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**IN THE SUPREME COURT OF**
**THE REPUBLIC OF VANUATU** CIVIL CASE No.161 OF 1996

(Civil Jurisdiction)

**BETWEEN :** Barry Kalmet, Deputy Chairman of National Tourism Office
**1st Applicant**

Jimmy Casimir, Member of NTO
**2nd Applicant**

Tom Numake, Member of NTO
**3rd Applicant**

Jean Paul Virelala, Member of NTO
**4th Applicant**

Gilles Bourdet, Member of NTO
**5th Applicant**

Patrick Crowby, Member of NTO
**6th Applicant**

**AND:** The Honourable Demis Lango
Minister for Civil Aviation, Tourism, Post & Telecommunications & Meteorology
**1st Respondent**

Theodore Solong
**2nd Respondent**

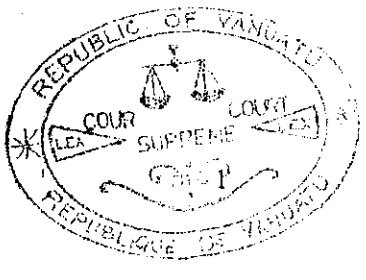
Funny Jarel (otherwise known as Fanny Cyrel)
**3rd Respondent**

Sandie Kalven
**4th Respondent**

Paul Tasso
**5th Respondent**

Levi garo
**6th Respondent**

Obed Bule



7th **Respondent**

Gerard Teilemb
8th **Respondent**

Tom Tapum
9th **Respondent**

Attorney General
10th **Respondent**

# JUDGMENT

Coram : Mr Justice Vincent Lunabek, Acting Chief Justice
Mrs Susan Bothman Barlow for the Applicants
Mr Ishmael Kalsakau for the Repondents

## Introduction : Factual Background

This is an application by way of Motion dated 3rd February, 1997. The Applicants herein, in a representative action, apply to this Court seeking for an Order of Certiorari and an Order of Prohibition requiring that a declaration and a Notice and an Appointment, each made by the Honourable Minister for Tourism on 22nd November 1996, concerning the Applicants, in purported exercise of his powers under Section 5 of the National Tourism Office Act CAP 142 be brought up and quashed.

The Motion is filed with two supporting Affidavits of Barry Kalmet who is the First Applicant. The two Affidavits in support of this application were respectively filed on 10 December 1996 and on 10 February 1997.

On 3rd July 1996, the Applicants were appointed by the then Minister of Civil Aviation, Tourism, Telecommunication, Postal Services and Meteorology, Albert Ravutia, Members of the National Tourism Office for a period of three (3) years with effect from that date.

Judicial Notice can be taken from Official Gazette No.18 of July 1996 Annexed to Mr Barry Kalmet's Affidavit.

Meanwhile, the then Minister Responsible for Tourism was replaced by the current Minister for Tourism, Hon. Demis Lango.

On or about 22 November 1996, the Minister Responsible for Tourism, issued the following :-

(1) A Declaration by way of Public Notice purported to declare the Offices occupied by the Applicants as Members of the National Tourism Office vacant.

(2) A Termination of the Applicants as Members of NTO with effect from 22nd November 1996.

(3) An Appointment of the Respondents herein, as Members of NTO for a period of 3 years with effect from that date. Judicial Notice be taken from Official Gazette No.51 of 2 December, 1996.

LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION GRANTED.

On 10 December, 1996 Mrs Susan Barlow Bothmann on behalf of the Applicants applied on ex parte Summons for leave to apply for Orders of Certiorari and Prohibition against the decisions of the Hon. Minister of Tourism referred to as "A Declaration", "A Termination" and "An Appointment" dated 22nd November, 1996 to be brought up and quashed. The Ex parte Summons for leave was accompanied by a statement and the 1st Affidavit of the First Applicant, Mr Barry Kalmet of 10 December 1996.

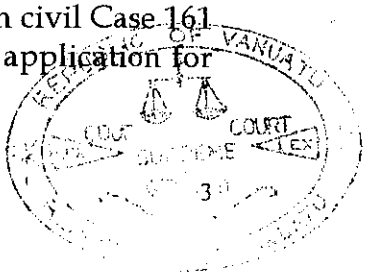
On 13th December, 1996 this Court granted leave pursuant to Order 61 of the High Court (Civil Procedure) Rules to the Applicants as requested and ordered further that the grant of leave shall operate as a stay of proceedings pursuant to Rule 2(4) of Orders 61 of the Hight Court (Civil Procedure) Rules, on the declaration titled "Public Notice", "Termination" and "Appointments" respectively made the 22nd November 1996 by the First Respondent Minister in so far as no actions may be taken by the Respondents or any of them to hinder the Applicants or any of them from continuing to hold office of the National Tourism Office and from fulfilling their functions as members of that Office until the matter is further determined by the Honourable Court or until further Order of this Court.

On 24 December, 1996, Mr Ishmael Kalsakau of the Attorney General's Chambers on behalf of the Respondents filed an Ex parte Summons with a Notice of Motion seeking, inter alia, the following Orders :-

(a) That the Ex parte Orders granted by the Court on 13th December, 1996 be set aside for want of prosecution.

(b) That the Respondents be allowed to assume their duties with immediate effect as duly appointed Members of the National Tourism Office.

On 27 February, 1997 this Court refuses to grant the Ex parte Orders sought by the Respondents and directed that the substantive hearing in civil Case 161 of 1996 be heard between both parties on 7 March 1997. Upon application for



further adjournment, the matter was adjournment to 11 March 1997 at 9 o'clock am.

PRELIMINARY APPLICATION TO CROSS-EXAMINE THE FIRST APPLICANT ON HIS AFFIDAVIT

On 11 March, 1997, Mr. I. Kalsakau made a preliminary application that the First Applicant Mr. Barry Kalmet be cross-examined on his Affidavit in order for the Respondents to ascertain whether Barry Kalmet has power to call a meeting as he alleged in his 2nd Affidavit of 10 February, 1997.

The preliminary application was treated by the Court as an important issue to be determined before the substantive hearing could be held.

On that basis, both Counsels were directed to provide written submissions on the question of whether in Application for judicial review and in particular Certiorari, the deponent of an Affidavit may be cross-examined in open Court on the said Affidavit.

On the same day 11 March 1997, this Court made the following ruling on the abovementioned question :-

PRELIMINARY RULING

Upon hearing Mrs Susan Barlow Bothmann for the Applicants and Mr Ishmael Kalsakau for the Respondents, upon further reading the documents which are placed before the Court and upon also reading and considering persuasive authorities directly relevant to the preliminary issue before the Court,

IT IS HEREBY ORDERED AND DIRECTED AS FOLLOWS :

1. THAT, as a matter of general principle, on the subject of procedures in matter of applications for judicial review and certiorari in particular, the substantive hearings were conducted on the basis of Affidavits evidence. There is no requirement for the deponent of an Affidavit to give oral evidence at the substantive hearing by way of cross-examination on Affidavits.

   In certiorari proceedings, if additional evidence had to be given, that had to be done by affidavit.

   It is to be noted that Certiorari and Prohibition proceedings,

   "afford speedy and effective remedy to a person aggrieved by a clear excess of jurisdiction by an inferior tribunal (an error of law by an administrative authority ...). But they are not designed to raise issues of fact for the High Court to determine de novo... where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the Court should determine it there and then. But

where the dispute turns on a question of fact, about which there is a conflict of evidence, the Court will generally decline to interfere."

The following persuasive authorities are accepted and followed by this Court:

. See R. V. Fulham etc. Rent Tribunal exp. Derek (1951) 2KB1 at 11 (Devlin)

. See likewise R. V. Pugh (Judge) (1951) 2KB 623, cited in Administrative Law by Sir William Wade QC & Christopher Forsyth, Seventh Edition (p.670).

. See also Order 61 Rule 5(2) of the High Court (Civil Procedure) Rule 1964.

2. THAT, nonetheless, as the documents put before the Court show :

It is possible, but exceptional, for the Court to allow cross-examination on the Affidavits.

(See Sir William Wade in Administrative Law referred to above (p.670)).

It was "exceptionally rare" for leave of the Court to be granted to allow cross-examination in judicial review proceedings.

(See Gordon Richard Q.C. : in Judicial Review : Law & Procedure, 2nd Edition (p. 151)).

Although the Court has a discretion to order cross-examination, unlike in other proceedings cross-examination is used not as a matter of course. Rarely has cross-examination of deponents on their Affidavit evidence been ordered. But cross-examination is only exercised when justice so demands. (Per Lord Bridge, R. V. Secretary of State for the Home Department, ex p. Khawaya (1984) A.C. 74, 125 ; see also per Lord Lowry " oral evidence and discovery, although catered for by the Rules, are not part of the ordinary stock in trade of the prerogative jurisdiction" in Roy v. Kensington and Chelsea and Westminster F.P.C. (1992) 1 A.C. 624).

This Court accepts also the persuasive authorities referred to above and adopts them in this case.

3. THAT, circumstances and/or situations where cross-examination of deponents on their affidavit evidence may be ordered :

(a) The first case ever to allow cross-examination is R.V. Shockesley (1956) L. W.L.R. 254 ; (1956) 1 ALL E.R. 563.

The circumstances of this case were remarkable and so special that the Court allows the cross-examination on the Affidavits.

(b) The Lord Diplock's Test :
*"The Justice of a particular case"* requires cross-examination on the Affidavits, in O'reilly V. Mackman (1983) 2 A.C. 237.

In this case, Lord Diplock said :

*"Whatever may have been the position before the rule was altered in 1977 in all proceedings for judicial review that have started since that date the grant of leave to cross-examine deponents upon applications for judicial review is governed by the same principles as it is in actions begun by originating summons ; it should be allowed whenever the justice of the particular case so requires".*

Notwithstanding the generality of this statement, it would only be upon rare occasions that the interests of justice would require that leave to cross-examination be given (see Lord Denning M.R. In George V. Secretary of State for the Environment. (1979) 77 K.G.R. 689 ; cited from Richard Gordon Q.C. : Judicial Review : Law & Procedure, Second Edition, Sweet ... Maxwell 1996 (P.151).

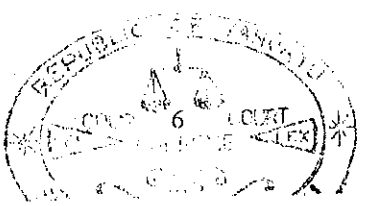
In R.V. Home Secretary; ex p. Khawaja (1984) A.C. 74, it was said that the interests of justice would rarely require the attendance of an overseas deponent for cross-examination.

In O'Reilly V. Mackman Lord Diplock qualified the effect of "the justice of a particular requirement for cross-examination" Test by indicating that the only expressly recognised exceptions to this were alleged procedural unfairness or a breach of natural justice. He further warned that :

*"The tribunal or authority's findings of fact, as distinguished from the legal consequences of the facts that they have found, are not open to review by the Court in the exercise of its supervisory powers except on the principles laid down in Edwards V. Bairstow (1956) A.C. 14, 36 ; and to allow cross-examination presents the Court with a temptation, not always easily resisted, to substitute its own view of the facts for that of the decision-making body upon whom the exclusive jurisdiction to determine facts has been conferred by Parliament." (pp. 282. 283).*

(c) Extension of Lord Diplock's test to the situation where a conflict of evidence arises on the Affidavits before the Court.

The Lord Diplock's Test of *"the Justice of a particular case"* requirement can be envisaged in other situations. In particular, a conflict of evidence on the affidavits before the Court may need



to be resolved in order to investigate the factors affecting a decision and whether there has been an abuse of discretion.

4. Situation in Civil Case No. 161 of 1996.

In the Case before this Court, Mr. Ishmael Kalsakau applies for leave to cross-examine the First Applicant, Barry Kalmet on his Affidavits. Mr Barry Kalmet deposited two (2) Affidavits before the Court.

It is submitted for the Respondents that the circumstances of this Case are remarkable and so special that they warrant cross-examination of the First Applicant. It is further submitted for the Respondents that there is a conflict of evidence, they, therefore, need to cross-examine the First Applicant on his Affidavits in order to ascertain the nature of certain facts that he raised in his Affidavits in particular, the allegations that he has power to call a meeting as he alleged in his second Affidavit dated 10 February, 1996. It is important to bear in mind the two (2) underlying elements of judicial review proceedings :

(a) the procedure is intended to be able to be implemented quickly. Expedition is vital, usually, if the remedy is to be useful at all, and

(b) The procedure was not intended to operate as a detailed "trial" of facts or the substance of any dispute. Its scope was and is precisely confined to relevant legal issues and the relevant facts relied upon are usually able to be ascertained by affidavits and exhibits and often not disputed or are incontrovertible.

In Judicial review proceedings, and in certiorari application in particular, I share the view that cross-examination of a deponent of an Affidavit should be allowed on exceptional circumstances only whenever the justice in a particular given case so requires.

When the application for cross-examination of a deponent of an Affidavit is based on "conflict of Affidavit evidence", it is my view that leave be granted only if the disputed Affidavits contained the sequence of events that leads up to the decision made by the relevant body. In other words, the said Affidavits must contain facts or sequence of events that lead up to the point where the Minister for National Tourism Office decided to terminate the Applicants and cause the Minister for National Tourism Office to make that decision of terminating the Applicants. Only those facts or sequence of events are relevant.

It is equally vital to understand that, once the Minister has made his decision, it does not matter if there exist other facts that have come to light that might have influenced the decision because the Minister has already made his decision. What happens after the decision was already made, is not relevant to the proceedings. It is also to be noted that should it transpire that a

behaviour by any of the parties, either after the decision was made or having occurred prior to the attention of the decision-maker, in this case, the Minister of Tourism , until afterwards, and if any facts of that nature are alleged, by the Minister as an answer to the application of judicial review, that flies in the face of such a defence.

Leave should be refused, in the event of there being a conflict of affidavit evidence where the disputed facts contained in the affidavit occurred or were made subsequent to the administrative decision (Ministerial decision) which is the subject of those judicial review proceedings.

In this case, it transpires from the Respondents' submissions that the disputed facts were contained in the Second Affidavit of the First Applicant, which was subsequent to the disputed Ministerial decision in these proceedings. Leave to cross-examine the First Applicant is, therefore, refused and the substance issue was dealt with on 13th March 1997.

That is the end of the Preliminary Ruling made by the Court on 11 March 1997.

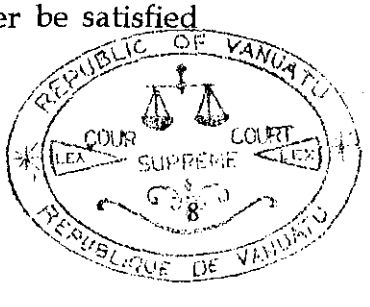
## SUBSTANTIVE APPLICATION : THE MOTION

In this Case, the grounds for the Motion are as follows :

A) That the said Declaration (of vacancy of office) and Notice (of Termination of members of NTO) and Appointment (of new members of the NTO) purport to be exercised of power conferred on the Minister responsible for Tourism (the First Respondent herein) by the National Tourism Office Act. CAP 142 (the 'Act') pursuant to Sections 5(4)(e), (the Declaration) and 5(4) (the Notice) and 5(1) (the Appointment) of the said Act, and in so acting the Minister has exceeded the powers granted to him by the Act and has acting ultra vires in making the said Declaration, Notice and Appointment.

B) That Section 5(1) of the Act provides that the "Office" to be established under the Act "shall consist of eleven members, ten of whom shall be appointed by the Minister." The "Minister" is defined in Section 1 as the Minister responsible for Tourism. On 3rd July 1996 the then Minister Albert Ravutia duly appointed the Applicants (inter alia) to be members of the NTO pursuant to S. 5(1). Section 5(3) of the Act provides that (subject to S.5 (4) and (5) members of NTO shall serve for a term of years but may be eligible for reappointment. The Applicants have not served for three years and therefore the First Respondent's action in purporting to make the Declaration, Notice and Appointment respectively is unlawful.

C) Section 5(4) of the Act provides that should the Minister be satisfied that a member of the office :



a) has been absent from 2 consecutive meetings of the office without the consent of the Chairman ;

b) has become insolvent ;

c) is incapacitated by physical or mental illness ;

d) has been convicted of a crime involving moral turpitude ; or

e) is otherwise unable or unfit to discharge the functions of a member ;

the Minister may by Notice published in the Gazette declare the office of the member vacant.

This is the Section pursuant to which the First Respondent had published the Termination Notice. As to that the Applicants submit that this Section (nor any Section of the Act) does not give the Minister power to terminate the office of any member, and therefore the First Respondent has acted outside his jurisdiction, ultra virus and without legal authority.

D. Further in relation to Section 5(4) of the Act the Applicants submit :

a) None of the provisions (a) to (e) inclusive apply to any individual applicant ;

b) The Section intended to operate in relation to individual circumstances arising in relation to individual members and that is not the case in this case ;

c) The First Respondent Minister has purported to declare the office of all the Applicant members vacant and he has no power under Section 5(4) of the Act to do so ;

d) The First Respondent has no power under the Act at all to do.

E. Section 5(4)(e) of the Act, as above is the Section pursuant to which the First Respondent purports to declare the offices of the Applicants herein, vacant. The Applicant submit :

a) None of the Applicants are unable or unfit to discharge their functions as members of the NTO ;

b) None of the Applicants have been advised, notified or contacted in any way as to how or why they are deemed to be unable or unfit to discharge their functions as members of the NTO ;

c) 5(4)(e) cannot operate to apply to all duly appointed members of the NTO at once ;

d) The First Respondent in purporting to act pursuant to 5(4)(e) must give reasons for his belief that any member is unable or unfit to discharge his function as member and the First Respondent has failed to do so.

F. That the Applicants have been denied the application of the principles of natural justice in the making of the Declaration and the Notice.

G. That the First Respondent has chosen to exercise his purported powers under the Act to replace an Office under the Act with another Office and he has no power or authority under the Act to do so.

## AFFIDAVIT EVIDENCE

The abovementioned facts deposed by Mr Barry Kalmet, the Deputy Chairman of the National Tourism Office, in his First Affidavit (relevant one) sworn on 10 December 1996, have been challenged by the Respondents on the basis that in essence as a matter of public policy, a New Minister is entitled to replace old members of the NTO Board in order to carry out the function and policy of the Government of the day. [see Affidavit of Mrs Tountano Bakokoto filed and sworn on 10th March 1997 in support thereof].

## RELEVANT LEGISLATIVE PROVISIONS

By Section 5 of the N.T.O. Act CAP 142, the responsibilities and powers of the Minister responsible for Tourism are set out :

By Section 5

*"(1) The office shall consist of eleven members, ten of whom shall be appointed by the Minister and who shall be-*

*(a) a representative of the Ministry responsible for tourism who shall be the chairman ;*
*(b) a representative of the Ministry responsible for transport ;*
*(c) a person who the Minister considers represents the interests of the island of Tanna ;*
*(d) a person who the Minister considers represents the interests of the island of Espiritu Santo ;*
*(e) a person from the public sector who the Minister considers has a connection with tourism ;*
*(f) a person who the Minister considers represents the interests of the international airlines operating to and from Vanuatu ;*
*(g) a person who the Minister considers represents the interests of the domestic airlines operating within Vanuatu ;*
*(h) a person who the Minister considers represents the interests of the hotel industry in Vanuatu ;*

(i) *a person who the Minister considers represents the interests of the tours operators in Vanuatu ;*
(j) *a person who the Minister considers represents sectors of tourism not otherwise represented on the office.*

(2) *The General Manager shall be a member of the Office ex-officio.*

(3) *Subject to Subsections(4) and (5) members of the Office other than the General Manager shall serve for a term of 3 years but may be eligible for reappointment.*

(4) *Should the Minister be satisfied that a member of the Office appointed under subsection (1)-*

(a) *has been absent from 2 consecutive meetings of the Office without the consent of the Chairman ;*
(b) *has become insolvent ;*
(c) *is incapacitated by physical or mental illness ;*
(d) *has been convicted of a crime involving moral turpitude ; or*
(e) *is otherwise unable or unfit to discharge the functions of a member; the Minister may by notice published in the Gazette declare the office of the member vacant.*

(5) *A member of the Office appointed by the Minister in accordance with subsection (1) may resign by not less than 30 days notice in writing to the Minister.*

By Section 21

*"The Minister may, after consultation with the Office give to the Office such directions of a general character with respect to the performance of any functions of the Office as appear to the Minister to be requisite in the public interest."*

By Section 22

*"The Minister may by Order make regulations not inconsistent with this Act for the better carrying out of the objects and purposes of this Act."*

The National Tourism Act [CAP 142] is enacted to provide for the establishment of the National Tourism Office (under Sections 22 (1)(2) of the Act) and for the development of tourism and the improvement of standards in the tourism industry.

The functions and powers of the Office are respectively set out by Sections 3 & 4 of the Act.

THE ISSUE

The case is concerned with a challenge by way of Judicial Review. It is contended by the Applicants that the Minister for Tourism in issuing a Declaration (of vacancy of National Tourism Office) and a Notice (of

Termination of Members of the N.T.O.) and Appointment (of New members of the N.T.O.), has acted outside his powers, therefore, unlawfully. The attack has concentrated essentially on Section 5(1), (4) give the Minister for Tourism some responsibilities and powers. The issue, expressed quite shortly, is whether in issuing the Declaration, the Notice and the Appointment, the Minister has exceeded his jurisdiction/powers, thus acting ultra vires and therefore unlawfully.

The Minister's reasons for his action.

In this case, the First Respondent Minister gave no reasons for his decision to declare the offices occupied by the Applicants as Members of the National Tourism Office vacant, to terminate the Applicants as Members of NTO and to appoint the Respondents therein, as Members of NTO for a period of 3 years.

## THE CHALLENGE

I now turn to the bases upon which it is contended that the Minister for Tourism exceeded his statutory powers.

### 1- The Minister is acting ultra vires in making the Declaration, Notice & Appointment [Ground A of the Applicant's Motion].

The Respondents say that the declarations of vacancy, Notice of Terminations, and Appointment of new Members is in accordance with the powers vested in the Minister of Tourism and therefore deny that the Minister has exceeded his powers.
The Respondents, further, deny that the Minister has acted ultra vires in making the said Declarations, Notice and Appointment.

Section 5(4) provides that :

> *"Should the Minister be satisfied that a Member of the Office appointed under Subsection (1)-*
>
> *(a) has been absent from 2 consecutive meetings of the Office without the consent of the Chairman ;*
> *(b) has become insolvent ;*
> *(c) in incapacitated by physical or mental illness ;*
> *(d) has been convicted of a crime involving moral turpitude ; or*
> *(e) is otherwise unable or unfit to discharge the functions of a member;*
>
> *the Minister may by notice published in the Gazette declare the office of the member vacant.* (my emphasis)

S.5(4)[(a), (b), (c), (d), (e)] constitute several matter, thus, specified of which the Minister must be satisfied if he is to declare the office of a member vacant. These matters are separate and alternatives. The word "or" establishes that

From the reading of S.5(4), it transpires that the Minister has a discretion. The phrase "(the Minister) may... declare..." are used and might enhance a discretion to be embodied by the word "may". But not, I think, in this context. While Parliament uses the English language the word "may" in a statute means may. Used of a person having an official position, it is a word of permission, an authority to do something which otherwise he could not lawfully do. The permission is circumscribed by context or circumstances in order to control the doing of that thing authorised, at discretion. Therefore, that discretion is not absolute or unfettered. It is a discretion which is to be exercised according to law and therefore must be used only to advance the purposes for which it was conferred. In other words, the discretion must be exercised bona fide, having regard to the policy and purpose of the statute conferring the authority and the duties of the officer to whom it was given. It may not be exercised for the promotion of some end foreign to that policy and purpose or those duties. It has accordingly to be used to declare the office of a member of the National Tourism Office vacant.

But one question then to be asked is this :

Must the permitted power be exercised if one of the five (5) conditions specified in S.5(4) of the Act be fulfilled ?

In my view, if one of the criteria (conditions) be fulfilled to the satisfaction of the Minister, he/she must declare the office of the member vacant. Thus, under such circumstances, the "may" becomes a "must".

In the case of Macdougall v. Paterson (1851) 11 C.B. 755 [at 138 ER 672], Jervis C.J. said this : "The word 'may' is merely used to confer the authority : and the authority must be exercised, if the circumstances are such as to call for its exercise". And giving judgment, in the same case, he said : "we are of opinion that the word 'may' is not used to give a discretion, but to confer power upon the Court and Judges ; and that the exercise of such power depends, not upon the proof of the particular case out of which such power arises."

This is directly applicable to the present case. If the Minister, having considered the Matter, is satisfied that one of the Five (5) conditions of S.5(4) is established he has to or he must declare by notice published in the Gazette the office of the member vacant .

the relevant principles are set out in the Hight Court of Australia's decision in Re Ward v. Williams (1955) 92 CLR 496 at p.505. There it was held that :

> *"... it is necessary to bear in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the prima facie presumption that permissive or facultative expressions operate according to their ordinary natural meaning. 'The authorities clearly indicate that it lies on those who assert that the word "may" has a compulsory meaning to show, as a matter of construction of the Act, taken as a whole, that the word was intended to have such a meaning' - per Cussen J. : Re Gleeson (2). The demeaning of such words is the same, whether there is or is not a duty or*

*obligation to use the power of which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power' - per Lord Selborne : Julius v. Bishop of Oxford (1). One situation in which the conclusion is justified that a duty to exercise the power or authority fall upon the officer on whom it is conferred by Lord Cairns in his speech in the same case. His Lordship spoke of certain cases and said of them '[they appear to decide nothing more than this : that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised'."*

In this case, the word "may" was intended by Parliament to be given compulsory meaning. The circumstances surrounded this are as follows :

The objects and purposes of the Act are to establish the National Tourism Office and to develop and improve the standards in the Tourism Industry.

In order to carry out the objects and purposes of the Act, the Office is given the task of encouraging and assisting the development of Tourism and ensures that the services the industry provides are of as high quality and of the highest possible standard.

In order to achieve that, S.5(1) says :

*"the Office shall consist of 11 members... who shall be such person selected and appointed as specified under S.5(1) [a, b, c, d, e, f, g, h, I, j]."*

These members shall be appointed for 3 years. It is the Parliament's intention that in order to better carry out the functions of the Office and the objects and purposes of the Act, should the Minister be satisfied that any of the conditions of S.5(4) of the Act is established, he must declare the Office vacant which once published in the Gazette constitute the termination and then the appointment of a new member of the Office.

So S.5(4) does, I think, give rise to a "situation in which the conclusion is justified that a duty to exercise the power or authority falls upon the Minister on whom it is conferred.

In this case, are the Declaration, Notice and Appointment validly made by the Minister ?

I accept the submissions that there is no evidence to support the conclusion that the Applicants were persons to whom Section 5(4) of the N.T.O. Act applies.

In that regard too, I am persuaded by the case of Edwards v. Bairstow (1956) A.C. 14 in which Lord Radclieffe says :

> *"If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously enormous in point of law. But without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In these circumstances, too, the Court must intervene. It has no option but to assume that there has been an error in point of law. I do not think it much matters whether this state of affairs is described as one in which there is not evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three..."*

I have no difficulty in accepting that this case can also be followed in Vanuatu as a persuasive authority for the proposition that if there is no evidence to support a conclusion, then there is an error of law in the decision reached.

By Section (5(1) :

> *"The Office shall consist of eleven members, ten of whom shall be appointed by the Minister..."*

S.5(1) gives the power to the Minister to appoint ten (10) members of the Office of National Tourism. That power is exercised by the Minister either when the term of 3 years expired and the members were reappointed under S.5(3) of the Act or when the Minister after he/she is satisfied that any one of the elements contained under S.5(4) has occurred then the Minister declares the office of the member fulfilling any of the required condition of S.5(4) vacant and then proceed with the appointment of a person to replace the former member whose office was lawfully declared vacant.

I find that the action of the Minister to declare offices of all members vacant ant to appoint new members without being satisfied of any of the required elements of S.5(4) of the Act, constitute a frustration by the Minister's exercise of his powers in the proper exercise of his discretion.

2. **The Minister's decision is unlawfully since, by section 5(3) of the Act, the members of N.T.O. shall serve for a term of 3 years**
[Grounds B of the Motion]

The Respondents say that it is not a strict requirement of law nor statutes that the Applicants must serve a term of three (3) years and therefore deny that the First Respondent Minister's action is unlawful.

By S.5(5) :

*"A member of the Office appointed by the Minister in accordance with Subsection (1) may resign by not less than 30 days notice in writing to the Minister."*

S.5(3) provides that :

*"Subject to Subsections (4) and (5) members of the Office other than the General Manager shall serve for a term of 3 years but may be eligible for reappointment."* (underlining words are my emphasis).

S.5(3) of the Act is a mandatory provision *"... members of the office... shall serve for a term of 3 years..."*.

The use of the word "shall", to entrust a function is taken prima facie to improve an obligation to exercise that function for the period specified by the Section.

As it transpires from the reading of S. 5(3) :
[*"Subject to Subsections (4) and (5)..."*], which means that it is the Parliament intention that if satisfied that Subsections (4) and (5) of the Section are established, then that is the end of the matter. However, if Subsections (4) and (5) of the Section are not satisfied in terms of the Section, then the members of the Office shall serve for a period of 3 years.

There is no reason to think that the Minister should have a discretion to exercise once satisfied that the circumstances under Subsection (4) an (5) are not established.

Therefore, it is my view that once satisfied that circumstances under Subsections (4) and (5) of S.5(3) are not established, the Applicants shall serve as members of N.T.O. for a period of 3 years.

In this case, I accept the submission that the Minister had no evidence upon which to make his decision about the Applicants. The Minister, in this case, did not conduct any inquiry at all into the circumstances of each member. Further there is no evidence that any of the Applicants resigned as a Member of the N.T.O.

In this case, the Minister has acted outside his jurisdiction, thus, unlawfully, and I so rule.

3. **In essence the Minister does not have power under S.5(4) to terminate the Office of any member of the N.T.O. [Ground C] ; declare the Office of all the Applicants members vacant [Ground D] and S.5(4)(e) cannot operate to apply to all duly appointed members of the N.T.O. at once [Ground E] ; and the Minister has no authority to replace one Office under the Act with another Office [Ground G] : In essence the challenge here is that the decisions of the Minister were unlawful on "Wednesbury" grounds.**

Ground C :

The Respondents say that S.5(4) of the Act in no way confines the ingredients of termination to those stated and even if a purported exercise of power has been derived from the said Section, such exercise of power has not been effected outside the jurisdiction of the First Respondent Minister. It is, thus, submitted he does not act outside his jurisdiction, ultra vires or without legal authority.

It is true that S. 5(4) of the Act contains no express provision granting the First Respondent Minister to terminate any member of National Tourism Office. That Section 5(4) provides specifically only for the Minister to declare the Office of a member vacant if the Minister is satisfied that one of the Five (5) criteria contained in S. (4) [(a), (b), (c), (d), (e)] of the Act is established.

It the Minister is so satisfied then, he/she must by Notice published in the gazette, declared the Office of the member vacant. This will amount quite clearly to a lawful termination of the Office of a member of the N.T.O. Subsequently, he/she will proceed by appointing a new member under S.5(1), (3) of the Act.

As to Ground C above, I am of opinion that the Minister exercises his powers under S. 5(4) of the Act in a manner that no reasonable Minister properly informed/advised will do. The Minister exceeds his powers or ultra vires his powers under S.5(4) of the Act.

Grounds D, E & G (considered jointly)

The Respondents contended that S.5(4) [(a), (b), (c), (d), (e)] of the Act contains provision that apply to the Applicants' and the Minister has powers by this very Section in reference to his dealings with the Applicants and therefore they denied Ground D.

They further say that S.5 (4)(e) of the Act can operate to apply to all duly appointed members of the N.T.O. at once.

Finally, they contended that the First Respondent Minister does have powers to replace one office under the Act with another office and therefore they deny Ground G of the Motion.

It is common ground that under S.5(4) of the Act, the Minister responsible for Tourism has power to declare the Office of a member vacant, but the Minister can only do so after he/she is satisfied that one of the Five (5) elements in S. 5(4)[(a), (b), (c), (d), (e)] is established.

Importantly, thus, it has to be noted that where Parliament has given to a Minister or other person or body a discretion, the Court's jurisdiction is not to interfere with that discretion but to maintain a check on excesses in the exercise of discretion. In the words of Lord Ackner in Reg. v. Home Secretary, Exp. Brind [1991] [H.L.(E.)] 2 W.L.R. 590, 60 1 :

*"It would be a wrongful usurpation of power by the judiciary to substitute its, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the Court in the exercise of its supervisory role will quash that decision. Such a decision is correctly, through unattractively, described as a "perverse " decision. To seek the Court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made is to invite the Court to adjudicate as if Parliament had provided a right of appeal against the decision. That is, to invite an abuse of power by the judiciary."*

S. 5(4) [(a), (b), (c), (d), (e)] of the Act is intended to operate in relation to individual circumstances arising in relation to individual members.

Importantly the question then to be asked is :

Do the provisions [(a), (b), (c), (d), (e)] of Subsection (4) of the Section 5 apply to any individual applicant ?

So far as the facts of this case are concerned the Affidavit materials show that the Minister had no evidence upon which to make his decision about the Applicants. He did not conduct any inquiry at all into the circumstances of each member. He wanted them to cease being members of the N.T.O. and the only "power" he could find in the Act was Section 5(4).

I find also that as a matter of fact that there is no basis whatsoever for the Minister funding as an established fact, that suddenly and at the same time all the appointed members of the NTO are either insolvent, incapacitated by illness, convicted of crime or otherwise unfit to discharge their functions as is required by S. 5(4).

Further, there is no evidence that the Applicants, individually and jointly are unable or unfit to discharge their functions as members of the NTO. Equally, there is no evidence that the Applicants, individually and jointly have been advised, notified or contacted in any way as to how or why they are deemed to be unable or unfit to discharge their functions as members of the NTO.

The reliable test is to ask : "Could a decision-maker acting reasonably have reached this decision ?"

Authoritatively, Sir William Wade observes :

*"It is one thing to weigh conflicting evidence which might justify a conclusion either way. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the Court is disposed to intervene."* [see Wade, Administrative Law 7th ed. at p. 312].

In the words of Lord Diplock in Secretary of State for Education and Science v. Tameside Metropolitan Borough Council [1977] A.C. 1014, 1064 :

> *"The very concept of administrative discretion involves a right to choose between more that one possible course of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred."*

In this case, the Minister for Tourism, as the decision-maker, failed to call his attention to matters that he is obliged to consider. Thus, that failure constitutes, on the absence of what the Minister perceived to be sufficient justification on the merits, a course which surely no reasonable Minister would take.

In this case, I am of the opinion that s.5(4)(e) cannot operate to apply to all duly appointed members of the N.T.O. at once. Equally, s.5(4) cannot be used to replace one Office under the Act with another Office.

The intention of Parliament is to use s.5(4) on individual basis and under individual circumstances. This is in line with the objects and purposes of the Act. Further in support of this, the Minister may give to the Office such directions of a general character, after consultation with the Office, with respect to the performance of any functions of the office... to be requisite in the public interest. (s.21). Finally, the Minister may by Order make regulations not inconsistent with this Act for the better carrying out of the objects and purposes of this Act. (s.22) [CAP 142].

Therefore, the First Respondent Minister has exercised his powers under Section 5(4) of the Act in such a way that no reasonable Minister would follow and therefore, such decisions are immediately amenable to quashing by this Court upon the principles enumerated by Lord Greene in Associated Provincial Picture Houses Ltd v. Wednesbury Corp. (1948) 1 KB 223 (Wednesbury) which I have no difficulty to be guided by them and adopted them as my own and I so rule.

4. **<u>The Minister in purporting to act under s.5(4)(e) must give reasons for his belief and the Applicants have been denied Natural Justice</u>**
(grounds E(d) and F of the Notice of Motion)

The Respondents contented that the First Respondent Minister is under no legal obligation to give reasons for his purported actions and they deny that there has been a breach of the principles of Natural Justice.

In this case, the First Respondent Minister does not provide any reason for his purported decisions.

The principle of law on that point is very clearly stated in the decision of the Court of Appeal in the Attorney General of the Republic of Vanuatu (Appellant) v. President Frederick Karlomuana Timakata (Respondent) 2 Van. L.R. 679, 684. There, their Lordships accepting and following the High Court of Australia's decision in Public Service Board of NSW v. Osmond

[1986] the 1959 CLR 656 and after stating that the law as stated in that case is similarly stated by the House of Lords in England held that :

> *"It is therefore not possible to hold that the rules of natural justice require that reasons should be given for an administrative decision and still less possible to hold that there is a fundamental rule of that king. .... (further) the requirement that reasons be given for an administrative decision is not a fundamental principle of natural justice."* [the word in between brackets is my own].

It is common ground that his Court is only bound by the decisions of the Vanuatu Court of Appeal. Decisions of Commonwealth Countries and other jurisdictions are of persuasive authorities only for this Court.

In the present case, I beg to distinguish from the principal of law stated above in the case of Broadcasting and Television [Appeal Case No.1 of 1993 Van.L.R. 679].

By National Tourism Office Act, the Parliament intended to establish the National Tourism Office [sect. 2 of the Act] for the purposes of developing and improving the tourism industry. To carry out the objects and purposes of the Act, the Officer is "Mandatorily" ("shall" is used) given the functions of encouraging, assisting and ensuring that the services the industry provides are of as high a quality and of the highest possible standard. Furthermore, the office is given powers necessary and convenient for the carrying out of its functions. Those powers are subject to ministerial regulations [s.4(1) of the Act,]which themselves be made not inconsistent with this Act (s.22).

Importantly then, emphasis is put on the composition of the office which shall consist of eleven members, ten (10) of whom shall be [the persons described under s.5(1) (a) to (j) (inclusive)] and the ten members shall serve for a term of 3 years [s. 5(3)].

Then, should the Minister exercising his discretion under s.5(4)(e) of the Act, I am of the opinion that there are compelling provisions and circumstances under the N.T.O. Act [CAP 142] to impose on the Minister an implied obligation on him/her as a decision-maker to act fairly.

This implication derives from the terms of the Act itself.

This implies that since the Minister under s. 5(4) "may" which should be read "must" or "shall" by notice published in the gazette declare the Office of a member vacant, once he is satisfied that one of the 5 criteria of s.5(4) is established, the Minister is required to advise, notify or contacted in any way as to how or why each of Applicants is deemed to be unable or unfit to discharge his functions as member of the N.T.O. under s. 5(4)(e) of the Act.

In this case, the Minister had failed to give to the Applicants, reasons of his challenged decisions before he made them. In so acting as the Minister did in the present case, the Applicants were denied one of the essential elements of the administrative justice : They were denied opportunity for making

representations. The point to be clarified and understood here is that the Minister must inform the Applicants of the reasons of his purported decisions before he made them. So that the Applicants would have an opportunity to comment or to make representations.

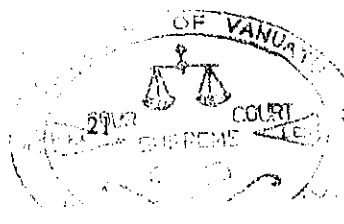
The following authorities or persuasive authorities and opinions are in support of this view :

In the case of [the Broadcasting and Television] Appeal Case No.1 of 1993, Gibbs, and Loss JJA conceded that :

> *"Where the rules of natural justice require that a person making a decision should give the person affected an opportunity to be heard before the decision is made the circumstances of the case will often be such that the hearing will be a fair one only if the person affected is told the case made against him..."*
> then they go on saying :
>
> *"... That is quite a different thing from saying that once a decision has been fairly reached the reasons for the decision must be communicated to the party affected."* (See also Public Service Board of NSW v. Osmond [(1986) 159 CLR 656 at 663].

In the Court of Appeal in Breem v. Amalgamated Engineering Union (1971)2 Q.B.D. 175, Lord Denning, in his powerful dissenting judgment said this :

> *"It is now well settled that a Statutory Body, which is entrusted by statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or what you will. Still it must act fairly. It must in a proper case give a party a chance to be heard. The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this : the Statutory Body must be guided by relevant considerations which it ought not to have taken into account, the decision cannot stand. No matter that the Statutory Body may have acted in good faith, nevertheless the decision will be set aside. That is established by Padfield -v- Minister of Agriculture, Fisheries and Food (Supra) which is a land mark in modern administrative law... If the rules set up a domestic body and give it a discretion it is to be implied that that body must exercise its discretion fairly. Even though its functions are not judicial or quasi-judicial, but only administrative, still it must act fairly. Should it not do so the Courts can review its decision, just as it can review the decision of a Statutory Body. Then comes the problems ought such a body statutory or domestic, to give reasons for its decision to give the person concerned a chance of being heard ? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be*



*afforded him, according as the case may demand. The giving of reasons is one of the fundamentals of good administration."*

In Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch. 149 at p. 170 Lord Denning said :

*"The speeches in Ridge v. Baldwin (1964) A.C.40 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."*

In the G.C.H.Q. case (Council of Civil Service Union v. Minister for Civil Service) (1985) A.C., must be consequences that effect the applicant,

*"(b) by depriving him of some benefit or advantage which either*

*(i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment ; or... "*

It is fundamental to understand that, it is one thing to weigh conflicting evidence which might justify either way. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this points, therefore, the Court is disposed to intervene. [See Sir William Wade, Q.C. LLD, FBA in administrative law, 7 ed. at p. 312].

In the instant case, the Minister is not relying on facts at all. He is seeking to use s.5(4)(e) of the Act to dismiss the N.T.O. in its entirety and he simply does not have the power under the Act to do so and there is no evidence to support the Minister's Action.

In effect, as Richard Gordon Q.C. pointed out in his Book *"Judicial Review : Law and Procedure 1996,*

*"A decision-maker is not , necessarily empowered to reach erroneous findings of facts about matters relevant to the existence of his jurisdiction for otherwise, he could by his own error give himself powers which were never conferred by Parliament."*

Further, Professor Wade recognises that :

*"There is a strong case to be made for the giving of reasons as an essential element of administrative justice. The need for it has been sharply exposed by expanding law of judicial review, now that so many decisions are liable to be quashed or appealed against on grounds of improper purpose, irrelevant considerations and errors of law of various kinds unless a citizen can discover*

*the reason behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. A right to reasons is therefore indispensable part of a sound system of judicial review... It is also a healthy discipline for all who exercise power over others."* (see Wade's Administrative Law, 6tyh Edition 547-550).

Therefore, while there is no general duty to give reasons, I am persuaded that R v. Secretary of State for the Home Department, exparte Doody is a persuasive authority for the proposition that a Court will require that reasons be given where a decision-maker is potentially susceptible to judicial review in order that an applicant may know whether an error of law occurred. [see Gordon, reference cited above at p.38].

I would order costs for the Applicants as requested in the Motion.

At the completion of the written judgment, I take note of the National Tourism Office (Amendment) Act No.7 of 1997.

**DATED AT PORT-VILA this 6th DAY of OCTOBER 1997**

**BY THE COURT**

.....

**VINCENT LUNABEK J.**
**Acting Chief Justice**