IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

NATURE OF JURISDICTION:	**Constitutional petition against Lunabeck, ACJ's decision under Legal Practitioner's Act.**
COURT FILE NO.:	**Civil Case No. 66 of 1999**
DATE OF HEARING:	**23 August 1999**
DATE OF DELIVERY OF JUDGMENT:	
THE COURT:	**Muria, J.**
PARTIES:	**LEULUA'IALI'ITASI MALIFA,** **AND** **THE ATTORNEY GENERAL of Vanuatu on behalf of VINCENT LUNABECK, ACJ.**
ADVOCATES:	
Petitioner	**In person**
Respondent	**J. Kilu**
KEY WORDS:	**Constitution – constitutional challenge by petition under Criminal Procedure Code, s. 218 – whether appropriate or not – Legal Practitioners Act – whether CJ's exercise of discretion under s. 13 of the Act unconstitutional – power to control legal profession and admission to practice – whether breach of the rules of natural justice – effect of temporary practicising certificate – whether "legitimate expectation" doctrine apply – Interpretation of Constitution ss. 5(1)(d) & (k), 47, 48 & 49 – need for strong legal profession in the public interest.**
SUCCEEDED/DISMISSED:	**Dismissed.**
PAGES:	**1 - 30**

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

IN THE MATTER of the Constitution of the Republic of Vanuatu

AND

IN THE MATTER of an Application for Registration to the Bar pursuant to the Legal Practitioners Act 1980 CAP 119 and The Legal Practitioners Regulation (Amendment) Act 1989

BETWEEN:

LEULUA'IALI'ITASI MALIFA, ***Petitioner***
Lecturer in law at Emalus Campus

AND

THE ATTORNEY GENERAL of Vanuatu ***Respondent***
on behalf of VINCENT LUNABECK, ACJ.

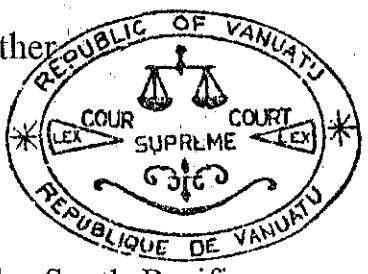
JUDGMENT

MURIA J: In this application brought by way of petition under Articles 6 and 53 of the *Constitution* and section 218 of Part XIII of the *Criminal Procedure Code*, the applicant sought the following orders namely:

DECLARATION that the decision dated May 20, 1998 of the Respondents denying the Applicant admission/registration to the Bar violated the Constitution or **ALTERNATIVELY**

that the said decision is wrong in law and is therefore invalid and of no effect **AND FOR A FURTHER ORDER** that this Honourable Court directs the Law Council to urgently consider the Applicant's application for admission and registration to the Bar **OR ALTERNATIVELY FOR AN ORDER** by way of compensation remedial of the alleged breach of the Applicant's constitutional right and for infringement of the Constitution.

The applicant relies on a number of grounds which are set in his application and which I will deal with them later in this judgment. For now, I feel necessary that I deal briefly with the background of the case before proceeding further.



Brief background

The applicant is a resident lecturer in law at the University of the South Pacific, Emalus Campus, Port Vila, Vanuatu. He is a citizen of Samoa. He holds a Bachelor of Law Degree from the Otago University, New Zealand, a Diploma in Public Law from the Australian National University, Australia, and a Master of Law Degree from Harvard Law School. The applicant was admitted to the Bar in the Australian Capital Territory, New Zealand and Western Samoa. He practiced law in Western Samoa and in New Zealand for about 16 years altogether.

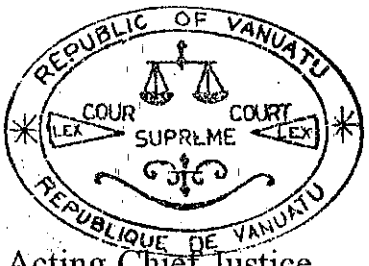
In April 1998, an application was made by Mr. Julian Ala who is a legal Practitioner on behalf of the applicant to be temporarily admitted to practice in Civil Case No. 24 of 1998 (in Petitioner's application and ACJ's letter of 20 May 1998) the reference was to CC169/97) in order to represent His Excellency the Head of State of the Republic of Vanuatu in that case. I will simply refer to this as "the *President's* Case". In or about 20 April 1998, his Lordship, the Acting

Chief Justice, granted the application and issued a Temporary Practicing Certificate No. 01 of 1998 to the applicant. One of the conditions of the applicant's temporary practicing certificate was that upon the conclusion of the said *President's Case*, the applicant's practicing certificate ceased to have effect. It would appear that the hearing of that case was completed on or about 5 May, 1998.

Subsequently, the applicant was again instructed by Mr. Shem Rarua and others to represent them in another constitutional case. On 7 May, 1998, Mr. Stephen T. Joel who was the Public Solicitor, by a letter of the same date, wrote to the Law Council seeking its endorsement for an application for another temporary admission for the applicant/petitioner. The Law Council was not able to convene to consider the application and advised the Public Solicitor to seek admission before the Acting Chief Justice. On the 11 May 1998, Mr. Stephen Joel applied to his Lordship, on behalf of the applicant, by a letter of the same date seeking temporary admission for the applicant to represent Mr. Shem Rarua and the others in the matter that was set down for hearing before the Court on 13 May 1998. The Acting Chief Justice considered the application and refused to grant temporary admission to the applicant. His Lordship's decision was conveyed to Mr. Stephen Joel in a letter of 20 May 1998 and the Public Solicitor in turn conveyed the Acting Chief Justice's decision to the applicant by a letter of 18 June 1998.

Obviously, not being satisfied with the Acting Chief Justice's decision, the applicant wrote to the Public Solicitor seeking re-submission to the Chief Justice

of his application to be temporarily admitted to practice so that he could represent Shem Rarua and the others. Consequently, the Public Solicitor wrote to the Acting Chief Justice seeking reconsideration of the applicant's application. It appears that there has been no response to that request for reconsideration. As a result, the applicant now brings the present proceedings.



The Nature of the proceedings

The essence of the applicant's case is that the decision of the Acting Chief Justice in refusing to grant him a temporary admission to practice in the case applied for was a breach of the *Constitution* or wrong in law. The applicant seeks a review of the Acting Chief Justice's decision through the special constitutional challenge procedure as laid down in Part XIII of the *Criminal Procedure Code*. That challenge is by way of petition.

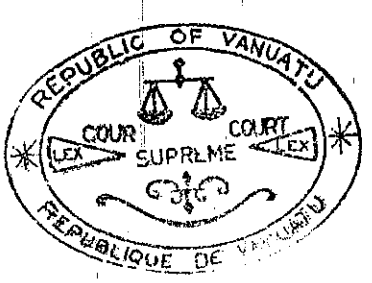
The applicant filed his petition on the 16 July, 1999 and subsequently served the process upon the respondents. The case was fixed for hearing on Wednesday 18 August, 1999 at 9.00 a.m. and a notice for that hearing was issued. The applicant certainly knew of the hearing date but as he had already made arrangement to attend a conference in New Zealand, he had decided to attend the conference instead. He left on 18 August, the day the matter was to be heard. The day before he left, he wrote to the respondents' legal representatives and advising them of his departure for the conference. He also requested the matter to be set down for 26 or 27 August, 1999. At the hearing on 18 August, the applicant's position was brought to the attention of the Court by Mr. Kilu who appeared for the

respondents. Also at that hearing, Counsel for the respondents informed the Court that he would be making an application to dismiss the applicant's petition. That application, by way of Notice of Motion, was filed on 20 August, 1999.

Constitutional Challenge Procedure

The enabling provisions under the *Constitution* to bring proceedings for constitutional redress are Articles 6 and 53. The procedure for bringing such proceedings, however, is set out in section 218 of the *Criminal Procedure Code* [CAP 136] ("the CPC"). Under that provision, the application for constitutional redress must be by petition which must be accepted by the Court as filed "no matter how informally" it was brought. Section 218 is in the following terms:

> (1) Every application to the Supreme Court for the exercise of its jurisdiction under Articles 6, 53(1), 53(2), and 54 of the Constitution shall be by petition and shall be valid no matter how informally made.
>
> (2) The Supreme Court may on its own motion or upon application being made therefor by any party interested in the petition summon the petitioner before it to obtain any further information or documents it may require.
>
> (3) The petitioner shall, within 7 days of the filing of his petition in the Supreme Court or within such longer period as the Court may on application being made therefor order, cause a copy of the petition together with copies of supporting documents filed in relation to such petition to be served on the party or on all those parties whose actions are complained of.

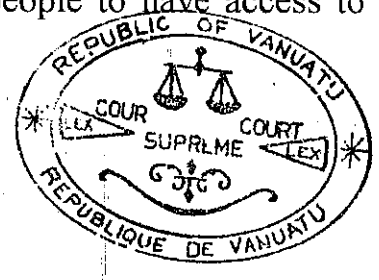


(4) Any party who is served with a copy of the petition in pursuance of subsection (3) may without prejudice to any other legal remedy available to such party apply to the Supreme Court for an order dismissing the petition on the ground that the petition is without foundation or vexatious or frivolous.

(5) Unless the Supreme Court shall be satisfied in the first instance that the petition is without foundation or vexatious or frivolous, it shall set the matter down for hearing and shall inquire into it. It shall summon the party or parties whose actions are complained of to attend the hearing.

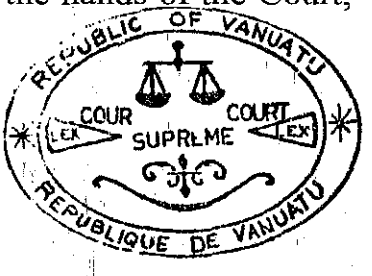
(6) On the day appointed for hearing, the Supreme Court shall enquire into the matters raised by the petition and after hearing all parties concerned shall give its decision and order or directions (if any) thereon in open court.

It would appear to be obvious that Parliament had intended by the above provisions that formal mode of bringing an application to seek constitutional redress need not be adhered to. Thus a complainant can still come to the Court with his petition however informally it was brought. One can appreciate the wisdom of Parliament in adopting such an approach, particularly in a situation as existing in Vanuatu as well as in many other small jurisdictions where the provision of legal assistance is not readily available. In such a situation the need for formality however, should not be a hindrance to a person having access to the Court to vindicate a breach of his constitutional right. Such informality, however, is not without flaw, for instance, the Court may well be flooded with frivolous complaints. Against that, is the need for the ordinary people to have access to



their Courts and if they should come by the hundreds or thousands, then let them come.

Having said that, it will be observed that the informality envisages under section 218 relates to the process by which a person institutes the petition and not to the manner in which the Court is to deal with it. Once a case is brought before the Court, the control of the proper conduct of the matter is in the hands of the Court, applying the relevant rules of practice of the Court.



Before I proceed to deal with the main issues in this matter, I feel I should make an observation on the procedure to be adopted by the Court in a case such as this. In *Honourable Willie Jimmy MP –v- The Ombudsman and the Attorney General*, Civil Case No.112 of 1995, an issue was raised as to whether the facility for constitutional redress contained in Article 53(1) should be invoked in accordance with the provisions of section 218 of the CPC or should it be brought by way of Originating Summons procedure. Charles Vaudin d'Imecourt. CJ held that Parliament intended that the special procedure for constitution applications to be that as laid down in Section 218 of the CPC which must apply to all constitutional applications. I share the view expressed by his Lordship that Parliament saw fit to enact the CPC on 1 October 1981 in which it was provided under section 218 for the special jurisdiction of the Supreme Court in Constitutional matters and as such this Court cannot ignore such statutory directive as there given. I also share, however, the remarks made by the Court of Appeal in *The Application by Ganke*

and Brinds Ltd [1980-1988] 1Van. LR 53 where the Court said that it was odd to find the procedure for bringing a constitutional petition in the CPC. But as Parliament puts it there, it must be followed.

Having said that, I venture to express my reservation on the view taken in the *Willie Jimmy* case that the preliminary inquiry procedure as in criminal cases applies to a constitutional petition in order to satisfy the Court of the matters specified in subsection (5) of section 218. Constitutional cases are by nature civil, so that in the absence of any further rules made by the Chief Justice under section 220 of the CPC, the rules, in addition to those stated under section 218, to be applied in constitutional petitions must be those generally applied in civil cases and set out in the *High Court (Civil Procedure) Rules* 1964 (the Blue Book). At the beginning of the hearing of this petition, the respondent sought to have the petition dismissed by filing a Notice of Motion pursuant to the *High Court (Civil Procedure) Rules*. The Rules relied upon for service of the application were those set out in *High Court Rules*. In fact throughout the respondent's written and oral submission, reliance had been placed upon the Rules of Court as set out in the *High Court (Civil Procedure) Rules*. I think it was right to rely on the *High Court Rules* in the absence of any other rules. The confusion seems to me, stems from the fact that the initial process of bringing a constitutional action has to be started under the *Criminal Procedure Code* and thereafter made no further rules as to the further conduct of the matter. I would respectfully suggest that since Arts. 6, 53 and 54 of the *Constitution* have already provided the substantive provisions

granting the right to any aggrieved person to challenge an infringement of the *Constitution* or to challenge an election result before the Supreme Court, the only necessary action is for the Chief Justice to make Rules on the advice of the Judicial Committee setting out the procedure for the bringing of constitutional actions. Such rules may include the present provisions set out in section 218 of CPC. The Rules may well be included in the present *High Court (Civil Procedure) Rules*. If that is done, Parliament may wish to consider whether Part XIII of the CPC is really required or not. I make these *obiter* observation in view of the circumstances I find in this case.

So much for those *obiter* remarks. I now turn to the main issues raised in these proceedings. The application by the respondent by way of Notice of Motion to dismiss the petition was refused by the Court at the commencement of this hearing. The Court proceeded to deal with the substantive petition by the applicant.

Grounds of the Petition.

The petitioner raised four grounds in his petition, namely:

1. SECTION 13 of the Legal Practitioners Act 1980 as repealed by section 3 of the Legal Pactitioners Regulation (Amendment) Act 1989 violated Articles 47, 48 & 49 of the Constitution.

2. THE DECISION of the Respondents dated May 20, 1998 breached Articles 5(1)(d) &(k) of the Constitution.

3. ALTERNATIVELY there is error of law in said decision; or that the said decision was made for an improper purpose and took into account irrelevant factors and improper considerations.

4. THE SAID DECISION is subject to the rules of natural justice which were not complied with in that –

(i) No fair opportunity was given to the Applicant to be heard or to

(ii) respond before the said decision was made.

the said decision was not made in good faith, or based on some evidence of probative value or to ensure that justice is manifestly done,

(iii) there is legitimate expectation the Application was to be dealt with fairly and similarly as was the Applicant's application to be admitted/registered to the Bar to act and appear for His Excellency, Jean Marie Leye Lenelcau, then President of Vanuatu; or of similar applications of this kind; and

(iv) there is real likelihood of bias or real danger of bias in the said decision that all reasonable appearances of it is unfair, unreasonable and unjust."

Those being the grounds raised and relied upon by the petitioner, I feel that the best way to deal with them would be to take the issues as raised by each of the grounds and consider it in turn. In so doing, I shall take into account the arguments urged upon the Court by both parties.

Ground 1 – Section 13 Legal Practitioners Act 1980

Firstly, I confess I do not understand the purpose of challenging a provision that is no longer "alive" as violating the *Constitution*. Section 13 of the *Legal Practitioners Act* 1980 had long been repealed before the decision of the respondent complained of in this case had been made which decision was made on

20 May, 1998 pursuant to the new section 13 of the *Legal Practitioner Regulations (Amendment) Act* 1989. For the purpose of argument, I shall assume that the petitioner is challenging the constitutionality of the new section 13 of the Legal Practitioners Regulations (Amendment) Act (LPA).

As I understand the petitioner's argument in support of his first ground, he contended that Articles 47, 48 and 49 of the *Constitution* enshrine the principle of the independence of the Judiciary; the administration of justice vests in the Judiciary; and the Head of the Judiciary is the Chief Justice. As such, the petitioner suggested that for the Chief Justice to carry out his administrative function under the s.13 of the LPA would be a violation of the independence of the Judiciary.

This argument can be disposed of briefly. The provisions of the *Constitution* referred to by the petitioner certainly preserve the principle of the independence of the Judiciary. In addition, they also ensure the independence of the offices of the Judges of the Supreme Court. The Head of the Judiciary is the Chief Justice. Both he and the other judges are not subject to control by anybody in the exercise of the functions of their offices.

In the case of the Chief Justice, he also carries with him the over-all functions of ensuring the proper administration of justice through the Courts. These include, ensuring that those who practice in the Courts are entitled to do so. For that is part and parcel of the machinery provided by law so as to ensure the proper administration and delivery of justice. Parliament had therefore seen fit to clothe

the Chief Justice with the power under section 13 of the LPA for that very purpose. I do not see how it can be said that section 13 of the LPA violates sections 47, 48 & 49 of the *Constitution*. If anything, section 13 is complimentary to the effective discharge of the functions of the Judiciary. Ground 1 is rejected.

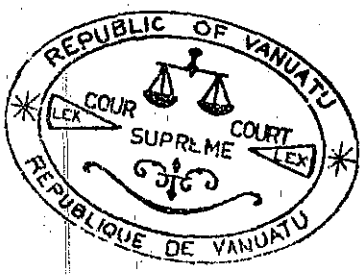
Ground 2. Breach of Articles 5(1)(d) & (k) of the Constitution.

Under this ground, the petitioner alleges a breach of his fundamental rights and freedom under Articles 5(1) (d) and (k) of the *Constitution* which provide:

> "5(1) The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religions or traditional beliefs, political opinions, languages or sex but subject to respect for the rights and freedoms of others and to the ligitimate public interest in defence, safety, public order, welfare and health-
>
> .....
>
> (d) protection of the law;
>
> .....
>
> (k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph in so far as it makes provisions for the special benefit, welfare protection or advancement of females, children and young persons, members of under privileged groups or inhabitants of less developed areas."

Basically, the argument by the petitioner is that, he had been discriminated against when the Acting Chief Justice refused him temporary admission in the case of *Shem Rarua & Ors –v- Electoral Commission & Ors*, having been granted a temporary admission earlier in the *President's* case. Before deciding whether

there had been a breach of Art. 5 of the *Constitution*, the petitioner has to show whether he had been discriminated against.



Whether there had been discrimination or not.

The expression "discrimination" is not defined in Art. 5 but I think it can easily be taken to mean the affording of different treatment to different persons on the ground of race, place of origin, religious or traditional beliefs, political opinions, language or sex. Like in many other newly independent countries within the Commonwealth, provisions have been made safe-guarding the fundamental rights and freedoms of the individuals under the *Constitution* of the Republic of Vanuatu. Among those rights and freedoms guaranteed are the right to protection of the law (Art. 5(l)(d)) and the right to be equally treated under the law or administrative action (Art. 5(1)(k)). The petitioner in the present case alleged that his rights under those provisions of the *Constitution* had been infringed by the respondent.

I accept the petitioner's contention that the expression "protection of the law" is of wider import. It is a guarantee of procedural fairness as well as substantive rights. It assures also all persons in Vanuatu unhindered access to the Courts. Thus it was argued by the petitioner that when the learned Acting Chief Justice refused his application for temporary admission to represent Shem Rarua and Others, the learned Acting Chief Justice was in breach of Art. 5(1)(d). He argued that learned Acting Chief Justice was able to grant him temporary admission to represent the Head of State in Civil Case No. 169 of 1997 which was a case of "*an important and public interest*" but was refused admission to represent Shem Rarua & Others

in another constitutional case. As such he argued, the learned Acting Chief Justice was affording protection of the law based on the status of a person needing legal representation.

The right to protection of the law indeed guarantees both procedural fairness as well as substantive justice. There is sufficient authority on this point in this jurisdiction. In *The President Frederick Kalomuana Timakata –v- The Attorney General* (1989-94) 2 Van. LR 575, Vaudin d'Imecourt CJ., after referring to a number of English cases, said at page 599:

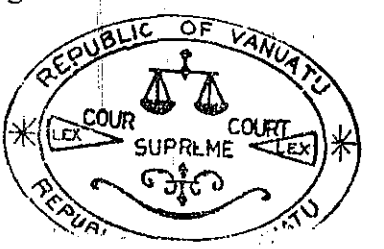
> "It is quite clear that the principles of natural justice have been held to apply to both legal and administrative proceedings and are part and parcel of the protection of the law or as put on behalf of the Petitioner: 'Protection of Law' within the meaning of Article 5(1)(d) is both a guarantee of procedural fairness and or fundamental rights."

Similar expression of the same principle can be found in *Boulekone –v- Timakata* (1980 – 88) 1 Van L.R. 228. Thus protection of the law requires that the petitioners in the Shem Rarua case must be afforded the same opportunity to bring their case before the Court just as His Excellency the President was afforded to do so. That was done. The Court had accepted Shem Rarua's election case and had it listed for hearing. Again just as His Excellency the President was afforded the opportunity to seek legal representation, Shem Rarua and the others had been given that opportunity. The complaint however, is that the petitioner in this case was permitted to represent His Excellency the President in CC169 of 1997 but refused admission in Shem Rarua's case. Was this a breach of Article 5(1)(d) and

(k)? In so far as Shem Rarua & Others were concerned, I do not think it can be successfully argued that by refusing temporary admission to the petitioner they (Shem Rarua & others) were necessarily deprived of the protection of the law under the *Constitution*. Their right to be heard before the Court remained unaffected and so was their right to seek legal representation from those qualified to represent them in Court. There must be drawn a distinction between the right to legal representation and the right to practice in order to be entitled to represent a party in Court. The right to legal representation is a constitutional right while the right to be admitted to practice is not. Hence when the petitioner suggested that the learned Acting Chief Justice was in breach of Art. 5(1)(d) when he refused the petitioner temporary admission, that cannot be right. It would seem to me that the main thrust of the petitioner's contention was that he was allowed admission in one case but not the other and in so doing the learned Acting Chief Justice breached the *Constitution*. With respect, I do not think this argument is right. The right to be admitted is governed by statute and as long as the statute does not offend the *Constitution*, it must allow some "differentiation" within the legitimate objective of the statute. This was clearly pointed out in the Namibian case of *Mwellie –v- Ministry of Works, Transport and Communication & Anor* reported in [1996] 2 CHRLD 199 where it was held that equality before the law is not an absolute right and that reasonable classifications in legislation are permitted by the *Constitution* of Namibia provided they are rationally connected to a legitimate legislative objective and are found on 'intelligible *differentia*'. So that by treating the state employees differently from other employees in that case, the Public

Service Act did not discriminate among the class of people it covered, namely the state employees. The distinction was between the state employees and other non-state employees, which distinction was reasonable and rationally connected to the objective of the Act, since it was not based on any of the impermissible grounds of discrimination set out in the Namibia *Constitution*. The *Constitution* of Vanuatu itself recognises that there are permitted restrictions to the right of equal protection or equal treatment under the law which is a recognition that the right to equality before the law is not an absolute right. For Art. 5(1)(d) explicitly provides that the rights and freedoms listed under that provision are *"subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health."* The Legal Practitioners Act with which we are concerned here does not discriminate among those it covers, namely, registered legal practitioners. If that was done and evidence was produced to show that a member of the registered legal practitioners had been afforded different treatment from the other members, then that may be violating Art. 5 (1)(d) and (k). The distinction in this case was one that could be seen applicable between registered legal practitioners and a non-registered legal practitioner. The petitioner is a non registered legal practitioner. This is clearly borne out by the learned Acting Chief Justice remarks in his letter of 20 May 1998 where he said:

> "The principle rule of the law in this jurisdiction in respect to admission to practise as a legal practitioner, is Part 1 B of the Legal Practitioner's Act CAP 119 (as amended).



Admissions on Temporary basis in accordance with section 13 of the said Act as referred to above, constitute the exception to the Rule.

My duty is to make sure that the exception does not become the rule."

It is therefore upon the petitioner to show that the distinction resulting from the Acting Chief Justice's decision to refuse him temporary admission is unconstitutional or unreasonable. In so far as the contention that the learned Acting Chief Justice, was in breach of Art. 5(1)(k) is concerned, the petitioner has not shown that the refusal was based on any of the impermissible grounds set out in the *Constitution*. Ground 2 is rejected.

Ground 3

This ground is an alternative. It alleges that the learned Acting Chief Justice's decision was erroneous in law. It further alleges that the decision was made on improper purpose and took into account irrelevant factors. The petitioner posed the question in his submission: On what basis did the Acting Chief Justice act when he made his decision to refuse him temporary admission? To appreciate the background to the refusal, I think it would be useful to set out the decision of the learned Acting Chief Justice as contained in his letter dated 20 May 1998 to the Public Solicitor:

"Mr. Stephen Joel
Public Solicitor
Office of the Public Solicitor
P O Box 794
PORT-VILA

20th May 1998

REPUBLIC OF VANUATU
COUR SUPREME COURT
REPUBLIQUE DE VANUATU

Dear Stephen,

Re: Application for Admission of Mr Leuluai'iali'i Tasi Malifa on a Temporary Practising Certificate on behalf of the Petitioners Shem Rarua and Others

I thank you for your letter of 11th May 1998 inrespect to the abovementioned matter. As per our telephone conversation between yourself and myself this morning (20/5/98), I am now writing to inform you about the decision I take in respect to the above application.

Section 13 of the Legal Practitioner's Act CAP 119 provides:

"Notwithstanding the other provisions of this Regulation, the Chief Justice may, after consulting the Attorney General –

(a) in the public interest; or

(b) on application by a legal practitioner;

admit to practise, subject to conditions as the Chief Justice may see fit to impose, as Barrister and Solicitor, for the purposes of any specific cause or matter, any person who is not a legal practitioner registered under this regulation and who has come or intends to come to Vanuatu for the purposes of appearing in such cause or matter,...."

After consulting the Hon. Attorney General, I come to the conclusion that this application must be refused.

The principle rule of the law in this jurisdiction in respect to admission to practise as a legal practitioner, is Part 1 B of the Legal Practitioner's Act CAP 119 (as amended).

Admissions on Temporary basis in accordance with section 13 of the said Act as referred to above, constitute the exception to the Rule.

My duty is to make sure that the exception does not become the rule.

Mr Leuluai'aili'i Tasi Malifa has been granted a Temporary Practising Certificate on April 1998 in Civil Case No. 169 of 1997 on behalf of his Excellency the President of the Republic of Vanuatu on the basis that Civil Case No. 169 of 1997 is an important and fundamental case for the public interest. It was just less than one month ago that a Temporary Practising Certificate was granted to him.

In the present case, there is no such public interest element transpiring and although the application was made by the Public Solicitor as a legal practitioner in this jurisdiction, by perusing closely section 13 of the Act, it transpires clearly that section 12 applies to any person –

1. Who is not a legal practitioner registered under this Act and

2. Has come or intends to come to Vanuatu for the purposes of appearing in such cause of matter.

Section 13 of the Act is not applicable to Mr Leuliai'iali'i Tasi Malifa's position.

In effect, it is common ground that Mr Leuluai'iali Tasi Malifa resides in Vanuatu and he is a law lecturer at the U.S.P. Law Faculty at Port Vila, Vanuatu.

The persons on behalf of whom the Public Solicitor had applied will not be prejudiced by this refusal:-

- There are a number of Private Lawyers in Port-Vila, Vanuatu;
- The Public Solicitor may provide his services to these persons as well.

I would appreciate if you could advise these persons that once they have a lawyer they will advise the Supreme Court Registry so that a date for directions can be given sometimes this week.

Sincerely yours,

.....

Vincent Lunabek, J

Acting Chief Justice"

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU

I feel it would also be useful to set out the terms of the Temporary Admission referred to in the letter and I do so hereunder:

"TEMPORARY PRACTISING CERTIFICATE

PRACTISING CERTIFICATE NO. 01 OF 1998

This is to certify that MR LEULUA'IALI'I TASI MALIFEA of University of the South Pacific , Emalus Campus Port Vila in the Republic of Vanuatu has been granted a Temporary practising certificate for the purpose of appearing in the Courts of the Republic of Vanuatu on behalf of His Excellency the Head of State of the Republic of Vanuatu.

This certificate is granted subject to the following conditions:-

1. That the holder of this Certificate shall only act in the Republic of Vanuatu in conjunction with the legal representation of His Excellency the Head of State of the Republic of Vanuatu, Mr Jean Marie Leye Lenalcau Manatawaii in the Civil Case No. 24 of 1998 in the matter of a referall by the president of a Bill to the opinion of the Supreme Court pursuant to article 16 (4) of the Consitution;

2. That the holder of this Certificate shall not engage in any legal work of any description other than legal work necessarily connected with the above matter;

3. That the holder of this Certificate, shall not hold himself out as a lawyer entitled to practice in Vanuatu other than in respect of the above matter, nor shall he accept any other brief from the said Head of State;

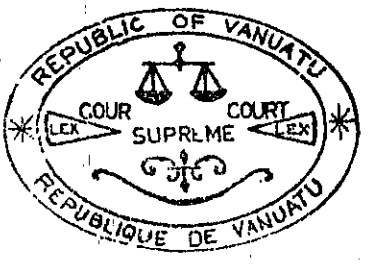
4. That the holder of this Certificate shall, during the subsistence of this Certificate, ensure that he has complied with all relevant laws of Vanuatu relating to the residence and employment of non-citizens;

5. This certificate shall cease to have effect upon the conclusion of the above-named matter.

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

Dated at Port Vila this ..... day of April 1998

VINCENT LUNABECK J,
Acting Chief Justice of the
Supreme Court of the Republic of Vanuatu"



I am in entire agreement with the learned Acting Chief Justice when he said that the temporary admission under section 13 of the LPA must be viewed as an exception to the rule. Only a legal practitioner registered to practice has the right to practice in Vanuatu. The only exception is that provided by section 13 of the Act.

The petitioner in this case was not a registered Legal Practitioner. But he was granted temporary practicing Certificate to practice in CC169 of 1997 pursuant to section 13 of the Act. His right to practice as a legal practitioner ceased at the conclusion of that case. Thereafter he, like any other non registered legal practitioner, has no right to practice in Vanuatu.

It would appear from his letter that the learned Acting Chief Justice considered that CC169 of 1997 was "an important and fundamental case for the public interest" of Vanuatu and that clearly formed the basis for the grant of temporary practising Certificate to the petitioner. When the petitioner sought another temporary admission, this time, to represent Shem Rarua and Others in a case against the Electoral Commission, the learned Acting Chief Justice was of the view that the case was not of such public interest so as to justify invoking the exception under section s13 of the Act. The learned Acting Chief Justice was of the view also that there were registered legal practitioners in Port Vila who could

equally render legal assistance to the parties concerned. The discretion conferred on the learned Acting Chief Justice under section 13 clearly gave him the power to refuse another temporary admission to the petitioner.

It must be observed that in Vanuatu the right to control admission to practice vests in the Chief Justice. The Law Council plays a vital role in this process. It certifies who is to be registered as legal practitioner, for without a certificate from the Council to that effect, no admission by the Chief Justice is possible, save for the provisions of section 13 of the Act. These controlling authorities of the legal profession are important in ensuring that the interest of the legal profession is safeguarded. Whilst it is in the public interest to have non-nationals admitted where the local profession is not able to meet the needs of Vanuatu for legal representation, there is also in the public interest the need to encourage and maintain a strong and independent local profession. It is therefore incumbent on the controlling authorities concerned to bear these principles in mind when considering applications for admission by lawyers from abroad to practice in Vanuatu. I would venture to suggest that the public interest of Vanuatu would be served, on the need for legal representation, if the following factors are taken into account, namely, the need to encourage a strong local Bar, the need to continue to admit overseas counsel where the local Bar is not able to meet the needs of those concerned for legal representation, the need to consider the financial interest of the clients and the need to take into account the views of the Law Council.

With those principles in mind I return to the question posed by the petitioner earlier and I can only answer that by saying that the learned Acting Chief Justice was entitled to refuse the petitioner's second temporary admission application by virtue of his power under section 13 of Act. At the lapse of his temporary admission to practice in CC169 of 1997, the petitioner no longer enjoyed any right to practice in the Courts in Vanuatu. As such, in the absence of such a right, there is no legal basis to insist on the discretionary power under section 13 being exercised in his favour and even to challenge the exercise of that discretion. What I have said is, in my view, in line with the intention and policy of the Legal Practitioners Act. Parliament in its wisdom saw the need to encourage and safeguard the legal profession in Vanuatu and in conferring the discretionary powers under the Act, including that in section 13, it clearly intended that "*it should be used to promote the policy and objects of the Act*" see Lord Reid's comments in *Padfield –v- Minister of Agriculture* [1968] AC 997: This was what the learned Acting Chief Justice did when he exercised his power under section 13 of the Act. There was no error of law in the exercise of that discretion in this case. For those reasons ground 3 must fail.

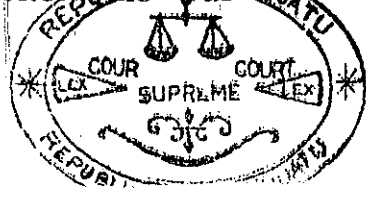
Ground 4.

This ground complains of the breach of the rule of natural justice. The petitioner's case on this point is that he had not been given the opportunity to be heard and that was a breach of the rule of natural justice as protected by the *Constitution*. This rule has been dealt with in many cases by the Courts here in Vanuatu and I do not

need to go into them, save to say that the right to be heard is a principle of law so entrenched in the laws of Vanuatu. It is recongised by the *Constitution* (Art. 5((1)) as well as by the common law as applied in Vanuatu. See *Boulekone –v- Tuimakata* [1980-88] 1 Van. LR 305 and *Bill Willie –v- Public Service Commission* [1989-94] 2 Van. L.R. 634.

It will also be observed that not every breach of the rules of natural justice will entitle the aggrieved party to a remedy when in the opinion of the Court the question of law must clearly be answered unfavourably to the aggrieved party, as was pointed out by the High Court of Australia in *Stead –v- State Government Insurance Commission* (1986) 161 CLR 141 and applied in the Solomon Islands case of *Price Waterhouse and Others –v- Reef Pacific Trading Limited & Another* (1996) Civil Appeal No. 5 of 1995 (CA). The basic question to be determined in this case is really one relating to the entitlement of the petitioner to be granted temporary admission. That is a question of law and in the light of what I had already said regarding his status as a non-registered legal practitioner, a breach of the *audi alteram parten* rule in his case would make no difference. However, I do not find that there was any breach of that rule in this case.

There is one further hurdle which the petitioner needs to get over in order to succeed on this ground. He must show that there is a requirement in section 13 of the LPA and the Acting Chief Justice must call the petitioner and hear him before rejecting his application. There is no such requirement under that section. The application under section 13 was made by the Public Solicitor who was



registered legal practitioner on behalf of the petitioner. The materials before the Acting Chief Justice contained sufficient details on the petitioner necessary for the Acting Chief Justice to consider the application for temporary admission. Nothing else was needed more. There is no requirement for the Acting Chief Justice to call the petitioner and hear him. In such a case, in my judgment, there cannot be said to be any breach of the rules of natural justice even if the petitioner was not called to be heard. Each case, of course, must depend on its own facts.

On the question of *"legitimate expectation"* to be dealt with, the petitioner argued that the learned Acting Chief Justice failed to properly consider this principle when his Lordship dealt with his case. It is obvious that the basis for that contention was the fact that the petitioner was earlier granted temporary admission to represent H.E. the President and as such, he argued, there was no reason to be denied admission in his application for temporary admission to represent *Shem Rarua and Others* in the subsequent case. The principle of *"legitimate expectation"* had been considered in a number of cases. In *Schmidt –v- Secretary of State for Home Affairs* [1969] 1 All ER 905, Lord Denning first enunciated this principle of *"legitimate expectation."* In that case *Schmit's* and Another who were American citizens were in England for the purpose of study at the College of Scientology. Their permits were for a limited time. The time expired and they wished to extend it so that they could complete their studies. They applied to the Home Secretary for extension of their permits. He refused. They brought an action against the Home Secretary, saying that his action in refusing the extension

was invalid because he did it for an unauthorised purpose and also because he did not act fairly towards them. The Court of Appeal held that the principle of *audi alteram partem* principle did not apply to the Secretary's decision as a foreign alien has no right and so, no legitimate expectation, to remain in the country once his permit has expired.

The general principle of *"legitimate expectation"* thus saw its first moment of existence in Schmidt's case through the enunciation by Lord Denning in the following words at page 909:

> "The speeches in *Ridge –v- Baldwin* (7) show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

It would seem that *"legitimate expectation"* would only apply where the person, in respect of whom an administrative decision is taken, possesses a right or obligation recognised by law. In the above-mentioned case, Schmidt's permit had expired. Upon the expiration of the time permitted he no longer has any right and no legitimate expectation to stay in England. The right to be heard did not apply in his case. It would be different if his permit still existed but was cancelled before the time limit expired. In such a case he would be entitled to be heard since he would have a legitimate expectation of being allowed to stay until the time permitted expired.

In *Schramm –v- Attorney General* (1981) 21 FLR 125 an Australian doctor who worked in Fiji for some years wished to take up Fiji citizenship and so he applied for citizenship. She was refused. She brought a case to the Court challenging the Minister's refusal to grant her citizenship. The Supreme Court of Fiji held that the principle of natural justice did not apply because she had no right to be granted citizenship.

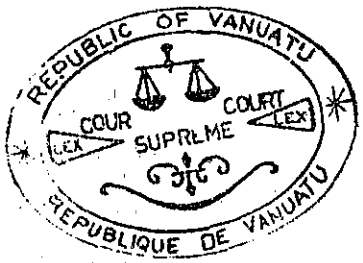
A more fuller appreciation of the concept can be seen in the words of Lord Diplock in *Council of Civil Service Unions –v- Minister for Civil Service* [1985] AC 374 where he said:

> "The decision must affect some other person either –
>
> (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
>
> (b) by depriving him of some benefit or advantage which either:
>
> (i) he had been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do unless there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or
>
> (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

In the light of those authorities and the principles expounded therein on this doctrine of legitimate expectation, I return to the circumstances of the present case. The petitioner was not a registered legal practitioner in Vanuatu. He was granted temporary permission to practice in the case of H.E. the President of Vanuatu. His Temporary Practising Certificate specifically provided for the duration of that case only. At the conclusion of that case, the certificate *"shall cease to have effect."*

The President's case had concluded on 5 May 1998. The Temporary Practising Certificate ceased to have effect. The petitioner was from that time onwards, a person no longer entitled to practice, temporarily or otherwise, in the Courts in Vanuatu. He thus had no longer any right to practice as such nor any legal obligation in law to represent any person in the Courts in Vanuatu. It must therefore follow that he could no longer have any right or any legitimate expectation of being permitted to practice again in Vanuatu. In other words, just because he was given temporary permission to practice in the President's case, that did not oblige the Acting Chief Justice to grant him another temporary admission. It would be unreal to regard the petitioner's application for another temporary admission on the basis of his previous temporary admission. His previous temporary admission had ceased and his status a temporary legal practitioner also ceased with the expiration of his temporary certificate. The argument based on the principle of legitimate expectation cannot stand in this case.

The other allegations raised against the learned Acting Chief Justice complained of his Lordship's decision being made in bad faith and that there was real likelihood of bias on his Lordship's part. The onus remains on the petitioner to establish these allegations. I do not need to dwell in these two allegations as there is plainly no evidence to substantiate them. These allegations lack merit and they are equally rejected.



Conclusion

In a nutshell, the petitioner seeks to challenge the learned Acting Chief Justice's refusal to grant him temporary admission to practice in the Courts in Vanuatu, in particular, in the case of Shem Rarua and Others against the Electoral Commission. He challenged that decision based on alleged breaches of the *Constitution* and on alleged breaches of the rules of natural justice. It is fair to say that the petitioner had argued his own case with utmost courtesy, diligence and professionalism. The Court is very grateful to the numerous authorities that he helpfully referred the Court to in the course of his argument. I have found against him on the legal issues raised but I am sure the principles which the Court has expounded in this judgment would be of future guidance, not only to the petitioner but to all concerned in the legal profession in Vanuatu.

Having given the matter considerable thought and having heard argument from the parties, the Court comes to the conclusion that as all the grounds relied upon by the petitioner failed, the petition must be dismissed with costs.

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU

Sir (Gilbert) John Baptist Muria
Judge

12 November 1999.