

BETWEEN: Alickson Viralone Gamaliere

Claimant

AND: Government of the Republic of Vanuatu in right
of the Minister of Foreign Affairs

Defendant

Date: 5th September 2023
Before: Justice W.K. Hastings
Counsel: Mr KT Tari for the claimant
Ms N Robert for the Defendant

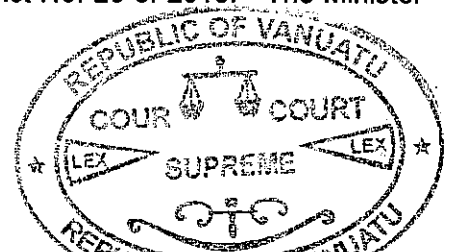
JUDGMENT

Introduction

1. Mr Gamaliere seeks judicial review of the decision of the Minister of Foreign Affairs to recall him from Dubai, where Mr Gamaliere was serving as Consul General of the Republic of Vanuatu.
2. Mr Gamaliere asks the Court to quash that decision as being unjustified, unreasonable, or unlawful. He also asks the Court to reinstate him as Consul General of the Republic of Vanuatu to Dubai.
3. The Republic of Vanuatu opposes Mr Gamaliere's claim.

Background

4. The claimant is a citizen of Vanuatu. By an instrument dated 3 March 2022, the Minister of Foreign Affairs appointed the claimant as Consul General of the Republic of Vanuatu to Dubai under s 17(1) of the Foreign Services Act 2013. After consultation with the Director General, the terms and conditions of Mr Gamaliere's employment as Consul General were established.
5. The Minister wrote to the claimant on 9 November 2022 to inform him "of the Government's decision to recall you as Consul General of the Republic of Vanuatu to Dubai, United Arab Emirates, with immediate effect. This is in accordance with Section 28 of the Foreign Service Act No. 20 of 2013." The Minister



also wrote "The above decision means you no longer have official mandate to represent the Vanuatu Government's interests in Dubai."

6. The Minister's letter did not set out the reason for recalling Mr Gamaliere. In its defence, the Republic stated it was because "the Claimant had travelled for unofficial purposes without obtaining prior approval of the employer" contrary to section 28(1)(i) of the Act and clause 9(1)(i) of the terms and conditions.
7. Section 28 sets out the grounds on which the Minister may recall a Consul General. Section 28 (1)(i) in particular provides as follows:

28. Recall and resignation of Consul General or Diplomatic Staff

(1) The Minister may in writing recall a Consul General or Diplomatic Staff, if he or she:

...

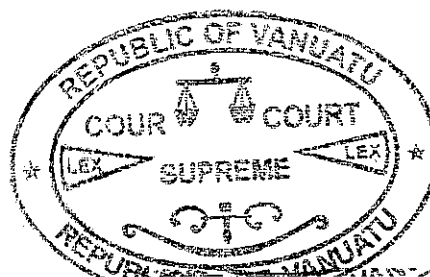
(i) consistently travels for unofficial purposes without obtaining prior approval from the Director General;

Clause 9(1)(i) of the "Terms and Conditions of the Employment of the Consul General of the Republic of Vanuatu to Dubai" dated 3 March 2022 is in similar terms. There is no material difference between the wording of either provision for the purpose of this claim.

8. In his sworn statement of 16 June 2023, the claimant confirmed "at all material times I was not afforded an opportunity to address any allegation and or grounds for my recalling as stipulated under section 28 of the Act."
9. In the conference convened under r.17.8, Mr Tari for the claimant and Ms Robert for the defendant agreed on the following facts:
 - a. The claimant was recalled on 9 November 2022.
 - b. The claimant was not given an opportunity to address the grounds on which the Minister's decision was based.
10. The agreed facts narrowed the issue to be tried. The essence of the case is whether the Minister of Foreign Affairs had an obligation to give the claimant an opportunity to address the grounds on which he intended to recall the claimant as Consul General to Dubai before making the decision to recall him.

Submissions

11. Mr Tari for the claimant submitted that s 5 of the Constitution entitles all persons to the protection of the law and to equal treatment under the law or administrative action. Mr Tari submitted that natural justice required the Minister to give the claimant notice of the reasons for his intended recall, and the opportunity to address those reasons, before the decision to recall the claimant was made. He relied on *Fairmount Investment Ltd v Secretary of State for the Environment* [1976] 2 All ER 865 at 872 (HL) per Lord Russell:



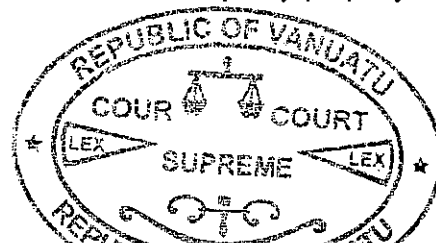
For it is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles.

Mr Tari submitted there is nothing in the Foreign Services Act that removes the Minister's obligation to comply with the principles of natural justice. He also submitted that the word "may" in the opening words of s 28 means that the Minister has a discretionary power requiring him to consider which of the grounds in s 28(1) he intended to use to recall the claimant, a consideration which requires taking into account the claimant's response if he had been given the opportunity.

- Ms Robert for the defendant submitted the Minister acted within his powers to recall the claimant. She submitted the Act is silent on the process for recalling a Consul General, and that a judicial review is not the appropriate civil proceeding to decide whether the Minister had an obligation to give the claimant an opportunity to respond before the Minister decided to recall him. Ms Robert submitted the Court must be cautious when dealing with a judicial review claim which if successful, and according to the claimant's further sworn statement, would provide the foundation to bring a subsequent claim for damages.

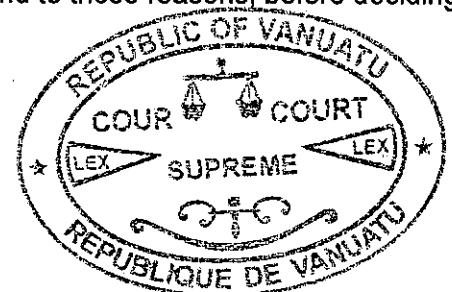
Discussion

- It is important to state what this case is not about. It is not about Vanuatu's obligations under the Vienna Convention on Diplomatic Relations ratified by Vanuatu in the Vienna Convention on Diplomatic Relations 1961 (Ratification) Act No. 1 of 2018. That convention concerns relations between states, not between a state and its diplomatic representative.
- This case is not about the merits of the Minister's decision. Judicial review concerns how the decision was made, not whether it was correct on its merits.
- This case is not about damages. This is an application for judicial review which involves consideration of matters quite different from those considered in claims for damages. Although a claim for damages may be made subsequently, it is usually not appropriate to include such a claim within judicial review proceedings which are meant to be determined expeditiously: *Marikembo v President of the Republic of Vanuatu* [2017] VUSC 44. In this case, the claimant has signalled in his further sworn statement that he intends to seek damages if there is a finding of unlawfulness in this case, but he has not asked for damages as part of this judicial review application.
- What this case is about, is whether natural justice imposes an obligation on the Minister of Foreign Affairs to give a Consul General reasons for his proposed recall and an opportunity to be heard before the recall decision is made. The extent of that requirement will depend on all the circumstances of the case: *Michel v President of the Republic of Vanuatu and others* [2015] VUCA 14 at [25]-[26]; *Minister of Education and Training v Tabi and others* [2023] VUCA 30 at [31].
- One of the circumstances that distinguishes this case from *Tabi* is that it concerns a decision of the Minister of Foreign Affairs with respect to a diplomatic officer. That makes justiciability an issue because the Court is constitutionally bound to respect the separation of powers between the judicial and the executive branches of government. The courts exercise restraint in matters of policy properly for the



executive, and the executive in turn respects the courts' determinations of questions of law (*De Smith's Principles of Judicial Review*, 2d ed., 1-036, p. 25).

18. The conduct of foreign affairs is squarely for the executive branch. The Court must be vigilant not to exercise powers properly belonging to the Minister of Foreign Affairs in the conduct of Vanuatu's foreign relations. The conduct of foreign affairs involves the formulation and implementation of policy vis-à-vis other states. In *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20, Lord Bingham noted at [8], the "restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations." These are examples of policy the government would expect a person appointed to represent its interests in foreign states to implement.
19. The appointment of a person to represent Vanuatu's interests abroad is therefore a vital component of the conduct of foreign affairs by the executive branch. The government needs to trust that the person it appoints to a diplomatic office will communicate and implement the government's foreign policy in the receiving state. This is why the Act imposes a high threshold on who is qualified to represent Vanuatu's interests abroad and sets out the process by which that person is appointed. The Act also describes the functions of a Consul General in terms of the relationship between Vanuatu and the receiving state.
20. The recall of a person as Consul General might also be for reasons of "high" policy, for example, as a result of the outbreak of war, or to mark Vanuatu's disagreement with some action of the receiving state. In those situations, the Courts will not adjudicate on the legality or propriety of a recall decision. But a recall may also be based on the grounds set out in s 28(1) of the Act. The grounds specified in the Act are largely disciplinary and performance-related. They are not matters of high policy. The separation of powers reserves to the courts determinations of questions of law in respect of matters not of high policy, including determining whether a decision made by a member of the executive branch was made in a procedurally fair manner, and the extent to which a member of the executive branch is bound by the obligations that natural justice imposes on him.
21. This was not a recall based on high policy. It was based on a statutory criterion. In this case therefore, the Court may properly decide whether or not the Minister's decision to recall the Consul General was made lawfully. That question is justiciable, does not involve the Court in high policy, and it respects the separation of powers.
22. Was the Minister's decision to recall the claimant lawfully made? The short answer is no. It is now well established "in the field of public administration and employment that procedural fairness, often referred to as natural justice, requires that a reason and an opportunity to be heard be given before a decision affecting personal rights is made:" (*Minister of Education and Training v Tabi and others* [2023] VUCA 30 at [31]). There is nothing in the Foreign Services Act that restricts or eliminates the Minister's obligation to give reasons and an opportunity to be heard before making a decision to recall a Consul General on a s 28(1) ground. I also agree with Mr Tari's submission that consideration of the Consul General's response will make the Minister's decision more thorough and robust, in the sense the Minister will have taken into account a relevant consideration before making his decision. The wording of the ground cited by the Minister as the reason for recall provides the claimant opportunity to defend himself. I find therefore that the Minister acted unlawfully in not providing the claimant reasons for his proposed recall and in not providing the claimant with an opportunity to respond to those reasons, before deciding to recall the claimant as Consul General.



23. The consequences that should follow the findings of unlawfulness then arise. Ordinarily, if a decision has been made following an unlawful process, the decision would be quashed. It would then be for the Minister to remake the decision by giving the Consul General reasons for the proposed recall, an opportunity to respond to those reasons, and if the opportunity is taken up, to take that response into account in deciding whether or not to recall him.
24. In this case however, quashing the decision to recall the claimant would essentially reinstate him as Consul General (although the claimant out of caution has separately asked for an order reinstating him as Consul General in addition to the quashing order). Restoring the claimant to his position as Consul General to Dubai would effectively involve the Court in the appointment of a person to represent Vanuatu's interests in the receiving state. That is a matter reserved to the executive branch in its conduct of foreign affairs. The separation of powers "dictates that questions of law should be for conclusive resolution by the judicial branch and ... the executive must respect the court's determination of a question of law" (*De Smith*, above). To go further than a finding of unlawfulness risks breaching the separation of powers by entering into a realm democratically reserved to the executive in its conduct of foreign relations.

Result

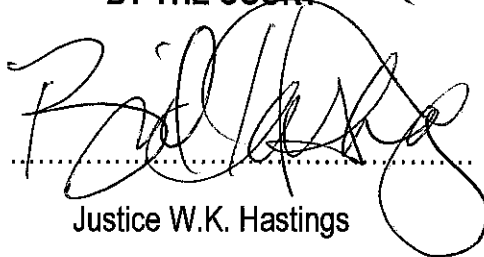
25. Having determined the question of law in the claimant's favour, to my mind, and for the above reasons, that is as far as the Court should go. I decline to quash the Minister's decision, and decline the claimant's application for an order reinstating him as Consul General to Dubai.

Costs

26. Both sides have been partially successful. Costs will lie where they fall.

Dated at Port Vila this 5th day of September 2023

BY THE COURT


Justice W.K. Hastings

