IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 23/2547 COA/CIVA

BETWEEN: ALICKSON VIRALONE GAMALIERE
Appellant

AND: GOVERNMENT OF THE REPUBLIC OF VANUATU IN RIGHT OF THE MINISTER OF FOREIGN AFFAIRS
Respondent

Date of Hearing:	***8 November 2023***
Coram:	***Hon. Acting Chief Justice Oliver A Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Viran M Trief*** ***Hon. Justice Mark O'Regan*** ***Hon. Justice Richard White*** ***Hon. Justice Edwin P Goldsbrough***
Counsel:	***J Tari for the Appellant*** ***L Huri for the Repsondent***
Date of Judgment:	***17 November 2023***

JUDGMENT OF THE COURT

Introduction

1. The appellant, Mr Gamaliere, was the Consul-General of the Republic of Vanuatu to Dubai, having been appointed to the post by the Minister of Foreign Affairs (the Minister) on 3 March 2022. On 9 November 2022 a different Minister of Foreign Affairs decided to recall him, thus terminating the appointment.

2. On 16 June 2023, the appellant applied to the Supreme Court for judicial review of the Minister's decision to recall him, which, he argued, was unlawful and made in breach of the rules of natural justice. Despite the delay in making his claim, necessitating the grant of an extension of time to commence the proceeding, the appellant sought an urgent hearing. He pleaded that the Court should quash the Minister's decision to recall him. He also asked the Court to reinstate him as the Consul-General. He did not seek a declaration that the decision to recall him was unlawful.

3. The appellant was partially successful in the Supreme Court: *Gamaliere v Government of the Republic of Vanuatu in right of the Minister of Foreign Affairs* [2023] VUSC 141. The primary Judge found the decision to recall him was unlawful. But the Judge declined to quash the decision or to order that he be reinstated.

4. The appellant appeals to this Court against the primary Judge's refusal to grant a remedy. The respondent does not cross-appeal against the Judge's findings that the decision to recall was unlawful. That means that the only issue before us is whether the primary Judge erred in declining to quash the Minister's decision to recall the appellant and to order that he be reinstated as the Consul-General.

Background

5. The appellant's appointment as Consul-General was made under s 17(1) of the Foreign Services Act No 20 of 2013 (the Act). The appointment was for a period of three years. At the time of making the appointment, the Minister also made an order setting out the terms and conditions of the appellant's employment as Consul-General (the Terms). An unusual feature of the appointment was that the Terms provided that the appellant was "self-funded and ... not entitled to any remuneration and other entitlements".

6. The appellant deposed in the Supreme Court that he had entered into an agreement for sponsorship of the Consulate General of Vanuatu in Dubai with a Thai national resident in Dubai. Under this agreement the sponsor agreed to pay USD32,000 per month for the three-year period of the appellant's appointment as remuneration for the Consul-General and others to be employed in the consulate, to pay for regular return trips to Port Vila and to pay other costs of establishing the consulate. In return the appellant agreed to appoint the sponsor as a Vice Consul, among other things, and arrange for vehicles owned by the sponsor to be fitted with diplomatic number plates.

7. The letter from the Minister to the appellant informing him of the recall decision said that the decision was made in accordance with s 28 of the Act. The Minister did not give reasons. However, in his defence to the Supreme Court claim, the Minister stated that the reason was that the appellant had travelled for unofficial purposes without approval, contrary to s 28(1)(i) of the Act and cl 9(1)(i) of the Terms. Section 28 provides:

> ***28. Recall and resignation of Consul-General or diplomatic staff***
> *(1) The Minister may in writing recall a Consul-General ... if he or she:*
> ...
> *(i) consistently travels for unofficial purposes without obtaining prior approval from the Director General.*

8. Clause 9(1)(i) of the Terms was in similar terms.

The Supreme Court decision

9. The primary Judge found that the recall decision was unlawful because the Minister had failed to give reasons and had also failed to give the appellant an opportunity to be heard before the decision was made.

10. The primary Judge then turned to the question of the consequences of the finding of unlawfulness. He noted that ordinarily a decision that had been made following an unlawful process would be quashed, leaving it for the Minister to remake the decision by giving the appellant reasons for the proposed recall and an opportunity to respond to them.

11. He then continued (at [24]):

> *In this case however, quashing the decision to recall the [appellant] would essentially reinstate him as Consul-General ... . Restoring the claimant to his position as Consul-General to Dubai would effectively involve the Court in the appointment of a person to represent Vanuatu's interests in the receiving state. That is a matter reserved to the Executive branch in its conduct of foreign affairs. ... To go further than a finding of unlawfulness risks breaching the separation of powers by entering into a realm democratically reserved to the executive and its conduct of foreign relations.*

Submissions

12. The appellant argues that the primary Judge's approach to remedy leaves a legal limbo. He argued that the present case was analogous with a recent decision of this Court *Minister of Education and Training v Tabi* [2023] VUCA 30. In that case this Court upheld the decision of the Supreme Court on a judicial review commenced by three members of the Teaching Service Commission whose appointments had been terminated by the President on the advice of the Minister. The President had, on the advice of the Minister, appointed three new members. But those decisions had been stayed pending the outcome of the judicial review proceedings.

13. In *Tabi*, the primary Judge quashed the decision of the President to remove the claimants from the Commission and also quashed the decision of the President to make the new appointments.

14. This Court upheld the Supreme Court decision in *Tabi*. It rejected an argument advanced on behalf of the Minister that the effect of the Supreme Court decision was to reinstate the claimants to the Commission in circumstances where the relationship between the Government and them had broken down. The Court considered that reinstating the claimants did not require an ongoing relationship with the Minister, as the Minister could again advise the President to remove the claimants, following the appropriate procedures to ensure that this was done lawfully.

15. The appellant argues that this case is analogous.

16. The respondent argued that this Court's decision in *Tabi* was distinguishable given the fact that the appointment in the present case involves the representation of Vanuatu in another country, which requires that the Government has full confidence in the appointed person. The respondent cited the decision of the House of Lords in *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141. In that case, their Lordships found that the decision of the Chief Constable to force the resignation of a trainee constable was unlawful. Their Lordships made a declaration to that effect but declined to make an order of mandamus to reinstate Mr Evans, even though they recognised that was the only satisfactory remedy for him. As Lord Brightman put it (at 156), an order for mandamus "might border on usurpation of the powers of the Chief Constable, which is to be avoided".

17. The respondent also relied on observations made by this Court in earlier cases as to the importance of the separation of powers: *Vanuaroroa v Republic of Vanuatu* [2013] VUCA 41 at [30] and *Mass v Government of the Republic of Vanuatu* [2018] VUCA 11 at [56].

Decision

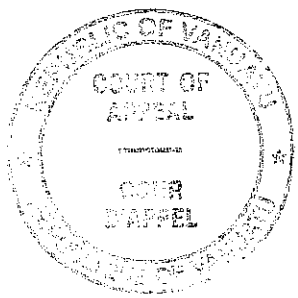
18. Judicial review remedies are discretionary. We agree with the primary Judge that in the present case, it would have been inappropriate to quash the Minister's decisions to recall the appellant and to order the Minister to reappoint the appellant. The conduct of foreign affairs is quintessentially an Executive function into which the Court would normally be careful not to intrude. The fact that the Consul-General had entered into the unusual sponsorship arrangement makes this an even more compelling consideration, as his reinstatement would commit the Government to the continuation of that arrangement. We see those factors as differentiating the present case from *Tabi*.

19. Another factor in the exercise of the remedial discretion is delay. In the present case the appellant did not commence his proceedings until more than six months after the decision to recall had been made. While we do not see this as a decisive factor, given that there appears to have been no significant prejudice to the Minister as a result of the delay, it is also a factor that reinforces our view that the remedial discretion should be exercised against quashing the recall decision.

20. The primary Judge said that a finding of illegality was as far as he could go. We would have thought that it would have been appropriate to grant a declaration that the decision to recall was made unlawfully but we note that no such declaration was sought by the appellant in his judicial review claim.

Result

21. We dismiss the appeal against the decision of the primary Judge.

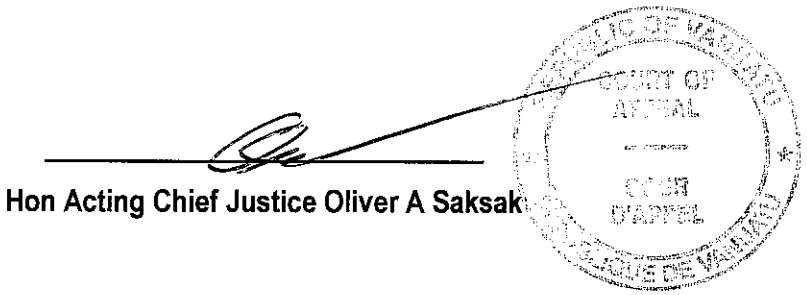


Costs

22. The appellant must pay the respondent costs of VT75,000.

DATED at Port Vila this 17th day of November 2023

BY THE COURT



Hon Acting Chief Justice Oliver A Saksak