

**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: 13 November 2023 & 28 November 2023

Before: Justice V.M. Trief

In Attendance: Claimants – Mr M. Fleming
Defendant – Mr F. Bong

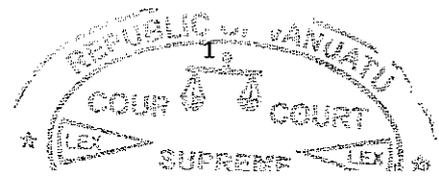
Date of Decision: 28 November 2023

JUDGMENT

[with corrections under the slip rule to paras 73, 82, 165, 168 & 169 and additional Order in para. 172]

A. Introduction

1. This was an urgent claim for judicial review of the order by the Minister of Internal Affairs for the removal of Claimants numbered 1-7 Hugo Brugger, Marcel Brugger, Fabienne Brugger, Olivier Brugger, Pascal Brugger, Chloe Brugger and Sandra Daly Brugger from Vanuatu, and of the order or direction under which Claimant 8 Birgit Mettel was arrested and deported.
2. Also under challenge was any declaration by the Director of the Department of Immigration (the 'Director') declaring the Claimants as prohibited immigrants.
3. This matter proceeded to the hearing of the Claim. After the lunch break, counsel informed me that the Defendant State having listened to the evidence and the

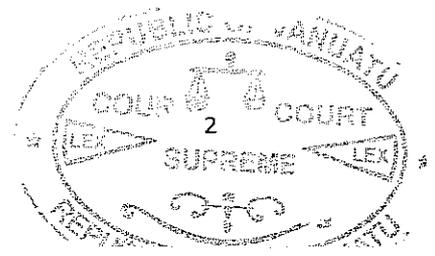


Claimants' submissions, accepted that the decision by the Minister and the declarations by the Director that Claimants 1-7 are prohibited immigrants were not served on the Claimants and accordingly, should be quashed. Counsel requested that the Court make its decision and set out its reasoning.

4. This is the decision.

B. Background

5. Claimants 2 and 3 Marcel and Fabienne Brugger own the Aquana Resort at Eratap area on Efate island. Claimants 4-6 Chloe, Pascal and Olivier Brugger are their three children aged 13, 11 and 9 years old. They have lived for 13 years at Eratap, building the Aquana Resort and employing Ni-Vanuatu. This has been the only home that the children have known. They resided in Vanuatu under residence permits which had to be renewed annually.
6. Marcel's father Claimant 1 Hugo Brugger resided with Claimants 2-6 at Aquana Resort. He too resided in Vanuatu under a residence permit which had to be renewed annually.
7. By *Removal of Non-Citizens from Vanuatu* Order No. 169 of 2023 dated 17 August 2023, the Minister of Internal Affairs Rick Tchamako Mahe in exercise of the powers conferred by paras 53A(1)(ab) and (ac) of the *Immigration Act* No. 17 of 2010 (the 'Act') ordered the removal of Claimants 1-7 from Vanuatu.
8. Starting at 2am on Sunday 27 August 2023, Immigration officers supported by the Police executed the Minister's decision by taking the Claimants 1-6 into custody and then put them on the Port Vila-Sydney flight at 7am that morning.
9. Several hours after Claimants 1-6 were taken into custody, Immigration officers returned to Aquana Resort and took Claimant 7 Sandra Daly Brugger into custody and also put her on the Port Vila-Sydney flight at 7am on 27 August 2023. Ms Sandra Daly Brugger was on an extended tourist visa, being a more recent arrival to Vanuatu.
10. It is unknown on what grounds or basis or pursuant to what decision or order Claimant 8 Birgit Mettel was arrested and deported.
11. On 13 October 2023, the Claimants filed Urgent Claim for Judicial Review (the 'Claim'). It is disputed.
12. On 8 November 2023, I conducted a Rule 17.8 Conference and ruled that the matter be listed for hearing of the Claim: *Brugger v Republic of Vanuatu* [2023] VUSC 236.
13. On 10 November 2023, this Court granted a stay of the Minister's decision and the Director's declarations of the Claimants as prohibited immigrants: *Brugger v Republic of Vanuatu* [2023] VUSC 237.



14. The Claimants remain outside of Vanuatu.

C. The Pleadings

15. The Claimants 1-7 by the Claim, seek an order quashing the Minister of Internal Affairs Hon. Rick Tchamako Mahe's decision by way of the *Removal of Non-Citizens from Vanuatu* Order No. 169 of 2023 dated 17 August 2023 (the 'Minister's 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.

16. The balance of the relief sought is costs and any other Order deemed suitable.

17. It is alleged as follows in the Claim:

- (1) The Minister made his decision *ultra vires* his power in paras 53A(1)(ab) and (ac) of the Act as none of the Claimants had been declared prohibited immigrant that they know of, and that none of the Claimants has been given opportunity to be heard as to allegation that they have breached their visa conditions on three different occasions;
- (2) That the Claimants were not afforded natural justice in being given notice of the Minister's decision and the opportunity to seek its review, including under subs. 55(3) of the Act, and that the Minister did not analyse whether or not notice was required pursuant to subs. 53A(2) of the Act;
- (3) That the Claimants do not know of any declaration of them as prohibited immigrants and as to any such declarations, that these were made without regard to the terms of clause 19(a) of the *Immigration Visa Regulation Order* No. 180 of 2011 (the 'Visa Regulations');
- (4) That Claimant 7 was on a tourist visa and there are no grounds for her arrest and deportation;
- (5) That Claimant 8 was not named in the decision by the Minister therefore it is unknown on what grounds she was arrested and deported;
- (6) That the Minister made the decision without any consideration of the State's obligations under the *Convention of the Rights of the Child* (the 'CRC') 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;
- (7) That the Minister's 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 to pay for and obtain visas; and
- (8) That the Minister's decision was done for an ulterior motive to benefit a third party local politician in the event that the Claimants were deported.

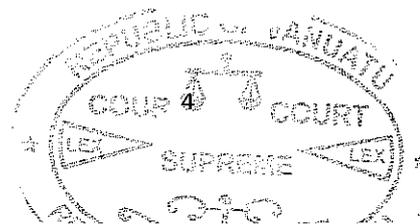


18. The Sworn statements of Marcel Brugger and Fabienne Brugger, and the Second Sworn statement of Marcel Brugger, were filed in support of the Claim.
19. The State's case as pleaded in the Defence is that the Minister made his decision on the grounds that the Claimants 1-8 were prohibited immigrants and had breached their visa conditions on three different occasions. It was pleaded that in 2021, Claimants 1-7 were served Jeffrey Markson, Director of Immigration's letters declaring them as prohibited immigrants and their lawfulness has never been challenged. It was also pleaded that subsequently, penalty notices were served on the Claimants for residing illegally in Vanuatu without a valid visa. Finally, 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.
20. The State filed the Sworn statements of Mr Markson, Minister Mahe, Mathias Tariaala Garoleo and John Iatika in support of the grounds of the Defence.
21. As set out in the Claim, the Claimants allege that they do not know of any order declaring them as prohibited immigrants. They have raised in para. 1 of the Claim the existence of the Director's declarations, and whether or not they were lawfully made. It was pleaded in the Defence that the Director's declarations were made on 7 April 2021 and have not been challenged therefore are valid. Accordingly, the Director's prohibited immigrant declarations were also under challenge in this matter and if necessary, the Court can make any Order deemed just including as to the lawfulness or otherwise of those declarations.

D. The Law

22. Section 26 of the Act provides as follows:

26. (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) *A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding VT500,000 or a term of imprisonment of not more than 2 years or both.*
- (3) *It is a defence to a prosecution for an offence under subparagraph (1)(c)(i) if the person charged proves he or she was an exempt person at the time of attempting to enter Vanuatu.*
- (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.

23. Section 50 of the Act provides as follows:

50. (1) The following non-citizens are prohibited immigrants:
- (a) a person who is removed from Vanuatu under Part 6, or is removed or deported from any other country;
 - (b) a person who attempts to enter or enters Vanuatu, or who enters and remains in Vanuatu, in contravention of this Act;
 - (c) a person who breaches a condition of his or her visa;
 - (d) a person who is convicted of an offence, in or outside Vanuatu, and is sentenced to a term of imprisonment of 12 months or more, life imprisonment or the death penalty;
 - (e) a person who is or is likely to be involved in the commission of an offence against the Counter Terrorism and Transnational Organised Crime Act [CAP 313];
 - (f) a person who is a terrorist within the meaning of the Counter Terrorism and Transnational Organised Crime Act [CAP 313];
 - (g) a person whose presence in Vanuatu is a risk to the security or defence of Vanuatu, or to public order in Vanuatu;
 - (h) a person who is wanted in another country by the relevant authorities in that country in relation to the commission of an offence in that country;
 - (i) a person who arrives in Vanuatu as a stowaway;
 - (j) a person who is a people smuggler or a person involved with people smuggling;
 - (k) a person who is in the process of being deported from or has been asked to leave any other country;
 - (l) a person who is a member of any class of persons prescribed by the regulations to be prohibited immigrants;
 - (m) a member of the family of a prohibited immigrant, unless the Director declares in writing that the member is not a prohibited immigrant.
- (2) The Director may in writing declare that a person is not a prohibited immigrant.
- (3) To avoid doubt, if a visa is cancelled, its former holder, if in Vanuatu, becomes, on the cancellation, a prohibited immigrant unless, immediately after the cancellation, the former holder holds another visa that is in effect.

(my underlining)

24. Section 50A of the Act provides as follows:

- 50A. (1) The Director may approve the publication of information relating to a prohibited immigrant if the Director is satisfied that the prohibited immigrant is in Vanuatu.
- (2) Publication of information under subsection (1) includes, but is not limited to:
- (a) the name or known aliases of the prohibited immigrant; and



- (b) the address of the prohibited immigrant; and
 - (c) the nationality of the prohibited immigrant; and
 - (d) the photograph of the prohibited immigrant.
- (3) Publication of information of a prohibited immigrant under this section may be made on newspaper, television, radio, internet or any other means by which information may be disseminated.

25. Section 53A of the Act provides as follows:

- 53A. (1) If in the opinion of the Minister, a person who is a non-citizen:
- (a) is involved in activities that are detrimental to national security, defence or public order; or
 - (aa) is participating or involving himself or herself in political activities including attending a political party meeting or political group meeting, financing a political party or financing activities; or
 - (ab) is a prohibited immigrant under this Act; or
 - (ac) has breached any condition of his or her visa on three different occasions; or
 - (b) is a wanted person in a foreign country for any criminal offence he or she has committed in that foreign country
- the Minister, may by Order, remove such person from Vanuatu.
- (2) The Minister does not need to give any notice for the removal of this person from Vanuatu.
- (3) This section applies notwithstanding any other provision in this Act.

(my underlining)

26. Section 55 of the Act provides as follows:

55. (1) An immigration officer may:
- (a) detain a person subject to a removal order using such force as may be reasonably necessary in the circumstances; and
 - (b) with the consent of the owner or occupier of land or premises or under a warrant issued under section 19, enter the land or premises and search the land or premises, or any vessel, vehicle, aircraft or other thing in or on the land or premises, for a person subject to a removal order, and detain that person.
- (2) A person subject to a removal order may be detained in custody or at such a place as the Director may determine until the person is removed from Vanuatu.
- (3) Subject to subsection (5), a removal order takes effect on:
- (a) if the period for applying to the Supreme Court for a review of the order has expired without any application having been made, the end of that period; or



- (b) if an application is made within that period, when the application is finally determined.
- (4) If:
- (a) a non-citizen is to be removed from Vanuatu; and
 - (b) the non-citizen or another person holds a ticket for the non-citizen from a place within Vanuatu to a place outside Vanuatu;
- the Director may arrange (with or without the ticket holder's consent) for the ticket to be used for the transport of the non-citizen from Vanuatu.
- (5) If a person in respect of whom a removal order is made has been sentenced to any term of imprisonment, the sentence must be served before the order takes effect unless the Director otherwise directs following consultation with the Commissioner of Police.

(my underlining)

27. Section 59 of the Act provides as follows:

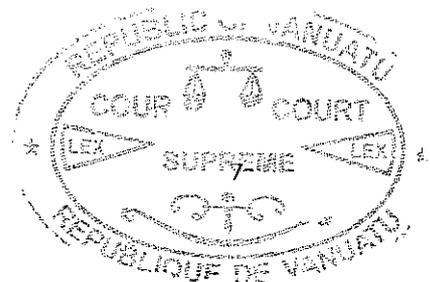
59. (1) If an application for review under section 58 is dissatisfied with any decision of the Minister made under subsection 58(5), or the decision of the Minister under section 53, the applicant may appeal to the Supreme Court against that decision.
- (2) An appeal must be made within 21 days after the date of the Minister's decision that is the subject of the appeal, or within such extended time as the Supreme Court allows.
- (3) On any appeal under this section, the Supreme Court may affirm, vary or set aside the decision that is the subject of the appeal, and may give all such directions (if any) to the Minister or any other person concerned as may be necessary to give effect to the Court's decision.

28. Section 60 of the Act provides as follows:

60. (1) The Director may require the applicant for an extended visitor visa, a residence visa or a student visa to provide a security in accordance with this Part.
- (2) The purpose of the security is to ensure the holder of the visa complies with the provisions of this Act and the conditions of the visa.
- (3) The security must be provided to the Vanuatu Government bonds account established in accordance with the provisions of the Public Finance and Economic Management Act [CAP. 244] before the visa is granted.

29. Section 62 of the Act provides as follows:

62. (1) A security is by force of this section forfeited to the Government if the holder of the visa:
- (a) breaches a condition of the visa; or
 - (b) is or becomes a prohibited immigrant; or
 - (c) is removed from Vanuatu under Part 6.



- (2) *The financial institution holding a security that has been forfeited must return or refund the security together with any interest paid on the security to the Director within 7 days after the date of a written request from the Director.*

30. Section 83 of the Act provides as follows:

83. (1) The Director or any immigration officer may serve a penalty notice on a person if it appears to the Director or any immigration officer that the person has committed an offence under:
- (a) section 13, 20, 21, 22, 23, 26 or 79; or
- (b) any other provision prescribed by the regulations.
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person must, within 30 days after the date of the notice, pay to the Director the amount of the penalty prescribed by the regulations.
- (3) The amount prescribed by the regulations must not exceed the maximum penalty for the offence.
- (4) If the amount specified in the penalty notice is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (5) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil proceeding arising out of the same occurrence.

(my underlining)

31. Clause 19 of the Visa Regulations provides as follows:

19. For the purposes of paragraph 50(1)(l) of the Act, the following classes of persons are prescribed prohibited immigrants:
- (a) a person who, without a compelling reason and without making a valid application for a visa, remains in Vanuatu for a period of more than 30 days after the expiry of the term of validity of a visa or permit granted or issued, or deemed to have been granted or issued, under the Immigration Act [CAP. 66] or the Immigration Act No. 17 of 2010;
- (b) a person designated by resolution of the United Nations Security Council as a person, or a member of a class of persons, whose entry and stay in Vanuatu should be prevented.

(my underlining)

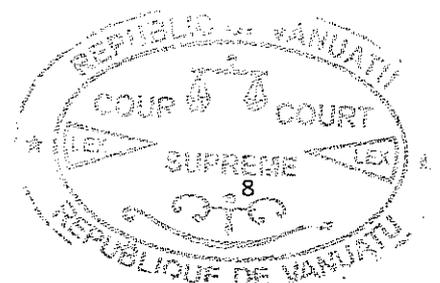
32. The *Penalty Notice Regulation* Order No. 181 of 2011 (as amended) prescribes the amount of the penalty in respect of different offences prescribed in the Act as set out as follows in the Table of the Schedule:

SCHEDULE

PENALTY AMOUNT AND PENALTY NOTICE

1 PENALTY AMOUNT

TABLE



Column 1 Item	Column 2 Provision of The Immigration Act	Column 3 Amount of penalty in Vatu
1	13(3)(a)	100,000
2	13(3)(b)	100,000
3	13(3)(c)	100,000
4	13(3)(d)	100,000
5	20(3)	250,000
6	21(3)	200,000
7	22(3)	150,000
8	23(3)	150,000
9	26(1)	250,000
10	79(1)	500,000
11	79(2)	500,000
12	26(4)	250,000

33. The prescribed form for a penalty notice is set out in the Schedule to Order No. 181 of 2011.

E. The Evidence and Findings

34. Did the Claimants' residence visas expire on 22 October 2019 or on 22 October 2020?

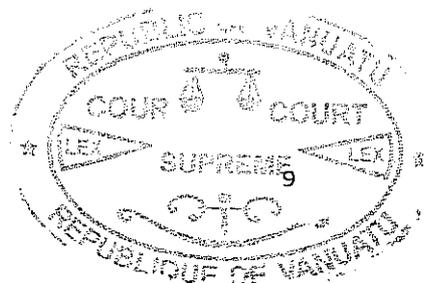
35. The Claimants' case is that is that their residence visas expired on 22 October 2020. The State's case was that Claimants 1-6 and 8's residence visas expired on 22 October 2019.

36. Director Markson deposed in paras 3 and 4 of his sworn statement as follows:

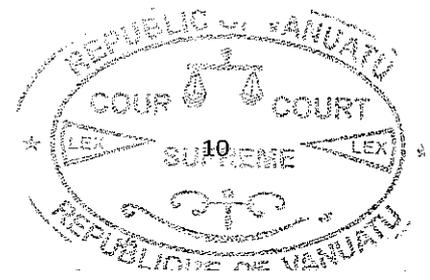
3. *I confirm that the following claimants Hugo Brugger, Marcel Brugger, Fabienne Brugger, Chloe Brugger, Pascal Brigger, Olivier Brugger and Birgit Brugger (the "First Claimants") had been residing in Vanuatu on residence visa permits since 2009.*
4. *I confirm that the First Claimants' visas expired on 22 October 2019. A true copy of each of the First Claimants' visas transcript showing the expiration date of their visas are attached and marked "JM1".*

37. The documents in **Attachment "JM1"** are copies of residence visas for:

Claimant's name	Visa expiry date
Hugo Brugger	22 October 2019
Marcel Brugger	22 October 2019
Fabienne Brugger	22 October 2020
Chloe Brugger	22 October 2018 & 22 October 2019
Pascal Brugger	22 October 2019
Olivier Brugger	22 October 2020
Birgit Brugger	22 October 2019



38. There are documents in **Attachment "JM1"** for both a "Birgit Brugger" (expiring on 22 October 2019) and for "Birgit Mettel" (expiring on 22 October 2018).
39. There is no suggestion that Sandra Daly Brugger was issued a residence visa. The Claimants' case is that she was on an extended tourist visa as she was a more recent arrival to Vanuatu. Mr Markson's evidence is that Sandra Daly Brugger arrived on a tourist visa, and applied for an extension which was granted until 17 December 2019. Accordingly, I infer that the visas attached in **Attachment "JM1"** with the names "Birgit Brugger" and "Birgit Mettel" were both for Birgit Mettel but her surname was expressed as "Brugger" instead of "Mettel" in the 2019 visa.
40. **Attachment "JM1"** consists of copies of residence permits expiring on 22 October 2018, 22 October 2019 and on 22 October 2020. The two residence visas expiring on 22 October 2020 are for Fabienne Brugger and child Olivier Brugger. These two documents directly contradict Mr Markson's assertion in his para. 4 that the Claimants 1-6 and 8's residence visas "expired on 22 October 2019".
41. Marcel Brugger attached as **Attachment MB6 pages 26-29** to his second sworn statement copies of residence visas for Hugo Brugger, Fabienne Brugger, Birgit Mettel and himself which expired on 22 October 2020. He deposed that the children Chloe, Pascal and Olivier also had similar visas but as he is not in Vila, he cannot get access to the files.
42. In the email chain between Mr Brugger and Immigration officer Stewart Toka dated October 2022 at **Attachment MB5 pages 24 and 25** is a copy of Mr Toka's email dated 12 October 2022 in which he (Mr Toka) included a screenshot of Marcel Brugger's residence permit which expired on 22 October 2020.
43. Accordingly, I reject Mr Markson's evidence that the Claimants 1-6 and 8's residence permits expired on 22 October 2019 as it is contradicted by his own documentary evidence and by the Claimants' evidence. I consider that his evidence is not credible and reliable, and that I can rely on it only where it is supported by the documentary evidence.
44. I find that Claimants 1-6 and 8 were issued residence permits which expired on 22 October 2020.
45. Did the Claimants apply to renew their residence permits?
46. The Claimants' case is that their visa renewal applications were lodged about 3 weeks before their visas expired in October 2020 but that subsequently they did not receive renewed residence visas, and that they resubmitted their documents a number of times including applying again in 2021 for renewal of their visas. The State's case is that they did not.
47. Mr Markson deposed as follows at his para. 8:



8. I confirmed [sic] that since the re-instatement of the residency visa fees on 1 October 2020, the Department has never received an application for renewal of residency visa and another Extended Visitor Visa along with the residency fees from the First Claimants and the Second Claimant respectively...

(my underlining)

48. Mr Brugger attached a copy of his letter dated 4 May 2021 to the Immigration Department [**Attachment MB2** to his first sworn statement]:

Statement regarding Residency permits

Dear Sir,

I visited the office this morning regarding a residency permit issue with my family. I spoke to Officer John who asked me to make a statement regarding what had occurred and return it to the office.

My family and I have been holding residency permits in Vanuatu since 2009.

Last October the residency permits for my family members expired: Marcel Brugger, Fabienne Brugger, Birgit Mettel, Hugo Brugger, Chloe Brugger (child), Pascal Brugger (child), Olivier Brugger (child).

I found out through our family friend Esrom, who works at Immigration, that the renewal fee may be waived due to the Covid-19 pandemic. I asked him if he could assist with the lodgement and arranged for my staff, bus driver Wallis John, to drop the old residency permits with necessary documentation off at his office, to allow Esrom to lodge them on my behalf. I did not enclose a cheque for the Vanuatu government due to the presumption the fees had been waived. This was in October last year.

It seems now that my documents are missing and have yet to be located.

I mistakenly forgot to follow up on collecting my renewals until compliance officers visited last week.

I have been made aware by the officers that visited my premises, that I should not have asked a friend who works at immigration to lodge the documents on my behalf. I apologise for this.

The officers also mentioned that the renewal fee was only waived for a short period of time and my renewal may not have fallen into the waived period.

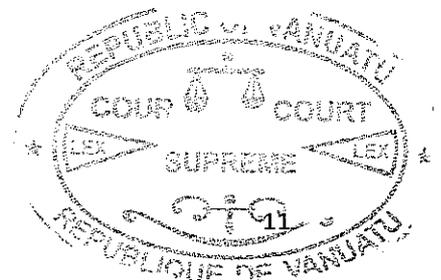
I am concerned about the possibility of receiving a large fine for not lodging the renewal. If the renewal fee did not fall into the waived period, I completely understand and can gather the money to pay the renewal fee straight away.

If I could ask for you to consider not issuing me a fine, it would be great appreciated. Unfortunately my business has not been running well since the tourism has stopped and I am struggling to keep afloat.

I wish to extend my apologies for this situation and also for involving Esrom in this.

It will not happen again.

*Thank you for your consideration,
Marcel Brugger*



- Passport Copies of all applicants
- Copies of residency permits, which we had scanned on file
- Direction No. 24 of the Government

(my underlining)

49. Mr Brugger referred to his letter dated 4 May 2021 [**Attachment MB2**] and deposed as follows at paras 5(c) and (d) of his second sworn statement:

5. ..

- (c) *I referred to Esrom (his full name I believe is Esrom Namaka Loughmani) who worked at Immigration (its common expats get to know certain officers personally who they return to each year for assistance) and that I had lodged the Visa renewal in "October last year". It would have been somewhere between 28 September 2020 and 4 October 2020. The fact is we were always conscious to get the Visas done promptly each year. I would put together a bundle of documents such as copies of passports, VIPA approval, business licence, and the residency application form and attach the cheque for payment. I remember talking with Esrom about the fee waiver and asked him to confirm whether I needed to pay for this year, I remember giving him the residency application etc, and I left it at that.*
- (d) *In the letter I state: "It seems now [in May 2021] my documents are missing...", what I was referring to is that Officer John [Immigration officer], had told me that morning, my file is missing, and they could not find it. He has said there was no files at the office. (As I have deposed in my 1st statement I had been told on 2 occasions our file was "lost". This same Officer was extremely rude, and I remember his telling me words to the effect "you white people think you can come here and take over the place", I was very offended and told him that was inappropriate.)*

50. In response to Mr Markson's para. 8, Marcel Brugger deposed as follows at para. 23 of his second sworn statement:

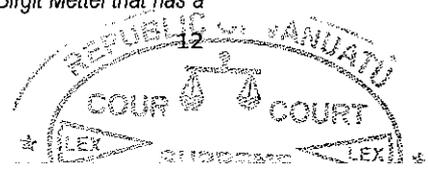
23. **Paragraph 8 [of Mr Markson's sworn statement].** *This is false that the department has never received an application for the renewal of the Visas.*

- (a) *First, I repeat what I said at paragraph 5 above.*
- (b) *Second, as I have already stated, I was told on a number of occasions our files were "lost". That is why we needed to (one example) give documents again. See for example emails between myself and Stewart Toka (MB5 pages 24 & 25) noting I had met with him, and provided him copies of my residence Visa (he told me they had lost my file and so couldn't find it), along with the passports, my business licence and VIPA.*

51. Mr Brugger repeated at his para. 26:

26. **Paragraph 11 [of Mr Markson's sworn statement].** *This is the first time I have ever seen these JM7 [prohibited immigrant] declaration letters, and again I restate over and over again:*

- (a) *I did lodge the renewal applications at least 3 weeks before the 2020 Visa was to expire.*
- (b) *As soon as I became aware for the first time there was an issue (4 May 2021, see my MB2 letter) I immediately began an exhausting attempt for the next 2 years to sort matters out.*
-
- (e) *Finally, there is something very strange about what he has put in. He says we had never put in any documents since being issued the 22 October 2019 Visas. Then how is it possible that he was able to put in photocopies of the passport of Birgit Mettel that has a*



issue date of 17 May 2021, for my son Pascal Brugger which has an issue date of 19 May 2021, for Olivier which has an issue date of 26 November 2020, and Chloe that has an issue date of 24 November 2020??? These were provided with the Visa renewal applications I made for 22 October 2021; the same one he says I did not do!!!

(my underlining)

52. Mr Marcel Brugger deposed as follows at paras 9-18 of his second sworn statement:

9. In the JR Claim I have given particulars of the hundreds of various communications between myself and the Immigration Department.
10. Attached and marked **MB5 pages 1 to 25** are those emails referred to in the particulars.
11. I want to draw the Court's attention to a number of matters.
12. On 8 October 2021 I wrote to DG Markson after I had met with him that morning. That meeting was to discuss the next years Visa (our Visas were dated 21 October of each year). This is what I wrote.

From: Aquana Beach Resort [mailto: aquanabeachresort@yahoo.com.au]
Sent: Friday, 8 October 2021 8:15 AM
To: jmarkson@vanuatu.gov.vu
Subject: Residency permits

Dear Director Markson,

Thank you for meeting with me recently regarding My families Residency permit issue.

We are soon due (21st of October) to renew the permits. As I don't have a copy of the previous year's permits, am I able to submit the renewal application and other required documents without the copy of last year's permits?

Please let me know how I should proceed.

Regards,
Marcel

13. He did not reply, so again I wrote to him on 19 October 2021.

From: Aquana Beach Resort [mailto: aquanabeachresort@yahoo.com.au]
Sent: Tuesday, 19 October 2021 10:47 AM
To: jmarkson@vanuatu.gov.vu
Subject: Residency permit renewal

Dear Director Markson,

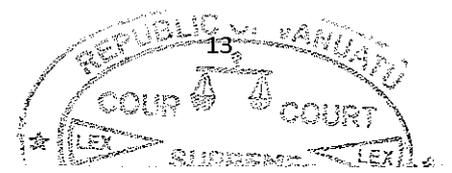
My residency permits are due to be renewed on the 22nd of October but as I do not have last year's permits, can I still submit the application for renewal for this year.

If you could let me know how to proceed that would be great.

Best Regards,
Marcel

(my underlining)

14. Following this, there was simply nothing, **absolutely nothing from him.**
15. I was then passed from one officer to another, then another, but no one would give me an answer or help.



16. *They were all sick, away, didn't know, didn't want to know, couldn't find the files, etc, etc, it was just unbelievable!!!*
17. *But there is one other point I want to make very clear.*
18. *Not once, in all the various meetings, calls, emails, was there ever any mention, reference or anything that we were prohibited immigrants as now being claimed, **nothing, nothing, nothing!!!***
53. **Attachment MB5** consists of copies of emails between Mr Brugger and different Immigration Officers from 8 September 2021 to 31 October 2022 in which Mr Brugger continuously followed up the Claimants' residence visa renewals to no avail.
54. A copy of Mr Brugger's email to Mr Markson dated 8 October 2021 was attached at **Attachment MB5 page 5**. A copy of Mr Brugger's 19 October 2021 email was attached at **Attachment MB5 page 6**.
55. At **Attachment MB5 page 20** is an email from Immigration officer Olivier Napuat in which he stated that the Claimants "*provided documents to one of our officers under suspension and the documents didn't reach Immigration Office.*"
56. Mr Brugger stated as follows at the bottom of **Attachment MB5 page 25**:

Early December 2022: Enquired via phone regarding amount payable and progress of residency permits (no one able to answer).

Mid January 2023: Went past Immigration and enquired, still nothing ready.

Since then, several attempts several Phone calls and visits of the Immigration office resulted in always the same answer – not ready or don't know. No confirmation whether fines were waived, no confirmation if one year was deducted per the directive No 24 of immigration etc.

24th of August 2023: Wallis John [Aquana Resort driver] went past the immigration to check if the residency payment amount had been established and residency permits were ready and he was advised that they were not ready as yet.

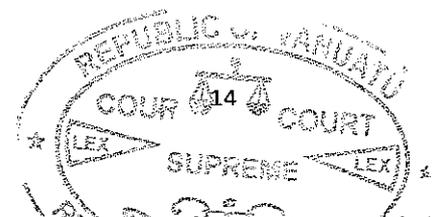
28th of August 2023 - Family was from Vanuatu to Australia (Sydney) without any notice given and no time pack any personal belongings

57. Mr Brugger deposed at paras 32-36 of his second sworn statement as follows:

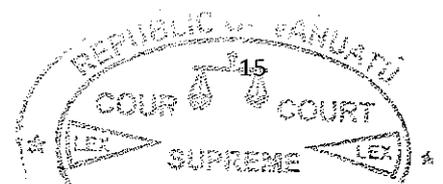
32. *At no time before we were arrested and deported was I called by the Minister, his aides, or the immigration department officers, advising me that we were in breach of our Visas on 3 occasions, or there was an issue.*

33. *In fact, we had lodged the forms for the Visas and that is why only 2 days before deportation I had sent our driver Wallis to pick up the Visas, as we had been led to believe they were ready to collect. In fact, I would conservatively say that Wallis had been sent over 10 times and I at least on 2 occasions personally to the Port Vila office to get the Visas in the 12 months before approximately, this was in addition to countless calls we made, either myself or Fabienne.*

34. *I would like the DGs Declaration and the Order of the Minister both quashed, along with a public apology.*



35. *Finally, the government may have used the money held in our security accounts to buy for our tickets to be deported, meaning not only are we now homeless, (we share a 2-bedroom unit with family), I have no work, no money, how do we pay for a ticket to return? I would like the government to pay for the cost of our airfares to return, by paying the money to our lawyer's account, and also put the immigration bond money back if taken.*
36. *My lawyer has informed me that his hours spent since being instructed to deal with our situation, immediately after our deportation is 80 hours (with a discount). I know he has met with the former PM Kilman, and former Minister Lauko, 1st PA to the former Minister, sent a number of letters and emails to the Attorney General, and has been in constant contact with us. We have spent hours and hours on the phone reviewing material, discussing matters, noting there are 8 claimants. His fees are VT40,000 per hour plus VAT and I would want my entire costs paid, as I feel it's unfair that we should have to find the money to pay his fees, when we have done nothing wrong, and treated this way.*
58. This evidence is not contradicted. Indeed, Mr Markson at his para. 12 referred to the Claimants' "numerous visits to the Department, when they had several meetings with Immigration Officers".
59. Mr Markson attached at **Attachment "JM7"** copies of his letters dated 7 September 2021 declaring Claimants Hugo, Marcel, Fabienne and Sandra Brugger and Ms Mettel as prohibited immigrants and copies of the following passports:
- a) Birgit Mettel, issued on 17 May 2021;
 - b) Pascal Brugger, issued on 19 May 2021;
 - c) Olivier Brugger, issued on 26 November 2020; and
 - d) Chloe Brugger, issued on 24 November 2020.
60. Claimants' counsel Mr Fleming submitted that the only way that the Immigration Department obtained copies of those passports was because visa renewal applications were submitted after October 2020. I agree. Mr Markson's evidence that no visa renewal applications were received since 1 October 2020 is contradicted by the copies of passports he provided which were issued after October 2020 therefore I infer that these were provided by the Claimants in following up after October 2020 their visa renewal applications.
61. I therefore find as follows:
- a) That the Claimants applied in or before October 2020 for renewal of their visas but did not subsequently receive renewed residence visas;
 - b) Mr Brugger followed up over the next 2-year period for the renewal of the Claimants' visas and resubmitted their documentation a number of times which included in 2021, visa renewal applications for the following year;
 - c) The Claimants made numerous visits to the Immigration Department and had several meetings with Immigration officers;
 - d) Mr Brugger was still following up in August 2023 for the Claimants' visas and only days before their deportation, had understood that the visas were ready for collection; and



e) The State is responsible for the absence of valid visas for the Claimants since 22 October 2020.

62. Were the Claimants served Penalty Notices?

63. The Claimants' case is that they were not served Penalty Notices. The State's case is that they were aware of the Penalty Notices.

64. Mr Markson attached at **Attachment "JM6"** copies of the following undated Penalty Notices in relation to alleged offences contrary to subs. 26(4) of the Act:

Claimant's name	Date of alleged offence	Due date of notice	Penalty amount
Sandra Daly Brugger	22 October 2020	29 April 2021	VT250,000
Hugo Brugger	22 October 2020	29 April 2021	VT50,000
Marcel Brugger	22 October 2020	29 April 2021	VT250,000
Fabienne Brugger	22 October 2020	29 April 2021	VT250,000
Brigit Brugge	22 October 2020	29 April 2021	VT250,000
Chloe Brugger, Pascal Brugger & Olivier Brugger	22 October 2020	22 September 2021	VT50,000

65. It is stated in Ms Daly Brugger's Penalty Notice as follows:

Detail of allege offence/s

Sandra Daly Brugger, You were granted are Tourist Visa to enter and reside in Vanuatu as are tourist. You have continued to reside in with a tourist visa illegally Therefore, Your current status is in contrary to sections 45(1)(a) and (b) of the **Immigration Act No. 17 of 2010**. Therefore, upon the powers given under this Act, a penalty fine is to be paid to the Vanuatu Immigration Services.

Reminder: Immigration Regulation No. 180 of 2011 section 20 and section 84(1)(a) and 85(1)(d) of the Immigration Act bans you from leaving the country if the penalty fines is unpaid.

The prescribe amount of the penalty notice is VT250,000. You have 30 days to pay the above amount.

Failure to comply with this notice will amount to prosecution.

(my underlining)

66. It is stated in the Penalty Notices for the other adult Claimants as follows:

Detail of allege offence/s



[Claimant's name], you were granted with a Residency visa as a Foreign Investor in Vanuatu with your business RIMAREX LIMITED – (ERATAP EFATE). While in Vanuatu, You continue to reside illegally without a visa and also failed to renew your residency Visa before the expiry of your visa. Therefore, your status here in Vanuatu is contrary to section 26(4) and (5) of the Immigration Act No. 17 of 2010.

Upon the powers given under section 83 of this Act, a penalty fine is to be paid to the Vanuatu Immigration Services.

Reminder: Immigration Regulation No. 180 of 2011 section 20 and section 84(1)(a) and 85(1)(d) of the Immigration Act bans you from leaving the country if the penalty fines is unpaid.

The prescribe amount of the penalty notice is [VT250,000 or VT50,000]. You have 30 days to pay the above amount.

Failure to comply with this notice will amount to prosecution.

(my underlining)

67. It is stated in the Penalty Notice for the 3 children Claimants as follows:

Detail of allege offence/s

Ms Chloe BRUGGER, Mr Pascal BRUGGER and Mr Olivier BRUGGER You were granted with a Residency visa as a child accompany parents who are foreign investors in Vanuatu – (ERATAP EFATE). Your residency visas have been expired since 22 October 2020. Therefore, your status here in Vanuatu is contrary to section 26(4) and (5) of the Immigration Act No. 17 of 2010.

Upon the powers given under section 83 of this Act, a penalty fine is to be paid to the Vanuatu Immigration Services.

Reminder: Immigration Regulation No. 180 of 2011 section 20 and section 84(1)(a) and 85(1)(d) of the Immigration Act bans you from leaving the country if the penalty fines is unpaid.

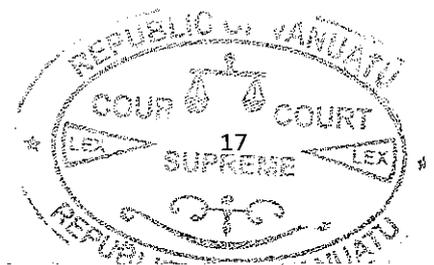
The prescribe amount of the penalty notice is VT50,000. You have 30 days to pay the above amount.

Failure to comply with this notice will amount to prosecution.

(my underlining)

68. Mr Markson deposed at his para. 10 that the Claimants were informed that Penalty Notices had been issued against them for breaching their visa conditions as evidenced by Mr Brugger's **Attachment MB2** letter dated 4 May 2021.

69. However, reference to Mr Brugger's **Attachment MB2** does not assist. Mr Brugger did not refer to any Penalty Notices in that letter but to the possibility of receiving a large fine for not lodging the renewal. Penalty Notices impose a penalty which I can understand Mr Brugger referring to as a "fine". If the Claimants had received the Penalty Notices purportedly dated 29 April 2021, most of which demanded payment of VT250,000, surely he would have referred to it in his letter dated 4 May 2021. Instead, Mr Brugger stated that he was concerned about the possibility of receiving a large fine, asked that the Department consider not issuing him a fine and apologised for the situation.



70. In Mr Brugger's **Attachment MB5 page 1** to his first sworn statement are the following emails:

From: Aquana Beach Resort [mailto: aquanabeachresort@yahoo.com.au]
Sent: Wednesday, 8 September 2021 2:11 PM
To: jmarkson@vanuatu.gov.vu
Subject: Residency permits

Dear Director,

I received your email address from the front office today where I asked to make an appointment to see you regarding important immigration documents which were delivered to me today.

If you could let me know when you would be available for me to meet with you that would be greatly appreciated.

Regards,

Marcel

...

From: Graziella Thavo
Sent: Wednesday, 8 September 2021 4:03 PM
To: Madeleine Natonga
Cc: info@aquana.com.au
Subject: Re: Appointment with Director

Dear Madeleine,

Owner of Aquana Mr BRUGGER Marcel wants to have an appointment with the Director.

Reason: Immigration Issues and Penalty Notice given by compliance.

Phone: ...

Please confirm date and time.

Kind Regards,
Graziella

71. Mr Brugger deposed as follows at paras 5(a) and (b), 24 and 25 of his second sworn statement:

5. Please read the **4 May 2021 letter marked MB2** to my 13 October 2023 [first sworn] statement. In summary this letter was:

- (a) Written after someone from the immigration department had come to see me saying we did not have valid Visas and that we needed to pay a fine. I was concerned about receiving a large fine and asked about not issuing a fine, as we were in Covid times and business life was hard, no tourists, debts, etc. They said go to the office in town.
- (b) I went to the immigration office that same morning and spoke with a man who identified himself as John who had asked me for a statement. So, I quickly went home and wrote this letter and returned and delivered it.

....

24. **Paragraph 9 [of Mr Markson's sworn statement].** This is false that 30 days after expiration of the Visas, penalty notices were issued.

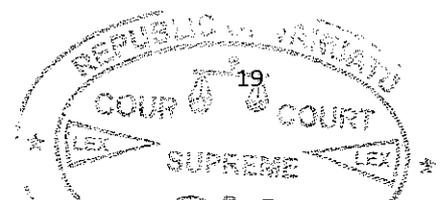


...
(b) ... these purported penalty notices he attaches, are unsigned, dated 22 September 2021, and as I have said before, I never, never, never saw them.

25. **Paragraph 10 [of Mr Markson's sworn statement].** This is false that we were "well informed that a Penalty had been issued." If he is referring to the visit I received from the department officers who said a fine was being issued as above at para. 5(a), then that is correct they told me of a fine. But as I have stated already I immediately took action to resolve this, and my belief was this was dealt with in later events and finished and was not being pursued as at no time when meeting with these people did anyone ever say "By the way, you haven't paid that fine we issued."

(my underlining)

72. I infer from Mr Brugger's email to the Director dated 8 September 2021 and the ensuing email between Graziella Thavo and Madeleine Natonga (who I assume are Immigration Department staff) [Attachment MB5 page 1] that Mr Brugger was served a Penalty Notice on 8 September 2021 which led him to him immediately sending his email requesting a meeting with the Director. From the chain of emails in Attachment MB5, it appears that he finally met with the Director in or around October 2021, which led to Mr Brugger's 8 October 2021 email to the Director [page 5]. I assume this is what Mr Brugger was referring to at para. 25 of his second sworn statement in saying that he, "immediately took action to resolve this, and my belief was this was dealt with in later events and finished and was not being pursued as at no time when meeting with these people did anyone ever say "By the way, you haven't paid that fine we issued."
73. In the circumstances, I find that the Penalty Notices with due dates of 29 April 2021 at Attachment "JM6" were served on Mr Brugger on 8 September 2021.
74. Were the Director's prohibited immigrant declarations of 7 April 2021 served on the Claimants?
75. The Claimants' case is that they were never served the Director's declarations that they were prohibited immigrants. The State's case is that the Director made his declarations on 7 April 2021 and that they were served on the Claimants and have not been challenged.
76. As to the latter contention, I previously held in this Court's 10 November 2023 decision as to the Urgent Stay Application that the Director's declarations as to prohibited immigrants are under challenge in the present matter: *Brugger v Republic of Vanuatu* [2023] VUSC 237.
77. Mr Markson deposed the following in his paras 11 and 12:
11. *I confirm that on 7 April 2021, the Claimants were declared as Prohibited Immigrants. True copies of the Declaration are attached and marked "JM7."*
12. *I confirmed that the Claimants were served with the Declaration of Prohibited Immigrants during one of their numerous visits to the Department, when they had several meetings with Immigration Officers.*



78. There is no evidence otherwise of service on the Claimants of the Director's prohibited immigrant declarations.
79. The prohibited immigrant declarations for each of the 5 adult Claimants is dated 7 September 2021 in that that is the date at the top of each letter. However, it is stated in the body of the letter that the declaration and the publication of each Claimant's name in the prohibited Immigrant lists was made on 7 April 2021.
80. It was stated in each prohibited immigrant declaration in identical terms as follows [**Attachment "JM7"**]:

DECLARATION AS PROHIBITED IMMIGRANT

As of today, Tuesday the 7th of April 2021, your name has been entered into the prohibited Immigrant Lists, pursuant to sections 50(1)(b) and (c) of the Immigration Act No. 17 of 2010.

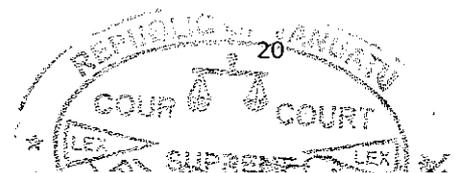
- You have entered and remain in Vanuatu without a valid visa since the 22nd October 2020.*
- A 30 days Penalty notice was also being served to you for residing illegally on the 29th of April 2021, but you have not made any attempts to sort things out within that period, and*
- You without a compelling reason fails to make valid application for a visa, you continue to remain in Vanuatu for a period of more than 30 days which is contrary to clause 19(a) of the Immigration Visa Regulation Order 180 of 2011. By virtue of clause 19, you becomes a prohibited Immigrant.*

Therefore, your continuous presence in Vanuatu is in contrary to the Immigration Act No. 17 of 2010 and the Immigration regulation Order 180 of 2011.

Furthermore, we advise that you to make every necessary arrangements to leave the country and you are banned from entering Vanuatu until such a time your name is being clear from the prohibited immigrants list.

(my underlining)

81. The State's case is that the Director's prohibited immigrant declarations were made on 7 April 2021 (despite the letters being dated 7 September 2021). Accepting that they were made on 7 April 2021, each of those declarations ended with a statement that each Claimant was to make every necessary arrangement to leave the country and was banned from entering Vanuatu until their name had been removed from the prohibited immigrant list.
82. The State also relied on Penalty Notices to the Claimants which carried due dates of 29 April 2021 and 22 September 2021. I have already held that the Penalty Notices with the 29 April 2021 due dates were served on Mr Brugger on 8 September 2021. Each of those Penalty Notices included a statement that the Claimant was banned from leaving the country if the penalty fees were unpaid.
83. It does not, with respect, make sense that the Claimants were declared as prohibited immigrants on 7 April 2021 and told to leave the country and then subsequently, issued Penalty Notices with due dates of 29 April 2021 and 22 September 2021 in which they were banned from leaving the country if the penalty fees had not been paid.



84. Mr Brugger deposed as follows at paras 31(a), (b) and 32 of his first sworn statement:

31. **Attached and marked MB4** is a copy of the wording of the Facebook page press release by the Minister at the time.
- a. I never saw the list or given any notice that we were prohibited immigrants on 7 September 2022 or at all as he states.
- b. I deny that the Immigration Department had been trying to resolve the Visa issues with us, that is a simple lie. What we know is that they lost the files, they refused to meet with me, in particular Director Markson, and I had done everything humanly possible to sort matters out.
- ...
32. After we were arrested and deported, I saw on Facebook many pictures that could only have been taken by the arresting officers of us, there was one posted of me sitting in my underwear with my crutches, another of the family being bundled onto the plane, others of my father passport.

85. Attachment MB4 to Mr Brugger's first sworn statement reads as follows:

Minister of Internal Affairs Vanuatu

Deportation Order Executed on Sunday 27th August 2023

Vanuatu Immigration Services (VIS) in collaboration with Vanuatu Police Force has executed a deportation order on the 27th of August 2023.

The order was signed by the Minister of Internal Affairs on the 17th of August 2023. Family Brugger are the owners of Aquana Eratap Resort and they have been residing in Vanuatu without a valid visa since 2020.

The last renewal of their visa was on the 22nd of October 2019. They had been listed as Prohibited Immigrant on the 7th September 2021. Since then they have been doing business and residing in Vanuatu without any valid visas. The family consist of five adult and three children.

VIS has made attempt for the person of interest to renew their visas but with numerous attempts, they were not able to resolve their visa issues but continue doing business while residing illegally in Vanuatu.

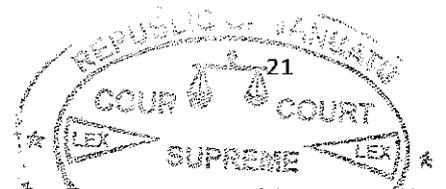
The removal operation is part of the continues effort that VIS has been executing to ensure that all foreigner national who enter the country has to comply with all relevant laws of Vanuatu.

The Operation has been planned for some month and yesterday (Sunday 27 August) was the perfect timing for the operation since there is just one guest in the resort, so the operation was conducted around 1am and the people of interest where remove on the Sidney flight which departed at 7am in the morning.

The operation is a message to all foreign nationals that are currently residing in Vanuatu to ensure that we adhere to the laws of the country and to ensure that our visas are valid when residing in Vanuatu.

Immigration has a duty to ensure that our borders is secure and the duty is mandate by the Immigration Act.

We acknowledge Vanuatu Police Force for the support provide during the operation and our national airline for the assistance provided to ensure that persons of interest are transported to their home country.



(my underlining)

86. Mr Brugger deposed as follows at paras 6-8 of his second sworn statement:

6. Never, never, never, before 7 April 2021 did I have any knowledge of what the DG purportedly did, that he was going to do this, or was I asked about the situation. So how could I challenge something I don't know about, or even if I did know about (or known of it, which I honestly believe I didn't), surely me immediately writing and trying to sort matters is of worth?
7. I can also state to the best of my knowledge and belief, neither did any of the other claimants, my children, wife, elderly father (who gets confused very easily about matters) ever get given any notice.
8. But even if I did, surely, I would have said something in the letter [Attachment MB2]. I had a business, house, kids at school, etc, etc, if this truly had been the case, I would have immediately taken action, seen a lawyer, called the DG, I would have done something!!!. This was important to me.

(my underlining)

87. Mr Brugger deposed as follows at paras 26 and 27 of his second sworn statement:

26. **Paragraph 11 [of Mr Markson's sworn statement].** *This is the first time I have ever seen these **JM7 declaration letters**, and again I restate over and over again:*
 - (a) *I did lodge the renewal applications at least 3 weeks before the 2020 Visa was to expire.*
 - (b) *As soon as I became aware for the first time there was an issue (4 May 2021, see my **MB2 letter**) I immediately began an exhausting attempt for the next 2 years to sort matters out.*
 - (c) *I was never asked before DG Markson made this purported declaration to try and resolve matters, as I did not believe there were any issues to resolve.*
 - (d) *The dates in the declaration as prohibited immigrants doesn't make any sense – how could we have been declared as illegal immigrants on the 7th of April 2021? The date on **the JM6 Penalty Notice** is 22nd of September 2021 (it says we cannot leave the country until the fines are paid) and the **JM7 letter** stating that we are prohibited immigrants is dated the 7th of September 2021 says we have to leave immediately. Even if they made a mistake with the date of the 7th of April 2021, this would have meant that we are prohibited immigrants and then would have come back 14 days later to give us a fine???*

....

27. **Paragraph 12 [of Mr Markson's sworn statement].** *This is false and a lie. We were never served with any **JM7** Declarations "during one of their numerous visits to the Department, when they had several meetings with Immigration Officers." Never happened, and as I have already stated, not once did anyone ever say to me this had happened. Simply is untrue.*

(my underlining)

88. The Director's prohibited immigrant declarations are asserted to have been made on 7 April 2021. Mr Brugger's evidence is that he and the Claimants were never served the Director's prohibited immigrant declarations. Surely if they had been served, Mr Brugger would have mentioned it in his letter to the Department dated 4 May 2021 [Attachment MB2]. Surely if the Director's declarations had been served,



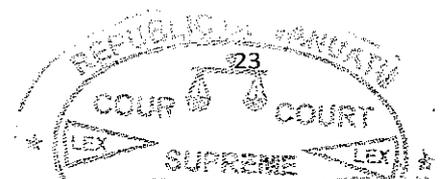
Mr Brugger would have raised it in his meeting with the Director following which he sent his 8 October 2021 email to the Director: para. 12, Mr Brugger's second sworn statement. Mr Brugger again emailed the Director on 19 October 2021: para. 13, Mr Brugger's second sworn statement. If the Director's declarations had been served, surely Mr Brugger would have mentioned it in that email? Instead, Mr Brugger referred in both emails to following up renewal of his and his family's residence visas.

89. Even if the Director's prohibited immigrant declarations were made on 7 September 2021, he and Mr Brugger met following which Mr Brugger sent his 8 October 2021 email. If the declarations had been served, surely Mr Brugger would have mentioned it in his 8 October 2021 and 19 October 2021 emails. I must infer that Mr Brugger was not told about nor served those declarations.
90. There is no evidence to support Mr Markson's assertion that the Claimants were served his declarations that they were prohibited immigrants. In the absence of evidence of service on the Claimants, I find that the Director's declarations that the Claimants are prohibited immigrants at **Attachment "JM7"** were not served on the Claimants.
91. What evidence is there of breach of CRC obligations?
92. As to the allegations in relation to breach of the State's obligations and conversely of the three children Claimants' rights under the CRC, Mr Brugger deposed as follows in paras 3, 4, 12-14 and 19-22 of his first sworn statement:

3. *After our deportation we are living with family in Australia, we have no house, car or job, the children are not at school, and our property in Eratap is left unattended and we could be living there. Simply put, our life has to a certain extent been destroyed because of what that the Minister did.*
4. *We are all suffering from anxiety, constantly "on edge", and we are trying to make sense of what happened.*
- ...
12. *We had lived for 13 years without incident in Eratap, building the Aquana Resort and employing many locals. It was the only home our 3 children knew of, they went to school there, and we imagined they would grow up there.*
13. *I can confirm that my 3 children are now suffering severe mental and emotional anxiety, are scared, frightened and scarred emotionally following the events of 27 August 2023. They require therapy.*
14. *My children were never offered any assistance before regarding their rights, simply nothing.*
- ...

Children

19. *In addition to my evidence of what happened to my 3 children, based on what I saw and was observing on the night we were arrested I would like to add as follows:*



20. **Olivier Brugger**; my son, was forcibly removed and arrested like parents, was in distress, crying, was restrained from being with his mother, when at airport became uncontrollable in crying when mother Fabienne was told as a Swiss National she would be deported straight to Switzerland. Had no knowledge of any reason or basis for the deportation, was not offered any assistance legal or otherwise.
21. **Pascal Brugger**; my son, was forcibly removed and arrested like parents, was in distress, crying, was restrained from being with his mother, when at airport became uncontrollable in crying when mother Fabienne was told as a Swiss National she would be deported straight to Switzerland. Had no knowledge of any reason or basis for the deportation, was not offered any assistance legal or otherwise.
22. **Chloe Brugger**; 13 year old daughter. Was left topless in room with male Immigration Officers who refused to leave, was taken without bra or top, but managed to find a wind jacket for her top and then taken by force. Was forcibly removed and arrested like the parents, was in distress, crying, was restrained from being with her mother and me, when at airport became uncontrollable in crying when mother Fabienne was told as a Swiss National she would be deported straight to Switzerland. Had no knowledge of any reason or basis for the deportation, was not offered any assistance legal or otherwise.

93. Both Mr Brugger and Mrs Brugger's evidence contained harrowing accounts of the way the Minister's decision was executed on Sunday 27 August 2023 morning, the lack of legal or other assistance for their children and the effect on them all. In the present matter, I was concerned only with reviewing the decision-making process resulting in the declarations by the Director and the decision by the Minister. The manner of the Claimants' removal is a matter for other proceedings.

94. The evidence vis-à-vis the children is uncontradicted. It is clear from the evidence that the children Claimants were denied legal and other appropriate assistance.

F. Discussion

Claimant 8

95. It was pleaded in the Claim that the grounds or basis for or decision or order under which Claimant 8 Ms Mettel was arrested and deported are unknown.
96. The Defence is silent as to what the grounds for Ms Mettel's arrest and deportation were, and as to the decision or order under which she was arrested and deported. Counsel could not assist as to this aspect of the State's case.
97. Vanuatu is a country of laws. Those laws apply to all persons including the State. In complying with the law, the State upholds the rule of law. It beggars belief that the State through its office-holders and officers effected the forcible removal of Ms Mettel from the country and has not identified any legal basis for doing so. The State's conduct is nothing short of egregious and is to be condemned in the strongest terms.
98. I therefore conclude that there was no lawful basis for Ms Mettel's arrest and deportation. Orders will be made quashing the decision or order for her arrest and deportation, and declaring her arrest and deportation unlawful.



Claimants 1-7

99. Only Claimants 1-7 were named in the decision of the Minister ordering their removal.
100. Was the Minister's decision to remove Claimants 1-7 made within or beyond (*ultra vires*) power?
101. The Minister's decision was made on 17 August 2023 and stated as follows:

In exercise of the powers conferred on me by paragraphs 53A(1)(ab) and (ac) of the Immigration Act No. 17 of 2010, I, the Honourable RICK TCHAMAKO MAHE, Minister of Internal Affairs, make the following Order.

1 Removal from Vanuatu

(1) *The following persons are to be removed from Vanuatu:*

- (a) *Hugo BRUGGER; and*
- (b) *Marcel BRUGGER; and*
- (c) *Fabienne BRUGGER; and*
- (d) *Olivier BRUGGER; and*
- (e) *Pascal BRUGGER; and*
- (f) *Chloe BRUGGER; and*
- (g) *Sandra Daly BRUGGER.*

(2) *This Order is made under the consideration that the persons under subclause (1):*

- (a) *are a prohibited immigrant; and*
- (b) *have breached conditions of their visas on three different occasions.*

2 Commencement

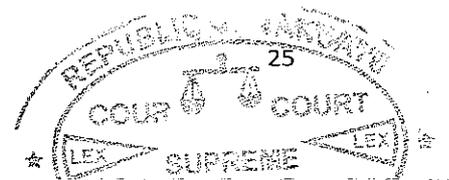
This Order commences on the date on which it is made.

(my underlining)

102. The 2 grounds for the Minister's decision were that (i) Claimants 1-7 are prohibited immigrants; and (ii) they breached their visa conditions on three different occasions.

1st Ground of Minister's decision: Director's declarations of Claimants 1-7 as prohibited immigrants

103. I have already held above that the Director's prohibited immigrant declarations of 7 April 2021 were not served on Claimants 1-7. That explains why these were not challenged until the present proceedings.
104. The failure to serve the Director's prohibited immigrant declarations on the Claimants constitutes a breach of natural justice as they were denied the opportunity to seek review of the declarations.



105. The prohibited immigrant declarations for each of the 5 adult Claimants is dated 7 September 2021 but is stated to have been made on 7 April 2021 [**Attachment “JM7”**] and in identical terms as follows:

DECLARATION AS PROHIBITED IMMIGRANT

As of today, Tuesday the 7th of April 2021, your name has been entered into the prohibited Immigrant Lists, pursuant to sections 50(1)(b) and (c) of the Immigration Act No. 17 of 2010.

- You have entered and remain in Vanuatu without a valid visa since the 22nd October 2020.*
- A 30 days Penalty notice was also being served to you for residing illegally on the 29th of April 2021, but you have not made any attempts to sort things out within that period, and*
- You without a compelling reason fails to make valid application for a visa, you continue to remain in Vanuatu for a period of more than 30 days which is contrary to clause 19(a) of the Immigration Visa Regulation Order 180 of 2011. By virtue of clause 19, you becomes a prohibited Immigrant.*

Therefore, your continuous presence in Vanuatu is in contrary to the Immigration Act No. 17 of 2010 and the Immigration regulation Order 180 of 2011.

Furthermore, we advise that you to make every necessary arrangements to leave the country and you are banned from entering Vanuatu until such a time your name is being clear from the prohibited immigrants list.

(my underlining)

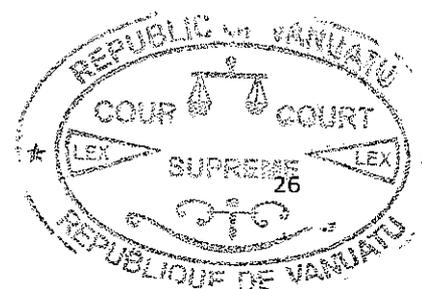
106. The prohibited immigrant declarations are stated to have been made due to: (i) the Claimants remaining in Vanuatu without a valid visa since 22 October 2020; (ii) a Penalty Notice was served on 29 April 2021 for residing illegally but this was not complied with; and (iii) breached clause 19(a) of the Visa Regulations.

107. I now consider each of these in turn.

(i) Allegedly remaining in Vanuatu without a valid visa since 22 October 2020

108. As held above, the Claimants applied on or before October 2020 for renewal of their residence visas. They applied in time for their visas to be renewed, followed this up exhaustively yet their visas were not renewed and they were suddenly deported without notice. The State is responsible for the absence of valid visas for the Claimants since 22 October 2020.

109. I hold therefore that this is not a valid ground for declaring the Claimants as prohibited immigrants.



(ii) *Penalty Notices allegedly served on 29 April 2021 but not complied with*

110. The due date for the adult Claimants' Penalty Notices was 29 April 2021 and for the children, 22 September 2021.
111. There is no evidence that the Penalty Notices were served on 29 April 2021 but I have held that they were served on 8 September 2021. Given the dates, it must have been only the adult Claimants' Penalty Notices which were served on 8 September 2021.
112. The purpose of a penalty notice is to inform a non-citizen that they are suspected of having committed an offence under the Act. A non-citizen who is served a penalty notice may elect, within 30 days after the date of the notice, to pay to the Director the amount of the penalty prescribed by the regulations if they do not wish to have the matter determined by a court: subs. 83(2) of the Act.
113. If the amount specified in the penalty notice is paid, that non-citizen will not be liable to any further proceedings for the alleged offence.
114. There is no mandatory requirement imposed by a Penalty Notice. It is a matter for the non-citizen who has been served if he or she *elects* to pay the amount of the penalty (and thereby evade legal proceedings), otherwise it is for the State to prosecute them him or her for the alleged offence.
115. It follows that this also is not a valid ground for declaring Claimants 1-7 as prohibited immigrants.

(iii) *Alleged breach of clause 19(a) of the Visa Regulations*

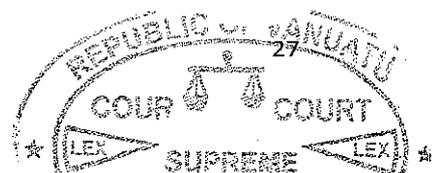
116. Clause 19(a) of the Visa Regulations provides as follows:

19. For the purposes of paragraph 50(1)(l) of the Act, the following classes of persons are prescribed prohibited immigrants:

- (a) a person who, without a compelling reason and without making a valid application for a visa, remains in Vanuatu for a period of more than 30 days after the expiry of the term of validity of a visa or permit granted or issued, or deemed to have been granted or issued, under the Immigration Act [CAP. 66] or the Immigration Act No. 17 of 2010;

(my underlining)

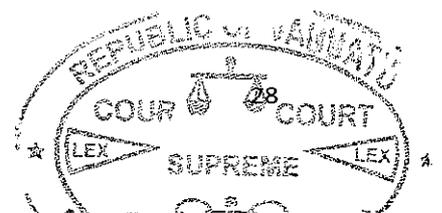
117. Persons who remain in Vanuatu for more than 30 days after the expiry of their visas "without a compelling reason" and "without making a valid application for a visa" are prescribed prohibited immigrants pursuant to clause 19(a) of the Visa Regulations.
118. I have already held above that Claimants 1-7 applied for renewal of their visas. Accordingly, the second limb of clause 19(a) of the Visa Regulations is not satisfied.



119. The Bruggers owned and lived at Aquana Resort which was the business that they made a living from, their children went to school here and this was the only home that they have known. These are all compelling reasons for remaining in Vanuatu for more than 30 days after the expiry of their visas. Accordingly, the first limb of clause 19(1) of the Visa Regulations also is not satisfied.
120. Accordingly, clause 19(a) of the Visa Regulations does not apply to Claimants 1-7.
121. In conclusion, none of the grounds relied on in the Director's declarations of the Claimants as prohibited immigrants are made out and therefore there was no lawful basis for them to be declared as prohibited immigrants. Accordingly, those declarations by the Director will be quashed and declared unlawful.
122. It follows that the Claimants were not prohibited immigrants and that is not a valid ground for the Minister's decision ordering their removal from Vanuatu.
123. An order will also be made for the removal of the Claimants' names from the prohibited Immigrants Lists referred to in the Director's declaration letters, and from any other publication including the Minister's press release on Facebook dated 28 August 2023 and from any other publication in which they were publicised as being prohibited immigrants.
124. There will also be an order for a public apology by the State.

2nd Ground of Minister's decision: Alleged breach of visa conditions on three different occasions

125. The State's case is that the Claimants were residing in Vanuatu without a valid visa therefore breached their visa conditions on three different occasions. This is denied.
126. It is an offence against subs. 26(4) of the Act for a non-citizen to remain in Vanuatu without holding a valid visa. The penalty for this offence is set out in subs. 26(5) of the Act. If a non-citizen is convicted of this offence then that can be counted as a breach of their visa condition.
127. However, none of the Claimants have been prosecuted or convicted of offending against subs. 26(4) of the Act, therefore a conviction cannot be pointed to as evidence that they breached their visa condition on any occasion.
128. Alternatively, a non-citizen who is served a penalty notice may elect, within 30 days after the date of the notice, to pay to the Director the amount of the penalty prescribed by the regulations if they do not wish to have the matter determined by a court: subs. 83(2) of the Act.
129. If the amount specified in the penalty notice is paid, that non-citizen will not be liable to any further proceedings for the alleged offence.



130. The only Penalty Notices in respect of the Claimants were those at **Attachment "JM6"**. As these penalty notices were never accepted by the Claimants by paying the penalties specified, the Penalty Notices cannot be and are not evidence that the Claimants breached their visa conditions on any occasion.
131. In the absence of any convictions of the Claimants in respect of subs. 26(4) of the Act and in the absence of any penalties paid pursuant to a penalty notice, it cannot be and has not been established that the Claimants breached their visa conditions on three different occasions. Accordingly, this is not a valid ground for the Minister's decision ordering their removal from Vanuatu.
132. In the circumstances, the Minister's decision was made *ultra vires* or beyond the power conferred by para. 53A(1)(ab) of the Act as Claimants 1-7 were not lawfully declared as a prohibited immigrants under the Act, nor under para. 53A(1)(ac) of the Act as it cannot be established that the Claimants breached their visa conditions on three different conditions.
133. It follows that the decision by the Minister will be quashed and declared unlawful.
134. Did the Minister consider whether or not notice was required under subs. 53A(2) of the Act?
135. The Claimants' case is that they were not offered natural justice in being given notice of the Minister's decision and the opportunity to seek its review, including under subs. 55 (3) of the Act, and that the Minister did not analyse whether or not notice was required pursuant to subs. 53A(2) of the Act.
136. The State's case was that the Minister did consider whether or not to give notice pursuant to subs. 53A(2) of the Act and decided not to as the Claimants were already aware that they had been declared prohibited immigrants. In addition, both the Director's prohibited immigrant declarations and Penalty Notices had been served in 2021 therefore the Claimants were fully aware of the situation and had had ample time to seek redress but had not done so.
137. Minister Mahe's evidence confirms that he did consider whether or not to give notice of his decision, and that he decided to proceed without giving them notice. His reasons included that the Director informed him that the Claimants were fully aware that they had been declared prohibited immigrants, they were fully aware of the Penalty Notices but had failed to pay any 'fines' and that they had failed to lodge valid visa renewal applications.
138. As already set out above, the prohibited immigrant declarations were never served on the Claimants and they were not aware that they had been declared prohibited immigrants. Therefore the Minister was misinformed on that score.
139. Also as set out above, there was no mandatory requirement to pay any penalty specified in a Penalty Notice. Accordingly, the Minister was also misinformed that there had been a failure on the Claimants' part to pay penalties ('fines').



140. The Minister was also misinformed that the Claimants had failed to lodge valid visa renewal applications. As already held above, they did lodge visa renewal applications on or before October 2020 and then subsequently but it was the Immigration Department who for unknown reasons did not issue renewed visas.
141. In the circumstances, the Minister considered whether or not to give notice to the Claimants pursuant to subs. 53A(2) of the Act but took into account information that was incorrect.
142. Is notice required of a s. 53A removal order?
143. The State argued that the effect of subs. 53A(3) of the Act is that a s. 53A removal order is not subject to subs. 55(3) of the Act which provides that a removal order takes effect when the period for applying to the Supreme Court for a review of the order has expired or if an order has been made within that period, when the application is finally determined.
144. Justice Goldsbrough dealt with this in his Decision on Preliminary Questions of Law in *Gil Jang Yoon v Republic of Vanuatu* [2023] VJSC 239; Civil Case 1893 of 2022 (3 February 2023). That was a proceeding in which the two Applicants challenged, *inter alia*, a s. 53A order for their removal from Vanuatu. Counsel posed the following preliminary questions of law for the Court to answer: see para. 6 of the *Gil* Decision:

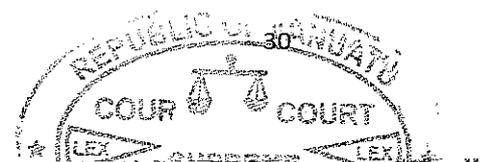
- (1) *Whether the Removal Order made pursuant to section 53A of the Immigration Act is subject to sections 54, 55(3) and 59 of the Immigration Act?*
- (2) *If the answer to 1 is yes, is the Removal Order prevented from coming into effect until after:*
 - (a) *It has been published in the Government Gazette and thereafter the period specified in section 55(3) of the Immigration [Act] has lapsed, or*
 - (b) *The person affected by the Removal Order has been served with it and the period specified in section 55(3) has lapsed.*

145. Justice Goldsbrough noted as follows at paras 9-11, 13, 15 and 17-19, of the decision:

9. *Section 53A [of the Immigration Act] is an identical provision save nothing more than a different section number to its predecessor which was section 17A. As will become apparent, it is necessary to consider section 17A and whether it is different from the present incarnation. Section 17A provided:-*

Removal of non-citizens from Vanuatu

- (1) *A person who is a non-citizen may be removed by the Minister, by Order, from Vanuatu if in the opinion of the Minister, the person –*
 - (a) *is involved in activities that are detrimental to national security, defence or public order; or*
 - (b) *is a wanted person in a foreign country for any criminal offence he has committed in that foreign country.*



(2) *The Minister does not need to give any notice for the removal of this person from Vanuatu.*

(3) *This section applies notwithstanding any other provision in this Act.*

10. *As can be seen the two provisions are almost identical in everything but numbering. This is significant because there is no Court of Appeal authority on section 53A but there is authority from the Court of Appeal about section 17A. As the two sections are otherwise identical, that authority must still be considered as binding on this Court, indeed in submissions counsel for the Respondents ask this Court to follow that decision.*

11. *The decision in question is Ayamiseba v Attorney General & Principal Immigration Officer [2006] VUCA 21. Ayamiseba was the subject of an Order made under section 17A but found himself back in Vanuatu after the Order had been executed but no country was prepared to receive him and he was returned to Vanuatu because of that. In Vanuatu he filed a claim seeking review of the Order made against him. At first the claim sought to have the section declared unconstitutional but in the Court of Appeal that part of the claim was discontinued. He continued to maintain that the Order was not properly made and the Court of Appeal entertained his claim and quashed the Order on the grounds set out in the judgment.*

...

13. *In Ayamiseba, the Court of Appeal noted that whilst section 17A(2) did not require the Minister to give notice of any intention to making an order, the Minister was not precluded from giving notice and should consider whether or not notice should be given before relying on that provision. In that case the Court of Appeal found that neither the Minister nor any of his advisers had considered the point, and because of that, determined that the Order was not properly made and quashed it.*

...

15. *It is also important to consider Ayamiseba in a different way. Ayamiseba establishes the authority of the Supreme Court to review a decision of the Minister when the Minister makes a section 17A order (now a section 53A order).*

...

17. *The Respondent says that the provision of section 53A(3) removes the obligations of compliance with both section 55 and section 59. Ayamiseba is authority that the Supreme Court does have the power to review a decision of the Minister and supports the submission that both section 59 (appeals) and by implication section 55 (procedure) apply after a section 53A order without notice has been made.*

18. *The Court of Appeal has already established that there is a right to seek a review of an order in the Supreme Court. In order for that right to be exercised there must be a period of time within which the order may be challenged prior to the actual deportation. There are therefore two reasons why both sections 55 and 59 should be held to be applicable in the case of a section 53A order, one to ensure that the right to seek a review is not simply illusory and the second because the exclusionary words in section 53A(3) are limited to that section alone, which deals with the making of the order, and do not expressly extend to the subsequent provisions of sections 55 and 59. There is doubt when section 59 refers to orders made under section 53 as opposed to section 53A but that doubt is resolved in the applicant's favour when one considers that the Court of Appeal has already, in Ayamiseba, explicitly set out the right of the individual to seek review of the order made against him or her.*

19. *That allows the first preliminary question to be answered affirmatively, that section 53A is subject to both section 55 and section 59.*

146. The Judge stated at para. 22 of the *Gil* Decision, relevantly, and then set out in para. 23 the answers to the questions as follows:



22. ... Whilst section 53A empowers the Minister to make an order without notice, he may choose to give notice, a matter for his deliberate judgment. Thereafter as the subject of the order has the right to challenge the order, he must be allowed the time to launch a challenge to it either by way of appeal (which would be dealt with under section 59) or judicial review. The Respondent may prefer, given the relative timeframes, to opt for the section 59 procedure permitting only 21 days to launch an appeal rather than the standard limit of six months following a decision to launch a Judicial Review of the decision. Either way the order cannot come into force under section 55(3) until the period for applying to the Supreme Court has expired or the application finally disposed of. To rule that section 55 is to be excluded and the removal order comes into force with immediate effect is both contrary to the express provisions of the legislation and contrary to the principle established in *Ayamiseba* that the subject has a right of review in the Supreme Court.
23. The questions are thus answered as follows:-

A removal order made under section 53A is subject to the provisions of section 54, 55(3) and 59 of the Immigration Act.

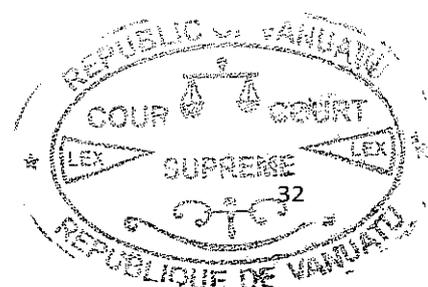
The removal order does not come into effect until after the period allowed for review has expired or until the review has been finally determined.

Section 53A itself is not unconstitutional, although in terms of the agreed issues, that question does not need to be answered.

(my underlining)

147. I agree with Goldsbrough J's reasoning in *Gil Jang Yoon v Republic of Vanuatu* [2023] VUSC 239 and adopt it. Accordingly, I do not agree with the submission on behalf of the State that a s. 53A removal order is not subject to subs. 55(3) of the Act. Such orders are subject to subs. 55(3) and so I would add to the reasoning in the *Gil* Decision that therefore, any removal order made pursuant to subs. 53A(1) of the Act must be served on the persons the subject of the order in order that they can exercise their right to seek review of the removal order.
148. In the present matter, the decision of the Minister which was an order under s. 53A for the removal of Claimants 1-7 from Vanuatu was not served on them. The non-service of the Minister's order was a failure by the State to comply with its legal obligations as set out in *Ayamiseba* and in *Gil*, and has resulted in the Claimants not being afforded natural justice in having the opportunity to seek review, including under subs. 55(3) of the Act, of the Minister's decision.
149. Was the Minister's decision made for an ulterior motive to benefit a third party?
150. Given that the Minister's decision will be quashed on other grounds, I give no further consideration to this issue.
151. Did the State comply with its obligations under the CRC?
152. Article 3(1) of the CRC provides as follows:

Article 3



1. *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

153. Article 37(d) of the CRC provides as follows:

Article 37

States Parties shall ensure that:

.....

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

154. The State did not answer this part of the Claim in its Defence.

155. It is clear from the Claimants' evidence that the children Claimants Chloe, Pascal and Olivier Brugger were deprived of their liberty when they were taken into custody on 27 August 2023 by the Immigration officers and Police. It is also clear that they were denied prompt access to a lawyer and other appropriate assistance as is their right under Article 37 of the CRC. The State did not file any evidence to contradict this.

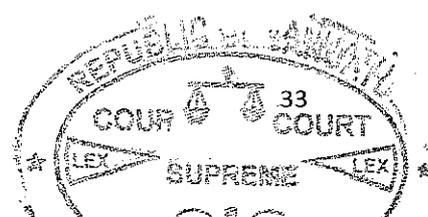
156. The children Claimants had lived in Vanuatu all of their lives, they attended school here and their home was here with their parents. They were removed from Vanuatu without notice of the Minister's decision. I consider that in doing so and in denying the children prompt access to legal and other appropriate assistance, the State failed to discharge its obligations under Article 1 of the CRC for the best interests of the child to be a primary consideration.

157. This too is cause to quash the Minister's decision and to declare it unlawful.

G. Costs

158. Costs shall follow the event. The Claimants seek costs on an indemnity basis, citing rule 15.5 of the *Civil Procedure Rules* ('CPR') and the decisions in *Tidewater Holding Limited v Kramer Ausenco Vanuatu Limited* [2022] VUSC 157 and *Kramer Ausenco (Vanuatu) Ltd v Supercool Vila Ltd* [2018] VUCA 29. Mr Bong submitted that the costs should be on the standard basis and be taxed if not agreed.

159. The State's actions which resulted in the Claimants bringing these proceedings were without good cause and egregious, and have resulted in costs that the Claimants would not have incurred otherwise not to mention the upheaval that has been caused to them and to their lives. In the circumstances, I consider indemnity costs are appropriate and there will be an order for the Defendant to pay the Claimants' costs of 80 hours (which is a discount) of Mr Fleming's time plus VAT totalling VT3,680,000.



H. Result and Decision

160. The decision by the Minister of Internal Affairs by way of the *Removal of Non-Citizens from Vanuatu* Order No. 169 of 2023 dated 17 August 2023 is quashed and declared unlawful.
161. The removal from Vanuatu of Claimants 1-7 Hugo Brugger, Marcel Brugger, Fabienne Brugger, Olivier Brugger, Pascal Brugger, Chloe Brugger and Sandra Daly Brugger is declared unlawful.
162. The decision or order for the arrest and deportation of Claimant 8 Birgit Mettel is quashed.
163. The arrest and deportation of Claimant 8 Birgit Mettel is declared unlawful.
164. The declarations by the Director of Immigration of Claimants 1-7 as prohibited immigrants are quashed and declared unlawful.
165. The Penalty Notices directed to the Claimants with due dates of 22 September 2021 are declared unlawful.
166. The Defendant is to forthwith remove the Claimants' names from the prohibited Immigrants Lists referred to in the Director's declaration letters, and from any other publication including the Minister's press release on Facebook dated 28 August 2023 in which they were publicised as being prohibited immigrants.
167. The Defendant is to issue a public apology to the Claimants.
168. The Defendant is to forthwith pay for the cost of the Claimants' airfares and travel (including domestic flights within Australia) to return to Vanuatu.
169. The Defendant is to forthwith reimburse any of the Claimants' immigration bonds and securities that may have been used in their unlawful removal from Vanuatu.
170. Costs shall follow the event. The Defendant is to pay costs to the Claimants on an indemnity basis fixed at VT3,680,000. The costs are to be paid within 28 days.
171. The stay order granted on 10 November 2023 is discharged.
172. The Defendant is to issue **within 7 days** a residence Visa of the same category and conditions previously granted for each of the Claimants 1-6 and 8.

DATED at Port Vila this 28th day of November 2023
BY THE COURT


Justice Viran Molisa Trief

