IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU **Appeal Case No. 3 of 1997**

BETWEEN: **GERARD LEYMANG**

Appellant

AND: **THE OMBUDSMAN**

Respondent

Coram: **Justice Bruce Robertson**
Justice John von Doussa
Justice Kalkot Mataskelekela
Justice Oliver Saksak

Hearing: **13 and 14 October 1997**

Counsel: **Mr C R de Robillard for the appellant**
Mr K J Crossland and Ms H Lini Leo for the respondent

REASONS FOR JUDGMENT

THE COURT: This is an appeal against an order for committal made against the appellant ("*Mr Leymang*") by Acting Chief Justice Lunabek on 19 August 1997. The order recited that the Court was satisfied that Mr Leymang had been guilty of contempt in the face of the Court by refusing on 21, 22 and 29 July 1997 to disclose information in the course of an examination under oath pursuant to an order of the Supreme Court dated 21 July 1997. The order had been made in proceedings brought by the Ombudsman pursuant to s 17(7) of the *Ombudsman Act* No. 14 of 1995. The appellant refused to disclose the names of persons known to him who allegedly made complaints about "Mr X" (the name of the person complained about was not publicly disclosed because of confidentiality attaching to an enquiry being conducted by the Ombudsman in respect of which the questions were asked). The Court order then provided as follows:

"1. *Mr Gerard Leymang stands committed to a prison at the direction of the Police Commissioner for a period of six months from the date of his apprehension.*

2. *Mr Gerard Leymang pay a fine of Vt 100,000 immediately; and*

3. *Mr Gerard Leymang pay to the Ombudsman's Office costs in the amount of Vt 100,000 immediately.*

IT IS FURTHER ORDERED *that this order of the Court lie unexecuted for a period of 21 calendar days (ie by 4 pm Monday 8 September 1997) if the respondent, Mr Leymang:*

(a) Purges the contempt before 4 pm Monday 8 September 1997 by providing the said information under oath to the satisfaction of the Court (with the exception that the order of costs in favour of the Ombudsman shall remain); or

(b) Files and serves a notice of appeal by 4 pm Monday 8 September 1997 against this order in which case the order shall lie unexecuted pending determination of such appeal."

A notice of appeal was filed on 8 September 1997. The order for committal has remained unexecuted pending the determination of the appeal by this Court.

The matters leading up to the making of the order for committal are complex. For present purposes it is not necessary to go into all of them as they are all fully recorded in the reasons for judgment of Lunabek ACJ dated 25 August 1997. It is sufficient to record the following central events. Mr Leymang is a senior and respected leader in the Republic of Vanuatu. Before becoming involved in politics, he was educated in Vanuatu, New Caledonia and France. He became a priest in the Catholic Church. He was one of the founders of the UNP Party, and in 1978 became the first Chief Minister when Vanuatu became self-governing before independence which followed in 1980. In 1992 he was appointed to the position of head of Cabinet and First Secretary to the Prime Minister in the Government of Prime Minister Carlot Korman. During 1993 in that position he was involved with events which led to the non-renewal of a residency permit of Mr X, who had hitherto been a long time resident

of Vanuatu. Mr X made a complaint on 13 January 1995 to the Ombudsman about the non-renewal of his residency permit. The office of Ombudsman was created by Article 61 of the Constitution of the Republic of Vanuatu. The Ombudsman has wide powers of enquiry to which more detailed reference is made later. On 13 September 1996 Mr Leymang was served with a summons to appear as a witness by the Ombudsman. The summons was headed "In the matter of an enquiry by the Ombudsman of Vanuatu under the Constitution and Ombudsman's Act". The summons required Mr Leymang to attend on 15 October 1996 to give evidence in a confidential matter being inquired into by the Ombudsman namely "Enquiry into the non renewal of [Mr X's] permit". The summons also required Mr Leymang to produce documents.

The summons had been preceded by requests by the Ombudsman to Mr Leymang in informal interviews to disclose the name of a person or persons who had made complaint to him about Mr X. He acknowledged that people had complained to him but refused to disclose their identity, he now says on the grounds that the information was given to him in confidence by those that made the complaint. A written request was then made by the Ombudsman to Mr Leymang for the information. The request was refused. Then came the summons. On the appointed day, 15 October 1996, Mr Leymang refused to give the information on oath. The Ombudsman was at that time seeking to exercise power under Article 62 of the Constitution and s 17(2) and (3) of the *Ombudsman Act*.

On 21 October 1996 Mr Leymang filed a Constitutional petition in the Supreme Court, identified in these proceedings as Civil case No. 139 of 1996. In the Constitutional petition he sought to challenge the validity of the appointment of the Ombudsman. He alleged that the

appointment of the Ombudsman was invalid on the ground that the process of consultation preceding the selection of an Ombudsman envisaged by Article 61(1) of the Constitution and s 5(1) of the *Ombudsman Act* had not occurred. Many procedural steps have occurred in Civil Case No. 139 of 1996, but the petition has not yet been heard. Whilst the petition has been brought to the attention of this Court, the action is not before us. The petition was not ready for trial at the time when the order for committal was made against Mr Leymang. It is far from clear that the petition is ready for trial even now.

On 29 January 1997 the Ombudsman made application to the Supreme Court pursuant to s 17(7) of the *Ombudsman Act* for an order that Mr Leymang be examined on oath before the Court to obtain answers to the questions that he had hitherto refused to answer. Section 17(7) provides:

> *"(7) If any person fails or refuses to appear or fails or refuses to provide any information after having been served with a summons, the Ombudsman may apply to the Court for the person to be summoned to appear before the Court and furnish the information or other thing requested in the summons."*

The supporting affidavit from the Ombudsman deposed that:

> *"2. The information is required by me for the purpose of an enquiry that the Ombudsman's Office is conducting stemming from the decision by the Immigration Department to refuse to renew the residency permit of [Mr X]. On or about 17 January 1995 I initiated the enquiry after receiving a complaint from [Mr X] on 13 January 1995.*
>
> *3. The most important part of the scope of the enquiry relates to potential breaches of the Leadership Code principles set out in Chapter 10 of the Constitution (articles 66 & 67). Accordingly, the enquiry is not exclusively or even principally concerned with illegality or unreasonableness of the decision of itself. The decision, on the basis of the information obtained to date by the*

Ombudsman's Office, strongly appears to be the end product of a failure by certain leaders to follow and/or apply the law. In failing to follow the law the wider and more significant leadership issues arise."

The affidavit went on to give information about the position occupied by Mr Leymang at the time the decision relating to Mr X was made, and exhibited two letters from the Principal Immigration Officer at the Immigration Department to the Ombudsman saying that the Immigration Department was instructed by Mr Leymang, as First Secretary to the Prime Minister's Office, that the residency permit of Mr X was not to be renewed beyond 31 December 1994.

After the issue of the application, a number of interlocutory hearings occurred, and orders were made common both to the application and to the Constitutional petition. It is plain that these hearings became emotionally charged and are now the subject of many criticisms made by counsel for Mr Leymang.

On 21 July 1997 the application seeking an order that Mr Leymang be examined before the Court came on for hearing. The order was made, and 2.00pm that day was fixed for the purposes of the examination. At 2.10pm Mr Leymang was present in Court and the examination commenced. Questions were asked of Mr Leymang by counsel for the Ombudsman. Although the lengthy examination touched on a number of issues, on the critical question as to the identity of the person or persons who had made complaint about Mr X, Mr Leymang refused to identify them. However, he said that he knew the identity of these people, and indicated that they were from the Sanma Province.

Both counsel for the Ombudsman, and the Court, explained to Mr Leymang the position in which he was placed by his refusal to answer. The hearing was adjourned to the following day at 2.00pm to enable Mr Leymang to consider his position and the warning that had been given that his continued refusal to answer could result in an order for his committal.

When the matter resumed on 22 July 1997 Mr Leymang was present, but said that he was not refusing to answer the relevant question, but was "objecting" to answering it. The Court then made the following orders and direction, before adjourning the hearing to 29 July 1997.

> *"(1) Mr Leymang is given further time to seek legal advice,*
>
> *(2) A complaint be referred to the Public Prosecutor for the Contempt of Court under Section 82(1)(b) of the Penal Code Act; and*
>
> *(3) the Ombudsman is directed to prepare the Committal Proceedings under Section 82(3) of the Penal Code. [CAP 135]."*

On 29 July 1997, it was necessary for the Court to further adjourn the hearing until 18 August, 1997. On that day a notice of motion issued on behalf of the Ombudsman and supported by an affidavit, was before the Court. The notice of motion sought orders that Mr Leymang be committed to prison and pay the costs of the application. The basis for seeking the orders was that Mr Leymang had refused to answer questions on 21 and 22 July 1997 as to the identity of the people who had complained to him about Mr X.

Mr Leymang indicated that he did not desire to cross-examine the deponent of the affidavit in support of the notice of motion. The Court then ruled that the committal proceedings be heard in open Court (because of the confidential nature of the examination, the hearing had

previously been conducted in a closed Court). Mr Leymang was not represented by a lawyer. He said he had no confidence in local lawyers and wished to be represented by overseas counsel, Mr de Robillard, from whom he had received legal advice. He advised the Court that his position remained unaltered; he would not give the names. The Court delivered its decision on whether Mr Leymang should be committed the following day, and the order for committal was made. Reasons for the decision of the Court were handed down on 25 August 1997.

The Acting Chief Justice in his reasons noted the alternative procedures that were available in respect of civil and criminal contempt, and in particular the powers arising under s 23 of the *Courts Act* [CAP 122], and under s 82(1)(b) of the *Penal Code Act* ("the *Penal Code*") in the case of contempt in the face of the Court. His Lordship explained that he had directed that the matter be referred to the Public Prosecutor so that if a charge of contempt were to be dealt with under s 82(1)(b) of the *Penal Code*, the accused (Mr Leymang) would be given the appropriate opportunity to get legal advice and prepare his defence to the charge. However the Public Prosecutor had not laid a complaint so that procedure was not an option. The Acting Chief Justice decided that the appropriate course for him to take was to exercise the summary jurisdiction arising under the Court's inherent powers to deal with contempt in the face of the Court. His Lordship was satisfied that Mr Leymang had received the opportunity to obtain legal advice, to call evidence if he wished to do so, and to answer the charge of contempt against him. His Lordship was satisfied that Mr Leymang was in no doubt why he was accused of contempt of Court. Findings beyond reasonable doubt were made that Mr Leymang knew the answers to the relevant questions, that he refused to answer them, and that he had no lawful justification for so refusing.

When the appeal to this Court was called on for hearing, Mr de Robillard announced his appearance for Mr Leymang, and then proceeded to address the Court as to the reasons why he considered he was entitled to appear. He said he was admitted as a local practitioner and held the necessary consents and registrations. He pursued this issue at some length, perhaps because it was indirectly related to an interlocutory order that had been made by Lunabek ACJ which brought to the attention of Mr Leymang that if he wished to be represented by Mr de Robillard, or any other overseas counsel, it would be necessary for that person to obtain a temporary practising certificate. Documents produced to the Court by Mr de Robillard indicated that there was good reason for his Lordship to question the entitlement of Mr de Robillard to appear unless he obtained a temporary practising certificate. Mr de Robillard's entitlement to appear as a local practitioner depends upon registrations and consents no proper evidence of which were before the Court, save for the Court's own register of practitioners (which did not bear out Mr de Robillard's assertion). The Court of Appeal informed Mr de Robillard that in these proceedings it could not adjudicate upon his entitlement to appear as a local practitioner. If he asserted the right to do so, in the circumstances of this case, which concerned the liberty of a subject, the Court would hear him. However it was entirely his decision whether he appeared, and if he were not duly qualified to appear in the capacity that he announced, he would be committing an offence against the provisions of the *Legal Practitioners' Act* [CAP 119], as amended.

The notice of appeal filed by Mr Leymang raised 27 grounds. Many of them sought to impugn procedural steps and interlocutory orders that had been made either in the application under s 17(7) of the *Ombudsman Act* or in relation to the Constitutional petition. Many of the

grounds were canvassed by Mr de Robillard, and were expanded upon in written materials submitted by him or by Mr Leymang before the hearing. To limit the range of issues, the Court, with the assistance of Mr de Robillard, identified eight principal topics which Mr Leymang sought to pursue on the appeal. These topics were as follows:

1. Was the Ombudsman lawfully in office?

2. Was the Ombudsman lawfully entitled to inquire into the matter that she was investigating?

3. Did the Ombudsman use proper procedures to initiate the proceedings in the Supreme Court and were the principles of natural justice applied in the hearing during which Mr Leymang refused to answer the Ombudsman's questions?

4. Was the Court mistaken or confused about its role in relation to the application made under s 17(7) of the *Ombudsman Act*?

5. Did the Ombudsman have to prove that the questions asked were necessary and relevant to the enquiry?

6. Did the appellant because of his position and history have a lawful reason not to answer the questions?

7. Did the appellant in fact answer the questions sufficiently in any event?

8. All else failing, was the penalty proportionate and appropriate to the contempt?

The Court then received submissions from Mr de Robillard topic by topic. At the conclusion of his submissions on topics 1 to 7, the Court adjourned. Upon reconvening, the Court announced that it considered none of the matters advanced on Mr Leymang's behalf provided an excuse for him not answering the Ombudsman's questions, and that the finding of contempt should be upheld. The Court then adjourned until the following day to enable Mr Leymang to obtain further advice and to consider his position.

When the hearing resumed, Mr Leymang gave evidence on oath, and in the course of doing so answered the outstanding questions. He purged his contempt. He also explained his reasons for not earlier answering the questions. As a leader in the community he considered that people, including the complainants about Mr X, came to him to raise issues of public importance. If he were not to honour the confidences which he thought had been reposed in him by those people, that could break down the traditional way in which people communicated with their leaders. Further, he had considered that the Ombudsman was exceeding her powers. He considered that her appointment was invalid and for that reason she had no entitlement to seek the information requested. His evidence amounted to a frank explanation and apology which the Court accepted as genuinely given.

Submissions were then made on the eighth point identified with Mr de Robillard, namely the appropriate penalty. For reasons which are given under topic 8 below, the Court set aside the orders for imprisonment and for the payment of a fine, and in lieu directed that by way of costs on the application brought by the Ombudsman and on the appeal Mr Leymang pay to the Ombudsman the sum of Vt 200,000 by 25 fortnightly payments each of Vt 8,000, the first of such payments to be made on 1 December 1997, and upon condition that if default occur in the making of any fortnightly payment, the whole of the balance of the sum of Vt 200,000 then outstanding would become immediately due and payable.

In light of the ultimate disposition of the appeal it is not necessary for us to canvass every one of the complaints made by Mr de Robillard about orders and procedures which occurred in the interlocutory stages. Before giving our reasons on the eight points on which argument was addressed, we consider it is appropriate to note that harsh words and criticisms were

exchanged between the participants as the proceedings progressed in the Court below. Those participants were not only the Ombudsman and Mr Leymang, but counsel and the Judge himself. Whether all the statements and criticisms were justified or not occupied much time in argument before this Court. Hopefully, the discussion in the course of argument has helped to clear the air. It appeared to us, generally speaking, that the statements and actions of the different participants which were criticised were responses based at the time on genuine perceptions and beliefs held by the participants. It seems to us likely that there were misunderstandings between the participants as to the motives of others. Misunderstandings led to aggressive resistance to requests, directions and suggestions. Strong heads were involved. The Court, the Ombudsman and her officers, and Mr Leymang, each by reason of their respective positions expected degrees of respect and compliance which exceeded what the others thought were appropriate. That led one or other of the participants at times to treat the conduct of another as deliberately intended to be rude or defiant when that was not the purpose or intent. In the result, what should have been a fairly straightforward and orderly exercise between rational and intelligent people to obtain apparently innocuous information turned into an aggressive, emotionally charged battle. To take one example only, at one point when Mr Leymang had indicated his intention to the Court not to answer the questions, the learned Judge indicated that the case would be adjourned to the following day when Mr Leymang would be asked to reconsider his refusal, in light of the seriousness of his position. The Judge made a remark to the effect that he proposed to adjourn, go home and "take a bath", and reflect on the matter. This statement was one of the subjects of harsh criticism by Mr Leymang on the ground that it was sarcastic, cynical and inappropriate. But obviously that was not the intent of the remark by the Judge. The expression which was used is a common one between lawyers and judges. It means only that it is wise in a serious situation to stand

back and allow a period of cool consideration before deciding what steps should next be taken. Plainly that was sensible advice which the Judge obviously hoped everybody would follow.

No useful purpose would be served by enumerating other misunderstandings that occurred. We turn to the eight topics that were argued.

1. Was the Ombudsman lawfully in office?

Article 61 of the Constitution of the Republic of Vanuatu provides for the appointment of the Ombudsman, and the requirements of this Article are repeated in s 5(1) of the *Ombudsman Act*. By Article 61(1) the Ombudsman shall be appointed, for five years, by the President of the Republic after consultation with the Prime Minister, the Speaker of Parliament, the leaders of the political parties represented in Parliament, the chairman of the National Council of Chiefs, the chairmen of the Local Government Councils, and the chairmen of the Public Service Commission and the Judicial Service Commission.

Mr Leymang contended that an irregularity occurred in the appointment of the respondent in that there was a failure or irregularity in the consultation process contemplated by Article 61(1). The argument asserted that the appointment of the Ombudsman was therefore invalid. It was submitted that this leads to the consequence that the Ombudsman could not validly exercise the powers contained in the *Ombudsman Act* to require Mr Leymang to supply information or to answer questions under compulsion. A further consequence, so it was submitted, is that the Court could not lawfully require Mr Leymang to answer questions in proceedings brought by an invalidly appointed Ombudsman.

The evidence before the Court in the Ombudsman's application under s 17(7) does not enable any opinion to be formed as to the validity of the Ombudsman's appointment. No information on this topic was tendered before the trial Judge. Two brief, untested affidavits which the appellant sought to introduce on the hearing of the appeal fall far short of the necessary enquiry and evidence that would be needed. However, even if it is accepted to be the case that there was irregularity or omission in the course of the consultation process such that the Ombudsman does not now validly hold office, that fact would not relieve the appellant of his obligation to supply information and answer questions put to him by the person apparently holding office as Ombudsman. It is a well recognised rule of the common law that where a person has exercised powers and functions of a public office which involve the interests of the public and third persons, with colour of right, the exercise of those powers and functions is accorded validity even if there has been a defect or irregularity in the manner of the appointment of that person such that the appointment was not a valid one. This doctrine has been referred to as the doctrine of de facto office. The statement of the doctrine in the Supreme Court of Connecticut in *State v Carroll* (1871) 9 Am Rep 409, made by Butler CJ at 427-428, speaking for the Court, has been approved and followed in many jurisdictions; in the Supreme Court of the United States in *Norton v Shelby County* (1886) 118 US 425, in the Court of Appeal in New Zealand in *In re Aldridge* (1893) 15 NZLR 361 at 368-379, in the High Court of Justice in England in *Adams v Adams* [1971] P 188 at 211-212, in the High Court of the Solomon Islands in *Re Nori's Application* [1989] LRC (Const) 10, and in Australia in *The Queen v Cawthorne* (1977) 12 SASR 321 per Bray CJ at 329-334. Ward CJ in *Re Nori's Application* described Butler CJ's statement as one of the classic definitions of an officer de facto. Butler CJ said:

> *"A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: An officer* de facto *is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised:*
>
> *First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be.*
>
> *Second, under colour of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like.*
>
> *Third, under colour of a known election or appointment, void, because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public.*
>
> *Fourth, under colour of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.*
>
> *Any thing less comprehensive and discriminating will, I think, be imperfect and deceptive as a definition."*

In our opinion this Court should follow this statement. When applied to this case any irregularity in the appointment of the Ombudsman alleged by Mr Leymang falls squarely within the third class of case.

Counsel for the appellant argued that the order of the Supreme Court made on 21 July 1997 pursuant to which Mr Leymang was examined, should not have been made until the Constitutional petition which questioned the validity of the Ombudsman's appointment was heard and determined. We are unable to agree with that submission. It follows from the principle to which we have just referred, that even if it were established at a trial of the

Constitutional petition that the Ombudsman was not validly appointed, steps taken by her prior to that determination would not thereby be invalidated. In otherwise proper exercise of power under the Constitution and the *Ombudsman Act*, an enquiry had been initiated. As part of that enquiry, a proper request was made to Mr Leymang to supply information. His failure to do so led to the application and order of the Supreme Court requiring him to answer on oath. The application was regularly made, and would remain a valid one even if it were subsequently determined that the appointment of the Ombudsman was invalid. The order for committal was based on Mr Leymang's refusal to answer on oath a question he was required to answer by the Court. It was an order made because of his refusal to comply with the order of the Court.

2. Was the Ombudsman lawfully entitled to enquire into the matter she was investigating?

Article 62 of the Constitution provides for enquiry by the Ombudsman. Article 62(1) reads:

> *"62(1) The Ombudsman may enquire into the conduct of any person or body to which this Article applies -*
>
> *(a) upon receiving a complaint from a member of the public (or, if for reasons of incapacity, from his representative or a member of his family) who claims to have been the victim of an injustice as a result of particular conduct;*
>
> *(b) at the request of a Minister, a member of Parliament, of the National Council of Chiefs or of a Local Government Council; or*
>
> *(c) of his own initiative."*

The functions of the Ombudsman enacted in s 14 of the *Ombudsman Act* deal with the exercise of this Constitutional power in more detail, and s 16 deals with the procedures to be followed in enquiries under one or other paragraphs of Article 62(1).

Counsel for the appellant argued that the Ombudsman was conducting an enquiry following a complaint by Mr X. Mr X has since left the country of his own volition (before his residency permit expired). As he has now left the jurisdiction it was argued that the Ombudsman should not be expending resources on investigating a complaint which is now, in substance, dead. It was further argued, by reference to s 16(1)(c) of the *Ombudsman Act* that the Ombudsman is prevented from pursuing the enquiry. That provision empowers the Ombudsman to pursue an enquiry under Article 62(1) of the Constitution unless "the complainant has available to him another remedy or channel of complaint that he could reasonably be expected to use". It was argued that Mr X, if he is still aggrieved by anything that happened, could pursue a remedy by way of Constitutional petition, judicial review, or an action based on a wrongful exercise of statutory power. These arguments overlook other important provisions of the Constitution and the *Ombudsman Act*. Article 62(1)(c) of the Constitution enables the Ombudsman to pursue an enquiry "of his own initiative" and s 16(2) of the *Ombudsman Act* expressly provides that "The Ombudsman's declining to enquire into a complaint shall not affect his power to enquire generally into a matter on his own initiative". The exercise of power by the Ombudsman was not therefore dependent upon a complaint from an individual that could validly be pursued under s 16(1) of the *Ombudsman Act*.

The argument also overlooks the sworn and unchallenged testimony of the Ombudsman that the enquiry was not limited to the complaint by Mr X, but was part of a wider enquiry into

whether there had been a breach of the leadership code enacted in Chapter 10 of the Constitution.

The Acting Chief Justice was criticised for not having embarked on a detailed investigation as to the scope of the enquiry being conducted by the Ombudsman, and whether the complaint made by Mr X should properly be excluded from the subject matter of an enquiry by s 16(1) of the *Ombudsman Act*. In the circumstances of this case there was no obligation cast upon the Acting Chief Justice to inquire into such matters. The application was made on the sworn evidence of the Ombudsman as to the subject matter of the enquiry. That evidence was not challenged. The Acting Chief Justice was entitled to act upon that information, and on the fact that the Ombudsman was empowered to conduct an enquiry on her own initiative.

A further submission was made by counsel that as the *Ombudsman Act* did not come into force until 18 September 1995, the Ombudsman was not entitled to inquire into events which occurred before that date. The primary source of power for the Ombudsman to conduct an enquiry arises under the Constitution which came into force in 1980. The *Ombudsman Act* gave expression to that source of power. There is nothing in the Act which expressly states that the power of enquiry is limited to conduct which occurred after the commencement of the Act. There is no reason in principle why the Act should be read down in this way, and the fact that the Constitution made provision for the Office of Ombudsman and enquiries of the kind referred to in Article 62 provides a good reason for not reading down the Act to exclude conduct contrary to the Constitution, which occurred before the passing of the *Ombudsman Act*.

3. Did the Ombudsman use proper procedures to initiate the proceedings in the Supreme Court, and were the principles of natural justice applied in the hearings?

In the course of his submissions counsel for the appellant conceded that the application brought under s 17(7) was regular in form and followed correct procedures in the initial stages. However error occurred, so it was contended, when the Court ordered Mr Leymang to appear before the Court to furnish the information by examination on oath. Pursuant to this order Mr Leymang was required to enter the witness box, be sworn, and to answer questions put to him by counsel for the Ombudsman in the presence of the Judge. Counsel for the appellant contended that the correct procedure would have been for the Court to make an order directing Mr Leymang to answer questions put to him by the Ombudsman out of Court. Upon a failure to comply with that order, the matter would be brought on again before the Court, and the appropriate action would be in the form of civil contempt proceedings for non-compliance with an order of the Court. Counsel for the appellant submitted that if this procedure had been followed there would not have been a contempt in the face of the Court.

Counsel contended that the Ombudsman's enquiry constituted an administrative procedure, but that by requiring Mr Leymang to answer questions on oath from the witness box, the Court had erroneously turned the enquiry into a judicial proceeding. We do not agree with these submissions. They are contrary to the terms of s 17(7) of the *Ombudsman Act* which is set out earlier in this judgment. That sub-section expressly contemplates that the person who fails to answer questions put by the Ombudsman pursuant to the provisions of s 17 may be summonsed "to appear before the Court to furnish the information". The procedure envisaged by the section was followed in this case. This is an entirely sensible procedure. It recognises that the person concerned has already refused to answer questions asked out of Court. The

procedure intends that the questions will be put in Court, in the face of the authority of the Court, and with a judicial officer present to explain to the examinee the obligation to answer, and, if necessary, the question. The Act intends that when the person summonsed appears before the Court to furnish information, that person will do so as part of a routine judicial procedure. A failure to comply with an order of the Court to answer questions asked of the person whilst that person is under oath in the witness box, amounts to a contempt in the face of the Court.

We do not propose to discuss each of the alleged procedural miscarriages which counsel endeavoured to identify as constituting a breach of the principles of natural justice. Some involved an alleged failure to serve documents or give adequate notice of hearings, but the fact is that Mr Leymang was present when the crucial orders were made. Furthermore, it is clear that the Acting Chief Justice was at pains to explain procedural steps to Mr Leymang, and that Mr Leymang understood what was required of him. The problems that then arose were due to Mr Leymang refusing to comply because he thought, for one reason or another, that he should not be required to do as ordered.

In the context of the committal application he was afforded more opportunities than might normally be expected to obtain legal advice and to reconsider his position. Opportunities for him to do so were offered on 21, 22 and 29 July and 18 and 19 August 1997.

Other alleged miscarriages were without substance. Counsel, when pressed by the Court, was unable to articulate how any of the alleged miscarriages had caused Mr Leymang to suffer an injustice.

We should however, deal with one serious allegation made against the Acting Chief Justice, namely that he prejudged the issue and showed bias against Mr Leymang by the terms of the order made on 22 July 1997 directing that a complaint be referred to the Public Prosecutor for contempt of Court under s 82(1)(b) of the *Penal Code*, and directing the Ombudsman to prepare "Committal Proceedings" under s 82(3) of the *Penal Code*. It is far fetched and mischievous on the part of counsel to suggest that this order reflects bias or prejudgment on the part of the Judge. It is plain that the order cannot be so interpreted. The position in which Mr Leymang found himself had already been explained to him. It was clear that he was refusing to answer questions. He had been warned that his failure to answer could amount to him being in contempt of Court, and counsel for the Ombudsman had informed the Judge that the Ombudsman would seek an order for committal. The obvious purpose of the order was to ensure that if contempt proceedings were to be pursued against Mr Leymang, that he be given proper notice in writing in advance of the next hearing specifying exactly the conduct alleged to constitute the contempt. Far from demonstrating any breach of the rules of natural justice, the order was designed to ensure that the rules of natural justice were complied with. It is obvious from the steps that were taken by the Acting Chief Justice that he was at pains to ensure that every proper procedural step was taken in the interests of fairness to Mr Leymang.

4. Was the Court mistaken or confused about its role in relation to the application made under s 17(7) of the *Ombudsman Act*?

This question raised the same point which is dealt with in submission 3 above, namely whether the Court was in error in requiring Mr Leymang to enter the witness box. The Court was not mistaken or confused about its role.

5. Did the Ombudsman have to prove that the questions asked were necessary or relevant to the enquiry?

The powers of the Ombudsman are undoubtedly very wide. The Ombudsman may inquire into any matter within Article 61 of the Constitution and s 14 of the *Ombudsman Act*. Further, Article 65 of the Constitution provides that "The Ombudsman shall not be subject to the direction or control of any other person or body in the exercise of his functions".

However, wide though they are, these powers do not lead to the conclusion urged by counsel for the Ombudsman, namely that a Judge presiding over a s 17(7) application and examination is debarred from considering the relevance of questions asked by counsel for the Ombudsman. Nor does the width of the Constitutional provisions lead to the conclusion that the decision of the Ombudsman to pursue a particular line of enquiry, or to ask particular questions, can never be the subject of judicial review. Article 65 must be understood to mean that the Ombudsman shall not be subject to the direction or control of any other person in the lawful performance of the powers which arise under Article 61-63 of the Constitution. However, if the lawful performance of those powers is exceeded, the Ombudsman is subject to restraint by the Court. Further, insofar as the *Ombudsman Act* lays down procedures and imposes limitations upon the exercise of power by the Ombudsman, the Court has jurisdiction to enforce compliance with those provisions.

The question of relevance in investigations conducted under wide statutory powers has arisen in other jurisdictions. In *McGuiness v Attorney-General (Vict.)* (1940) 63 CLR 73, the High

Court of Australia considered an objection to the relevance of a particular question to the subject matter of an enquiry by a Royal Commissioner. Latham CJ at 86 said:

> *"The Royal Commissioner ... was not appointed to determine an issue between the Crown and a party, or between other parties. The Commission was appointed to conduct an investigation for the purpose of discovering whether there was any evidence of the suggested bribery. Such an investigation may be, and ought to be, a searching investigation - an inquisition as distinct from the determination of an issue. In the course of such an inquiry it would or at least might be a valuable step forward if the identity of the persons giving information to the editor of the newspaper could be discovered so that they could be summoned for the purpose of giving evidence on oath as to their knowledge, or as to the source of their information if they had no direct personal knowledge of the matters in question."*

Ross v Costigan (1982) 41 ALR 319 also concerned the power of a Royal Commission. Ellicott J, in the Federal Court of Australia, said at 334-335:

> *"In determining what is relevant to a Royal Commission inquiry, regard must be had to its investigatory character. Where broad terms of reference are given to it, as in this case, the Commission is not determining issues between parties but conducting a thorough investigation into the subject matter. It may have to follow leads. It is not bound by rules of evidence. There is no set order in which evidence must be adduced before it. The links in a chain of evidence will usually be dealt with separately. Expecting to prove all the links in a suspected chain of events, the Commission or counsel assisting, may nevertheless fail to do so. But if the Commission bona fide seeks to establish a relevant connection between certain facts and the subject matter of the inquiry, it should not be regarded as outside its terms of reference in doing so. This flows from the very nature of the inquiry being undertaken.*
>
> *...This does not mean, of course, that a Commission can go off on a frolic of its own.*
>
> *However, I think a court if it has power to do so, should be very slow to restrain a Commission from pursuing a particular line of questioning and should not do so unless it is satisfied, in effect, that the Commission is going off on a frolic of its own. If there is a real as distinct from a fanciful possibility that a line of questioning may provide information directly or even indirectly relevant to the matters which the Commission is required to*

> *investigate under its letters patent, such a line of questioning should, in my opinion, be treated as relevant to the inquiry.*

Ellicott J's decision was affirmed by the Full Court which said that "what questions the Commissioner should ask, or allow to be asked, is a matter for his own good sense and judgment", and that what he can look at is "what he bona fide believes will assist him in his inquiry": (1982) 41 ALR 337 at 350-1.

In *Douglas v Pindling* [1996] AC 890, after referring to *Ross v Costigan* at first instance and in the Full Court, and to observations in the Court below that certiorari should not go unless the Commission had gone off "on a frolic of its own or is acting mala fide", and that because the Commission is an investigative body, it "must necessarily embark on what might be regarded as fishing", the Privy Council said at 904:

> *In their Lordships' opinion these passages correctly indicate the considerations which should guide a commission of inquiry in deciding on the issue of summonses for production of the banking records of an individual or a company. If there is material before the commission which induces in the members of it a bona fide belief that such records may cast light on matters falling within the terms of reference, then it is the duty of the commission to issue the summonses. It is not necessary that the commission should believe that the records will in fact have such a result. The commission can do no more than pursue lines of inquiry that appear promising. These lines may or may not in the end prove productive.*
>
> *As regards the function of the court in the event that the commission's decision to issue a summons is challenged, the matter is to be approached upon the traditional judicial review basis ... In particular, the decision of the commission should not be set aside unless it is such as no reasonable commission, correctly directing itself in law, could properly arrive at. It would appear that this is the test which Ellicott J had in mind ... when he spoke of a commission going off 'on a frolic of its own'."*

In the present case however there is no need to resort to the application of these principles. On the information before the Court, the question which Mr Leymang refused to answer was plainly relevant to a lawful enquiry, whether the enquiry was a limited one into the complaint of Mr X about the non-renewal of his residency permit, or whether it was a wider enquiry into potential breaches of the leadership code. The affidavit in support of the s 17(7) application annexed letters which showed that Mr Leymang had conveyed an instruction to the Immigration Department not to renew the residency permit of Mr X. The enquiries of the Ombudsman had ascertained that Mr Leymang said that complaints had been made to him about the conduct of Mr X. A necessary line of enquiry was therefore to ascertain the identity of those complainants to enable further enquiries to be pursued to ascertain whether there was substance in the complaints which could have justified the non-renewal of the permit.

In any event the question of relevance was not raised by Mr Leymang at the time of his examination. It was not on that basis that he refused to answer the questions, and the occasion for the Judge to rule on the question of relevance did not arise.

6. Did the appellant because of his position and history have a lawful reason not to answer the questions?

Counsel for the appellant suggested that because the appellant was the First Secretary to the Prime Minister, questions posed to him might seek the disclosure of a matter of State. It is difficult to see how that could be the case on the evidence before the Court, but the submission is irrelevant on the ground that this is not a reason that was ever advanced by Mr Leymang for his refusal to answer.

It was also suggested at one point in the argument that because of Mr Leymang's leadership role and status in the community, he should not be asked to breach confidences reposed in him by members of the public. It would be quite contrary to the intention of Article 62 of the Constitution to allow a matter of private confidentiality of that kind to defeat the functions of the Ombudsman, and legitimate enquiry into possible breaches of the Leadership Code. Confidences of this kind have never been recognised as providing a legal privilege against disclosure where there is otherwise a legal obligation to answer questions. The best known example where the existence of such a privilege has been denied is in relation to journalists who seek to protect their sources of information: *Attorney-General v Mulholland and Fester* [1963] 2 QB 477 and *McGuinness v Attorney-General (Vict.)* cited above.

Finally on this point, it was submitted that because reports of the Ombudsman were often published in the media, it could be anticipated that information given by Mr Leymang to the Ombudsman might become public knowledge. This, it was argued, would be unfair to Mr Leymang, and to those members of the public who had given him information on a confidential basis. This submission cannot be accepted as it is also contrary to the intention of the Constitution as expressed in Articles 62 and 63.

Matters of confidentiality, and the protection of confidential information is expressly dealt with in the *Ombudsman Act*. By s 18, the Ombudsman and officers of the Ombudsman are subject to the provisions of the *Official Secrets Act* [CAP 111]. Section 19(3) and (4) provide for limited disclosure of information during the course of an enquiry. Section 20 provides for a heavy fine or imprisonment if secrecy is not preserved. However, once an enquiry is complete, a report must be made by the Ombudsman to the Prime Minister if the Ombudsman

concludes that any of the matters referred to in Article 63(2) of the Constitution occurred. That report will be a public document unless the Ombudsman decides to keep the report or parts of it confidential to the Prime Minister and the person in charge of the relevant public service on the grounds of security or public interest: see Article 63(3) of the Constitution, and s 24 of the *Ombudsman Act*. Even where a report is to be made public, s 19(5)(d) imposes a restraint on the disclosure of information that is recognised by law as confidential information, or that is of a personal nature.

Subject to these restraints, the Constitution recognises that it is in the public interest in furtherance of open and honest government that adverse findings be brought to the notice of the public. These detailed provisions dealing, on the one hand, with the protection of confidential information, and, on the other hand, with its disclosure, make it clear that the legislative scheme intends that a person required by the Ombudsman to reveal information that is of a private or confidential nature must disclose it to the Ombudsman.

7. Did the appellant in fact answer the questions sufficiently in any event?

It is plain on the evidence that Mr Leymang did not answer the Ombudsman's questions sufficiently, and this was ultimately acknowledged by Mr Leymang when he purged his contempt.

It was for these reasons that the Court indicated to the parties at the end of Mr de Robillard's submissions that it considered the finding of contempt was properly made. Then followed the events on the following day when the contempt was purged. The remaining question after that occurred related to the penalty imposed by the trial Judge.

8. Was the penalty proportionate and appropriate to the contempt?

Once the contempt was purged, the sentence no longer remained an appropriate one.

As we indicated earlier in these reasons, the Court accepted as genuine Mr Leymang's explanation for his refusal to answer, and for his resistance to the persistent steps taken by the Ombudsman to force an answer.

Rightly or wrongly, and we are in no position to judge, Mr Leymang held doubts about the validity of the Ombudsman's appointment. We accept that he erroneously believed that these doubts provided him with a valid reason for not providing the Ombudsman with the information required from him. Moreover, this is the first time a challenge to the powers of the Ombudsman has been mounted. Against this background the Court accepts Mr Leymang's evidence that he had not embarked upon a deliberate defiance of the scheme which the Constitution provides for the protection of the citizens of the Republic of Vanuatu. This protection is to ensure that the rule of law applies to every person in the Republic and that no one is or can be above the law. Mr Leymang was himself one of the founding fathers of the Constitution and it would indeed be most regrettable if he were guilty of a deliberate defiance of this Constitutional protection, but we do not think he was. Rather, we think Mr Leymang acted genuinely but with a misguided understanding of the legal consequences of his belief.

It is important, and entirely consistent with Mr Leymang's evidence, that once this Court ruled against his arguments, he then complied with the order of the Court. In these

circumstances the Court considered that the most important consideration was that a substantial contribution towards the costs of the proceedings be ordered against Mr Leymang, and that no further penalty be imposed. The order for costs is, in our view, sufficient in itself to indicate the seriousness of a failure to answer questions lawfully put by the Ombudsman in the course of a legitimate enquiry. We emphasise that the decision not to impose any further penalty upon Mr Leymang is in part due to the fact that the powers of the Ombudsman were hitherto untested in the Courts, and Mr Leymang acted out of a genuine but erroneous belief that he was not compellable by law.

In future cases, the powers of the Ombudsman will have been clarified by this decision. Beliefs of the kind held by Mr Leymang will provide no excuse to withhold information from the Ombudsman. A contemptuous refusal to supply information known to a person when ordered to do so by the Court in the course of an enquiry of this kind is a very serious matter, and it will usually be appropriate to impose a period of imprisonment as a coercive measure to ensure compliance.

Security for costs

Finally, counsel for the Ombudsman, requested that the Court of Appeal consider what procedure should be followed where a respondent to an appeal is desirous of obtaining security for costs. The Court of Appeal Rules 1973, in the absence of any new Rules made on the topic after Independence, apply to govern procedural steps in an appeal. Those Rules make provision for security for costs in Rule 22. That Rule reads:

> *"(1) The appellant shall -*

(a) forthwith upon the filing of any notice of appeal, pay to the Registrar of the High Court the fee prescribed for the filing of such notice; and

(b) upon request of the said Registrar made at any time after the filing of the notice of appeal -

(i) deposit with the Registrar such sum as the Registrar shall assess as the probable expenses of the preparation, certification and copying of the record; and

(ii) deposit such further sum, or give security therefor to the satisfaction of the Registrar, as the Registrar may fix as security for the prosecution of the appeal and for the payment of all such costs as may be ordered to be paid by the appellant.

(2) In the event of non-compliance with provisions of paragraph (1), or in the event of any security required to be given not being given, or being given in part only, within the time directed or within such extended time as may be allowed in accordance with rule 9, all proceedings in the appeal shall be stayed, unless the Court of Appeal shall otherwise order, and the appeal shall be listed for the next session of the Court of Appeal for a formal order of dismissal."

In the present appeal, by letter to the Registrar of the Court of Appeal, the Ombudsman asked the Registrar to "request" that security for costs be deposited by the appellant with the Registrar under Rule 22(1)(b)(ii). The Ombudsman suggested an amount as an appropriate sum. The Registrar did not act on that letter and no request for a deposit of security for costs was made to the appellant.

The Court of Appeal Rules 1973 were drafted when an entirely different structure of courts and court administration was in place. Rule 22 appears to be drafted on the assumption that the former Registrar referred to in the Rules would exercise powers of a kind that are not now exercised by the Registrar of the Court of Appeal of the Republic of Vanuatu. Rule 22, insofar as its terms make provision for the deposit with the Registrar of a sum of money as security for costs of the respondent in the event that the Court of Appeal orders that the

appellant pay the respondent's costs of the appeal, is not appropriate to present circumstances. A respondent to an appeal to the Court of Appeal should not seek to invoke these provisions. Rather, a respondent seeking security for costs should apply on Summons to a single Judge of the Supreme Court under Order 65, r 4 of the High Court (Civil Procedure) Rules, 1994 (the Blue Book). That rule provides:

> *"O 65, r 4.*
> *In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court shall direct."*

The application will then be decided by the Judge. If security for costs is ordered, the Judge will fix an appropriate amount in the order, and direct how security is to be given, e.g. by payment into Court, or by bank guarantee.

The formal orders of the Court announced on 14 October 1997 are:

1. Appeal against the finding of contempt in the face of the Court by the appellant is dismissed.

2. The contempt having now been purged by the appellant before the Court of Appeal, the orders contained in the order of committal dated 19 August 1997 are set aside.

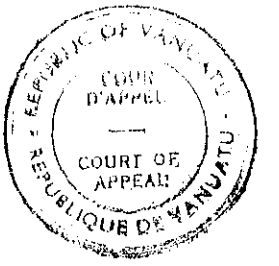
3. Mr Leymang shall pay towards the respondent's costs of Civil case No. 3 of 1997, and of this appeal, the sum of Vt 200,000 payable by 25 fortnightly payments each of Vt 8,000, the first of such payments to be made on 1 December 1997, and upon condition that if default

occur in the making of any fortnightly payment the whole of the balance of the sum of Vt 200,000 then outstanding shall become immediately due and payable.

Reasons published at Port Vila on the 14 **day of** October **1997**

Justice Bruce Robertson .....

Justice John von Doussa .....



Justice Kalkot Mataskelekele .....

Justice Oliver Saksak .....