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

Civil Appeal
Case No 18/2234

BETWEEN: **MOHAMMED RIZWAN**
Appellant

AND: **GOVERNMENT OF THE REPUBLIC OF VANUATU**
Respondent

CORAM:	***Hon Chief Justice V Lunabek*** ***Hon Justice J von Doussa*** ***Hon Justice J Hansen*** ***Hon Justice O Saksak*** ***Hon D Fatiaki*** ***Hon Justice S Felix***
COUNSEL:	*Mr D Yawha — Counsel for Appellant* *Mr M Hurley — Counsel for Respondent*
DATE OF HEARING:	*13 February 2019*
DATE OF DECISION:	*22 February 2019*

JUDGMENT OF THE COURT

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[1] The appellant appeals against the judgment of the Supreme Court dated 20 August 2018, dismissing his application for judicial review.

Background

[2] The appellant is a non-citizen of Vanuatu. He holds a residency visa for Vanuatu and has family and business interests here. He is a citizen of Fiji, but apparently has permanent residency status in New Zealand.

[3] On 5 April 2018, becoming aware of certain matters (irrelevant to this appeal), the Minister of Internal Affairs issued an order pursuant to s 53A (1) (a) of the Immigration Act

2010 for the removal of the appellant. That led to a successful urgent stay application, and those proceedings lapsed by virtue of a memorandum dated 23 May 2018. The only live matter remaining in those proceedings was the question of costs.

[4] The Minister undertook further inquiries and on 30 May 2018 issued a further removal notice, this time pursuant to the provisions of s 53A (1) (b) of the Act. At 6 a.m. on 30 May, the appellant was taken to the airport and a second urgent stay application was made that morning. A stay was ordered.

[5] The decision of the Minister was the subject of a Judicial Review proceeding, and the matter came before the Judge on 3 August 2018. Before the Judge, two matters were stressed for the appellant in the following sequence:

(i) whether or not a notice ought to have been given to Mr Rizwan of the Removal Orders; and then,

(ii) whether the Minister had acted reasonably in making the removal order under s 53A (1) (b).

We are unsure as to why it was suggested that the notice point ought to be considered before the s 53A (1) (a) and (b) matters.

[6] After rehearsing the matters before the Minister, the Judge made factual findings and then, in reliance on the decision of this Court, *Ayamisiba*[1], correctly identified a two-step procedure:

(i) the Minister had to form an opinion that Mr Rizwan came within either s 53A (1) (a) or (b), and then

(ii) the Minister had to consider whether notice ought to be given.

[7] The Judge considered there was sufficient information and evidence before the Minister that allowed him to make a reasonable decision for the removal of Mr Rizwan. He further

[1] *Ayamisiba v Attorney General [2006] VUCA 21.*

found that the Minister had turned his mind to whether or not notice should be issued and concluded correctly, for the reasons given by the Minister, that notice should not be given. He dismissed the appellant's application.

The statutory provision

[8] Section 53A of the Act provides as follows:

> **53A 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) 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] The substantive parts of this section are the same as that contained in s 17A of the previous Immigration Act, as considered in *Ayamisiba.*

[10] We note the first removal order was made under subsection (1) (a), which relates to activities detrimental to the national security, defence or public order of Vanuatu. There was mention in the information before the Minister at that stage, in a hearsay and anecdotal form, that the appellant was a wanted person in Fiji. However, the Minister did not proceed under that subsection, and did not rely on that. Rather, he proceeded on a consideration of the appellant's alleged behaviour and activities in Vanuatu. We are quite satisfied the resolution of the proceedings relating to the previous removal order is no bar to the Minister receiving additional information and issuing a new removal notice under a different subsection, as occurred here.

Evidence

[11] Following the litigation surrounding the first removal order, additional information became available to the Minister. This is revealed in the various Sworn Statements filed in this matter, on behalf of both parties.

[12] The Commissioner of Police for Vanuatu attended a dinner in Suva on the 21 May 2018 while on a study tour of Fiji. At that time, a Fijian police officer, who attended the dinner, informed the Commissioner of issues relating to the appellant Mr Rizwan. On the Commissioner's return he met with the Minister on 25 May 2018 in relation to budgetary matters. The Minister requested the Commissioner to remain after that meeting. The Minister inquired about Mr Rizwan, and the Commissioner briefed the Minister on the information he had received at the dinner, to the effect that Mr Rizwan was a wanted man in Fiji.

[13] Following the briefing, the Minister requested more information, and a Mr Garae, Aide De Camp, was ordered by the Commissioner to follow up with the Fijian authorities. Mr Garae did so, sending an email to the Assistant Commissioner of Fiji Police on 28 May 2018. He received a reply the same day from Isireli Tagicaki the Investigations Manager for the Fiji ICAC. The email stated:

> *On behalf of the Deputy of The Fiji Independent Commission Against Corruption, I would like kindly acknowledge that **Rizwan** is on our Wanted List of Suspect. He has a few charges still pending against him with us when he left the country. In fact the Commission was at the verge of laying charges against him in the Western district where he regularly operates from, when he absconded to Vanuatu.*

This information was available to the Minister.

[14] Following the issuing of the Removal Order on the 30 May 2018 a further email was received on 11 June 2108 from Chief Investigator West, Fiji Independent Commission of Corruption, a Mr Driver. He advised that the appellant had been convicted of a charge of conspiracy to commit felony, namely endeavouring to obtain money by virtue of forged

instrument, and sentenced to 12 months' imprisonment. He also said there were pending charges against a Mohammed Iliyaz and another. It became apparent from Mr Hurley's submission *"the other"* was the appellant. The charges involved counts of conspiracy to commit a felony; fraudulently obtaining the payment of VAT refunds; forgery; and uttering a forged document.

[15] The appellant in the proceedings had filed a Sworn Statement in the first proceedings as early as 8 May 2018 maintaining he was not the Mohammed Rizwan referred to by the Fijian authorities, that he had no criminal record, that he did not face pending charges in Fiji, and he had never been fingerprinted in Vanuatu or Fiji.

[16] The effect of the Sworn Statements filed in support of the respondent's case show the statements of the appellant to be untrue. It was entirely proper for this additional information to be filed by the respondent to defeat the untrue statements of the appellant in both Judicial Review proceedings.

[17] The fingerprints taken off the appellant in Vanuatu on 26 June 2018 exactly match those of the Mohammed Rizwan the Fijian Police were speaking of. Mr Yawha did not really address the proven lies of the appellant in his submissions. There is a further allegation in that material that the Fijian Police Clearance Certificates exhibited by the appellant were forgeries. They also demonstrate that the appellant had a number of convictions in Fiji and a number of pending charges. This evidence is unchallenged.

[18] It is clear from the Sworn Statements that following the lapsing of the first order, and before the issue of the second, the Minister had the benefit of the briefing of the Commissioner of Police that identified Mr Rizwan as a wanted person in Fiji. Additionally he had the material Mr Garae had received from Isireli Tagicaki that the appellant was on the wanted list of suspects and had charges still pending against him when he left Fiji. So clearly, by the date of the Minister exercising his discretion to issue the second removal order on 30 May, the Fijian authorities had confirmed the appellant as a wanted man. That of course has now been established beyond all doubt, despite the denials of the appellant.

Submissions

[19] In submissions to the Court, Mr Yawha relied on only two grounds. The first, was the information provided in the emails was insufficient to allow the Minister to make a reasonable decision to decide that the appellant was a wanted man and it was proper to make an order under s 53A(1)(b). When asked by the Court what information would have sufficed, he submitted it needed to be something formal from the Fijian authorities such as an application for an Extradition Order, a copy of the charges laid by the Fijian police or something under an official seal.

[20] His second point was that the Minister needed to consider whether or not notice should have been given in accordance with the provisions of natural justice as set out in *Ayamisiba.*

[21] Mr Hurley, for the respondent, submitted that the requirement for formal documentation as suggested by Mr Yawha would render the provisions of s 53A (1) (b) nugatory. He further pointed out that this Court has recognised on earlier occasions the significant changes in the modern world that lead to matters being dealt with by electronic communication. That is a given. He submitted it was nonsensical to suggest it would require something in the way of an application such as an Extradition Order from Fiji to establish to the reasonable satisfaction of the Minister that the appellant was a wanted man. Mr Hurley said it would be quite wrong to require formalised stamped documents in the circumstances that would regularly confront the Minister under s 53A (1) (b).

[22] He also submitted that on the plain wording of subsection (2) it is not necessary for the Minister to turn his mind to whether or not there ought to be notice given and that *Ayamisiba* was wrongly decided. He also referred the Court to an academic article that was critical of the decision in *Ayamisiba.*[2]

[23] He submitted that on the evidence, not only had the appellant lied about various matters, but a police clearance he relied on was in fact a forged document. There had been no cross-examination on this matter, as the appellant's counsel did not seek to cross-examine any of the respondent's witnesses. This left the respondent's evidence unchallenged.

2 Professor Don Paterson and Dr Robert Early, *Journal of South Pacific Law* (Vol 10 2006 — Issue 2).

Decision

[24] As noted the appellant did not cross examine any of the respondent's witnesses that means the judge and this Court are both entitled to accept all of that evidence.

[25] We are quite satisfied that it is unnecessary for the Minister, in reaching his conclusion, to only consider evidence and information of the formal nature submitted by Mr Yawha. We agree with Mr Hurley that to decide otherwise would undermine the very purpose of the legislation, which is to protect the Republic of Vanuatu from non-residents who are criminals, or facing serious criminal charges in another jurisdiction, or whose actions are detrimental to national security, defence or public order. To require the formalised documentation contended for by Mr Yawha fails to understand the nature of the investigation of the sort required under s 53A (1) and (b). It would also, as Mr Hurley submitted, seriously undermine the purpose of s 53A.

[26] We do not understand Mr Yawha's reference to an Extradition Order as that falls to be considered under different legislative provisions. The Minister had cogent evidence from the Fijian authorities in the Commissioner's briefing and the email that the appellant was *"a wanted man"*. In his judicial review proceedings, the appellant denied this, but the sworn statements show him to be a liar and clearly a wanted man in Fiji.

[27] We are satisfied the Minister balanced this information against the other relevant factors relating to the appellant's residency here and his family and business interests. In *Wednesbury* terms, the Minister made a reasonable and considered decision.

[28] In relation to the notice, we struggle to understand Mr Yawha's submission. In the original submission, Mr Loughman, then appearing, had submitted that the giving of notice seemed to be a matter that should be considered before considering subsections (1) (a) and (b). That is not what *Ayamisiba* says. The trial Judge correctly identified the two-step test that we set out above.

[29] We see some force in Mr Hurley's submission on the plain meaning of the words of subsection (2) and the criticisms in the academic article he referred us to. However, we do not think the point arises directly in this appeal. The reason for that is that the Minister clearly

turned his mind to whether or not notice should be given. He gave pertinent reasons as to why he considered it should not be given. We concur with those reasons and his decision not to give notice was reasonable, as the judge found. We also note that if the point ever arises directly for consideration, this Court would need to have argument as to whether or not there were any statutory or regulatory provisions in Vanuatu that could impact on subsection s53A (2), and also consider the effect of any of the international obligations that have been accepted by Vanuatu. This was one of the points made by the authors of the article referred to above.

[30] For the sake of completeness we note we have not exactly followed the grounds of appeal as filed. Rather, we have focused on the only two points relied on by Mr Yawha in the course of submissions.

[31] Finally, we are advised from the bar that between the date of the hearing of the Judicial Review and the delivery of the decision, the appellant left Vanuatu. It is suggested that this was in a somewhat dubious way. He has not returned.

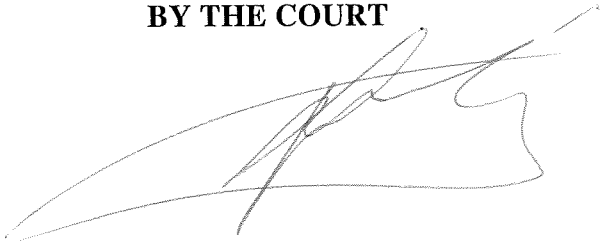
[32] The appeal is dismissed.

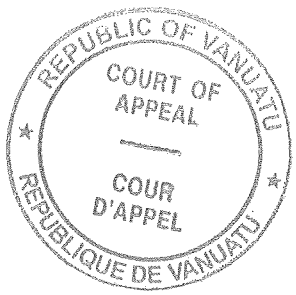
Costs

[33] The respondent sought costs. Given the appellant has fled the jurisdiction any order for costs is probably unenforceable but we award cost to the respondent in the sum of VT 50,000.

DATED at Port Vila on 22nd of February 2019.

BY THE COURT





Hon. Vincent Lunabek
Chief Justice.