IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Civil Appeal Case No. 666 of 2015

BETWEEN: REPUBLIC OF VANUATU
Appellant

AND: GUY BENARD
First Respondent

AND: MARIE BENARD
Second Respondent

Before: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Paul Geoghegan

Counsel: *Sakiusa Kalsakau for the Appellant*
First Respondent in person unrepresented
Less John Napuati for the Second Respondent

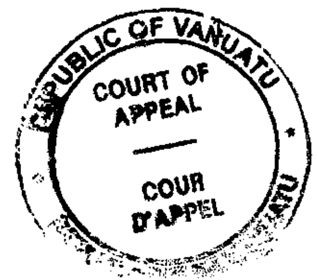
Hearing Date: *7th April 2016*
Judgment: *15th April 2016*

JUDGMENT

Introduction

1. This is an appeal by the State against the Judgment of the Supreme Court dated 12th October 2015 in which the Court awarded the total sum of VT7,112,255 in favour of the First and Second Respondents in respect of breaches of their fundamental rights guaranteed under Article 5 of the Constitution. The awards to each of the Respondents are described as "*damages*" in the judgment.

2. The Respondents were the applicants in Constitutional Case No. 11 of 2014. They made an application pursuant to Article 6 of the Constitution for relief including compensation. They claimed that their fundamental rights under Article 5, including their rights to the protection of the law (Article 5(1)(d) and to equal treatment under the law (Article 5(1)(k) had been infringed.



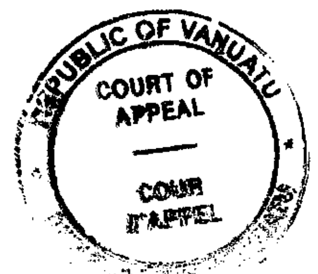
3. On 8th July 2015 the Court found the Republic had breached the Respondent's fundamental rights and entered judgment in favour of the Respondents. The Court then assessed damages and awarded the sums of VT1,112,258 as pecuniary damages, VT1,000,000 as non-pecuniary damages and VT2,000,000 as exemplary damages to Mrs. Benard and VT1,000,000 as non-pecuniary damages and VT2,000,000 as exemplary damages to Mr. Benard.

4. The Respondents sought to enforce their judgment before the Master first on 10th December 2015 when the Master struck out the State's application for suspension of enforcement and awarded costs in the sum of VT10.000 in favour of the Respondents. Further on 9th February 2016 the Respondents applied for enforcement and secured an order for payment of VT7,000,000 into Court within 30 days by 30th March 2015. Finally on 30th March the Master ordered that the judgment sum be paid into Court on or before 8th April 2016.

5. Apart from the appeal, the State applied for leave to appeal to this Court against the interlocutory decisions and orders of the Master dated 10th December 2015, 9th February 2016 and 30th March 2016 and seeks an order that the enforcement warrant be suspended pending the outcome of the appellant's appeal. The Court made an Order suspending the enforcement of the Master's Orders until judgment on this appeal. Strictly speaking the intended appeals against the Master's Orders should have been made to a single judge of the Supreme Court under Section 42(4) of the Judicial Services and Courts Act [CAP. 270] but undoubtedly this Court has power to suspend enforcement pending the outcome of this appeal.

Background Facts and judgment in the Supreme Court

6. The Respondents, Mr. and Mrs. Benard, in sworn statements in support of their constitutional petition say they came to Vanuatu in 1995 and have resided here ever since. They married in Port Vila on 27th December 2003. On 7th December 2007 they were naturalized as Ni-Vanuatu citizens by decision of the Citizenship Commission (the commission). However by letter dated 26th November 2014 Mr. Benard was advised by the commission that at its meeting on 20th November 2014 the commission had decided that his citizenship obtained on 7th December 2007 was granted contrary to s.12 of the Citizenship Act and for that reason his citizenship was revoked. The constitutional proceedings have been conducted on the basis that the commission's decision, at that time also cancelled Mrs. Benard's citizenship. The commission gave one month to Mr. Benard to liaise with the French Embassy to get a French passport, by inference because he must leave Vanuatu within that period. The cancellation of citizenship effectively cancelled his



Vanuatu passport and restricted his free movement beyond the boundaries of Vanuatu. The basis for the constitutional petition was that the revocation of his citizenship was without any valid basis in law or fact, and was an abuse of power.

7. In the first response to the constitutional petition, an officer of the commission in a sworn statement asserted that since 1st February 2003 Mr. Benard had failed to renew his residency permit and had thereafter been in Vanuatu without any valid permit visa. Hence he was illegally in Vanuatu and the grant of citizenship in December 2007 was invalid. According to the commission's records Mr. Benard had been residing lawfully in Vanuatu continuously for only five years (1998 – 2003) prior to obtaining citizenship, whereas Article 12 of the Constitution required continuous residency for at least ten years. The commission said that the revocation decision was therefore in accordance with law. The allegations in the petition were all denied.

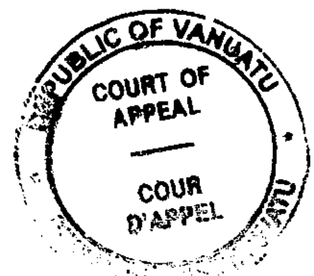
8. On 13th March 2015 the first conference on the petition took place before a judge of the Supreme Court. The judge recorded in a Minute of that conference:

> "4. *On the papers before me today it appears to be accepted that the Applicants were never given any opportunity to address the Commission before it reached a decision that the citizenship granted to the Applicants in December 2007 was granted contrary to section 12 of the Citizenship Act. The letter from the Commission doesn't even inform the Applicants what it was in section 12 they had fall foul of. Given that there are 9 sub sections to section 12 the very last that one would expect would be some detail, i.e. what part of the section, the complaint related to. I make no findings of fact at this stage but it appears to me from what I have seen so far that the respondent will find it very difficult to establish that it's procedures, when dealing with the Applicants, were not fundamentally flawed....*
>
> 5. *The Response and the sworn statement in support seem to rely solely on the fact that the Applicants did not have residence permits in 2003 and 2007. Apart from possibly overlooking section 12(8)(b) of the Citizenship Act the Commission appear to have acted with total disregard to the history of dealings between the Respondent and the Applicants. It is possible that the Commission was unaware of the history but I somehow doubt that given the extent of it and the previous attempts to have the Applicants deported or otherwise removed from the Country. The Commission even overlooked basic details such as the fact that the original application for citizenship was made in April 2006 and was only dealt with by the then Commission some 18 months later and only following proceedings in the Supreme Court.*"

9. The judge gave leave to the State, acting on behalf of the commission, to file further sworn statements in support of its defence.

10. Section 12(8)(b) to which the judge referred provides:

"*For the purpose of determining the period of residence in Vanuatu of any person –*



(a) ...

(b) *A period shall not be disregarded by reason only that the person resided in Vanuatu during that period without having complied with any law relating to immigration*".

11. In a further sworn statement made on 23rd April 2015 the secretary general of the commission asserted that the commission's decision to revoke Mr. Benard's citizenship was also based on the commission's decision that he was not a person of good character. No basis for that opinion was given save that Mr. Benard had not met the requirements of having a residency permit for the period 2003 – 2007.

12. At a further conference before the judge on 8th June 2015 a letter dated 25th May 2015 from the secretary general to Mr. Benard was produced. It advised Mr. Benard that the decision made on 20th November 2014 to cancel his citizenship was revoked. The letter in paragraph 2(a) said: "*... for your information, the citizenship office and the commission does not have access to a copy of the said file at the office, therefore it is important you provide a copy*".

13. The minute of that conference addresses the letter of 25th May 2015:

"1. ... The letter went on to say the commission was giving the first applicant 3 months notice to provide certain documents. The consequences of the first applicant not providing those documents were not actually spelt out. Given the previous behavior of the respondent the inevitable conclusion is that it is a veiled threat the first applicant's citizenship will be revoked once again. Apart from the real possibility the letter is a contempt of court (the revocation of the cancellation and a demand that the first applicant provides documentation, or else is clearly interference in the administration of justice in this matter) the respondent's behavior is difficult to comprehend.

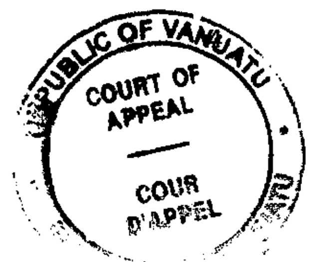
...

3. The respondent must surely realise how inequitable, how grossly unfair it is to suggest that someone else has to suffer severe consequences because of the Respondents own negligence in losing a file.

4. The respondent seems to ignore other means of obtaining the details it is so insistent it needs. For example a quick look at the case reports on Paclii would reveal the Court of Appeal case of Bernard v Republic of Vanuatu which at paragraph 63 (a) states the following:-

"(a) We allow the appeal to the extent that we declare Mr Bernard was for his employment from November 2003 until 31 December 2007 a section 38 VMA Act employee"

That would suggest the First Applicant as a Government employee would not require a visa during his employment. The declaration by the Court of Appeal would suggest the First Applicant would be covered by the provisions of section 12 of the Immigration Act.



...

6. *The Respondent appears to be saying because a wrong form was used in the original application and/or the Applicants (in particular Mr Bernard) were not entitled to reside in Vanuatu without paying permit fees between 2003 and 2007 and/or the proper procedure was not followed and/or the former members of the Commission were terminated immediately after citizenship was granted to the Applicants the Respondent is entitled to revoke citizenship. Whether this is a correct assessment of the Respondent's position is problematic because the Respondent has still not said clearly and concisely on what basis it can revoke the Applicant's citizenship which Citizenship it seems to accept* ***was*** *granted in 2007.*

...

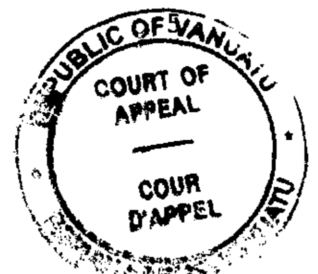
8. *At a previous conference this matter was set for trial on 8th July. When the case is called on, on 8th July it is proposed that judgment will be entered for the Applicants with damages to be assessed. That can be the only logical result following the Respondent's letter of 25th May 2015 and the "revocation" of the cancellation contained in that letter. Costs will be awarded against the Respondents on an indemnity basis. ..."*

14. When the case was called on 8th July 2015 the parties confirmed having received the minute dated 8th June 2015. No party made any application concerning the judge's conclusions set out in that minute. In his judgment then delivered the judge said the decision of the commission to revoke the cancellation of Mr. Benard's citizenship should have been the end of the matter. But it was not, as the letter of 25th May 2015 contained the implied threats already referred to. The judge said:

"3. *... a more obvious failure to adhere to the basic rules of natural justice is hard to find. If the second letter of 25th May 2015 had not been written I would have made an order countering such oppressive behavior in any event. Clearly though that in itself will not be enough to protect the Applicants.*

4. *In the circumstances it is necessary to look further at the respondent's behavior. In the response and counterclaim (to the application of 15th December 2014 seeking payment of permit fees) filed on 23rd April 2015 the respondent's main complaint seems to be that between February 2003 and 2007 Mr. Benard did not have residence permits. I pointed out to the respondents in my minute of 11th March that they had, apparently, overlooked the provisions of section 12(8)(b) of the Citizenship Act. Despite that the respondent persisted in its defence. The respondent then also added, for good measure no doubt, that it did not have a copy of the original application made by Mr. Benard or any information about him renouncing his French nationality. To my mind this basically was an admission they had lost the file. Rather than reconstruct the file themselves they were insisting the applicants did so "or else"!*

5. *This was repeated in a letter from the State Law Office dated 11th June 2015. The letter told Mr. Benard that he had been given 3 months to answer "allegations" including one that he did not renew his residency permit from February 2003 to 7th December 2007. The letter went on to say because of his "illegal residency" he was deemed to be of "bad and /or negative character". It was also stated that Mr Benard*



had never "denounced" his French citizenship. I have presumed that should have been a reference to renouncing his French citizenship. These were remarkable allegations to be levelled at Mr Bernard on that date and ignored basic information which was already in the State Law Office's possession (and presumably with the Secretary General of the Citizenship Commission as well). That must be the case because on 15th December 2014 Mr Benard had filed a sworn statement with annexures attached. Pages 22 and 23 seem to me to have provided the "proof" now demanded by the Respondent. If there is some doubt about that, that doubt disappears on 5th May 2015 because on that date the Applicants filed a bundle of documents. All the information required by the Respondents was included in that bundle, including details of Mr Benard's employment with the Vanuatu Maritime Authority. In addition the State Law Office would have seen my minute dated 8th June."

15. The Court held that the decision reached by the commission on 20th November 2014 was an infringement of the applicant's fundamental rights. Consequential orders to protect the position of Mr. and Mrs. Benard were made, and the assessment of damages or compensation was adjourned. At a further hearing the awards of damages referred to at the outset of this judgment were made.

16. The findings of the judge as set out above from the several minutes issued by him were not challenged before this Court by the State.

Grounds of Appeal

17. The appeal was advanced on three grounds, that the Judge at first instance –

    (a) Erred in law in finding that the Respondents' rights to freedom of movement were breached by the commission when the Respondents had not pleaded the breach of such rights.

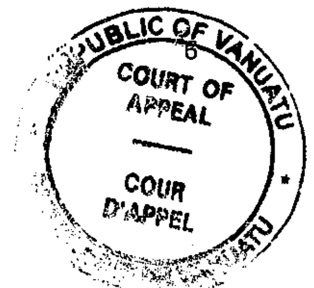
    (b) Took into consideration and gave too much weight to matters which were res judicata.

    (c) Erred in law in awarding exemplary damages to the Respondents when there was no evidence of aggravation or flagrancy making the conduct of the commission extraordinary and deserving punitive damages.

Submissions

18. In relation to the first ground Mr Kalsakau challenged the judgment of the primary judge at [17] when the Court said:

"17. ......By summarily revoking citizenship and making the first named applicant stateless the Respondent has breached his fundamental right to freedom of



movement whilst Mrs Bernard's citizenship was not revoked her right to freedom and her right to security were also breached. Whilst those issues are not pleaded as such I am entitled to reach that conclusion on the evidence before me. Whilst the Solomon Islands Constitution is differently worded I find guidance on the breach of Mrs Bernard's rights to freedom of movement (Article 5(1)(i) as a wife in the Solomon Islands High Court Case <u>*Hatilia v. AG*</u> *[2014] SBHG 125; HCSS – CC 456 of 2011 (13th October 2014)."*

19. In relation to the second issue Mr Kalsakau challenged the findings of the Court at [17] and [27]. At [17] the Court said:

    "17. ...... the oppressive action it has previously taken culminating in the present behavior complained of has breached the Applicant's right to equal treatment under both the law and administrative action."

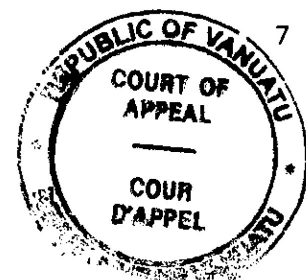
    "27. .... there is no doubt that both Mr and Mrs Bernard have been subjected to oppressive, arbitrary and unconstitutional actions. In the particular circumstances of this case it is clear the behavior has been sustained and particularly oppressive on the part of government and its officials. There is therefore a price to be paid. In the circumstances of this particular case I will order that the Respondent to pay exemplary damages to both Mr and Mrs Bernard of VT2,000,000."

20. In relation to the third issue Mr Kalsakau challenged the primary Judge's award of exemplary damages to the respondents. Mr. Kalsakau submitted that the judge's approach based on the assessment of damages in tort was an error of law and submitted that the right approach was to adopt the test set out in the case of <u>Bill Willie v. Public Service Commission</u> [1993] VUSC 4 [1980 – 1994] VLR 634 (25 March (1993). Counsel relied also on the cases of <u>Iaukas v. Republic</u> [2015] VUSC 131; Constitutional Case No. 5 of 2008 (27 September 2015) and <u>Michel v. Government</u> [2003] VUSC 133, Civil Case 27 of 2000 (14 April 2003).

21. Mr Napuati submitted briefly that the primary Judge was correct and that the appeal should be dismissed.

<u>Discussion</u>

22. At the hearing of the appeal and after questions put by the Court to Mr Kalsakau in relation to the first and second grounds of the appeal he conceded that the appellant could not possibly succeed on either ground. Whilst no reference was expressly made in the Constitutional Petition to the right to freedom of movement the general complaint that the Respondent's fundamental rights guaranteed by Article 5 had been infringed, and the factual circumstances pleaded are wide enough to encompass the infringement of their right to freedom of movement. As to the second ground, the fact that the fundamental rights of the Respondents had been infringed on an earlier occasion by the immigration authorities is plainly a



factor to be taken into account when assessing the nature and seriousness of a subsequent breach of those rights by the same authorities.

23. As to the third ground of appeal the starting point has to be the Constitution. Article 6 of the Constitution relevantly states:

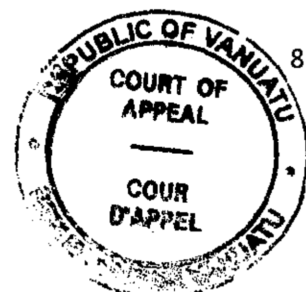
> *"6. Enforcement of fundamental rights.*
>
> *(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*
>
> *(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce that right."*

24. Article 53 provides for application to the Supreme Court regarding infringements of the Constitution:

> *"(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.*
>
> *(2) The Supreme Court has jurisdiction to determine the matter and make such order as it considers appropriate to enforce the provisions of the constitution.*
>
> *(3) (Not applicable...)."*

25. It is clear that the powers reserved to the Supreme Court under Article 6(2) is to pay 'compensation'. This term does not appear in Article 53(2) but we endorse the views of Chief Justice D'Imecourt in <u>Bill Willie v. Public Service Commission</u> when his Lordship said:

> *"The word compensation does not appear in Article 53 (2), but both Articles are sufficiently wide to entitle the Court to "make such order as it considers appropriate to enforce the provisions of the Constitution". In my view, this is drawn sufficiently widely as to entitle the Court, in an appropriate case, to order punitive damages, but there must be a limit within which such damages can be paid. I am greatly assisted here by the rules of the Common Law with regards to judicial review. I believe that there is a fair and proper parallel to be drawn between the two.*
>
> *It is now well established that the Courts will not award damages against Public Authorities merely because they have made orders which turn out to be ultra vires, even where real financial loss has resulted. In order to obtain such damages, malice or conscious abuse must be proved.*



In short it can be said that administrative action which is ultra vires but not actionable merely as a breach of duty will found an action for damages in any of the following situations:

1. *If it involves the commission of a recognized tort such as trespass, false imprisonment or negligence.*

2. *If it is actuated by malice, e.g. personal spite or a desire to injure for improper reasons.*

3. *If the authority knows that it does not possess the power to take the action in question......*

It seems to me, that under the Constitution of Vanuatu, there is no reason to depart from those well tested and approved common law rules. Although the Constitution is sufficiently widely drafted to allow for punitive damages, in my view those damages can only be awarded in the context civil proceedings for the above reasons."

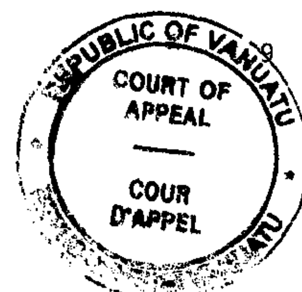
26. The learned Chief Justice did not award any damages in Willie's case because he found that (a) no torts had been committed, (b) no malice in the sense of spite or a desire to injure for improper reasons was established, (c) the Police Commissioner did not know he did not have the power to take the action he took and (d) it was not established the Commissioner acted in bad faith.

27. In Iaukas v. Republic [2015] VUSC 131; Constitutional Case 5 of 2008 (27 September 2015) Chief Justice Lunabek made the following statement with respect to claims made under Article 6:

"The Constitution of Vanuatu empowers the Supreme Court to enforce rights guaranteed in it. In this case, it is my judgment that, if the Applicant proves the breaches of his constitutional rights as alleged, the Court could award monetary compensation pursuant to Articles 6 and 53 of the Constitution. If this remedy is awarded, it is not a remedy in tort, but one in public law based on strict liability for the contravention of fundamental rights to which the principle of sovereign immunity, does not apply. Article 5 of the Constitution is concerned with public law, not private law and so the remedy sought therefor is one of public law, not in tort. The leading case is Maharaj v. Attorney General of Trinidad and Tobago already mentioned."

28. What follows from the cases of Willie and Iaukas is that two quite separate avenues for relief may lie for administrative action in breach of fundamental rights guaranteed by Article 5. In an appropriate case it could be open to a person to pursue both avenues of remedy, but double compensation will not be allowed.

29. One avenue is to pursue common law rights for damages for a recognized tort including for misfeasance in public office. If successful the remedy will be damages assessed on common law principles that include special damages for proved out of pocket expenses and other monetary losses, general damages for



personal injury or damage to business or reputation, and for serious and contemptuous wrongs, punitive damages as well.

30. The other avenue is to seek public law relief under Articles 6 and 53(2) of the Constitution for a breach of the constitutional rights guaranteed under Article 5. Strict liability attaches to such a breach: Iaukas v. Republic. But not every breach will attract an award of compensation. A person whose constitutional rights have been infringed is entitled to a declaration to that effect unless the breach is merely a trivial one, but an additional compensatory award will only be made where it is established by evidence that the breach was the result of malice, conscious abuse or knowing disregard of the person's rights.

31. It follows that not every breach of a constitutional right will attract compensation. Errors frequently occur in the day to day functioning of government departments. Mistakes can be made unwittingly by public servants, perhaps in ignorance of proper procedures or the law. Such mistakes may constitute a breach of Article 5 rights, but will not attract an award of compensation unless malice, conscious abuse, or knowingly disregard of the person's rights is proved.

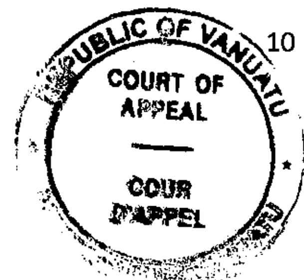
32. The question then arises: on what principle is compensation to be assessed for breach of a constitutional right? In Silas Michel and Others v. The Government and the Commissioner of Police [2003] VUSC 133; Civil Case 27 of 2000 (14 April 2003) the Supreme Court recognized the principle established in the New Zealand case of Angela Marie Dunlea & Others v. Attorney General [2000] NZ CA 84 where the Court of Appeal discussed the vindication of rights under the New Zealand Bill of Rights Act 1990. The Court of Appeal said this at paragraph 24, page 18 of their judgment:

"Compensation will not be effective to vindicate and affirm the right which has been violated however unless the quantum of the award recognizes that a fundamental right possessed by the Plaintiff has been denied. If follows that the award cannot be simply equated with damages for "equivalent" breaches of common law torts such as wrongful arrest, false imprisonment or the like. The focus of the Court is wider and must embrace the impact of the State's violation of the citizen's fundamental rights."

33. The Court of Appeal went on to say on page 20 that:

"The award is public law compensation not common law damages. The focus of the claim is on the breach of rights not on personal injury, and is similar to the approach adopted for exemplary damages claims. Such damages also focus on punishing the conduct of the wrongdoer rather than compensating the victim for the personal injury."

34. In assessing compensation to be paid for an established breach of a constitutional right consideration of the nature of the wrongdoing that attracts the right to compensation must be of central importance. The more serious the malice or knowing conduct that renders the breach sufficiently serious to warrant



compensation, the greater will be the need to make an award that adequately demonstrates that seriousness and will demonstrate the need for respect of the fundamental right or rights that have been infringed.

35. As a starting point compensation should make good actual pecuniary losses suffered by the victim, like special damages in a common law action make good out-of-pocket expenses. If personal injury or damage to business or reputation of the kind which attracts general damages in a common law assessment is suffered compensation for that should be recognized, and again common law principles may provide by analogy a useful guide.

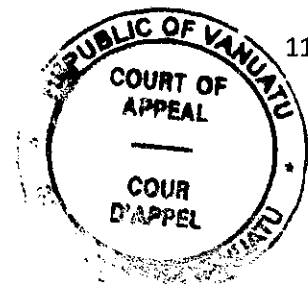
36. But beyond compensation for those items, common law principles as to punitive damages are likely to be of little assistance. Depending on the flagrancy of the conduct constituting the breach of the constitutional right the compensatory award may be lower than would be an award at common law, or might be much higher.

Result

37. Applying the principles of law which we have identified, the sudden revocation of Mr. Benard's citizenship without forewarning (which also affected the citizenship of his wife) was a misuse of power. Had Mr. Benard been forewarned and given the opportunity to respond before his citizenship status was considered by the commission, the revocation would in all probability not have occurred. Then when the propriety of the cancellation was challenged, instead of fairly addressing the merits of the situation and simply revoking the cancellation, the commission and the State pressed on with high-handed and unjustified threats against his citizenship as described in the Minutes. It is that conduct in particular that must attract significant compensation to reflect the seriousness of the breach of the respondent's Article 5 fundamental rights.

38. The awards of damages made in the Supreme Court were arrived at as if the constitutional breaches were the subject of a common law assessment of damages. For the reasons we have given, that was the wrong approach.

39. The award in so far as it covered Mrs. Benard's pecuniary losses should stand as part of a compensation award made according to the public law principles. However the balance of the awards, VT1,000,000 for non-pecuniary damages and VT2,000,000 for exemplary damages to each Mr. and Mrs. Benard, must be set aside as they are based on common law damages principles appropriate to an action in tort. Applying the public law principles we consider each of Mr. and Mrs. Benard should receive an award of compensation of VT2,000,000. We consider this award is appropriate to mark the seriousness of the breaches of their constitutional rights. In reaching this conclusion we consider that it is significant that the time interval between when the commissions breach of Mr. and Mrs. Benard's constitutional rights impacted on them (24 November 2014) until the breach was cured and their citizenship status was secured by order of the Court (8 July 2015) was less than 8 months.

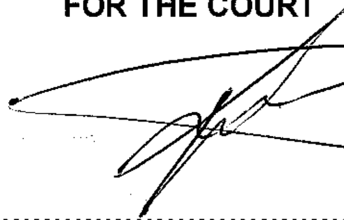


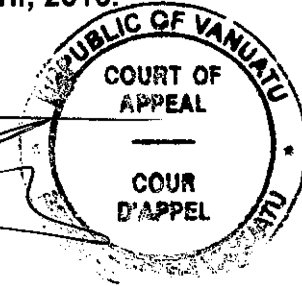
40. In the result, judgment will be entered for Mr. Benard in the sum of VT2,000,000 and Mrs. Benard in the sum VT3,112,258.

41. In this appeal the State has identified and had resolved a question of constitutional public law of significant importance. For this reason the Appellant should bear the costs of the appeal. There will be an order that Mr. and Mrs. Benard recover their costs on the standard basis.

DATED at Port Vila this 15th day of April, 2016.

FOR THE COURT





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VINCENT LUNABEK
Chief Justice