IN THE HIGH COURT OF KIRIBATI 2021

CIVIL CASE NO. 16 OF 2021

	[DAVID LAMBOURNE	**APPLICANT**
	[	
BETWEEN	**[AND**	
	[	
	[ATTORNEY GENERAL	**RESPONDENT**

Before: The Hon Chief Justice William Hastings

11 November 2021

Ms. Kiata Kabure for the Applicant
Mr. Monoo Mweretaka for the Respondent

JUDGMENT OF HASTINGS CJ

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Introduction

[1] On 12 August 2021, the applicant David Lambourne applied under s 88 of the Constitution for the following relief:

(a) A declaration that he holds office as a judge of the High Court of Kiribati, and will continue to hold that office until such time as he dies or resigns, or is removed from office in accordance with section 83(2) of the Constitution;

(b) A declaration that section 5(2) of the High Court Judges (Salaries and Allowances) Act 2017 (as amended by section 2 of the High Court Judges (Salaries and Allowances) (Amendment) Act 2021) is, in whole or in part, inconsistent with the Constitution and is therefore void to the extent of the inconsistency;

(c) A declaration that the withholding of his salary and other remuneration is unconstitutional;

(d) A declaration that the refusal to issue him with a visa to enable him to return to Kiribati is unconstitutional;

(e) A declaration that, as a judge of the High Court, he is entitled, for as long as he holds that office, to be issued with a visa under the Kiribati Immigration Act 2019 (and any successor law) such as would enable him to enter and reside in Kiribati and perform his duties and functions as a judge;

(f) Relief, in the nature of an order for mandamus, directing the Beretitenti, as the Minister responsible for the administration of the Kiribati Immigration Act 2019, to issue a visa or take other action under the Act to enable the applicant to enter and reside in Kiribati and perform his duties and functions as a judge, for as long as he continues to hold office;

(g) Such other declaration and/or relief as, in the circumstances of this case, the Court considers appropriate.

[2] The originating summons was supported by an affidavit affirmed by the applicant on 5 August 2021. On 20 August 2021, the respondent entered an appearance. On 30 August 2021, the respondent sought an extension of time to file a statement of defence. On 21 September 2021, the respondent was granted an extension until 1 October 2021 to file a defence with supporting affidavits. The matter was listed before the Commissioner on 4 October 2021 to ensure compliance. On 4 October 2021, Mr Mweretaka advised the Commissioner that the respondent would not file and serve a statement of defence; instead the respondent would rely on the affidavits of Michael Foon, Secretary of Foreign Affairs and Immigration dated 30 September 2021; Dr Naomi Biribo, Secretary to the Cabinet and principal adviser to the Beretitenti dated 1 October 2021; and Teramweai Itinraoi, Chairperson of the Public Service Commission, also dated 1 October 2021.

[3] The matter was set down to be heard on 19 October 2021. As I was on Kiritimati Island then, the matter was heard by consent on my return one week later, on 26 October 2021. Ms Kabure filed written submissions on 12 October 2021. By the morning of the hearing, no written submissions had been filed by the respondent.

[4] Also on the morning of the hearing, Mr Mweretaka gave oral notice that he was instructed to seek my recusal. Ms Kabure said she was taken by surprise. I directed Mr Mweretaka to file and serve a written application with supporting documentation. He said he could do this by 2.30pm. The matter was adjourned to 2.30pm. When it was recalled at 2.30pm, Mr Mweretaka had no written application or supporting documentation. To avoid further delay, I decided to proceed with the substantive hearing, and gave the respondent leave to file a written recusal application within two weeks. Mr Mweretaka then handed up written submissions for the substantive hearing, which was held. As neither Ms Kabure nor I had the opportunity to read the respondent's written submissions before the hearing, I gave her leave to respond to the respondent's written submissions by 5pm on 27 October 2021. She indicated the next morning that having read the respondent's written submissions, she had nothing to add.

[5] The recusal hearing was set down for 9 November 2021. At the beginning of the hearing Mr Mweretaka said he was instructed to withdraw the application and did so.

[6] As a preliminary matter, this action has been brought under s 88 of the Constitution. Section 88 gives the High Court jurisdiction to determine whether any provision of the Constitution has been contravened, provided it is satisfied that the interests of the person making the application "are being or are likely to be affected" by the contravention. I am satisfied on the affidavit evidence that the applicant's interests are being affected, and that the Court has jurisdiction to hear the matter.

[7] Neither Ms Kabure nor Mr Mweretaka wished to cross-examine the deponents. There is therefore no dispute that the affidavits provide the

evidence necessary to determine this matter. I turn now to those affidavits to set out the factual background.

The Facts

[8] In October 2017, the Judiciary of Kiribati invited "expressions of interest from senior legal practitioners and judicial officers for one Puisne Judge of the High Court." To be considered for appointment, an applicant had to have at least ten years' experience as a practitioner before the High Court of Kiribati, or have been a judicial officer "in a comparable jurisdiction for at least 7 years." No reference was made to a term limit.

[9] The applicant had at least ten years' experience as a practitioner before the High Court. He expressed an interest in the appointment in November 2017.

[10] On 7 January 2018, the High Court Judges (Salaries and Allowances) Act 2017 (the 2017 Act) and the Judicial Salaries and Allowances Regulations 2018 (the 2018 Regulations) came into force. Section 5 of the 2017 Act stated:

> 5. (1). Pursuant to section 83(1) of the Constitution, the tenure of office for the judges of the High Court shall be subject to the appointment.
>
> (2). Where the appointment was made for a fixed period, the appointment may be further extended provided the appointee's age during the period of the appointment does not exceed 65 years.

The Regulations do not refer to a term of appointment.

[11] On 1 February 2018, Chief Justice Sir John Muria and the Public Service Commission "resolved to advise the Beretitenti in accordance with the

provisions of s. 81(2) of the Constitution" that the applicant be appointed a Puisne Judge of the High Court. The minute of this meeting was signed by the Chief Justice and the four members of the Public Service Commission in attendance, including Ms Itinraoi who was then a member. In her affidavit, Ms Itinraoi states correctly "[t]he minutes do not specify the length of David's appointment period." She states "[t]o my understanding and recollection, it is because it was never raised or discussed during the meeting."

[12] On 10 May 2018, the Beretitenti, "acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission" appointed the applicant a Puisne Judge of the High Court of Kiribati with effect from 1 July 2018. The applicant was not asked to enter into a contract of employment at the time of his appointment. The instrument of appointment was signed by both the Beretitenti and the Secretary to the Cabinet. It made no reference to a term of appointment.

[13] The applicant was issued with two year-long permits to enter, reside and work in Kiribati. The first covered the period from 10 July 2018 to 10 July 2019; the second from 10 July 2019 to 10 July 2020.

[14] On 27 February 2020 he left Kiribati to attend a conference in Brisbane and to take annual leave. He intended to return on 6 April 2020, but as a result of the pandemic, Kiribati closed its borders on 19 March 2020.

[15] Between March and September 2020 nothing much happened. In September 2020, the government announced that repatriation flights from Nadi to Tarawa would commence in November 2020.

[16] On the instruction of the Chief Justice, the applicant travelled to Nadi, Fiji to await a repatriation flight to Tarawa. He arrived in Fiji on 5 November

2020 and quarantined for 14 days. The Chief Justice advised the Chief Registrar by email dated 17 November 2020, copied to the applicant, that "[i]t is now a necessity that Judge Lambourne is in Kiribati as soon as possible, in view of my imminent departure after 31 December 2020."

[17] The first repatriation flight to Tarawa from Nadi departed on 19 November 2020. The applicant was not on the list of people authorised to board that flight. He was not on the list of people authorised to board the second flight from Nadi to Tarawa on 13 December 2020.

[18] On 4 January 2021, the Chief Registrar advised the applicant that the Secretaries of Justice and Foreign Affairs and Immigration required him to renew his immigration permit which had expired on 10 July 2020.

[19] The applicant was not on the list of people authorised to board the third flight that left Nadi for Tarawa on 10 January 2021.

[20] The applicant applied for an immigration permit on 19 January 2021. In his affidavit, the Secretary of Foreign Affairs and Immigration said the application was not processed until 23 April 2021.

[21] The applicant was not on the list of people authorised to board the fourth repatriation flight that left Nadi for Tarawa on 2 February 2021.

[22] On 1 March 2021 the Chief Registrar told the applicant that the Secretary of the Public Service Office required the applicant to sign a contract before he would give clearance for the issue of a work permit.

[23] On 2 March 2021, the applicant emailed the Chief Registrar that "[a]t no point during my discussions with the former Chief Justice prior to my appointment was it suggested that I would be appointed for a fixed 3-year

term." Also on 2 March 2021 the applicant emailed the Secretary of Justice to give notice of his objection to signing a contract on three grounds: first, because it purported to fix a three year term that was not stated in the instrument of appointment; second, because signing an employment contract would suggest that the appointment could be terminated in a way not contemplated by the Constitution; and third, because even if the clause purporting to fix a term were deleted, what is left goes no further than what is already in the 2017 Act and 2018 Regulations. He offered instead a memorandum of understanding which was rejected by the Secretary.

[24] The applicant was not on the list of people authorised to board the fifth, sixth and seventh repatriation flights that left Nadi for Tarawa on 6 March 2021, 16 March 2021 and 27 March 2021.

[25] On 30 March 2021, the Chief Registrar advised that he was ceasing payment of the applicant's salary and allowances. On 1 April 2021, the applicant advised that in light of the cessation of his salary and allowances, he was prepared to sign the proposed contract.

[26] The applicant was not on the list of people authorised to board the eighth repatriation flight that left Nadi for Tarawa on 4 April 2021.

[27] On 8 April 2021, the applicant signed the contract. In his affidavit he said:

> I signed the contract only as a matter of practical necessity. It was clear from my communication with the Secretary of Justice and the decision to withhold my salary that, in order to resume my duties, I would have to agree to the provided contract in order to be issued with an immigration permit so as to secure a place on a repatriation flight.

[28] On 23 April 2021, the Beretitenti also signed the contract. Although dated 23 April 2021, the contract records that the Beretitenti "has appointed David Lambourne as the Puisne Judge for a period of three years commencing the 1st July 2018 and ending on 30th June, 2021."

[29] On 26 April 2021, the Chief Registrar advised the applicant that the Public Service Office and the Ministry of Foreign Affairs and Immigration required a police clearance certificate, a medical certificate and a performance appraisal before the work permit could be issued. These were submitted (the now former Chief Justice supplied the performance appraisal).

[30] On 29 April 2021, the High Court Judges (Salaries and Allowances) (Amendment) Act 2021 (the amendment Act) was passed by the Maneaba ni Maungatabu. It entered into force on 19 May 2021. It amends s 5(2) of the principal Act by requiring the appointment of a judge to be on a fixed term. No contract is required by the legislation, but the fixed term provision purports to apply "to new and existing judges." At the time of its passage and at the date of its coming into force, there were no "new judges" and the applicant was the only "existing judge." The Act also requires production of a satisfactory medical report for judges over 65 years of age who wish to extend their appointment.

[31] On 7 May 2021, payment of the applicant's salary and allowances, including arrears, resumed.

[32] On 24 May 2021, the Secretary for Foreign Affairs and Immigration advised that the applicant's work permit had been approved but only until 30 June 2021, the date the contract expired. The Secretary also said that any extension would require a new contract of employment, police clearance and medical certificate.

[33] Payment of the applicant's salary and allowances ceased from 1 July 2021.

[34] There have been no further repatriation flights from Nadi or Australia.

Assumptions Made by the Deponents

[35] All of the affidavits disclose the assumptions made by the deponents during these events with respect to the term of the appointment. The applicant said he was aware that "all previous appointments to the High Court had been for a fixed term, but all of those appointments, bar one, had been of judges from outside Kiribati." He assumed that "the fact that I had been appointed from among those already admitted to practise in Kiribati contributed to the decision not to fix a term for my appointment." He was also aware that previous appointees to the High Court had entered into contracts of employment, but as the first person appointed after the entry into force of the 2017 Act and the 2018 Regulations, he "understood … my remuneration and other terms of service would be as provided for under those laws."

[36] On the other hand, Secretary to the Cabinet Dr Naomi Biribo stated in her affidavit that there had been "a long established system and practice in Kiribati" that foreign judges recruited to work in Kiribati "signed a contract for service setting out the duration of their engagement." She stated that "[t]here was no indication or advice to the Beretitenti (as head of the Republic) that the standard practice of fixed term by contract to a foreign judge would not be applied to the applicant." She said the Office of the Beretitenti was "of the belief that there is a contract of fixed term" because both times she asked to see it in the second year of his appointment, she said the Judiciary refused on the ground the contract was confidential. She said it

was only when the Judiciary applied the second time for the applicant's work permit that she was told there was in fact no contract. She said "[s]ince there was no advice or indication to the Beretitenti from the former Chief Justice and PSC when the applicant's appointment was made that there would be a deviation from the standard practice concerning foreign judges the situation/mistake was rectified when the actual contract between the Applicant and the Beretitenti was signed on 23 April 2021."

[37] The Chairperson of the Public Service Commission, Teramweai Itinraoi, stated in her affidavit, "[i]n my view, this is not right as every expatriate employed by the Government must always have a length of employment period and it is never indefinite."

[38] Michael Foon, the Secretary for the Ministry of Foreign Affairs and Immigration, stated in his affidavit that on his "understanding of our laws, there is no visa entitlement or inference on a work visa in relation to any appointment of Judge in Kiribati. No person is entitled to a visa as a right and that the granting of a visa does not of itself entitle the holder to granted entry permission."

Applicant's Submissions

[39] The applicant submitted that three issues need to be resolved:

(a) The applicant's tenure;

(b) The constitutionality of s 5(2) of the High Court Judges (Salaries and Allowances) Act 2017; and

(c) The applicant's entitlement to enter and reside in Kiribati under the Kiribati Immigration Act (the Immigration Act).

[40] With respect to his tenure, Ms Kabure submitted the Constitution must be interpreted in a broad and purposeful way, and that the High Court is the arbiter of whether or not the executive and legislative branches have complied with the Constitution (ss 17 and 89). She submitted this is why the independence of the judiciary is safeguarded in the Constitution by ensuring a high degree of security of tenure for judges of the High Court and Court of Appeal (ss 83(2) and 93(2)), by constraining the role of the executive in the appointment of most judges (ss 81(2) and 91(1)(b), and by protecting judicial remuneration and other terms of service (s 113). Ms Kabure submitted that as a matter of constitutional and statutory interpretation, the Constitution, the 2017 Act and the 2021 amendment Act anticipate the possibility of appointments other than for a fixed period. She submitted that there is no legal basis for asserting non-citizen judges can only be appointed for a fixed term; a contract in addition to the appointment is unnecessary because anything that would be covered by a contract is already covered by the 2017 Act and 2018 Regulations; and a contract is not a prerequisite for the grant of a visa under the Immigration Act. In this case, the contract signed by the Beretitenti on 23 April 2021 did not accord with the advice he received from the Chief Justice sitting with the Public Service Commission in 2018. Ms Kabure submitted "a subsequent contract cannot alter the legal effect of the original instrument of appointment," and any attempt to remove the applicant from office other than by the method prescribed in the Constitution is unconstitutional.

[41] Ms Kabure submitted that if I find the applicant continues to hold office, then it logically follows that he remains entitled to salary and allowances by virtue of his appointment.

[42] With respect to the constitutionality of s 5(2) of the 2017 Act, Ms Kabure submitted the Maneaba ni Maungatabu cannot limit the exercise of a

constitutional discretion without amending the Constitution, and an ordinary statute cannot create requirements additional to those provided for in the Constitution unless expressly permitted by the Constitution. She submitted that s 5(2) purports to alter s 81 of the Constitution by mandating both the nature of judicial tenure and additional eligibility criteria and is therefore unconstitutional. She also submitted that s 5(2)(a) could only have applied to the applicant, as he was the only "existing judge" at the time of its coming into force, and its effect was to bring his appointment to an end in a way incompatible with ss 81(3) and 113(3) of the Constitution.

[43] With respect to the applicant's entitlement to enter and reside in Kiribati under the Immigration Act, Ms Kabure submitted there is only one way the Minister or an immigration officer can exercise their discretion to decide whether or not to issue a visa and grant entry permission for a judge of the High Court or Court of Appeal, and that is in favour of the judge for as long as the judge holds office. She submitted that to refuse to issue a visa to a judge, or to cancel the judge's visa while he is still in office, thereby preventing him from performing his role, "is tantamount to the suspension or removal of the judge from office in a manner not contemplated by the Constitution." She submitted that the public servants who required him to enter into a contract, and provide a performance appraisal, police clearance and medical certificate before deciding his visa application, acted unconstitutionally.

Respondent's submissions

[44] Mr Mweretaka for the respondent submitted that from "time immemorial foreign judges (which also applies to other foreign nationals working in Kiribati) were always given a renewable fixed term appointment specified by contract." He submitted that "[f]oreigners cannot be given an

indefinite appointment as their stay in Kiribati needs to be monitored or assessed at intervals, at the end of their engagement before renewal." He submitted the basis of this established practice is "the nation's sovereign right to control the stay of foreigners in the country," which is consistent with s 19 of the Constitution that provides that only those of I-Kiribati descent have the right to enter Kiribati, and s 27(1) of the Immigration Act which provides that no person is entitled to a visa as of right. He submitted the applicant's contention that he has life tenure would undermine the sovereignty of the nation protected under s 1 of the Constitution.

[45] Mr Mweretaka submitted that the words "upon the expiration of the period of his appointment" in s 83(1) of the Constitution imply there must be a fixed term. He submitted there was no advice to the Beretitenti from the Chief Justice and the Public Service Commission in 2018 that "the established practice for foreigner judges of fixing their term by contract would not be followed." He conceded that the contract "could have been signed way earlier" but the Secretary was misled by the Judiciary into believing there was a contract. He submitted "[w]hat the Beretitenti did when signing a contract with the applicant did not create a change to what was presented to him in terms of the advice for an indefinite appointment as there was no such advice" and the matter therefore did not need to be referred back to the Chief Justice and the Public Service Commission. In any event, Mr Mweretaka submitted that when the applicant signed the contract, he knew very well that it fixed the term of his appointment and he cannot complain about it now. He also submitted that fixing the term of appointment by contract did not violate s 113(3) of the Constitution because it provided for equal treatment with all other former foreign judges. Mr Mweretaka opined that there may come a time "when our own nationals could occupy the judge post

of the High Court and when that happens then the life tenure for judges could be reconsidered and probably applied."

[46] Mr Mweretaka submitted that s 5(2) of the 2017 Act was not inconsistent with the Constitution. He submitted that fixing the retirement age at 65, and requiring police and medical certificates "should not be regarded as mandating the nature of judicial tenure or additional eligibility." He submitted that these requirements "are merely needed to achieve a better development of the judicial tenure by producing better judicial officers." He submitted neither the 2017 Act nor the 2021 amendment Act altered judges' security of tenure. Instead, it ensured the equality of "employment terms and requirements on both judges (as Constitutional post holders) and public employees as allowed for by s 113(3) of the Constitution.

[47] With respect to the applicant's entitlement to enter and reside in Kiribati under the Immigration Act, Mr Mweretaka submitted:

> It is worth noting that the independence of the judiciary will not be affected if a foreign judge was required to produce materials in support of a visa application. These are all part of the valid information needed by the immigration officer or the Minister responsible (Te Beretitenti) to make an informed decision before granting or refusing a visa, in support of Kiribati sovereign right over its land and borders.

[48] Mr Mweretaka submitted that "the applicant, as a foreigner, must be bound by our immigration laws and his visa must be for a fixed period, not indefinite." He submitted, "[t]he bottom line is a foreigner, whether he is a judge or public servant, their entry and stay in Kiribati must be controlled or monitored regularly by the Republic as a sovereign right hence the visa could never be for life." He submitted that even if I find the appointment is indefinite, the visa would not be indefinite: "[f]oreign judges would still be bound by our immigration laws hence their visa for a fixed term. This is to

allow time for a review of his visa before renewal which is Kiribati sovereign right, to control the entry and stay of foreigners in the country."

The Rule of Law and an Independent Judiciary

[49] It is important to put this case in context. It involves the separation of powers, the rule of law and an independent judiciary, all of which are fundamental constitutional principles. Kiribati is a member of the Commonwealth of Nations. As such, it shares certain values with other Commonwealth nations. In 1991, the Harare Commonwealth Declaration was adopted by the Commonwealth Heads of Government. It affirms that the rule of law and the independence of the judiciary are among the "fundamental political values" of the Commonwealth.[1] It also recognises the rule of law as part of the "shared inheritance" of the Commonwealth that constitutes its "special strength."[2]

[50] The Harare Commonwealth Declaration led to the development of the Latimer House Guidelines in 1998 and then to the Commonwealth Latimer House Principles on the Accountability of and the Relationship between the Three Branches of Government, to which the Guidelines are annexed. The Commonwealth Latimer House Principles were adopted by consensus by the Commonwealth Heads of Government in 2003, and were incorporated into the Charter of the Commonwealth which was adopted by the Commonwealth Heads of Government in December 2012 and signed by the Queen in March 2013. The Charter states the rule of law to be one of the core principles of the Commonwealth. It commits each member state to "an independent, impartial, honest and competent judiciary."[3]

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[1] Harare Commonwealth Declaration [1991] para 9, http://thecommonwealth.org/history-of-the-commonwealth/harare-commonwealth-declaration.
[2] Ibid, para 3.
[3] Charter of the Commonwealth, Principle VII, http://thecommonwealth.org/our-charter.

[51] Principle IV of the Commonwealth Latimer House Principles states that the judicial appointment process should ensure "equality of opportunity for all who are eligible for judicial office," "arrangements for appropriate security of tenure and protection of levels of remuneration must be in place," and "interaction, if any, between the executive and the judiciary should not compromise judicial independence."

[52] Also in 2012, the United Nations General Assembly resolved to adopt the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. The Declaration states in part, "We are convinced that the independence of the judicial system, together with its impartiality and integrity, is an essential prerequisite for upholding the rule of law and ensuring that there is no discrimination in the administration of justice."[4]

[53] Maintenance of the rule of law requires an independent judiciary. The central meaning of this concept rests on the separation of powers. Lord Bingham has written:[5]

> Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision making role, should not be independent of government.

[54] The independence of the judiciary is ensured when judges have security of tenure. In *Valente v R*,[6] the Supreme Court of Canada defined security of tenure as "a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by

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[4] A/RES/67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels. This resolution was adopted by the General Assembly at its 3rd plenary meeting, 24 September 2012*:* https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf.
[5] T Bingham, *The Business of Judging* (Oxford, Oxford University Press, 2000), 61.
[6] *Valente v R* [1985] 2 SCR 673 at para 31.

the Executive or other appointing authority in a discretionary or arbitrary manner."

[55] Former Chief Justice of Canada Beverley McLachlin has written about the importance of security of tenure, financial security and administrative independence in enabling an independent judiciary to perform its core functions:[7]

> The necessary pre-conditions for judicial independence are the conditions that remove the apparent or real possibility of inappropriate influence from the other two branches on the judiciary's exercise of its essential adjudicative functions. Security of tenure and financial security are necessary to remove the possibility that the other branches could influence the judiciary by threatening judges' careers and economic security. Administrative independence is required both as an important intrinsic feature of judicial independence, and also to remove the appearance of inappropriate influence on the courts through executive control of their budgets. The purpose of these conditions is not to create special benefits for judges as individuals, but to enable the judiciary to properly exercise its essential function in the constitutional economy of the modern democratic state.

[56] These principles reflect widely held norms and provide the context in which constitutional and statutory provisions affecting the separation of powers, judicial independence and the rule of law can be interpreted.

[57] The Constitution, to which I now turn, is consistent with these principles.

The Law

[7] B McLachlin, "Judicial Independence: A Functional Perspective" in *Tom Bingham and the Transformation of the Law* (Oxford, Oxford University Press, 2009), 269 at 281-282.

[58] It has long been held that constitutions must be interpreted as sui generis, taking into account the context, purpose, and textual setting of a provision requiring interpretation.[8] The interpretation must keep in mind that "the question is not what may be supposed to have been intended [by the framers], but what has been said".[9] Constitutional interpretation does not preclude close textual analysis when required, but the interpretation must always be in the context of the broader purpose of the Constitution and its status as supreme law.

[59] Section 1 of the Constitution declares Kiribati to be a sovereign democratic Republic. Inherent in the notion of democracy are the separation of powers, and the maintenance of the rule of law by an independent judiciary, each member of which swears or affirms to uphold the Constitution. Section 2 declares the Constitution to be the "supreme law" of Kiribati, and if any other law is inconsistent with the Constitution, that law shall, to the extent of the inconsistency, be void. So important is an independent judiciary to the rule of law, that section 10(8) of the Constitution requires any court or adjudicating authority "prescribed by law for the determination of the existence or extent of any civil right or obligation" to be "independent and impartial." It is important to note that s 10(8) is found in Chapter II of the Constitution which concerns the protection of fundamental rights and freedoms of the individual. Section 69(3) states that any statute, insofar as it alters Chapter II, shall not come into operation unless it has been the subject of a referendum in which two-thirds of all the persons entitled to vote support it. This would include any statute that altered s 10(8) by diminishing the independence of a court or adjudicating authority. The

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[8] *Minister of Home Affairs v. Fisher* [1980] AC 319 at pp. 328-329 per Lord Wilberforce; D. Feldman, "Statutory interpretation and constitutional legislation" (2014) 130 L.Q.R. 473.
[9] *Edwards v Attorney-General for Canada*, [1930] AC 124 at 137 per Viscount Sankey L.C.

reference to an independent and impartial judiciary in Chapter II emphasises the importance of an independent judiciary in the Constitution.

[60] Other sections of the Constitution emphasise the importance of an independent judiciary. The High Court is given original jurisdiction by s 17 to hear and determine any application by a person who alleges that any of the Chapter II provisions has been, is being, or is likely to be, breached in relation to him. Section 88 gives the High Court jurisdiction to hear and determine any allegation that any provision of the Constitution other than Chapter II has been contravened and his interests are being or are likely to be affected by the contravention. Section 88(6) gives the High Court original jurisdiction to hear and determine any questions as to the interpretation of the Constitution referred to it by the Beretitenti acting in accordance with the advice of Cabinet, the Attorney-General or the Speaker, and s 89(2) gives the High Court jurisdiction to determine any question about the interpretation of the Constitution referred to it by any subordinate court that is of the opinion that the question involves a "substantial question of law." The provisions that give the High Court jurisdiction to interpret the Constitution are consistent with principles in other Commonwealth countries. For example, in *R (on the application of Miller) v The Prime Minister*[10], the Supreme Court of the United Kingdom stated that "the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits." Similarly, in *Attorney-General v Latu*[11], the Court of Appeal of Samoa stated "[w]e see it as beyond reproach that the Supreme Court can order the Head of State to convene Parliament if that is what the Constitution requires."

[10] *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 at para 39.
[11] *Attorney-General v Latu & Ors* [2021] WSCA 6 at para. 110.

[61] Provisions in the Constitution for the appointment and tenure of office of judges of the High Court reflect the provisions set out above giving the High Court jurisdiction over matters of constitutional importance. In this part of the discussion, I will consider the applicant's submission on how these provisions should be interpreted in his case.

[62] With respect to appointment, High Court judges are appointed by the Beretitenti "acting in accordance with" the advice of the Chief Justice "sitting with" the Public Service Commission under s 81(2). Only persons who have "held office as a judge in any country" or who have been "qualified for not less than 5 years to practise as a barrister or solicitor" are eligible for appointment as a High Court judge under s 81(3). Section 81(3) contemplates the appointment of a foreign judge. The provisions relating to a judge's appointment, removal and security of tenure do not make a distinction between foreign and I-Kiribati judges.

[63] With respect to tenure, s 83(1) states "[s]ubject to the provisions of this section," the office of a judge of the High Court becomes vacant "upon the expiration of the period of his appointment to that office." Nowhere does the Constitution define the duration of "the period of his appointment." Section 83(1) merely states the vacancy occurs when the period of appointment expires. That phrase clearly contemplates a period of appointment that expires - in other words, a fixed term appointment. The phrase "period of appointment" could also encompass an appointment until a fixed retirement age was reached, if that were specified in the instrument of appointment, and a life appointment, again if that were specified in the instrument of appointment. Mr Mweretaka concedes this point at para 14 of his submissions where he states that I-Kiribati judges could be appointed for life under the Constitution. But if no term is specified in the instrument of

appointment, and no term is specified in the Constitution, how is the phrase "period of appointment" to be given meaning?

[64] The applicant has submitted that in the absence of a specified term in the instrument of appointment or in the Constitution itself, the term of the appointment must default to a life appointment. In common law jurisdictions, appointments to judicial office for life are increasingly rare.[12] They were perhaps less rare when the Constitution was written, but constitutions are living documents and must be interpreted as such. In my view, ss 81 and 83 must be given an interpretation that is consistent with the principle of judicial independence, which means they cannot be interpreted to include an appointment for an unspecified term to be determined later by the executive branch. Such an interpretation invites executive interference in judicial independence. Provided, however, the period of appointment is not determined at a later date by the executive, s 83 can be interpreted to accommodate a period of appointment that is indefinite. An indefinite period is still a period. An indefinite period would of course still be subject to death, resignation or lawful and constitutional actions terminating the appointment such as removal from office in accordance with s 83.

[65] Section 81 does not exclude an appointment for an indefinite period. Such an appointment fits within the opening words of s 83(1). It is capable of expiring (on death or resignation), and can be made "subject to the provisions" of s 83 (the removal provisions).

[66] The other provisions of the section to which the opening words of subsection 83(1) refer, concern the intricate process required to remove a

[12] The major exception is a federal judicial appointment in the United States, which is for life. See Ingram, Carl B., "The Length of Terms of Judges in the Pacific and its Impact on Judicial Independence" in *Land Law and Judicial Governance in the South Pacific: Comparative Studies* (Wellington, New Zealand Association of Comparative Law, Special Issue Hors Serie Volume XII, 2011), at 375.

judge from office for inability or misbehaviour. The intricacy of the process reflects the significance of the office and its functions. By making the vacancy of the office subject to the removal provisions, the opening words of s 83(1) mean that the expiry of the period of appointment (in this case, the indefinite period of the appointment), and the creation of a vacancy in office, can be brought forward by the removal process. With the exception of a judge's resignation, the removal process is the only way the expiry of the of the period of appointment, whether it is for a term of years or indefinite, can be brought forward.

[67] I am confirmed in this view by the provisions for the appointment and tenure of Court of Appeal judges. Unlike High Court judges, Court of Appeal judges must be appointed "for a period of time or for the trial or hearing of particular causes or matters, as may be specified in the instrument of appointment" under s 91(1)(b). This provision is significant for three reasons: the drafters of the Constitution could have stated that High Court judges, like Court of Appeal judges, were to be appointed for a period of time or to hear particular matters, but did not; including a period of time in s 91 specifically precludes an indefinite appointment in terms not found in s 81, which leaves open an interpretation that s 81 does not exclude such an appointment; and the drafters anticipated that these matters would be stated in the instrument of appointment.[13] Section 93 concerns the tenure of Court of Appeal judges and is expressed in terms similar to those in s 83.

[68] Section 113 also concerns the security of tenure of High Court and Court of Appeal judges. It provides that their remuneration "and other terms

[13] With respect to the last point, see *Muhammad v Attorney-General* [1995] KIHC 1, per Gibbs J: "It cannot be concluded that because an instrument of appointment is mentioned in sections 84 and 91 and not in section 81 that no instrument is necessary to effectuate the power given by section 81."

of service" shall "not be altered to his disadvantage after his appointment except as part of any alteration generally applicable to public employees."

[69] I turn now to consider the three issues as stated by Ms Kabure. The first issue is the applicant's tenure which involves determining the term of the applicant's appointment to judicial office in 2018, the effect of the contract he signed in 2021 on the appointment and the relevance of s 113. Following consideration of his tenure, I will consider the effect of s 5(2) of the 2017 Act as amended on the appointment. Finally, I will consider the applicant's entitlement to enter and reside in Kiribati under the Kiribati Immigration Act.

The Applicant's Tenure

The term of appointment

[70] A judge's assumption of office is effected by the judge's appointment to that office by the appointing authority. The appointing authority must comply with the Constitution. In this case, both the formal procedure for appointment, and the instrument of appointment itself, complied with the Constitution.

[71] The appointing authority is the Beretitenti. He did nothing wrong. He appointed the applicant in accordance with the advice of the Chief Justice sitting with the Public Service Commission. That advice did not include a reference to a fixed term.

[72] The words of the Constitution do not exclude an indefinite appointment if no shorter or defined term is expressed in the appointment. Such an interpretation is consistent with the importance placed on judicial

independence in the Constitution itself, and in the Commonwealth and United Nations instruments discussed above.

[73] Consistent with the advice given to the Beretitenti by the Chief Justice sitting with the Public Service Commission, the applicant's instrument of appointment does not state a term. This does not breach s 81 or s 83 of the Constitution. While it may have been the practice to appoint judges, and at the same time define the term of their appointment in a contract, in this case no such contract was offered at the time of appointment. The absence of a contract does not affect the validity of the appointment.

[74] I find it difficult to accept that members of the executive branch assumed there was a contract, and that that contract specified the term of appointment. The executive branch is the appointing authority. The appointing authority controls the appointment, including whether or not the appointment is accompanied by a contract. It is not for the appointee to offer a contract or to point out to the executive branch that it is departing from a "long established" practice (in the words of the Secretary to the Cabinet) which the executive branch has known about since "time immemorial" (in the words of Mr Mweretaka). In those circumstances, it was not unreasonable for the applicant to have assumed that the absence of a contract meant that the terms and conditions that in the past had been placed into a contract were now covered by the 2017 Act and 2018 regulations.

[75] In this case, past practice was not followed. It is not for me to speculate why. Once a judge has been appointed though, their appointment cannot be altered (except as part of a measure applying generally and evenly

to all holders of public office)[14] because to do so would undermine judicial independence. There is no going back from this appointment by the executive. To be consistent with s 81, any future appointment that is for a fixed term must specify the length of the term in the instrument of appointment. Alternatively, the Constitution could be amended to specify the duration of the period of a future judge's appointment.

[76] Although the term of appointment had been specified in the contract in the past, in the absence of a contract, the only place a term could be expressed in this case was in the instrument of appointment, and it was not. The Constitution states that a judge's office becomes vacant on the expiry of the period of his appointment, and I have found that s 83 can be interpreted to accommodate an indefinite appointment. I therefore make two findings: first, that the applicant's appointment was for an indefinite period; and second, that any later determination of the period of appointment by the executive branch is inconsistent with s 83, the instrument of appointment, and the principle of judicial independence requiring security of tenure.

[77] The applicant was appointed a Puisne Judge of the High Court for an indefinite period in 2018.

The 2021 contract

[78] I turn now to consider the effect of the 2021 contract. Mr Mweretaka submitted in Court that the contract was not inconsistent with the Constitution or the instrument of appointment. He submitted that both the Constitution and the instrument of appointment were silent on the duration of the period of a judge's appointment, but some duration needed to

[14] J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research undertaken by Bingham Centre for the Rule of Law)* (London, British Institute of International and Comparative Law, 2015) at 2.3.14.

specified. He submitted the 2021 contract was not inconsistent with the Constitution or the instrument of appointment because it merely filled a gap in both by stating a fixed term. In other words, there was nothing for the contract to be inconsistent with. He submitted the Chief Justice and the Public Service Commission did not therefore have to reconvene to give the Beretitenti fresh advice to offer a contract that merely filled gaps.

[79] I have already stated my interpretation of the Constitution, that s 83(1) can accommodate an indefinite appointment. In any contest between an instrument of appointment and a contract, the instrument of appointment must prevail. In *Muhammad v Attorney-General*,[15] the applicant's instrument of appointment was set to expire two months before his contract. The applicant's term of appointment was fixed in the instrument of appointment. The applicant (who was Chief Justice of Kiribati at the time) applied for an order that he was entitled to remain in office for the term specified in his contract. Gibbs J held the terms of the contract could not prevail over the instrument of appointment. The applicant's only remedy was damages for breach of contract. In the course of the judgment, Gibbs J said:

> Although the Chief Justice is in one sense an employee of the Government, he stands in a very special position. It is essential to the nature of the judicial office that a judge should be independent of the Executive since it is the function of the judiciary to determine disputes not only between subject and subject but also between subjects and the State. It is a fundamental principle of the constitutional law of England, and therefore of Kiribati that judges are independent of the Government in the exercise of their functions. … The only method of removal of a judge is that provided by section 83 of the Constitution and any contractual provision which purported to allow a judge to be dismissed other than under section 83 would be invalid.

[15] *Muhammad v Attorney-General* [1995] KIHC 1, at pp. 9-10.

[80] Having found the phrase "period of the appointment" in s 83(1) can be interpreted to include an indefinite period of appointment, a contract that purports to limit a judge's appointment to nine weeks from the date of signing is inconsistent with an instrument of appointment that is silent on the duration of the term, and which must therefore be interpreted in light of the Constitutional provision under which it was made to mean an indefinite term. Although the contract states that the applicant was appointed to a three year fixed term commencing 1 July 2018 and ending 30 June 2021, this was simply not the case. This contract is best seen as an attempt to retrofit a term onto an instrument of appointment that did not specify a term.

[81] This is not to say judges can never be party to a contract that fixes a term at the time of appointment (for the executive to attempt to do so after the appointment adversely affects judicial independence). The inquiry must always be focused on the judge's security of tenure. The Latimer House Guidelines[16] recognise that fixed term appointments may be inevitable in, and can be particularly useful to, smaller countries that wish to attract foreign judges to serve on senior courts.[17] This has been the practice in many Pacific countries, including Kiribati. These appointments are often described as fixed-term contract appointments, "although the position of a judge is better described as a public office rather than a private law contractual relationship."[18] It is not best practice to put a judge on contract because a contract introduces the possibility of a reduction in judicial independence, the introduction of private law remedies into a public appointment, and inconsistency with both the Constitution and the instrument of appointment.

[16] Guideline II.1.
[17] J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research undertaken by Bingham Centre for the Rule of Law)* (London, British Institute of International and Comparative Law, 2015) at 2.2.15.
[18] Ibid, 2.2.14.

But as long as a judge's tenure is adequately secured, the Latimer House Guidelines do not preclude the practice.

[82] In this case however, the applicant was appointed without a contract. Under s 81(2) of the Constitution, the Beretitenti can only act "in accordance" with the advice of the Chief Justice sitting with the Public Service Commission. There was no advice in 2018 when the applicant was appointed, that he was appointed to a fixed term, let alone a three year fixed term. There was no fresh advice from the Chief Justice sitting with the Public Service Commission in 2021. It cannot be said that the 2021 contract, and the circumstances in which it was signed, did not adversely affect the applicant's tenure. If it has effect at all as Mr Mweretaka submits, it purported to reduce his tenure from an indefinite term to three years, and actually reduced his tenure from an indefinite term to nine weeks. The instrument of appointment must prevail over the contract. In this case, the contract was constitutionally invalid because the Beretitenti acted without the advice of the Chief Justice sitting with the Public Service Commission, it was not consistent with the instrument of appointment, and because it adversely affected the applicant's security of tenure.

[83] For these reasons, the 2021 contract is of no effect.

The relevance of s 113

[84] Mr Mweretaka submitted that fixing the term of appointment in a contract, and the actions of officials who required an employment contract, health and police certificates, and a performance appraisal, complied with s 113 because these requirements are generally applicable to both the holders of constitutional positions and public employees. He also submitted that that

s 113 was not breached because all previous foreign judges were subject to the same requirements.

[85] Section 113(5) states that the provision applies to High Court judges. Section 113(3) permits a post-appointment disadvantageous alteration to a judge's terms of service only if it is part of an alteration generally applicable to public employees. There is no doubt the applicant's "terms of service" were altered to his disadvantage. The term of his appointment was shortened by the 2021 contract. To comply with s 113, the alteration to the applicant's terms of service must be part of an alteration generally applicable to public employees. The section is focussed on ensuring any alteration to a judge's terms of service is part of a generally applicable alteration. The alteration in this case was by means of a contract purporting to define the term of his appointment. There is no evidence that the tenure of public employees was altered by putting them on contract in 2021, or that their terms of employment were shortened to three year fixed terms, "as part of any alteration generally applicable to public employees." It cannot therefore be said that the alteration to the applicant's terms of service was part of an alteration generally applicable to public employees. Further, the comparison is to a generally applicable alteration in the terms of service of current public employees. I do not accept Mr Mweretaka's submission that a comparison to former office holders is within the provision.

[86] For these reasons, the 2021 contract is not saved by s 113.

[87] I have concluded that the applicant was appointed for an indefinite period in 2018, and that the 2021 contract is of no effect, cannot in any event prevail over the 2018 appointment, and is not saved by s 113. I turn now to consider Ms Kabure's second issue, the effect of s 5(2) of the High Court Judges (Salaries and Allowances) Act 2017 on the applicant's appointment.

The Effect of s 5(2) of the High Court Judges (Salaries and Allowances) Act 2017

[88] At the time of the applicant's appointment, s 5 provided as follows:

> **Tenure of Office**
>
> 5. (1). Pursuant to section 83(1) of the Constitution, the tenure of office for judges of the High Court shall be subject to the appointment.
>
> (2). Where the appointment was made for a fixed period, the appointment may be further extended provided the appointee's age during the period of the appointment does not exceed 65 years.

[89] Six days after the Beretitenti signed the 2021 contract, the Maneaba amended the 2017 Act by replacing s 5(2) with the following provision:

> 5 (2) (a). The appointment of a judge must be made on a fixed term specified which may be extended where deemed necessary. This applies to new and existing judges.
>
> (b). Where the appointment was made for a fixed period, the appointment may be further extended until the appointee is 65 years old or beyond upon production of a satisfactory medical report.
>
> (c). Where the appointee is over 65 years when first appointed, the appointment made for a fixed period, may also be extended upon production of a satisfactory medical report.

[90] On 19 May 2021, four weeks after he signed the 2021 contract, the Beretitenti signed his assent to the amendment Act.

[91] The opening words of the original s 5(2) and the new s 5(2)(b), "where the appointment was made for a fixed period" anticipate that appointments can be made for other than a fixed period. This is consistent with s 83(1) of

the Constitution as I have interpreted it. Although those words can be read consistently with s 5(1) which has not been amended, they cannot be read consistently with the new s 5(2)(a) which requires a judge to be appointed for a fixed term. To my mind, by passing s 5(2)(a), the Maneaba has fettered the discretion to appoint judges found in s 81 which does not *require* the advice given to the Beretitenti to limit the appointment of a judge to a fixed term, and it is inconsistent with s 83(1) which does not exclude an appointment for other than a fixed term.

[92] Any fettering of a constitutional discretion must be by way of an amendment to the Constitution and not by ordinary statute. This proposition was confirmed by the Federal Court of Canada in *Conacher v Canada (Prime Minister).*[19] *Conacher* concerned a statute passed by Parliament that purported to limit the Governor-General's discretion to dissolve Parliament on the advice of the Prime Minister. The Federal Court held that no ordinary statute (or in this case, Act passed by the Maneaba) could fetter a constitutional discretion; any such fettering required an amendment to the Constitution:

> … Canada has a system of constitutional supremacy that lays out the boundaries of Parliament's power. In this case, the constitutional context is that the Governor General has discretion to dissolve Parliament pursuant to Crown prerogative and section 50 of the *Constitution Act, 1867*. Any tampering with this discretion may not be done via an ordinary statute, but requires a constitutional amendment …

[93] The Constitution may of course permit the Maneaba to fetter the appointment discretion or specify further requirements. It has done so, for example, with respect to the number of High Court judges in s 80(2): "[t]he judges of the High Court shall be the Chief Justice and such number of other

[19] *Conacher v Canada (Prime Minister)* [2010] 3 FCR 411 at 430.

judges, if any, *as may be prescribed*." There is no similar provision permitting the Maneaba to prescribe additional conditions on the qualifications a person must have to be appointed a judge in s 81(3) or on the content of the advice given to the Beretitenti in s 81(2). In the absence of a provision in the Constitution enabling the Maneaba to prescribe further conditions of appointment or the content of advice to the Beretitenti, the provisions of an ordinary statute that purports to do so are constitutionally invalid. A constitutional amendment is required.

[94] The second sentence of s 5(2)(a) is also unconstitutional. It purports to apply the first sentence to existing judges. There was only one existing judge at the time, and that was the applicant. There can be little doubt that a provision limiting a judge's tenure to a fixed term that purports to apply retrospectively to one judge after he was appointed adversely affects that judge's security of tenure and thus his independence. Its effect is to remove the judge from office in a manner that is inconsistent with the removal provisions of s 83 of the Constitution.

[95] I am not prepared at this stage to find ss 5(2)(b) and (c) unconstitutional. A similar provision was in place when the applicant was appointed, and s 83(2) refers to "infirmity of body or mind" as a ground for finding an inability to discharge the functions of office. Sections 5(2)(b) and (c) may be consistent with s 83(2), or it may be that medical evidence needs to be left to the Tribunal advising the Maneaba whether the judge should be removed on that ground. I have not heard argument on this specific point.

[96] As I have found s 83(1) is capable of supporting an interpretation that an appointment can be for an indefinite term, and in the absence of any provision in the Constitution limiting the advice that is given by the Chief Justice sitting with the Public Service Commission to the Beretitenti, I am

prepared to find s 5(2)(a) is inconsistent with the Constitution and void to the extent of the inconsistency.

The Applicant's Entitlement to Enter and Reside in Kiribati

[97] I turn now to Ms Kabure's third issue, the applicant's entitlement to enter and reside in Kiribati. She submitted that to refuse to issue a visa to a judge, or to cancel the judge's visa while he is still in office, thereby preventing him from performing his role, "is tantamount to the suspension or removal of the judge from office in a manner not contemplated by the Constitution."

[98] Mr Mweretaka submitted that the applicant must be treated the same as other foreign public employees. His "bottom line" was that the entry of any foreigner, whether a judge or a public servant, into Kiribati "must be controlled and monitored regularly by the Republic as a sovereign right hence the visa could never be for life."

[99] I do not read Ms Kabure's submission to be that the applicant should be granted a visa for life. The applicant is of course bound by the laws of Kiribati and, indeed, has sworn an oath to uphold them. I took her submission to be that any discretion created by the Immigration Act must be exercised in a manner consistent with the Constitution. The Constitution anticipates that persons who have served as judges in another country, and foreigners who have been admitted to practice in Kiribati for not less than five years, are eligible for appointment to the High Court of Kiribati. The appointment, tenure and removal provisions do not distinguish between foreign and I-Kiribati judges. The Constitution treats them all the same, and the Constitution prevails over any law inconsistent with it. That means provisions of the Immigration Act must be given an interpretation that is

consistent with the Constitution, and the exercise by a public official of a discretion created by the Immigration Act must also be consistent with the Constitution.

[100] This includes the decision to grant a visa, which of course in these times, can properly be accompanied by reasonable and proportionate quarantine requirements. It is not that the visa is granted for life, but the decision to grant a visa must be exercised in a manner that complies with the Constitution, particularly in the case of a Constitution that anticipates the appointment of a person with foreign judging experience to the High Court of Kiribati. As Gibbs J said in *Muhammad*, a judge "stands in a very special position. It is essential to the nature of the judicial office that a judge should be independent of the Executive …". Immigration officials therefore must interpret and apply the Immigration Act in a way that recognises the constitutional position of a judge. Any decision taken by an official that stops a judge performing his constitutional functions effectively removes the judge from office in a way not contemplated in s 83 of the Constitution.

Result

[101] For the reasons above, I make the following declarations:

(a) The applicant holds office as a judge of the High Court of Kiribati for an indefinite period, until such time as he dies, resigns or is the subject of any lawful and constitutional action terminating the appointment such as removal from office in accordance with s 83. He remains entitled to the salary, allowances, other remuneration and leave provided in the High Court Judges (Salaries and Allowances) Act 2017 and the Judicial Salaries and Allowances Regulations 2018.

(b) Section 5(2)(a) of the High Court Judges (Salaries and Allowances) Act 2017 (as amended by section 2 of the High Court Judges (Salaries and Allowances) (Amendment) Act 2021) is inconsistent with the Constitution and is therefore void to the extent of the inconsistency;

(c) The exercise of statutory discretions by public officials must recognise the constitutional nature of a judge and be in accordance with the Constitution.

[102] I give the respondent the opportunity to demonstrate good faith as a result of these declarations. Discretionary executive powers must not be used to effectively undermine judicial independence. It follows from these declarations that the applicant's salary, allowances and other entitlements must be restored, and that discretionary immigration decisions must accommodate the judge's special position as a constitutional office-holder.

[103] I also grant the parties leave to apply for any ancillary orders necessary to give effect to this decision.

Dated 11th day of November 2021

Hon William Kenneth Hastings
Chief Justice