

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

**Constitutional
Case No. 21/2906 SC/CNST**

IN THE MATTER OF: The Constitution of the Republic of Vanuatu

AND IN THE MATTER OF: A Bill for the Foreign Service (Amendment) No. 19 of
2021

BETWEEN: His Excellency Pastor Obed Moses Tallis Tamar Ne Were,
President of the Republic of Vanuatu
Applicant

AND: Seoule Simeon Davidson, Speaker of Parliament
Respondent

Date of hearing: 8 October 2021

Date of oral decision: 8 October 2021

*Date of written Reasons for
Judgment:* 19 April 2023

Before: Chief Justice Vincent Lunabek

In Attendance: Mr G. Blake for the President of the Republic of Vanuatu (The Referral Authority)
Mr G. Avock for the Speaker of Parliament (Respondent)

REASONS FOR JUDGMENT

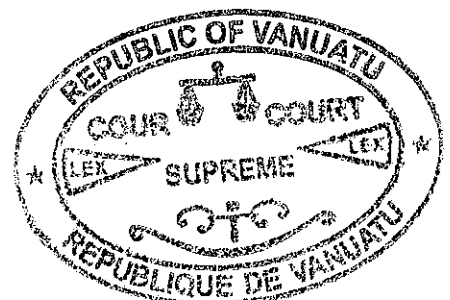
A. Introduction

1. This is a Referral pursuant to Article 16(4) of the Constitution seeking the Supreme Court's opinion as to whether the Bill for the Foreign Services (Amendment) Act No. 19 of 2021 ("the Bill") is unconstitutional.
2. The Amendment of Foreign Services Act No. 19 of 2021 provides:

"At the end of Section 29

Add

'(4) The Office of a Special Envoy is not a public office'.



B. Rational for unconstitutional validity of the said Bill

3. The President refers the Bill to the Supreme Court because he considers that the amendment of Section 29 of the Foreign Services Act No. 20 of 2013 (the "Act") by the introduction of subsection 29(4) is inconsistent with Articles 57(2), 13(3)(a) and 13(4) of the Constitution.

C. Issue

4. The issue in this case is whether Section 29(4) of the Proposed Foreign Services (Amendment) Act No. 19 of 2021 (The "Bill") is inconsistent with Articles 57(2) and 13(3), as qualified by Article 13(4) of the Constitution.

D. Submissions by Counsel

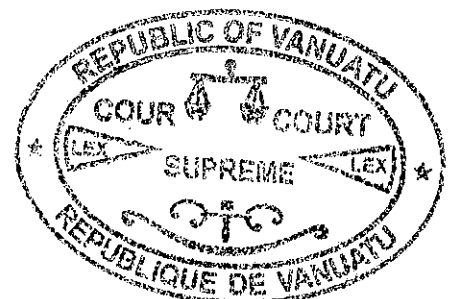
(i) Submissions for the Referral Authority (President of the Republic)

4. The President has reached the conclusion that the Bill was inconsistent with the provisions of the Constitution and specifically with Articles 57(2) and 13(3).
5. The Referral Authority refers to Articles 57(2), 13(3)(a), 13(4) and 90(3) of the Constitution.
6. The Referral Authority points to this important fact that the term "public office" as it appears in the Constitution, is not defined in the Constitution.
7. The appointment of a "Special Envoy" is provided for in the Foreign Services Act (the "Act") wherein a "Special Envoy" is defined in the Act as "a person appointed under Section 29 to carry out a specific mission".
8. Section 29(1) of the Act provides that:

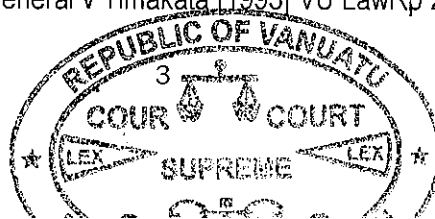
"A Minister may on the approval of the Council, appoint a person as a Special Envoy to represent the Republic of Vanuatu on a specific matter in a state for the specific periods specified in his letter of appointment".

9. The Referral Authority points that all that the Bill provides for is the inclusion of an additional subsection 29(4) in that Act to provide that:

"The office of a Special Envoy is not a public office".



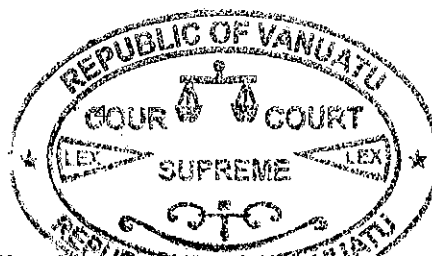
10. The Referral Authority says further that the combined effect of all the cited provisions in the Constitution is that a person appointed to public office must be a citizen, subject to:
- (i) The specific characteristics of that citizenship provided for in Articles 13(3) and (4); and
 - (ii) The proviso allowing for the appointment of non-citizen in the context provided for in Article 90(1) of the Constitution.
11. The Referral Authority submits that the term "*public office*" is not defined in the Constitution but the Bill through the amendment to Section 29 of the Act, purports to remove a Special Envoy, as defined in the Act, from the scope of the term "*public office*" as it is used in the Constitution.
12. The Referral Authority further says that in doing so, the Bill effectively qualifies who may be appointed to public office despite the limitations on such appointments in the Constitution. The Referral Authority submits that the Bill purports to act as an aid to the interpretation of the Constitution, specifically the meaning of the term "*public office*" as it appears in the Constitution.
13. The Referral Authority says that there would be no need for Section 29(4) to be included in the Act if, by the operation of Article 90(3) of the Constitution, it allowed for the appointment of a non-citizen "*Special Envoy*", which it clearly does, subject to the limitations set out in Article 90(3).
14. The Referral Authority submits that the only purpose for including Section 29(4) in the Act, inserted through the Bill, can be to allow for the appointment of non-citizens as Special Envoys notwithstanding that there may be a citizen of Vanuatu qualified for appointment to the position of Special Envoy, for the purposes of Article 90(3).
15. The Referral Authority submits that legislation which purports to interpret or qualify the use of a term in the Constitution cannot be given effect to. The Referral Authority refers to the following judgments of the Court of Appeal of Vanuatu in support of his submissions:
- *Silas v The Public Service Commission* [2014] VUCA 9;
 - *Kilbride Ltd. v Republic of Vanuatu* [2020] VUCA 24; and
 - Cases referred to therein:
 - *Minister of Homes Affairs v Fisher* [1980] AC 319 at 329;
 - *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670;
 - *Attorney General v Timakata* [1993] VU LawRp 2; [1980 – 1994] Van LR 679.



16. The Referral Authority finally submits that if the term "*public office*" as it appears in Articles 57(2) and 13(3)(a) extends to the appointment of a Special Envoy under the Act, then to purport to exclude a "*Special Envoy*" from the operation of the Constitutional prohibitions dealing with appointment to public office would be at odds with the Constitution.
17. The Referral Authority says that if the Court were to find that the nature of the role of a Special Envoy as provided for in the Act clearly fell within the term "*public office*" as it is used in the Constitution, then clearly the Bill, in that it purports to legislate for an outcome which is inconsistent with a provision in the Constitution, cannot and must not be promulgated.

(ii) **Submissions for the Respondent (Speaker of Parliament)**

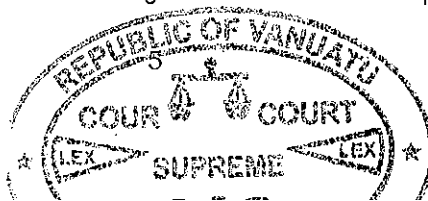
18. The Respondent (Speaker of Parliament) concedes and accepts the submissions of the Referral Authority in that the interpretation of the Constitution must be interpreted in its own right which means that the Constitution has to be interpreted as a whole and to ensure that it is clear, workable and practicable instrument of the State. The starting point of the interpretation of a Constitution is the Constitution and the ending point is the Constitution itself. As the supreme law of the land, the Constitution must not be treated as an act of Parliament but as *sui generis* calling for principles of interpretation of its own suitable to its character without necessary acceptance of all presumptions that are relevant to the legislation of private law (*Silas v The Public Service Commission* [2014] VUCA 9 at [20]; *Kilbride Ltd. v Republic of Vanuatu* [2020] VUCA 24 at [7]).
19. The Respondent further concedes and accepts that the words "*public office*" is not defined in the Constitution.
20. The Respondent also concedes and accepts that Article 13(3)(a) and (4) provides for who should be appointed into a public office and that only two categories of persons should be appointed in a public office, namely an indigenous citizen and a naturalised citizen.
21. The Respondent submits that he relies on the case of *Republic of Vanuatu v Mark Bebe* to argue that Section 29 of the Foreign Service Act of 2013 is not inconsistent with Articles 57(2) and 13(3), as qualified by Article 13(4) of the Constitution. Section 29 of the Act creates a statutory position of a Special Envoy. The appointment of that Special Envoy is done by the Minister on approval of the Council of the Ministers. The appointment is not a permanent appointment. It is only to serve a particular purpose, and once such a purpose is fulfilled, then the appointment ceased.



22. The Respondent says that although the position or office created by Section 29 of the Act falls outside the definition of Public Service, it still serves the Republic of Vanuatu. The Respondent submits that the decision of the Court of Appeal in the Republic of Vanuatu v Mark Bebe purports to make such clarification.
23. The Respondent finally submits that Article 90 (3) of the Constitution makes reference to Article 57(2) of the Constitution, for an appointment of a non-citizen in a public office until a citizen of Vanuatu is qualified for that appointment to that public office. The Respondent points to the fact that the appointment of non-citizen as a Special Envoy is for a temporary period only. The Respondent maintains that the Bill is constitutionally valid.

E. Considerations by the Court

24. The following are the relevant provisions of the Constitution:
- Article 2
The Constitution is the supreme law of the Republic of Vanuatu;
 - Article 16
(1) Parliament may make laws for the peace, order and good government of Vanuatu;
...
(4) If the President considers that the bill is inconsistent with a provision of the Constitution, he shall refer it to the Supreme Court for its opinion. The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution;
 - Article 57(2)
Only citizens of Vanuatu shall be appointed to public office. The Public Service Commission shall determine other qualifications for appointment to public service;
 - Article 90(3) dealing with the transitional provisions provides:
(3) Notwithstanding Article 57(2), until a citizen of Vanuatu is qualified for appointment to a public office a non-citizen may be appointed to that office but, except in the case of a judge of the Supreme Court, shall be appointed for a limited period;
 - Article 13(1), (2), (3)(a) and (4) of the Constitution (Sixth) (Amendment) Act No. 27 of 2013 dealing with the recognition of dual citizenship provides:



- (1) The Republic of Vanuatu recognises dual citizenship;
- (2) A person who is a citizen of Vanuatu or of a state other than Vanuatu may be granted dual citizenship;
- (3) For the purposes of protecting the national sovereignty of Vanuatu, a holder of dual citizenship must not:
 - (a) Hold or serve in any public office; ...
- (4) To avoid doubt, sub article (3) does not apply to an indigenous citizen or a person who has gained Vanuatu citizenship by naturalisation, who hold dual citizenship.

25. Section 29(1), (2) and (3) is the relevant Section of the Foreign Services Act of 2013. It provides:

"29. Appointment of Special Envoy

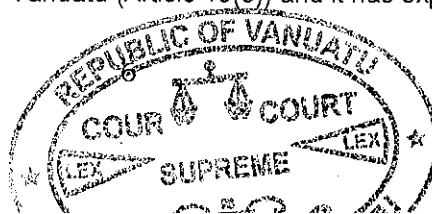
- (1) The Minister may on the approval of the Council, appoint a person as a Special Envoy to represent the Republic of Vanuatu on specific matters in a State for the specific period specified in his letter of appointment;*
- (2) The appointment ceases to have effect on the date on which the matter for which the Special Envoy is appointed for is accomplished;*
- (3) The Special Envoy will only carry out the functions specified under this Terms and Conditions of Appointment."*

26. Section 29(4) is the relevant section of the Proposed Foreign Services (Amendment) Act No. 19 of 2021 (The "Bill") the constitutional validity of which is challenged in the present case. It provides:

"(4) The Office of a Special Envoy is not a public office".

27. By perusing and considering the relevant provisions of the Constitution, it is clear that only citizens of Vanuatu shall be appointed to public office (Article 57(2)).

28. Article 13 of the Constitution (as amended) was introduced for the purposes of protecting the national sovereignty of Vanuatu (Article 13(3)) and it has explicitly prohibited a holder of

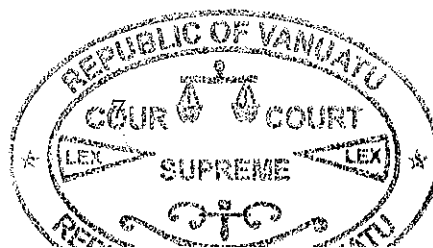


dual citizenship, among other matters, to hold or serve in any public office (Article 13(3)(a)). Article 13(4) qualifies the above prohibition by permitting an indigenous citizen or a person who has gained Vanuatu citizenship by naturalisation, who hold dual citizenship, to hold or serve in any public office.

29. Article 13(3)(a) explicitly prohibits a non-citizen to hold or serve in any public office. It is a mandatory prohibition. A holder of dual citizenship **must not** hold or serve in any public office, save for the qualification made under Article 13 (4) of the Constitution. **(Emphasised)**
30. Article 90(3) appears to be the only exception to the general position within the Constitution which prohibits appointments of non-citizens to public office. If Article 90(3) is intended to be used or relied upon as the Respondent (Speaker of Parliament) submits, then, there is no need for Section 29(4) of the Foreign Services (Amendment) Act. There must be a purpose and the only purpose to add subsection (4) of Section 29 of the Foreign Services (Amendment) Act of 2021 can be to permit something by legislation which is not permitted by the Constitution.
31. I do not accept the submissions made on behalf of the Respondent (The Speaker of Parliament) and I reject them as having no basis.
32. It is noted that the term "*public office*" as used in the Constitution is not defined. The Interpretation Act does not and cannot assist. It is inapplicable to interpret terms or language in the Constitution. It cannot qualify the terms or language in the Constitution. The cases of **Silas v Public Service Commission [2014] VUCA 9; Kilbride Ltd. v Republic of Vanuatu [2020] VUCA 24** and others are on the point. As noted in **Silas v The Public Service Commission [2014] VUCA 9 at [20]**, the Court of appeal said:

"As we have noted the Judge in the Supreme Court used s. 21 of the Interpretation Act to assist in interpreting Article 57(4). This was the wrong approach to interpreting the Constitution. The Constitution is the Supreme Law of Vanuatu, above all other laws. It must be interpreted in its own right. The starting point is obviously the Constitution and the ending point of the interpretation exercise of a provision of the Constitution is also the Constitution itself. The use of an ordinary statute to interpret the Constitution undermines the Constitution as Supreme Law. Ordinary statutes cannot be used as interpretative aids when interpreting the provisions of the Constitution. This is consistent with the decisions of this Court in Tari v Natapei [2001] VUCA 18; In re the Constitution, Kalpokas v Hakwa [2002] VUCA 12 and Hakwa v Masikevanua [2002] VUSC 92 and others."

33. In **Kilbride Ltd. v Republic of Vanuatu [2020] VUCA 24 at [7]**, the Court of Appeal stated in relation to interpreting the Constitution:



"... the Constitution is not an ordinary Act of Parliament. It is the supreme law of the Republic based on the Westminster model. In **Minister of Home Affairs v Fisher** [1979] UKPC 21; (1980) AC 319 at 329 the Privy Council stated that the way to interpret a constitution based on the Westminster model is to treat it not as if it were an Act of Parliament but "as sui generis calling for principles of interpretation of its own suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law". This approach was approved by a differently constituted Privy Council in **Ong Ah Chuan v Public Prosecutor** (1981) AC 648 at 670 where the Board said that such a constitution should receive a generous interpretation. See also **Attorney General v Timakata** [1993] VULawRp 2; [1980 – 1994] Van LR 679."

34. In **Virelala v Ombudsman** [1997] VUSC 35; Civil Case 04 of 1997 (22 September 1997), the Court held that the Constitution is the law behind the law and is still evolving. The Constitution is to be interpreted and applied by keeping in mind and be in line with *the progress of the country, and adapt themselves to the new developments of times and circumstances*. The powers and related provisions in the Constitution must be read in an organic, developing or progressive manner. The Court expresses the view that subject to the Constitution, Parliament of Vanuatu is given plenary powers under Article 16(1) of the Constitution to make laws for the peace, order and good government of Vanuatu. The expression "*subject to the Constitution*" means that the powers of the Parliament are limited and that its limits are not to be transcended. There, the Court identified the two (2) following constitutional limitations vis à vis the legislative function of Parliament where the Court will intervene to sanction an Act or a provision of an Act of Parliament which contravenes the Constitution:

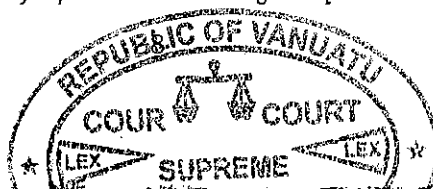
"Firstly, the Court will declare an Act or a provision of an Act unconstitutional when it infringes one of the fundamental rights and freedoms guaranteed and protected under Article 5 of the Constitution.

[See Appeal case No. 6 of 1988 in Re. Barak Tame Sope & Others v. Attorney General & Others. Reported in Vanuatu Law Report Vol. 1, 1980-88 p.411].

In that case, the Court of Appeal considering that the right of a Member of Parliament to express himself freely in Parliament cannot be restricted. Section 2(f) of the Members of Parliament (Vacation of seats) Act 1983 was intended to restrict that fundamental right. Their Lordships, thus, held that Section 2(f) of the said Act of 1983 is unconstitutional.

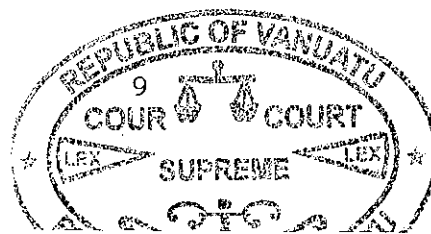
In Appeal Case No. 1 of 1993 in Re. The Attorney General of the Republic of Vanuatu -v- Frederick Karlomuana Timakata at p.4 (unreported) says that:

"... A provision such as Article 5(1)(d) [of the Constitution] not only prevents the Parliament from ousting the jurisdiction of the Courts, but also prevents the Parliament from abrogating those principles of natural justice which may rightly be regarded as fundamental... Subject to the Constitution, the Parliament of Vanuatu is given plenary powers by Article 16(1) of the Constitution, and in the exercise of those powers it may repeal or alter existing law" [see Article 95 of the Constitution].



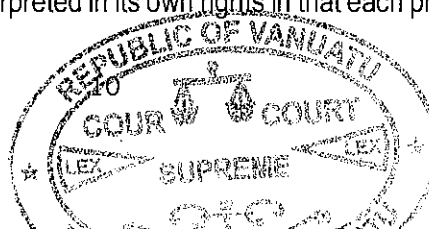
Secondly, the Court will intervene to sanction an Act of Parliament or a provision of an Act of Parliament, by declaring it unconstitutional in the circumstance where there is an express or explicit prohibition provision contained in the Constitution to do or not to do something, but Parliament, nevertheless, legislates to that prohibited effect in contravention of the constitutional express prohibition provision.” [Emphasized].

35. In Virelala's case, the Court in considering, among other matters, the constitutional validity of Section 14(4)(b)(ii) of the Ombudsman Act, was of opinion that sub-paragraph (ii) of paragraph (b) of subsection (4) of the Section 14 of the Ombudsman Act was contrary to Article 62(2) of the Constitution. The reason being that Article 62(1)(2) of the Constitution provides that "*the Ombudsman may enquire into the conduct of ... all public servants, public authorities and ministerial departments, with the exception of the President of the Republic, the Judicial Service Commission, the Supreme Court and other Judicial Bodies*" [Emphasized]. Section 14(4)(b)(ii) provides that the President may enquire into the conduct of the Ombudsman and any person holding judicial office and, for that purpose shall –
- (i)
 - (ii) be entitled to delegate such enquiry to the Ombudsman or any judicial or legal officer. [Emphasized].
36. By considering Section 14(4)(b)(ii) of the Ombudsman Act together with the express (explicit) prohibition provision of Article 62(2) of the Constitution, the Court was of the opinion that sub-paragraph (ii) of paragraph (b) of sub-section (4) of the Section 14 of the Ombudsman Act was unconstitutional (in part) in that it is contrary to Article 62(2) of the Constitution.
37. The Court then remedied the partial unconstitutionality of the Section 14(4)(b)(ii) of the Ombudsman Act by making the following declarations and directions:
1. That the Ombudsman Act No. 14 of 1995 is constitutionally valid; **save** that sub-paragraph (ii) of paragraph (b) of sub-section (4) of the Section 14 of the said Act is unconstitutional; and
 2. That the following words in Section 14(4)(b)(ii) of the Ombudsman Act No. 14 of 1995: "*the Ombudsman or*" be removed.
38. It is to be noted that in Virelala's case, the Ombudsman Act (as an existing Act) was constitutionally challenged by a writ of summons with a statement of claim relevant at the



time. (It will be now a normal constitutional dispute claim under the modern Constitutional Rules).

39. The present case, like many other cases previously, the constitutional validity check or control was made under Article 16(4) of the Constitution with respect to a proposed Act (or Bill) or a provision/section of that Bill of Parliament before it is assented to by the President of the Republic. (The process of the constitutional validity check/control is through a Constitutional Referral by the President of the Republic to the Supreme Court under Article 16(4)). The common ground for an Act of Parliament and a proposed Act (Bill) of Parliament is about their constitutional validity so as to ensure that an enactment (Act) or a proposed enactment (Bill) of Parliament is and must always be consistent with the Constitution as the supreme law of the land.
40. The second scenario envisaged and applied in *Virelala v Ombudsman* [1997] VUSC 35 and referred to above at paragraph [34], reflects the factual situation of the present case. In the present case, I agree and accept the submissions of the Referral Authority that if the term "*public office*" as it appears in Articles 57(2) and 13(3)(a) extends to the appointment of a Special Envoy under the Act, then to purport to exclude a "*Special Envoy*" from the operation of the constitutional prohibitions dealing with appointment to public office would be at odds with the Constitution.
41. I also accept and agree with the Referral Authority's submissions that if the Court were to find that the nature of the role of a Special Envoy as provided for in the Act clearly fell within the term "*public office*" as it is used in the Constitution, then clearly the Bill, in that it purports to legislate for an outcome which is inconsistent with a provision in the Constitution, cannot and must not be promulgated.
42. In the context of the Foreign Services Act of 2013 and its subsequent amendment in 2021, a Special Envoy under the Act is charged with representing the Republic of Vanuatu on a specific matter in dealings with another state. It is difficult to see how such a role would not be considered "*public office*". When one considers the language of Article 13(3)(a) and its reference to the holder of public office protecting the national sovereignty of Vanuatu it only adds weight to the public nature of the role given its representation of the Republic in bilateral dealings.
43. It has to be noted that whether or not a Special Envoy under the Act is serving in public office, I accept and agree with the Referral Authority's submissions that the mere fact that the Bill purports to insert a provision in the Act which impacts the interpretation of the Constitution by purporting to exclude certain appointments from the scope of the term "*public office*" as it is used in the Constitution, renders it inconsistent with the Constitution. The Constitution can only be interpreted in its own rights in that each provision of the Constitution



should be regarded, not as operating independently, but as intended to be construed and applied in the light of other provision of the Constitution. Thus, an endeavour should be made to give effect to all provisions of the Constitution and not by reference to a provision in legislation.

44. The Bill, in question here, is inconsistent with the Constitution and its only purpose can be to permit something by legislation which is not permitted by the Constitution. If any such appointment would be invalidated by operation of the Constitution the Bill cannot validate it.

F. Conclusion

45. The Court is of opinion given under Article 16(4) of the Constitution that the Bill should not be assented to or promulgated by the President of the Republic (The Referral Authority) because it is inconsistent with Articles 57(2); 13(3)(a) and (4) of the Constitution.
46. Those are the reasons of the oral decision made on 8 October 2021 after hearing submissions from Counsels.

DATED at Port Vila, this 19th April 2023

BY THE COURT

**V. Lunabek
Chief Justice**

