IN THE HIGH COURT OF TUVALU

CIVIL JURISDICTION

FUNAFUTI

CIVL CASE NO 5/16

IN THE MATTER OF THE CONSTITUTION OF TUVALU AND

IN THE MATTER OF THE PARLIAMENTARY RULES OF PROCEDURE

ATTORNEY GENERAL

Plaintiff

SPEAKER TO PARLIAMENT

First Respondent

APISAI IELEMIA

Second Respondent

Laingane Italeli Maina

Acting Attorney General for the plaintiff

Isala T Isala for the first respondent

Filiga Nelu Taukiei for the second respondent

Hearing: 4, 5 October 2016

Judgment: 2 November 2016

The Chief Justice

JUDGMENT

1. An urgent *ex parte* originating summons was filed by the acting Attorney General as Plaintiff and without naming any other parties on 18 August 2016. It was supported by an affidavit sworn by the acting Attorney General dated 19 August 2016.
2. The summons recited the following contentions as the basis for the Court making declarations and orders: A sitting of Parliament had been duly convened by proclamation of the Governor General. A motion without notice was moved by the Prime Minister to remove and exclude The Hon Apisai Ielemia from sitting in the Parliament. The motion was passed and the Speaker removed The Hon Apisai Ielemia from Parliament. The Hon Apisai Ielemia had been previously convicted by the Senior Magistrate.
3. The summons contended that the Speaker's ruling contravened each of Rule 5(3) of the Parliamentary Rules of Procedure and s98(1) of the Constitution.
4. The summons contended that, where a criminal conviction and sentence is stayed pending appeal, the status of the affected member is unaffected and that the Speaker's ruling excluding The Hon Apisai Ielemia was *ultra vires*.

5. The affidavit sworn by the acting Attorney General in support annexed a legal opinion given by the acting Attorney General which she swore that she had delivered to the Speaker of Parliament and which was dated 17 August 2016. There is no suggestion in her affidavit that any of the Speaker, the Prime Minister or any other Minister had requested that the acting Attorney General should provide a legal opinion upon the subject of the lawfulness of the exclusion of The Hon Apasai Ielemia from Parliament or upon another related subject. The context establishes that no request for legal advice had been made and that the advice which the acting Attorney General had delivered to the Speaker was given upon her own initiative.
6. The advice of the acting Attorney General recited that The Hon Apisai Ielemia has been convicted on 27 April 2016 and sentenced on 3 May 2016 to 12 month imprisonment on each offence, to be served concurrently by way of weekend detention. It recited that on 3 May 2016, The Hon Apisai Ielemia had applied for a stay of sentence and that an order granting a stay had been made on 2 June 2016.
7. The affidavit of the acting Attorney General made no reference to the fact, as all counsel agreed at the hearing, that The Hon Apisai Ielemia had commenced to serve the sentence of imprisonment on 6 May 2016, before the stay order granted on 2 June 2016 had been made. Thus, between 6 May 2016 and 2 June 2016, The Hon Apisai Ielemia was a person who was serving a sentence of imprisonment.
8. The advice of the acting Attorney General referred to s98(1) of The Constitution, which provided that a sentence of death or imprisonment for more than 12 months prohibited a member of Parliament from continuing to exercise his functions as a member of Parliament and provided that such a person should not attend Parliament. The advice referred to the aspect of s98 which provided that 30 days after such a sentence, the member of Parliament's seat became vacant unless he had had the period extended by the Speaker.

9. The advice of the acting Attorney General expressed the view that, as a result of the stay of his convictions and sentence, The Hon Apisai Ielemia was no longer bound under s98(2) because his conviction was no longer operative.
10. The advice of the acting Attorney General expressed the view that the decision of the Speaker to exclude The Hon Apisai Ielemia was *ultra vires* and that the Speaker was bound to treat The Hon Apisai Ielemia as an effective member of Parliament.
11. The advice of the acting Attorney General referred to the jurisdiction of the High Court under The constitution s 100 to determine any question of whether a member of Parliament had vacated his seat.
12. When I became aware on 19 August 2016 that the urgent *ex parte* summons had been filed, I gave directions that an amended summons be prepared and filed naming the Speaker and The Hon Apisai Ilemia as parties and that the matter proceed upon notice and not as an *ex parte* application.
13. A similar course was followed by Sr Gordon Ward in comparable circumstances in ***R v Prime Minister and minister Responsible for Elections; ex parte Sakaio*** [2014] TVHC 15 at 2. I am aware that ***In Re The Constitution of Tuvalu*** 5/2004, his Honour proceeded ex parte, but I do not think that should be other than the most unusual course. Except in extraordinary circumstances, the Court should not make orders or declarations which might affect the status of a member of Parliament without affording the person who might be affected a right to be heard. Nor should the Court ordinarily make orders affecting the position of the Speaker or the proceedings of Parliament without affording at least the Speaker an opportunity to be heard. Even very urgent matters can be determined without depriving proper parties of their rights to be heard.
14. In compliance with these directions, an amended originating summons was filed on 19 August 2016 which originally named The Hon Apisai Ielemia as an additional plaintiff and the Speaker of Parliament by the name of his office as the defendant. Although the

acting Attorney General filed the amended originating summons because of the directions which I had given, her position was that the addition of The Hon Apisai Ielemia and the Speaker of Parliament "made no sense" and requested the Court to deal with the application upon an *ex parte* basis. This was apparently done without the consent of the Hon Apisei Ielemia and was therefore irregular. Eventually, the summons was further amended to name the Hon Apisei Ielemia as the second respondent and proceeded to hearing in that form.

15. In giving the directions which I gave, I was not refusing to hear the originating summons. I had formed the view upon reading the originating summons that any order which might be made would be likely to involve a consideration of the rights of The Hon Apisea Ielemia and would involve consideration of the lawfulness of the actions of the Speaker and of the Parliament during a parliamentary session. I therefore considered that both The Hon Apisea Ielemia and the Speaker of Parliament were necessary parties and were entitled to be heard. I formed the view that it would have been inappropriate for the Court to have given an *ex parte* judgment or made orders which affected them without their having been parties and having had an opportunity to adduce evidence and make submissions. I considered both to have been necessary parties.

16. The originating summons raises very important questions of constitutional law, of Parliamentary procedure, the role of the Speaker and the role of the Attorney General as the principal legal adviser to the government under The Constitution s 79. I formed the opinion that, because of the importance of these questions, notice should be given of the application.

17. I gave, at the insistence of the acting Attorney General, an interim judgment refusing to make any orders on an *ex parte* basis.

18. At the outset of the hearing, I asked counsel for The Hon Apisai Ielemia whether her client wished to make any submission that I should not hear the matter. After consulting her client, counsel

informed me that her client had no objection to my hearing the matter.

19. The most immediate issue raised by the proceedings was whether The Hon Apisai Ielemia remained a member of Parliament entitled to participate in the proceedings or Parliament or whether his seat had become vacant by reason of the operation of the provisions of The Constitution contained in Part VI Division 3 Subdivisions C and D.

20. Although this issue arose clearly upon the Summons which the acting Attorney General had filed, I listed the case for mention, drew it to the attention of counsel for the parties and directed that counsel file written submissions in advance of oral argument. In particular, I asked counsel to consider the possible meaning and effect of the expression in ss95(1)(a) "or is serving a prison sentence" and to address in their submissions whether or not the clause meant that a person who is serving a prison sentence is disqualified from being elected as a member of Parliament and therefore, as a result of s96(1)(f) a member of Parliament who commences to serve a sentence of imprisonment without the benefit of a stay order vacates his seat.

21. The acting Attorney General's submissions stated that the application raised issues under The Constitution s98(1) and involved the exercise of the Court's jurisdiction under The Constitution s100 and involved the issue of whether the seat of The Hon Apasai Ielemia has become vacant. These submissions reflected the fact that the amended summons contended that the position of The Hon Apasai Ielemia as a member of Parliament had been unaffected by his conviction and sentence because the Court had made a stay order.

22. The submissions for The Hon Apasai Ielemia relied upon the grant of the stay on 2 June 2016 and made extensive submissions as to the effect of The Constitution ss95, 96 and 98. The submission contended that the expression "serving a prison sentence" is not an alternative to the qualification "term exceeding 12 months" and that the meaning to be attributed was that "serving a prison sentence" required that the person "had been sentenced by a Court in a Commonwealth country

to death or to imprisonment for a term exceeding 12 months and is serving a prison sentence" "for another offence".

23. Counsel for the Speaker referred the Court to the Interpretation and General Provisions Act, s20(1), which provided that: In relation to a written law passed or made after the commencement of this Act…"or", "other" and "otherwise" are to be construed disjunctively and not as implying similarity unless the word "similar" or some other word of like meaning is added.
24. Having read counsel's written submissions and having heard oral argument, I concluded that the effect of the constitutional provisions to which I have referred was that a serving member of Parliament who commenced at any time during his term as a member of Parliament to actually serve a sentence of imprisonment vacated his seat.
25. I do not consider any other alternative interpretation to be open.
26. S95(1) deals with two separate contingencies. The first is that a person has been sentenced by a court in a Commonwealth country to death or to imprisonment for a term exceeding 12 months and has not received a free pardon. The second is that a person is serving a prison sentence.
27. The first is not concerned with whether the person has commenced to serve the sentence. It acts upon the fact that the sentence has been imposed. The second is not concerned with the duration of the sentence. It acts upon the fact that the sentence has commenced to be served.
28. There is an identifiable and rational basis for The Constitution identifying each of these two contingencies as a disqualifying event. In the first case, it is the seriousness of the sentence and, by implication of the crime for which it was imposed. In the second case, it is the currency of the imprisonment and, by implication, the fact that a person who is incarcerated should not be able to be a candidate for election whilst actually serving their sentence of imprisonment.

29. Although I have reached my conclusion without reference to historical materials, those materials suggest the same outcome. The current constitutional provisions differ significantly from the comparable terms of The Tuvalu Independence Order 1978, s49(1) of which provided that "No person shall be qualified to be elected as a member of Parliament who…(d) is under sentence of death imposed on him by a court in any part of the Commonwealth or is serving a sentence of imprisonment (by whatever name called) for a term of or exceeding 12 months, imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court". There were similar provisions relating to a sitting member in s 51.
30. The Minutes of the Constitutional Review Select Committee of Parliament for 18 May 1995 show that the members of the Committee were alive to the issue in the present case. Those minutes record the following: "Committee expressed its disagreement with the provision of this subsection in which an MP could return to Parliament even though he had been sentenced to imprisonment but not more than 12 months. Committee noted again that in the Tuvalu context an MP being imprisoned is more than enough to lose the confidence of his constituency".
31. The terms of s 95(1) also differ from the comparable provisions of the Kiribati Independence Order 1979, s56(1), which represent a different set of policy choices.
32. In her earnest search for a construction that would preserve The Hon Apisai Ielemia from loss of his seat, his counsel proposed a construction of the second limb of s95(1)(a) which required that the sentence being served should be for some second offence, so that before a person was disqualified from being an elector, he would have had to have suffered two separate and unconnected convictions and be serving the second of the sentences imposed as a result of the two convictions. I am satisfied that such a construction does not reflect the ordinary meaning of the clause and would do

unacceptable violence to the constitutional language as well as to its clear purpose.

33. The written submissions for The Hon Apisai Ielemia extensively addressed the issue of "whether Mr Ielemia is entitled to sit as a member of Parliament in this sitting of Parliament" and contained detailed submissions as to the effects of the provisions of The Constitution, ss 95(1). In the written submissions, the argument for The Hon Apasai Ielemia is put this way: "those who are sentenced to a term exceeding 12 months and have not received pardon are disqualified under s95(1) and also those who are sentenced to a term exceeding 12 months and are also serving a prison sentence, which is argued to be from another offence".

34. Notwithstanding these comprehensive submissions for The Hon Apasai Ielemia addressed to the effect of s95(1), on 5 October 2016, his counsel handed up further written submissions which contended for the first time that the case was not concerned with the position of The Hon Apasai Ielemia as a member of Parliament but was concerned with the power of the Speaker to make a decision "invalidating a membership of a member of Parliament". Counsel contended that if "the court thinks that the issue of the membership of the second respondent is a matter that must be considered, that should be considered separately through an application for the High Court to exercise its jurisdiction under s100 of The Constitution".

35. As is apparent from the face of these submissions, the amended summons cannot be determined without addressing the issue of whether The Hon Apasai Ielemia had vacated his seat. If he had vacated his seat, The Speaker was not only entitled but bound to exclude him from participating as a member of Parliament in the proceedings of Parliament. This issue was not only unavoidable, but it had been comprehensively argued by all counsel by the time counsel for The Hon Apasai Ielemia made her submissions that the Court should not decide the issue in the present proceedings.

36. In any event, the present proceedings were proceedings under s100(1) because they were proceedings in which a question arose as to whether "a member of Parliament has vacated his seat" and therefore fell within the terms of s100(1)(b). I am satisfied that the present proceedings could not be decided without addressing that question.
37. When The Hon Apisai Ielemia commenced to serve his sentence on 6 May 2016, he became a person who was then disqualified from being elected as a member of Parliament. He therefore fell within s96(1)(f) as a person who at that moment "ceases to be qualified for, or becomes disqualified from election to Parliament under .. s95" and as a result of s95(1) his seat became vacant.
38. This circumstance arose because The Hon Apisei Ielemia did not obtain an order staying his sentence of imprisonment until after he had commenced to serve it. The result would have been different if he had done so because he would not have triggered the second limb of s 95(1)(a) as he would not have commenced to serve his sentence.
39. Because the issue of the status of The Hon Apisai Ielemia was important for the proper conduct of Parliament and because, if he had vacated his seat, a bye election would be necessary, I made declarations that his seat had been vacated on 6 May 2016 as a result of his having on that date commenced to serve a term of imprisonment.
40. Although a potential candidate for election to Parliament is no longer disqualified from being a candidate if later the conviction is overthrown or the sentence is reduced or he finishes serving his term of imprisonment, these recovery events do not assist a currently serving member of Parliament. This is because the effect of s 96(1)(f) is that a serving member of Parliament must retain at all times his qualification to be elected. If, at any time during his term of office, he loses the status of a person qualified to be a candidate for election, he ceases to be a member of Parliament and the position cannot be

thereafter cured by the disqualification having ceased to apply to him.

41. This was the position in which The Hon Apisei Ielemia found himself. After he had commenced to serve his sentence, the sentence was stayed and his conviction was later overturned on appeal. Although he then regained his qualification to be elected to Parliament, he had in the meantime vacated his seat.

42. There are some tensions between the provisions of s 95(1)(a) as it is picked up by s96(1)(f) and the terms of s98. The effect of these tensions is that a person who is sentenced to death or imprisonment for a term exceeding 12 months has 30 days (or such further period as the Speaker and then the Parliament may allow) within which to obtain an overthrow of the conviction on appeal or a free pardon and, if he does so, his seat is not vacated. The same 30 days indulgence does not extend to a person who has commenced to serve a term of imprisonment. Even in such a case, the member of Parliament is not entitled to discharge his functions as a member of parliament or to attend Parliament as a member.

43. The next important issue raised by the proceedings is the proper role of the Attorney General under The Constitution.

44. The office of the Attorney General is one of the great constitutional offices of Tuvalu, established under The Constitution s79. The same section defines the responsibilities of the office.

45. Under s79(3), the Attorney General is the principal legal adviser to the Government. Under s79(5)(b) the Attorney General may take part in the proceedings of Parliament and the committees of Parliament but may not vote.

46. Under s79(6) the Attorney General shall, unless excused by or under the authority of the Prime Minister, attend all meetings of the Cabinet.

47. Under s79(7) the Attorney General has responsibility for criminal proceedings and that capacity, by reason of s 79(11), is independent from any direction.

48. The Attorney General is not a member of the Cabinet and has no executive authority. Nor is she a member of Parliament. Nor is her office representative as she is not elected.
49. The paramount role of the Attorney General is to act as the chief legal adviser to the government. That means she is, and must always hold herself ready and available to be, the chief legal adviser to the Cabinet. She should not, indeed may not, do anything antithetical to this paramount constitutional duty. Her ability to attend Parliament and to speak is subject to this overriding duty and for the purpose of furthering its discharge. So is her obligation, unless excused by the Prime Minister, to attend Cabinet meetings.
50. As the legal adviser to the government, the Attorney General has all the usual duties of a legal adviser. She must maintain the confidence of her client. She must not act contrary to her client's instructions. She must not herself, without the consent of her client, disclose upon what subjects she has advised or what was her advice. These remain the privilege of the client, to waive or not as the client chooses.
51. The Attorney General may not adopt a position which makes it impossible for her to give her client confidential advice or which indicates to any person other than her client what her advice has been.
52. In the present case, the evidence led in the Attorney General's own case shows that the Attorney General gave unsolicited advice to the Speaker and disclosed that unsolicited advice to all members of Parliament. As a result, it became impossible for confidential advice on the same subject to be given to Cabinet.
53. The same applies to the commencement of these proceedings. The Attorney General adopted a public position in which her advice to the Speaker was disclosed to the Court and to the parties. She became the plaintiff in proceedings which had every potential of being contrary to the interests or wishes of the government. It became impossible for her to represent the interests of the government or any minister in the proceedings.

54. It is constitutionally of the highest importance that the Attorney General performs the role established by the Constitution for that office and only that role.
55. The practice appears to have grown up of legal officers of the Attorney General's office appearing against the interests of the government. In my opinion, this practice is constitutionally impermissible. No lawyer in the Attorney General's office may do what the Attorney General herself may not constitutionally do and appearing against the government or in a manner contrary to its interests is high on the list of impermissible actions.
56. It is important to understand that the Attorney General is not the enforcer of standards of the government or of Parliament. It is not for her to ensure that Parliament or the executive do the correct thing or even act according to her view of the law. That is the responsibility of the Prime Minister and his Cabinet and they are answerable to the electorate for their discharge of that responsibility. In the course of their discharge of it, they are entitled to have confidential access to the independent legal advice of the Attorney General, but executive authority and responsibility for its exercise remain firmly in the hands of the Cabinet and are not shared by the Attorney General. She is a professional adviser to government and not a political player. That is the distinction between the constitutional structure of Tuvalu and bodies politic where the Attorney General as a minister and an elected member of Parliament exercises executive power and is responsible to the electorate for his conduct and for that of the government.
57. The final issue raised by the proceedings is the extent to which the Court will interfere with the conduct of proceedings in Parliament. Had it been that case that The Hon Apisai Ielemia had remained a member of Parliament and able to exercise his parliamentary functions, it would have been necessary to say more about this question. There is no doubt that, while the Court will always determine any live issue of whether a member of Parliament has or

has not vacated his seat under The Constitution s 100, in general the Court will respect Parliament's authority to manage its affairs and the Speaker's responsibility in that regard. In the circumstances of the present case, it is unnecessary to say more on this aspect.

58. For these reasons, on 5 October 2016, I made the following declaration:

Declare, pursuant to The Constitution of Tuvalu, s100(1)(b) that:

On 6 May 2016 The Hon Apasai Ielemia vacated his seat as a member of Parliament by reason of the fact that upon that date he commenced to serve a term of imprisonment and became a person not qualified to be elected as a member of parliament by reason of The Constitution of Tuvalu s95(1)(a) and therefore his seat became vacant by reason of The Constitution of Tuvalu, s96(1)(f).

59. No other substantive orders are necessary. The effect of the declaration made on 5 October 2016 is that a bye election must be held "as soon as practicable" under The Constitution s88. "It is an immediate obligation" for the responsible minister to issue a notice of election and it is not permissible for the minister to await the occurrence of some other event or the resolution of future uncertainties: ***Regina v Prime Minister and Minister Responsible for Elections; ex parte Sakaio [2014] TVHC 15 Civil Case 1/2013 (24 May 2013)*** per Ward CJ at paras 16 and 18.

60. I direct the parties to file any written submissions relating to costs within 14 days of the date of judgment.

Charles Sweeney

Chief Justice

THE SEAL OF THE HIGH COURT OF TUVALU
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