

IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU  
HELD AT PORT VILA

Civil Case No. 30 of 1997

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(Civil Jurisdiction)

BETWEEN: Mr. GUY BENARD

(Petitioner)

AND: THE MINISTER FOR IMMIGRATION

(First Respondent)

AND: THE COMMISSIONER OF POLICE

(Second Respondent)

AND: THE PRINCIPAL IMMIGRATION  
OFFICER

(Third Respondent)

JUDGMENT

The Petitioner Guy Benard and his wife and daughters live in Port Vila. On 10<sup>th</sup> April 1997 early in the morning he went out to get bread. On his return there were police cars outside his house: there were many police officers in and around his house. He was arrested and taken to the police station. He was kept in cell 6 until the next day. He was ill and was taken to the hospital. He was taken that day to a court and later released.

It appeared that the petitioner's arrest was as a result of a removal or deportation order and the Principal Immigration Officer was using his power to arrest him, then keep him in custody with a view to speedy removal from the country.

In his petition under articles 5, 6 and 53 of the Constitution he alleges breaches of Articles 5 (1) (b), (d), (i) and (k). The court proceeded on the petition filed on 23 May 1997. That petition requested various orders and relief. The action throughout has proceeded as one for compensation for infringement of constitutional rights effectively under prayer H. It might be action could or should have been brought for assault, wrongful arrest, false imprisonment and other torts. However, I must give judgment on the petition.

A variety of legal arguments have been advanced on behalf of both parties, particularly the respondent in answer to this petition. There is much evidence, material and argument which is peripheral and has little or no bearing on the issues. The petitioner was legally represented until about June 2000 and thereafter intermittently by the Public Solicitor. By June 2000 the court was dealing with preparation for trial and not the framing of the petition.

The respondents have sought in their final submissions to reply strictly on what is set out in the petition. Many matters directly related to the substance of the petition were covered in evidence although they were not specifically set out in the petition. A court must keep the balance between assisting a litigant who appears to have a good cause but in sufficient legal expertise to pursue it properly and favouring one party in a dispute to the detriment of another.

In this case, the petitioner had full legal assistance until June 2000 and thereafter intermittent advice and guidance.

I consider the most practical way of approaching this case is to make findings of fact and then apply the law, even though that application

of the law might mean there was no necessity to make certain findings of fact. Where it is clear from the law no finding of fact should be made then I will refrain from doing so.

For the petitioner I have heard the evidence of Guy Benard, Vanessa Benard, Jean Vincent-Do, Hilda Crowby-Ito, Robert Karie, Sumbe Antas, Mrs.Hortas (Housegirl), Candice Benard, Marie Celine Chan Si Lin and Robert Bohn. Two affidavits of Hilary Toa were read.

For the respondent I have heard the evidence of Peter Bong, Commissioner of Police, John Mark Bell and Sergeant Kami Toa.

I will consider the evidence of each witness in turn.

Vanessa Benard is the petitioner's daughter. She was asleep at home when she became aware of police officers in their house. She was wearing pants and T-shirt. As she left the house she saw a police officer in her parents' room. He was by a cupboard. She saw him with a bag in his hand which she knew contained some of her mother's jewellery. He put it in his pocket. She then stood outside with her mother and sisters in the rain. She was 'petrified'. She saw her father handcuffed and taken away. She was not shown any document or told why the police were there. After the police left she returned to the house and with her mother saw that a brown velvet bag, which contained the jewellery, was missing. There was nothing else missing from the house.

I will deal with the question of the jewellery later. I accept the evidence of Vanessa Bernard. The incident was clearly fixed in her memory and her descriptions were consistent with other witnesses.

On 14 March 1997, approximately four weeks before the petitioner's arrest, Jean Vincent-Do says two police officers came with

little warning to his house. They took him to the police station where he stayed for approximately four hours. For one and a half hours they pressurised him to say he had seen semi- automatic guns at the home of the petitioner and on his ship. He refused to do so, as it was not true. He was ordered not to tell anyone what happened. He was not ordered to make a false statement.

I accept his evidence. He was unshaken in cross- examination and was clear and forthright on details.

Hilda Crowby-Ito was seen by two police officers at 1pm on 10 April at her home. She was asked to make a statement saying she had seen Guy Benard threaten someone with a knife at Star Wharf. She refused to do this as it was not true. She was then told to 'forget it'

I accept her evidence. There was nothing to suggest she was doing other than tell the truth.

In 1997 Robert Karie was Minister of Home Affairs. He said he was in charge of Immigration and Willie Jimmy was Minister of Foreign Affairs. He said he was consulted about the proposed deportation of Guy Bernard and did not agree to it. He did not know Guy Benard was arrested on 10 April 1997, until Mme Benard came and told him.

He said in 1997 the Minister of Home Affairs was responsible for the police and cases of deportation. Robert Karie said that between 10<sup>th</sup> and 25 April those powers had been taken from him. He produced RDK/1.

This document, signed by the then Prime Minister, and dated 25 April apparently restored responsibility for the police to the Minister of Home Affairs, Karie D. Robert. Later, in his evidence for the respondent,

the Commissioner of Police stated he was then responsible for the appointment of the Principal Immigration Officer, who would have been a police officer. The respondent produced documents (Official Gazette 10<sup>th</sup> February 1997) showing at that time the Minister of Foreign Affairs was responsible for immigration affairs. Indeed the Order for Removal is headed Ministry of Foreign Affairs and Immigration.

The petitioner was able to produce documents dated 1992 showing that full responsibility for immigration affairs had been passed to the Public Service Commission.

There is thus conflict as to who was responsible for immigration and the service.

I do not reject the evidence of Robert Karie, but I cannot say on the evidence before me he was the person responsible for decisions on immigration, and in particular questions of deportation.

Sumbe Antas the Deputy Director of Customs gave evidence next. He told the court that the Customs Department can seek the assistance of police if it is required in the execution of their duties.

The petitioner gave evidence about the delay in 1996 in the customs clearance of his boat the MV Kimbe and its containers. That does not at first sight appear to have any bearing on these proceedings. However, the petitioner does allege that his arrest and detention, with a view to immediate deportation, was the result of the desire of certain persons, including or aided by others in the Government and executive, to have him out of the country.

I do not have evidence concerning the clearance of the boat and its containers to make any findings as to the reasons for the delay.

There is one important aspect of Sumbe Antas' evidence. A licence for one year, and dated 9 December 1996 was issued for Guy Benard to import three firearms. That import licence was revoked by letter dated 27 March 1997, fourteen days before the arrest and detention. No specific reason was given other than to say "*Follem some allegation we iko againstem Mr. Guy Marcel Alain Benard mo investigation i still procede*". I do not say whether or not in law a reason should be given or could be required.

I accept the evidence of Sumbe Antas, although only a small part is relevant to these proceedings.

The petitioners' housegirl, Mrs. Hortas, gave evidence next. She saw the house was under surveillance in early 1997. On 10 April she arrived after the police and Guy Benard had left. She saw Madame and the girls were upset and crying, the house was dirty and Madame had lost her jewellery. She described the jewellery and how and where it was kept.

I accept her evidence. Although not specifically relevant to any of the major issues in the case, it gave background consistency to the allegations of the petitioner.

Candice Benard adopted her affidavit and gave evidence to support events at the house on the morning of 10 April as alleged by the petitioner. I accept her evidence.

Two affidavits of Hilary Toa, dated 30 October 1997 and 14 May 1997, were read by agreement to the Court. These are of peripheral

evidence and there was some challenge to the admissibility of parts thereof.

Madame Marie Celine Chan Si Lin, the petitioners' partner, gave evidence. She arrived in Vanuatu on 10 October 1995. She lodged the necessary documents, fees and guarantees to apply for residency. She obtained a permit valid from 2 April 1996 to 1<sup>st</sup> February 1997. She applied for renewal in late January 1997. Between February and April 1997 she had no valid permit. *"Everytime I went to see them, they just said come back ... I was afraid, because of what had happened, Guy Benard had been arrested and I had no papers."*

She described the morning of 10 April (she mistakenly said the 9<sup>th</sup> in evidence). She described police entering the house and being required with her daughters to stand outside in the rain, and clad in few clothes. She told of how her oldest daughter reported the theft of the jewellery to her.

In cross-examination she agreed she had no permit for a while, but said she was waiting for a reply. She stated no document or search warrant was shown or proffered; she saw a policeman with a paper in his hand. When it was put to her that it was a search warrant she replied *"In that case why not show me."* Eventually, with the assistance of the French Ambassador, she obtained her permit. She gave detailed evidence about the missing jewellery, when and where she had acquired it and its value, where it was kept and how she left it with Madame Goiset, for safe keeping, when she was overseas.

I accept her evidence. She is the partner of the petitioner but did not appear to give her evidence in a way other than a fresh recollection of what happened.

Robert Bohn gave evidence next. He stated in 1996 Madame Chan Si Lin came with Madame Thi Tham Goiset to discuss business matters and forming a company, Blue Wave, to be involved in shipping. He talked about the delay in clearance and costs of storage of the petitioners' boat and containers. He said no reason was given for the delay. I accept this evidence, but again, it was of peripheral, if any, relevance.

The petitioner, Guy Benard, gave evidence next. He adopted his affidavits of 24 April 1997 and 5<sup>th</sup> September and 24<sup>th</sup> October 2000.

He presented his curriculum vitae and gave a history of his decision to come to set up in business in Vanuatu and the preliminary actions he took. He gave evidence about the setting up of a fishing project, which is his area of expertise.

Guy Benard arrived in Vanuatu on 11<sup>th</sup> July 1996 on a visitors permit. He said problems seemed to be cropping up for his project. The company was Blue Wave. But despite the difficulties, "*I decided to go ahead. It was a mistake.*" He said money was requested "under the table".

On 21 October 1996 his boat MV Kimbe arrived. (It is now owned by Blue Wave). He was granted a work permit. The respondents accepted the petitioner had a valid work permit in April 1997. He stated that on 1<sup>st</sup> November 1996, at the instigation of Madame Goiset, the MV Kimbe became the subject of a Mareva injunction.

He stated about that time he was told he had a residency permit, No. 413/96, valid for a year. He was never actually given the permit.



It was at that point in his evidence that counsel for the respondent stated *"we say there was a valid work permit, but no valid residence or visitor's permit in April 1997."*

Guy Benard continued that he had a valid ticket to board a flight on 11<sup>th</sup> November 1996, but the Immigration Department would not release his passport which had been handed in with his application in October 1996. The passport has never been returned.

[The passport was later held by the Court on the application of the respondents. Towards the end of evidence counsel for the respondents stated there was no longer any request by them to the Court for the passport to be held].

Guy Benard continued that he wished to leave Vanuatu on 11<sup>th</sup> November, to comply with the law, he couldn't. His passport was being withheld.

He described his attempts over the next few months to sort out the position, and his fears that a person was behind the problems he was facing. He said he was warned not to get another passport from the French Embassy.

The petitioner then described the events of 10<sup>th</sup> April 1997. He left early to get bread and returned to find police cars and police outside and in his house. He was arrested and handcuffed, thrown against the car then taken to the police station and placed in a cell. A visiting friend who had been staying with him, Yassid Chouach, was placed in the same cell, No. 6. He was not shown any arrest or search warrant.

He described the poor conditions in the cell. He had no food, no access to a toilet, "*we were locked like dogs*". His colleague was very upset and called for the police to come. Mr. Benard says he suffers from a real heart problem.

Sometime the next day a representative of the French Embassy was allowed to see him. By that time he was running a fever, and insisted he go to the hospital. He was later taken there, but the police, he says, withheld the tablets prescribed for him. He had some water at the hospital.

He said on return to the cell his wife had Court Orders to go to the Court; "*Immigration wanted to take us to the Airport*".

He said later he went to Court. He couldn't understand what was happening as he had a fever. Someone accused him of making pornographic photographs of his children, and that is why they wanted him deported, (the petitioner became very emotional at that suggestion).

He said after the court hearing he went back home. He said he was never told why he was arrested or for what offence. At one stage he saw a paper with 'removal order' on it.

He said twice since that time he has been charged with other offences and acquitted.

He said he was later told by his advocate that his deportation was for s. 5 Immigration Act. Two statements, one each purportedly from M. and Mme Goiset were given to him making allegations against him. Neither was signed. The statements were dated 9<sup>th</sup> April 1997. "*That is when I realised it was a set up.*"

He said he now has a residence permit and renews it yearly.

- He later found there had been a removal order for him. That had been revoked. Then there had been a purported "*Revocation of the revocation.*"

In cross-examination he detailed the date of his entry stamped in his passport of 11/7/96, and extension to 11/9/96, 11/10/96 and 11/11/96. He agreed that no other stamps existed for residence in the country. However, he insisted there was a residency permit 413/96 for a year from 11/11/96.

It was put to him that his permit applications were false when he said he had no criminal convictions. It was suggested he had been sentenced in 1984 in Gabon to two years imprisonment for fraud. He angrily denied this stating the conviction had been overturned by the "Court of Cassation". The extract of police records he said shews a nil entry.

He was asked about his detention and his applications for permits, but maintained his evidence. It was suggested allegations of missing items had been made concerning other police searches of his home. He replied only once and that related to a watch and some documents.

I accept the evidence of Guy Benard. He has been consistent, his evidence is corroborated at various junctures and it was given in an open and frank way.

I accept his evidence on the factual matters concerning this petition. At times he speculated and drew inferences and conclusions about why actions were taken. This is speculation and I don't find it as fact. It is indicative of his state of mind during and after these events.

That was the petitioner's case.

The Commissioner of Police, Peter Bong, was the first witness for the respondent. He outlined various procedures and reports that should be kept when seizures are made and persons arrested and detained. He said he was not aware of the allegation of theft of jewellery until he received notice from the Attorney General's Office.

He said if there was an Immigration case, police could act in an assisting capacity. He was not aware of any goods kept by the police in this case.

In cross-examination he stated he did not supervise the operations of the immigration department. He had no power of control over the Principal Immigration Officer apart from seconding a senior officer to take the post. He was shown his letter of 13 September 1997 appointing Leslie Garae as Principal Immigration Officer. The letter instructed the Principal Immigration Officer that all things should be reported to him. He said it was not an instruction. The Commissioner of Police "should be aware but not instruct" the Principal Immigration Officer in any way. He was not cross-examined on the then Minister of Foreign Affairs letter of 13 September 1997 to the Commissioner, querying his appointment of Garae as it was for the Public Service Commission, not the Commissioner of Police, to appoint the Principal Immigration Officer.

He was asked, "*on 10 April 1997, many police came to my house, were you informed of the operation.*" He replied "*I was not informed before or at the time.*" He said Superintendent Samuel was in charge of Port Vila police Station, but he is now in East Timor. It would be in the authority of a superintendent. He was asked if there would be any files and replied it

was a question for immigration. They will be at the immigration offices. He said he did not receive a letter of 14 April 1997 from the Petitioner. He said he was briefed after the incident. I can't say how many days after. He said he couldn't remember if he was in Court on 11 April 1997. He said he had not seen the unsigned Goiset statements before. He first became aware of the allegation of stolen jewellery "*last week when contacted by the Attorney General*".

In answers to the Court he said if customs or immigration arrest anyone the police cells are used and security and welfare are with the police. He said there should be a record of detention. He said he was informed about the Gabon "conviction" a few days before the April 1997 incident. It came in a briefing to his office. He said that allegations of "overstaying, the previous conviction and false declaration came to me "*from immigration. Not from a police source, that I am aware of*".

The respondents next witness was John Mark Bell. He is now working for a private company but at the time was Principal Immigration Officer. He made an affidavit dated 11 April 1997 apparently for court proceedings. It must be considered in detail.

Paragraph 5 states that Guy Benard had "*been without a valid permit*" since 11 November 1996.

Paragraph 6 stated he was required to leave the country and reapply for a permit.

Paragraph 8 said he had only been entitled to live in Vanuatu for up to four months.

Paragraph 10 said that under "Section 4 (8)" of the Act he authorised the arrest of Mr. Benard.

Paragraph 11 said in relation to Mr. Chouach he had threatened Mme Goiset with a knife, threatened to shoot another man and stab another. "*All statements in relation to these threats are with the police*".

Paragraph 12 said "*following consultation with the Ministry of Home Affairs the Minister issued deportation orders for both Mr. Benard and Mr. Chouach dated 9 April 1997 ... under Section 17*".

He said he was in a rush. The affidavit wasn't prepared by him and it was not his hand writing. He said "*I was ordered by Peter Bong to sign this. I am not saying it is untrue*".

On each of the paragraphs above his answers in examination in chief were ones of not recalling or having nothing to say. Paragraph 10 was the idea of the person who drafted the affidavit, namely someone from the State Law Office.

When asked "*Did you authorise the arrest of Benard and Chouach?*". He replied "*I wouldn't agree to that, I carried out orders given to me. I believe a copy is with the Court. I believe the last paragraph states clearly, I have to carry out all instructions and orders given to me by the Commissioner of Police*". At the time the Commissioner was Peter Bong.

He referred to his affidavit of 23 May 1997. He agreed he signed it but says he was ordered to do so by the Commissioner of Police. That gave a history of the petitioner's permits up to 11 November 1996.

Paragraph 13 states "*it was clear from his file that the Petitioner was residing illegally in the country*". He said in evidence he disagreed with this. He said this came from the Commissioner of Police, and from Mr. Dinh van Than and his sister Mme Golset.

Paragraph 16 dealt with the Removal Order. Bell stated this was issued after the date of remand of Benard and backdated. He did not say on what basis he knew this.

Paragraph 18 states "*The Minister acted under his power under Section 17 (1) in issuing the removal order ... on the grounds the petitioner was living illegally in the country ...*". Mr. Bell said "*This is incorrect. Incorrect because as I mentioned earlier an order came from outside, Dinh van Than and his sister, and not from the Minister concerned. They authorised the Commissioner of Police and he carried out his orders*".

At this stage counsel for the respondent asked for the witness to be "declared hostile".

It is pertinent to note Bell's affidavit of 31<sup>st</sup> October 2000 says Mr. Peter Bong gave orders to deport Guy Benard, there was no legal warrant and no immigration officer present. He continued that to the best of his knowledge Benard was not in breach of any law on 9<sup>th</sup> April 1997.

The case was adjourned for a few days for the parties to consider the position.

When the Court reconvened the application to declare the witness hostile was remade. Counsel accepted she had a copy of the affidavit dated 31<sup>st</sup> October 2000 of Bell before calling him, but Bell refused to speak to

them. After argument I refused to declare Bell a hostile witness.  
Examination in chief concluded.

In cross-examination he agreed he signed the "removal order" of 9<sup>th</sup> April 1997 as he was ordered to do so by the Commissioner of Police.

He then dealt with background and supporting matters. He said he had been contacted by others who were not police or government or civil servants, namely Thi Tham Goiset and Dinh Van Than. He had been invited a number of times to Goiset's office above Snoopy's.

The witness concluded his evidence.

Counsel for the respondent produced to the Court the police station occurrence book for 11 April 1997. The book or page concerning 10 April 1997 could not be produced.

Sergeant Kami Toa then gave evidence of the events on 11 April 1997. He said the petitioner was looked after properly, supplied with food and water. He and two others took the petitioner to the hospital.

In cross-examination he said he was not on duty on 10 April 1997. He said the petitioner didn't look sick. He did not remember any tablets. He denied anyone came to the cell with tickets and passports for the petitioner and Mr. Chouach.

In answer to the Court he said he was first asked in January 2000 to remember this day. He had had a meeting at the police headquarters when counsel and the Police Commissioner were present. He gave his statements two days later. Whilst I do not reject the evidence of Sergeant Toa, where it differs from that of the petitioner I prefer the petitioner's.



That concluded the evidence for the respondent. Counsel then stated there was no further opposition to the return of the petitioner's passport. Counsel further stated their view that the "revocation of the revocation" of the Removal Order was invalid. Therefore the Revocation of the order of 13 May 1997 was valid and that there was now no deportation order against Guy Benard.

Counsel then went on to say that the respondents "concede at the time of arrest he (Benard) was lawfully present in Vanuatu pursuant to his residency permit". The Residency Permits Register for 1996 and 1997 was produced. It shows on pages 27 - 28 permission to reside valid from 22 November 1996 to 11 November 1997.

The respondent would rely on the width of the wording in section 17 Immigration Act. Some argument was heard from the parties and written submissions were requested by and lodged with the Court.

The respondent argued there can be no claim for the upset and distress caused to the petitioner's family and for the loss of the jewellery on the basis they were not parties to the proceedings and no claims were made in the petition. I must accept this argument. Whilst the provisions providing for action to be taken for breach of Constitutional rights allow for informality and those not tutored in the law to bring cases, the petitioners family are not petitioners. Accordingly I must focus on the petitioner himself and his petition, in effect the incidents of 10-11 April 1997.

There is no dispute he was arrested from outside his house and kept in custody. I am satisfied that was with a view to his speedy deportation.

Counsel for the respondent submits section 4 (2) and the Principal Immigration Officer's letter of 9<sup>th</sup> April and Section 17 (1) and the Minister Order dated 9<sup>th</sup> April gave legality to these activities. Both sections are from the Immigration Act.

I consider section 4 (2) and the Principal Immigration Officer's letter first. Section 4 (2) states:- *If the Principal Officer has, or any police officer has, reasonable cause to suspect that any person has committed an offence against this Act, or that the presence of any person in Vanuatu is unlawful, and if it appears to be necessary to arrest such person immediately, he may arrest such person without a warrant:*

*Provided that where the person arrested is a person whom the Principal Immigration Officer, or the police officer, has reasonable cause to suspect is a prohibited immigrant and such person is a passenger or seaman on a ship, he may, if he consents, be handed over to the custody of the master of the ship until its departure from Vanuatu.*

Whether or not I accept the evidence of Bell the fact is there is no evidence to shew he had any reasonable cause to suspect the petitioner had committed an offence against the Immigration Act. There is no suggestion of an arrest for any other offence or under any other power save for section 17 (1). In his evidence the Commissioner of Police, in effect, said the police were assisting the Immigration service. Mr. Bell said his actions were carried out and affidavits signed as a direct result of orders from the Commissioner.

There was clearly confusion then about who was responsible for immigration matters, who appointed the principal officer and to whom he reported and was responsible. I need not inquire into that nor whether such confusion was being utilised. The plain fact is the petitioner has

shown an arrest and detention when there is no evidence to clothe those actions with any legality under section 4 (2).

I turn to the Order of Removal signed by the then Minister of Foreign Affairs acting purportedly under section 17. I accept that according to the Gazette, the Minister of Foreign Affairs was the one responsible for immigration and had the power to sign such an order.

Section 17 (1) states: *Notwithstanding any other provisions of this Act, the Minister in his discretion may make an order in the form prescribed under this Act that any person, whether or not he is unlawfully present in Vanuatu, shall, on the expiry of 14 days or such longer period as the Minister in his discretion may specify from the date of service of the order on such person or on the completion of any sentences of imprisonment which he may be serving be removed from and remain out of Vanuatu, either indefinitely or for a period to be specified in that order. The Minister need not give any reason for his order, which shall not be challenged in any court in any proceedings whatever.*

The respondents argue quite simply section 17 gives the power to order the removal of a person whether or not he is unlawfully present in Vanuatu. Person here refers to a "non-citizen", section 2. The Minister need not give reasons, and the Order shall not be challenged in any proceedings whatever. The case of *Coombe -v- Minister of Home Affairs* VLR (1) P. 74 was cited in support.

The court is in some difficulty as full argument has not been received from the respondent and little or no legal argument from the unrepresented petitioner. I have the written submissions and some oral argument.

On its face the Removal order was signed on 9<sup>th</sup> April 1997 directing removal on 11<sup>th</sup> April. This corresponds with the evidence of Bernard that he was to be taken to the airport and not to the court on 11<sup>th</sup> April.

However, the Act gives the power to make an order that any person shall "on the expiry of 14 days or such longer period as the Minister in his discretion may specify from the date of service of the order on such person..."

The minister did not comply with this Act in that he ordered removal two days after the date of the order. Further there is no evidence the order was ever served on the petitioner. The removal order was either completely invalid or could only be acted upon fourteen days after service. The wording of the forms prescribed at schedule 6 does not make for clarity in this regard.

Subsection 17 (3) states:- *A person against whom an order under this section is made may, if the Minister in his discretion so directs, while awaiting removal and while being conveyed to the place of departure, be kept in prison or in police custody, and while so kept shall be deemed to be in lawful custody.*

There is no evidence the Minister gave a direction for the petitioner to be kept in custody while awaiting removal. The subsection states :- "*if the Minister in his discretion so directs*".

I look at section 20 of the Act. It states:-

- (1) *No suit or other legal proceedings for damages shall be instituted in any court of law against the Minister or the Principal Immigration Officer or any other officer or any other person for or on account of or in respect of any act, matter or thing done or omitted to be done or*

*purported to be done or omitted to be done, in good faith, in the performance or exercise or intended performance or exercise of any duty or power imposed or conferred by or under this Act; and the provisions of this section shall extend to the protection from liability as aforesaid of any person deputed by delegation under this Act or under any other law for the time being in force to perform or exercise any such duty or power aforesaid.*

- (2) *The exercise of any power or discretion conferred upon the Minister of the Principal Immigration Officer by any of the provisions of this Act shall not be called into question or challenged in any court in any proceedings whatsoever.*

This was not argued before me, but I consider it. Questions of burden of proof arise. Is it for the petitioner to show a lack of good faith or the respondent to shew good faith ?

The evidence of Bell is clear he was acting under orders of the Commissioner of Police and says he had no bona fide basis for his actions. The Commissioner of Police stated it was purely an immigration matter. There is no evidence why the firearms import licence was cancelled two weeks before the incidents. Jean Vincent- Do and Hilda Crowby- Ito stated how police officers came to their houses seeking false statements against the petitioner. There are the typed but unsigned witness statements concerning the petitioner. No order or document was served on or shown to the petitioner from time of arrest until, at the earliest, his court appearance. The then Principal Immigration Officer says he was required to sign two false affidavits. The original removal order was revoked five weeks later. A residency permit had been granted to the petitioner covering the time in question.

It is a matter of concern that at the outset counsel for the respondent was instructed to act on the basis that there was no valid permit for the defendant to be in the country in April 1997. He insisted there was and cited number 413/96. It was only at the conclusion of the evidence that the book was submitted to the court showing the permit, and the concession made that the petitioner's presence in Vanuatu in April 1997 was lawful.

Where John Mark Bell gives evidence about matters specifically within his knowledge I accept his evidence subject to this. Many of the matters he referred to involved the Commissioner of Police. These were not put in cross-examination to the Commissioner. Indeed given the way the evidence came out many could not have been put.

In these circumstances I cannot make specific findings where the evidence of the two is contradictory or one suggests wrong doing by the other.

However, I am satisfied on all the evidence that there was a lack of bona fides in the actions of the Minister and the Principal Immigration Officer.

However, this is a constitutional petition brought under articles 5, 6 and 53.

Articles 53 (1) + (2) state:-

(1) *Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.*

- (2) *The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.*

Article 6 (1) states:-

*Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.*

Articles 5 (1), (b) (c) (d) (i) and (k) state:-

- (1) *The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health:-*

(b) *liberty;*

(c) *security of the person;*

(d) *protection of the law;*

(i) *freedom of movement;*

(k) *equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.*

I am not in this judgment specifically considering restrictions imposed by law on non-citizens, although the petitioner is a non-citizen.

The original petition was lodged on 27 April 1997. These proceedings were conducted on the petition of 23 May 1997, and in effect only on Prayer H 'such other or further orders and /or relief as the court considers just'. This, by the time of trial, narrowed down to the events of 10 and 11 April 1997.

I do find that the petitioner rights under article 5 (1) (b) and (d) have been infringed by the Government of Vanuatu and specifically by the Ministry of Foreign Affairs, the Principal Immigration Officer and the Commissioner of Police in that an Immigration Act Removal Order was made without good faith, it was unlawful on the face of it, it was not served on or shown to the petitioner as is required by statute, the time in which it was sought to be enforced was unlawful, an order for the arrest of the petitioner was made by the Principal Immigration Officer without good faith and without any foundation in law, in the light of this and acting upon these orders the petitioner was unlawfully arrested outside his home, his house was unlawfully searched and his wife and daughters in his sight made to stand outside in the rain in night clothes, he was handcuffed and unlawfully detained in a cell for approximately thirty hours in the circumstances he described

It must be noted carefully that suggestions and allegations have been made about persons who were not before the court, or who were before the court but not cross-examined thereon. Those persons have not been in a position to respond to these suggestion and allegations nor bring evidence to refute them. This must be made clear at all times.

I will hear the parties on the issue of quantum.



## RULING ON COMPENSATION

On 14 March 2001 I received the parties oral and written submissions concerning compensation. I must, of course, only award compensation for the breaches found.

Article 6 (2) Constitution states the Supreme Court may make "such orders issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.

I have not heard argument concerning the ambit of considerations for which compensation can be given. I do not consider the court is limited to pecuniary loss and "damages similar to damages for pain and suffering", as the respondent suggests.

### Pecuniary Loss.

The petitioner has not lost any wages so there can be no award for that. The respondent concedes that payment must be made for the lost price of the Vanuatu - New Caledonia air ticket. The parties can agree that figure, as it is not specifically before me.

There does not appear to be any other pecuniary loss.

### Non- Pecuniary loss

The respondent submits awards should be consistent with previous judgments of the Supreme Court. No awards for compensation for breaches of an individual's constitutional rights were cited to me. Two cases involving false imprisonment and deprivation of liberty were cited.

In *Harrison -v- J.P Holloway, Commissioner of Police* (VLR 1 P. 147) an amount of Vatu 250,000 was made in 1984 by the Court of Appeal for unlawful arrest and detention for a period of approximately two months.

In *Public Prosecutor-v- Kota and Others*, Supreme Court Criminal Case No. 58 of 1993 a figure of Vt 150,000 was awarded by the Supreme Court for the removing by force of a woman from Port Vila to Tanna and the keeping of her there for a week. This was by way of compensation against defendants in a criminal trial.

Whilst these two cases give an idea of awards previously made in cases of false imprisonment and loss of liberty neither was a constitutional case nor involved the Government or governmental bodies or agents except in the former case to the extent that the police were so acting within the confines of that case.

In the case before me I have found breaches of Articles 5 (1) b and d in that a Removal Order was issued by a Minister without good faith. It was unlawful on the face of it. It was not served on or shown to the petitioner as is required by statute. The time in which it was sought to be enforced was unlawful, an order for the arrest of the petitioner was made by the Principal Immigration Officer without good faith and without any foundation in law. In the light of this and acting upon these orders the petitioner was unlawfully arrested outside his home. His house was unlawfully searched and his wife and daughters in his sight made to stand outside in the rain in night clothes, he was handcuffed and unlawfully detained in a cell for approximately thirty hours in the circumstances he described

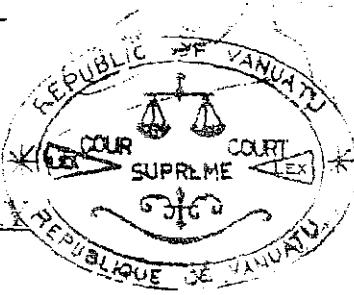
Doing the best I can in the circumstances I find that an amount of Vt. 1,500,000 is the correct figure, and I so award. I will hear the parties on costs.

Respondent to pay the petitioners costs on a party and party basis as agreed or taxed.

Dated at Port Vila this 16<sup>th</sup> day of March 2001

R. J.

R. J. COVENTRY



Judge

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem of a scale of justice. The words "REPUBLIC OF VANUATU" are written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. The words "COUR SUPREME" and "COURT SUPREME" are written on either side of the central emblem. The seal is stamped over the signature "R. J. COVENTRY".