“Does not need to” - discretionary power or non discretionary exemption? Ayamiseba v Attorney General [2006] VUSC 21; [2006] VUCA 21

By

Professor Don Paterson[1] and Dr Robert Early[2]

Introduction

The purpose of the authors in compiling this case note is, primarily, to draw attention to a decision of the Court of Appeal of Vanuatu about the interpretation of s17A Immigration Act, Cap 66, which, in the authors’ respectful opinion, is open to question. The authors also wish to draw attention to some broader issues which are brought to the fore in this case.

Facts

Mr Andy Ayamiseba is originally from West Papua, and came to Vanuatu in 1983 as a member of the Black Brothers band at the invitation of the government of the newly independent country of Vanuatu, which under the leadership of the late Father Walter Lini, was anxious to show support for the struggle of its Melanesian neighbour, which had formerly been part of the Dutch East Indies, but was by then the Indonesian province of Irian Jaya. The Black Brothers proved to be a very popular band with its very distinctive and haunting melodies, and became immensely well-known and well-liked. The particular patron of the Black Brothers within the Vanuatu Government was the Secretary-General of the Vanua’aku Pati and Minister of Government, Mr Barak Sope, who allowed them to stay in one of his houses and provided them with financial support. Mr Ayamiseba remained in Vanuatu for about six months and then went to Holland, returning to Vanuatu from time to time during the next five years. In 1987 there was a very dramatic falling out between Father Walter Lini and Mr Barak Sope, sparked over protest demonstrations which Mr Sope had helped to organise against the policies of the government. Mr Sope was removed from government, and in 1988 the Black Brothers, as his protégés and supporters, were all deported to Australia in the “interest of national security and internal political stability”.
After the fall of the Lini government in the early 1990’s, Mr Ayamiseba’s name was removed from the list of prohibited immigrants, and he made several visits to Vanuatu on travel documents provided by the Australian government.
Mr Ayamiseba’s presence in Vanuatu was known to the government and from time to time he appeared at functions arranged to support the West Papua independence movement. In 2002 he was issued with a Vanuatu diplomatic passport, but this expired or was terminated in February 2005. In November 2005, Mr Ayasmiseba, who had formed a relationship with a ni-Vanuatu woman and fathered a child by her, was requested by the Immigration Department through the Ministry of Foreign Affairs to apply for a residency permit in Vanuatu.
It became evident that Mr Ayamiseba’s presence in Vanuatu was not just for the purpose of re-kindling public interest in the haunting melodies of the Black Brothers, such as “Yu no save changem” or “From wanem”. Nor was it for the purpose of enjoying the pleasures of fatherhood, or of savouring the delights of the country that was to be acclaimed “The Happiest Country on Earth”. Mr Ayasimeba, it appeared, had a political agenda - to persuade the government of Vanuatu to support the independence movement of West Papua. Mr Ayamiseba was also said to have imported a container load of goods into the country for which no duty was paid. It was even rumoured that Mr Ayasimeba had been speaking to some members of

the opposition on the topic of independence for West Papua, and these rumours apparently found their way to the office of the Minister of Internal Affairs.

On 9 February 2006 the Minister of Internal Affairs signed a removal order that “Mr Andy Ayamiseba is to be removed from Vanuatu and remain outside the country for a period of 10 years commencing from the date on which this order is made.” Later that same night, at 10.15pm, the police served this order on Mr Ayamiseba at his home, escorted him to the airport, and placed him on a plane leaving at 10.45pm for Solomon Islands.

The plane left with Mr Ayamiseba on board, and delivered him to Honiara, Solomon Islands, but the immigration authorities there would not allow him to enter the country, and so he was put back on the plane which then left for Brisbane, Australia, where again the immigration authorities would not let him enter the country. So Mr Ayamiseba was placed back on the plane, which returned to Port Vila on 10 February 2006. On arrival at Port Vila, Mr Ayamiseba was detained at the airport, until later in the afternoon when his counsel was able to obtain a restraining order to stay the removal order made by the Minister the previous day. Mr Ayamiseba’s counsel then applied for an order of judicial review of the minister’s removal order of 9 February 2006. This application was heard by the Supreme Court, and when it was refused in a judgment dated 7 April 2006, that decision was appealed to the Court of Appeal which gave its decision on 6 October 2006.

The law

The law involved in the deportation of Mr Ayamiseba is contained in the following sections of the Immigration Act:

S17 (1) Notwithstanding any other provisions in this Act, the Minister in his discretion may make an order...that any person...shall on the expiry of 14 days or such longer period as the Minister in his discretion may specify...be removed from and remain out of Vanuatu....

(1A) Before making an order under subsection (1), the Minister must give the person notice in writing...that the Minister proposed to make the order; and...the reasons why the Minister proposed to make the order...and...that the person may within 14 days make representations to the Minister.

(1B) The Minister must consider the representations before making an order under subsection (1)....

17(A) 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 is involved in activities that are detrimental to national security, defence or public order.

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

As a matter of legislative history it may be noted that subsections (1A) and (1B) had been inserted into the Act by an amendment in 1998, and subsection 17(A)(1) and (2) were inserted into the Act by an amendment enacted in 2004.

Supreme Court

In the Supreme Court it was argued that the removal order made by the Minister was in breach of the common law rule of natural justice and in breach of Mr Ayamiseba’s constitutional right to the protection of the law. The Court held that the common law right to natural justice was expressly removed by section 17A of the Immigration Act, and that the constitutional rights of Mr Ayamiseba were expressly stated by section 5 of the Constitution to be “subject to any restrictions imposed by law on non-citizens”, and section 17A of the Immigration Act had imposed such restrictions.

It was argued on behalf of Mr Ayamiseba that the effect of section 17A(2) is not to exclude the power of the Minister to give notice where natural justice so requires, and that natural justice did so require in this case. The Court held that the section is to be interpreted as not requiring the Minister to give notice, “but rather one which imposes a discretion on the Minister. The Minister is not required to give notice but may do so if he considers it appropriate or proper in the circumstances of a particular case. In the present case the Minister has decided that he need not give notice to the claimant. In his sworn statement the Minister declared that in his opinion the claimant was involved in activities that are detrimental to national security

and public order."
Finally, it was argued that the Minister could not order the deportation of a stateless person, but the Supreme Court considered that Mr Ayamiseba was not stateless, because "it is possible for another country to accept him."
The Supreme Court accordingly declined to make any order of judicial review of the order of the Minister removing Mr Ayamiseba from Vanuatu.

Court of Appeal
In the Court of Appeal, counsel for Mr Ayamiseba began to repeat his argument that section 17A Immigration Act was unconstitutional because it deprived Mr Ayamiseba of his constitutional rights to natural justice and protection of the law, but the judgment of the Court reports that: "Before us he abandoned that argument and accepted that in terms of Article 5.1 of the Constitution, Parliament may by law impose restrictions on the fundamental rights and freedoms of non-citizens."
After counsel abandoned another argument which was stated to be "not a sustainable argument either", the Court of Appeal took up, apparently of its own initiative, the point discussed by the judge in the Supreme Court that section 17A of the Act confers on the Minister a discretion as to whether or not to give notice, and held that since there was no proof that the Minister had directed his mind to whether he should give notice, the Minister was not authorised by the Act to order the deportation of Mr Ayamiseba without giving him notice of his intention to do so.
The essence of the decision of the Court is in the following words: "This is a simple matter of statutory interpretation. The Minister had to reach a rational decision...that there was no need for him to give notice. That is what the Act requires...He had to decide if, in this case, it was needed. There is no evidence to suggest that this important...inquiry was undertaken at all...The Court being satisfied that the deportation order was made without proper compliance with the statute it is therefore declared to be a nullity."

Comment - Statutory Interpretation
The critical words in the Immigration Act were those in section 17A(2) which said: "The Minister does not need to give notice." Both the judge in the Supreme Court and the judges in the Court of Appeal took the view that these words mean that the Minister has a discretion to decide whether or not to give notice, and the Court of Appeal took the proposition further and held that the Minister has to make a decision as to whether or not to exercise that discretion, and that if there is no evidence that he did make such decision, then he was in breach of the section.
With respect, that is not quite what the section says. The section says that the Minister does not need to give notice. It is true, as the judges pointed out, that the section does not prohibit or preclude the Minister from giving notice. But nor does it require him to decide whether or not to give notice. What it says is that "the Minister does not need to give notice."
The words "does (or do) not need to", like all other words in the English, or any other, language, have to be interpreted in their context. If the words are used in relation to an opportunity or a chance they clearly allow a discretion. For example, if I say: "We are going to the beach for a swim, but you do not need to come unless you want to", then clearly I am giving you a choice, allowing you to exercise a discretion, as to whether or not you wish to come to the beach with us or not. Again if I say: "I would like to go to the movies tonight, but you do not need to come", I am allowing you a choice as to whether or not you come. When the words "does not need to" are used in relation to an obligation or requirement, however, they take on more the meaning of an exemption from, or an exception to, the obligation or requirement words. If parents say to a child: "You must say your prayers every night before going to bed, but tonight you do not need to because you have a bad cold", the parents mean that the child is released from the normal requirement or obligation of saying prayers. The parents are not indicating that the child must make a decision as to whether or not to say prayers. Likewise, if a teacher says to a pupil: "Normally you must bring your books to class, but today you do not need to because we will be having sports", the teacher is releasing the pupil from the normal obligation to bring his or her books. The teacher is not requiring the pupil to make a decision as to whether or not to bring books. Again if a librarian puts up a notice that all

cell telephones must be switched off in the library, but that staff do not need to switch off their cell telephones, the librarian is not requiring that the staff must make a decision as to whether or not they switch off their cell telephones when they enter the library - the librarian is indicating that staff can enter without switching off their cell telephones.
The words “the Minister does not need to give notice” which appear in subsection 17(A)(2) follow the obligation that is stated in section 17(1A) that “Before making an order under subsection (1) the Minister must give the person notice in writing...” What the words “does not need to” mean in this context, it is respectfully submitted, is that the Minister is exempted from the requirement of giving notice, not that the Minister must make a decision as to whether or not notice should be given. It is that obligation or requirement of giving notice from which the Minister is exempted or excepted, and there is no requirement that the Minister must make a decision as to whether or not to give notice.
It is true that a person can waive or surrender any right or benefit that is given, but that does not mean that the person must make a deliberate decision as to whether or not to waive the right. The right remains until such time, if at all, that the person decides to waive the right. Thus in this case, as the judges pointed out the Minister was not prohibited from giving notice, the Minister could waive his right to an exemption from the requirement of giving notice, if he wished. But that does not mean that the Minister must make a deliberate decision as to whether or not he will waive that exemption. The exemption remains up until, if at all, the Minister decides to waive his right not to give notice.
In the above text we have argued that the interpretation adopted by the Court of Appeal is not in accordance with normal principles applied by courts when interpreting words in legislation. We have also broadened our approach and considered the ordinary usage of the words “does not need to”. An analysis of a small random sample of occurrences of the phrase “does not need to”, taken from the British National Corpus (www.natcorp.ox.ac.uk) of ten million words of modern English text, showed that the normally understood meaning of the phrase, as outlined above, provided an intelligible and acceptable reading which was coherent with the apparent intent of the original statements. However, applying the interpretation of the meaning of the phrase as appears to have been adopted in this case by the Court of Appeal to the instances of the phrase in the English corpus produced readings which seemed perplexing, incoherent, or incompatible with the apparent intent of the original statements. In each case the reader is left with the impression that a forced inference was being adopted, which could not be justified or proven from the statement itself. This clearly reinforces the view that the interpretation or reading of the phrase which was adopted by the Court in this particular case is highly idiosyncratic, and runs counter to the intuitive interpretation that would be made by speakers of the English language.
Accordingly as a matter of statutory interpretation, the decision of the Court of Appeal seems, with respect, to be incorrect.

Wider Issues
As mentioned earlier in the introduction to this case-note, the decision of the Court of appeal raises some issues which are wider than the interpretation of Section 17A(2) of the Immigration Act of Vanuatu, and which the authors consider are worthy of comment:
1. Natural justice
It appears from the decision of the Court of Appeal that the point which was ultimately the basis upon which their decision hinged, ie. that section 17A(2) requires that the Minister must make a choice as to whether or not to give notice, and that there was no evidence that the Minister had made that decision, was taken up on the initiative of the members of the Court themselves, and was not the subject of argument by counsel.
When a point of fine legal interpretation arises that has not been addressed by counsel, it hardly seems to be in accordance with basic principles of natural justice, nor in accordance with normal courtroom practice, that it should be made the subject of decision by a court without allowing all counsel the opportunity to address the court on it.

2. Burden of proof and presumption of legality

When any proceedings are brought in a court, the burden of proof is upon the person who is bringing the proceedings, ie., in civil cases, the plaintiff, claimant or applicant, and in criminal cases the prosecution. It is that person who must satisfy the court as to the truth of his or her allegations - the burden of proof is not on the defendant to disprove those allegations.

Moreover, when civil proceedings are brought against public officials, there is a presumption that is to be applied, that, in the absence of evidence to the contrary, official actions have been done properly. This is sometimes expressed in the Latin words, *omnia praesumuntur rite esse acta,* meaning all things are presumed to have been done correctly.

If that presumption were applied to the decision which the Court of Appeal considered that the Minister should have made in this case, ie. a decision as to whether notice should be given, it would mean that it in this case the Minister should, in the absence of evidence to the contrary, be presumed to have made that decision. But the Court presumed to the contrary.

Moreover, even if the legal presumption is not applied, it hardly seems correct to assume that the silence of the Minister about whether or not he considered a matter means that he did not consider it. It is surely equally possible that the Minister may have considered it, but either he or the legal adviser drafting his affidavit may have omitted to mention it.

3. Evidence of critical facts

It is evident that the fact upon which the decision in this case hinged was the fact as to whether the Minister had made a decision that notice need not be given. But there was no evidence before the court directly on this point. There was evidence that the Minister did not mention it in his affidavit, and the court assumed from his silence on the point, that he had made no such decision. But is that a safe assumption? When a point is so critical, would it not be better practice for further particulars to be required to be provided, or that the deponent of the affidavit be required to be cross-examined?

The mental processes of the Minister were not visible, and the best way that the Court could be sure of what they were was for the Minister to give evidence himself of what he did or did not think about at the time that he was issuing the deportation order. Such evidence would then be subject to cross-examination. At the conclusion of this process the Court would not be left in the position in which it was placed in this case, of having to make assumptions on inadequate factual foundation.

4. Constitutionality of restrictions against non-citizens

The Supreme Court and the Court of Appeal both accepted that the words in Article 5.1 of the Constitution “subject to any restrictions imposed by law on non-citizens” are to be read at their face value, and mean that Parliament may make any kinds of laws that are discriminatory of non-citizens, and remove from non-citizens the fundamental rights and freedoms that are recognised in that Article. This is a very wide proposition and one might have hoped that either the Supreme Court or the Court of Appeal would have explored it in more detail, and considered whether there might not be some exceptions or limits to it. If the courts do not, then it is to be hoped that Parliament when next it amends the Constitution might reduce the extent of this exclusion of non-citizens from the rights and freedoms enjoyed by citizens.

5. Judicial silence about inhumane deportation practices

A disturbing feature of both the judgement of the Supreme Court and the judgment of the Court of Appeal is that neither judgment made any comment upon the inhumane practice that was adopted by the officials involved in the deportation of Mr Ayamiseba. The deportation order, which was signed on 9 February 2006, did not specify when he was to be removed, but it was apparently served on him by police at his home at 10.15pm that same day, and he was taken to the airport and put on a plane departing at 10.45pm. Obviously he must have been allowed totally inadequate time to put his affairs in order and prepare what he needed to take with him for an absence from the country which was stated by the order to be for a minimum of ten years, and to make arrangements for, and say farewell to, the woman who was the mother of his four year old son and to the boy himself.

This is not the first time that deportation orders have been made against people which have been executed

with no adequate warning to the deportees or their families, and which have proved to be unauthorised. Some of the persons deported have returned and sued the government in respect of these practices. It is surprising and disappointing that none of the judges involved in this case expressed any censure about the way in which Mr Ayamiseba was plucked from his family and sent off to an unknown destination for at least ten years with what must have been little more than ten minutes' notice.

6 Legislative drafting practice

As mentioned earlier, the term "does not need to" is not one which is very much used in legislation. It is more common in everyday speech than in the pages of the statute books. It clearly is an expression which can give rise to some difference of view as to its precise meaning, and it would be wise not to use it in future. If it is desired to indicate that something is not necessary, does not need to be done, it is probably less contentious to say that that thing shall not be done.

7. Hearings and judgments of Court of Appeal of Vanuatu

The Court of Appeal of Vanuatu is required by the Constitution to be comprised of "two or more judges of the Supreme Court sitting together". In practice, at present the Court of Appeal is usually composed of the current judges of the Supreme Court, together with a judge from Australia, New Zealand and Fiji. They sit in regular sessions of two weeks twice a year, May and October, or thereabouts. This regular twice yearly sitting of the Court of Appeal has proved to be a very efficient means of dealing with appeals from the Supreme Court of Vanuatu.

Ayamiseba's case is an example of the expedition with which such appeals are heard and decided. The hearing before the Court of Appeal was on 26 September 2006, and the written judgment was handed down on 6 October 2006. In accordance with the usual practice, the judgment of the Court of Appeal in Ayamiseba's case is anonymous and unanimous. It is one of some ten cases that were heard by the Court of Appeal from the period 25 September - 6 October 2006, and is one of nine written judgments which were issued by the Court of Appeal on 6 October 2006.

Obviously the members of the Court of Appeal are under very great pressure to conduct the hearings and complete the written judgements in the short space of two weeks when the members are together. Such a heavy and tight workload would seem to make it impossible for each member of the Court to give his full attention to all aspects of each appeal.

There is, therefore, a risk that procedures at the hearings which require additional time would be avoided, such as calling on counsel to make further submissions on important points which have not been addressed, and requiring that deponents of affidavits be called upon to clarify obscurities or silences in their affidavits. There is a risk, also, that judgments of the Court of Appeal may be the product of only one judge, who may well not be normally resident in Vanuatu, and that individual judgments do not receive the rigorous scrutiny that they should from all members of the Court before they are completed. It is also likely that there is not the time or opportunity for judgments to contain comments upon practices which should be the subject of judicial comment.

---

[1] Emeritus Professor of Law, USP School of Law, Emalus Campus, Port Vila, Vanuatu.

[2] Director, USP Pacific Languages Unit, Emalus Campus, Port Vila, Vanuatu.

© University of the South Pacific 1998-2006