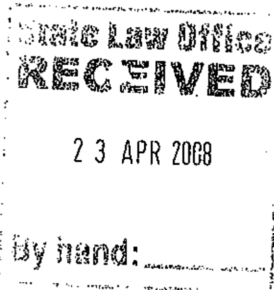
IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Constitutional Case No. 03 of 2008

IN THE MATTER OF	**ARTICLES 6 & 53 OF THE CONSITUTION OF THE REPUBLIC OF VANUATU**
BETWEEN:	**JIMMY METO CHILIA** Applicant
AND:	**THE REPUBLIC OF VANUATU** Respondent



Coram: ***Justice C.N. TUOHY***

Counsel: ***Mr. Yawha for Applicant***
Mr. Jenshel & Ms. Molisa for Respondent

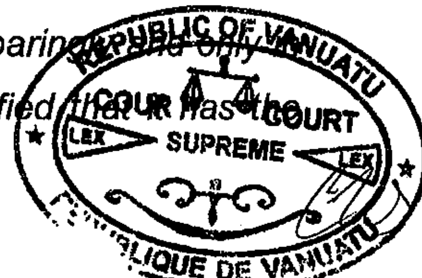
Date of Conference: ***9th April 2008***

RULING

1. At the first conference under R 2.8, the Respondent applied to strike out this Constitutional Application. I refused the application and stated that I would give reasons in writing. They follow.

2. The Court held in **Benard v. Vanuatu** [2007] VUSC 68, Con C 1 of 2007 that the Court has jurisdiction to strike out a Constitutional Application. However the Court stated that:

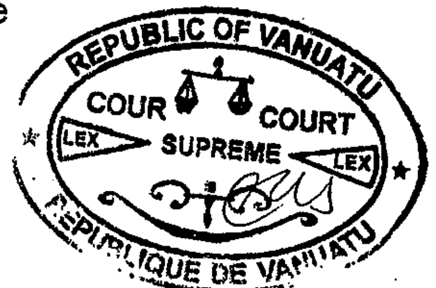
   "the jurisdiction should be exercised sparingly and only in a clear case where the Court is satisfied that it has the



requisite material; the applicant's case must be so clearly untenable that it cannot possibly succeed. Those principles must apply particularly to Constitutional Applications which under R 2.2 are valid no matter how informally made".

The Court must also keep in mind that the Applicant although now represented by a lawyer filed his papers himself.

3. The Applicant claims infringement of the fundamental right protected by Article 5(1) (d), protection of the law. The factual assertions set out in his application are:
   - On 15 November 2007, he was appointed as Chairman of the Citizenship Commission by the President on the advice of the Prime Minister;
   - Under the Citizenship Act, the appointment was for 3 years;
   - On 13 December 2007 he was removed from office by virtue of an instrument for removal signed by the President;
   - The Office of the Prime Minister conveyed to the public through the media that the removal was in consequence of the grant of citizenship to one Guy Benard in exchange for a bribe paid to the Applicant
   - The Applicant himself has been given no reason for his removal and no opportunity of answering the allegations of corruption against him which are false



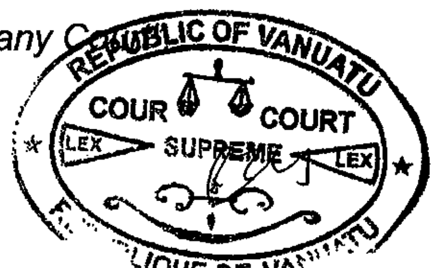
- In consequence he has suffered severe reputational damage

4. The application is rather unclear about how his right to protection of the law has been infringed but the major thrust of it is that he has not been given any opportunity to answer the allegations against him in violation of the principles of natural justice.

5. The submission of counsel for the Respondent is that not every denial of procedural fairness and natural justice amounts to an infringement of the right to protection of the law. He submitted that the Applicant's protection of the law consists of his ability to approach the Courts with his grievance. However, he went on to submit that in fact the law does not give the Applicant a right to be heard before his removal. If he is correct in that submission, then there is not much point in the Applicant approaching the Courts with his grievance.

6. In **Attorney-General v. Timakata** [1993] VUCA 2; [1980-1994] Van LR 679, the Court of Appeal was called on to decide whether the following clause in a bill infringed the constitutional right to protection of the law:

> *"The Prime Minister may if he thinks it expedient to do so remove any member (of a statutory corporation) from office without assigning any reason therefore and such removal cannot be called in question in any C*

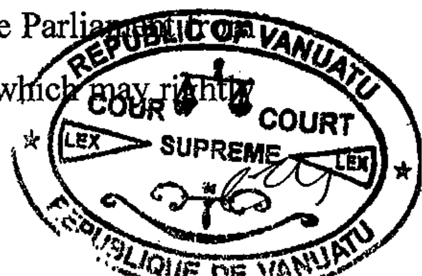


7. The Court cited with approval the following passage of the decision of the Privy Council in **Ong Ah Chuan v. Public Prosecutor** [1981] AC 648, 670:

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

8. The Court went on to say:

> "It appears from that decision that a provision such as article 5(1)(d) not only prevents the Parliament from ousting the jurisdiction of the Courts but also prevents the Parliament from abrogating those principles of natural justice which may rightly

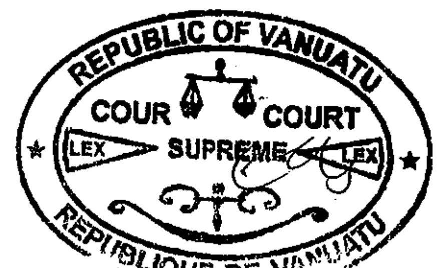


be regarded as fundamental. That does not mean that all the rules which governed the exercise of administrative functions at the date of the commencement of the Constitution are necessarily preserved forever. Subject of course to the Constitution, the Parliament of Vanuatu is given plenary powers by article 16 (1) of the Constitution and in the exercise of those powers it may repeal or alter existing law: See article 95 of the Constitution. Article 5 (1)(d) prevents the Parliament from altering only those rules of natural justice which are truly fundamental.

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

9. It is the Respondent's submission that the Citizenship Act does not admit the application of the rules of natural justice to the removal of a member of the Commission by the President – not because there is an explicit ouster provision in the Act but by virtue of a process of statutory interpretation. The Respondent argues, however, that **Timakata's** case is not applicable because there is no explicit ouster provision.

10. The distinction between a law which explicitly ousts the rules of natural justice and one which has that effect without overtly saying so appears at first blush to be deficient in substantive merit whatever its technical merit

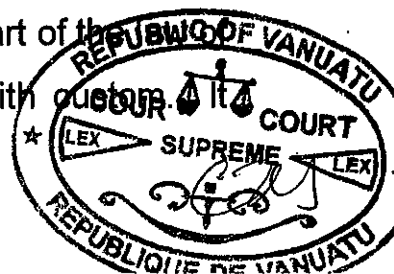


11. There is an argument that, in the circumstances pleaded, in principle the rules of natural justice, whose source is the natural law not any statute or precedent, require that the Applicant be given a hearing. If, as the Respondent argues, the Citizenship Act precludes any such right, then based on both general principle and **Timakata's** case, there is a an argument that the Respondent's right to the protection of the law has been infringed.

12. Of course, there is a contrary argument that, in contradiction to the Respondent's submission, application of the conventional principles of administrative law might ensure that the Applicant was given an opportunity to defend himself. If so, he cannot claim loss of protection of the law when he has not yet tried to access the law by making an application for judicial review. He has also not tried to access the law of defamation which might give him at least some partial redress (although not in respect of the removal).

13. That argument is not the one made by the Respondent. In any event, this is a strike out application where the onus is the other way. The Applicant's claim must be so plainly untenable it could not possibly succeed. In my view, it is not in that category.

14. I record also that Claimant's submission based on Article 95(3) of the Constitution that customary law remains part of the law of Vanuatu and that natural justice is in accord with custom. It

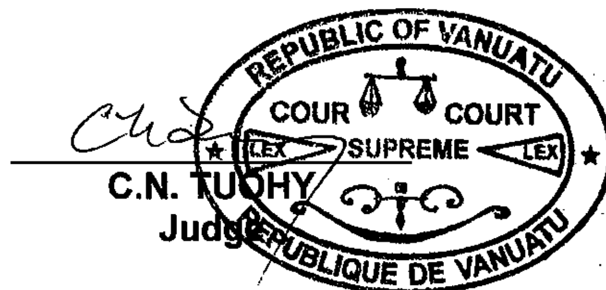


could be added that under Article 95(2) the common law must be applied wherever possible taking due account of custom. I have not found it necessary to discuss this submission at this point.

15. The application to strike out is dismissed. I record also that I have considered and rejected the Respondent's invitation to state a case for the Court of Appeal. I do not consider that it is appropriate to refer the case to the Court of Appeal at this stage. It may be, as counsel for the Respondent says, that the matter will end up in the Court of Appeal sooner or later. However, the appellate Court (and the parties) are entitled to the factual findings and the reasoning of the Supreme Court to which constitutional applications must by virtue of the Constitution itself be made.

Dated at Port Vila, this 23rd day of April, 2008

BY THE COURT



C.N. TUOHY
Judge