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

Civil Appeal
Case No. 18/3368 CoA/CIVA

BETWEEN: RAOUL MONTHOUEL and NAOKO OGAWA
Appellants

AND: THE REPUBLIC OF VANUATU
Respondent

Coram:	***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gus Andrée Wiltens*** ***Hon. Justice Stephen Felix***
Counsel:	*First Appellant in person on behalf of the appellants* *S. Aron for the Respondent*
Date of Hearing:	*2nd and 7th May 2019*
Date of Judgment:	*10th May 2019*

JUDGMENT

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1. The appellants appeal against an order of the Supreme Court dated 19th November 2018 which, at a conference hearing, struck out a constitutional application filed by them to enforce the alleged infringement of constitutionally protected fundamental rights and freedoms, namely: security of the person – Article 5(c); protection of the law – Article 5(d); freedom of movement – Article 5(i); and equal treatment under the law and administrative action – Article 5(k).

2. The application was struck out on the ground that it did not show a breach of any of the constitutional rights alleged to have been infringed.

3. There are seven grounds of appeal which in substance allege a failure on the part of the Supreme Court judge to follow and correctly apply the Constitutional Procedures Rules 2003 and further allege an incorrect understanding of the claims made by the applicants.

4. The first conference listed after the commencement of the proceedings was on 19th October 2018. At that hearing the judge endeavored to explain the requirements of the Constitutional Procedures Rules to the first appellant, Mr Monthouel and directed the applicants to file documents that they relied upon.

Clearly the judge considered that the documents were necessary to better understand the applicants' complaints. The applicants complied with this direction and filed a book of documents. The same documents are now included in the appeal book before this court and are relied upon as the relevant evidence to support the claims.

5. A further conference hearing was listed on 19th November 2018. This conference was treated by the judge as the "*first conference*" for the purpose of the Constitutional Procedures Rules as it was the first conference where there was sufficient evidence provided by the applicants for the judge to consider whether the application meaningfully disclosed a constitutional claim.

6. The appellants' documents disclose that their complaints concern a motor vessel originally named "*Imperator*" but now named "*KWA*". They had sailed that vessel which they describe as a "*private motor yacht*" to Vanuatu from Suva, Fiji arriving in September 2010 towing a diving platform. They, or at least Mr Monthouel, had obtained a VIPA certificate as well as residency and business licences and VAT registration to enable him to establish a helmet diving business at Aneityum – Mystery Island that would operate from the moored diving platform. Mr Monthouel and his family (including two children) intended to live on the motor yacht whilst operating the helmet diving business.

7. On arrival in Vanuatu the appellants encountered difficulties with the Office of the Maritime Regulator (OMR) and its licensing officers. The OMR and the licensing officers considered that the motor yacht did not qualify for local registration in Vanuatu, and without that registration the applicants could not import their yacht and possessions into Vanuatu. The OMR and the licensing officers considered the vessel and the platform were intended to operate as component parts of the helmet diving business, and that the yacht should be classified as a commercial vessel for the purposes of the Shipping Act [CAP. 53]. On the footing that it was a commercial vessel the OMR required it to undergo a survey in Noumea and to follow procedures that the appellants considered were wrongly imposing severe restrictions on their use and maintenance of the vessel.

8. A sustained period of disagreement between OMR and the licensing officers on the one hand and Mr Monthouel on the other continued until ultimately on 12th April 2018 the vessel obtained local registration. It seems that the local registration has settled the disagreements that hitherto existed between the parties. All along the appellants have asserted that the vessel is a private or leisure yacht, not a commercial vessel.

9. Even though the local registration has apparently solved the importation issues, the appellants allege that as the result of the OMR and the licensing officers' wrongly insisting the vessel was a commercial vessel their use of the vessel was

so restricted that their constitutional rights and freedoms were in the meantime infringed.

10. In the Supreme Court, the conference Judge took a different view and struck out the application. The reasons given by the Judge are discussed later in this judgment.

Discussion – The Grounds of Appeal

11. The appellants' submission that the Constitutional Procedures Rules were not correctly followed reflect a fundamental misunderstanding of the rules. The procedures that were followed in this case were entirely consistent with the rules when properly understood. Rule 2.8 provides a number of powers open to the court at the first conference. This range of powers is intended to allow whatever steps the conference Judge considers necessary to bring about the just determination of the claim with the minimum of delay. Central to the appellants' arguments are the first two powers specified in rule 2.8, namely the power at the first conference to (a) deal with any application to strike out the constitutional application; and (b) order the respondent to file a response. The appellants complain that the application was not struck out at the first conference. It is true on a literal view that the application was struck out at the second conference, but in reality it was struck out at the first conference held once the appellants had filed the evidence on which they based their claim. In any event, the Court is empowered under the Civil Procedures Rules, which also apply, to strike out a constitutional application at a stage later than the first conference.

12. The appellants complain that the judge was biased against them as he did not act as required by Rule 2.5(2) of the Constitutional Procedures Rules. That rule relevantly provides:

"(2) After the Application is filed and before returning sealed copies to the applicant, the Court must:

(a) fix a date for the first Conference in the matter; and

(b) write this date on the Application."

As we understand the complaint, the Judge did not immediately comply with the Rule 2.5(2) by simply fixing a date, writing it in and returning the application to the applicant. Rather he required more information and directed the filing of documents. Clearly the Judge took that view as the application did not sufficiently comply with Rule 2.3(2)(a) as it failed to set out details of the evidence relied on. It was for this reason that the Judge directed the appellant to file his documents. Rather than show a reluctance on the part of the Judge to accept the application (and thereby exhibit possible bias) the Judge was endeavoring to help the

applicants get their papers in order so that their claim could be understood and progressed to a proper "*first conference*" hearing.

13. The appellants' grounds of appeal also misunderstand Rule 2.8(b). Whilst the court may direct the respondent to file a response, it is the clearly established practice of the court not to order a response unless and until the applicant has satisfied the Court that the applicant has filed sufficient evidence to identify a likely infringement of a guaranteed constitutional right. If the applicants' evidence fails to do so the court will not require a response, and will not put the respondent to the cost and effort of responding to allegations that do not identify a likely infringement of a constitutional right. See: Mass v Government of the Republic of Vanuatu [2018] VUCA 11.

14. There is no merit in the grounds of appeal that challenge the procedures followed in the Supreme Court. The balance of the grounds of appeal challenged the Judge's assessment of the merits of the appellants' claims and the conclusion that the evidence failed to show a breach of the constitutional rights asserted in the application.

Discussion – Merits

15. The thrust of the appellants' claim that their right to security of person was infringed was that by requiring the vessel to be surveyed in Noumea, the voyage there would expose the appellants to maritime risks and possible injury, and because necessary maintenance was restricted they were exposed to potential risk of injury from the condition of the vessel and their equipment. Discussion between members of this Court and Mr Monthouel confirmed that the complaint concerned exposure to potential personal harm, but that no actual personal harm had been suffered. We agree with the conference judge that on the evidence before the Court the applicants have failed to show that their right to security of the person has been infringed. This high constitutional right is not concerned with the risk of personal injury that arises out of everyday government and commercial activities.

16. The claim that the appellants' constitutional right of freedom of movement has been infringed is misconceived. Their allegation is that restrictions placed by OMR and the licensing officers on the movement of their vessel restricted their freedom of movement. Those restrictions restrained the movement of the vessel, not the movement of the appellants. The appellants did not have their passports impounded. They could come and go wherever and whenever they chose. The restrictions imposed were not on their movement. That they could not move about in one particular vessel is beside the point as their movement was otherwise unrestrained. The conference Judge was entirely correct to so hold.

17. The claim of unequal treatment under the law and administrative action is based on different background facts to the other alleged infringements. As we understand this claim, once the helmet diving business had been frustrated by the restrictions placed on the yacht, in particular restrictions on movement, the appellants changed the nature of their business and sought to obtain vessel salvage work in Port Vila and elsewhere in Vanuatu. However their efforts to obtain salvage contracts failed. Tenders they submitted were not successful. The allegation is that other entities seeking similar work however obtained salvage contracts. These facts provide no evidence of unequal treatment under the law. Their failure to obtain contracts is merely evidence that the appellants were subject to the ordinary vicissitudes of commercial activity. The evidence presented does not show unequal treatment of the kind which the Constitution protects. Again we agree with the reasons of the conference Judge for so deciding.

18. The documentary evidence also suggest that there are examples in Port Vila of other people not being restrained to the same extent as the applicants believe they have been restrained from carrying out commercial activities that could potentially pollute the harbor. This may demonstrate that at times the relevant authorities are lax in some instances and not others in enforcing the law, but that is no evidence of unequal treatment under the law of the kind which the Constitution protects.

19. In striking out the application the conference Judge also considered that the evidence failed to show any meaningful claim that the appellants' right to the protection of the law had been infringed. The Judge noted that the appellants dispute the decisions of the OMR and licensing officers as being contrary to the requirements of the Shipping Act and other legislation. The Judge said:

> "*The material filed show that the Customs Officers and Maritime Officers have powers set out under statutory regulations. They made decisions pursuant to those regulations. Mr Raoul who appears in person and for his wife was not happy with these decisions or has issues with the decisions made under these regulations. The way forward for him is to challenge those decisions by way of judicial review. The constitutional claim does not assist the applicants.*"

20. Save for one issue arising from the evidence, we agree with this assessment of the appellants' claims. The law has many remedies and procedures which would have permitted the appellants to protect their commercial and private interests against wrongful actions of the OMR or other government officers. They could have done so by judicial review, as the Judge mentioned, or by proceedings in the general jurisdiction of the court by claims for damages, declarations or construction of the legislation. The legal protection under the law was there, but the appellants simply did not seek it. Rather than seek a remedy provided by the law they went on arguing with the authorities, and did so for so long that the remedies available at law became time barred from enforcement.

21. There is however one issue where we consider the applicants' evidence showed a possible infringement of their right to protection of the law. That issue concerns a failure by the Minister responsible for the administration of the Shipping Act to respond to four letters written to him by Mr Monthouel which may constitute appeals to the Minister under Section 46 of the Shipping Act introduced by the Shipping (Amendment) Act No. 12 of 2008. That section reads:

> *"46. APPEAL AGAINST DECISION OF LICENSING OFFICER*
> *(1) A person who is not satisfied with any decision of a licensing officer may appeal to the Minister within 21 days after being notified of the decision.*
>
> *(2) The Minister may affirm, vary or set aside the decision from which an appeal is made and must notify the appellant in writing of such determination".*

22. By four letters dated respectively, 4th May, 24th August, 26th August and 18th September 2011 Mr Monthouel wrote to the Minister seeking his intervention to enable local registration of his private/pleasure motor yacht. In the body of first letter reference was made to s.46 and the Minister's intervention was sought under that section. The letters of 24th August and 18th September 2011 were headed: "*Subject:* ***Appeal*** *for* ***registration*** *and* ***importation*** *of the private yacht 'Imperator'.*

23. Whilst these letters lack the formality of an appeal expertly drafted by a lawyer, the heading and content, at least in the letters of 4th May, 24th August and 18th September 2011 could sufficiently meet the requirement of an appeal under section 46.

24. The appellants say that none of these letters was answered. Mr Monthouel says he never heard from the Minister nor any government officer about them.

25. In our opinion a refusal to respond to a valid appeal under s.46 could constitute an infringement of the constitutional right to protection of the law.

26. A valid appeal under s.46 must be made to the Minister within 21 days after being notified of the decision. The appellants' documents show that the appeal letter of 24th August 2011 was written the day following a communication from the principal licensing officer which effectively refused the appellants' request for domestic registration on the ground that the vessel was a commercial vessel that required the survey in New Caledonia. The letter of 24th August 2011 meets the time limit imposed by s.46 although it does not expressly refer to the decision of the principal licensing officer made the previous day. The letter to the Minister dated 18th September 2011 is written 5 days beyond the time limit, but it is in effect a repeat of the letter of 24th August 2011 and pleads for the Minister's

urgent intervention because of the coming cyclone season and the need to move the diving platform and install it at Aneityum.

27. In relation to these four letters we consider the application sufficiently disclosed a possible allegation of infringement of right to the protection of the law, and was sufficient to require a response from the respondent, and a hearing of that aspect of the constitutional application.

28. Having reached this conclusion, the usual course which this Court should take would be to refer this particular aspect of the constitutional application back to the Supreme Court for further consideration, but otherwise uphold the decision striking out the balance of the application. However, once the issue relating to these letters was identified in oral arguments, we took the exceptional course of inviting the respondent to make a response to this Court in case there was a simple answer that would satisfy the appellants and avoid the need for further proceedings in the Supreme Court. We adjourned the matter to enable that to happen.

29. On the resumed hearing of the appeal, the respondent filed written submissions that confirmed that the Minister had received the letters of 24 August and 18 September 2011. The respondent said that on 23 August 2011 the Principal Licencing Officer (PLO) had informed the appellants of his decision not to register the vessel as a private vessel. The PLO informed the appellant that according to the Department's view the vessel should be registered as a commercial vessel and directed the appellants to comply with the requirements of registering a commercial vessel (this was the requirement which is the subject matter of the letters to the Minister). However the respondent denies that the letters constitute an appeal within the meaning of s.46 of the Shipping Act. As the letters did not constitute a proper appeal the Minister was not required to notify the appellants under s.46(2).

30. The written submissions go further into factual matters and say that on receipt of the appellants' letter of 24 August 2011 the Minister understood the content of the letter to be that the appellant was requesting the Minister to authorize registration and importation of the appellants' vessel. Accordingly the Minister conducted a meeting with the PLO at which the Minister decided not to grant the request made by the appellant in his letter of 24 August 2011.

31. The respondent further submits that there has been no infringement of the appellants' right to protection of the law as the appellant had a right of appeal under s.46 of the Shipping Act which he did not exercise, and in any event there are other legal remedies available to the appellants which have not be exercised. The matters put forward by the respondent touch on the merits of the appellants' claims, and would normally be made, with evidence, by way of response only once a response is ordered at a conference hearing by the Supreme Court. They

were made to this Court following the invitation of this Court earlier referred to. The response has not disclosed any simple answer that satisfies the appellants, so the matter must take its course according to the Procedures laid down in the Constitutional Procedures Rules.

32. In our view the complaint by the appellant that his four letters by which he sought to invoke the appeal provisions of s.46 were not processed according to the legal requirements of s.46 does raise in a meaningful way a claim of infringement of the appellants' right to protection of the law sufficient to call for a formal response from the respondent in accordance with the Constitutional Procedures Rules. The matter must therefore be returned to the Supreme Court for this purpose and for determination of the claim based on the Minister's treatment of the four letters which the appellants assert constitute an appeal under s.46 of the Shipping Act.

33. By returning the matter to the Supreme Court we are not deciding that there has been an infringement of a constitutional right. That must be determined by the Supreme Court once the respondent has formally responded to the claim.

34. Issues which are likely to require the consideration of the Supreme Court are:

- did the letters received by the Minister constitute valid appeals within the meaning of s.46?;
- what action (if any) did the Minister take in response to the letters?
- Why did the Minister not reply to the letters?
- If the letters constituted an appeal, and had the appeal been considered on its merits what outcome according to law should have occurred?

35. If the appellants' contentions are wrong in law, there will have been no infringement of his rights to protection of the law. If the appeal should have been upheld, what (if any) loss did the appellants suffer? If there was loss what remedy should follow? If there was a ministerial failure to respond to a valid appeal or appeals, the Court will have to consider whether that failure was due to an inavertant oversight or due to poor office management, or whether the refusal was accompanied by malice, conscious abuse or a knowing regard of the appellants' rights: See: Republic of Vanuatu v Benard [2016] VUCA 4 at [25] – [30].

36. The appeal is therefore allowed to the limited extent necessary to return the application to the Supreme Court for determination whether the evidence adduced regarding the four letters we have identified constitute an infringement of the appellants' right to protection of the law guaranteed by Article 5(d) of the

Constitution. In all other respects the appeal is dismissed. There will be no orders as to costs on this appeal.

DATED at Port Vila, this 10th day of May, 2019.

BY THE COURT

Justice John von DOUSSA