a provision in the Constitution the Act shall nevertheless be valid to the extent that it is not in conflict with the Constitution."

Mr Merkel also relied on the similar common law principle that statutory language should if possible be construed so as to avoid conflict with the Constitution (See Hector v Attorney General of Antigua and Barbados. [1990] AC 312 at 319) and on the many cases which have read down ouster clauses so that they were made either meaningless (see Wade : Administrative Law, 6th Ed, at pp 725-9) or have the effect that the Court will intervene only when the decision sought to be reviewed is not a bona fide attempt to exercise the power conferred, in a matter relating to the subject matter of the legislation in question and reasonably capable of reference to the power : See R v Hickman; Exparte Fox and Clinton [1945] 70 CLR 598 at 615. He submitted that in accordance with these principles the Bills should be read down so that they did not conflict with the Constitution.

There is no doubt that if the Bills had received the President's assent and had become law the ouster provisions would, if possible, have been construed so that they did not conflict with article 5(1)(d). That however does not mean that they were not inconsistent with the Constitution within article 16 (4). It was precisely because they would have been inconsistent with the Constitution, if passed into law, that they would have been read down as a matter of construction, if that could possibly have been done. It is not necessary to decide whether it would have been possible to interpret the ouster provisions in such a way that they would have been entirely consistent with the Constitution. One purpose of article 16 (4) is to prevent laws which on their face appear to be inconsistent with the Constitution from being enacted. If the Bill is inconsistent with the Constitution it is not to be promulgated, and the citizen is thereby saved the trouble of deciding whether the offending provision can be read down so as not to apply to the circumstances of the particular case and spared the expense of having the question tested in the Courts.

It may well be that for some purposes, the provisions of the Interpretation Act can be regarded in deciding whether a Bill is

unconstitutional. For instance, if a Bill appeared to discriminate on the ground of sex because it used only masculine expressions, regard could be had to the fact that if it became law words importing the masculine would include the feminine : See Interpretation Act section 3(2). However section 9 is in this respect exceptional; it applies only where there is a conflict between an Act and the Constitution. However where there appears to be a conflict between the Bill and the Constitution the President must refer the Bill to the Supreme Court and the Bill should not be promulgated if the Supreme Court holds that the inconsistency exists.

The authorities cited on the very different question whether inconsistency arises between a law of the Commonwealth of Australia and a law of an Australian state do not assist in determining the present question. Here the provisions which oust the jurisdiction of the Courts were plainly inconsistent with article 5 (1)(d).

The question that remains for decision is whether the provisions of the two Bills which deal with the giving of reasons detract from the protection of the law guaranteed by article 5(1)(d). Mr Flick, who appeared for the Respondent, rightly submitted that it is a valuable protection against excess of power to require the person or body exercising the power to give reasons for the manner of its exercise. If a body exercising a statutory power has fallen into error, the reasons given will be likely to reveal the error and make it easier to correct it. There are good arguments of principle why an administrative tribunal should give reasons for its decisions; amongst other things they will make the tribunal more amenable to the supervisory jurisdiction of the Courts and will help promote public confidence in the administrative process : See Osmond v Public Service Board of NSW [1984] 3 NSW LR 447, at 463, a decision of a NSW Court of Appeal. However, as the High Court of Australia subsequently held, reversing the decision of the NSW Court of Appeal, there is no general rule of the Common Law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons : Public Service Board of NSW v Osmond [1986] 159 CLR 656, at 662. As was further said in that case at 663, "Where the rules of natural justice require that a person making a decision should give the person affected an opportunity to be heard before the decision is made, the circumstances of the case will often be such that the hearing will be a fair one only if the person affected is told the case made against him. That is quite a different thing from saying that once a decision has been fairly reached the reasons for the decision must be communicated to the party affected." It was further pointed out that if the decision maker does not give any reason for his decision, the Court may be able to infer that he had no good reason. The law as stated in that case is similarly stated by the House of Lords in England.

It is therefore not possible to hold that the rules of natural justice require that reasons should be given for an administrative

decision, and still less possible to hold that there is a fundamental rule of that kind. The fact that the giving of reasons may be regarded by a citizen as increasing the protection that the law provides does not mean that a failure to give reasons is a denial of the protection guaranteed by article 5 (1)(d). That article does not entitle to citizen to every form of assistance that the law might conceivably provide or to every procedural right that may be available at any particular time. The article entitles the citizen to the observance of those principles of natural justice which may properly be regarded as fundamental, and not to other principles which may be valuable but which are not fundamental. The requirement that reasons be given for an administrative decision is not a fundamental principle of natural justice.

For these reasons the provision in section 3(6) of the Broadcasting Bill that the Prime Minister may remove any member of the Corporation from office without assigning any reason therefor does not contravene any fundamental principle of natural justice and therefore does not conflict with article 5(1)(d) of the Constitution.

The provisions of section 8 A(2) of the Licensing Bill are significantly different. They do not merely entitle the Minister to decline to give any reason for the refusal or revocation of a licence; they prevent him from doing so. The words "may not give any reason" do not leave the Minister a discretion. "May not" in this context, means "shall not" or "must not".

The Licensing Bill is drastic in its provisions. The livelihood of many people carrying on a gainful activity, other than for salary or wages, depends on the possession of a licence, which the Minister, in his discretion, may refuse or revoke. If the Minister refuses or revokes a licence without giving reasons the Court would not be able to infer that he had no good reasons, for the law would prevent him from revealing what reasons he had. Indeed the Minister might well claim that the section prevented him from giving notice to the person holding or seeking a licence of the reasons why he proposed to revoke or refuse it. The effect of any rule or principle will depend on the statutory context in which it is to be applied. The duty to refuse reasons for the refusal or revocation of a licence would have a particularly damaging affect on a citizen whose livelihood depends on the licence. It would significantly prevent the citizen from enforcing his right to a licence in a case where the refusal or revocation was wrongful. We hold, in these circumstances, that the provision which forbids the Minister to give reasons does detract, in a fundamental way, from the protection of the law to which the citizen is entitled.

We agree therefore that section 8 A(2) of the Licensing Bill is in conflict with the Constitution.

On the view which we have taken it is unnecessary to consider whether a licence under the Licensing Bill is "property" within article 5(1)(j) of the Constitution.

In the result we hold that the learned Chief Justice was correct in deciding that the whole of section 8A (2) of the Licensing Bill and the words "and such removal shall not be called in question in any Court" in section 3(6) of the Broadcasting Bill were inconsistent with the Constitution. We do not however agree that the words "without assigning any reason therefor" in section 3(6) are inconsistent with the Constitution.

It is a question whether, if a provision in a Bill is inconsistent with the Constitution, the Supreme Court, acting under article 16 (4), may advise the President to assent to the remainder of the Bill after excising the offending words. We do not think it necessary to answer that question in this case, since before the learned Chief Justice both parties agreed that such a course is possible and we do not consider that they should be allowed to resile from that concession at this stage.

We allow the appeal in part and vary the decision of the learned Chief Justice by deleting from his direction the words "without assigning any reason therefor". The costs of both parties should be paid by the Government.

DATED at Port Vila this 15th day of October 1993