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

Judicial Review
Case No. 18/987 SC/JUDR

BETWEEN: Mohammed Rizwan

Claimant

AND: The Government of The Republic of Vanuatu

Defendant

Date of TRIAL: ***3rd day of August, 2018***

Before: ***Justice GA Andrée Wiltens***

In Attendance: ***Frederick Loughman for the Claimant***

Mark Hurley for the Defendant

JUDGMENT

A. INTRODUCTION

1. This was an application for Judicial Review of a decision on 30 May 2018 by the Minister of Internal Affairs ordering the removal of Mr Rizwan under section 53A (i)(b) of the Immigration Act 2010.

2. There had been an earlier similar order for removal (Order No. 37 of 2018) on 5 April 2018 which led to a successful urgent stay application. That matter lapsed by virtue of a memorandum dated 23 May 2018; the only live issue in relation to that was the issue of costs.

3. Following the Minister's decision on 30 May 2018, Mr Rizwan was arrested at 6 am and taken to the airport. A second urgent stay application was made that morning and granted.

4. This present application for judicial review is therefore addressing the legality, fairness and appropriateness of the Minister's decision. I record that this is not an appeal; of the Minister's

decision, it is the Supreme Court utilising its supervisory jurisdiction, not its appellant jurisdiction, to see if the decision was warranted and reasonable in all the circumstances.

5. At the same time as the second urgent stay application made, there was an associated application to declare the Minister as being in contempt of Court in making his second order for removal. At a time-tabling conference prior to the hearing, I directed that the substatnvie issue of judicial review should be heard first, and the question of contempt or otherwise disposed of subsequently.

B. RULE 17.8

6. This rule has not been strictly complied with in this case. However the purpose of the rule has not been ignored.

7. As was said in *Kwirinavua v. Tariwe* [2016] VUCA 54 the intention behind the rule is to attempt to fast-track the case. That is what has happened here. The decision sought to be reviewed was made on 30 May 2018, the hearing of the substantive matter took place on 3 August 2018.

8. The important aspects of fast-tracking a case are to ensure that no party is caught unaware or by surprise. Here ample notice has been afforded all parties, and they have had sufficient time to fully argue the merits of the case. In fact both sides were eager to progress the matter.

C. THE APPLICATION

9. Mr Loughman pointed two aspects of the case as demonstrating "ill will" on the part of the Minister:

   - When arrested at 6 am and taken to the airport Mr Rizwan did not have his passport. Immigration was simply by-passed, with the clear intention of placing Mr Rizwan on the 9 am flight to Fiji.

   - After the stay had been issued Criminal Case No. 18/1549 was filed in the Magistrate's Court seeking the extended detention of Mr Rizwan. The next day the Magistrates' Court set aside the order for continuing detention once it became aware of the stay.

10. Mr Loughman stressed two separate issues in his submissions:

   - Whether or not Notice ought to have been given to Mr Rizwan of the Minister's removal order; and

   - Whether the Minister had acted reasonably in making the removal order under section 53A (1)(b) of the Immigration Act.

11. Section 53A of the Immigration Act reads as follows:

"53A Removal of non-citizens without notice

(1) If in the opinion of the Minister, a person who is a non-citizen:

(a) is involved in activities that are detrimental to national security, defence or public order; or

(b) is a wanted person in a foreign country for any criminal offence he or she has committed in that foreign country.

the Minister, may by Order, remove such person from Vanuatu.

(2) The Minister does not need to give any notice for the removal of this person from Vanuatu.

(3) This section applies notwithstanding any other provision in this Act."

12. Mr Loughman cited in support *Ayamiseba v. Attorney General* Civil Appeal case No. 13 of 2006. He submitted that to be an authority to the effect that the right to prior notice has not been removed. What is required, he submitted, is that Minister address the issue of whether or not notice ought to be given.

13. Given that emphasis, remarkably at paragraph 33 of his written submissions, Mr Loughman effectively conceded that the Minister had turned his mind to whether or not notice ought to be given. To my mind Mr Loughman was conflating two separate and quite distinct aspects of the case.

14. Mr Loughman's main point in relation to the Minister's decision to order removal was that his opinion was based solely on an e-mail dated 28 May 2018 which Mr Loughman submitted was insufficient and required substantiation before a reasonable opinion could be formulated on the information contained. He submitted further that subsequent information provided to the Minister should not be taken into account in determining the reasonableness or appropriateness of the Minister's decision, anything learnt after the event should not be used to justify the original decision.

15. Mr Loughman referred to the Extradition Act [Cap. 287]. I do not know why. This is not an extradition or even a mutual assistance in criminal matters case. I was solely concerned with a removal order.

16. Mr Loughman's conclusions were alarming. Apart from the quite valid submission of the Minister improperly exercising a discretion, he went onto allege:

- An abuse of power by the Minister;
- An abuse of discretion by the Minister;
- An abuse of process;
- The Minister acting ultra vires; and

- The Minister acting illegally.

17. Mr Loughman properly submitted that the Minister's discretion ought to exercised with great caution given the social, political and economic implications of removing a non-citizen who has close ties to Vanuatu and rights under the Constitution. I endorse that submission.

18. Mr Loughman sought orders that the Minister's decision was ultra vires; and he sought an order quashing the removal order with costs. In support of his application he had filed four sworn statements by Mr Rizwan. Mr Hurley had indicated he did not wish to cross-examine Mr Rizwan; therefore the sworn statements comprised the claimant's evidence.

D. THE DEFENCE

19. Mr Hurley had filed sworn statements by:-

- Evelyn Malokle – 23/4/18
- Frazer Tambe – 23/4/18
- Andrew Solomon Napuat – 23/4/18
- Albert Nalpini – 23/4/18
- Andrew Solomon Napuat – 30/5/18
- Wilson Abiut – 11/6/18
- Albert Nalpini – 11/6/18
- Andrew Solomon Napuat – 12/6/18
- Samson Garaemwala – 27/7/18
- Rakesh Mani – 31/7/18
- Nina Biagh – 31/7/18, and
- Rakesh Mani – 2/8/18.

20. Mr Hurley rightly submitted that this case was confined to errors of law, not factual merits. He cited several authorities to support that contention:-

- *Re: Refugee Review Tribunal; ex p Aala* (2000) 2004 CLR 82.
- *Cyclamen Ltd v. Port Vila Municipal Council* [2006] VUCA 2; and
- *Ayamiseba v. Attorney General* [2006] VUCA 21.

21. Mr Hurley submitted such factors as lawfulness, rationality, procedural correctness and whether documentary support existed were matters that should be considered

22. There are 5 stated grounds in support of the application, and Mr Hurley dealt with each as follows:

    (i) The Minister did not substantiate or give reasons for the Removal order:- Mr Andrew Solomon Napuat has now given reasons in two sworn statements of 30/5/18 and 12/6/18.

    (ii) The allegation was made that Mr Rizwan was a "wanted man" in Fiji, which allegation was unsubstantiated and withdrawn, in relation to the Removal Order in issue:- no mention is made of Mr Rizwan being a "wanted man". Further, there is now evidence that, there are criminal charges in existence against Mr Rizwan in Fiji.

    (iii) Mr Rizwan holds a valid residence permit, for over 5 years, and should have been given notice:- Mr Hurley submits that there is now evidence before the Court demonstrating that a residence permit ought not to have been granted to Mr Rizwan due to his antecedents, and there are real concerns regarding the process by which Mr Rizwan obtained his residence permit.

    (iv) Mr Rizwan has business interests and family ties in Vanuatu:- Mr Hurley submits these matters are not relevant to the current issue.

    (v) Mr Rizwan has current obligations in Vanuatu:- Mr Hurley submits this is not a relevant consideration.

23. Accordingly, Mr Hurley submits there is no valid basis to challenge the Minister's decision as being ultra vires.

24. Mr Hurley does not stop there. He advances the proposition that Mr Rizwan has committed perjury in alleging mistaken identity: Mr Rizwan in his 3rd sworn statement falsely stated he has never been asked to provide his finger prints and he has no criminal record. There is clear evidence to counter both propositions – Mr Mani deposes to his numerous previous convictions in Fiji, and Constable Biagk demonstrates Mr Rizwan gave fingerprints to the Fiji Police on 25/22/02, and Mr Rizwan was also finger printed in Vanuatu on 26/6/18 – some 2 weeks prior to swearing his 3rd statement.

25. The fingerprint comparison evidence is uncontested. Indeed all the defence evidence is unchallenged – surprisingly Mr Loughman did not wish to cross-examine any of the witnesses whose sworn statements were filed in support of the defence.

26. It is therefore further uncontroverted that the Fiji Police records and Vanuatu Police records match in terms of Mr Rizwan's date of birth and the names of his parents.

27. I accept Mr Hurley's submissions that this is not a case of mistaken identity. The information from Fiji that Mr Rizwan has previous convictions and that are current criminal proceedings against him on foot relates to the same person the subject of the Removal Order.

E. DISCUSSION

28. I glean from *Ayamiseba* that the Minister's function involved a two-step procedure:-

    (i) form the opinion that Mr Rizwan came within either section 53A(1)(a) or (b); and then

    (ii) consider whether notice ought to be given.

29. The Minister's opinion, in this case, was formed after the following matters were taken into consideration:

    - Commissioner Nalpini's briefing on 25 May 2018 after his return from Fiji.

    - E-mail from Mr Tagicaki from FICAC to Mr Garaemwala of 28 May 2018, the contents of which were later corroborated as being correct by no less than 5 subsequent pieces of information.

30. Mr Loughman's submission proceeded on the incorrect basis that the Minister only formed his opinion based on the 28 May 2018 e-mail. In fact Commissioner Nalpini's briefing, after he had gone to Fiji following the earlier information received which led to the first Removal Order in April, resulted in the Minister wanting yet further information. Subsequently the 28 May 2018 e-mail was referred to the Minister confirming that Mr Rizwan was on the wanted list, that he had a previous conviction and a few charges still pending, and that further charges were about to be laid when Mr Rizwan "absconded" to Vanuatu – all of which information turns out to be true and correct.

31. The Minister's opinion was formed on more than just the 28 May 2018 e-mail. His opinion was based on the matters which caused him to make the earlier Removal Order supported by later information in the form of the Commissioner's briefing and then the 28 May 2018 e-mail.

32. I cannot see any reason to say that the opinion formed was unlawful, irrational, procedurally incorrect or unsupported by documentary exhibits. It is not "*Wednesbury* unreasonable" in all the circumstances: *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 ICB 223.

33. The second issue is whether or not notice ought to have been of the Removal Order. The legal position is that, as the Minister had formed his opinion that Mr Rizwan came within section 53A(1)(b), under subsection (2), he did "not need to give any notice....".

34. The Minister obviously considered whether he should do so nevertheless. Mr Loughman conceded that. The Minister's view was that prior notice of the Minister's intentions was being leaked by officials in SLO and/or by politicians, and the Minister was concerned that Mr Rizwan might, prior to its execution, depart Vanuatu for somewhere other than Fiji, if warned of the Removal Order.

35. In the circumstances the Minister's decision was fully justified and cannot be criticised.

D. DECISION

36. The grounds for seeking Judicial Review have not been made out. The application is accordingly dismissed.

37. Costs to the Defendant for this aspect of the case should follow the event. However a final decision on costs will need to wait for the case to be fully concluded. Mr Rizwan contempt allegation still needs to be addressed.

38. There will be a conference at 8 am on 30 August 2018 to ascertain if Mr Rizwan wishes to pursue that matter; and also for the whole issue of costs to be addressed.

Dated at Port Vila this 20th day of August 2018
BY THE COURT

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Justice G.A. Andrée Wiltens

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU