

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

**Constitutional
Case No. 20/622 SC/CNST**

BETWEEN: Stephen Quinto & Nicola Juliet Quinto
Applicants

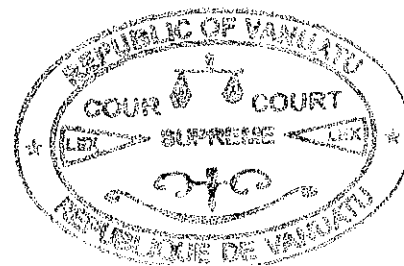
AND: Republic of Vanuatu
Respondent

Date of Oral decision: 14 April 2020
Date of written reasons: 22 April 2020
Before: Chief Justice Lunabek
In Attendance: Mrs MNF Patterson (and Ms Laniana Raikatalau) for the Applicants
Mr. Sammy Aron for the Respondent

**REASONS FOR STRIKING OUT CONSTITUTIONAL APPLICATION AT FIRST
CONFERENCE HEARING**

A. INTRODUCTION: NATURE AND EXTENT OF APPLICATION

1. This is a Constitutional Application filed against the Republic of Vanuatu on 17 March 2020.
2. Stephen Quinto and Nicola Juliet Quinto both of Luganville, Santo are the applicants in this application.
3. The applicants apply pursuant to Article 6 of the Constitution of the Republic of Vanuatu in respect of breaches of their fundamental rights and seek compensation for the physical injuries, loss and damages caused to them by the criminal offences of assault committed on their bodies by one Nigel John Giltrap of Luganville, Santo, as a result of a negligent decision of the Director of Immigration granting Mr. Nigel John Giltrap a residency permit to reside in Vanuatu in 2013.
4. The applicants say their fundamental rights that are infringed, continue to be infringed and likely to be infringed are:
 - (1) Right to security of the person pursuant to Article 5(1)(c); and



- (2) Right to protection of the law guaranteed by Article 5(1)(d) of the Constitution.
5. The applicants say that the person or body who infringes those rights is the Director of Immigration.

B. GROUND FOR APPLICATION

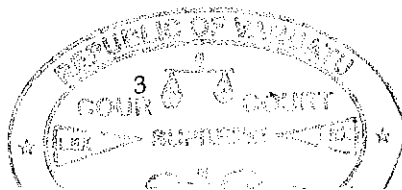
6. The applicants applied upon the following grounds:
- (1) On or about 2013, Mr Giltrap, a New Zealand national arrived in Vanuatu and applied for a visa to reside in Vanuatu ("Residence Visa");
- (2) The Director of Immigration ("Director") negligently provided Mr Giltrap with a residence permit when he should not have done so.

(2)– 1. They provide the particulars of the Director's negligence as follows:

- (a) Part of the mandatory procedure for processing Mr. Giltrap's application is to *inter alia* check to see whether:
- (i). the documents submitted in support of his application contained false or misleading information;
- (ii). he had passed the character test provided in section 38 of the Immigration Act 2010 ('Act'), including in respect of Mr. Giltrap the presence of two or more terms of imprisonment of more than 2 years, in which case he would have failed such a character test; and
- (iii). rejecting his application if it was ascertained that he:
- had misleading or false information in his application; and
 - that he failed the character test by reason of two or more terms of imprisonment of more than 2 years.
- (b) In the material that Mr. Giltrap was required to supply in support of his application was a Criminal Convictions Report ('CCR') from the New Zealand Ministry of Justice, including record of prior criminal convictions.
- (c) The CCR is recorded under the name of Nigel John Giltrap, out of which one page was missing.



- (d) It was obvious that one page was missing, because the two pages of prior convictions in the CCR that Mr. Giltrap provided were numbered "1" & "3" and also there was a gap in the continuous dates of prior convictions listed.
- (e) Page "1" of Mr. Giltrap's CCR recorded:
- (i) 5 convictions on 23 June 2006 for breaching protection orders recorded with a sentence of community work;
 - (ii) One conviction for assault with a weapon on 10 November 2009; and
 - (iii) Four separate convictions for breaches of protection orders issued against him by his former partner; and
 - (iv) Concurrent imprisonment sentences on 10 November 2009 (with no specific information available in relation to the duration of the concurrent sentences).
- (f) The Director failed to require Mr. Giltrap to supply or otherwise obtain page "2" of his CCR, for the obvious reasons that with incomplete information, there is likelihood that Mr. Giltrap had further convictions to his name.
- (g) Had the Director enquired further on the convictions and prison sentences in the CCR, such inquiry would have led to further information pertaining to the CCR recorded convictions. Such an inquiry would have, for instance, shown results that includes (but not limited to):
- (i) The Court of Appeal case of *Nigel John Giltrap v The Queen* [2010] NZCA 157 ('**appeal case**')
<http://www.nzlii.org/nz/cases/NZCA/2010/157.pdf>
 - (ii) The appeal case clarifies the information on the CCR which records convictions entered on 10 November 2009. It clarifies the CCR information that Mr. Giltrap was tried by a jury in the Christchurch District Court on or about October 2009, under the New Zealand Crimes Act 1961 and the New Zealand Domestic Violence Act 1965. He was convicted and was sentenced to a total of 2 years and 2 months imprisonment on 10 November 2009 (as per CCR information).
 - (iii) Mr Giltrap appealed against his conviction and sentence, and his appeal was dismissed and both conviction and sentence were upheld on 30 April 2010. He served his prison sentence immediately prior to his residence visa application.



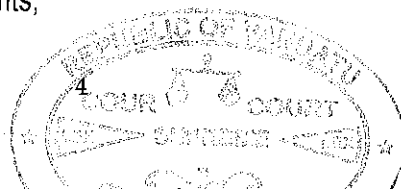
- (iv) Apart from such a search, the Director ought to have utilised official channels to confirm the full extent of Mr. Giltrap's criminal history.
- (v) The Director failed to do this.
- (h) As a result of the Director's negligence to correctly apply the character test under the Act and:
 - (i) request Mr. Giltrap to provide complete information;
 - (ii) inquire further as to his criminal convictions; and
 - (iii) correctly ascertain Mr. Giltrap's criminal history

Mr. Giltrap who was a person with a criminal convictions for violence and who had served prison sentence of over 2 years was permitted to reside in Vanuatu, putting at risk other residents of Vanuatu in relation to the security of the person and in denial of all those persons including the applicants' right to the protection of the law, namely the Act.

- 7. On the 20.03.18 Mr. Giltrap assaulted the elderly applicants at the Si Chuan Restaurant in Luganville, causing them harm and injury and particularly in relation to the second applicant, considerable injury (as particularised in section D. below.
- 8. Mr. Giltrap was convicted in Criminal Case 2506 of 2018 on two charges of intentional assault (occasioned on the applicants) contrary to section 107(a) and (b) of the Penal Code and sentenced (on appeal) to 2 months imprisonment on each of the charges (served concurrently).

C. THE APPLICANTS RESULTING LOSS AND DAMAGE

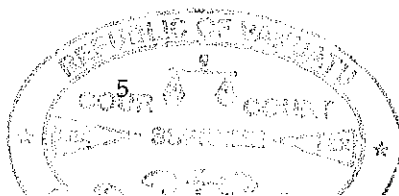
- 9. The applicants say that as a result of the negligence of the Director of Immigration and the ensuing breach of the applicants fundamental rights above the applicants have suffered loss and damage:
 - (1) The Applicants immediate apprehension as to their safety particularly given their age and physical ability to properly defend themselves, while in the Si Chuan Restaurant, where the assault took place;
 - (2) Immediate anxiety compounding the fear, at the confrontational manner in which Mr. Giltrap advanced towards the Applicants at Si Chuan Restaurant, immediately before the assault of the Applicants;



- (3) Humiliation following loud verbal insults and the assault by Mr. Giltrap, resulting in injury to Mrs Quinto.
- (4) Physical injuries sustained by the Applicants, due to the assault by Mr Giltrap, the consequences of which continue to affect the Applicants and for which the Applicants have had to incur huge medical expenses on.

10. The applicants particularised their injuries and damages are as follows:

- (a) Psychological impact, shock, anxiety and trauma occasioned on the elderly couple during and after the assault which happened in a public place;
- (b) Blows impacting Mr. Quinto's chest resulting in a deep external bruising lasting a month and internal contusion to his heart;
- (c) While in pain himself, Mr. Quinto helped care for his wife who was also significantly injured for the month following the assault;
- (d) Mr Quinto experienced increased and more constant dizziness which developed into sudden onset of near fainting which developed to chest pains, nausea and shortness of breath.
- (e) The symptoms which began the month after the assault continued to deteriorate rapidly and essentially Mr Quinto had suffered incremental heart failure which required multiple levels of clinical intervention including having to undergo a procedure for inserting an ICD implant in lieu of open-heart surgery;
- (f) Mrs Quinto had to be moved from the site of the assault by ambulance personnel – she was bedridden for the better part of the month following the assault. The injury to her right leg did in time ameliorate and she did finally regain use of her right leg but it was to remain painful ever since the assault;
- (g) Mrs Quinto was unable to walk for several weeks and then only with crutches;
- (h) Mrs Quinto remained on crutches for 2months for the better part of 2 months;
- (i) Medical description of the injury of Mrs Quinto is such that she sustained a new trauma to her right upper femur – directly to the site where she had had implanted a prosthesis following a fracture one year earlier. The healing process, still continuing from that earlier trauma, in a 76-year-old woman was interfered with and was visible in X-Rays taken at Northern District Hospital four days after the assault. She was taken there by ambulance to verify her condition as the pain was such that she thought her leg had broken again. The pain, though much



abated, continues and she requires ongoing and continuous therapy to help with her condition.

- (j) The Applicants have a much reduced life expectancy following the injuries they sustained, given their old age, and for which they are not expected to enjoy to the fullest extents as they would have had it not been for the assault and the resulting injuries they sustained.

11. They say the following are the medical expenses for the injuries sustained by them in terms of medical treatment and cost of medical care associated with the injury as a result of the assault by Mr Giltrap:-

- (a) Procedure for inserting an ICD implant in lieu of open-heart surgery for Mr. Quinto.
 - (i). AUD\$64,642.80 in hospital fees and charges by St. Andrews Hospital in respect of in-patient Cardiac investigations; including for planned surgical theatre items and disposables;
 - (ii). AUD\$3,696.55 for in-patient treatment St. Andrews Hospital; and
 - (iii). AUD\$400.00 in respect of implanted defibrillator remote monitoring annual fee.
- (b) Medical costs of Mrs Quinto to be assessed by the Court.
- (c) Other expenses incurred:
 - (i). Cost of airfares from Santo to Vila in the sum of VT67,200 x (3 round trips) = VT201,600 (Return included).
 - (ii). Cost of airfares from Vila to Brisbane Australia for medical treatments in the amount of VT109,120 (one way) X 5 round trips =VT1,091,200 as Mr. Quinto had to travel in Business class due to her condition and the discomfort and pain she was suffering due to the injury and had to be accompanied by his wife as he could not travel alone.
 - (iii). Clinical/hospital bills in Australia for the sum of approximately VT3,000,000 (to be finally assessed) for implantation of the ICD
 - (iv). Cost of Hotel in Australia in the amount of VT200,000.

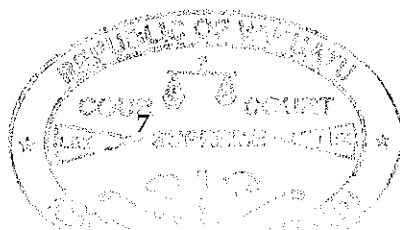


(v). Cost of transport in Australia, from hotel to Hospital in the amount of VT100,000.

12. They say there is constant apprehension following release of Mr. Giltrap from prison in November 2019, and given the threats Mr. Giltrap made against Mr Quinto at the Si Chuan Restaurant that Mr Giltrap would have him taken of and that Mr Giltrap was a dangerous man.
13. Loss of confidence in the Vanuatu government and in particular, the Department in that while the Applicants have made huge investments in Santo, the environment in which they conduct business has been gravely affected given the presence of people like Mr. Giltrap who as an expatriate with previous criminal record in New Zealand, and a criminal conviction in Vanuatu, is allowed to remain in Vanuatu.
14. Loss of ability to conduct business with confidence given the presence of Mr. Giltrap and given the threats he has already previously made against the Applicants.
15. Emotional and psychological turmoil and distress during the incident, immediately following the incident with the physical injuries of Mrs Quinto, as well as the recovery from the assault and the injuries.
16. Emotional and psychological distress from the constant feeling of apprehension and fear given the dangers presented in the presence at large of Mr. Giltrap.
17. Loss of private and public reputation given Mr Giltrap wild accusations of outstanding monies owed to him by the Applicants, when those accusations were made in a public place at the Si Chuan Restaurant.

D. REMEDIES SOUGHT

18. The applicants seek the following remedies:-
 - (1) A declaration that the granting of a residence visa to Mr. Giltrap was in excess of the powers given to the Director of Immigration under the Act and that this failure represents a direct deviation from and neglect of the objects of the Act premised on protection and security of persons in Vanuatu.



- (2) A declaration that in neglecting the statutory functions stipulated under the Act, and allowing Mr. Giltrap to reside in the country, that this directly breached the fundamental rights of the applicants guaranteed under the Constitution, resulting in the applicants' injuries and damages suffered.
 - (3) A mandatory order quashing the decision of the Director of Immigration granting residence visa to Mr. Nigel Giltrap.
 - (4) An order for compensation for the physical injuries the applicants sustained, including medical bills in respect of those injuries;
 - (5) An order for compensation for the emotional and psychological distress, humiliation, embarrassment, intimidation, confusion and bewilderment and injury and loss to public and private reputation in a sum to be assessed.
 - (6) Other orders as deemed fit by the Court.
19. Mr Stephen Quinto files a sworn statement in support of the Constitutional Application on 17 March 2020.
 20. The matter was listed for a first conference hearing on 14 April 2020 at 2:00pm o'clock in the afternoon pursuant to Rule 2.8 of the Constitutional Rules.

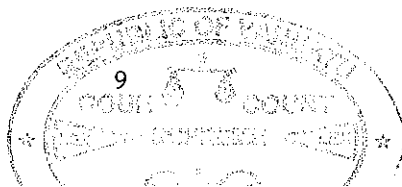
E. FIRST CONFERENCE HEARING ON 14 APRIL 2020

21. I read the Constitutional Application of the applicants filed in this current proceeding and the sworn statement of Stephen Quinto filed in support.
22. I have asked Mrs Patterson Counsel for the applicants whether the applicants have filed a separate but related civil claim for damages for injuries and the like resulting from the assaults occasioned on their bodies by Mr Giltrap after his prosecution, convictions and sentence in criminal case No. 2506 of 2018 on two charges of Intentional assault. Mrs Patterson informed me that there was none apart from this Constitutional Application.
23. I did not ask the question: why, or why not in the light of the provision of Article 6 of the Constitution which provides: "(1) *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."

24. I heard Mrs Patterson at the First conference hearing. I also enquired into the matters raised by the applicants to assess whether their application has a constitutional foundation.
25. The intended constitutional challenge, here, is against a decision made by the Director of Immigration on 2013 giving Mr Nigel John Giltrap residence permit in Vanuatu (the relevant year for the alleged failure in the exercise of statutory function). There were no details provided in respect to that decision as to its date and duration or whether it was made with a condition or not and whether other members of Mr Giltrap's family were also concerned as they might be covered by it as a result of its granting under the Act at least 5 years since 2018 (the relevant period until the offending and also the resultant consequence which was led to breaches of rights as alleged).
26. It was accepted that on or about 2013, the Director of Immigration provided Mr Giltrap with a residence permit. For the purpose of my preliminary enquiry into the matters raised by the applicants and at this stage of the First Conference Hearing, I proceeded on the assumption that under the Immigration (Amendments) Act of 2010, the Director has the statutory powers and had exercised those powers within the Act on the material provided to him by Mr Giltrap at the time of his application for residence visa in 2013.
27. It was alleged that by relying on these material without further enquiry the Director failed his statutory duties which amount to the breaches of the rights of the applicants. This was what I understood from the application and the material statement filed in support.
28. However, my reading of the Act and the preliminary facts of the records of the convictions of Mr Giltrap in the District Court of Christchurch (New Zealand) were that the last offences he was convicted of and sentenced for more than 2 years imprisonment after an unsuccessful appeal in 2010 before the Court of Appeal of New Zealand occurred in 2008. In 2013, it was a period of about 5 years after the commission of those offences when Mr Giltrap applied and was granted a residence visa in 2013 by the Director of Immigration.



29. I note the provision of section 38 of the Immigration Act 2010 (the "Act") which was referred to and relied on by the applicants. I note further other related and relevant provisions of the Act. The relevant parts of the Immigration Act are set out below to ensure that there is an understanding of what is sought and intended to be achieved through the judicial powers of the court and whether it was right to do so by this Constitutional Application.

"PART 4 VISAS FOR NON-CITIZENS

Division 1 General provisions

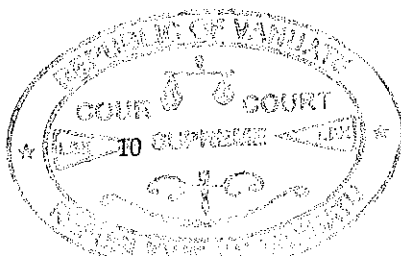
26 Requirement for a visa

- (1) A person commits an offence if the person:
- (a) is a non-citizen; and
 - (b) is not the holder of a visa issued under this Act; and
 - (c) either:
 - (i) attempts to enter Vanuatu; or
 - (ii) enters Vanuatu; or
 - (iii) enters and remains in Vanuatu.
- (2) ...
- (3)...
- (4) A non-citizen who lawfully enters Vanuatu commits an offence if he or she remains in Vanuatu and is not the holder of a valid visa.
- (5) A non-citizen who commits an offence under subsection (4) is liable on conviction to a fine not exceeding VT500,000 or a term of imprisonment of not more than 2 years or both.

27 Classes of visas

There are the following classes of visas:

- (a) a visitor visa;
 - (b) an extended visitor visa;
 - (c) a residence visa;
 - (d) a student visa;
 - (e) a special category visa;
 - (f) a transit visa;
 - (g) an interim visa.
- ...



30 Residence visa

- (1) A residence visa is to be granted for a period of at least 1 year, but must not be granted for a period that exceeds 10 years.
- (2) If a person is the holder of a residence visa ("the holder"), then, subject to sections 37 and 38, a member of the family of the holder may be granted a residence visa for a period that is the same as the period for which the holder's residence visa has been granted.

...

Division 2 Application for a visa

34 Applications

- (1) An application for a visa must be made to the Principal Immigration Officer in the approved form.
- (2) A person who is in Vanuatu can apply for a visa (other than a visitor visa) only if the person is the holder of a valid visa, whether or not it is of the same kind or a different kind to the visa being applied for.

...

36 Invalid applications

- (1) An application for a visa is invalid if the application:
 - (a) is not in the approved form;
 - (b) is not accompanied by the prescribed charge and is not exempt under subsection 35(2).
- (2) The Principal Immigration Officer must not accept an application for a visa that is invalid under paragraph (1)(a) or (b).

Division 3 Grant of a visa

37 Criteria for grant of a visa

The criteria for the grant of a visa are:

- (a) the person is not a prohibited immigrant; and
- (b) a determination under section 85 is not in force in relation to the person; and
- (c) the person passes the character test; and



- (d) *the person is not suffering from a contagious or other disease, or a mental condition, which makes his or her presence in Vanuatu a risk to the health of the community in Vanuatu; and*
- (e) *any security required to be provided under Part 8 in relation to the visa being applied for has been provided to the satisfaction of the Principal Immigration Officer; and*
- (f) *the person has the financial means to support himself or herself, and all of his or her dependants (if any); and*
- (g) *any other criteria prescribed by the regulations.*

38 Character test

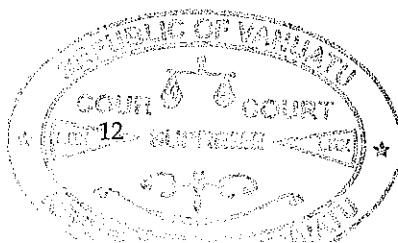
(1) *A person does not pass the character test if:*

- (a) *the person has been sentenced to:*
 - (i) *death; or*
 - (ii) *imprisonment for life; or*
 - (iv) *a term of imprisonment of 12 months or more; or*
 - (iv) *2 or more terms of imprisonment (whether on one or more occasions) where the total of those terms is 2 years or more; or*
- (b) *the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or*
- (c) *the person has or has had an association with another person, or with a group or organisation, and the Principal Immigration Officer suspects on reasonable grounds that the other person, group or organisation has been or is involved in criminal conduct.*

(2) *If the Principal Immigration Officer is satisfied that it is in the public interest for a person who does not pass the character test to enter Vanuatu, the Principal Immigration Officer may deem the person to have passed the character test.*

(3) *If:*

- (a) *a person does not pass the character test because he or she has been convicted of one or more offences; and*



(b) the Principal Immigration Officer is satisfied that the offence or offences were committed at least 5 years ago and were of a minor nature;

the Principal Immigration Officer may deem the person to have passed the character test.

39 Decision to grant or refuse to grant a visa

(1) The Principal Immigration Officer must grant an applicant a visa if the Principal Immigration Officer is satisfied that:

(a) the application for the visa is in the approved form; and

(b) any visa application charge payable in relation to the application for the visa has been paid; and

(c) the applicant for the visa has:

(i) passed the character test; and

(ii) satisfied the other criteria in section 37.

(2) If the Principal Immigration Officer is not satisfied of any of the matters in paragraph (1)(a),(b) or (c), the Principal Immigration Officer must refuse the application for a visa.

40 Notice of visa decision

(1) As soon as practicable after making a decision to grant a visa or to refuse an application for a visa, the Principal Immigration Officer must give the applicant notice of the decision.

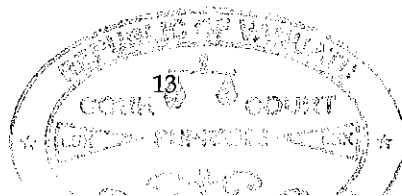
(2) Notice of a decision to refuse an application for a visa must be in the approved form and:

(a) specify the criteria the applicant did not satisfy under section 37; and

(b) state that the applicant can apply under section 58 to the Minister for a review of the Principal Immigration Officer's decision.

(3) Failure to give notice of a decision does not affect the validity of the decision.

(4) The Principal Immigration Officer must not re-open an application for a visa for further consideration after his or her decision on the application has been made.



41 When visa is in effect

(1) A visa has effect as soon as it is granted, but may provide that it comes into effect at the beginning of a day specified in the visa, being a day after its grant.

(2) Subject to the cancellation of a visa, a visa ceases to be in force at the end of the last day of the period for which the visa has been granted.

42 Special timing rule for certain foreign investors

(1) This section applies to a person if:

(a) the person has applied for... a residence visa; and

(b) the person is a foreign investor within the meaning of the Vanuatu Foreign Investment Promotion Act [CAP 248]; and

(c) an approval certificate within the meaning of that Act has been issued in relation to the person; and

(d) the person has given to the Principal Immigration Officer the approval certificate or a copy of the approval certificate certified by the Vanuatu Investment Promotion Authority to be a true copy.

(2) Subject to sections 37 and 38, the Principal Immigration Officer must so far as practicable determine the person's application for... a residence visa within 5 working days after the approval certificate or certified copy is given to him or her.

...

Division 4 Conditions of a visa

44 General conditions

A visa is granted subject to each of the following conditions:

(a) the holder of the visa must comply with the laws of Vanuatu;

(b) the holder of the visa must comply with the conditions of the visa;

(c) the holder of the visa must not behave in a manner that is prejudicial to peace, good order, good government or public morality in Vanuatu;

(d) the holder of the visa must advise the Principal Immigration Officer of any significant changes to his or her personal or financial circumstances;

(e) such other conditions prescribed by the regulations.



45 Employment and commercial or business activities

(1) ...

(2) The holder of a residence visa may:

(a) subject to the Labour (Work Permits) Act [CAP. 187], commence or continue in any employment in Vanuatu; and

(b) subject to the Business Licence Act [CAP 249], the Vanuatu Foreign Investment Promotion Act [CAP 248], the Companies Act [CAP. 191] and any other relevant law, commence or continue any commercial or business activities in Vanuatu.

...

46 No extensions or renewals of visas

A visa cannot be extended or renewed.

Division 5 Cancellation of a visa

47 Grounds for cancellation

(1) The Principal Immigration Officer may cancel a visa that has been granted to a person if the Principal Immigration Officer is satisfied that:

(a) the person has not passed the character test or no longer passes the character test; or

(b) the person has on or after the grant of the visa been convicted of an offence, in Vanuatu or another country, and sentenced to a term of imprisonment of 12 months or more, life imprisonment or the death penalty; or

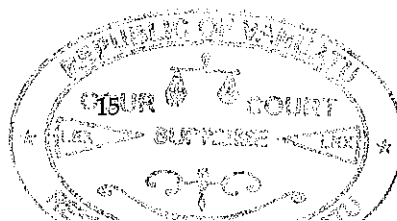
(c) the person is suffering from a contagious or other disease, or a mental condition, which makes his or her presence in Vanuatu a risk to the health of the community in Vanuatu; or

(d) the person does not have the financial means to support himself or herself, and any of his or her dependents; or

(e) the person made a statement that is false or misleading in a material particular in his or her application for the visa; or

(f) the person has not complied with a condition of his or her visa; or

(g) another person required to comply with a condition of the visa has not complied with that condition; or



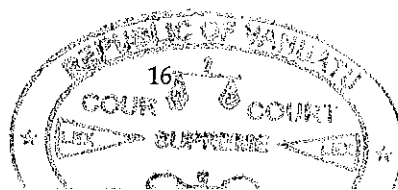
- (h) the visa should not have been granted because the application for the visa or its grant was in contravention of this Act; or
 - (i) any circumstances which permitted the grant of the visa no longer exist; or
 - (j) the presence of the person in Vanuatu is a risk to the safety or good order of the community in Vanuatu; or
 - (k) a ground prescribed by the regulations for cancelling a visa applies to the person.
- (2) If the visa of a person ("the first mentioned person") is cancelled, a visa of the same class held by another person because that other person is a member of the family of the first mentioned person is by force of this subsection cancelled.
- (3) A visa may be cancelled if the holder of the visa is in or outside Vanuatu.

48 Notice of proposed cancellation

- (1) If the Principal Immigration Officer is proposing to cancel a visa, whether its holder is in or outside Vanuatu, the Principal Immigration Officer must give the holder notice in the approved form that:
- (a) states there appears to be grounds for cancelling the visa and give particulars of those grounds; and
 - (b) provides a summary of the information on which the Principal Immigration Officer is relying; and
 - (c) specifies that the holder has 14 days from the date of the notice to make a written submission to the Principal Immigration Officer showing that:
 - (i) those grounds do not exist; or
 - (ii) there is a reason why the visa should not be cancelled.
- (2) If the holder does not make a submission within the 14 days, the Principal Immigration Officer may cancel the visa at the end of that period.
- (3) If the holder makes a submission within the 14 days, the Principal Immigration Officer must consider the submission before deciding whether or not to cancel the visa.

49 Notice of cancellation decision

- (1) As soon as practicable after making a decision whether or not to cancel a visa, the Principal Immigration Officer must give the holder of the visa notice of the decision.



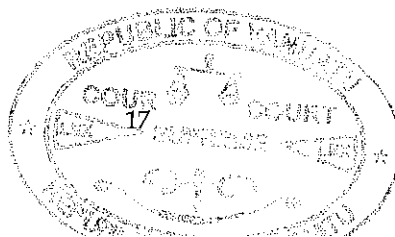
- (2) If the Principal Immigration Officer's decision is to cancel the visa, notice in the approved form must:
- (a) set out the reasons for the decision; and
 - (b) state that the holder can apply under section 58 to the Minister for a review of the Principal Immigration Officer's decision.
- (3) If a person applies for a review under section 58, the person's visa remains valid until the review is finally determined.
- (4) If a person does not apply for a review under section 58, the person's visa is cancelled with effect from the end of the period for making an application for review under that section.
- (5) To avoid doubt, this section does not affect the expiry of a visa before:
- (a) a review mentioned in subsection (3) is finally determined; or
 - (b) the end of the period mentioned in subsection (4)."

30. I have perused the Act, its objects and purposes; I have also considered its direct connections or relationships with other Acts such as the Business Licences Act [Cap 249], the Companies Act [Cap 191] and in particular the Vanuatu Foreign Investment Promotion Act [Cap248]. I bear in mind of the provisions of sections 38 (3) and 42 (1)(2) of the Immigration Act.

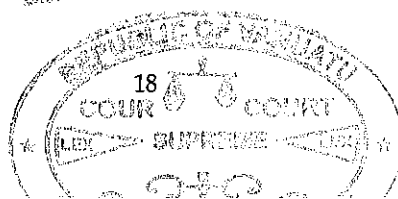
31. It might be possible that, based on the material provided to him by Mr Giltrap, be it incomplete, as alleged by the Applicants, the Director might apply his mind on section 38 (3) of the Act when he gave residence visa to Mr Giltrap in 2013. That subsection (3) provides:

- "(3) If:
- (a) a person does not pass the character test because he or she has been convicted of one or more offences; and
 - (b) the Principal Immigration Officer is satisfied that the offence or offences were committed at least 5 years ago and were of a minor nature;

the Principal Immigration Officer may deem the person to have passed the character test."

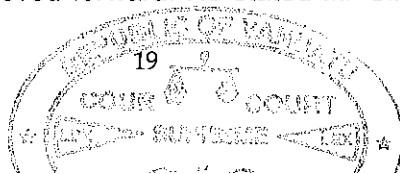


32. The records of convictions of Mr Giltrap were about offences of domestic Violence and breaches of orders. Whether or not the Director was right or wrong in his appreciation of the seriousness of the offences committed by Mr Giltrap in 2008, he has made a decision to grant a residence visa to Mr Giltrap in 2013. The Director cannot re-open that application for further consideration after his decision on the application has been made based on section 40 (4) of the Act.
33. From 2013 to 2018, Mr Giltrap resided in Vanuatu and set up businesses and invested in Vanuatu on the basis of the residence permit given to him in 2013. There were business relations or dealings between the applicants and Mr Giltrap as shown in the sworn statement of Mr Stephen Quinto in support of the Constitutional Application. It is apparent that the applicants accepted the business relations or dealings they had with and by Mr Giltrap. All that happened were under the laws of the Republic.
34. In March 2018, when Mr Giltrap assaulted the applicants, a complaint was made to the police authorities. Mr Giltrap was charged for assault, tried, convicted and sentenced by the Supreme Court for an imprisonment term of 6 months. On appeal, the Court of Appeal confirmed his convictions and reduced his sentence to 2 months imprisonment for offences of assault, contrary to Sections 107(a) (b) of the Penal Code.
35. In the circumstances of this case, the enforcement of the rights of the applicants in the security of their person and their rights to the protection of the law in relation to them, have been provided to them through the vindication of the criminal law in the prosecution, convictions and sentence of Mr Giltrap by the courts of Vanuatu as soon as it happened and there were no undue delays in doing so.
36. Be that as it may, at the time of the decision in 2013 to give residence permit to Mr Giltrap, there were no direct links or connections or correlations with the applicants, their fundamental rights and the breaches of those rights whatsoever. The alleged failure to further enquire on the incomplete information given to the Director by Mr Giltrap for residence visa, may constitute an error, but it could not amount to breaches of fundamental rights in the circumstances of this case.
37. Compensatory and damages claims including emotional and psychological stress and medical expenses resulting from the criminal conducts will result in civil claim



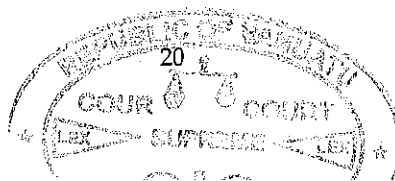
against the convicted individual person as he must be individually and personally liable for the consequences of his criminal behaviours. Compensatory orders 4 and 5 sought in the remedies to the application should have been pursued in that way.

38. It is noted that the First declaratory relief sought in the remedies was to the effect that: **“...the granting of residence visa to Mr Giltrap was in excess of the powers given to the Director of Immigration under the Act and this failure represents a direct deviation from and neglect of the object of the Act premised on protection and security of persons in Vanuatu”** and it was the principal declaratory relief sought that, if materially grounded and connected to the applicants, it would lead me to the conclusion of my preliminary enquiry that there was a cause of action that was founded on the Constitution in the circumstances of this case. There was none here.
39. Further the sworn statement of Mr Quinto filed in support of the application focused principally on the assaults occurring on 10 March 2018 by Mr Giltrap at Si Chuan Restaurant in Luganville, Santo and consequences of these assaults. There was an allegation of constant apprehension following release of Mr Giltrap from custody in November 2019. Apart from this allegation (and the past threat which was part of the circumstances of the criminal conducts at Si Chuan Restaurant), there was no evidence of constant apprehension following release of Mr Giltrap from custody in November of last year in the sworn statement filed by Mr Stephen Quinto.
40. Mr Stephen Quinto deposed in his statement that the criminal assault against him and his wife in 2018 were not the only case of assaults involving Mr Giltrap over the time he has lived in Santo. He stated two (2) other assaults and other charges of aggression pending against him as follows:
- (a) Mr Giltrap was charged for the 10th of March 2018 intentional assault causing temporary injury to Mr Warren Fung at Ratua Resort in Santo;
 - (b) In the same month (ten days and a day after he assaulted them), Mr Giltrap was also charged on the 21st March 2018 of intentional assault on Mr James Harold Neel, also in Luganville, Santo, causing temporary injury and stealing his Laptop; and
 - (c) A year and a half or so earlier, he was also charged with threatening Air Vanuatu office people in Santo, destroying their property ... but this case has never been moved forward. He stated Mr Giltrap also threatened the



principal victim, CEO Joseph Laloyer with retribution if he did not withdraw the charges ... the last and most serious of which the Public Prosecutor has never brought against him.

41. It is to be noted that the criminal charges of aggression pending against Mr Giltrap must and will follow their own course. They cannot help this constitutional application of the applicants.
42. Cases or actions of threatening of people by Mr Giltrap as alleged, if true and serious, have to be the subject of complaints and charges by the alleged victims. But they are not matters to be raised by the applicants as they are not helping them in their present Constitutional Application.
43. It may be that through this Constitutional Application the applicants sought in effect the cancellation of the residence visa of Mr Giltrap by the Court.
44. The circumstances of this case, do not justify this judicial cancellation route.
45. It may be that it was a matter of public policy raised in this Constitutional Application. The public authorities including the Director of Immigration are alerted through this Constitutional Application that the Director relied on an incomplete information material without further enquiry to give residence visa and that they may have consequences on the fundamental rights of others.
46. The power of cancellation of a residence visa is a statutory power of the Director of Immigration with required notice processes in accordance with Sections 47, 48 and 49 of the Immigration Act. They are not statutory powers given to the Court. It will only in exceptional circumstances that the Court will step in.
47. There may be appropriate cases or circumstances where the failure of government or its instrumentalities in breach of their statutory functions may amount to breach of fundamental rights. But the circumstances of the present case were not such cases or circumstances.
48. In this case, Mrs Patterson failed to demonstrate to me that the present Constitutional Application with the sworn statement in support discloses a cause of action founded in the Constitution which relate directly to the breaches of the fundamental rights of the applicants of the security of the person and protection of

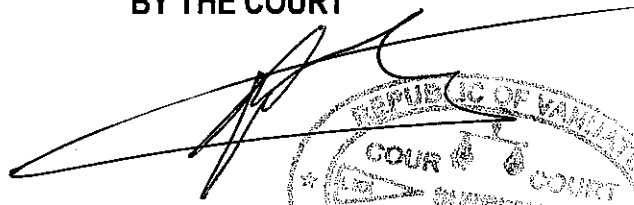


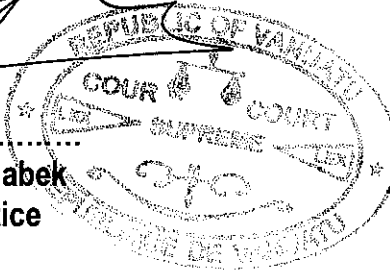
law under Article 5 (1) (c) and (d) of the Constitution by the decision of the Director of Immigration granting Mr Giltrap residence permit in Vanuatu in 2013.

49. Those are the reasons for the striking out of this Constitutional Application on 14 April 2020. I ordered costs in favour of the Respondent against the Applicants of VT 15,000 to be paid within 14 days from the date of the order.

DATED at Port Vila this 22nd day of April, 2020.

BY THE COURT


.....
Vincent Lunabek
Chief Justice



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "SUPREME COURT" in the center. It also contains the text "COUR SUPREME" and "REPUBLIC OF VANUATU" in a smaller font. The seal is partially obscured by the signature and the name of the Chief Justice.