

IN THE HIGH COURT OF FIJI

AT SUVA

CIVIL JURISDICTION

Judicial Review No. HBJ 05 of 2025

IN THE MATTER of section 5 of the Fiji Independent Commission Against Corruption Act 2007, section 44 of the Interpretation Act 1967 and sections 16, 81, 82, 112 of the Constitution of the Republic of Fiji 2013

IN THE MATTER of the decision of the First Respondent, acting on the advice of the Second Respondent, to revoke the appointment of the Applicant as the Commissioner of the Fiji Independent Commission Against Corruption on 2 June 2025.

BETWEEN : **BARBARA PAULINI BRIAR MALIMALI**
Applicant

AND : **THE PRESIDENT OF THE REPUBLIC OF FIJI**
First Respondent

THE PRIME MINISTER OF THE REPUBLIC OF FIJI
Second Respondent

THE ATTORNEY-GENERAL OF FIJI
Third Respondent

Counsel : **Ms T Waqanika & S Savu for Applicant**
Mr E Tuiloma & Mr P Nawaikula for First and Third Respondents
Mr S Valenitabua for Second Respondent

Hearing : **27 October 2025**

Judgment : **2 February 2026**

JUDGMENT

[1] The applicant, Ms. Barbara Malimali, was appointed Commissioner of the Fiji Independent Commission Against Corruption (**FICAC**) on 4 September 2024. Shortly after Ms Malimali’s appointment, His Excellency the President of the Republic of Fiji (**the President**) established a Commission of Inquiry (**COI**) to enquire into the propriety of her appointment. The COI presented its report to the President in May 2025. On 2 June 2025, the President, acting on the advice of the Honorable Prime Minister of the Republic of Fiji (**the Prime Minister**) revoked Ms Malimali’s appointment.

[2] Ms Malimali has brought the present judicial review proceedings seeking orders quashing the President’s decision and reinstating her to the position of Commissioner.

[3] There are a number of issues advanced by the parties. The critical issue, however, is whether the Prime Minister had the authority to advise the President to revoke Ms Malimali’s appointment. If the Prime Minister did not have this authority, then the revocation is ultra vires.

Background

[4] FICAC came into being in 2007 through the Fiji Independent Commission Against Corruption Act 2007 (**FICAC Act**). At the time of its enactment, the 1997 Constitution was in force¹.

¹ The 1997 Constitution was revoked by decree in 2009.

- [5] The FICAC Act made provision for a Commissioner and Deputy Commissioner. The original wording of section 6 provided that the President may appoint a Deputy Commissioner. Section 5 stated that the Commissioner was *'subject to the orders and control of the President'*, and *'shall hold office on such terms and conditions as the President may think fit'*.
- [6] Mr George Langman was appointed Deputy Commissioner in 2007 and remained in that position until 2019.
- [7] In 2016, there was an amendment to section 5. The amended provision stated that the *'Commissioner shall be appointed by President'*. By this time, the 2013 Constitution was in operation. Section 115 of the Constitution provided for the establishment of FICAC. Subsection (2) stated that FICAC *'shall consist of a Commissioner, Deputy Commissioner and such other officers as may be appointed by law'*. Section 115 was silent on how the Commissioner or Deputy Commissioner were to be appointed. These matters were, of course, prescribed in the FICAC Act.
- [8] In 2019, there were further changes to the FICAC Act. Sections 5 and 6 were both amended. Pursuant to the amendment, a Commissioner and Deputy Commissioner were to be appointed by the President *'on the recommendation of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney-General'*.
- [9] It appears that shortly after the 2019 amendment, and following Mr Langman's departure, Mr Rashmi Aslam was appointed as Commissioner.² He resigned in September 2023. In November 2023, Ms Francis Puleiwai was appointed Acting Deputy Commissioner.
- [10] Ms Puleiwai was in her position for a little over six months when the government decided to appoint a Commissioner – as the COI noted, there had not been a time since FICAC was established where the positions of Commissioner and Deputy Commissioner were both filled at the same time (although clearly the Constitution and the FICAC Act provides for both to be appointed).

² Pg 65 of COI Report.

[11] The relevant events as they pertain to the appointment of Ms Malimali to the position of Commissioner in 2024 are set out in the timeline below:³

Dates	Event
08/04/2024	Complaint made by Ms Alexandra Forwood to FICAC against Ms Malimali, who is then the Chairperson of the Electoral Commission of Fiji (ECF). The allegation is that Ms Malimali has sent a letter on 2 April 2024 to the Constitutional Offices Commission, in her capacity as Chairperson of ECF, purporting to speak for the ECF Commissioners, requesting the removal of the Supervisor of Elections, but without the ECF Commissioners' authority. ⁴ Ms Forwood states that she has received her information directly from one of the ECF Commissioners, being Mr Reginald Jokhan.
09/04/2024	Ms Puleiwai emails Ms Forwood acknowledging receipt of her complaint. The complaint is registered internally by FICAC.
13/04/2024	Ms Puleiwai refers the complaint to FICAC's Legal Division for a legal assessment as per usual internal process. The complaint, however, is not actioned by the Legal Division and remains pending awaiting legal assessment. ⁵
15/06/2024	The Judicial Services Commission (JSC) advertise the vacant position of Commissioner of FICAC with a close-off date of 28 June. Fifteen applications are received, one of which is from Ms Puleiwai.
10/07/2025	JSC meets and decide to re-advertise the position of Commissioner to encourage overseas applicants. JSC sets up

³ I have prepared a timeline as I found it difficult, at times, to follow the sequence of events as discussed by the COI.

⁴ The COI considered that there were two separate complaints arising from Ms Forwood's letter of 8 April 2024, the second complaint pertaining to a directive by ECF to the Supervisor of Elections (SOE). The SOE had received complaints about the conduct of politicians and had referred these to FICAC. The directive from ECF to SOE was to table the complaints with ECF first, as well as notify the persons that are the subject of the complaints, before referring them to FICAC.

⁵ The evidence of the Manager Legal at FICAC, Ms Bokini-Ratu, at the COI hearing is that this was an oversight due to the volume of work at the time.

	a Selection Panel to shortlist and interview applicants. The Panel comprises of Justice Salesi Temo (then Acting Chief Justice), Ropate Green (then Acting Permanent Secretary for Justice) ⁶ and Josaia Waqaivolavola (the Acting Chief Magistrate).
13/07/2025	JSC re-advertise the position of Commissioner with a close-off date of 26 July 2024. Eight applications are received, including another from Ms Puleiwai as well as an application from Ms Malimali. The Selection Panel make a shortlist of 6 applicants from the 22 applications received. One of the shortlisted applicants is Ms Malimali. Ms. Puleiwai does not make the shortlist. Two of the six applicants decide not to pursue their application.
20-21/08/2025	The Selection Panel interview the four applicants. Ms Malimali attains the highest score.
22 or 23/08/2024	Ms Malimali is informally informed that her application has been successful. ⁷
26/08/2024	JSC sends a request to the Legal Practitioners Unit (LPU) requesting a check on whether any of the applicants have a disciplinary history. LPU advise that there are three pending complaints against Ms Malimali and urgently process the same.
27/08/2024	LPU provides an update to JSC advising that the three complaints against Ms Malimali have been dismissed – COI accepted in its Report that the dismissals by LPU were ‘ <i>sensible</i> ’ and ‘ <i>took no issue</i> ’ with them. ⁸
28/08/2024	At 2pm, JSC sends a flying minute to its members ⁹ attaching details of the scores and summaries of the interviews with the four applicants. It is noted in the flying minute that the

⁶ Mr Green was also, and still is, the Solicitor General.

⁷ Chapter 5, para 172, page 228 of COI Report.

⁸ Chapter 5, para 105, page 188 of COI Report.

⁹ JSC comprises of the Chief Justice, President of the Court of Appeal, Permanent Secretary for Justice, a legal practitioner and a lay person; section 104(1) of the Constitution.

	<p>Selection Panel ‘<i>unanimously recommends</i>’ Ms Malimali to be appointed Commissioner.</p> <p>The President of the Court of Appeal and Mr Green respond by email the same day to confirm approval. It appears that JSC accept that Ms Malimali is confirmed given that the Acting Chief Justice and two members (a majority of JSC) have approved the appointment. It is unclear what, if any, response was provided by the lay member of JSC (Ms Vani Catanasiga). The legal practitioner member of JSC (Ms Shoma Devan Singh) sought further information from JSC’s Secretary on 29 August.</p>
29/08/2024	<p>Ms Forwood sends an email to Ms Puleiwai seeking an update on her April complaint and makes a second complaint against Ms Malimali, on this occasion complaining that Ms Malimali has disclosed private information regarding Ms Forwood’s voting status and tax status to Ms Lynda Tubuya, a politician.</p>
30/08/2024	<p>Ms Puleiwai learns that Ms Malimali is the successful applicant for the position of FICAC Commissioner.</p> <p>In response to Ms Forwood’s email of the previous day, Ms Puleiwai checks the status of the first complaint against Ms Malimali with Ms Bokini-Ratu. The matter has not been progressed since 13 April 2024. Ms Bokini-Ratu immediately allocates the matter to Mr Mausio for a legal opinion. Mr. Mausio prepares a legal opinion on the same day opining that there is a prima facie case against Ms Malimali warranting an investigation by FICAC.</p> <p>An investigation is launched the same day by FICAC. It obtains search warrants for the offices of ECF and the Constitutional Offices Commission (COC). FICAC executes the search warrant on the offices of ECF.</p>

	Ms Puleiwai sends a letter to the President to advise of FICAC’s investigation against Ms Malimali. ¹⁰
01/09/2024	Ms Puleiwai informs the Prime Minister of FICAC’s investigation into Ms Malimali and seeks one week to complete its investigation before Ms Malimali is appointed.
02/09/2024	<p>FICAC attempt to execute its search warrant on the offices of COC through the Solicitor General but is unable to do so.</p> <p>On the same date, Justice Temo consults the Attorney-General (Graham Leung) by email regarding the appointment of Ms Malimali as the Commissioner - as is required under section 5 of the FICAC Act. Mr Leung formally endorses the appointment.</p> <p>At 1:27pm, Mr Saumi from FICAC contacts Mr Leung to advise him of the investigation against Ms Malimali. The reason for the call pertains to FICAC’s unsuccessful efforts to execute the search warrant on the COC offices.</p>
03/09/2024	<p>Mr Leung contacts Ms Puleiwai to learn more about the investigation against Ms Malimali. Mr Leung subsequently calls Justice Temo and recommends that that Ms Malimali’s appointment is placed on hold.</p> <p>Later that same day Mr Leung receives a letter by email from the ECF Commissioners complaining about FICAC’s search warrant on 30 August and expressing support for Ms Malimali. They refute the allegation by Ms. Forwood. Mr Jokham, who Ms Forwood earlier identified as the person who had supplied the information to support her complaint</p>

¹⁰ COI found that Ms Puleiwai’s decision, and actions, to investigate the complaint against Malimali was not motivated by improper purpose. In my view, the correct inquiry is whether Ms Puleiwai had a conflict of interest upon learning of Ms Malimali’s appointment on 30 August 2024, given Ms Puleiwai was an unsuccessful applicant for the same position. The other salient question to have been considered is whether it was appropriate for Ms Puleiwai and FICAC to investigate Ms Malimali given Ms Malimali was the incoming Commissioner – or whether the complaints ought to have been passed to another agency, such as the Fiji Police, to investigate.

	<p>of 8 April 2024, is one of the signatories to the ECF letter.</p> <p>Shortly, thereafter, Mr Leung calls Justice Temo to inform him that based on the content of the ECF letter <i>‘there was no rational basis upon which I could object to or delay the Judicial Services Commission proceeding to confirm the appointment of Ms Barbara Malimali as Commissioner’</i>.¹¹</p>
04/09/2024	<p>Mid-morning: The President appoints Ms Malimali as the Commissioner of FICAC, effective from 5 September 2024.</p> <p>The Chief Registrar (Tomasi Bainivalu) accompanies Ms Malimali to the FICAC office to introduce Ms Malimali to the staff, advise them of the appointment, and inform them that Ms Malimali begins her tenure the next day. It appears that two of the staff involved in the investigation of Ms Malimali, being Mr Wakanivesi and Mr Saumi, express disappointment with Ms Malimali’s appointment to Mr Bainivalu and Ms Malimali.</p> <p>That evening, the FICAC team investigating the complaints against Ms Malimali, obtain four statements from ECF staff including the Supervisor of Elections. The FICAC team subsequently meet. Ms Puleiwai is present. It is agreed that that they will continue the investigation and that there is sufficient evidence to interview Ms Malimali and charge her for abuse of office.</p>
05/09/2024	<p>At 8am, Ms Puleiwai formally approves Mr Saumi’s request to arrest Ms Malimali if she resists FICAC’s request for an interview.</p> <p>Ms Malimali attends FICAC offices to commence her tenure as Commissioner.</p>

¹¹ Chapter 5, para 217, page 246 of the COI Report.

At about 8.30am, Mr Saumi gathers three FICAC officers, including Mr Wakanivesi, and approach Ms Malimali to inform her of their intention to interview her under caution in respect to the complaints against her. As Ms Malimali is reluctant to agree to any interview, they advise Ms Malimali that, acting on the instructions of Ms Puleiwai, they are placing Ms Malimali under arrest. Ms Malimali telephones Mr William Clarke¹² requesting his assistance at the FICAC offices and requesting that he contact the Chief Registrar to also come to the FICAC office.

Ms Malimali is taken down to the interview rooms to be interviewed. A short time later, several persons arrive at the FICAC office to discuss Ms Malimali's arrest. These include Mr Bainivalu (who has attended in his role as Secretary for JSC) as well as the following senior lawyers, William Clarke, Laurel Vaurasi, Amani Bale, and Nemani Tuifagalele. The FICAC officers present include Ms Puleiwai, Mr Saumi and Ms Bokini Ratu. There follows a lengthy meeting. At its conclusion, FICAC agree to release Ms Malimali.¹³ The COI made findings that the senior lawyers and the Chief Registrar bullied and intimidated the FICAC officers. The COI was critical of their attendance at the FICAC office. The COI expressed the view that their actions '*constituted an obstruction into an ongoing investigation*'.¹⁴ The COI was also critical of advice provided by the Chief Registrar at the meeting that the Acting Chief Justice had given a directive to registries not to accept anything filed by Ms Puleiwai, or anyone other than Ms Malimali.¹⁵

¹² Mr Clarke is President of the Fiji Law Society at the time.

¹³ The FICAC investigation file for Ms Malimali was subsequently transferred at the direction of Ms Malimali to the DPP's office on 19 September 2025 to complete the investigation.

¹⁴ Chapter 6, para 73, page 330.

¹⁵ Chapter 6, para 56, page 320.

	<p>Later that afternoon, JSC meet to discuss the events at the FICAC offices earlier that day. All JSC members attend except Ms Devan, who sends her apologies. JSC are of the view that Ms Puleiwai is potentially in breach of three offences; unlawfully assuming the Commissioner’s power, wrongfully assuming the Commissioner’s power and insubordination. Ms Puleiwai is called to JSC offices. She is advised that she has the option of resigning immediately and being paid in lieu of her notice period, or face charges for her conduct. She agrees to resign and immediately prepares a resignation letter.</p>
07/09/2024	Ms Puleiwai leaves Fiji.
11/09/2024	Ms Malimali, in her capacity as Commissioner of FICAC, issues a Stop Departure Order against Ms Puleiwai.

Appointment and conduct of Commission of Inquiry

[12] There followed, in the subsequent weeks, somewhat of an uproar amongst some over Ms Malimali’s appointment.

[13] On the advice of the Prime Minister, on 29 October 2024 the President established a Commission of Inquiry into the appointment of Ms Malimali. Justice David Ashton-Lewis was appointed as the Commissioner and Ms Janet Mason was appointed as Legal Counsel to assist the Commissioner. The Terms of Reference were set out in the appointment and read:

Inquire into the full circumstances and processes leading to the appointment of Miss Barbara Malimali as FICAC Commissioner, including but not limited to:

(a) The manner and process by which she was appointed.

(b) Whether her appointment was in accordance with section 5 of the Fiji Independent Commission Against Corruption Act 2007.

- (c) *The individuals involved in the decision to appoint the Commissioner, and the extent an appropriateness of their involvement.*
- (d) *Whether, and to what extent, there was any inappropriate involvement by any individuals in the appointment.*
- (e) *Whether, and to what extent, any individuals used their public office to improperly influence this selection and appointment process; and*
- (f) *Whether or not the process and the appointment of the Commissioner was unlawfully or improperly influenced by vested interests, including current FICAC cases or investigations on high profile individuals, including Members of Parliament, Ministers and senior public servants.*

[14] Justice Ashton-Lewis and Ms Mason were sworn in on 11 November 2024. The COI was Gazetted on 10 January 2025.

[15] Before the COI began its hearings, the Commissioner and Ms Mason met privately with a number of intended witnesses. Ms Malimali states that she met with the Commissioner and Ms Mason on 18 November 2024.

[16] Ms Malimali states that she was informed on 3 January 2025 that the hearings would commence on 6 January 2025 and was advised to arrange her own legal representation. On 5 January 2025, she instructed Ms Tanya Waqanika.

[17] The first witness for the COI hearings on 6 January 2025 was the Prime Minister. He provided his evidence in camera. Ms Malimali stated in her affidavit that neither she nor her counsel were permitted to hear this evidence.¹⁶

[18] On 24 January 2025, Ms Malimali terminated Mr Saumi's employment with FICAC. This was brought to the attention of the COI. The COI was concerned that Ms Malimali was interfering with its inquiry and sought the cooperation of JSC to suspend Ms

¹⁶ Ms Malimali's affidavit executed on 4 June 2025, at para 11.

Malimali for the duration of the COI proceedings.¹⁷ JSC's position was that it did not have power to suspend Ms Malimali. The COI disagreed and sought an 'urgent' legal opinion from Professor Philip Joseph KC¹⁸.

[19] Ms Mason wrote to Professor Joseph on 9 February 2025 setting out the COI's position on the legal situation, and expressing the view that JSC did have power to suspend Ms Malimali as did the Prime Minister. Three questions were posed for Professor Joseph to answer. Firstly, whether JSC had the power to suspend on advice to the President; secondly, whether on a reading of section 82 of the Constitution the Prime Minister had power to do so on advice to the President; and thirdly, in the event that the Commissioner is suspended whether an interim Acting Deputy Commissioner could be appointed.

[20] Professor Joseph responded with an opinion on 14 February 2025. Relying on section 44 of the Interpretation Act 1967, he opined that as JSC had the power to advise the President to appoint a Commissioner so too did JSC have power to advise the President to suspend the Commissioner. Professor Joseph opined that the Prime Minister also could effect a suspension of the Commissioner though section 82 of the Constitution. Finally, Professor Joseph agreed that there was provision in the FICAC Act to appoint an interim Deputy Commissioner. In short, Professor Joseph endorsed COI's view of the legal situation.

[21] On 18 February 2025, and following a meeting between Justice Temo and Ms Malimali, Ms Malimali agreed to go on leave until 12 March 2025. On the advice of JSC, the President appointed Mr Lisiate Fotofili to act as Deputy Commissioner while Ms Malimali was on leave.

[22] COI was not satisfied with the outcome arranged on 18 February. On 24 February 2025, Ms Mason prepared a draft letter on behalf of COI intended for the President seeking revocation of Mr Fotofili's appointment and the suspension of Ms Malimali. The draft letter set out COI's position that it is the Prime Minister (and not JSC) who

¹⁷ In fact, the COI had written to JSC on 13 December 2024 requesting her suspension; page 491 of COI Report.

¹⁸ Professor Joseph is an academic at Canterbury University in New Zealand and a barrister. He specialises in the areas of constitutional and administrative law. He is also an author of a leading text on the subject; '*Joseph on Constitutional and Administrative Law*'.

has lawful authority to advise the President on the appointment of the Commissioner and Deputy Commissioner of FICAC. COI's analysis of the relevant provisions in the Constitution and the FICAC Act was set out in the draft letter. COI relied on the wording of section 82 of the Constitution, to conclude that section 5 and other provisions in the FICAC Act were ultra vires as they were inconsistent with the Constitution.

[23] The draft letter was emailed to Professor Joseph on 24 February for his 'feedback'.

[24] Professor Joseph responded the next day,¹⁹ endorsing the analysis, findings and recommendations of COI. Professor Joseph agreed that section 5 of the FICAC Act was inconsistent with section 82 of the Constitution and that as the latter was the supreme law of Fiji, it prevailed. Accordingly, section 5 was unlawful. In light of this, and pursuant to section 82, Professor Joseph expressed the opinion that it was the Prime Minister who had the authority to advise the President on the appointment, removal, and suspension of the Commissioner and Deputy Commissioner of FICAC.

[25] It is not clear whether COI subsequently sent the draft letter to the President.

[26] The COI hearings concluded in March 2025. The COI completed its Report in May 2025.

COI Report

[27] The evidence before this Court is that three copies of the COI report were delivered to the President in May 2025. They were delivered on 1 May, 14 May and 21 May 2025. It is not clear from the evidence whether the three copies were the same – there is no suggestion that they were different. There is evidence that COI produced redacted and un-redacted versions. This appears to be the explanation for the three copies. In any event, the Report was formally handed to the President on 14 May 2025.

[28] The COI Report is a lengthy document. The main body of the Report is 437 pages. There are eight chapters. In addition to setting out in detail the events and evidence

¹⁹ 25 February 2025.

pertaining to the appointment of Ms Malimali, the COI also consider the history of FICAC and its legislative framework. The COI considered the substance of the complaints against Ms Malimali lodged by Ms Forwood with FICAC in April and August 2024, as well as Ms Malimali's vocational history – to consider her suitability for the position of Commissioner. The other matter investigated by COI are the events after Ms Malimali's appointment, including the stand-off at the FICAC offices on the morning of 5 September 2024 following Ms Malimali's arrest. Finally, FICAC has considered some of the decisions taken by Ms Malimali as Commissioner following her appointment.

[29] I have read the Report. I do not propose to set out the content of the Report at length.²⁰ It is, however, helpful to summarise some of the key findings and recommendations in the Report, which I do as follows:

- i. The COI considered in some detail the allegations and complaints made by Ms Alexandra Forwood to FICAC and the evidence supporting her allegations. It also considered the propriety of the investigation undertaken by FICAC. The COI considered that there was substance to the complaints and that the investigation by FICAC, whilst rushed, followed FICAC's normal process.
- ii. The COI found that Ms Malimali's appointment process was tainted by JSC failures. It considered there to be a conflict of interest in that the Acting Chief Magistrate had a previous working relationship with Ms Malimali which he ought to have disclosed and, thus, not been involved in her interview. Further, there was, according to COI, an alleged abysmal failure of senior officials to act professionally and ethically. COI identified these persons as being the Attorney-General, Chief Registrar, Solicitor General, and Acting Chief Justice. The COI considered that it was not acceptable for Ms Malimali to be appointed Commissioner while an active FICAC investigation was underway. The COI also considered that Mr Green ought not to be involved in the selection of the FICAC Commissioner as he had a pending FICAC complaint against him.

²⁰ I have relied in large measure on the Report to compile the timeline above.

- iii. There were a number of findings against Ms Malimali. The COI did not accept her evidence as truthful. It noted that she failed to inform JSC of the FICAC complaint against her when asked directly by the Solicitor General during her interview. She did not reveal during the appointment process that she had been denied a practicing certificate in Tuvalu in 2016 as a result of conduct in a case in that jurisdiction. Further, she had completed and signed seven consecutive practicing certificate declarations to the Legal Practitioners Unit (LPU) in Fiji, from 2018 to 2024, wherein she failed to disclose the fact that she had been denied a practicing certificate overseas. There is a specific question in the declaration on the matter, which reads, *‘Been refused a practicing certificate, had it suspended or cancelled in Fiji or elsewhere?’* In the 2018/2019 declaration, Ms Malimali answered ‘yes’ to the question and referred to Tuvalu in 2016. The next declaration, for the 2019/20 year, Ms Malimali ticked ‘No’ to the same question but stated in the comments *‘I think I am persona non grata in Tuvalu, I was apparently not liked by the Gvt. I think that was in 2015 or 2016. I used to represent the former PM, who died in 2018’*. She answered ‘no’ to the question in the 2020/21 declaration, ‘no’ in the 2021/22 declaration with an inaccurate explanation for being refused in Tuvalu, ‘no’ in the 2022/23 declaration, with no mention of the Tuvalu refusal and ‘no’ in the 2023/24 declaration with, again, an inaccurate explanation for the Tuvalu refusal.²¹
- iv. The COI was critical of the involvement of the Chief Registrar and senior lawyers at FICAC’s office on 5 September 2024, finding that this conduct amounted to bullying, intimidation, obstruction of justice and interference with the FICAC investigation.
- v. The COI was critical of the fact that JSC and the Attorney-General subsequently confirmed Ms Malimali’s appointment despite being aware that an active FICAC investigation against Ms Malimali was in train.

²¹ Chapter 5, paras 135-155, pages 199-219.

- vi. The COI found that there was political influence in Ms Malimali's appointment. They pointed to the fact that Ms Malimali intended to immediately shut down Ms Forwood's complaints (which apparently were mainly made against high profile politicians), that Ms Malimali had a close relationship with Mr Manoa Kamikamica (the then Deputy Prime Minister who was also being investigated by FICAC) and Ms Lynda Tubuya (another politician under investigation by FICAC), and that Ms Malimali was not, evidently, keen to file charges against Mr Biman Prasad (then Deputy Prime Minister) – FICAC had completed its investigation on Mr Prasad's complaint at the time of Ms Malimali's appointment and considered that there was sufficient evidence to lay charges. COI relied on the evidence of Mr Kalaveti Ravu (a Minister in the Government who was facing FICAC charges) who stated in evidence before the COI that he had been advised by Mr Kamikamica that the complaint against Mr Ravu by FICAC would go away once Ms Malimali was appointed Commissioner. Mr Kamikamica denied these allegations. The COI preferred Mr Ravu's evidence on the matter.
- vii. The COI suggested that a number of persons had potentially committed offences and recommended referral for police investigation.²²
- viii. The COI made a number of recommendations. These included that the appointments of Ms Malimali and Mr Fotofili be revoked immediately. That Ms Puleiwai either be reinstated or another Commissioner appointed. That the FICAC Act be amended as section 5 was invalid. Further, that the FICAC file for Ms Malimali be transferred back to FICAC for completion of its investigation as the Director of Public Prosecutions and the Deputy DPP were conflicted – both having a previous relationship with Ms Malimali.

Events post COI Report

[30] On 28 May 2025, the Prime Minister wrote to the President to advise that Ms Malimali be suspended '*with immediate effect and the complaints against her be referred to the*

²² Referrals were made to the Fiji Police for investigation following delivery of the COI Report. It appears, from media reporting, that the police undertook investigations and then provided the files to the Office of the Director of Public Prosecutions for advice on whether there is sufficient evidence to lay charges.

Fiji Police Force (FPF) for a full investigation'. Further, that 'pursuant to section 82 of the Constitution, it is recommended that either Mr Eliesa Tuiloma or Ms Lavenia Rokoika be appointed to act as the Commissioner in the interim', that the Government would prioritise an amendment to the FICAC Act to remove the Judicial Services Commission and replace it with the Constitutional Officers Commission as the appointing authority for the Commissioner and Deputy Commissioner of FICAC.

[31] In line with the advice from the Prime Minister, the President wrote to Mr Fotofili on 29 May 2025 to advise that his appointments was revoked effective immediately and that he was to hand his work items to the Acting Commissioner of FICAC, being Ms Rokoika. A letter was sent to Ms Malimali the same day by the President, advising her that she was suspended pending investigation by the Fiji Police, and she too was required to deliver her work items to Ms Rokoika.

[32] On 2 June 2025, the Prime Minister wrote to the President, recommending that Ms Malimali's suspension *'be rescinded and Ms Malimali's appointment to be revoked, as I recommended in my letter to Your Excellency on 23 May and 28th'*. The President wrote to Ms Malimali later the same day, to advise that his letter of 29 May 2025, *'was sent to you in error and is to be disregarded and replaced with this letter'*. The President further advised:

Pursuant to Sections 81(2) and 82 of the Constitution of the Republic of Fiji (Constitution), and upon receipt of the advice of the Honourable Prime Minister, your appointment as Commissioner of the Fiji Independent Commission Against Corruption (FICAC) is hereby revoked with immediate effect.

[33] It is Ms Malimali's evidence in her affidavit of 4 June 2025, that she learned on 2 June 2025, at about 5.30pm, from browsing Facebook, that there was a statement on the Fiji Government Facebook page, advising that she had had her appointment revoked. She had not received any formal communication of this prior to viewing the Facebook post. The letter from the President was subsequently delivered to her solicitor later that same evening.

[34] It appears that on 29 May and 6 June 2025, Justice Ashton-Lewis was interviewed on an Australian radio station, in respect to his conduct of the COI. He made a number of remarks about the conduct of the COI in the interview. A transcript of the interview has been provided by Ms Malimali in her supplementary affidavit, filed on 10 June 2025.²³ According to the transcript, Justice Ashton-Lewis provided the following statements in the interview:

... So I was asked, would I sit on a Royal Commission that was looking into the appointment of a woman into her office, as head of the Fiji Independent Commission Against Corruption? That is a body that is established by the Fiji Constitution, and it virtually answers to nobody, wow. It's very powerful. And it can, if it finds things are made out, it can destroy a life... Now this commission is highly political, and under the previous government, it was weaponised, and it was used by the then Attorney General and the then Prime Minister to really destroy enemies. Gotcha. Trumped up charges would be laid and trumped up decisions would be made. Now, when Sitiveni Rabuka came back into office two years ago, the pressure on him was clean up this body. Its shortened name is FICAC, Fiji Independent Commission Against Corruption. Would you please clean it up and make it do its job properly. Well, a woman was appointed to it who was universally seen as corrupt, and she was universally seen as someone who would protect high-ranking people and any complaints made against them would be closed or would be decided quickly, not on full evidence, and they would be found to have nothing to answer to. So the pressure on the Prime Minister over the last two years was, could you please investigate this Commission, and this woman, she is unsuitable for the job. She is unqualified for the job by dint of her background, and no one trusts her. Well, no one other than those who wanted her to get in. Now those who wanted her to get in were still are senior members of the government who claim to be totally committed to the current regime, but they've had five of them have had terrible accusations made against them and complaints made to FICA against them, and it's been noticed that this woman is seemingly delaying them, has closed some and so there's been a push to form a Presidential commission to look into her appointment. ...

²³ It does not appear that the respondents dispute the accuracy of the transcript.

...

...Now I found that there were nine people who had done...things such as lied under oath. That's called perjury. I found that nine of them obstructed the course of justice and that they had also perverted the course of justice in the appointment of this particular woman... So now what's happened is the Prime Minister is considering it. I have received word that he's going to act on all my recommendations in relation to nine people... My recommendation has been act on the recommendations first before you release it to the public. And the reason being, we received pretty good intelligence. That's counsel assisting and myself that those who are named in it are going to seek to bring an injunction to stop it being released....

...

...One of these people that I identified was someone who's well, they all smile at his face and stab him in the back if I get the chance. And one of them is a wannabe Prime Minister, gotcha, and he thinks he should be, well, if Sitiveni Rabuka acts, he's never going to be Prime Minister, because I found disgraceful things that he was doing, yet smiling to the Prime Minister...

[35] Needless to say, that given that the COI Report had only recently been presented to the President and the consequences of the COI findings and recommendations were still playing out in Fiji, and being investigated by the Fiji Police, the interview by the former Commissioner of the COI was ill advised.

[36] On 26 June 2025, the Prime Minister advised the President to release a redacted version of the COI Report. A redacted version was released to the public on 1 July 2025.

Present Proceedings

[37] Two days after Ms Malimali had her appointment as Commissioner revoked, she filed the present proceedings. She sought leave which was granted on 21 July 2025.

- [38] The proceedings have been brought from the **advice** of the Prime Minister dated 2 June 2025 to revoke her appointment and the **decision** by the President of the same date, acting on the Prime Minister's advice, revoking Ms Malimali's appointment.
- [39] The grounds for Ms Malimali's review are that the Prime Minister did not have the authority to advise the President, such authority instead vesting in the Judicial Services Commission as per section 5 of the FICAC Act. Ms Malimali further claims that she could not be removed without adherence to clause 7 of her contract and compliance with section 112 of the Constitution. Secondly, Ms Malimali claims that she been denied natural justice and not given an opportunity to address the allegations contained in the recommendations and findings of the COI before the Prime Minister and President acted upon the same. Thirdly, and finally, Ms Malimali claims that the Prime Minister did not act reasonably when he relied on the findings and recommendations of the COI.
- [40] The relief sought by Ms Malimali include an order and/or declaration that the advice and decision of 2 June 2025 are unlawful and ultra vires. She seeks reinstatement to the position of Commissioner and seeks general damages, special damages, interest and costs.
- [41] A number of affidavits have been filed by the parties. Indeed, there is a large amount of evidence presented to this Court. Ms Malimali has filed her original supporting affidavit dated 4 June 2025, a supplementary affidavit dated 10 June 2025, a second supplementary affidavit dated 4 August 2025, a reply affidavit dated 4 July 2025 and, finally, a further reply affidavit dated 3 October 2025.
- [42] With respect to the respondents, an affidavit was filed for Mr Mainavolau dated 27 June 2025. The First and Third Respondents filed affidavits for Lesikimacuata Korovalu (Permanent Secretary of the office of the Prime Minister) and Vukidonu Qionibaravi (Official Secretary in the office of the President) both on 16 September 2025. The two deponents annexed the COI Report as well as the documents for the Prime Minister and President pertaining to the establishment of the COI and the revocation of Ms Malimali's appointment.

Decision

- [43] There are three issues raised by Ms Malimali, being:
- i. Whether the President was permitted to revoke her appointment as Commissioner on the advice of the Prime Minister?
 - ii. Whether Ms Malimali was denied natural justice prior to the decision of 2 June 2025?
 - iii. Whether the Prime Minister acted reasonably, when advising the President, in reliance on the findings and recommendations of the COI Report?
- [44] If the Prime Minister did not have authority to advise the President on the revocation of Ms Malimali's appointment then this is determinative of the proceeding and the second and third questions do not require determination.
- i. **Did the Prime Minister have authority to advise the President to revoke Ms Malimali's appointment?**
- [45] The COI formed the view that section 82 of the Constitution only permitted a body or authority to advise the President if the Constitution expressly conferred that power on the body to advise the President. The power conferred on JSC to advise the President on the appointment of a FICAC Commissioner (and Deputy Commissioner) arises through section 5 of the FICAC Act and not the Constitution. In light of this, COI was of the view that section 5 is ultra vires and that the Prime Minister has power under the first part of section 82 to advise the President. COI relied on its own analysis of the material provisions and placed stock on the fact that Professor Joseph endorsed COI's analysis.
- [46] Ms Malimali's position is that section 115(2) of the Constitution read alongside section 5 of the FICAC Act, authorizes JSC (not the Prime Minister) to advise the President. Further, she argues that the Prime Minister is not the appropriate office to be involved in advising the President on the appointment of a Commissioner for FICAC. Reliance is

placed on passages from the ‘Reeves report’²⁴ which suggests that the Prime Minister ought to have no role in the appointment of positions such as the Director of Public Prosecutions office, which are intended to be independent and free of political influence (much like the FICAC Commissioner).

[47] Counsel for the First and Third Respondents offer a number of alternative arguments. They do not adopt the COI’s interpretation of section 82. The First and Third Respondents, in fact, accept that section 5 is lawful and that JSC does have the authority to advise the President on the appointment of the Commissioner.²⁵ They argue, however, that in limited circumstances where JSC is ‘*constitutionally paralyzed*’ the Prime Minister can temporarily stand in the shoes of JSC and advise the President on an appointment (or revocation of an appointment). They say that based on the findings of COI, JSC was constitutionally paralyzed.

[48] It appears that not even the Second Respondent adopts the COI’s interpretation of section 82. As with the First and Third Respondents, the Second Respondent argues that the Prime Minister is a legitimate temporary substitute for JSC where JSC is constitutionally paralyzed. The Second Respondent claims that JSC was paralyzed because of the conduct of its members – as per the findings of the COI.

Analysis of the Constitution and FICAC Act

[49] Whether the Prime Minister had authority to advise the President to revoke Ms Malimali’s appointment, turns on an analysis of the provisions in the 2013 Constitution. As such, it is helpful, before embarking on an analysis of these provisions, to consider the principles that this Court should apply.

[50] The Supreme Court has had two recent occasions to consider the 2013 Constitution. **In the matter of a reference by Cabinet for an opinion from the Supreme Court** [2025] NZSC 20 (29 August 2025) the Supreme Court traversed the history of the Constitutions of Fiji beginning with the 1970 Constitution and the successive

²⁴ The Fiji Islands: Towards a United Future. Report of the Fiji Constitution Review Commission 1996.

²⁵ See pg 25, para 122 of First and Third Respondent’s submissions dated 10 November 2025.

Constitutions in 1990, 1997 and 2013. The circumstances surrounding the enactment of the 2013 Constitution were described by the Supreme Court in the following terms:

[85] In March 2012 the Bainimarama Government announced that a new constitution would be developed by a constitutional commission and debated and approved by a constituent assembly. A decree was promulgated setting up the Commission. A separate decree, the Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012, set out the procedure that was proposed for the development and adoption of the new Constitution. Section 3 of this Decree provided that the purpose of the Decree was to adopt a Constitution for Fiji that, amongst other things, “results from full, inclusive and fair participation of Fijians”. The Commission, headed by Dr Yash Ghai was appointed and commenced work in July 2012. It produced a report and draft constitution in December 2012. The Government, however, rejected the Yash Ghai Commission draft and, as well, did not set up a constituent assembly. Instead, the Government produced its own draft constitution in March 2013. After a comparatively brief consultation process of around a month, the present Constitution of the Republic of Fiji (the 2013 Constitution) was adopted by Decree on 6 September 2013.

[51] The Supreme Court identified limitations on the court’s role in interpreting the Constitution and discussed the principle of remedial interpretation:

[199] We must respect the limits of the judicial role which preclude a general merits review and rewriting of the 2013 Constitution. We accept that if the amendment procedures provide a workable mechanism for democratic change, any unsatisfactory elements of the 2013 Constitution could be resolved over time and in a democratic way, leaving no occasion for judicial involvement.

...

The role of remedial interpretation?

[210] Remedial interpretation is a familiar concept particularly in the area of constitutional law and human rights legislation. For example, a statute which on its ordinary interpretation would exceed the constitutional power of the legislature which enacted it, may be read to conform with the law-making power. That may simply involve a choice, from competing available constructions, of that construction which is within power. If no such construction is available on ordinary principles of interpretation, then there may be a reading down of the statute to bring it within the power.

[52] **In the matter of a reference by Cabinet for an opinion from the Supreme Court** [2024] FJSC 20 (28 June 2024), the Supreme Court considered the interpretation to be given to section 105(2)(b) of the Constitution, in particular the words ‘*been found guilty of any disciplinary proceedings involving legal practitioners, whether in Fiji or abroad*’. The Supreme Court considered the interpretative principles to apply to the Constitution, referring with approval to the following discussion by the same court in *Qarase v Chaudhary* [2003] FJSC 1:

[27] *In Qarase this Court was required to interpret and apply the 1997 constitution. It set out its approach in the following passages cited by the participants:*

62. *Statutory and constitutional interpretation must always take as its point of departure the natural and ordinary meaning of the words appearing in the provision to be construed and read according to their context. ... Sometimes, as in this case, the words so read will yield only one construction which may be called “the plain reading of the provision”. ...*
63. *Construction builds upon the natural and ordinary meaning of the words in a constitutional provision. The way in which the words, taken together, are to be read will often involve selection from among a number of possible readings. That selection must have regard to the context which includes the whole of the document*

identified as the Constitution (Amendment) Act 1997. It must also have regard to the interpretive principles which are found in the Constitution itself and which apply to the whole of its text. ... The purpose or object underlying the provision to be construed, the spirit of the Constitution as a whole, context, in the extended sense of the context in which the Constitution was drafted, and social and cultural developments relating to particular human rights, all have a part to play by virtue of s 3. ...

64. Construction is a multi-dimensional process. It is not appropriate to approach a text on the basis that some kind of ambiguity must first be found to exist in a specific provision before taking into account the whole of its context and other relevant principles and considerations. At the very least context must be considered in the first instance.

65. This is of particular significance when interpreting a constitution. A basic rule of interpretation is that the nature of the document being construed is itself a matter to be considered ...

...

67. A narrow literalism is not an appropriate way to interpret a constitution. Such a text, perhaps more than any other, must be interpreted by reference to the natural and ordinary meaning of its words, but not literalistically, and in its total context as well as by reference to the principles which it lays down for its own interpretation.

[53] The Supreme Court proceeded to state:

[28] We take four relevant points from these passages:

a. First, the starting point is the natural and ordinary meaning of the language at issue, construed in its context. This may produce a single

“plain reading” of the relevant provision, which will resolve the issue of interpretation.

- b. Second, in considering the natural and ordinary meaning of the language used, the Court must take into account the interpretive directions contained in the constitution, the purpose of the provision under consideration and the constitution’s broader context.*
- c. Third, taking account of context in ascertaining meaning is not dependant on finding an ambiguity in the language being interpreted. Particularly in a constitutional setting, context is always important in the interpretative process.*
- d. Fourth, the Court must not take a narrow, literalistic approach to interpreting a constitution, ie, an approach which interprets the language in isolation rather than in light of its overall purpose and context and of the constitutionally mandated principles of interpretation.*

[29] We accept these propositions and turn to consider the interpretative principles in the Constitution itself.

(ii) Relevant constitutional provisions

[30] Section 3(1) of the Constitution provides:

Principles of constitutional interpretation

(1) Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.

The significant feature of this direction is that the process of interpretation or application of the Constitution requires a consideration of both the purpose and objects of the Constitution as a whole and the values underlying a democratic society based on dignity, equality and freedom. In other words, the Constitution

requires that a contextual approach be taken, rather than one which simply looks at the meaning of words in isolation from their overall setting. As we have said, an independent, well-qualified and trustworthy judiciary is vital to a functioning democracy.

[54] And at [34]:²⁶

The Constitution was promulgated against the background that:

(a) There was no extensive public consultative process prior to its adoption; rather, it was the work of a small group of officials.

(b) When it was promulgated, Fiji had an extensive body of statutory law. It is not clear that to what extent there was close consideration of how the Constitution (or particular provisions in it) would affect that existing statutory law (or elements of it). Put another way, it cannot be assumed that all instances of inconsistency were identified at the time, much less that there was a deliberate decision that particular constitutional provisions should prevail over relevant existing statutory provisions.

These features may, in some settings, weaken the notion of constitutional supremacy, or at least require the Court to consider how to mesh what appear to be inconsistent provisions so as to avoid problematic outcomes.

[55] As per the above discussion by the Supreme Court, it is important to take a plain meaning of the words in the provision but not lose sight of the purpose of the provision and its context. My analysis begins with sections 81 and 82 of the Constitution as it is the President who has made the decision that is the subject of the present proceedings.

[56] Section 81(2) of the Constitution provides that the President is the ‘*Head of State, and the executive authority of the State is vested in the President*’. Section 82 reads:

²⁶ Footnotes not included.

President acts on advice

In the exercise of his or her powers and executive authority, the President acts only on the advice of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.

- [57] Put simply, the President does not act independently when he exercises executive authority. The President may only act on advice in the circumstances provided under section 82. The President may act on the advice of **Cabinet**, or on the advice of a **Minister**, or on the advice of a **body** or **authority**.
- [58] Two bodies established under the Constitution are the Judicial Services Commission (established under section 104) and the Constitutional Offices Commission (established under Section 132).
- [59] Section 104 is found at '*Chapter 5 – Judiciary*'. The members of the JSC comprise of the Chief Justice, President of the Court of Appeal, Permanent Secretary responsible for Justice, a legal practitioner and a layperson (five persons). JSC appoints Judges, investigates complaints against judicial officers and, pursuant to subsection (3) '*has such other powers and functions as may be prescribed by a written law*'. Subsection (8) provides, '*[i]n the performance of its functions or the exercise of its authority and powers, the Commission shall be independent and shall not be subject to the direction or control of any person or authority, except by a court of law or as otherwise prescribed by written law*'.
- [60] JSC was set up, in part, to manage the appointment and removal of judicial officers.
- [61] Also found at Chapter 5, under Part B, are provisions establishing the office of the Independent Legal Services Commission (**ILSC**) (section 114), office of the Solicitor General (section 116) and the office of the Director of Public Prosecutions (section 117). It is no coincidence that the FICAC provision (section 115) is found alongside the provisions for the ILSC, Solicitor General and Director of Public Prosecutions.

[62] Express provision is made for the appointment of the Solicitor General,²⁷ the Director of Public Prosecutions,²⁸ and the Commissioner of ILSC,²⁹ by the President on the recommendation of JSC following consultation with the Attorney General. Indeed, all appointments expressly prescribed under Part B of Chapter 5, are by the President on the recommendation of JSC, following consultation with the Attorney General; these include appointment of members of the Public Service Disciplinary Tribunal (section 120(5)), and appointment of members of the Accountability and Transparency Commission (section 121(5)).

[63] Unlike sections 114, 116 and 117, section 115 does not contain an express provision stating that the Commissioner (or Deputy Commissioner) of FICAC is appointed by the President on the advice or recommendation of JSC. However, the absence of such a provision does not necessarily mean that it was intended that the Commissioner be appointed in some other manner.

[64] In my view, the absence of such a provision in section 115 was deliberate by the drafters of the 2013 Constitution. The reason is that when the 2013 Constitution was enacted there was already provision for appointment of a Commissioner and Deputy Commissioner in the FICAC Act. It was, therefore, unnecessary for the Constitution to make express provision at section 115. Indeed, the wording of section 115(2) supports this view, as it expressly states that *‘the Commission shall consist of a Commissioner, Deputy Commissioner and such other officers as may be appointed by law’* – it is notable that there is no equivalent provision to section 115(2) found at sections 114, 116 or 117. The FICAC Act is the ‘law’ which makes provision for the appointment of the Commissioner (section 5), the Deputy Commissioner (section 6) and such other officers (section 8). And, of course, sections 5 and 6 expressly state that the President appoints the Commissioner and Deputy Commissioner on advice from JSC following consultation from the Attorney-General.

[65] I am satisfied that the placement of the FICAC provision (section 115) under Part B of Chapter 5 is also deliberate. There is a commonality between FICAC and the offices of ILSC and DPP. They each are required to operate and function independent from

²⁷ Section 116(5).

²⁸ Section 117(3).

²⁹ Section 114(5).

political interference. The fact that JSC is involved in providing a recommendation to the President on appointments under Chapter 5 is consistent with its Constitutional obligation to be independent.

[66] In my view, there is a further reason supporting JSC's involvement in the appointment of the FICAC Commissioner and Deputy Commissioner. It is consistent with JSC's constitutional involvement in setting the remuneration for the Commissioner and Deputy Commissioner. Section 115(12) reads:

*The Commissioner and the Deputy Commissioner shall be entitled to such remuneration as **determined by the President acting on the advice of the Judicial Services Commission following consultation by the Judicial Services Commission with the Attorney-General**, and any such remuneration must not be varied to their disadvantage, except as part of an overall austerity reduction similarly applicable to all officers of the State.³⁰*

[67] Section 115(12) designates JSC as the body responsible to advise the President on the remuneration for the Commissioner and Deputy Commissioner. It would be inconsistent with the scheme of Part B of Chapter 5 and section 115, and somewhat peculiar, for the Prime Minister (or indeed another body or authority) to advise the President on the appointment of the Commissioner and Deputy Commissioner.

[68] The other body established under the Constitution is the Constitutional Offices Commission (COC) which is set up under Section 132. The COI recommended that COC replace JSC as the body responsible for advising the President on appointment of the FICAC Commissioner and Deputy Commissioner. Section 132 is found under 'Chapter 6 - State Services'. The members comprising COC are the Prime Minister, Leader of the Opposition, the Attorney General, two persons appointed by the President on the advice of the Prime Minister, and one person appointed by the President on the advice of the Leader of the Opposition. It has a much more political make up than JSC. All of the members are either politicians or selected by politicians.

³⁰ My emphasis.

[69] COC is responsible for providing advice to the President on the appointments of a number of office holders, including the Commissioner of Police (section 129), the Commissioner of the Fiji Corrections Service (section 130), the Commander of the Military Forces (section 131), the Auditor General (section 151) and the Governor of the Reserve Bank of Fiji (section 153). These roles are distinct from those found under Part B of Chapter 5.

Section 82 of the Constitution

[70] In my view, the above analysis of the provisions in the Constitution and the FICAC Act overwhelmingly support the legal position that JSC is the body that advises the President on the appointment of the FICAC Commissioner.

[71] However, COI took a different view of the Constitution, relying on the wording of section 82. COI interpreted section 82 as requiring the **body** or **authority** to be explicitly authorized under the Constitution to advise the President. Here of course the source of the authority for conferring the power on JSC to advise the President comes from section 5 of the FICAC Act and not the Constitution. If COI's interpretation of section 82 is correct, then section 5 is ultra vires.

[72] COI's interpretation of section 82 is explained by Ms Mason in her draft letter to the President dated 24 February 2025. Paragraphs 11 and 12 of the draft letter read:

*11... the JSC function in relation to the suspension of the FICAC Commissioner is not sourced in the Constitution. It is instead set out in s 5 of the FICAC Act 2007. Consequently, JSC is not **prescribed by the Constitution for a particular purpose as a body or authority on whose advice the President acts in that case.** The JSC's powers of appointment suspension, and/or, dismissal of the FICAC Commissioner **are not** prescribed by the Constitution. They are sourced in s 5 of the FICAC Act.*

12. Consequently, the President cannot act on any recommendation from the JSC in relation to FICAC appointments, suspensions, or dismissals. It therefore means that s 5(1) along with ss 5(3), 6(1), 6(2), 7(1), and 7(2) of the FICAC Act are all ultra vires the Constitution, because the President, under s 82, can only act on the

advice of the Cabinet or a Minister or of a body prescribed under the Constitution for a particular purpose as a body on whose advice the President acts in that case.

[73] Professor Joseph endorsed COI's analysis in his legal opinion dated 25 February 2025. Relying on the wording of section 82, Professor Joseph stated at paragraph 9 of his opinion:

... The Constitution does not prescribe the JSC as the body that will advise HE³¹ in making appointments, suspensions, etc to the FICAC. Rather, 'the written law' (namely, s 5(1) of the FICACA) prescribes the JSC as being that body. This explains why the provisions of the FICACA listed above are constitutionally invalid: they contravene the terms of s 82 of the Constitution.

[74] Professor Joseph stated that section 82 is 'exhaustive' as to the persons or bodies who may advise the President and that the word 'only', found in section 82, is instructive; that is, unless the requirements under section 82 are complied with, the body is not authorized to advise the President.

[75] Before considering section 82 in more detail, it is timely to restate the wording. Section 82 reads:

In the exercise of his or her powers and executive authority, the President acts only on the advice of Cabinet or a Minister or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.

[76] It is helpful to break down the wording to better understand its meaning. The wording of the provision can be broken down as follows:

In the exercise of his or her powers and executive authority

³¹ The President.

the President acts only

on the advice of

- *Cabinet*
- *or a Minister*
- *or of some other body or authority prescribed by this Constitution for a particular purpose as the body or authority on whose advice the President acts in that case.*³²

[77] It is plain from the above, that the President acts only on the advice of one of three persons or entities; Cabinet, a Minister or a body/authority. The first two do not concern us (unless the third does not apply here). It is the interpretation to be placed on the wording of the third bullet point that is crucial to the present case.

[78] In interpreting the words at the third bullet point, COI (and Professor Joseph) give particular emphasis to the words ‘**prescribed by this Constitution**’. They read these words to mean that the Constitution must prescribe that the body or authority is to provide advice to the President. In my view, this is a strained interpretation of the ordinary words. The COI’s interpretation only works if the provision instead reads, ‘*or of some other body or authority prescribed by this Constitution ~~for a particular purpose~~ as the body or authority on whose advice the President acts in that case*’.³³ In other words, it requires removing, or ignoring, the words ‘for a particular purpose’. If COI’s interpretation is to be accepted, it requires ignoring the words, ‘for a particular purpose’. In other words, they are surplusage. I do not accept that the drafters of the 2013 Constitution had no reason or purpose for including those words. They must be given meaning.

[79] What then is intended under section 82 to be ‘prescribed by this Constitution’? Having carefully considered the various possible readings, and break down of the words found

³² My emphasis.

³³ My crossing out of ‘for a particular purpose’.

in the third bullet point, I am satisfied that these words only make sense if they are read as follows:

or of some other body or authority

- *prescribed by this Constitution for a particular purpose*
- *as the body or authority on whose advice the President acts in that case.*

[80] Reading the words as they are framed above, it is clear that it is the body or authority that must be ‘**prescribed by the Constitution**’ for a particular purpose. JSC is, of course, a body prescribed under the Constitution for a particular purpose. On this reading, there is no requirement that the Constitution prescribe that JSC is to advise the President on the appointments of the FICAC Commissioner. That being the case, section 5 of the FICAC Act is not ultra vires and JSC is the correct body to advise the President. In my view, this interpretation accords with a plain reading of section 82 and sits comfortably within the scheme and context of Part B of Chapter 5 along with section 115.

[81] Here, of course, the decision that is the subject of these proceedings did not involve the President appointing Ms Malimali as Commissioner, but a decision revoking her prior appointment. Section 5 of the FICAC Act only provides a power to appoint. There is no provision in the FICAC Act or the Constitution empowering the President to revoke the appointment. It is necessary to refer to section 44 of the Interpretation Act, which reads:

Where by or under any written law, a power or duty is conferred upon any person or authority to make any appointment or to constitute or establish any board, commission, committee or similar body, then, unless a contrary intention appears, the person or authority having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment, of, and to reappoint or reinstate, any person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, any

*board, commission, committee or similar body appointed, constituted or established, in exercise of such power or duty, and to reappoint, reconstitute or re-establish the same, **provided that where the power or duty of such person or authority so to act is exercisable only upon the recommendation, or is subject to the approval or consent, of some other person or authority, then such powers shall, unless a contrary intention appears, be exercisable only upon such recommendation or subject to such approval or consent.***³⁴

[82] Applying section 44 here, the President is permitted to revoke an appointment but only on the advice of JSC following consultation with the Attorney General.

[83] As I have indicated, the respondents do not adopt the COI's interpretation of section 82 and, instead, accept that JSC is authorised under section 5 to advise the President. I note that the First and Third Respondents construction of section 82 accords with my interpretation. Their written submissions read at paragraph 127:³⁵

*This can be distinguished with the third category, which is a body or authority, and it is pertinent to note that the Constitution sets out specific qualifiers for such a body or authority empowered to advise the President under Section 82. **That is the body or authority must be prescribed by the Constitution for a particular purpose.***³⁶

[84] The respondents nevertheless argue that the Prime Minister was temporarily permitted in the present matter to advise the President because JSC was '*constitutionally paralyzed*'.

Was JSC 'constitutionally paralyzed'?

[85] The so-called paralysis of JSC is said, by the respondents, to arise from COI's critical findings against JSC. The main criticisms of JSC by COI are summarized as follows:

³⁴ My emphasis.

³⁵ Submissions on the Application for Judicial Review for First and Third Respondents dated 10 November 2025.

³⁶ My emphasis.

- (i) The ‘*abysmal failure of senior officials*’, including members of JSC, to act professionally and ethically.³⁷ The criticism here being to allow, and proceed with, the appointment of Ms Malimali whilst she had an active investigation with FICAC.
- (ii) One person on JSC’s Selection Panel, Mr Waqaivolavola, had a conflict as he knew Ms Malimali and ought not to have been involved in her interview.
- (iii) A member of JSC, Mr Green, had a pending complaint against him with FICAC and ought not to have been involved in the appointment of the Commissioner. COI is also critical of Mr Green in respect to efforts by FICAC to execute a search warrant on COC’s offices during the Malimali investigation. COI considered that he stalled the execution of the search warrant.³⁸
- (iv) It was inappropriate for JSC to decide the appointment of the Commissioner by a ‘flying Minute’.
- (v) The appointment process was rushed and this contributed to ‘*multiple fundamental flaws*’. This included a failure to properly vet Ms Malimali, do a reference check, a FICAC check, and psychometric assessments.

[86] The COI also held the view that Ms Malimali was not a suitable person to be appointed as Commissioner of FICAC - COI was critical of JSC for failing to discover Ms Malimali’s unsuitability for the position. COI’s criticisms of Ms Malimali are summarized as follows:

- (i) Ms Malimali had an active FICAC investigation against her (and according to COI, the complaints had merit).
- (ii) Ms Malimali failed to inform JSC of the FICAC complaint/investigation. When asked by Mr Green at her interview about the status of any FICAC

³⁷ Chapter 8, para 34, page 427 of COI Report.

³⁸ Chapter 4, paras 128, 133 at pages 135 and 139.

investigations, Ms Malimali failed to disclose the pending complaint. Ms Malimali had given evidence before the COI that she was aware of the complaint from Ms Forwood since about April 2024. By 30 August 2024, when FICAC executed a search warrant on ECF, Ms Malimali would have been aware that there was an active investigation against her and should, according to COI, have informed JSC immediately of the investigation in respect to her application for appointment as Commissioner, but she did not.³⁹

- (iii) Ms Malimali was involved in a ‘*serious issue related to an inappropriate encounter*’ in Tuvalu in 2016 which was the subject of a decision by an appellate court in that jurisdiction and an adverse finding by the court.
- (iv) As a result of the 2016 incident, in March 2017 Ms Malimali was declined a practicing certificate in Tuvalu on the basis that she was not of fit and proper character.
- (v) Ms Malimali completed seven consecutive practicing certificate declarations, from 2018 to 2024, to practice in Fiji and did not fully and/or properly disclose that she had been barred from practicing overseas.
- (vi) Her appointment as Commissioner was influenced by political and other interests. COI relied here on Ms Malimali allegedly stopping, on commencement of her tenure, investigations into complaints by Ms Forwood, and questioning the charges proposed to be laid against Mr Prasad. COI also placed weight on the evidence of Mr Ravu who stated that he had been informed by Mr Kamikamica that the latter would arrange for Ms Malimali to ‘squash’ Mr Ravu’s charges once she was appointed.

[87] There are two issues to consider with respect to the respondents argument that JSC was paralyzed (thus permitting the Prime Minister to advise the President to revoke Ms Malimali’s appointment). Firstly, whether there is a legal basis for the Prime Minister having such temporary authority to advise the President? Secondly, whether factually it can be said that JSC was paralyzed?

³⁹ Chapter 5, paras 106-119, pages 188-194.

- [88] The courts should be cautious, and indeed reluctant, to interfere with the powers conferred on a body by legislation or the Constitution. In order for the respondent's argument to have any legs, requires, in my view, some legislative or Constitutional support. There is none.
- [89] Also, I am satisfied that the COI findings fall well short of demonstrating that JSC was constitutionally paralyzed. In effect, the respondents suggest that on the basis of the COI findings, the members of JSC were compromised.
- [90] JSC was capable of considering COI's findings and making its own decision whether to recommend to the President to revoke Ms Malimali's appointment – or indeed, take any other course of action it considered appropriate in light of the findings of COI. JSC has five members. COI was critical of two of those members. There were still three other members which were not the subject of criticism. Pursuant to section 104 of the Constitution, a quorum for a JSC meeting consists of the chairperson and two members. JSC is permitted to regulate its own procedure and make its own rules. JSC could have addressed COI's criticisms by calling a meeting to consider revocation of Ms Malimali's appointment (or any other recourse) and any members who are allegedly conflicted could remove themselves.
- [91] Finally, I will also briefly address the other arguments advanced by the respondents. I will deal first with the arguments for the First and Third Respondents. Mr Tuiloma argued that as per the COI findings, Ms Malimali's appointment was made following a defective process and that, in such circumstances, the President was permitted to correct the error on advice from the Prime Minister. No provision is identified to support these powers. Even were I to accept that it was permissible, there is no obvious reason why JSC could not correct the matter itself. It was also argued by Mr Tuiloma that the functional incapacity of JSC permitted the President to act under the doctrine of constitutional necessity. The short answer here, as explained above, is that I do not accept that JSC was functionally incapacitated.
- [92] For the Second Respondent, Mr Valenitabua drew a distinction between the use of the word 'recommendation' at section 5 of the FICAC Act and the word 'advice' at section

82 of the Constitution. Section 5 provides that the President makes an appointment on the recommendation of JSC. Section 82 provides that the President may only act on advice. The argument being that a recommendation is not binding whereas the Prime Minister advising under section 82 is binding. There are problems with the Second Respondent's argument. It assumes the Prime Minister has power to advise the President on the appointment of the FICAC Commissioner, which he does not. The use of the word 'recommendation' is not confined to section 5 of the FICAC Act. It is also found in the Constitution at sections 114(5), 116(5), 117(3), 120(5) and 121(5). 'Advice' is, in fact, defined in the dictionary as '*an opinion, recommended*'⁴⁰. Accordingly, the words advice and recommendation can be used interchangeably.

ii. Was there a breach of natural justice?

[93] Ms Malimali claims that she was denied natural justice when her appointment was revoked on 2 June 2025. She says she was not given an opportunity to respond to the findings in the COI Report. There is no need to determine this issue in light of my determination that the revocation was unlawful.

iii. Whether the Prime Minister acted reasonably to rely on the COI findings to revoke the appointment?

[94] Again, this issue is moot and, as such, I do not need to determine the matter.

Conclusion

[95] Pursuant to section 5 of the Fiji Independent Commission against Corruption Act 2007, the President appoints the Commissioner of FICAC on the recommendation of JSC following consultation with the Attorney-General. The President may also revoke the appointment and suspend the Commissioner – as per section 44 of the Interpretation Act – but, again, only on the recommendation of JSC following consultation with the Attorney-General.

⁴⁰ The Little Macquarie Dictionary.

[96] The Prime Minister did not have authority to advise the President to revoke Ms Malimali's appointment on 2 June 2025. Similarly, the President was acting without lawful authority when he revoked Ms Malimali's appointment the same day as did not do so on advice of the JSC.

[97] As such, the revocation of Ms Malimali's appointment as Commissioner on 2 June 2025 was unlawful and ultra vires.

[98] Finally, I have deliberately refrained from making any assessment of the COI findings. It has not been necessary in light of my determination on the first issue.

Next step

[99] JSC is the body empowered with the authority to advise the President. JSC is not required to action or comply with the findings and recommendations of COI. JSC must independently decide itself what to make, if anything, of the COI evidence, findings and recommendations as they pertain to the appointment of Ms Malimali.

[100] If JSC decide to act on the same, in respect to any revocation, termination or removal, it will need to consider the correct mechanism to employ. As per Ms Malimali's contract, at clause 7, the *'[p]rocedure for removal of Commissioner shall be the same as what is prescribed for removal of Judges in Section 112 of the Constitution'*. Section 112 provides for removal where there is 'misbehavior'. Pursuant to that provision, a tribunal must be established to investigate and prepare a report for the President with a recommendation as to whether there has been misbehaviour.

[101] Several findings by COI against Ms Malimali pertain to her alleged failure to provide full disclosure during the appointment process. Some allegations pertain to her conduct after her appointment. JSC will need to consider whether section 112 operates in respect to the alleged non-disclosures before her appointment.

[102] I am conscious that the President, again acting on the advice of the Prime Minister, appointed Ms Rokoika as Acting Commissioner of FICAC in June 2025 and that Ms

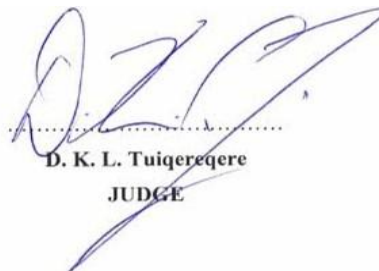
Rokoika is currently fulfilling that role. I do not have jurisdiction to consider the validity of her appointment. It is a matter for JSC to consider.

Orders

[103] My orders are as follows:

- (i) I declare that the advice of the Prime Minister and the decision of the President on 2 June 2025 to revoke Ms Malimali's appointment as Commissioner of FICAC was unlawful and ultra vires.
- (ii) I am not prepared to make any order reinstating Ms Malimali to the position of Commissioner. JSC will need to consider and decide upon the matter along with the appointment of Ms Rokoika as Acting Commissioner.
- (iii) I will not be making any order for general damages or special damages. JSC's decision on the status of Ms Malimali's position as Commissioner will affect what, if any, loss of income she suffers from 2 June 2025.
- (iv) As Ms Malimali has been successful she is entitled to costs which I summarily assess in the amount of \$7,500 to be paid by the First, Second and Third Respondents within 28 days.
- (v) Leave is granted to any of the parties to apply to the Court for further orders.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Waqanika Law for the Applicant

Attorney General's Office for the First & Third Respondents

Valenitabua & Associates for the Second Respondent