

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

Judicial Review
Case No. 23/2774 SC/JUDR

BETWEEN: 1. Hugo Brugger; 2. Marcel Brugger;
3. Fabienne Brugger; 4. Olivier
Brugger; 5. Pascal Brugger; 6. Chloe
Brugger; 7. Sandra Daly Brugger; and
8. Birgit Mettel

Claimants

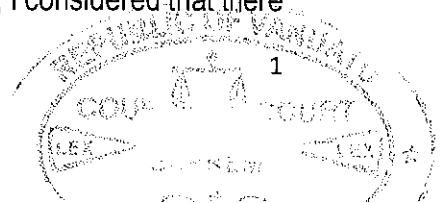
AND: Republic of Vanuatu

Defendant

Date of Hearing: 8 November 2023
Before: Justice V.M. Trief
In Attendance: Claimants – Mr M. Fleming
Defendant – Mr S. Aron & Mr F. Bong

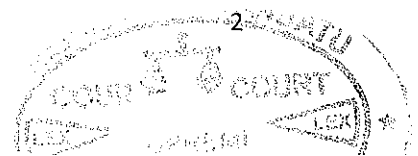
DECISION AS TO RULE 17.8 MATTERS

1. Claimants' Urgent Application for Stay filed on 3 November 2023 heard. Decision reserved.
2. Defence filed today but no sworn statements filed in support of the grounds of the Defence. Defendant's counsel Mr Aron applied for adjournment of the Rule 17.8 Conference until after sworn statements filed given their difficulties obtaining instructions and so that each party is on an equal footing. Claimants' counsel Mr Fleming opposed that application submitting that the Court should proceed with Rule 17.8 Conference today.
3. I ruled as follows: The urgency of this matter is undisputed. A Defence has today been filed, well after the 14 days required by the Civil Procedure Rules (the 'CPR') and after the time required by the Court's Orders. There can be no question that the State as model litigant understands its obligations to comply with the law and with the CPR. With both the Claim and Defence having been filed, I considered that there



was sufficient material filed for me to proceed with the Rule 17.8 Conference. Accordingly, I declined the application and heard counsel as to the Rule 17.8(3) matters.

4. The Claimants 1-7 by the Urgent Claim for Judicial Review, seek an order quashing the Hon. Rick Tchamako Mahe, Minister of Internal Affairs' decision by way of the *Removal of Non-Citizens from Vanuatu* Order No. 169 of 2023 dated 17 August 2023 (the 'decision') and an order quashing the removal of Claimant 8 without notice and without any removal order made under the *Immigration Act* or any law of Vanuatu (the 'Claim'). The balance of the relief sought is costs and any other Order deemed suitable.
5. The Sworn statements of Marcel Brugger and Fabienne Brugger were filed in support.
6. The Claim is disputed: Defence filed today.
7. Rule 17.8(3) of the CPR provides that the judge will not hear the claim unless he or she is satisfied as to all four matters set out in that rule:
 - (i) the Claimants have an arguable case (rule 17.8(3)(a), CPR);
 - (ii) the Claimants are directly affected by the decision under challenge (rule 17.8(3)(b), CPR);
 - (iii) there has been no undue delay in making the Claim (rule 17.8(3)(c), CPR); and
 - (iv) there is no other available remedy which resolves the matter fully and directly (rule 17.8(3)(d), CPR).
8. If the judge is not satisfied about those matters, he or she must decline to hear the claim and strike it out (r. 17.8(5), CPR).
9. Mr Aron accepted that the Claimants are directly affected by the decision under challenge (rule 17.8(3)(b), CPR). He also accepted that there has been no undue delay in making the Claim (rule 17.8(3)(c), CPR). He submitted that the Claimants do not have an arguable case (rule 17.8(3)(a), CPR) and that there is another available remedy which resolves the matter fully and directly (rule 17.8(3)(d), CPR).
10. Having considered the Claim and Defence, and having heard counsel Mr Fleming and Mr Aron, I am satisfied that the Claimants have an arguable case (rule 17.8(3)(a), CPR) for the following reasons:
 - a) It is alleged in the Claim that the Minister made the decision *ultra vires* his power in paras 53A(1)(ab) and (ac) of the *Immigration Act* No. 17 of 2010 (the 'Act') as none of the Claimants had been declared prohibited immigrant that they know of, that none of the Claimants has been given opportunity to be heard as to allegation that they have breached conditions of their visas on three different occasions, that the Claimants were not afforded natural justice in



being given notice of the decision and opportunity to seek its review, that the Claimants were not given the opportunity to seek review of the decision in accordance with subs. 55(3) of the Act, that as to any order declaring them prohibited immigrants – that this was without regard to the terms of reg. 19(1) of the *Immigration Regulation Order* No. 180 of 2011, and that the Minister did not analyse whether or not notice was required pursuant to subs. 53A(2) of the Act;

- b) It is also pleaded in the Claim that Claimant 7 was on a tourist visa and there are no grounds for her arrest and deportation, and that Claimant 8 was not named in the decision by the Minister therefore it is unknown on what grounds she was arrested and deported;
 - c) It is also pleaded in the Claim that the Minister made the decision without any consideration of his obligations under the *Convention of the Rights of the Child* that the best interests of the children Claimants 4-6 be a primary consideration, that none of them would be subject to cruel, inhuman or degrading treatment and that none of them be deprived of their liberty unlawfully or arbitrarily without having access to a lawyer, and were denied prompt access to legal or other appropriate assistance;
 - d) It is pleaded in the Claim that the decision was an improper exercise of statutory power being so unreasonable and done without due regard for process and without regard to Claimant 2's efforts over a 2-year period on behalf of the Claimants 1-6 and 8 to pay for and obtain visas;
 - e) Finally, it is pleaded in the Claim that the decision was done for an ulterior motive to benefit a third party local politician in the event that the Claimants were deported;
 - f) The Defendant's case as pleaded in the Defence is that the Minister made his decision on the grounds that the Claimants 1-8 were prohibited immigrants and had breached condition of their visas on three different occasions. Further, that in 2021, they were served the Director of Immigration's decision declaring them as prohibited immigrants and its lawfulness has never been challenged therefore it is a valid order and part of the basis for the decision by the Minister. It was also pleaded in the Defence that penalty notices were subsequently served on the Claimants for residing illegally in Vanuatu without a valid visa. It was pleaded too that the Minister decided not to give notice of the decision to the Claimants as they were already aware that they had been declared prohibited immigrants; and
 - g) It is clear from the foregoing summary of the Claim and the Defence that there are issues in dispute between the parties and that the Claimants have an arguable case.
11. Mr Fleming submitted that there is no other remedy that resolves the matter fully and directly. Mr Aron submitted to the contrary as no review has been sought of the Director's decision declaring the Claimants as prohibited immigrants. As set out in the Claim, the Claimants allege that they do not know of any order declaring them



as prohibited immigrants. Such order has now been pleaded in the Defence as having been made on 7 April 2021. Contrary to Mr Aron's submission, the existence of the Director's decision, and whether or not there was a factual basis for it, have been squarely raised in para. 1 of the Claim. If necessary, the Court can make any other Order deemed just including as to the lawfulness or otherwise of the Director's decision. Accordingly, I am satisfied that this proceeding is the only remedy available to the Claimants to challenge the lawfulness of the decision by the Minister and thus resolve the matter fully and directly (rule 17.8(3)(d), CPR).

12. As I am satisfied that the Claimants have an arguable case, that there is no other remedy which resolves the matter fully and directly, and there was no dispute as to the other rule 17.8(3) matters, this matter needs to be listed for hearing of the Claim.
13. The Defendant is to file and serve sworn statements in support of the grounds of the Defence **by 3pm on 10 November 2023.**
14. The Claimants are to file and serve sworn statements in reply **by 9am on 13 November 2023.**
15. This matter is listed for Hearing of the Claim **at 10am on 13 November 2023.**

**DATED at Port Vila this 8th day of November 2023
BY THE COURT**

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Justice Viran Molisa Trief

