IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

Civil Appeal

Case No. 19/367 CoA/CIVA

BETWEEN: **Eilon Mass**

Appellant

AND: **Minister of Internal Affairs**

Respondent

Date:	1 May 2019
Before:	Chief Justice V. Lunabek
	Justice J. von Doussa
	Justice R. Young
	Justice O. Saksak
	Justice D. Aru
	Justice G.A. Andrée Wiltens
In Attendance:	Mr E. Mass in person
	Mr S. Aron for the Respondent
Date of Decision:	10 May 2019

JUDGMENT

A. Introduction

1. Mr Mass is in a dispute with the Minister of Internal Affairs regarding his immigration status. In the course of the dispute, Mr Mass sought an urgent restraining order to prevent the Minister from proceeding with his removal from Vanuatu until the Judicial Review proceedings filed by Mr Mass have been completed. That application was declined, and Mr Mass appealed.

2. Prior to the hearing of the appeal, the Minister gave an undertaking to not pursue the Removal Notice until the substantive Judicial Review Claim is determined. It is therefore not necessary

for this Court to hear that appeal, or to make any additional orders/directions. Costs are to lie where they fall.

3. Additionally, in the course of the various proceedings that make up this litigation, Mr Mass applied for the primary Judge to recuse himself on the basis of actual and perceived bias. The application was declined, and Mr Mass also appealed that decision. The remainder of this judgment deals with this matter.

B. Background

4. Mr Mass has been in Vanuatu since late 2012. His immigration status since then has been the cause of much legal debate between Mr Mass and the Minister.

5. Of direct relevance to the issue we are considering, on 16 January 2018, the Minister of Internal Affairs issued a Removal Notice in respect of Mr Mass, pursuant to section 53(2) of the 2010 Immigration Act [Cap 17]. That invited Mr Mass, within 14 days, to respond with reasons for the Minister to consider as to why he should not be removed. Mr Mass accepted that invitation and responded at length by letter dated 22 January 2019.

6. On 30 January 2019, Mr Mass filed an application for Judicial Review, seeking to quash the Removal Order plus other ancillary relief. At the same time, Mr Mass applied *ex parte* for an order to restrain the Minister from taking any steps to remove him from Vanuatu until his Judicial Review application had been heard.

7. On 5 February 2019, the primary Judge directed that State Law Office be served with the application for restraining orders and be given the opportunity to make submissions. He heard the application on 6 February 2019, and orally declined to make the orders sought. That was subsequently confirmed in writing.

8. On 26 February 2019, Mr Mass made an application for the primary Judge to recuse himself from hearing the application for Judicial Review. That application was heard on 4 March 2019. Again the decision to decline the application was given orally, and later confirmed in writing.

9. On 7 March 2019, Mr Mass appealed that decision. He was given Leave to Appeal by the primary Judge on 18 March 2019.

C. The Decision

10. By Minute dated 4 April 2019, the primary Judge recorded that he rejected the application to recuse himself. He set out that the application was based on 3 grounds, all of which he did not accept. There was submitted to be apprehended bias on the part of the Judge in not hearing the application for restraining orders on an *ex parte* basis. Secondly, the delay in releasing a written decision regarding the rejection of that application also demonstrated apprehended

bias. Finally, it was submitted that to have declined the application for restraining orders also demonstrated apprehended bias.

11. The primary Judge saw no apprehension of bias available on the basis on which the arguments were put forward, and he accordingly declined to recuse himself. The Judge further commented that "...the general observation made by Mr Mass about the Courts being discriminatory towards him, including myself, is irrelevant to this particular case."

D. Appeal

12. Mr Mass was highly critical of the primary Judge for not dealing with his urgent Application for Restraining Order on an *ex parte* basis. He pointed to a number of examples where matters were dealt with *ex parte*. The fact that the primary Judge required the matter to be dealt with *inter parties* was submitted to be the commencement of a course of conduct by the primary Judge, which an independent person with full knowledge of all the material facts, would regard as demonstrating bias.

13. Mr Mass was also critical of the primary Judge for not immediately, as allegedly promised by the Judge, confirming his oral decision in writing – that was only done by Minute dated 7 February 2019 but only received by Mr Mass on 1 March 2019. He submitted the Minute was back-dated. Mr Mass submitted that he needed the written decision as the primary Judge, when declining the application, had stated he would give certain instructions to the Minister regarding the possible removal of Mr Mass. Mr Mass needed those directions as he continued to be in danger of imminent removal.

14. When the written decision was forthcoming, Mr Mass considered the directions to the Minister were vague, confusing and unhelpful. He also submitted that because the decision had gone against him that too was indicative of bias on the part of the primary Judge.

15. Mr Mass was further critical of the delay in receiving the written decision confirming that the Judge would not recuse himself. He submitted that the Judge had committed to providing this in the soonest time possible, but the Minute was only released on 4 April 2019 – a month after the hearing.

16. Mr Mass also pointed out that the primary Judge has still not provided a written decision regarding granting him Leave to Appeal, since 18 March 2019.

17. Mr Mass has been in the throes of litigation in Vanuatu for many years. To use his language he "...faced government corruption and miscarriage of justice for several years included many judgments of the courts...which locked him up in jail, or refused to release him..." He submitted he had been incarcerated wrongfully for 287 days. Mr Mass submitted that the primary Judge was simply continuing to follow the trend of judicial bias against him, even in the face of his continued serious jeopardy of being deported and while suffering mental stress and sleepless nights. That was said to further demonstrate apprehended bias.

E. Discussion

18. Recusal is appropriate if there is a reasonable apprehension on the part of an informed and fair-minded observer of the absence of an impartial, objective and independent tribunal. The test involves a 2-step consideration. First, what should be identified is what it is said that might lead a judge to decide the case on other than the merits. Secondly, and equally importantly, there must be a logical connection between the matter and the feared deviation from the course of deciding the case on the merits.

19. We are unable to criticise the primary Judge for an obviously sensible step in not hearing the Application for Restraining Orders *ex parte*. It was right to get State Law Office involved. Not only that, but the matter was dealt with, as it should have been, expeditiously. We also do not accept that Mr Mass was in real danger of being imminently deported – especially in light of the primary Judge making it plain in his Minute that the Minister's deportation considerations should wait until the Judicial Review proceedings had determined the legality of the process. There is nothing in any of these points that might lead a fully informed reasonable person to an apprehension of bias.

20. Mr Mass had unrealistic expectations in expecting written decisions forthwith. What was provided, and when it was provided, is unremarkable; and in our view not unduly delayed. Even if there was delay, we do not consider a fully informed reasonable person would apprehend bias on the part of the Judge.

21. We certainly do not think the Judge's comments to the Minister lack clarity. Nor do we see any evidence of back-dating. The documents simply reflect what occurred. These matters could not lead to an apprehension of bias.

22. There is no need for the primary Judge to provide written reasons for granting Leave to Appeal.

23. We respectfully agree with the primary Judge that Mr Mass' litigation background is not relevant when determining the issue of recusal. Mr Mass may well have little or no faith in the Vanuatu justice system as a result of his personal experiences, but his views cannot be equated with those of a reasonable, fully informed and fair-minded observer.

24. The fact a decision goes against one of the parties is in the nature of all legal disputes – there is always a winner and a loser. Much more than a mere loss needs to be established before a contention of bias can have any prospect of traction.

25. There is nothing in any of the matters advanced to suggest that the primary Judge might not decide the Judicial Review application on anything but the merits of the case. The appeal therefore falls at the first hurdle. The second step of the test need not be addressed.

F. Result

26. This appeal is dismissed.

27. The Respondent is entitled to costs, which we set at VT 35,000. Mr Mass is to pay that within 21 days.

Dated at Port Vila this 10th day of May 2019
BY THE COURT

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Chief Justice V. Lunabek

REPUBLIC OF VANUATU
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