15/09/23

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

Civil
Case No.22/1893 SC/CIVL

BETWEEN: **Gil Jang Yoon**
First Applicant

AND: **Choi Eun Cheol**
Second Applicant

AND: **The Republic of Vanuatu**
Respondent

Date of Decision: *3rd February 2023*
Before: ***Justice EP Goldsbrough***

Appearance: ***Sugden, R for the Applicants***
Roberts, N for the Respondent

DECISION ON PRELIMINARY QUESTIONS OF LAW

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1. A Constitutional application was filed on behalf of the two applicants on 22 July 2022. It seeks various remedies after alleging two fundamental rights and freedoms were infringed, the right to liberty, security and freedom of movement (Article 5 (1) (b) and (c) and 5 (1) (i)) and the right to a fair trial within reasonable time (Article 5 (1) (d) and 5 (2) (a)).

2. Whilst a criminal trial was (and still is) pending and the applicants released on bail with a condition not to leave the country, an order was made, without notice, by the responsible Minister, which order was executed with immediate effect. The applicants were arrested, detained and deported all within hours with limited opportunity to do anything save collect a few personal items. Their destination was South Korea. A request for their return had arrived in Vanuatu from that country where various orders had been made, again in criminal proceedings.

3. The relief sought is set out below:-

Remedies Sought

REPUBLIC OF VANUATU COUR COURT SUPREME LEX LEX

(1) A declaration that section 53A of the Immigration Act conflicts with the Constitution.

(2) An Order that the Order made on the 21st of March 2022 for the Removal of the Applicants from Vanuatu by the Minister of Internal Affairs be struck out and declared void ab initio.

(3) An Order requiring the Director of Immigration to make a declaration pursuant to section 50(2) of the Immigration Act that the Applicants are not prohibited immigrants and to publish the declaration in a prominent manner in 3 newspapers of the Applicant's choice within 7 days of the making of this order.

(4) An Order that the Minister of Internal Affairs and the Director of Immigration not treat the Applicants as prohibited immigrants or as having ever been prohibited immigrants.

(5) An Order that Criminal Case No. 598 of 2020 be struck out for failure to afford the Applicants a fair hearing within a reasonable time and that the Applicants' costs of defending that proceeding be paid by the Respondent.

(6) Compensation for:-

   (i) The infringements of the Applicants' constitutional rights.

   (ii) for what the Applicants have suffered as a result of the breaches of the Constitution that have affected them and in particular for:-

      (a) The distress and humiliation that the Applicants suffered as a result their removal, the way in which it was carried out and the harm to their reputations including as a result of the Daily Post article.

      (b) The financial loss both now and in the future that they have suffered personally and to their business and for what it will cost for them to return to Vanuatu, and also any losses they sustain in their Civil Court disputes that they have been unable to attend to.

(7) Interest on any sum assessed as compensation at 5% per annum.

(8) Costs.

4. One relief not sought is that the applicants be returned here either to face the criminal trial or resume their lives here in business, or even to allow them to challenge the order made against them in court, as they hope to achieve that within this Constitutional application.

5. As it seems to this Court that the application could not be properly disposed of in one hearing, a decision was made by the Court to first set out and then determine preliminary questions about the constitutionality of the legislation under which the Order was made, the propriety of its execution and what, if anything, follows from those decisions.

6. The parties agreed the issues to be determined as preliminary matters and also agreed a set of facts for the same issues. The Court is grateful to counsel for those steps. The agreed issues for determination are:

   (1) Whether the Removal Order made pursuant to section 53A of the Immigration Act is subject to sections 54, 55(3) and 59 of the Immigration Act?"

   (2) If the answer to 1 is yes, is the Removal Order prevented from coming into effect until after:

      (a) It has been published in the Government Gazette and thereafter the period specified in section 55 (3) of the Immigration has lapsed, or

      (b) The person affected by the Removal Order has been served with it and the period specified in section 55(3) has lapsed.

   (3) If the answer to paragraph 1 is no, is section 53A unconstitutional?

7. The agreed facts for the preliminary point are:

   (1) On 21 March 2023 the Minister of Immigration signed under section 53A (1) (b) of the Immigration Act the Order that is attached hereto.

   (2) The Order was not published in the Government Gazette by 19 April, 2022 or at all.

   (3) After 4 pm on 17 April 2022 members of the Vanuatu Police Force and the Immigration Department arrested the Applicants and kept

them in custody until they had been transported by air departing at 7am, from Port Vila on 18 April 2022 to South Korea where they were handed over to South Korean authorities on 19 April 2022.

(4) The Applicants were not given prior notice of the Minister's signed Order dated 21 March 2022 and of the actions of the Police and Immigration Officers prior to their arrest on 17 April 2022.

8. Submissions on the agreed facts and issues were filed and the Court is again grateful to counsel. Whilst it is not the first question in the agreed issues, the Court proposes to deal with the question concerning the constitutionality of the section under which the Minster made his order. That section is section 53A of the much amended Immigration Act. Section 53A provides:-

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.

9. Section 53A is an identical provision save nothing more than a different section number to its predecessor which was section 17A. As will become apparent, it is necessary to consider section 17A and whether it is different from the present incarnation. Section 17A provided:-

Removal of non-citizens from Vanuatu

(1) A person who is a non-citizen may be removed by the Minister, by Order, from Vanuatu if in the opinion of the Minister, the person –

(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 has committed in that foreign country.

(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.

10. As can be seen the two provisions are almost identical in everything but numbering. This is significant because there is no Court of Appeal authority on section 53A but there is authority from the Court of Appeal about section 17A. As the two sections are otherwise identical, that authority must still be considered as binding on this Court, indeed in submissions counsel for the Respondents ask this Court to follow that decision.

11. The decision in question is *Ayamiseba v Attorney General & Principal Immigration Officer* [2006] VUCA 21. *Ayamiseba* was the subject of an Order made under section 17A but found himself back in Vanuatu after the Order had been executed but no country was prepared to receive him and he was returned to Vanuatu because of that. In Vanuatu he filed a claim seeking review of the Order made against him. At first the claim sought to have the section declared unconstitutional but in the Court of Appeal that part of the claim was discontinued. He continued to maintain that the Order was not properly made and the Court of Appeal entertained his claim and quashed the Order on the grounds set out in the judgment.

12. It is clear from reading the judgment that the Court of Appeal agreed with the discontinuance of that part of the claim seeking a decision about the constitutionality of the legislation. Whilst the matter was not argued, there is an implicit acceptance that the legislation does not contravene the Constitution. I

am inclined to agree with that acceptance. As long as the requirements of the section have been met when the Minister decides to exercise the power given to him, the resultant order cannot properly be challenged. But, as the Court of Appeal went on to determine, how the Minister may exercise the power is important.

13. In *Ayamiseba*, the Court of Appeal noted that whilst section 17A (2) did not require the Minister to give notice of any intention to making an order, the Minister was not precluded from giving notice and should consider whether or not notice should be given before relying on that provision. In that case the Court of Appeal found that neither the Minster nor any of his advisers had considered the point, and because of that, determined that the Order was not properly made and quashed it.

14. In this case, on the facts as set out, did the Minister consider whether he should give notice or not? If he did, the order may stand, if he did not, the order should be quashed as in *Ayamiseba*. That question is a question of fact and should be considered when the evidence is in, and should not be dealt with as a preliminary question of law, save that this Court at this stage can alert counsel to the question as a question that may be determinative of the whole claim.

15. It is also important to consider *Ayamiseba* in a different way. *Ayamiseba* establishes the authority of the Supreme Court to review a decision of the Minister when the Minster makes a section 17A order (now a section 53A order).

16. The Respondent to this application submits that the provision of section 53A (3) precludes an appeal under section 59 and also relieves the state of the obligation to comply with section 55 of the same legislation. Section 55 deals with removal procedure and how the Principal Immigration Officer must carry out his or her duties in that regard. Section 55 provides:-

Removal procedure

(1) An immigration officer may:

(a) detain a person subject to a removal order using such force as may be reasonably necessary in the circumstances; and

(b) with the consent of the owner or occupier of land or premises or under a warrant issued under section 19, enter the land or premises and search the land or premises, or any vessel, vehicle, aircraft or other thing in or on the land or premises, for a person subject to a removal order, and detain that person.

(2) A person subject to a removal order may be detained in custody or at such a place as the Director may determine until the person is removed from Vanuatu.

(3) Subject to subsection (5), a removal order takes effect on:

(a) if the period for applying to the Supreme Court for a review of the order has expired without any application having been made, the end of that period; or

(b) if an application is made within that period, when the application is finally determined.

(4) If:

(a) a non-citizen is to be removed from Vanuatu; and

(b) the non-citizen or another person holds a ticket for the non-citizen from a place within Vanuatu to a place outside Vanuatu;

the Director may arrange (with or without the ticket holder's consent) for the ticket to be used for the transport of the non-citizen from Vanuatu.

(5) If a person in respect of whom a removal order is made has been sentenced to any term of imprisonment, the sentence must be served before the order takes effect unless the Director otherwise directs following consultation with the Commissioner of Police.

17. The Respondent says that the provision of section 53A (3) removes the obligations of compliance with both section 55 and section 59. *Ayamiseba* is authority that the Supreme Court does have the power to review a decision of the Minster and supports the submission that both section 59 (appeals) and by

implication section 55 (procedure) apply after a section 53A order without notice has been made.

18. The Court of Appeal has already established that there is a right to seek a review of an order in the Supreme Court. In order for that right to be exercised there must be a period of time within which the order may be challenged prior to the actual deportation. There are therefore two reasons why both sections 55 and 59 should be held to be applicable in the case of a section 53A order, one to ensure that the right to seek a review is not simply illusory and the second because the exclusionary words in section 53A (3) are limited to that section alone, which deals with the making of the order, and do not expressly extend to the subsequent provisions of sections 55 and 59. There is doubt when section 59 refers to orders made under section 53 as opposed to section 53A but that doubt is resolved in the applicant's favour when one considers that the Court of Appeal has already, in *Ayamiseba*, explicitly set out the right of the individual to seek review of the order made against him or her.

19. That allows the first preliminary question to be answered affirmatively, that section 53A is subject to both section 55 and section 59. As this Court is obliged to apply *Ayamiseba*, the Order may be quashed when the facts are available and if they show the question of whether to give notice or not was not considered or not properly considered.

20. It also allows this Court to find that, as neither section 55 nor section 59 was complied with, the actions of the Executive were unlawful, if not unconstitutional. If section 53A properly construed excluded both section 55 and section 59, it would be unconstitutional when it removed the right of the subject to a review of the making of the Order in the Supreme Court. That is not a right here complained of but would be a breach of the right to the protection of the law as contained in clause 5 (1) (d).

21. For the avoidance of doubt, and this is a reference to the submissions made on behalf of the Respondent, section 53A does not "require removal without notice". This suggestion appears at the bottom of page 2 of the Respondent's

submissions. That is exactly what *Ayamiseba* said was wrong back in 2006. There, at paragraphs 3, 4 and 5 of page 5 of the judgment it is said:-

> As became apparent in the course of the hearing the section 17A regime does not in terms "prohibit" or "prevent' the Minister from giving notice or affording to a non-citizen the rights of natural justice, it merely empowers the Minister to decide whether he needs to in the particular case.
>
> It is quite wrong to say that the provision explicitly removes rights to prior notice to which a non-citizen might otherwise be entitled. It merely enables or empowers a Minister to decide whether he needs to give notice.
>
> As a matter of statutory interpretation section 17A requires that the Minister must be of the opinion that the circumstances under either subsection, (1) (a) or (b) exists and then separately under subsection (2) whether in the circumstances he needs to give notice.

22. It is, perhaps, this continued misapprehension that leads to the same errors being repeated. Whilst section 53A empowers the Minster to make an order without notice, he may choose to give notice, a matter for his deliberate judgment. Thereafter as the subject of the order has the right to challenge the order, he must be allowed the time to launch a challenge to it either by way of appeal (which would be dealt with under section 59) or judicial review. The Respondent may prefer, given the relative timeframes, to opt for the section 59 procedure permitting only 21 days to launch an appeal rather than the standard limit of six months following a decision to launch a Judicial Review of the decision. Either way the order cannot come into force under section 55 (3) until the period for applying to the Supreme Court has expired or the application finally disposed of. To rule that section 55 is to be excluded and the removal order comes into force with immediate effect is both contrary to the express provisions of the legislation and contrary to the principle established in *Ayamiseba* that the subject has a right of review in the Supreme Court.

23. The questions are thus answered as follows:-

A removal order made under section 53A is subject to the provisions of section 54, 55(3) and 59 of the Immigration Act.

The removal order does not come into effect until after the period allowed for review has expired or until the review has been finally determined.

Section 53A itself is not unconstitutional, although in terms of the agreed issues, that question does not need to be answered.

24. Following delivery of this decision, counsel are invited to file a draft Consent Order containing future steps and timetable. If it is not possible to agree the steps and timetable, liberty is given to seek a further Conference.

25. Costs are costs in the cause.

DATED at Port Vila this 3rd **day of February, 2023**

BY THE COURT

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EP Goldsbrough

Judge