IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil
Case No. 22/2122 SC/JUDR

IN THE MATTER OF: **Section 82 of the Civil Aviation Act [CAP 258]**

BETWEEN: **Joshua Mwanzo Kaboha**
Claimant

AND: **The Director of the Civil Aviation Authority**
Defendant

Date of Hearing: 8th December 2022
Before: Justice S M Harrop
Counsel: Ms S Mahuk for the Claimant
Mr J. Wells for the Defendant
Date of Judgment: 16th December 2022

JUDGMENT AS TO APPLICATION TO STRIKE OUT CLAIM

Introduction

1. On 13 July 2022 the Acting Director of Civil Aviation Ms Grace Naparau (the Director) made a decision under section 9 of the Civil Aviation Act [CAP 258] (the Act) declining to grant Mr Kaboha's application of 16 June 2022 for an aviation document (or two) described as "ATPL issuance and the Twin Otter aircraft (DHC – 6) command position".

2. The claimant had a right of appeal against this decision under section 82 of the Act. Any such appeal had to be lodged within 28 days of the decision appealed against, so by 10 August 2022. However the claimant chose instead, on 11 August 2022, to file an "urgent claim for judicial review", although the intituling included "In the matter of: section 82 of the Civil Aviation Act CAP 258"

3. The defendant has now applied for the claim to be struck out and refiled as an originating application by way of appeal under section 82.

4. The defendant also submits that, even if that occurs, the claim is absolutely barred because the claimant did not comply with section 6 of the State Proceedings Act 2007; the defendant submits

the claimant was required to give notice of his intention to institute proceedings against the defendant and that his failure to do so operates as a complete prohibition on the commencement of the proceeding against the State[1].

5. The defendant acknowledges that such notice would not be required if the proceeding was urgent but submits it was not.

6. The application is opposed by the claimant as to all three issues.

The form of the proceeding

7. When the matter came before Justice Tuohy on 15 September 2022 there was no appearance by the defendant despite her having been served on 12 August 2022 nor had she taken any step to respond to the claim.

8. His Lordship invited counsel for the claimant to consider whether the claim was properly a judicial review "as it appears to be in substance and appeal against the refusal to grant an aviation document under s 82 of the Civil Aviation Act".

9. His Lordship directed that the Minute be served on the State Law Office for the attention of the Attorney-General Mr K Loughman.

10. The next conference was before me on 4 October 2022. Mr Wells appeared for the defendant and (again) Ms Mahuk for the claimant.

11. In the Minute I issued immediately after that conference I recorded:

> *"1. After discussion this morning, I conclude (as indeed Justice Tuohy suggested at the last conference) that this case is in substance an appeal against the refusal to grant an aviation document under section 82 of the Civil Aviation Act rather than a judicial review.*
>
> *2. Accordingly I direct that the claim is to be treated as an originating application under section 83 of that Act and the sworn statements of the claimant and Mr Chevalier are to be treated as sworn statements filed in support of the application. I consider this is a practical and sensible approach causing no prejudice to the defendant. It is consistent with Rules 1.2, 1.3, 1.4 and 18.9."*

12. There was no opposition from Mr Wells to this suggestion prior to my making the direction nor any challenge to it subsequently, at least until the application to strike out was filed on 11 November 2022. There has been no attempt to appeal against my ruling.

13. Since 4 October there was a further conference on 19 October at which Mr Wells did not raise this issue (or for that matter the s6 issue).

14. I reject the strike out application to the extent it is based on the form of the proceeding. In my view it is now too late to challenge that. I have already made a decision that the judicial review claim is to be treated as an originating application the bringing of an appeal under s83(1) of the

[1] *Republic of Vanuatu v Kwang Singh 1* [2013] VUCA 35

Act. Mr Wells accepts there is no prejudice to the defendant resulting from that decision, which I continue to regard as practical and sensible and in accordance with the spirit and wording of the Rules to which I referred.

15. Although it was not previously drawn to my attention that the appeal had been lodged one day out of time, I formally, retrospectively, allow the applicant that one further day beyond the 28 days under s83(1) of the Act to file his appeal, as he did on 11 August 2022.

16. Again, Mr Wells cannot point to any prejudice to the defendant in granting that application and I perceive none.

Was notice required to be given under section 6 of the State Proceedings Act?

17. The State Proceedings Act 2007 (as amended by No. 4 of 2010) is described in the Introduction to the Act as: *"an Act to regulate the institution and conduct of civil proceedings in which the State is a party to, or may be interested, and for related purposes".*

18. Section 6 of the State Proceedings Act provides:

> *(1) No proceeding against the State, other than an urgent proceeding or a Constitutional proceeding may be instituted under section 3 unless the party intending to do so first gives written notice to the State Law office of such intention.*
>
> *(2) The notice under subsection(1) must:*
>
> *(a) include reasonable particulars of the factual circumstances upon which the proposed proceedings will be based; and*
> *(b) be given not less than 14 days and no more than six months prior to the institution of proceedings.*

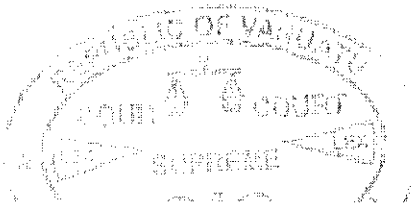
19. Section 3 of the Act provides: *Subject to this Act, a proceeding may be instituted by or against the State.*

20. Is this proceeding one against "the State"?

21. When the Government Proceedings Act was amended in 2010, by the Government Proceedings (Amendment) Act No. 4 of 2010, "State" was defined as: "includes for the purposes of this Act, a Constitutional or a Statutory Entity".

22. Prior to that amendment, when the legislation was known as the Government Proceedings Act, it contained the following definition of Government: "includes all ministers, offices (sic), instrumentalities, and agencies of the Executive Government and their servants or agents, but does not include:

> (a) a body created by or under an Act; or



(b) an office created by the Constitution; or
(c) any individual in his or her private capacity"

23. However, that definition was expressly repealed by section 4 of the Government Proceedings (Amendment) Act No.4 of 2010. So Parliament, for whatever reason, did not carry on with or incorporate the breadth of the definition of Government into the definition of State. The latter is now merely an inclusive definition but no guidance is given as to what else is included beyond "a Constitutional or a Statutory Entity".

24. The obvious inference from the express repeal of the detailed definition of "Government", is that it was intended that the scope of the Act would or at least may be, considerably less than it had been previously. Otherwise, Parliament would surely have simply included the details of the previous definition of Government in the new definition of State. It pointedly failed to do so.

25. This however is not the end of the matter because, although counsel did not refer to it, I am aware that, also in 2010, the Interpretation Act [CAP 132] was amended by the Interpretation (Amendment) Act No.1 of 2010. It repealed the earlier definition of "State" and substituted with: "State" means the Republic of Vanuatu and includes the:

(a) President
(b) Parliament
(c) Government; and
(d) Judiciary

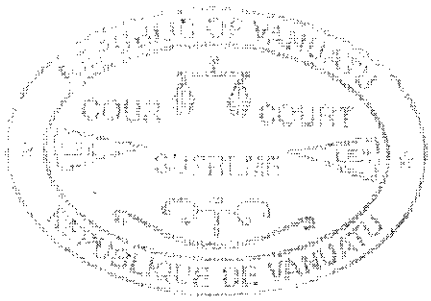
26. It also repealed the earlier definition of "Government" and replaced it with: "Government" means the Executive Government of the Republic of Vanuatu and includes:

(a) the Prime Minister; and
(b) Ministers; and
(c) all departments and other administrative units of a Ministry, however described, but not statutory entities or Statutory Corporations.

27. I note this too is an inclusive definition so what "Government" means is not, or at least not necessarily, limited to these categories. Whatever it means, comes within the definition of "State" by reason of paragraph (c) of the definition of "State".

28. As a result of working through this convoluted series of statutory amendments I consider the question I have to decide is whether the Director of Civil Aviation, as the defendant in this proceeding, is one or more of, or within the category of:

(a) a Constitutional or a Statutory entity; or
(b) the President; or
(c) Parliament; or
(d) the Judiciary; or
(e) the Prime Minister; or
(f) a Minister; or



(g) all departments and other administrative units of a Ministry, however described, but not Statutory Entities or Statutory Corporations"
(h) some other position within the natural and ordinary meanings of either "Government" or "State"

29. I consider the extent of each of these relevant definitions must be informed by what is expressly included and taking into account the repealed definition of "Government" which Parliament decided not to perpetuate.

30. It is first necessary to consider the position of the Director of Civil Aviation, how she is appointed, the nature of her powers and her level of independence.

31. Although the Act recognises the position of Director of Civil Aviation, appointment to that position is not made under the Act; rather Division 2 of Part 3 of the Act sets out the functions and duties of the Minister and the Director of Civil Aviation.

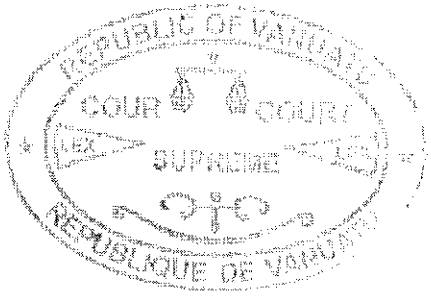
32. I accept Ms Mahuk's submission that, by contrast for example with the Police Commissioner who is appointed by the President on the advice of the Police Service Commission[2], the Director is appointed under s18 of the Public Service Act [CAP 246]. That is a general provision[3] empowering the appointment of directors, or those occupying positions equivalent to directors, rather than referring to any particular position.

33. The Director's functions are set out in s16 of the Civil Aviation Act. Notably ss(5) provides:

> *"The Director must act independently, and is not subject to the direction or control of any person or body, in performing or exercising any functions or powers in relation to:*
>
> *(a) the granting, suspension or revocation of aviation documents; or*
> *(b) the granting of exemptions under this Act; or*
> *(c) the enforcement of the provisions of this Act"*

34. On the face of this subsection, the Director is or may be subject to the direct and control of others (for example the Minister) in relation to all the other decisions she may make but she is expressly *not* so subject in relation to the particular kinds of decision referred to.

35. It was in relation to the Director's refusal to grant Mr Kaboha's applications for aviation documents that this proceeding arose, so the relevant decision came within subsection 5. accordingly, apart from being subject to appeal to the Supreme Court under s82, her decision had to be made independently and without any direction or control from any person or body.



[2] Section7A of the Police Act [CAP] 105
[3] As amended by s 8 of the Statute Law (Miscellaneous Provisions) Act No. 3 of 2022.

36. As to the stated categories set out in paragraph 28 above, some obviously do not apply to the Director of Civil Aviation. She is not a Constitutional Entity, the President, Parliament, the Judiciary, the Prime Minister or a Minister.

37. I also do not consider she is a Statutory Entity. By contrast with Police Commissioner, who was held to be a Statutory Entity for s6 purposes by the Court of Appeal in *Rakau v Bong* [4] she is not appointed by statute but rather by the Public Service Commission. Her functions are set out in a statute (the Act) but her appointment is not made under or provided for in that statute or in another one.

38. I also do not consider that the Director comes within the definition of "all departments or other administrative units of the Ministry, however described..." That definition suggests a group of government workers who together constitute a department or administrative unit, not an individual Director who holds an independent and special position.

39. For the reasons already outlined I also do not consider that the Director, as an independent decision-maker (at least in relation to the kind of decision being dealt with here), comes within the natural and ordinary meanings of the words "Government" or "State". Again those words refer to large State entities, not the individuals who may work in parts of them, such as a Government department or Ministry.

40. Had the repealed definition of "Government" still been in place, arguably the Director would have been seen as a "servant or agent" of an instrumentality or agency of the Executive Government but, as I have held, on repealing that definition Parliament, one must assume deliberately, chose not to replace it with something similar; instead the current definition of "government" is quite different and on the face of it much more circumscribed; it does not include servants or agents of departments or other administrative units, only the departments and administrative units themselves.

41. I therefore conclude that this appeal against the Director's decision to refuse aviation documents to Mr Kaboha is not a proceeding instituted against "the State" in terms of s3 of the State Proceedings Act. Therefore there was no obligation on Mr Kaboha to give a section 6 notice.

42. In case I am wrong in this conclusion, I nevertheless find that the exception in s6 applies because this qualifies as an "urgent proceeding". It is an appeal which must be filed within 28 days of the decision being notified. That indicates urgency, even though there is power for the Supreme Court to allow an extension.

43. I have no doubt that from Mr Kaboha's point of view this was and remains an urgent matter; I note too that Ms Mahuk referred in the waistband of the claim for judicial review filed on 11 August 2022 (albeit also referring to s82 in the intituling) to it being an *urgent* claim. Although no sworn statement expressly deposing as to urgency was filed, Mr Kaboha filed a detailed sworn statement at the same time as the claim. This included the following paragraphs:

[4] Civil Appeal case 15/667 15 April 2016

"15. *To my surprise on 13 July 2022, I received a letter from the defendant advising that I was not successful in my application and citing supposed observations of the CAAV observer as grounds for my application being declined.*

16. *I was instructed verbally by the Air Vanuatu Operations Manager to await as the company would communicate with the CAAV on my behalf. I was then informed verbally by Air Vanuatu spokesperson Naiany Karu that Air Vanuatu had made no headway with my case, but that I had a right to request a judicial review, and that my time was running short.*

17. *I then contacted the director of CAAV by phone on 3 August 2022 requesting a personal meeting. This meeting took place on 4 August 2022 at 8:30 am, at the CAAV building. We discussed our points of view of the situation, and I explained my intentions.*

18. *The Director agreed to personally look into my eligibility for the license (sic), and the qualifications and experience of her observer, Wilfred Makaba, which I had taken issue with given heavy reliance on his lay person observations as opposed to the highly qualified Examiner.*

19. *I urged immediate action and review as I understood from Air Vanuatu advice that the time to apply to the Supreme Court was short. Nothing has happened to date.*

20. *I am currently restricted to flying smaller aircrafts for Air Vanuatu and unable to reap the benefits of a higher scale salary for flying larger aircrafts that a successful APTL test would have permitted".*

44. I am satisfied that Mr Kaboha treated his appeal/claim to the Supreme Court as urgent and that he would have filed it before he did, had the Director not assured him that she would personally look into his eligibility. It is entirely understandable that he held off until she got back to him but it appears she never did.

45. I am therefore satisfied that this was "an urgent proceeding" for the purposes of s6 of the State Proceedings Act.

Result

46. I reject each of the three points raised by the defendant. The application to strike out the proceeding is dismissed.

47. The claimant is entitled to costs against the defendant. Having regard to the number of issues raised, the submissions required of the claimant to deal with them and my finding against the defendant on all three issues, I fix costs at VT100,000. These are to be paid within 28 days.

Dated at Port Vila this 16th day of December 2022
BY THE COURT

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Justice S M Harrop