JUDICIAL REVIEW

Application of Part 17

17.1 This Part applies only to the Supreme Court

[17.1.1] Judicial review only in Supreme Court See generally *Enock v David* [2003] VUCA 19; CAC 25 of 2003. Magistrates should beware claims which seek judicial review, in substance if not in form.

Definitions for Part 17

17.2 In this Part:

"decision" means a decision, an action or a failure to act in relation to the exercise of a public function or a non-public function;

[17.2.1] Status of intermediate decisions Questions may arise as to whether intermediate decisions are reviewable: See generally *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11; 64 ALJR 462. See further [17.2.5] as to "public" functions. In *Edmanley v Police Services Commission* [2005] VUSC 159; CC 218 of 2005 what might be described as an intermediate decision was held not to be a proper subject for review and also raised the possibility that an applicant might lack the necessary standing required by r.17.8(3)(b) on the basis that an intermediate decision does not have the effect of *directly* affecting the person's interests. On the other hand, in *Japhet v Mata* [2010] VUSC 17; CC 187 of 2007 at [11]-[17] the delay of registration of an instrument under the *Land Leases Act* pending investigation was held to be a "decision" within the meaning of the rule. See further [17.8.3].

"decision-maker" means a person who made a decision;

"declaration" means an order declaring an enactment to be of no effect;

[17.2.2] Scope of remedy This is a narrower remedy than a declaration in equity which is not mentioned in rr.17.4 or 17.9(1)(a) and which may not be intended to be available, unlike in other Commonwealth jurisdictions: *Barnard & Ors v National Dock Labour Board & Ors* [1953] 2 QB 18 at 41; [1953] 1 All ER 1113 at 1119; [1953] 2 WLR 995 at 1009. As to the position under the former *Rules* see *Nelson v A-G* [1998] VUSC 58; CC 17 of 1995. The precise terms of Part 17 were not considered in any detail in *Enock v David* [2003] VUCA 19; CAC 25 of 2003 yet the Court of Appeal proceeded on the assumption that declarations of the rights of the parties more generally would be available in judicial review applications, stating that the rule "recognises that where a review of the decision of another body is sought, whether it is a body with public functions or body or decision-maker with non-public functions, the likely remedy to be granted will be a declaration about the rights of the parties". Likewise in *Port Vila Town Island Council of Chiefs v Tahi* [2008] VUSC 21; CC 160 0f 2007 Tuohy J, without considering the issue, granted a declaration going beyond this definition.

"enactment" means an Act of Parliament or subsidiary legislation, orders or by-laws made by a person empowered by an Act to do so;

[17.2.3] Difficulty generated by definition This definition is perhaps unfortunate - if an enactment is *ultra vires* a power contained in an Act it would seem a proper subject for review, however the definition apparently excludes such an enactment with the absurd result that neither r.17.4(1)(a) nor r.17.9(1)(a) is activated.

"judicial review" means a review of the lawfulness of an enactment or a decision;

[17.2.4] Nature of judicial review It must be emphasised that judicial review is limited by legal error. Judicial review is not an appeal on the merits of a decision. Judicial review is a supervisory jurisdiction but does not permit the court to usurp the function of the decision-maker by making a substantive decision of its own: *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141 at 143-4, 154; 1982 1 WLR 1155 at 1160-1, 1173; *Lawson v Housing NZ* [1997] 2 NZLR 474 at 486; *Apisai v Simon* [2002] VUCA 42; CAC 17 of 2002; *Vanuatu Maritime Authority v Athy* [2006] VUCA 12; CAC 27 of 2006. Unfortunately, there are several examples where the Supreme Court has engaged in thinly disguised merits review and the Court of Appeal has been unmoved: See for example *Isom v PSC* [2009] VUSC 130; CC 216 of 2005, upheld on appeal *PSC v Isom* [2010] VUCA 9; CAC 23 of 2009.

"mandatory order" (formerly called a writ of mandamus) means an order that a person do something;

"non-public function" means a function whose exercise can infringe proprietary or contractual rights or jeopardise a person's status or livelihood;

[17.2.5] Public and non-public judicial review The availability of judicial review for "non-public functions" may be an enlargement of the common law of judicial review to which extent the rules are not effective: *Everett v Griffiths* [1924] 1 KB 941 at 947-8; *Cyclamen v Port Vila Council* [2007] VUSC 7; CC 43 of 2006 at [44]. That a Minister was acting for the Government and carrying out governmental functions does not automatically confer upon a decision a public law quality: *R v Department for Constitutional Affairs* [2006] EWHC 727 (Admin); *Cyclamen Ltd v Port Vila Council* [2007] VUSC 7; CC 43 of 2006 at [42]. Not every decision of Government is amenable to judicial review: *Taurakoto v Batic* [1993] VUSC 3; [1980-94] Van LR 620; *R v National Assembly for Wales* [2006] EWHC 2167 (Admin); *Cyclamen Ltd v Port Vila Council* [2007] VUSC 7; CC 43 of 2006 at [32].

"prohibiting order" (formerly called a writ of prohibition) means an order that a person not do something;

"quashing order" (formerly called a writ of certiorari) means an order that the decision of a decision-maker is quashed;

Application of the rest of these Rules to judicial review

17.3 The rest of these Rules apply to a claim for judicial review subject to the rules in this Part.

Claim for judicial review

17.4 (1) A person claiming judicial review may file a claim claiming:

E *CPR* r54.3(1)(a)

(a) a declaration about an enactment; or

[17.4.1] Limited declaratory power See further [17.2.2]. It is suggested that implied limitation against seeking declarations other than about enactments does not reflect the common law as to which see further [17.4.2]

E *CPR* r52.2(a), (b), (c)

(b) a mandatory order, a prohibiting order or a quashing order about a decision.

[17.4.2] Mandamus Despite the modern architecture of this Part, the law of judicial review is unreformed in Vanuatu. Many other jurisdictions have codified the common law to ameliorate some of the many ancient limitations and technicalities. It must be borne in mind that the provisions of this Part are not, to the extent that they may purport to modify the substantive common law, necessarily effective.

[17.4.3] No mixing of proceedings This rule suggests that a claim for judicial review is limited to the remedies described in paragraphs (a) and (b) with the result that claims for remedies of any other kind must be commenced in a separate general claim under Part 2. See further [2.2.2], [17.4.1]. This seems to be tacitly accepted so far.

(2) The claim must name as defendant:

(a) for a declaration, the Attorney General; and

[17.4.4] When Attorney General to be named It is necessary to name the Attorney General *only* when seeking a declaration about an enactment: *Edmanley v Police Service Commission* [2005] VUSC 159; CC 218 of 2005. Unfortunately, many practitioners name the Attorney General as a matter of course.

(b) for an order about a decision, the person who made or should have made the decision.

(3) The claim must:

(a) set out the grounds for making the claim; and

(b) have with it a sworn statement in support of the claim; and

[17.4.5] Importance of sworn statement The importance of compliance with this rule was emphasised by the Court of Appeal in *Cyclamen Ltd v Port Vila Council* [2006] VUCA 20; CAC 20 of 2006 where it was explained that the sworn statement is intended to identify each of the decisions under challenge and the facts necessary to enable a determination of the lawfulness of the decisions. All material matters must be placed before the court: *R v Horsham DC; Ex parte Wenman* [1994] 4 All ER 681 at 710.

(c) be in Form 34

Time for filing claim

17.5 (1) The claim must be made within 6 months of the enactment or the decision.

[17.5.1] Validity of time limitation It is doubtful whether the rule-making power permits such a rule and accordingly, its validity should not be assumed. The public interest in good administration requires, however, that claims for judicial review be made promptly so that issues as to the validity of decisions do not linger: *O'Reilly v Mackman* [1983] 2 AC 237 at 280-1; [1982] 3 WLR 1096 at 1106; [1982] 3 All ER 1124 at 1130-1; *Avock v Vanuatu* [2002] VUCA 44; CAC 22 of 2002; *Kalsakau v Wells* [2006] VUSC 79; CC 97 of 2006 at [11]. See further r.17.8(3)(c) which is probably valid and is unaffected by any doubt as to the validity of this rule.

(2) However, the court may extend the time for making a claim if it is satisfied that substantial justice requires it.

[17.5.2] Criteria relating to extension In *Avock v Vanuatu* [2002] VUCA 44; CAC 22 of 2002 the Court of Appeal referred to a "heavy onus" upon a person seeking leave (under the former rules) to commence a judicial review application 4 months out of time. The court refused to extend time in *Kalsakau v Wells* [2006] VUSC 79; CC 97 of 2006 (4 months out of time) and in *Maliu v Molitamata Village Land Tribunal* [2009]

VUSC 52; CC 28 of 2008 (4 years, no good explanation). A claim which was 1 month out of time was permitted (unopposed) in *Ishmael v President of Vanuatu* [2006] VUSC 78; CC 173 of 2005 noting that the delay was modest, there was no prejudice to the defendants and no other remedy was available to the claimants. The general importance of the point in issue may justify an extension if it is of genuinely public importance and such cases are likely to be exceptional: *R v Secretary of State for Home Dept; Ex parte Ruddock* [1987] 2 All ER 518 at 521; *R v Collins; Ex Parte MS* [1997] EWCA Civ 2019.

Serving claim

17.6 (1) The claim and sworn statement must be served on the defendant within 28 days of filing.

(2) The claim and sworn statement must also be served:

(a) on any other person who is directly affected by the claim; within 28 days of filing; and

(b) on any other person the court orders to be included as a party, within 28 days of the order.

Response

17.7 (1) The defendant must file a defence within 14 days of service of the claim.

(2) Any other person served with the claim who wants to take part in the judicial review must file a defence within 14 days of service of the claim.

(3) The defence must be served on the claimant within 14 days of service of the claim.

(4) With the defence the defendant and other person must file:

(a) detailed grounds for disputing or supporting the claim; and

[17.7.1] Meanng of “detailed grounds” What form the “detailed grounds” ought to take is uncertain. The requirement suggests something beyond an ordinary defence. It is anomalous that, even before the conference under r.17.8 (when the court considers whether the threshold is met), the defendant is required to detail its defence to a greater extent than in the defence itself. It is common for this requirement to be overlooked by parties and ignored by the court, provided that a defence is filed. Perhaps the rule should be read conservatively to avoid bare denials and as requiring no more than that “detailed grounds” of defence be found *in* the defence.

(b) a sworn statement supporting those grounds.

[17.7.2] Reconsideration by claimant Lawyers for claimants should reconsider the merits of the claim for judicial review once they have received the defendant’s evidence: *R v Horsham DC; Ex parte Wenman* [1994] 4 All ER 681 at 710.

Court to be satisfied of claimant’s case

17.8 (1) As soon as practicable after the defence has been filed and served, the judge must call a conference.

(2) At the conference, the judge must consider the matters in subrule (3).

[17.8.1] Purpose This prevents time being wasted by misconceived claims. The court will not look deeply into the merits beyond satisfying itself of the requirements below. For examples of claims which were struck out see *Kalpoi v Sope* [2004] VUSC 33; CC 53 of 2003; *Edmanley v Police Services Commission* [2005] VUSC 159; CC 218 of 2005; *Lord Mayor v Minister of Internal Affairs* [2009] VUSC 114; CC 115 of 2009.

(3) The judge will not hear the claim unless he or she is satisfied that:

[17.8.2] Onus of satisfying judge The onus of satisfying the court is upon the claimant: *In re Application by Coombe* [1988] VUSC 16; [1980-1994] Van LR 383.

(a) the claimant has an arguable case; and

[17.8.3] When no arguable case The same principles as apply to striking out cases disclosing no reasonable cause of action will apply here: *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53. If a decision is not justiciable then there is no arguable case: *Curtis v Minister of Defence* [2002] 2 NZLR 744. See further [17.8.1] for examples.

(b) the claimant is directly affected by the enactment or decision; and

[17.8.4] Meaning of "directly" It is uncertain exactly how "direct" must be the effect of the enactment/decision. The question of locus standi is a matter going to the jurisdiction of the court and is not a mere formality: *R v Secretary of Social Services, ex parte Child Poverty Action Group* [1989] 1 All ER 1047 at 1056. The test in this paragraph may be more stringent that that traditionally applied at common law (which remains the applicable substantive law), as to which see *IRC v National Federation of Small Businesses* [1982] AC 617 at 640, 656; [1981] 2 WLR 722 at 736-7, 751; [1981] 2 All ER 93 at 103-4, 115; *Stephens v Police Service Commission* [1995] VUSC 1; CC 11 of 1995. An intermediate decision may not be sufficient (*Edmanley v Police Services Commission* [2005] VUSC 159; CC 218 of 2005) nor may a mere loss of prestige (*Emelee v Lini* [2004] VUSC 89; CC 2 of 2004).

[17.8.5] Effect of rule on general law of *locus standi* To the extent that the rule purports to introduce a new test of locus standi, its validity should not be assumed: See *IRC v National Federation of Small Businesses* [1982] AC 617 at 629, 631, 645, 647-8; [1981] 2 WLR 722 at 726, 728, 741, 743; [1981] 2 All ER 93 at 96, 97, 107, 109; *TK v Australian Red Cross Society* (1989) 1 WAR 335 at 340.

E *CPR* r54.5

(c) there has been no undue delay in making the claim; and

[17.8.6] Relationship to r.17.5 This appears to be independent of the time limit in r.17.5 and leads to the conclusion that an application for judicial review could be defeated upon this ground even if brought within time or within time as extended: *Kalpokas v Natapei* [2004] VUSC 55; CC 86 of 2004; *Kalsakau v Wells* [2006] VUSC 79; CC 97 of 2006 at [21]; *R v Dairy Produce Quota Tribunal; Ex parte Caswell* [1990] UKHL 5; [1990] 2 AC 738. Undue delay is not to be gauged simply by locating the earliest practicable opportunity and adding a short time for lawyers to advise and launch proceedings. It is crucially affected by the potential or actual effects of the passage of time on others: *R v Lichfield DC* [2001] EWCA Civ 304 at [37]. On the other hand, even delay without accompanying prejudice may preclude the grant of the exceptional forms of relief in r.17.9 which should not be made available to those who sleep on their rights: *R v Senate of University of Aston* [1969] 2 All ER 964 at 976, 979.

(d) there is no other remedy that resolves the matter fully and directly.

[17.8.7] Meaning of "fully and directly" It is uncertain precisely how "full and direct" the proposed alternative remedy must be to preclude judicial review. This formula may be more stringent that that traditionally used at common law (which remains the applicable substantive law): See for example *R v Bank of England* (1819) 2 B & Ald 620 at 622; 106 ER 492 at 493; *R v Stepney* [1902] 1 KB 317 at 321; *R v Dunsheath* [1951] 1 KB 127 at 131-2; [1950] 2 All ER 741 at 743; *R v Board of Trade* [1965] 1 QB 603 at 615, 623; [1964] 2 All ER 561 at 566, 571; [1964] 3 WLR 262 at 269, 276; *R v Commissioner of Police, ex parte Blackburn* [1968] 2 QB 118 at 144, 149; [1968] 1 All ER 763 at 774, 777; [1968] 2 WLR 893 at 910, 913-4.

[17.8.8] Alternative remedies precluding review The existence of a statutory appeal procedure will usually preclude judicial review: *R v Birmingham CC* [1993] 1 All ER 530 at 537. The possibility of an alternative claim for damages based on the same matters as the claim for judicial review might preclude judicial review: *Telecom v Minister for Infrastructure* [2007] VUCA 8; CAC 32 of 2006. On the other hand, a remedy which is doubtful, partial, cumbersome or inaccessible is unlikely to be regarded as a real alternative: See for example *Fisher v Keane* (1878) 11 Ch D 353 at 360; *Lawlor v Post Office Workers* [1965] Ch 712 at 734; [1965] 2 WLR 579 at 596; [1965] 1 All ER 353 at 363; *Bimson v Johnson* (1957) 10 DLR (2d) 11 at 34-5; *R v Board of Vistors of Hull Prison; Ex parte St Germain* [1979] QB 425 at 456, 465; *R v Inland Revenue Commrs; Ex parte Preston* [1985] AC 835 at 862.

[17.8.9] Claimant should deal with viable alternative remedies If there is an apparently viable alternative remedy, the claimant's sworn statements ought to address this and explain why, in the particular circumstances of the case, judicial review is nevertheless thought to be appropriate: *R v Horsham DC; ex parte Wenman* [1994] 4 All ER 681 at 710.

(4) To be satisfied, the judge may at the conference:

(a) consider the papers filed in the proceeding; and

(b) hear argument from the parties.

[17.8.10] No requirement to hear evidence The judge is not required to hear the claimant's evidence: *Loparau v Sope* [2005] VUCA 4; CAC 26 of 2004.

(5) If the judge is not satisfied about the matters in subrule (3), the judge must decline to hear the claim and strike it out.

[17.8.11] Striking out claim an interlocutory decision Such a decision is interlocutory in nature and requires leave to appeal therefrom: *Vanuatu Maritime Authority v Athy* [2006] VUCA 12; CAC 27 of 2006.

Orders the court may make

17.9 (1) After hearing a claim, the court may make any of the following orders:

(a) an order declaring that the enactment being challenged is of no effect;

[17.9.1] See further [17.2.2], [17.4.1].

(b) a mandatory order, requiring the person named in the order to take the actions stated in the order;

(c) a prohibiting order, prohibiting the person named in the order from taking the action stated in the order;

(d) a quashing order, that the decision is quashed.

[17.9.2] Remedies discretionary Remedies are discretionary and may be withheld even if the claimant demonstrates a relevant error of law: *Leigh v National Union of Railwaymen* [1970] Ch 326 at 333-4; [1970] 2 WLR 60 at 65-6; [1969] 3 All ER 1249 at 1252. The grounds for discretionary refusal to grant relief may overlap considerably with those in r.17.8(3). Relief may also be refused where there is no longer a live or significant issue: *R v Inner London Education Authority* [1986] 1 WLR 28 at 50; [1986] 1 All ER 19 at 36; *Telecom v Minister for Infrastructure* [2007] VUCA 8; CAC 32 of 2006.

[17.9.3] Damages not available Damages are not a remedy available through judicial review: *Freedman v Petty* [1981] VR 1001 at 1032; *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 at 730. See further [17.4.3].

E *CPR* r54.19(2)

(2) If the court makes a quashing order, the court may also:

(a) send the matter back to the decision-maker; and

(b) direct the decision-maker to reconsider the matter and make a new decision in accordance with the court's decision.

[17.9.4] Costs A successful application for judicial review should ordinarily be accompanied by costs (on the standard basis): *Hurley v Law Council of Vanuatu* [2000] VUCA 10; CAC 12 of 1999.

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