

***Barak Tame Sope Maautamate v The Speaker of Parliament* :The Legal Limits of a Presidential Pardon**

By Miranda Forsyth^[*]

The question of the legal effects of a presidential pardon was the subject of a recent Vanuatu Court of Appeal decision: *Barak Tame Sope Maautamate v The Speaker of Parliament*, Hon. Henri Taga Tarikarea, unreported, CAC 4/03 (May 2003). Given the number of pardons that has been issued by the President in recent years, this is a question of some significance. The decision answers some of the questions about what a pardon can and cannot do, but also raises the important issue of the use of the *Leadership Code Act* (1998) ('Leadership Act') for prosecution of those who hold positions of office in the Republic.

In 2002 the appellant was convicted of two counts of forgery under the *Penal Code Act* [CAP 135] by the Supreme Court of Vanuatu and sentenced to three years imprisonment (see *Public Prosecutor v Barak Tame Sope Maautamate*, unreported, CR 10/02 (July 2002)). At the time of prosecution, the appellant was a Member of Parliament, and at the time of the committal of the offences he was the Prime Minister of the Republic of Vanuatu. The appellant served three months of his sentence and was then pardoned by the President in exercise of his powers under article 38 of the *Constitution of Vanuatu*.

Following his conviction, the appellant's seat became vacant as a result of the operation of section 3 of the *Members of Parliament (Vacation of Seats) Act* [CAP. 174] ('Members Act') which provides that if a member of Parliament is convicted of an offence, and is sentenced by a court to imprisonment for a term greater than two years, then his seat will become vacant thirty days after his conviction. Subsection (2) provides that this period of 30 days can be extended up to 150 days in certain circumstances, and subsection (3) provides that if at any time before the member vacates his seat his conviction is set aside, his seat will not become vacant.

After his pardon, the appellant sought to resume his seat in Parliament, contending that the pardon had the effect of removing the disqualification retrospectively from the date of his conviction. The Speaker took the view that the seat had become vacant 30 days after the conviction had been recorded. The appellant then commenced proceedings in the Supreme Court, seeking declarations that the appellant remained a duly elected Member of Parliament and was entitled to attend the current Parliament sittings. The Supreme Court refused to grant the declarations and the appellant appealed to the Court of Appeal.

The Court of Appeal also refused to grant the declarations. The appellant, while accepting that a pardon is different from an acquittal, had argued that the effect of the pardon was to clear him from all the consequences of the offence for which it had been granted, and all statutory or other disqualifications following upon conviction. He contended that the pardon therefore removed the disqualification imposed by section 3 of the *Members Act* on a Member of Parliament who has been convicted of more than two years imprisonment, and does so from the date on which the punishment was imposed. It was contended that the effect of the pardon should be to restore the appellant to his seat as an elected Member of Parliament.

The Court of Appeal held that the 'as a general proposition the grant of a pardon has the effect in law stated in Halsbury, including the removal of any disqualification'. The position in 8 Halsbury, *Laws of England*, (4th Ed) at para. 952 is:

The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence to which he was convicted.

However, the court disagreed with the appellant's characterisation of the seat becoming vacant under section 3 of the *Members Act* as being a disqualification of the member. Rather, it found that the "vacation of the seat is an event separate and independent from the disqualification of the member". Once the seat becomes vacant then the provisions relating to a vacancy become operational and a by-election should occur. The Court found that there was no reason in logic or in precedent why the pardon could operate retrospectively. Therefore, although the grant of the pardon "makes him a new man", it does not undo events that have happened, or remove rights that had become vested in a third party. The appellant could not therefore have his seat restored to him, except through a by-election.

It follows from the Court's decision that if the President had granted the pardon within 30 days of conviction, or if the appellant had sought to extend the time limits under section 3(2) of the *Members Act*, the seat would not have become vacated and the appellant could have resumed his position as Member of Parliament after his pardon.

This case raises the important question of why the appellant was not prosecuted under the *Leadership Code Act* (1998) (*Leadership Act*). This case seems to have been a perfect occasion for which to use that Act. The purpose of the *Leadership Act* is to prosecute criminal and otherwise undesirable conduct committed by leaders. 'Leaders' are defined to include not only Members of Parliament but also a large range of people holding positions of office and responsibility in the Republic (see section 5). The range of offences that are proscribed by the *Leadership Act* include specified criminal offences as well as other new offences, including, for example, using undue influence and not avoiding conflicts of interest.

The *Leadership Act* was enacted to give effect to Chapter 10 of the *Constitution*, which sets out the standards of behaviour expected of leaders. However, for reasons that remain unclear, it was not used to prosecute the appellant. Moreover, despite having been enacted over five years ago, the *Leadership Act* has never been used. If the *Leadership Act* had been used in the present case, the time and expense involved in these proceedings, as well as the uncertainty over the appellant's seat, could have been avoided.

The benefit of using the *Leadership Act* can be discerned in section 41 which provides that a person who has been convicted of a breach of that Act can be subject to an order dismissing him or her from office. Although that also flows from being convicted of a criminal offence, as discussed by the Court of Appeal, the *Leadership Act* goes even further. Section 42 provides that where the leader is dismissed from office under section 41, he or she may be disqualified from standing for election as, or being appointed as, a leader of any kind for a period of 10 years from the date of the conviction.

It is not clear why section 42 is limited to leaders who have been dismissed from office under section 41. Given that the *Leadership Act* itself is not limited to the prosecution of current leaders (see section 50), it does not make sense to exclude those leaders who could have been dismissed from office under section 41 but were not because they were not, in fact, holding office at the time they were prosecuted.

The chance to prosecute the appellant under the *Leadership Act* has been irredeemably lost as section 5(2)(n) of the *Constitution* provides that 'no person who has been pardoned, or tried and convicted or

acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial'. This would clearly cover the present situation. As it is, the appellant is free to contest the by-election for his former seat.

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