

BETWEEN: **ROBERT MURRAY BOHN**
 Applicant

AND: **REPUBLIC OF VANUATU**
 First Respondent

AND: **MOSES ERICK, DAVIDSON SEOULE, MAKEN
RITA VALIA, BENJIMIN KORAH JIMMY, KERRY
WILLIAM NEHEMIAH, ENNY YONA, IOAN SIMON
OMAWA, VAKUMALI NOVO, and JOEL PAKOA
NALU**

AND: Second Respondents

AND: **ISAAC BONGBONG HAMARILIU**
 Third Respondent

Coram: *V. Lunabek CJ*

Counsel: *Mr Nigel Morrison and Ms Jennifer La'au for the Applicant
Mr Justin Ngwele for the First Respondent
Mr Felix Laumae for the Second Respondents
Mr Robin Kapapa for the Third Respondent*

REASONS FOR RESERVED JUDGMENT

INTRODUCTION

Before the Court is an Amended Constitutional Application filed 31 January 2013 by Mr Robert Murray Bohn (Applicant). The Applicant challenges the constitutional validity of section 23A of the Representation of the People (Amendment) Act No.10 of 2012 in light of the Applicant's Fundamental Rights and Freedoms enshrined in Article 5(1) of the Constitution of the Republic of Vanuatu and particularly Article 5(1)(k) which provides for:-

"equal treatment under the law or administrative action..."

The constitutional question which is the subject of the Constitutional Application was raised incidentally by an Election Petition filed by the Second Respondents against the election of the Applicant as a Member of Parliament on 30 October 2012 in the Epi constituency. The said Election Petition referred to as Election Petition Case No.17 of 2012 was stayed pending the determination of the Constitutional question raised therein.



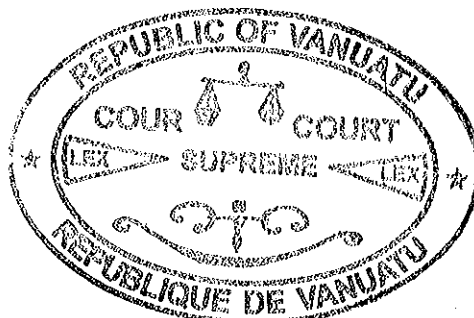
BACKGROUND FACTS

The brief facts can be set out in this way:

- On 26 November 2012, an Election Petition was filed against the Applicant (Robert Murray Bohn) by counsel Felix Laumae Kabini for the Second Respondents. The said Election Petition was registered in the Supreme Court under reference No.17 of 2012 and was related to the last Parliament elections of 30 October 2012.
- The reason given by the Petitioners (now Second Respondents) for supporting their action was inter alia in the matter of qualification of candidates who contest in rural constituencies in the terms enacted by the Representation of the People Act [CAP.146] as amended by section 23A.
- The Petitioners (now Second Respondents) main supportive arguments for requesting the invalidation of the Applicant's election is based on the allegations that the later candidate (now Applicant) does not meet the requirements of section 23A.
- Section 23A of the (Amendment) Act [CAP.146] provides:

"23A. Qualification for candidates for rural constituencies

- (1) Subject to section 24, a person wishing to contest an election in a rural constituency must be a native or a person originating from that rural constituency.*
- (2) A person not originating from a rural constituency is not eligible to qualify as a candidate for election for that particular constituency.*
- (3) Subject to section 23, a person referred to under subsection (1):*
 - (a) Must not be disqualified from voting; or*
 - (b) Has not received a sentence including a suspended sentence of a term or terms of imprisonment which has not ended; or*
 - (c) Is not an undischarged bankrupt; or*
 - (d) Must be a citizen.*
- (4) For the purposes of this section person originating from a rural constituency means a person:*
 - (a) Whose:*
 - (i) Grand father; or*
 - (ii) Grand mother; or*
 - (iii) Father; or*
 - (iv) Mother;*



is from that rural constituency; or

(b) Who has been adopted by law or custom into a family originating from that rural constituency;

rural constituency means a constituency other than Port-Vila, Luganville or any other constituency declared by the President, acting on the advice of the Electoral Commission, as not being a rural constituency."

The second Respondents filed sworn statements in the Election Petition reference No.17 of 2013 challenging the Applicant's adoption by custom.

The Applicant says that he qualifies as a candidate under section 23A but nevertheless a constitutional question arises.

THE CONSTITUTIONAL QUESTION

The constitutional question raised incidentally by the said Election Petition is:

"Whether section 23A of the Representation of the People (Amendment) Act No.10 of 2012 is unconstitutional in that it infringes the rights of the Applicant herein as a citizen under Article 5(1) of the Constitution?"

THE CONSTITUTIONAL CASE

The Applicant says the operation of section 23A does, or doe have the potential to, infringe his Fundamental Rights and Freedoms enshrined in Article 5(1) of the Constitution of the Republic of Vanuatu and particularly Article 5(1)(k) which provides for-

"equal treatment under the law or administrative action, ..."

The Applicant seeks remedy from the Supreme Court to protect the said Fundamental Rights and Freedoms.

SUBMISSIONS OF COUNSEL

Ms Jennifer La'au submitted on behalf of the Applicant that the Applicant is a citizen of Vanuatu and eligible to contest the 2012 Parliamentary elections. The Applicant's rights as a citizen of Vanuatu are enshrined in Article 5(1) of the Constitution of Vanuatu.

It is submitted that section 23A of the Representation of the People's (Amendment) Act No.10 of 2012 is unconstitutional and infringes the Applicant's constitutional rights more specifically it is submitted on behalf of the Applicant that sub-sections (1), (2) and (4) of



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section 23A of the Representation of the People (Amendment) Act No.10 of 2012 are unconstitutional and infringe the Applicant's constitutional rights.

It is submitted on behalf of the Applicant that s.23A of the Representation of the People's (Amendment) Act No.10 of 2012 categorises certain candidates to qualify for rural constituencies. Section 23A infringes or is likely to infringe the Applicant's constitutional rights under Article 5(1)(k) for equal treatment under the law as a citizen.

It is also submitted for the Applicant that s.23A of the Representation of the People's (Amendment) Act No.10 of 2012 creates discrimination between citizens based on race and place of origin.

It is submitted for the Applicant that the fundamental rights enshrined in Article 5(1) are acquired without discrimination "on the ground of race, place of origin, religious or traditional belief, political opinions, language or sex".

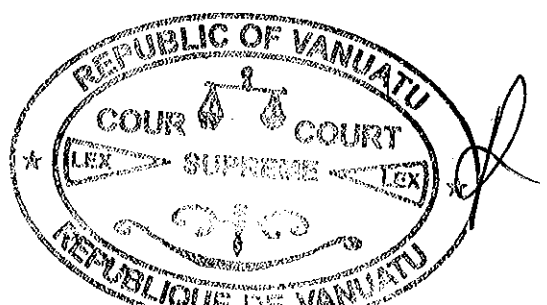
It is also submitted that Article 5(1) of the Constitution does not differentiate or categorise between indigenous citizens and naturalised citizens. It is contended that Article 5(1) refers to "all persons" acquiring the same/equal rights or equal treatment under the law.

It is further submitted that s.23A of the Representation of the People (Amendment) Act No.10 of 2012 places emphasis on the candidate's "race" and "place of origin" to qualify as a candidate for rural constituencies, clearly discriminatory against the Applicant's constitutional rights.

It is finally submitted that s.23A of the Representation of the People (Amendment) Act No.10 of 2012 is unconstitutional and adversely affects the rights of the Applicant as a citizen.

The Applicant, therefore, seeks remedy from the Supreme Court to protect his fundamental rights and Freedoms enshrined in article 5(1) of the Constitution of the Republic of Vanuatu particularly Article 5(1)(k) which provides for "*equal treatment under the law or administrative action...*"

Mr Justice Ngwele of the State Law Office on behalf of the Attorney-General submitted in response as follows:



He accepted and admitted that the Applicant is a naturalised citizen of Vanuatu. He also accepted that the Applicant had met the requirements of section 24(1) of the Representation of the People's Act [CAP.146].

Mr Ngwele submitted further that although the Applicant is not a native nor was he originating from that rural constituency, he accepted that the Applicant was adopted by custom by a family originating from the rural constituency he was elected.

Mr Ngwele also submitted that section 23A of the Representation of the People's (Amendment) Act No.10 of 2012 does not infringe the fundamental rights of the Applicant under Article 5(1). He argued that section 23A was enacted by Parliament pursuant to Parliament legislative powers to make laws for the peace, order and good governance of Vanuatu under Article 16 of the Constitution. He submitted that Parliament is empowered under Article 17(2) of the Constitution to enact s.23A of the said Act.

He also submitted that the purpose of section 23A was to provide limitations to ensure that a person from one rural constituency shall not contest elections to Parliament in another rural constituency.

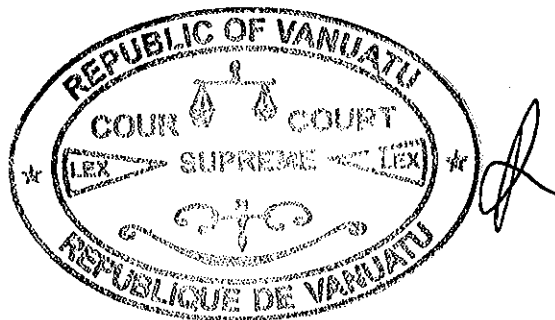
He further submitted that the Applicant does not categorically fit as a native, however, by reason of his adoption (which may be subject to some challenge from the Second Respondents) the Applicant is a person originating from that rural constituency.

He finally submitted that Article 5(1) was also to protect vulnerable groups from discrimination. He referred to the decision of the Supreme Court of Canada in **Andrew v. Law Society of British Columbia** [1989] 1 SCR 13 to the Court.

Mr Robin Kapapa submitted on behalf of the Second Respondents that section 23A of the (Amendment) Act [CAP.146] does not infringe the fundamental rights of the Applicant because Parliament is empowered to prescribed conditions and restrictions for eligibility of candidates to stand for election to Parliament (Article 17(1), (2) – Constitution). Parliament did so by enacting section 23A of the Representation of the People's (Amendment) Act No.10 of 2012.

COURT CONSIDERATION

I now consider the law, the submissions and the constitutional question raised in the application. I begin with the law.



THE LAW

I set out below the relevant provisions of the Constitution, the Court has to consider in this case, particularly Articles 1; 2; 5(1)(k); 6(1) & (2); 12; 14; 16(1); 17(1) & (2); and 53(1) & (2):-

"CHAPTER 1 - THE STATE AND SOVEREIGNTY

1. REPUBLIC OF VANUATU

The Republic of Vanuatu is a sovereign democratic state.

2. CONSTITUTION SUPREME LAW

The Constitution is the supreme law of the Republic of Vanuatu.

4. NATIONAL SOVEREIGN, THE ELECTORAL FRANCHISE AND POLITICAL PARTIES

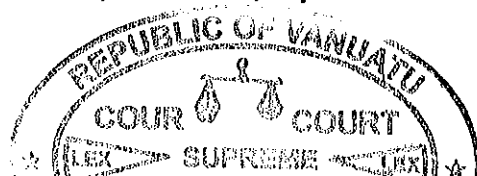
- (1) *National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.*
- (2) *The franchise is universal, equal and secret. Subject to such conditions or restrictions as may be prescribed by Parliament, every citizen of Vanuatu who is at least 18 years of age shall be entitled to vote.*
- (3) *Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy."*

"CHAPTER 2 - FUNDAMENTAL RIGHTS

PART I - Fundamental Rights

5. FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL

- (1) *The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-*
 - (a) *life;*
 - (b) *liberty;*
 - (c) *security of the person;*
 - (d) *protection of the law;*
 - (e) *freedom from inhuman treatment and forced labour;*
 - (f) *freedom of conscience and worship;*
 - (g) *freedom of expression;*
 - (h) *freedom of assembly and association;*
 - (i) *freedom of movement;*
 - (j) *protection for the privacy of the home and other property and from unjust deprivation of property;*
 - (k) *equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or*



advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.”

“6. Enforcement of fundamental rights

- (1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.**
- (2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right.”**

12. Naturalisation

A national of a foreign state or a stateless person may apply to be naturalized as a citizen of Vanuatu if he has lived continuously in Vanuatu for at least 10 years immediately before the date of the application.

Parliament may prescribe further conditions of the eligibility to apply for naturalization and shall provide for the machinery to review and decide on applications for naturalization.

14. Further provision for citizenship

Parliament may make provision for the acquisition of citizenship of Vanuatu by persons not covered in the preceding Articles of this Chapter and may make provision for the deprivation and renunciation of citizenship of Vanuatu.

CHAPTER 4 — PARLIAMENT

16. Power to make laws

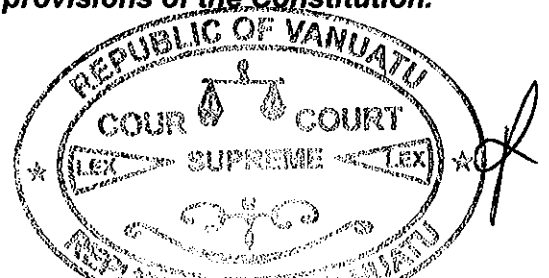
- (1) Parliament may make laws for the peace, order and good government of Vanuatu.**

17. Election of members of Parliament

- (1) Parliament shall consist of members elected on the basis of universal franchise through an electoral system which includes an element of proportional representation so as to ensure fair representation of different political groups and opinions.**
- (2) Subject to such conditions or restrictions as may be prescribed by Parliament every citizen of Vanuatu who is at least 25 years of age shall be eligible to stand for election to Parliament.**

“53. APPLICATION TO SUPREME COURT REGARDING INFRINGEMENTS OF CONSTITUTION

- (1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.**
- (2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.”**



The Applicant says the operation of section 23A of the Act does, or does have the potential to, infringe his Fundamental Rights and Freedoms enshrined in Article 5(1) of the Constitution and particularly Article 5(1)(k) which provides for:

“equal treatment under the law or administrative action”

The Applicant filed a sworn statement on 21 January 2013 in support of the Constitutional Application. He deposes that he is a citizen of Vanuatu. He was American and was naturalised citizen of Vanuatu on 15 December 1997. He deposes he has complied with all enactments of the existing laws and he had provided the Electoral Commission with the required evidence for his eligibility including evidence of adoption by custom by a family from Epi rural constituency. The Second Respondents challenge his election on the grounds inter alia that he did not meet the requirements of section 23A of the (Amendment) Act [CAP.146] by challenging his custom adoption. It follows then that the following constitutional question was raised incidentally by the Election Petition reference No.17 of 2012:

“Whether section 23A of the Representation of the People (Amendment) Act No.10 of 2012 is unconstitutional in that it infringes the rights of the Applicant herein as a citizen under Article 5(1)(k) of the Constitution?”

Article 5(1)(k) provides:

“5. FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL

(1) The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-

(a)

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.” [emphasis is mine]

On perusal of the language of Article 5(1)(k) of the Constitution, two observations could be made:

The first is in the wording of Article 5(1) itself in that: *“The Republic of Vanuatu recognizes, that,...,all persons are entitled to the following fundamental rights and freedoms of individual without discrimination on the grounds of race, place of origin, religious or*



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traditional beliefs, political opinions, language or sex...”; and it allows three qualifications which are:-

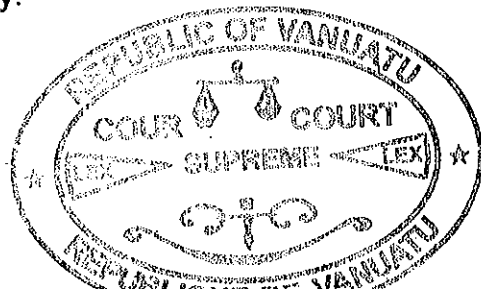
- (i) “subject to any restrictions imposed by law on non-citizens”; and*
- (ii) “but subject to respect for the rights and freedoms of others”; and*
- (iii) “and to the legitimate public interest in defence, safety, public order, welfare and health-“*

The second observation is that sub-paragraph (k) of Article 5(1) of the Constitution not only guarantees the rights to “equal treatment under the law or administrative action” in prohibiting discrimination as the general rule but it also provides exceptions to the general rule when it says: “except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.”

The question then for the Court is the approach the Court is to follow in exercising the control of the constitutional validity of section 23A of the Representation of the People (Amendment) Act No.10 of 2012 in light of Article 5(1)(k) of the Constitution.

I propose to proceed in this way. When confronted with a problem under the Fundamental Rights and Freedoms entrenched in the Constitution, the first question which must be answered will be whether or not an infringement of a guaranteed right has occurred. The onus is on the Applicant to show this. Any justification of an infringement which is found to have occurred must be made, if at all, under Article 5(1) of the Constitution or under the exceptions in the second limb of paragraph (k)(1) of Article 5 of the Constitution by the state Republic.

In assessing whether a complainant’s rights have been infringed under Article 5(1)(k), it is not enough to focus only on the alleged ground of discrimination and decided whether or not it is enumerated or analogous ground prohibited in the Constitution. The effect of the impugned law which creates discrimination or classification on the complainant must also be considered. A complainant under Article 5(1)(k) must show not only that he or she is not receiving equal treatment under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, he or she must show that the legislative impact of the law is discriminatory.

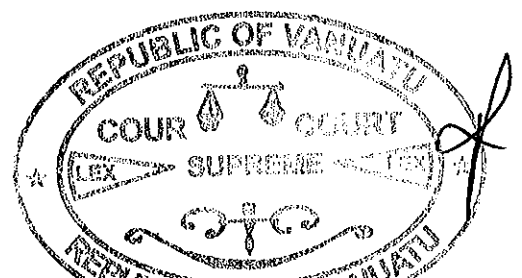


It is a well settled principle that when an Act of Parliament is against the fundamental rights of an individual, the intervention of the Courts "are necessary to maintain the rights guaranteed under Article 5. They cannot be precluded by Article 27 of the Constitution [see **Tari v. Natapei**] [2001] VUCA 18. Further, "it is the duty of the Court to promote constitutional rights... A Constitution and in particular, that part of it which protects entrenched fundamental rights and freedoms, is to be given a generous and purposive Constitution". [Moore DCJ p.273 of **R v. McConnel** [1995] 2 NSW 269]. These judicial pronouncements are not inconsistent with the judgments of the courts of Vanuatu in relation to constitutional guaranteed rights under Article 5. [See **Sope v. Attorney-General** [1988] Van.L.R.Vol.1, 1980-1988 p.411; **Timakata v. Attorney-General** [1992] VUSC 9; **Virelala v. Ombudsman** [1997] VUSC 35; **Kilman v. Attorney-General** [1997] VUSC 3 and others.

To begin with, the right protected under Article 5(1)(k) of the Constitution is the right of equal treatment under the law which prohibits discrimination based on the "race" or "place of origin" of the individual person. The discrimination under consideration is limited to discrimination caused by the application or operation of the law. It does not extend to discrimination caused by private activities. Article 5(1)(k) is not a general guarantee of equality; it does not provide for equality between individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.

There is no problem regarding the scope of the word "law" as employed in Article 5(1)(k) can arise in this case because it is an Act of the Legislature which is under attack. There will be situations where other governmental or quasi-governmental regulations, rules, or requirements may be termed laws under Article 5(1)(k) will arise and should be left for cases in which the issue arises.

The purpose of Article 5(1)(k) reading together with other rights provisions, is to ensure equality in the formulation and application of the law. Equal treatment entails the promotion of a society in which all persons are secured in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component. It has an all-encompassing right governing all legislative action which means that (subject to the permitted restrictions, defences or exceptions) "all persons" should be treated by the law on a footing of equality with equal concern and respect.



The right to equality under the law, the rights to the equal protection and benefits of the law contained in Article 5(1)(k), are granted with the direction contained in Article 5(1) itself that they be without discrimination. Discrimination is unacceptable in a democratic society such as Vanuatu because it epitomises the worst effects of the denial of equality, and discrimination reinforced by law is particularly repugnant. The worst oppression will result from discriminatory measures having the force of law. It is against this evil that Article 5(1)(k) of the Constitution of the Republic of Vanuatu provides a guarantee.

Article 5(1) of the Constitution enumerates the grounds upon which discrimination is forbidden. However, they are not so limited. These enumerated grounds do reflect the most common and probably the most socially destructive practiced bases of discrimination and must, in the words of Article 5(1), receive particular attention. It must be the intention of the Constitutional Framers that Article 5(1) be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but it is intended to provide a continuing framework for governmental power and, at the same time, it constitutes the bedrock for protection of equality rights.

I now consider the provisions of section 23A of the impugned law. Section 23A of the (Amendment) Act [CAP.146] provides qualification for candidates to stand for elections to Parliament in rural constituencies.

Section 23A(1) says that "...a person wishing to contest an election in a rural constituency must be a native or a person originating from that rural constituency."

Section 23A(2) says that:

"A person not originating from a rural constituency is not eligible to qualify as a candidate for election for that particular constituency."

Section 23A(3) provides that:

"(3) Subject to Section 23, a person referred to under subsection (1):

- (a) Must not be disqualified from voting; or
- (b) Has not received a sentence including a suspended sentence of a term or terms of imprisonment which has not ended; or
- (c) Is not an undischarged bankrupt; or
- (d) Must be a citizen."

Section 23A(4) provides:

For the purposes of this section person originating from a rural constituency means a person:



"(a) Whose:

- (i) Grand father; or
- (ii) Grand mother; or
- (iii) Father; or
- (iv) Mother;

Is from that rural constituency; or

(b) Who has been adopted by law or custom into a family originating from that rural constituency..."

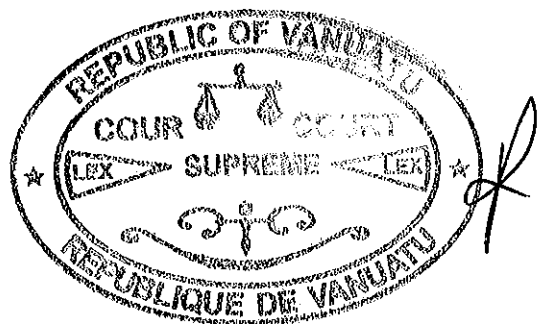
Section 23A creates distinction or differentiation between citizens of Vanuatu for qualification to stand for elections to Parliament in rural constituencies. Subsection (1) of s.23(A) refers to the word "native". It is not defined. Counsel appearing on behalf of the Attorney-General provides the following meanings from The Compact Oxford English dictionary:

- (a) A person born in a specified place;
- (b) A local inhabitant; and
- (c) A non-white original inhabitant as regarded by European colonists or settlers.

For present purpose, I do not intend to give a meaning to that word. I leave it for the future case. In this case, for what a "native" means, only a native citizen or a citizen who is originating from a rural constituency is eligible to stand for elections to Parliament in that particular rural constituency but not other citizens of the Republic of Vanuatu (s.23A(1)(2)). Subsection (4)(b) of s.23A appears to provide a restrictive permission in that it provides: "For the purposes of this Section person originating from a rural constituency means a person: (b) Who has been adopted by law or custom into a family originating from that rural constituency." However still subsection (4)(a),(b) places emphasis on the constitutional prohibited grounds or enumerated grounds of "race" and/or "place of origin".

The operation of s.23A of the said Act is to the following effect:

- Only a native citizen or a citizen who is originating from a rural constituency is eligible to stand for elections to Parliament in that particular rural constituency.
- Citizens of Vanuatu who have acquired their citizenships by fulfilling the requirements of the Constitution and any other laws of Vanuatu and become citizens of Vanuatu by naturalisation are not qualified to stand for elections to Parliament in a rural constituency.



- Male or female citizens of Vanuatu who live, reside and work in a rural constituency which is not their place of origin, are not qualified to stand for elections in that particular rural constituency.
- Male or female citizens of Vanuatu who live in their spouses' "places of origin" because of their marriage relationship are not eligible to stand for elections to Parliament in their spouses' rural constituencies.

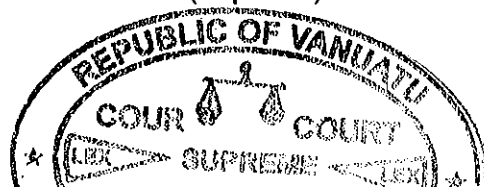
It is clear Section 23A of the Representation of the People's (Amendment) Act No.10 of 2012 places emphasis on the citizen's "race" and "place of origin" to qualify as a candidate for elections to Parliament in rural constituencies. It clearly infringes the Applicant's constitutional rights under Article 5(1) in its operation and effect.

The next step is whether s23A of the Act is enacted in the interest of the State Republic "to the legitimate public interest in defence, safety, public order, welfare and health" or was it enacted as an exception under the second limb of paragraph (k) of Article 5(1) in that: "it makes provisions for the special benefit, welfare, protection or advancement of females, children and young person, members of under-privileged groups or inhabitant of less developed areas" to warrant overriding constitutionally protected rights. The onus is on the state to establish this.

The submissions on behalf of the Republic of Vanuatu are to the effect that the purpose of section 23A was to provide limitations to ensure that a person from one rural constituency shall not contest elections to Parliament in another rural constituency.

If this is what the purpose of s.23A of the said Act is, then, s.23A was not enacted "to the legitimate public interest in defence, safety, public order, welfare and health under Article 5(1) nor was it enacted to "provide for special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas" under Article 5(1)(k). Whether intended or not, the limitations set by section 23A of the Representation of the People (Amendment) Act No. 10 of 2012 were based on discriminatory considerations prohibited in the enumerated grounds under Article 5(1) of the Constitution.

I now consider the effect or operation of section 23A of the said Act on the Applicant. In the present case, the Applicant is a citizen of Vanuatu. He is not a "native" nor was he originating from the rural constituency of Epi in which he was elected on 30 October 2012. He was required to fulfil the requirements of section 23A of the Act (cap 146) based on the



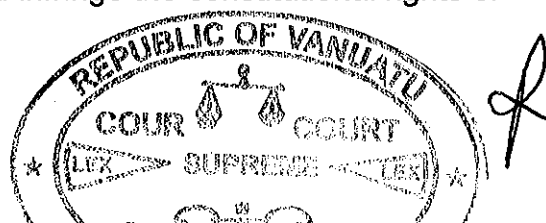
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enumerated grounds of "race" and "place of origin" to be an eligible candidate to stand for elections to Parliament on 30 October 2012. The fact that he had fulfilled the requirements of s.23A to contest the elections to Parliament in 2012 and was elected is not relevant considerations. The relevant consideration is that the requirements of s.23A of the Act were not imposed on other citizens of Vanuatu. The next relevant consideration is that the requirements of s.23A of the said Act are discriminatory measures against the constitutional rights and freedoms guaranteed under Article 5(1) of the Constitution. The state fails to establish the constitutional validity of s.23A of the Representation of the People (Amendment) Act No. 10 of 2012. There is no dispute about the adverse effect of s.23A of the said Act on the Applicant and other citizens of the Republic of Vanuatu.

It has to be emphasised that it is the role of the Legislature to establish public policy through legislations. The role of the Fundamental Rights and Freedoms of "all persons", entrenched in the Constitution, as applied by the Courts, is to ensure that in applying public policy the Legislature does not adopt measures which are not sustainable under the entrenched Fundamental Rights and Freedoms guaranteed under the Constitution.

It is not, however, for the Courts to legislate or to substitute their view on public policy for those of the Legislature. It must be said that not all legislative classifications must be rationally supportable before the courts. For example much economic and social policy-making legislations are beyond the institutional competence of the courts, and so the courts should be reluctant about questioning legislative and governmental choices in such areas. This does not mean that the courts should abdicate their constitutional duties. The function of the Court is to ensure that the legislative enactment against the requirements of the Fundamental Rights and Freedoms guaranteed in the Constitution and where the enactment infringes the entrenched fundamental rights and freedoms, in this case the provisions of Article 5(1)(k), and is not sustainable under 5(1) as a public defence, safety etc... nor is sustainable as an exception under the second limb of Article 5(1)(k) of the Constitution, the remedial power of the Court is set out in Articles 6(1) (2), 49(1) and 53(1) (2) of the Constitution.

I therefore accept the submissions made on behalf of the Applicant to the effect that s.23A of the Representation of the People's (Amendment) Act No.10 of 2012 not only categories between indigenous citizens and naturalised citizens and that it has differential impact on the Applicant in the protection or benefit accorded by law but, in addition, the limitations enacted in s.23A under challenge are discriminatory and infringe the constitutional rights of



the Applicant under Article 5(1)(k) of the Constitution. Subsections (1), (2) and (4) of s.23A of the Representation of the People's (Amendment) Act No.10 of 2012 are unconstitutional and adversely affect the rights of the Applicant as a citizen.

Subsections (1), (2) and (4) of section 23A are unconstitutional in that they are inconsistent with the provisions of the Constitution and they are to the extent of the inconsistency, of no force or effect.

I finally consider the severability question on the operative provisions of section 23A of the (Amendment) Act [CAP.146].

Subsection (3) of section 23A of the said Act is an operative provision of s.23A itself. It cannot stand alone. It is also unconstitutional in that it is inconsistent with the provisions of the Constitution and to the extent of its inconsistency, is of no force or effect.

In addition, I set out below other operative provisions of section 23A of the Representation of the People (Amendment) Act No.10 of 2012 which cannot stand without s.23A of the said (Amendment) Act: subsections (2A) and (2B) of s.25(2) paragraph (c)(i), (ii) of section 26(2).

Subsections (2A) and (2B) of section 25(2)-

"(2A) If a candidate wishes to contest the election in a rural constituency he or she must include in the declaration of candidature any document showing proof to the satisfaction of the Electoral Commission, that the candidate is a person originating from that rural constituency.

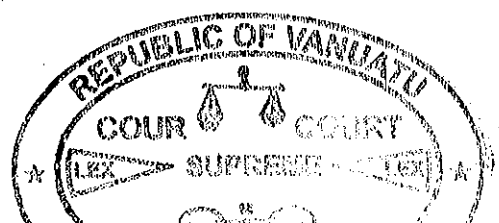
(2B) If there is doubt as to whether or not a candidate is a person originating from that rural constituency, the Electoral Commission may make any such inquiry as to the status of the candidate as it considers necessary."

Paragraphs (c)(i), (ii) of section 26(2)-

"(c) In the case of a candidate wishing to contest the election in a rural constituency:

- (i) if the candidate does not prove to the satisfaction of the Electoral Commission that he or she is a person originating from that rural constituency as provided under subsection 25(2A) ; or*
- (ii) after making an inquiry under subsection 25(2B) the Electoral Commission is satisfied that the candidate is not a person originating from that rural constituency."*

They are also unconstitutional in that they are inconsistent with the provisions of the Constitution and are to the extent of their inconsistency, of no force or effect.



A handwritten signature or mark, possibly a stylized 'R' or 'L', is written in black ink to the right of the seal.

I would answer the constitutional question as follows:-


Q. Whether section 23A of the Representation of the People (Amendment) Act No.10 of 2012 is unconstitutional in that it infringes the rights of the Applicant herein as a citizen under Article 5(1)(k) of the Constitution?

A. Yes.

The Applicant is entitled to his costs to be agreed or determined.

DATED at Port-Vila this 5th day of April 2013

BY THE COURT


Vincent LUNABEK
Chief Justice

