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

Civil Appeal
Case No. 25/1702 CAC /CIVA
[2025] VUCA 35

BETWEEN: DR SUNARAPARIPOORANAN PAKSHIRAJAN
Appellant

AND: FOREIGN SERVICE BOARD
First Respondent

AND: MINISTER OF FOREIGN AFFAIRS & EXTERNAL TRADE
Second Respondent

AND: COUNCIL OF MINISTERS
Third Respondent

Date of Hearing:	***8th August 2025***
Coram:	***Hon. Justice M. O'Regan*** ***Hon. Justice A. Besanko*** ***Hon. Justice D. Aru*** ***Hon. Justice V. Molisa Trief*** ***Hon. Justice E. Goldsbrough*** ***Hon. Justice M. Mackenzie***
Counsel:	***Ngwele, J for the appellant*** ***Aron, S of the Attorney General Chambers for the 1st, 2nd, and 3rd respondents***
Date of Judgment:	***14th August 2025***

JUDGMENT OF THE COURT

INTRODUCTION

1. Dr. Sundaraparipoonan Pakshirajan (the Appellant) responded to a public advertisement issued by the Foreign Service Board (the Board), which is part of the Ministry of Foreign Affairs (the Ministry), when it came to consider the appointment of a High Commissioner or Head of Diplomatic Mission to the country of India.

2. He was dissatisfied with the conduct of the recruitment process and sought judicial review of various decisions made in the course of that process.

3. The proceedings in the Supreme Court were commenced by the filing of an urgent application for interlocutory relief, swiftly followed by a substantive claim for judicial review of decisions made by the Board concerning the recruitment process.

4. After an initial hearing of the application for interlocutory relief and the filing of both the substantive claim and a defence to the claim, at a scheduled hearing, under Rule 17.8 of the Civil Procedure Rules, the Supreme Court determined that the required test had not been met and dismissed both the claim for interlocutory relief and the substantive judicial review claim.

BACKGROUND

5. The Appellant was granted Vanuatu citizenship under a programme known as the Development Support Programme (DSP), which was brought into existence under the Citizenship Act [Cap 112]. He was at that time an Indian citizen, having been born in Thiukurungudi, Tamilnadu India, on 26th May 1970[1].

6. His DSP citizenship was granted to him on 4th June 2021[2].

7. The initial advertisement for the post of High Commissioner to India was published on 27th August 2024[3]. That resulted in applications from three individuals, including the present Appellant. Of those three, one was considered ineligible, leaving the Appellant and one other completing the recruitment process.

8. Under the relevant legislation, the Foreign Services Act 2013, and in particular under section 12, the Board was required to submit its recommendation on the recommended candidate and two eligible candidates to the Minister after the Board had interviewed the candidates and made its assessments on the candidates.

9. No recommendation was submitted to the Minister by the Board. Instead, a second recruitment process was begun with a second advertisement published on 21st March 2025.

10. The Appellant re-applied but was not shortlisted for an interview.

11. It was this decision that prompted the Appellant to commence proceedings.

THE PROCEEDINGS

12. These proceedings were commenced in the Supreme Court with the filing, on 2 May 2025, of an urgent application for interim relief against the Board. That was served on the Attorney General's Chambers on 5 May 2025, returnable in the Supreme Court on 13th May 2025. It was supported by a Certificate of Urgency, together with a sworn statement from the present Appellant and from

[1] AB B page 56
[2] AB B page 55
[3] AB B page 206

his counsel. The essence of the urgent application was to require the Board to stop any further steps from being taken in the recruitment process.

13. Orders were made on 13 May 2025, including, inter alia, the filing of a substantive claim, the filing of a defence and a further hearing under rule 17.8 on 21 May 2025.

14. The substantive claim for Judicial Review was filed on 15 May 2025, and a defence to it on 19 May 2025. In that claim, the Appellant sought:-

i) A declaration that the First Defendant's decision to abandon the first recruitment process and re-advertise the position was unlawful, invalid and of no effect
ii) A declaration that the Appellant's exclusion from the second recruitment process was procedurally unfair, irrational and unlawful
iii) An order quashing any shortlist, recommendation or decision arising from the second recruitment process
iv) An order directing the respondent to recommence the recruitment process lawfully and to give the Appellant fair and equal consideration in accordance with the Act
v) An order restraining the respondents from making any appointment to the position until such time as a lawful recruitment process is completed and
vi) Costs.

15. Sworn statements were filed by officers from the respondent Board in addition to submissions filed for the Rule 17.8 hearing. Following the hearing of 21 May 2025, a judgment was published on 13 June 2025 after counsel had been allowed time to file written submissions and further sworn statements. That judgment contains the decision of the Supreme Court that the court, under rule 17.8 (5) CPR, should decline to hear the claim and that it should be dismissed. The expressed reason for that decision is that the claimant has no arguable case, and is not directly affected by the omission of the Board in not completing the lawful process under section 12 (1) (b) of the Act. It is also said that the substantive claim had not been filed. The primary Judge found that, as there remained only one person whose name could be forwarded to the Minister, the only reasonable and fair way to proceed was to re-advertise the position.

16. It is against that judgment that this appeal is brought.

RELEVANT LAW

17. Legislation to which the Supreme Court was referred included the Foreign Services Act No. 20 of 2013 and the Citizenship Act [Cap 112]. CPR rule 17.8 was also referred to. For convenience, the relevant sections are set out here.

18. The Board was established under the Foreign Services Act, where membership and procedures of the Board are also to be found. Section 7 establishes the Board, and Section 8 sets out membership of the Board. All members are *ex officio*. Section 9 sets out the Board's functions. Sections 12 and 13 set out requirements to be followed in the recruitment process. These are:-

"12 (1) The Board must:

(a) ensure that a shortlisted applicant must undertake a written assessment and interview; and

(b) ensure it submits its recommendation on the recommended candidate and 2 eligible candidates to the Minister after the Board has interviewed the candidates and made its assessments on the candidates.

(2) The Board must not take into account any direction or statement made by the Minister or any other persons when making its recommendations, except that normal employment references may be considered by the Board.

(3) The recommendation referred to under paragraph (1)(b) must specify the applicant's qualifications, experiences in any related field and his or her suitability for the position.

(4) The Board must not recommend a person if that person is:

(a) an honorary citizen of Vanuatu; or
(b) a person who has a criminal conviction; or
(c) a person who has dual citizenship; or
(d) a person with questionable reputation; or
(e) a person who is certified by a doctor to be unfit for employment.

(5) The Board must not submit its recommendation to the Minister if it considers that the applicant is disqualified under subsection (4).

(6) The Minister is to submit the Board's recommendation to the DCO for noting and to the Council for approval."

"13 Appointment of a Head of Mission

(1) The Minister on the approval of the Council is to appoint by Order a person to be a Head of a Mission in a State.

(1A) The Board must, in providing the advice to the Minister under subsection (1), state 2 names being for the applicant who has been recommended by the Board and the applicant whom the Board is satisfied is eligible, to be appointed as a Head of Mission.

(1B) The Minister is to submit both names that have been provided to him or her by the Board, to the Council."

19. In addition to the constitutional provisions contained in Articles 13 and 14 of the Constitution, the relevant provisions of the Citizenship Act [Cap 112] are:-

"PART 3A- DUAL CITIZENSHIP

"13A Application of Part 3A

This Part applies to a person who intends to apply for Vanuatu citizenship and hold dual citizenship as recognised by subarticle 13(1) of the Constitution of the Republic of Vanuatu.

. . . .

13E Application for citizenship by an investor under the Development Support Program

(1) The Minister is to prescribe by Regulation, the requirements for an application for citizenship by an investor under the Development Support Program.

(2) The prescribed fees payable by an applicant under the Development Support Program covers the applicant, his or her spouse and 2 children.

(3) The Minister may prescribe additional fees for any other child or resident dependant of the applicant.

(4) The Commission must within 3 months of receiving an application under this section, make a decision on whether or not to approve and grant a citizenship."

20. Both of the above were inserted into the legislation after the amendment to the Constitution, which recognised dual citizenship (Act 27 of 2013). That amendment inserted:-

*13. **Recognition of dual citizenship***

(1) The Republic of Vanuatu recognises dual citizenship.

(2) A person who is a citizen of Vanuatu or of a state other than Vanuatu may be granted dual citizenship.

(3) For the purposes of protecting the national sovereignty of Vanuatu, a holder of dual citizenship must not:

(a) hold or serve in any public office; and
(b) be involved in Vanuatu politics; and
(c) fund activities that would cause political instability in Vanuatu; and
(d) affiliate with or form any political parties in Vanuatu;
(e) stand as a candidate and vote at any of the following elections:

(i) general election for Members to Parliament; and
(ii) provincial election for members to a Provincial Government Council; and
(iii) municipal election for members to a Municipal Council.

(4) To avoid doubt, sub article (3) does not apply to an indigenous citizen or a person who has gained Vanuatu citizenship by naturalisation, who hold dual citizenship.

21. Rule 17.8 of CPR provides that as soon as practicable after the defence has been filed and served, the Judge must call a conference where the Judge must determine whether the claim

will be heard or not. In making that determination, the Judge must consider whether the claimant has an arguable case, and is directly affected by the decision, and there has been no undue delay and that there is no other remedy that resolves the matter fully and directly.. The Judge may consider at the conference the papers filed in the proceedings and hear argument from the parties. If the Judge is not satisfied about the matters he must consider, the Judge must decline to hear the claim and to strike it out.

GROUNDS OF APPEAL

22. In a notice of appeal filed on 16 June 2025, the Appellant raised seven grounds of appeal. Those grounds are:-

(1) That learned trial judge erred by finding that the Appellant did not have an arguable case under rule 17.8 (3) (a) of the *Civil Procedure Rules 2002* (the "*Rules*") despite clear arguable grounds raised by the Appellant including:

(a) The Foreign Service Board's ("*FSB*") failed to submit a recommendation in contravention of section 12 (1)(b) of the *Foreign Service Act No. 20 of 2013* (the ("*FSA*");

(b) FSB acted *ultra vires* section 12 (1)(b) by deciding to re-advertise;

(c) FSB excluded the Appellant in the second recruitment round in breach of his reasonable expectation of being considered;

(d) FSB excluding the Appellant pursuant to section 12(4)(c) of the FSA and Article 13 (3) of the Constitution, despite the Appellant being only a citizen of Vanuatu and not a dual citizen; and

(e) Potential bias or conflict of interest within FSB deliberations due to the presence of a previously unsuccessful applicant as a member.

(2) The learned judge erred by finding that the Appellant was not directly affected as per rule 17.8 (3)(b) despite the Appellant being clearly deprived through both the re-advertisement and his current exclusion.

(3) The learned judge erred by failing to make further findings under rule 17.8 (3)(c) and (d), and this was in contravention of rule 17.8 (2).

(4) The learned judge erred by finding that the FSB acted lawfully and reasonably in re-advertising the position due to lack of eligible applicants. In doing so, the judge:

(a) Misconstrued section 12 (1)(b) of the FSA;

(b) Failed to apply or distinguish *Pakoa v PSC* [2002] VUSC 196; and

(c) Overlooked the fact that both the Appellant and Richard Balkonan were available applicants eligible for recommendation.

(5) The learned judge erred by finding that the Appellant had failed to file a substantive Judicial Review Claim, thereby failing to consider the merits of the Judicial Review Claim that the Appellant duly filed.

(6) The learned judge erred by taking into account irrelevant matters and failing to consider crucial issues such as whether the Appellant was a dual citizen.

(7) The learned judge erred in awarding costs on an indemnity basis against the Appellant in the absence of any unreasonable, improper or contumelious conduct that would justify a departure from the standard rule as to costs.

SUBMISSIONS ON THE APPEAL

23. The first issue raised within this appeal is the decision of the Board not to make recommendations to the Minister following the first recruitment exercise. Relying upon the provisions of s 12, the Appellant submits that the Board was obliged to make a recommendation, that of the recommended candidate and of the two eligible candidates.

24. The second issue raised is that of procedural fairness, and the legitimate expectation of the Appellant if the second recruitment exercise be considered. Next is the question of apparent bias. That arises because a former applicant in the first recruitment exercise became a member of the Board when it began the second recruitment exercise.

25. The fourth submission concerns the primary Judge's decision that the Appellant was not directly affected by the decisions made by the Board in not making a recommendation and proceeding with the second recruitment exercise. Then there is a submission that the judge failed to make findings on two of the matters required in Rule 7.18 (3). There is a submission that the Judge took into account irrelevant and inconsequential matters, but failed to consider whether the Appellant was eligible for public office, and finally, that the Judge erred in awarding costs on an indemnity basis in the absence of any unreasonable or improper conduct.

DISCUSSION

26. At a rule 17.8 conference, the Court must satisfy itself of the claimant's case. Four matters are prescribed in r 17.8 (3), and unless the Judge is satisfied that all four matters are satisfied, the claim goes no further. The claimant must show an arguable case, that he is directly affected, that there has been no undue delay and that there is no other remedy that fully and directly resolves the matter.

27. If any one of those four matters is not made out, the claim must be struck out.

28. We do not therefore accept that there was an error when the Judge failed to make specific findings on two matters, undue delay and no other remedy, after he had determined that there was no arguable case and that the Appellant was not directly affected. Had he done so, nothing would have changed. There is no dispute that these two criteria were met in this case.

29. There is force in the argument that, contrary to the primary Judge's view, the Appellant was directly affected by the decision not to make any recommendation to the Minister following the completion of the first recruitment process. Still, given the finding of no arguable case, we consider little merit in making any different determination on that matter.

30. By far the most significant finding in the judgment is that the Appellant had not shown an arguable case. Without that, the claim was and is bound to fail. We will return to this later.

31. Clearly, at the time of the hearing, the Appellant had filed his substantive Judicial Review claim, and the Judge was in error to find otherwise. It had not been filed on the date ordered by the Judge, given that it was filed on 15 May 2025 and not before the close of business on 14 May, but nothing turns on that. Quite why counsel for the Appellant did not draw the Judge's attention to the filing by way of confirming compliance with the order remains unanswered, as is the question as to why the claim was not included in the trial file as one might expect.

32. Regardless, the Judge had all of the information he needed to determine the required issues. Sworn statements and a defence had been filed, and he had the benefit of submissions from counsel. There is nothing to be gained in any further consideration of this point.

33. Of much more significance is the finding that the Appellant had not shown an arguable case.

34. Judicial review involves discretionary remedies. In seeking an order concerning the first recruitment, we note that, at the time the injunctive order had been served on the respondent Board, the second interviews had already been held and a recommendation had already been given to the Minister, who had referred it to the Development Committee of Officials. No appointment had then been made.

35. It is difficult to see what the Appellant seeks to obtain from any relief now sought over the first recruitment process, other than to avoid repetition. It is a fact that the second recruitment process has taken place.

36. Judicial review also involves the identification of unlawful conduct. The Board made the decision not to make any recommendation to the Minister, as it considered providing only one name to the Minister as being other than in accordance with s 13. Of the three people who participated as candidates, one was not considered eligible by s12 (3) (d) and one was considered as no longer available for consideration as he had been offered alternative employment. The evidence does not go on to disclose if that person regarded themselves as no longer available, merely that

Ministry officials were aware of the alternative employment offer. The Judge describes the situation as him having been offered a government position. Whatever the position, the Board was not prepared to provide the Minister with just one name in breach of s 13.

37. We do not consider this course to be unlawful.

38. Judicial Review is not about the substitution of a decision lawfully made by another decision which the reviewing court regards as preferable. As this Court said in *Vanuaroroa v Republic of Vanuatu*[4] at para 30

> *"It is no part of the court's duty under its jurisdiction to enquire into or comment upon anything other than the lawfulness of Government action. It would be wrong for us to intrude upon the wisdom, prudence, efficacy or appropriateness of proposed action. This is a simple demonstration of the separation of powers which is of core importance in the Republic."*

39. This Court also approved the remarks made in *Alickson Gameliere v Republic of Vanuatu*[5] in the Supreme Court when it was said:-

> *"The conduct of foreign affairs is squarely for the executive branch. The Court must be vigilant not to exercise powers properly belonging to the Minister of Foreign Affairs in the conduct of Vanuatu's foreign relations. The conduct of foreign affairs involves the formulation and implementation of policy vis-à-vis other states. In R (on the application of Gentle) v Prime Minister [2008] UKHL 20, Lord Bingham noted at [8], the "restraint traditionally shown by the courts in ruling on what has been called high policy – peace and war, the making of treaties, the conduct of foreign relations." These are examples of policy the government would expect a person appointed to represent its interests in foreign states to implement.*
>
> *The appointment of a person to represent Vanuatu's interests abroad is therefore a vital component of the conduct of foreign affairs by the executive branch. The government needs to trust that the person it appoints to a diplomatic office will communicate and implement the government's foreign policy in the receiving state. This is why the Act imposes a high threshold on who is qualified to represent Vanuatu's interests abroad and sets out the process by which that person is appointed."*

40. Turning to the second recruitment process, the Appellant submits that he had a legitimate expectation that he would be called for an interview, having been found acceptable, or eligible to participate during the first recruitment process. We do not agree that there are grounds sufficient to establish any such legitimate expectation. Further, we consider it more important to look at whether the actions taken by the Board not to allow him to participate in the second recruitment process was unfair.

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[4] [2013] VUCA 41

[5] [2023] VUCA 50 following Gamaliere v Government of the Republic of Vanuatu in right of the Minister of Foreign Affairs [2023] VUSC 141

41. Although not provided with reasons at the time, Minutes provided within the appeal material show that the question of dual nationality arose. This question, in turn, brought Article 13 (3) of the Constitution into play. In his application for the position, the Appellant submitted material showing that he had been granted citizenship DSP under s 13E of the Citizenship Act. Given that Part 3A, where the provision can be found, speaks of dual citizens, it is not unreasonable to assume the Appellant was such a citizen. In his application the Appellant describes having returned his Indian passport but not of renouncing his Indian citizenship or any automatic renunciation by operation of law.

42. On appeal, counsel had made such material available to this Court. Our consideration, however, is and should be confined to the material available to the individuals responsible for making the decision, which is the subject of this claim. Taking into account the material provided by the Appellant, it is not clear that he was not a dual citizen and, as such, ineligible for appointment. As set out in the explanatory notes for applicants, the obligation to provide evidence of eligibility rests on the applicant. The requirements are set out in s6 of the Foreign Services Act, in particular in s6 (4) (b). No such document certifying that the applicant, the present Appellant, did not have dual citizenship was provided.

43. It was, therefore, in our view, not unreasonable for the question to be raised by the staff responsible for shortlisting. If an applicant were a dual citizen, the Constitution would forbid his appointment to public office. The obligation to show that he was not a dual citizen was with the Appellant.

44. This does not seek to determine the question as to whether the Appellant is a dual citizen or not. Nor was the Judge required to make such a determination to arrive at his conclusion. It examines the process within which the decisions complained of were made and whether any unlawful action was taken therein. It further examines whether such actions could be described as unreasonable. In our view, neither unlawfulness or unreasonableness has been made out.

45. Apparent bias is raised as a person who had been a participant in the first recruitment process, and who had been unsuccessful within that process, by the time of the second process, became a member of the Board. As earlier set out, membership of the Board is *ex officio*. This indicates that the previous unsuccessful applicant had been appointed to a position that entitled or obligated him *ex officio* to membership of the Board. This of itself cannot support any submission of apparent bias. By the time of the second recruitment process, any interest that the unsuccessful candidate may have had in the appointment would have disappeared.

46. At the conclusion of his judgment and without further explanation, the Judge ordered costs to be paid by the Appellant on an indemnity basis. We note from the papers that counsel for the present Respondent had given notice that, in the event of the claim not being upheld, such an order would be sought. What cannot be found in the papers is how such an order falls within the applicable rule in CPR. Under rule 15.5 (5) costs may be ordered on an indemnity basis in a limited number of situations. None of those four situations was apparent in the proceedings in the Supreme Court, and no such order was therefore warranted.

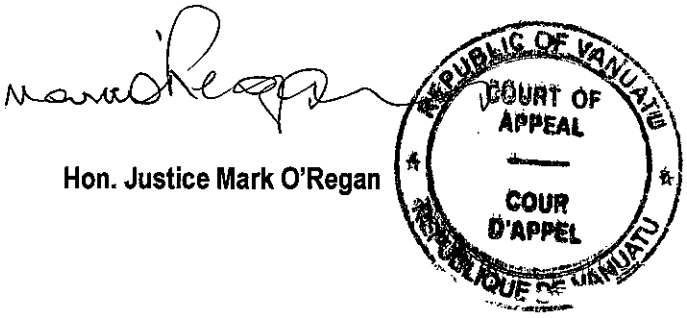
DECISION

47. The appeal is allowed to the extent only that the order granting costs on an indemnity basis is set aside and an order made for costs of the present Respondent in the Supreme Court to be payable on the standard basis, to be agreed or assessed. The balance of the decision of the Supreme Court is upheld, as is the order striking out the claim.

48. Costs of and incidental to this appeal are to be paid by the Appellant to the Respondent in the sum of VT 50,000.

Dated at Port Vila, this 14th day of August, 2025

BY THE COURT



Hon. Justice Mark O'Regan