

**BETWEEN:** HUGH ROBIN LOWE  
Appellants

**AND:** JEFFREY MARKSON,  
DIRECTOR OF IMMIGRATION SERVICES  
Respondent

**Date of Hearing:** 10<sup>th</sup> November 2022

**Before:** Hon. Chief Justice Vincent Lunabek  
Hon. Justice Ronald Young  
Hon. Justice Richard White  
Hon. Justice Dudley Aru  
Hon. Justice Edwin Goldsbrough  
Hon. Justice Stephen Harrop

**Counsel:** Mr R. Sugden for the Appellant  
Mr J. Wells and Mr T. Loughman for the Respondent

**Date of Decision:** 18<sup>th</sup> November 2022

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## JUDGMENT OF THE COURT

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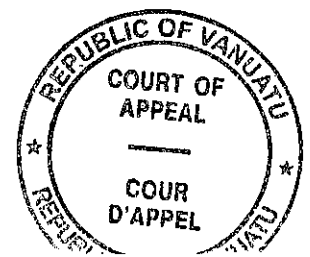
### Introduction

1. Mr Lowe appeals against a Supreme Court decision declining to hear his judicial review claim and striking it out after the Rule 17.8 conference. The primary judge was not satisfied about the four requisite criteria in Rule 17.8 (3); in particular he held that the appellant had no arguable case against the respondent and that in any event there was another remedy that would resolve the matter fully and directly.

### The Judicial Review Claim

2. 1 October 2021 the respondent, the Director of Immigration Services, sent Mr Lowe, who is not a citizen of Vanuatu, a letter headed "Declaration As Prohibited Immigrant", the full text of which read:

*"Please be advised that as of today Friday 1<sup>st</sup> of October 2021, you have been declared a Prohibited Immigrant in Vanuatu. Your name is added to the Prohibited*



*Immigrant list, pursuant to sections 50(1) (g) and 50 (1)(c) of the Immigration Act No.17 of 2010.*

*An immigration compliance assessment report shows that whilst you have been residing in Vanuatu, you have continually breach(sic) the conditions of your visa.*

1. *You have been residing in Vanuatu illegally without a visa since the 25<sup>th</sup> of August 2009. After that date, you still have not made any attempts to validate your visa. Clause 19(a) of the Immigration regulation 180 of 2011, without a compelling reason and without making a valid application for a visa, you continued to remain in Vanuatu for 30 days.*
2. *You have made a promise to the department of immigration that you will sort out your penalty notice by the end of 2020, again this has become a false promise and it is considered false information pursuant to sections 13(3) (b) of the Immigration Act No. 17 of 2010.*
3. *On Wednesday the 21<sup>st</sup> of October 2020, a formal complaint was received at the Tana(sic) Immigration office from 7 Tana(sic) Chiefs, leaders from 7 different Nakamals about you involving in subdividing their land commercial leases.*
4. *Another complaint was received by the same people through the Immigration office in Tana(sic) on Tuesday the 28<sup>th</sup> of September 2021 that you have been selling sand, coral and quarry to the locals. This has increasingly become a concern to the department of immigration. You, without a clear immigration status have been involved in activities that are detrimental to national security and public order.*
5. *You have made a promise to the department of immigration that you will sort out your penalty notice by the end of 2020, again this has become a false promise and is considered false information pursuant to sections 13 (3) (b) of the Immigration Act No. 17 of 2010.*

*Therefore your presence in Vanuatu is a risk to a security and to public order in Vanuatu*

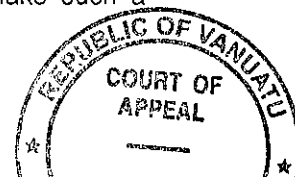
*In accordance to sections 50(2) of the Immigration Act No.17 of 2010, I now declare you, Prohibited Immigrant. You are advised to make every necessary arrangement to leave the county(sic). You will be banned from entering Vanuatu until such time your name is cleared from the Prohibited immigrant List.*

*Yours sincerely,*

*Jeffery(sic) MARKSON  
Director Vanuatu Immigration Services  
Ministry of Internal Affairs*

*Cc: Minister of Internal Affairs  
DG MOIA  
Immigration Border Control  
Customs Border Control  
All Airline Companies & Travel Agents  
File"*

3. On 22 October 2021 Mr Lowe filed a judicial review application seeking an order quashing the declaration on the grounds that the respondent had no power to make such a



declaration, that the alleged underlying bases for it could not reasonably have been concluded to exist and that Mr Lowe had not been afforded natural justice. Mr Lowe had had no notice that the respondent was considering making the declaration and no opportunity to be heard before it was made, particularly on the factual issues underlying it.

4. The respondent filed a defence asserting that he had not decided that the appellant was a prohibited immigrant; rather through his own conduct the appellant had, automatically and by operation of law, achieved that status for himself. In terms of Regulation 19(a) of the Immigration Regulations, the appellant was a person who, "without a compelling reason and without making a valid application for a visa", had remained in Vanuatu for a period of more than 30 days after the expiry of his visa, indeed in this case the period was some 13 years. Accordingly the "declaration" was not strictly that but rather mere advice from the respondent pointing out a status that the appellant had acquired through his own actions.
5. The respondent also denied unreasonableness and any breach of natural justice.

#### **The Supreme Court Decision**

6. The primary judge upheld the respondent's argument, concluding that by remaining in Vanuatu without a visa (well) beyond the expiry of his original one, the appellant had "put himself into that class of persons prescribed as a prohibited immigrant." He added: "The fault is therefore not on the Director. The fault rests and lies on the claimant himself. Unless he takes immediate steps to remedy his situation, I find that he has no arguable case against the defendant. I find also that he still has other remedies to resolve his case."
7. Among the other remedies to which the judge was referring, we infer, was the appellant's ability to make "a valid application for a visa".

#### **Discussion**

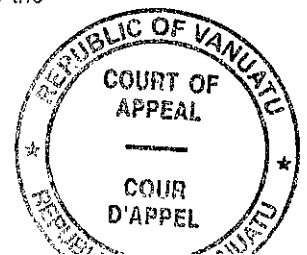
8. Section 50(1) of the Immigration Act relevantly provides:

***"50. Prohibited Immigrants***

*(1) The following non-citizens are prohibited immigrants:*

*(g) a person whose presence in Vanuatu is a risk to the security or defence of Vanuatu, or to public order in Vanuatu;*

*(i) a person who is a member of any class of persons prescribed by the regulations to be prohibited immigrants."*



9. Section 50A of the Immigration Act provides:

***"50A. Publication of information on prohibited immigrants***

- (1) *The Director may approve the publication of information relating to a prohibited immigrant if the Director is satisfied that the prohibited immigrant is in Vanuatu.*
- (2) *Publication of information under subsection (1) includes, but is not limited to:*
  - (a) *The name or known aliases of the prohibited immigrant; and*
  - (b) *The address of the prohibited immigrant; and*
  - (c) *The nationality of the prohibited immigrant; and*
  - (d) *The photograph of the prohibited immigrant*
- (3) *Publication of information of a prohibited immigrant under this section may be made on newspaper, television, radio, internet or any other means by which information may be disseminated."*

10. Regulation 19(a) of the Immigration Visa Regulation Order number 180 of 2011 ("the Order") provides: *"For the purposes of paragraph 50(1)(f) of the Act, the following classes of persons are prescribed prohibited immigrants:*

- (a) *"a person who, without a compelling reason and without making a valid application for a visa, remains in Vanuatu for a period of more than 30 days after the expiry of the term of validity of a Visa or permit granted or issued, or deemed to have been granted or issued, under the Immigration Act..."*

11. The key argument for the respondent, which the primary judge upheld, is that the appellant is, quite apart from whether he is, as a result of his activities on Tanna a risk to the security, defence or public order in Vanuatu, deemed to be a prohibited immigrant under regulation 19(a).

12. We do not accept that that status is acquired purely by operation of law and without somebody (logically the Director of Immigration Services) making a decision. On the contrary, before regulation 19 (a) is satisfied, thereby prescribing the appellant to be a prohibited immigrant, somebody has to have determined that the appellant does not have a compelling reason to have remained in Vanuatu beyond his visa expiry and that he has not made a valid application for a visa.

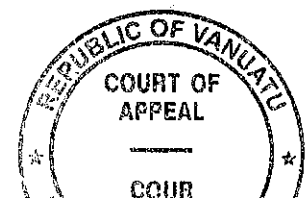
13. The same applies to the other main ground relied on by the respondent in his letter of 1 October 2021, that the appellant is a risk to security and public order in Vanuatu. Somebody has to determine that that is the case.

14. It follows that regardless of whether the respondent did or did not have power to make the declaration that he did, he first must have made the factual determinations which have



led to the appellant allegedly holding the status of prohibited immigrant and who was a risk to security and public order in Vanuatu. The terms of the declaration letter itself makes this clear. The respondent did not merely convey the fact of Mr Lowe's status but set out the reasons why the respondent considered he was a prohibited immigrant.

15. In addition, on the face of the evidence from Mr Lowe so far, he has an arguable case for breach of natural justice in that the significant decisions made by the respondent were made without warning or formal notice to him, so there was no opportunity for him to challenge the factual bases which the respondent cites in his declaration letter as justifying those decisions.
16. A person such as the appellant must have the ability to challenge on judicial review those underlying factual determinations as being unreasonable and/or made in breach of natural justice. The primary judge's decision here has deprived him of his opportunity to have the challenge he wishes to advance determined on its merits.
17. The Rule 17.8 conference is in the nature of a screening process designed to weed out frivolous or practically pointless judicial review applications. This case is clearly not in that category. We find that the appellant has an arguable case, that he is directly affected by the decisions which the respondent has made which have led to his alleged prohibited immigrant status, that there has been no undue delay in making the claim and that there is no other remedy that resolves the matter fully and directly.
18. As to the latter, there is clearly a practical step which the appellant can take which has the potential to substantially alleviate his concerns, which are ultimately about the risk of deportation. That is to make a valid visa application. However, we accept Mr Sugden's argument that that would not "fully and directly" resolve the problem created by the current "declaration". That is because the declaration has been published under section 50A to a wide range of authorities both in Vanuatu and beyond, as the list of those who received copies of the letter of 1 October 2021 confirms.
19. Although not strictly necessary to our decision, we add that the letter of 1 October 2021 makes it clear that a further, separate (but related) decision adverse to Mr Lowe's interests was made by the respondent. He first made the declaration that the appellant was a prohibited immigrant, but then also made the decision, apparently pursuant to section 50A, to add the appellant's name to the list of prohibited immigrants.
20. There can be no suggestion that the publication decision was made automatically or by operation of law; at the hearing Mr Wells acknowledged that it was a conscious and separate, albeit closely-related, decision made by the respondent. While in practice those who are found or declared to be prohibited immigrants may well ordinarily, or indeed in every case, be added to the list that is nevertheless a decision which has to be made by the respondent.



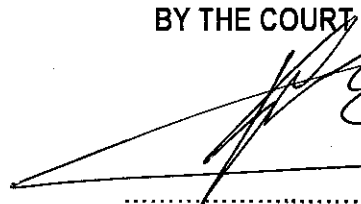
21. In our view that is a separate decision which must be open to challenge on judicial review by a person in the position of the appellant. The current judicial review application seeks a quashing merely of the declaration, not of the associated and separate publication decision, but the appellant should have the opportunity to amend his judicial review application in that manner if he wishes to do so.

**Result**

22. We are satisfied that the primary judge erred in declining to hear the claim and in striking it out.
23. The appeal is allowed and the case is remitted to the Supreme Court, before a different judge, for the judicial review proceeding to continue.
24. The appellant is entitled to costs against the respondent which are fixed at VT 75,000.

**DATED at Port Vila this 18<sup>th</sup> day of November, 2022**

**BY THE COURT**

  
.....  
**Hon. Chief Justice Vincent Lunabek**

