IN THE KIRIBATI COURT OF APPEAL
CIVIL JURISDICTION
HELD AT BETIO
REPUBLIC OF KIRIBATI

CIVIL APPEAL NO. 4 OF 2024

BETWEEN

DAVID LAMBOURNE — Appellant

AND

TANETI MAMAU, TEEKO IUTA, MANTOA MIITA
AMERIA TOKA, KATOKAMATANA ANTEREA
EVEATA MAATA, AG IRO REPUBLIC OF KIRABATI
NAKAU MOTE — Respondents

CIVIL APPEAL NO. 5 OF 2024

BETWEEN

DAVID LAMBOURNE — Appellant

AND

EVEATA MAATA, AMERIA TOKA,
KATOKAMATANA ANTEREA, TEAUAM IOTEBA
SPEAKER OF THE MANEBA NI MAUNETABU
TANETI MAMAU — Respondents

CIVIL APPEAL NO. 11 OF 2024

BETWEEN

TANETI MAMAU — Appellant

AND

DAVID LAMBOURNE — Respondent

Before: Sir Salika, JA
Nelson, JA
Khan, JA

Date of Hearing: 06 December 2024
Date of Judgement: 01 May 2025

APPEARANCES:

Counsel for the Appellant: P Herzsfeld SC & D Reynolds
Counsel for the Respondents: M Mwereiaka

JUDGMENT BY THE COURT

INTRODUCTION

1. The appellant David Lambourne was pursuant to s.81(2) of the Constitution appointed a judge of the High Court of Kiribati on 10 May 2018 by the Beretitenti, the President and Head of State of the Republic of Kiribati.

2. A complaint to the Beretitenti was lodged against him on 07 April 2022 by Mr Betero Atanibora and other members of the Parliament of Kiribati, the Maneaba ni Manugatabu. The complaint was in the Kiribati language but the English translation version is as follows:

6 March 2022
Chairman Tobwaan Kiribati Party
Ambo

RE: Discontent with Judge's conduct by withholding release of his judgement that would justify the Government's action.

As supporters of Tobwaan Kiribati Party along with other persons named below, this is our letter to show our discontent and aggrievance towards the Puisne Judge of the High Court namely David Lambourne for his conducts which we believe they are unacceptable or improper, and which has caused us to have doubt and great concern on his competency when discharging his duties as the Puisne Judge of the High Court to uphold justice. Having seen these conducts, it gives us and confirm our belief that David Lambourne is unfit, and so the extension of his contract should not be considered and he therefore should be removed from the bench as the Puisne Judge of the High Court of Kiribati. These are our observations on what David Lambourne has done during his tenure as High Court Judge upon which our beliefs are based and stemmed from:

I) He had withheld and delayed releasing of his judgement on the Opposition case Boutokaan Te Kaotia which case No. HC 05/20 this was done in January 2020, in which it was ascertained as to whether or not the withdrawal of public fund from the Development Fund to finance Government operation was right? This was when the 2020 National Budget was rejected by the opposition during the sitting of the Parliament at that time. It is well remembered that there was great impatience by the public especially the Government to hear the decision at that time, as it would justify the decision of our country's leader His Excellency *Te Beretitenti* Taaneti Maamau and his cabinet and his party Tobwaan Kiribati Party as a whole, who were in charge at the time. It is clear that the High Court judgement on this case has been arrived at but His Honor David Lambourne withheld releasing the judgement in this case for a period of 9 months, by which election of Member of Parliaments and *Te Beretitenti* had ended. We consider this conduct by His Honor David Lambourne as seriously wrong since the case is of national importance and so the judgement should be announced urgently before the election of MPs and election of *Te Beretitenti*. We have no doubt that David Lambourne did this because he shared a relationship with the opposition as accepted by all, also we have

no doubt that his decision to delay the releasing the judgement to the public was based on that relationship. This is not an acceptable conduct required from Judges; this clearly show the flaws of David Lambourne which then proves that he is unfit to be a Judge of the High Court of Kiribati.

2) We also believe that finalization of other cases has been delayed by David Lambourne and there are number of judgements that he had withheld for a long time. It should be remembered that delaying of judgement is unacceptable for it delays justice to those involved in the case, and this is the crucial responsibility of the Court and trusted to it by the public.

3) We disagree with David Lambourne's undertaking when he sued the Government for terminating his appointment as Puisne Judge of the High Court of Kiribati and then demanded that he be given a life appointment contract. We strongly object to this and we don't David Lambourne to be treated differently with the people of Kiribati by allowing only him to work until he dies, especially that he is a foreigner for he is an Australian citizen and he hasn't been granted Kiribati citizenship. Even though, the High Court found in his favor, we consider this as unjust and it has become our grave concern when the decision of the Chief Justice who is also a foreigner who entertained David Lambourne's case was released.

From those findings we wish to show our support to our government and demand that the appointment of David Lambourne is terminated for we considered his deeds unjust. Although since we demand a transparent or just decision, we apply to our government especially *His Excellency Te Beretitenti* to exercise his powers under the law to create an independent Tribunal to effect investigation on this issue and other further matters urgently.

We,
(please refer to the original documents for signatories)

3. As a result, the Beretitenti established a Tribunal on 13 May 2022 pursuant to section 83(4) of the Constitution to investigate the complaint. On 16 May 2022 the Beretitenti suspended the appellant from performing his functions as a judge without salary and other emoluments under s.83(5) of the Constitution.

4. After the establishment of the Tribunal the appellant on 20 June 2022 filed Originating Summons in the High Court Civil Case No.18 of 2022 seeking orders that:

(a) That the instrument appointing the Tribunal dated 13 May 2022 was invalid;
(b) An order restraining the Tribunal from doing any act pursuant to the instrument dated 13 May 2022;
(c) A declaration that the instrument dated 16 May 2022 suspending the appellant was invalid;
(d) An order for the payment of the appellant's salary including arrears.

5. On 23 June 2022, the Tribunal of its own volition stayed its proceedings pending the hearing and determination of Civil Case No.18 of 2022 by the High Court.

6. On 6 September 2023 the composition of the Tribunal was changed and the Tribunal's secretary advised the appellant that it has resumed investigations.

7. On 11 September 2023 the appellant filed an application to amend the Originating Summons in High Court Civil Case No. 18 of 2022 and the Commissioner issued an injunction to restrain the Tribunal from continuing its investigations until 10 November 2023.

8. On 1 November 2023 the Beretitenti revoked and suspended the Tribunal.

9. On 7 March 2024 the Beretitenti established a second Tribunal and on 19 April 2024 it delivered its report to Maneaba ni Maungatabu. On 25 April 2024 the Maneaba ni Maungatabu by a resolution recommended to the Beretitenti to remove the appellant from office.

10. A chronology of events and proceedings that ensued following the appellant's termination was prepared by the counsels and we have adopted the chronology as it sets out the matters in a proper sequence starting from 10 May 2018. The chronology of events is as follows:

10 May 2018	Beretitenti issues instrument appointing David Lambourne (DL) as a puisne judge of the High Court of Kiribati
1 July 2018	DL's appointment takes effect
16 July 2018	DL sworn in
16 January 2020	DL hears submissions in High Court Civil Case № 5/2020, Engiran Iuta v Minister for Finance and Economic Development; the application was dismissed, with oral reasons given and written reasons to follow
22 January 2020	DL hears application to reopen High Court Civil Case № 5/2020; the application was dismissed, with oral reasons given and written reasons to follow
27 February 2020	DL departs Kiribati for Australia, planning to return on 6 April 2020
19 March 2020	Kiribati border closed in response to Covid-19 pandemic; all scheduled flights cancelled
10 July 2020	DL's visa expires
26 August 2020	Chief Registrar advises DL by email that the parties to High Court Civil Case № 5/2020 had requested the written reasons for judgment
7 September 2020	DL delivers (by email) written reasons for judgment in High Court Civil Case № 5/2020
5 November 2020	DL travels to Nadi, Fiji from Australia to await a repatriation flight

19 November 2020	Repatriation flights from Nadi to Tarawa commence
31 December 2020	Appointment of Sir John Muria as Chief Justice expires
1 March 2021	Chief Registrar advises DL by email that he will need to sign a contract with Government before a visa can be issued to enable his return
30 March 2021	Chief Registrar advises DL by email that payment of his salary and allowances will cease until a contract is signed and a new visa is issued
8 April 2021	DL signs contract proffered by Secretary for Justice
23 April 2021	Beretitenti signs contract for the Government
29 April 2021	High Court Judges (Salaries and Allowances) (Amendment) Bill 2021 passed by the Maneaba ni Maungatabu
7 May 2021	Payment of DL's remuneration resumes (including arrears)
19 May 2021	Beretitenti gives assent to High Court Judges (Salaries and Allowances) (Amendment) Act 2021, and it enters into force
24 May 2021	Visa issued to DL (valid to 30 June 2021)
18 June 2021	Chief Registrar advises DL by email that there will be no further repatriation flights from Fiji, and he should return to Australia
28 June 2021	DL travels from Nadi to Sydney 30 June 2021; Contract lapses and DL's visa expires; payment of remuneration ceases
9 August 2021	Hon. William Hastings appointed as Chief Justice
12 August 2021	DL files Originating Summons (High Court Civil Case № 16/2021) naming Attorney-General (for the Republic) as respondent, seeking declarations that: • DL continues to hold office as judge of the High Court; • the High Court Judges (Salaries and Allowances) (Amendment) Act 2021 is unconstitutional; • the withholding of DL's salary and remuneration is unconstitutional; • the refusal to issue DL with a visa is unconstitutional; and • DL is entitled to be issued with a visa for as long as he holds office
21 August 2021	Hastings CJ issues directions order in High Court Civil Case № 16/2021 (Miscellaneous Application № 52/2021), including an order for payment of DL's remuneration
26 October 2021	Hastings CJ hears submissions in High Court Civil Case № 16/2021; judgment reserved

4 November 2021	DL files application seeking a declaration that the Attorney-General is in contempt of court for failure to comply with the order in paragraph 1 of Hastings CJ's directions order of 21 August
9 November 2021	Attorney-General files appeal to Court of Appeal against Hastings CJ's directions order of 21 August (Civil Appeal № 4/2021), and also files application for stay
9 November 2021	Hastings CJ hears DL's application filed on 4 November, and Attorney General's application for a stay
11 November 2021	Hastings CJ gives judgment in High Court Civil Case № 16/2021 ([2021] KIHC 8), rules that: • DL holds office for an indefinite term, until he resigns, dies, or is removed under s.83 of the Constitution, and remains entitled to all remuneration provided for by law; • s.5(2)(a) of High Court Judges (Salaries and Allowances) Act 2017 (as amended by the High Court Judges (Salaries and Allowances) (Amendment) Act 2021) is inconsistent with the Constitution and void to the extent of the inconsistency; • the exercise of statutory discretion by public officials must recognise the constitutional nature of a judge and be in accordance with the Constitution
11 November 2021	Hastings CJ gives his ruling on the applications heard on 9 November ([2021] KIHC 9), declining both applications
23 November 2021	Attorney-General files appeal to Court of Appeal against Hastings CJ's judgment of 11 November (Civil Appeal № 5/2021)
24 November 2021	Payment of DL's remuneration resumes (including arrears)
26 November 2021	DL files application with High Court seeking consequential orders regarding payment of remuneration and issuance of visa (Miscellaneous Application № 92/2021)
7 December 2021	Hastings CJ hears Miscellaneous Application № 92/2021 and orders Attorney General "to ensure that the relevant officer of the Ministry of Foreign Affairs and Immigration takes immediate steps to issue to the applicant a visa under the Kiribati Immigration Act 2019 such as will enable him to enter and reside in Kiribati and perform his duties and functions as a judge"
9 December 2021	Attorney-General files appeal to Court of Appeal against Hastings CJ's order of 7 December 2021 (Civil Appeal № 6/2021), and also files application for stay (Miscellaneous Application № 97/2021)
29 December 2021	Attorney-General discontinues Court of Appeal Civil Appeal № 4/2021
12 January 2022	After a hearing on the papers, Hastings CJ issues judgment in Miscellaneous Application № 97/2021, refusing the Attorney-General's application for a stay

15 February 2022	Secretary for Foreign Affairs and Immigration advises by email that DL will be issued with a visa on arrival into Kiribati
4 April 2022	Public Service Office receives letter (attaching a petition) of complaint against DL from MP Betero Atanibora MP
13 May 2022	Beretitenti establishes a tribunal to investigate allegations of misbehaviour against DL, chaired by Teekoa Iuta, with Eveata Maata, Katokamatana Anterea, Ameria Toka and Mantoa Miita as members
16 May 2022	Beretitenti suspends DL from performing his functions as a judge, without salary; payment of remuneration ceases
18 May 2022	Secretary for Foreign Affairs and Immigration rescinds advice of 15 February
20 June 2022	DL files Originating Summons (High Court Civil Case № 18/2022) naming the Beretitenti, the tribunal members and the Attorney-General (for the Republic) as respondents, seeking various declarations and orders regarding the validity of the Beretitenti's actions in establishing the tribunal and suspending DL without salary; DL also files a Notice of Motion seeking various interim orders pending hearing of the substantive matter (Miscellaneous Application № 30/2022)
21 June 2022	Tribunal decides to voluntarily cease work until the court case is heard
23 June 2022	Parties advised by email that Hastings CJ will hear Miscellaneous Application № 30/2022 on 30 June
29 June 2022	Beretitenti establishes a tribunal to investigate allegations of misbehaviour against Hastings CJ, and suspends him from performing his functions as a judge
30 June 2022	Hastings CJ advises parties in open court that he has been suspended; hearing of Miscellaneous Application № 30/2022 adjourned
1 July 2022	DL files Notice of Motion (Miscellaneous Application № 36/2022) seeking leave to amend Originating Summons in High Court Civil Case № 18/2022
21 July 2022	Court of Appeal Civil Appeals № 5 and 6/2022 listed for hearing on 11 August 2022
1 August 2022	Kiribati border reopens; DL returns and is issued with a 1-month visitor's visa 10 August 2022 Attorney-General files notices of intention to abandon Court of Appeal Civil Appeals № 5 and 6/2022

11 August 2022	DL served with deportation liability notice and deportation order and taken to the airport. When Court of Appeal Civil Appeals № 5 and 6/2022 are called on, the Court grants DL's application for an interim injunction preventing deportation ([2022] KICA 6). Beretitenti then issues second deportation order declaring DL a "risk/threat to national security" and persists with attempt to deport him, which fails. DL placed into immigration detention
11 August 2022	Beretitenti issues notice purporting to "recall, vacate and nullify" DL's original instrument of appointment and replace it with a new notice that expired on 30 June 2021
12 August 2022	Court of Appeal orders DL's release from immigration detention ([2022] KICA 7)
16 August 2022	DL files respondent's notice in Court of Appeal Civil Appeal № 6/2022, challenging the validity of the deportation liability notice and deportation orders, and the recall notice, of 11 August
19 August 2022	Court of Appeal hears submissions in Civil Appeals № 5 and 6/2022 26 August 2022 Court of Appeal gives judgment in Civil Appeals № 5 and 6/2022 ([2022] KICA 9), dismissing the Attorney-General's appeals, and holding that DL's attempted deportation was unconstitutional, and the recall notice is invalid. The Court held that DL cannot be deported for as long as he continued to hold judicial office, and confirmed the order that DL be issued with a visa
1 September 2022	DL's visitor's visa expires; no new visa issued
2 September 2022	Beretitenti establishes a tribunal to investigate allegations of misbehaviour against Blanchard, Hansen and Heath JJA, and suspends them from performing their judicial functions
16 September 2022	DL served with a second deportation liability notice, signed by the Beretitenti
7 October 2022	DL files Originating Summons (High Court Civil Case № 32/2022) naming the Beretitenti, the Secretary for Foreign Affairs and Immigration, and the Attorney-General (for the Republic) as respondents, challenging the validity of the deportation liability notice served on 16 September; DL also files a Notice of Motion seeking various interim orders pending hearing of the substantive matter (Miscellaneous Application № 60/2022)
5 December 2022	Tribunal investigating the question of Hastings CJ's removal from office delivers its report to the Maneaba ni Maungatabu
7 December 2022	Hastings CJ resigns, with immediate effect

20 February 2023	Second respondent in High Court Civil Case № 32/2022 (Michael Foon) dies
18 August 2023	Notice given that High Court Civil Cases № 18 and 32/2022 will be heard by Chief Magistrate Aomoro Amten (sitting as a Commissioner of the High Court)
22 August 2023	DL files Notice of Motion seeking leave to amend Originating Summons in High Court Civil Case № 32/2022, to substitute Uering Iteraera for Michael Foon as second respondent
23 August 2023	Beretitenti revokes appointment of Mantoa Miita as a tribunal member, and appoints Nakau Mote to the tribunal in his place
24 August 2023	Appearance before Commissioner; leave given to substitute second respondent in High Court Civil Case № 32/2022; other interlocutory matters adjourned to 10 November 2023
6 September 2023	DL advised by letter from the tribunal secretary (dated 4 September) of the change in the composition of the tribunal, and that the tribunal had resumed its investigation on 30 August 2023
11 September 2023	DL files Notice of Motion (Miscellaneous Application № 71/2023) seeking leave to further amend the Originating Summons in High Court Civil Case № 18/2022, to include Nakau Mote as eighth respondent
19 October 2023	Commissioner issues injunction to restrain tribunal from continuing its investigation until at least 10 November 2023
1 November 2023	Beretitenti revokes the appointment of the tribunal investigating the question of DL's removal from office
10 November 2023	Commissioner continues injunction to restrain tribunal until further order, and grants leave for DL to be represented by Australian lawyers; remaining interlocutory matters adjourned to 1 December 2023
1 December 2023	Commissioner lists both cases for hearing on 26 March 2024; leave given to amend the Originating Summons in High Court Civil Case № 18/2022 (as sought in Miscellaneous Applications № 36/2022 and 71/2023); remaining interlocutory matters adjourned to 6 December
6 December 2023	Remaining interlocutory matters adjourned to 27 December 2023
27 December 2023	Commissioner hears remaining matters under Miscellaneous Applications № 36 and 60/2022; decision reserved

31 January 2024	Commissioner orders that DL be issued with a visa; declines to order that DL receive remuneration pending hearing of the substantive matter
26 February 2024	Secretary for Foreign Affairs and Immigration issues DL with a visa, to expire when Commissioner gives judgment in the substantive matter
7 March 2024	Beretitenti establishes a second tribunal to investigate allegations of misbehaviour against DL, with Eveata Mauta as Chair, and Katokarnatana Anterea, Ameria Toka and Nakau Mote as members
20 March 2024	DL advised by letter from the new tribunal Chair (dated 19 March) of appointment of second tribunal; later advised by email from the tribunal secretary of the Beretitenti's revocation of the instrument appointing the original tribunal on 1 November 2023
20 March 2024	DL files Notice of Motion seeking leave to further amend the Originating Summons in High Court Civil Case № 18/2022, to include reference to the Beretitenti's appointment of the second tribunal on 7 March 2024
22 March 2024	Commissioner gives leave to further amend the Originating Summons in High Court Civil Case № 18/2022 23 March 2024 Beretitenti appoints Teauama Ioteba as a member of the second tribunal
25 March 2024	Commissioner issues an interim injunction to restrain the second tribunal from delivering its report, although it is permitted to continue with investigation
26 March 2024	Commissioner hears submissions in High Court Civil Cases № 18 and 32/2022; judgment reserved
28 March 2024	Tribunal member Nakau Mote dies
3 April 2024	DL advised by email from the tribunal secretary of the appointment of Teauama Ioteba as a member of the second tribunal on 23 March 2024
5 April 2024	DL appears before the second tribunal
16 April 2024	Commissioner gives judgment in High Court Civil Cases № 18 and 32/2022; holding that: • the establishment of the tribunal by the Beretitenti is valid; • DL's suspension is valid, but the Beretitenti's direction that it be without salary is invalid; • the deportation liability notice issued in September 2022 is invalid. The Commissioner declined to make any declarations regarding the tribunal's procedures
16 April 2024	DL makes second appearance before the second tribunal

17 April 2024	DL files an appeal to the Court of Appeal against the Commissioner's judgment in High Court Civil Case № 18/2022 (Civil Appeal № 4/2024), and also files application to the High Court for an order extending the interim injunction issued on 25 March, pending the hearing of the appeal (Miscellaneous Application № 2024-024028)
18 April 2024	Commissioner hears Miscellaneous Application № 2024-024028; decision reserved
18 April 2024	DL provides written submissions to the second tribunal
19 April 2024	Commissioner refuses DL's application for an order extending the interim injunction issued on 25 March
19 April 2024	Second tribunal delivers its report to the Maneaba ni Maungatabu
23 April 2024	DL files an application for leave to apply for an order of certiorari to quash the second tribunal's report (High Court Civil Case № 2024/02459), together with an application for interim orders to restrain the Maneaba ni Maungatabu from proceeding with any resolution regarding DL's removal from office, and to restrain the Beretitenti from taking any action to remove DL from office
24 April 2024	Commissioner hears High Court Civil Case № 2024/02459; decision reserved
25 April 2024	Commissioner refuses leave in High Court Civil Case № 2024/02459
25 April 2024	Maneaba ni Maungatabu considers a resolution to recommend to the Beretitenti that DL be removed from office; resolution adopted shortly after 1:00am on 26 April 26 April 2024 DL files an appeal to the Court of Appeal against the Commissioner's ruling in High Court Civil Case № 2024/02459 (Civil Appeal № 5/2024)
26 April 2024	Beretitenti removes DL from office 26 April 2024 DL served with third deportation liability notice
10 May 2024	DL files application with High Court seeking consequential orders regarding payment of remuneration (Miscellaneous Application № 2024-03164)
15 May 2024	DL departs Kiribati voluntarily
10 June 2024	Beretitenti files application with High Court for a stay of that part of the Commissioner's judgment in High Court Civil Case № 18/2022 dealing with the Beretitenti's decision to withhold DL's salary during his suspension (Miscellaneous Application № 2024-03133)

13 June 2024	Beretitenti files an appeal to the Court of Appeal against that part of the Commissioner's judgment in High Court Civil Case № 18/2022 dealing with the Beretitenti's decision to withhold DL's salary during his suspension (Civil Appeal № 11/2024)
14 June 2024	Commissioner hears Miscellaneous Application № 2024-03133, deferring consideration of Miscellaneous Application № 2024-03164
19 June 2024	Commissioner gives his ruling in Miscellaneous Application № 2024-03133, granting the Beretitenti's application for a stay, on condition that the amounts claimed by DL in Miscellaneous Application № 2024-03164 are paid into Court no later than 16 August 2024
16 August 2024	Government pays the sum of $84,338.11 into Court in compliance with the Commissioner's order of 19 June
18 September 2024	Beretitenti files amended notice of appeal in Court of Appeal Civil Appeal № 11/2024 Agreed as between the parties this second day of December, 2024.

FIRST AND SECOND TRIBUNAL APPEAL – APPEAL NO. 4 OF 2024

11. The appellant filed Appeal No. 4 of 2024 which concerned the appointment of the First and Second Tribunal to investigate the allegations of judicial misconduct against him and his suspension from office pending the conclusion of the investigations.

CERTIORARI APPEAL – APPEAL NO. 5 OF 2024

12. This appeal arose out of High Court Civil Case No. HC/CB/FT 2024/02459, which concerned an application for leave to apply for an order for Certiorari to quash the second Tribunal's report together with an application for Interim Injunction to restrain the Beretitenti from taking an action to remove the appellant from office. This application was heard by the Commissioner on 24 April 2024 and a ruling was delivered on 25 April 2024.

SALARY APPEAL – CIVIL APPEAL NO. 11 OF 2024

13. The respondents to the Tribunal appeal filed a separate appeal No. 11 of 2024 against that part of the Commissioner's judgement dealing with the Beretitenti's decision to withhold the appellant's salary during the suspension.

14. All the appeals were heard together, however, we will deal with them separately in our judgement as they relate to different issues.

APPEAL NO. 4 OF 2024

15. This appeal as we stated earlier deals with the establishment of the two Tribunals.

16. The tenure of the office of Judges of the High Court is contained in s.83 of the Constitution which states as follows:

> 83(1) Subject to the provisions of this section, the office of a judge of the High Court shall become vacant upon the expiry of the period of his appointment to that office.
>
> (2) A judge of the High Court may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be removed except in accordance with the provisions of the next following subsection.
>
> (3) A judge of the High Court may be removed from office by the Beretitenti in pursuance of a resolution of the Maneaba ni Maungatabu if the question of the removal of that judge has been referred to a Tribunal appointed under the next following subsection and the Tribunal has advised the Maneaba that he ought to be removed from office for inability as aforesaid or for misbehaviour.
>
> (4) If the Beretitenti considers, or the Maneaba resolves, that the question of removing a judge of the High Court from office for inability as aforesaid or for misbehaviour ought to be investigated then-
>
> a) the Beretitenti shall appoint a Tribunal which shall consist of a Chairman and not less than 2 other members, 1 of whom holds or has held judicial office; and
>
> b) the Tribunal shall inquire into the matter and report on the facts thereof to the Maneaba and advise the Maneaba whether the judge should be removed under this section,
>
> (5) If the question of removing a judge of the High Court from the office has been referred to a Tribunal under the preceding subsection, the Beretitenti may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the Beretitenti and shall in any case cease to have effect if the Tribunal advises the Maneaba that the judge should not be removed from office.

17. On 4 April 2022 a complaint against the appellant was lodged with the Public Service Office. At the material time the appellant was not in Kiribati and was in Australia.

18. The appellant stated in his affidavit dated 16 June 2022 as follows at [8], [9] and [10]:

> [8] On 7 April 2022 I received an email from the Chief Registrar, to which was attached a memorandum he had received from the Secretary for the Public Service Office, dated 5 April 2022. By that memorandum the Secretary informed the Chief Registrar that a complaint regarding me had been received, and advised that a tribunal would be established to investigate the complaint. Attached to the memorandum was a letter from the Honourable Betero Atanibora, a Member of the Maneaba ni Maungatabu from Abaiang, and the Chair of the Tobwaan Kiribati Party, to which was attached a letter setting out the complaint, said to have been

received from the supporters of the Tobwaan Kiribati Party and others. As the Member's letter and the letter of complaint are in Kiribati language, the Chief Registrar also provided an English translation prepared by one of the High Court interpreters. Annexed and market DL-3 is the email from the Chief Registrar (including the Secretary's memorandum, with the Member's letter and a complaint letter attached, together with the English translation).

[9] On 16 May 2022 I received an email from the Chief Registrar to which was attached a memorandum from the Secretary to the Cabinet. By that memorandum the Secretary advised that the 1st Respondent had established a Tribunal to investigate the question of my removal from office, and had suspended me without salary pending the outcome of the investigation. A copy of the suspension instrument was attached to the Secretary's memorandum. Annexed and marked DL-4 is the email from the Chief Registrar (including the Secretary's memorandum, with the suspension instrument attached).

[10] At no time prior to the establishment of the tribunal or my suspension had the 1st Respondent or anyone acting on his behalf, sought a response from me with respect to complaints made against me, nor had I been asked to show cause as to why I should not be suspended pending the outcome of the tribunal's investigations.

19. In relation to the complaint the appellant stated at [22], [23], [24] and [25] as follows:

[22] In relation to the allegations identified in sub-paragraphs (a) to (d) of paragraph 3 of the tribunal instrument, it is unclear to me what evidence, if any, could possibly have been before the 1st Respondent at the time of his decision to appoint the tribunal that could rationally have satisfied him that there was an issue of misbehaviour requiring investigation. Whilst this affidavit does not constitute my defence to those allegations, it is my intention to respond to them fully in due course at the tribunal proceedings, if necessary, for present purposes I note the following:

a. The allegation in sub-paragraph (a) refers to a case that I heard in which orders were made at the conclusion of the hearings, with the reasons for those orders taking longer to produce. I am unaware of any complaint having been made to the Chief Justice by any party to that litigation in respect of the delay in delivering those reasons. At no time did the Chief Justice ever raise with me the issue of delay in delivering my reasons in this case;

b. In relation to the allegation in sub-paragraph (b), I am unaware of any case in which a party had complained to the Chief Justice about any delay on my part in delivering a judgement. Nor has the Chief Justice ever raised any issues of delay with me;

c. In relation to the allegation in sub-paragraph (c), to the best of my knowledge I have never taken leave without the permission of the Chief Justice;

d. In relation to the allegation in sub-paragraph (d), I have never instructed any members of the court staff to represent that I was a party to a contract concerning my employment, or that any such contract should be confidential.

I first became aware that it had been suggested that a member of the court staff had made the representations in the context of Civil Case No. 16/2021. I corrected that misapprehension, explaining (as was accepted by the Court) that prior to April 2022, I had never entered into a contract of employment regarding my office as judge of the High Court.

[23] I am unaware if any of the allegations identified in sub-paragraphs (a) to (d) of paragraph 3 of the tribunal instrument has ever been referred to the Chief Justice, in accordance with the procedure provided for under paragraph 6.4(a) of the *Code of Conduct for Judicial Officers of the Republic of Kiribati* 2011.

[24] To the best of my knowledge I have done nothing that would amount to misbehaviour such as would warrant my removal from office.

[25] The allegation identified in paragraph 3(a) of the tribunal instrument refers to the High Court Civil Case No. 5/2020, which concerned an unsuccessful application made by Engiran Iuta. I note that Engiran Iuta is a brother of the 2nd Respondent.

20. Mr Herzsfeld submitted that the Beretitenti could only establish a tribunal under s 83(4) of the Constitution if he considered that the question of removing a Judge of the High Court should be investigated for his behaviour. He also submitted that the state of the satisfaction must not be found unreasonably in the *"Wednesbury"* sense in reliance on the statements of the learned Law Lords in ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** [1948] 1 KB 223 (HL). Of this the learned author Joseph of 'Constitutional and Administrative Law in New Zealand '2nd ed says at p.832:

"***Wednesbury*** unreasonableness equates with senselessness. Lord Diplock said a decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it". A plaintiff had to show "something overwhelming". In local authority rating cases, the Court of Appeal has adopted the full range of expressions for ***Wednesbury*** unreasonableness: "outside the limits of reason", "so outrageous in its defiance of logic or of accepted moral standards", "a pattern of perversity", and "so absurd that he must have taken leave of his senses." For the House of Lords, Lord Diplock's requirement of senselessness was a "fundamental limitation" on the power of judicial review."

21. Although applicable to the field of judicial review, we accept these principles can also apply to Constitutional review applications. Where the approach is governed by the celebrated and well accepted decision of the House of Lords in ***Minister of Home Affairs v Fisher*** [1980] AC 319:

"We have already indicated our agreement that the Constitution should be interpreted in the spirit counseled by Lord Wilberforce in ***Fisher's*** case. He speaks of a constitutional instrument such as this as *'sui generis'*; in relation to human rights of a "generous interpretation avoiding what has been called the austerity of tabulated legalism"; of respect for traditions and usage which have given meaning to the language; and of an approach with an open mind. This involves, we think, still giving primary attention to the words used, but being on guard against any tendency to interpret them in a mechanical

or pedantic way: Samoa Court of Appeal, *In re the Constitution Attorney General v Olomalu* [1982] WSCA 1."

22. Mr Herzsfeld further submitted that misbehaviour has a special meaning and he referred to the case of ***Madam Justice Leavers***[1] where it is stated at [50] as follows:

> [50] The public rightly expects the highest standard of behaviour from a judge, but the protection of judicial independence demands that a judge shall not be removed for misbehaviour unless the judge has fallen so far short of that standard of behaviour as to demonstrate that he or she is not fit to remain in office. The test is whether the confidence in the justice system of those appearing before the judge or the public in general, with knowledge of the material circumstances, will be undermined if the judge continues to sit – see *Therrien v Canada (Minister for Justice) [2001] 2 SCR No. 3.* If a judge, by a course of conduct, demonstrates an inability to behave with propriety, misbehaviour can merge into incapacity.

23. He also submitted that the Beretitenti had not validly appointed a Tribunal as the allegation against Justice Lambourne was not capable of reaching the standard of reasonableness in the "*Wednesbury*" sense and for that reason the Tribunal instrument was invalid.

24. Mr Mweretaka for the respondent submitted that under s.83 there was no obligation on the Beretitenti to go through the exercise as suggested by Mr Herzsfeld. All that the Beretitenti has to do is to consider the complaint and thereafter set up the Tribunal and he submitted that Beretitenti had properly considered the complaint and set up the Tribunal.

PROCEDURAL FAIRNESS

25. Mr Herzsfeld submitted that s.83(4) did not contain any express provision for the Beretitenti to allow the appellant to be heard before setting up the Tribunal but it was an implied statutory power and that failure to hear from the appellant before appointing the Tribunal means that the Tribunal instrument is invalid for denial of procedural fairness. He relied on ***Rees v Crane***[2] and ***Meerabux v Attorney General (Belize)***[3].

26. At page 7 of ***Meerabux v Attorney General (Belize)*** the provision of s.98 of the Belize Constitution is mentioned and the bottom of that page the **three stages** is discussed. It is stated at page 7 as follows:

> "It is helpful, I believe, in this regard, to set out the provisions of the Constitution which are materially relevant to a determination of this issue. These are contained in Section 98 as follows:
>
> "(3) A justice of the Supreme Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body

[1] (2016) UK TC
[2] (1994) AC 177[192-196]
[3] Action No. 65 of 2001 and BZSC 2 (12 March 2001).

or mind or from any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(4) A justice of the Supreme Court shall be removed from office by the Governor-General if the question of the removal of that justice from office has been referred to the Belize Advisory Council in accordance with the next following subsection and the Belize Advisory Council has advised the Governor-General that that justice ought to be removed from office for inability as aforesaid or for misbehaviour.

(5) If the Governor-General considers that the question of removing a justice of the Supreme Court from office for inability as aforesaid or for misbehaviour ought to be investigated, then -

(a) the Governor-General shall refer the matter to the Belize Advisory Council which shall sit as a tribunal in the manner provided in Section 54 of this Constitution; and

(b) the Belize Advisory Council shall enquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether that justice should be removed under this section.

(6) If the question of removing a justice of the Supreme Court from office has been referred to the Belize Advisory Council under the preceding subsection, the Governor-General may suspend the justice from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General and shall in any case cease to have effect if the Belize Advisory Council advises the Governor-General that the justice should not be removed from office.

(7) Except as otherwise provided in this section, the functions of the Governor-General under this section shall be exercised by him in his own deliberate judgment.

From these, it is evident that there are several stages involved in a determination of the question of the removal of a judge of the Supreme Court in Belize.

It is common ground between the parties that there are **three stages** which may be stated as follows:(Emphasis added)

First, the Governor-General considers that the question of removal of the judge ought to be investigated;

Secondly, he then refers the matter to the Belize Advisory Council which shall then sit as a tribunal and

Thirdly, the Belize Advisory Council then enquires into the matter and reports on the facts of the matter to the Governor-General.

But there is, in my view, on a closer analysis of the relevant Constitutional provisions, an inarticulate but critical antecedent stage to all the other stages. This, I will call the **trigger stage**, which is not evident on a literal reading of the Constitution's provisions"

27. At page 10 of ***Meerabux*** it is stated as follows:

"I respectfully adopt this exposition of the law. Looking therefore at the relevant constitutional provisions on the removal of a judge of the Supreme Court (the statutory procedure if you will), I hold that a judge who is the subject of those provisions, as the applicant in the instant case, is entitled, **ex debito justitiae**, to be heard at every stage of the procedure. This is so, even though the relevant Constitutional provisions are silent on the right of the affected judge to be heard. Justice requires it and if the independence of the judiciary means anything, this must be so. For without the right to be heard at each stage of the procedure, a judge would be condemned unheard. This will be a terrible day for the independence of the judiciary, the due administration of justice, and the rights and freedoms of Belizeans the protection and enforcement of which are entrusted to judges of the Supreme Court. If a judge of the Supreme Court does not have the right to procedural fairness, natural justice, fundamental justice, fair play in action, rational justice, substantial justice, or call it by whatever name or simply justice without any epithet, in a critical area as his tenure of office or the question of his removal therefrom, then it simply boggles the imagination to fathom how he can truly, with independence and integrity, dispense justice let alone protect the rights and freedoms of all Belizeans.

Surely, the framers of the Constitution could not have intended this. I am therefore prepared to hold and I do hold that notwithstanding the silence of subsections (3), (4) and (5) of section 98 of the Constitution, a judge of the Supreme Court of Belize, such as the applicant, is entitled to natural justice, in particular the principle of ***audi alteram partem***, procedural fairness, in relation to the question of his removal from office whether it be inability to perform the functions of his office for whatever cause or misbehaviour. The applicant therefore has a right to be heard before a decision concerning the question of his removal is arrived at. This right I also hold is applicable to all the stages of the process, viz, at the **consideration stage** by the Governor-General of the question of his removal from office whether for inability or misbehaviour ought to be investigated, at the stage where if the matter is referred to the Belize Advisory Council, (the referral stage).

What cannot be decided with certainty however, is whether the affected judge is entitled to be heard at the **trigger stage**. That is to say, should the complainants, in this case, attorney Lois Young-Barrow and the Bar Association of Belize, have first given an opportunity to the applicant to be heard on their complaints? This I surmise would be stretching somewhat the requirements of procedural fairness; and these are only binding on the decision-maker, not the person or body that brings the question to the attention of the decision-maker for consideration."

28. Mr Mweretaka in response submitted that there is no obligation on Beretitenti to hear the applicant's version before setting up the Tribunal. If he were to do so he would embark on deliberating the matter, which he is not mandated to do. He further submitted that the case of ***Rees v Crane*** was inapplicable as the circumstances were different to this matter.

SUSPENSION

29. Mr Herzsfeld submitted that the suspension of the appellant ceased when the instrument appointing the First Tribunal (16 May 2022) was revoked on 1 November 2023. He further submitted that if the 2022 Tribunal was valid then the powers to suspend the appellant required procedural fairness which was not afforded to him. He relied on the case of ***Sharma v President of Fiji***[4].

30. Mr Mweretaka submitted that the instrument establishing the Tribunal was valid and therefore the suspension was valid as well and that s.83(4) does not require the Beretitenti to afford the appellant the opportunity to be heard before imposing the suspension.

CONSIDERATION

31. Before we discuss the issues raised by the counsels, we refer to the publication titled ***The Commonwealth – The Appointment, Tenure and Removal of Judges under Commonwealth Principles – a Compendium Analysis of Best Practice – Bingham Centre for the Rule of Law*** (Commonwealth research commissioned by the Commonwealth Secretariat in 2015). It states at page 158 on removal of judges in Kiribati as follows:

> **Kiribati**
> Constitution of Kiribati 1979; Code of Conduct for Judicial Officers of the
> Republic of Kiribati 2011. All references are to the Constitution unless
> otherwise stated.
> Background
> Kiribati is a republic with a unicameral legislature and a directly elected
> President who is both Head of State and Head of Government. The superior
> courts are the High Court and the Court of Appeal. In certain cases there is the possibility of a final appeal to the Judicial Committee of the Privy Council.
> Appointments
> – The Public Service Commission (PSC) is established (s 98). It is composed of five members: a Chairman and four other Commissioners appointed and removed by the President in accordance
> with the advice of the Speaker and Chief Justice acting jointly. The Chief Justice sits as a member of the PSC to make various decisions
> concerning the judiciary.
> – The President of Kiribati appoints the Chief Justice and the President of the Court of Appeal 'acting in accordance with the advice of the Cabinet tendered after consultation with the Public Service Commission' (ss 81(1) and 91(3)). Other judges are appointed by the President of Kiribati 'acting in accordance with the advice of the Chief Justice sitting with the Public Service

[4] HBJ 10 of 2021 [121-142]

Commission' (ss 81(2) and 91(1)(b)). In the case of any judicial appointment the President of Kiribati may once refer back a candidate for reconsideration by the nominating body (s 46(2)).

...

Removal

– A judge may be removed from office 'only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour' (ss 83(2) and93(2)).

– The Code of Conduct for Judicial Officers of the Republic of Kiribati 2011 has clarified standards of judicial conduct and enables the Chief Justice to form a Judicial Ethics Committee to investigate complaints against judges. A judge who is the subject of a complaint is entitled to be heard by this committee, but this procedure does not form part of the constitutionally prescribed proceedings to determine whether a judge is to be removed.

– Proceedings to remove a judge are initiated by the President of Kiribati, if he or she considers that the question ought to be investigated,

or by a resolution of the legislative assembly (ss 83(4) and 93(4)).

– The President of Kiribati then appoints an ad hoc tribunal consisting of no fewer than three members, one of whom must be a serving or retired judge. After conducting an inquiry into the matter, the tribunal must report to the legislative assembly on the facts and provide advice as to whether the judge should be removed (ss 83(4) and 93(4)).

– While tribunal proceedings are pending, the President may suspend the judge in question for any part of the period until proceedings are concluded (ss 83(5) and 93(5)).

– If the advice of the tribunal is that the judge should be removed, and the legislative assembly passes a resolution to the same effect, the President of Kiribati may remove the judge from office (ss 83(3) and 93(3)).

32. It is further stated at page 95 of the Commonwealth Research at [3.4.8] as follows:

3.4.8 A fair decision-making process at the preliminary stage should provide the judge who is suspected of misconduct with an opportunity to respond informally to the allegations against him or her, before any decision is made to institute tribunal proceedings. The Privy Council laid down this principle in the important 1994 case of ***Rees v Crane***, 60 which confirmed that a judge was entitled to due process, also known as natural justice, during the preliminary phase in which allegations were under consideration before any tribunal had been established. This approach is justified by the risk of damage which any official action on allegations against a judge may do to the ability of that judge to command the confidence of litigants and continue on the bench. This is an institutional interest which goes beyond the personal interest in preserving their reputation which judges have in common with all persons facing disciplinary action. ***Rees v Crane*** has been applied by a number of Commonwealth courts in different jurisdictions.61 It has been observed, however, that natural justice does not always require a formal hearing. In ***President of the Court of Appeal v Prime***

Minister, *62* the Court of Appeal of Lesotho held that the Prime Minister's decision to form a tribunal was not unfair in circumstances in which the allegations against the judge were largely in the public domain, and the judge's response had been aired in litigation on substantially the same issues. The judge's reputation was found not to have been damaged further by the formation of the tribunal, and the court considered that it was in the interests of both the judge and public confidence in the judiciary that the tribunal inquiry be allowed to take place.

33. In ***The President of Court of Appeal v The Prime Minister and Others*** it is further stated at [19], [20], [21], [22], [23], [24], [25] and [26]:

[19] As explained by Gauntlett IA in his earlier quoted dictum from Matebesi, the requirements of fair procedure, which includes the audi principle, have 'more recently mutated to an acceptance of a more supple and encompassing duty to act fairly'. The same sentiments appear from the statement by Hoexter under the rubric 'audi alterem partem' (at 363):

'From the late 1980s . . . our courts have steadily retreated from the old formalistic and narrow approach to "natural justice" and towards a broad and flexible duty to act fairly in all cases.'

And in the same vein (at 362):

'. . . [P]rocedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all-important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant.'

[20] The principle that procedural fairness is a highly variable concept which must be decided in the context and the circumstances of each case and that the one-size-fits-all approach is inappropriate, has been explicitly recognised by the highest courts in England (see eg ***Doody v Secretary of State for the House Department and Other Appeals*** [1993] 3 All ER 92 (HL) 106d-h) and in South Africa (see eg ***Du Preez & another v Truth and Reconciliation Commission*** 1997 (3) SA 204 (A) 231-3; ***Minister of Health & Another NO v New Clicks SA (Pty) Ltd & others*** (Treatment Action Campaign & another as Amici Curiae) 2006 (2) SA 311 (CC) para 152). This means, as I see it, that the strict rules of the audi principle are not immutable. Where they are not strictly complied with, as in this case, the question as to whether in all the circumstances of the case the procedure that preceded the impugned decision was unfair, remains. I am mindful of the fact that the Prime Minister's case from the outset was not that the procedure preceding his request to the King was fair. On the contrary, his case was that the requirement of fair procedure did not apply. But notwithstanding the Prime Minister's stance, as I see it, the appellant must still persuade us that in all the circumstances the treatment meted out to him was unfair.

[21] In having regard to all the circumstances of the case, it must firstly be borne in mind that inherent to the impugned decision is the fact that it is a preliminary step aimed at causing an enquiry by an independent body, where the appellant shall be afforded ample opportunity to refute the allegations against him. This means that the Prime Minister's decision has no immediate effect on the appellant's tenure as President of the Court of Appeal. Nor could it in this case have led to the appellant's suspension without him being heard, since he was expressly invited to make representations as to why he should not be suspended. The potentially adverse effect of the decision was therefore limited to the appellant's reputation only. In this regard the adverse effect to the appellant's reputation shall, in the event of the Tribunal finding the allegations against him to be unimpeachable, in all likelihood not be permanent.

[22] The fact that the adverse effect of the impugned decision will be confined to the appellant's reputation leads me to a further consideration. It is this. At the time of the appointment of the Tribunal most of the allegations of misconduct against the appellant were already in the public domain. I say that in the light of the following:

(a) The unseemly incidents flowing from the protracted conflict between the appellant and the Chief Justice had been widely publicised.

(b) Some of the allegations against the appellant had been the subject of formal complaints by the Lesotho Law Society while others were raised in a formal publicised memorandum of complaint by the Law Society of Swaziland.

(c) Some of the allegations against the appellant were mentioned in the report of the ICJ Committee.

(d) There was a petition by a group of concerned citizens to the Prime Minister calling for the ouster of the appellant from judicial office, which also received coverage in the local press.

(e) Finally there was the litigation between the appellant and the Prime Minister, where virtually all the allegations of misconduct relied upon by the Prime Minister were ventilated in the papers before the high court.

[23] The upshot of all this, as I see it, is that the appellant's reputation was already tarnished before the request for the appointment of a Tribunal by the Prime Minister. On the face of it, it seems to me that the only way to salvage his reputation is for the appellant to successfully refute the allegations before the Tribunal. The case is therefore distinguishable from the situation that arose, such as in Rees (supra) where the harm to the judge's reputation arose solely from the appointment of the Tribunal itself. The feature of wide prior publication also rendered the case distinguishable from situations such as Rees in another respect. The removal of the uncertainty surrounding the appellant's reputation caused by the wide publication is not in his interest only. It also affects the unconditional public respect for the integrity of the judiciary without which the court simply cannot function. The interest of the administration of justice thus required the appointment of the Tribunal as a matter of urgency.

[24] Shifting the spotlight to a different facet of the case highlights the element singled out by Musi AJ as the basis for his minority judgment against the appellant. The basis for this finding was that the appellant had been informed in the answering affidavit in the first application of the Prime Minister's intention to initiate impeachment proceedings in terms of s 125(5); that virtually all the allegations of misconduct against the appellant eventually relied upon by the Prime Minister for his request to the King were made known to the appellant in the same affidavit; and that the appellant had availed himself of the opportunity to respond to these allegations in his replying affidavit. Moreover, from the contents of the letter of 22 August 2013, which informed the appellant that a Tribunal had been appointed, it was apparent that the Prime Minister had had regard to the appellant's response when he approached the King.

[25] It is true, as the appellant argued, that he was not formally invited by the Prime Minister to make representations as to why the request for the appointment of the Tribunal should not be made. Consequently, so he contended, his answer to the allegations in his replying affidavit was not a response to an invitation of that kind. I accept that the appellant was not invited to make representations regarding the appointment of the Tribunal and that what he said in his replying affidavit cannot be construed as having been such a response. It is also true that two of the allegations relied upon by the Prime Minister in his letter of 22 August 2013 had not been referred to in the answering affidavit in the first application. In consequence, the appellant had no opportunity to respond to these allegations either before the Prime Minister's impugned request was made to the King. But it is difficult to think of any reason why his response to the allegations would have been any different simply because it was given for a different purpose. Furthermore the overwhelming probabilities seem to indicate that the impugned request was not dependent on the additional allegations. And since the appellant's objection is aimed at the appointment of the Tribunal, and not at individual charges against him, the additional allegations would appear to be inconsequential in the present context.

[26] In all the circumstances of the case I am therefore not persuaded that the Prime Minister's failure to afford the appellant a hearing in the strict sense before requesting the King to appoint a Tribunal was unfair. Conversely stated, in the view that I hold, insistence on strict compliance with the audi principle in all its ramifications would in the circumstances of this case have been overly burdensome on the Prime Minister, undermined the administration of justice and unhelpful to the appellant. It follows that in my view the appeal against the high court's dismissal of the appellant's application cannot be sustained.

UNREASONABLENESS

34. If the complaint only related to the delay in delivery of judgements, then we agree that it would have been unreasonable in the *Wednesbury* sense for the Beretitenti to set up the Tribunal. Such matters could more appropriately be dealt with using the normal process for complaints against judges under the *Code of Conduct for Judicial Officers of the Republic of Kiribati 2011*. But the complaint was not merely about delayed judgments, it went much further than that.

35. The complaint of 16 March 2022 says:

"...it is clear that the High Court judgement on this case has been arrived at but His Honor David Lambourne withheld releasing the judgement in this case for a period of 9 months, by which election of Member of Parliaments and the *Te Beretitenti* had ended. We consider this conduct by His Honor David Lambourne as seriously wrong since the case if of national importance and so the judgement should be announced urgently before the election of MPs and the election of *Te Beretitenti*. We have no doubt that David Lambourne did this because he shared a relationship with the opposition as accepted by all, also we have no doubt that his decision to delay releasing the judgement to the public was based on that relationship."

36. The complaint about having a relationship with the opposition party and the delay in releasing the judgment because of that relationship amounted to a complaint of serious misbehaviour. It alleged political interference and impugned the independence, character and integrity of a sitting justice of the High Court of Kiribati. It required a transparent and robust process of investigation. In the context of a small island nation such as Kiribati, in our view it warranted the establishment of a Tribunal under s.83 of the Constitution. We therefore find that the Beretitenti was justified in setting up such a Tribunal. The truth or otherwise of the complaints were not a matter requiring determination at this stage, it was sufficient that serious questions had been raised about the impartiality and conduct of a sitting judge which needed to be investigated.

PROCEDURAL FAIRNESS

37. On the issue of procedural fairness Mr Herzsfeld relies on the case of ***Meerabux v Attorney General (Belize)***. S.98 of the Belize Constitution is very similar to s.83 of the Kiribati Constitution, however, there is one marked and significant difference between s.98(5) and s.83(3). S.83(3) is a stand-alone section on removal of a Judge from office after appointment of Tribunal by the Beretitenti and upon resolution of the Maneaba ne Moungatabu – if the Tribunal advised the Maneaba ne Moungatabu that he ought to be removed from office.

38. S.83(4) states –

"If the Beretitenti considers, or the Maneaba resolves that the question of removing a Judge ...ought to be investigated"

Mr Herzsfeld contends that if the Berelenti considers or the Maneaba resolves the question of misbehavior ought to be investigated, then the Berententi/ Maneaba must first give an opportunity to the Judge to respond to the allegations. We agree in principle as noted by the Court in ***Meerabux*** that the judge is entitled '*ex debito justitiae*' to an opportunity to be heard for the many and good reasons articulated in that case. The only question is at what point in the inquiry should this occur.

39. The Constitution is silent on this issue. But to require this opportunity be given beforehand would in our view inevitably expand and delay a matter that in the interest of all concerned should be dealt with transparently and expeditiously. It is not difficult to see how pre-Tribunal this could develop into a mini- inquiry in itself involving the production of evidence, calling of witnesses, lawyers submissions, etc as to the necessity for establishment of a Tribunal. This is the concern voiced in the passage above from the Lesotho case of ***President of the CA v Prime Minister*** where it was said:

"Procedural fairness is a principle of good administration that requires sensitive rather than heavy-handed application. Context is all important: the context of fairness is not static but must be tailored to the particular circumstances of each case. There is no longer any room for the all-or-nothing approach to fairness that characterised our pre-democratic law, an approach that tended to produce results that were either overly burdensome for the administration or entirely unhelpful to the complainant."

40. As noted by the Privy Council in ***Rees v Crane*** [1942] 1 All ER 833, 844:

"It is clear from the English and Commonwealth decisions which have been cited that there are many situations in which natural justice does not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the courts to this conclusion have included the fact that the investigation is purely preliminary, that there will be a full chance adequately to deal with the complaints later, that the making of the inquiry without observing the audi alteram partem maxim is justified by urgency or administrative necessity....

But in their Lordship opinion there is no absolute rule to this effect even if there is to be, under the procedure, an opportunity to answer the charges later. As *de Smith's Judicial Review of Administrative Action* (4th edn, 1980) p 199 puts it:

> 'Where an act or proposal is only the first step in a sequence of measures which may culminate in a decision detrimental to a person's interests, the courts will generally decline to accede to that persons submission that he is entitled to be heard in opposition to this initial act, particularly if he is entitled to be heard at a later stage' (My emphasis)

In considering whether this general practice should be followed, the courts should not be bound by rigid rules. It is necessary, as was made clear by Tucker LJ in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (as approved by Lord Guest in *Wiseman v Borneman* [1969] 3 All ER 275, [1971] AC 297 and by Lord Morris of Borth-y-Gest in *Furnell v Whangarei High Schools Board* [1973] 1 All ER 400, [1973] AC 660) to have regard to all the circumstances of the case:

> "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which, the tribunal is acting, the subject matter that is being dealt with, and so forth.'"

41. And further on in ***Rees v Crane*** in reference to the particular facts of the case:

"It is also in their Lordships view clear that the commission is not intended simply to be a conduit pipe by which complaints are passed on by way of representation. The commission may receive isolated complaints of a purely administrative nature which they consider can be dealt with adequately through administrative actions by the Chief Justice. Then they would no doubt not make a representation that the question of removal be considered. Indeed it may well in the public interest be desirable that such matters be dealt with quickly by the Chief Justice rather than that the full panoply of

representation, tribunal and the Judicial Committee be set in motion. The commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to present to the President, the commission must act fairly."

42. A pre-Tribunal opportunity could also serve to compromise the independence and the integrity of the eventual decision to be made by the Maneaba in a case where it is the Maneaba itself pursuant to s.83(4) that resolves to launch an investigation. In that event, the Maneaba would be subject to the duty to hear the Judge on the issue of whether the Complaint justifies the establishment of a Tribunal. The appellant's argument is that even in this preliminary stage, the Judge ought to be given an opportunity to be heard. Apart from the administrative problems this would pose, it is difficult to envisage how the Maneaba could then subsequently fairly, effectively and in a timely manner decide on the merits and outcome of the complaints.

43. We are in agreement with ***Meerabux*** cited in "paragraphs 26 and 27 above that at this **"trigger stage"**, this would be "stretching somewhat the requirements of procedural fairness" and that this should bind only "the decision-maker, not the person or body that brings the question to the attention of the decision-maker for consideration". We are accordingly of the view that what was intended by the framers of the Constitution was that the opportunity to be heard should be fully respected, but at the Tribunal phase of the investigation. It is not necessary at the pre-Tribunal stage to set in motion what the Privy Council in ***Rees v Crane*** referred to as "the full panoply of representation."

44. Notwithstanding that, and this is also a critical part of our decision, as noted in paragraph 17 above, on the 7 April 2022 the appellant was informed by the Chief Registrar of the Court of the complaints against him and the fact that a Tribunal would be established to investigate the complaints. He referred to those complaints in his affidavit dated 16 June 2022 outlined in paragraph 18 above. It is clear that he was therefore apprised on 7 April 2022 of the details of the allegations against him including copies of the relevant correspondence. And of the fact that the Government was establishing a Tribunal of investigation. He could have at that stage objected to the proposal and set out the basis of his objection. In the least he could have requested an opportunity to be heard on the matter. He is no novice in such matters, he is a qualified and experienced sitting justice of the High Court of Kiribati. The first Tribunal was not formally constituted by the Beretitenti until 13 May 2022, some five (5) weeks later. He made a deliberate choice not to respond to the 7 April 2022 communication from the Chief Registrar of the Court. He cannot now complain he had no fair opportunity to be heard prior to the establishment of the first Tribunal under s.83 (4) of the Constitution.

45. We are in complete agreement with what was said in the ***Lesotho Case*** where a similar situation prevailed:

"It is true, as the appellant argued, that he was not formally invited by the Prime Minister to make representations as why the request for the appointment of the Tribunal should not be made. Consequently, so he contended, his answer to the allegations in his replying affidavit was not a response to an invitation of that kind. I accept that the appellant was not invited to make representations regarding the appointment of the Tribunal and that what he said in his replying affidavit cannot be construed as having been such a

response..... In consequence, the appellant had no opportunity to respond to these allegations either before the Prime Minster's impugned request was made to the King. But it is difficult to think of any reason why his response to the allegations would have been any different simply because it was given for a different purpose. Furthermore the overwhelming probabilities seem to indicate that the impugned request was not dependent on the additional allegations. And since the appellant's objection is aimed at the appointment of the Tribunal, and not at individual charges against him, the additional allegations would appear to be inconsequential in the present context.

In all the circumstances of the case I am therefore not persuaded that the Prime Minister's failure to afford the appellant a hearing in the strict sense before requesting the King to appoint a Tribunal was unfair. Conversely stated, in the view that I hold, insistence on strict compliance with the *audi* principle in all its ramifications would in the circumstances of this case have been overly burdensome on the Prime Minister, undermined the administration of justice and unhelpful to the appellant. It follows that in my view the appeal against the high court's dismissal of the appellant's application cannot be sustained."

46. We are also of the view that by the time the second Tribunal was established, the appellant's position on the issues was a matter of public and court record and well known to the Beretitenti and indeed to all at large. We accordingly hold that failure to expressly afford the appellant a hearing before the establishment of the first and the second Tribunal was not in the particular circumstances of the matter procedurally unfair or unconstitutional. We therefore dismiss the appeal in Case No. 4 of 2024.

47. In light of the importance of the Constitutional issues raised, we order that each party shall bear their own costs in the matter (Appeal No. 4 of 2024)

APPEAL NO. 5 OF 2024 – CERTIORARI APPEAL

48. The Commissioner in the High Court refused to grant leave to the appellant by concluding that he had no jurisdiction to grant the relief sought in the Certiorari Application.

49. Mr Herzsfeld wanted us to deal with the substantive certiorari application under the powers vested in this Court pursuant to the provisions of s.11 of the Court of Appeal Act and Rule 22 of the Court of Appeal Rules as the facts are not in dispute. Mr Mweretaka submitted that we should not hear the certiorari application because the facts are very much in dispute. "It is not correct for the Appellant to say that the facts were not disputed": Respondents submission at paragraph 48. He further submitted that if we were to deal with the substantive matter this would prejudice the respondents as it would lose its right of appeal.

50. There is no question that on appeal, an appellate court would benefit greatly from a full and detailed appraisal at first instance of the certiorari application.

51. In the circumstances we refrain from dealing with the substantive certiorari application. We hold that the learned Commissioner was wrong in refusing to grant leave to the appellant. We grant leave for the certiorari application and order that it be remitted back to the High Court for hearing.

52. On this issue, the Commissioner found that "justice can only be served if monies the Respondent is entitled to are paid into the Court awaiting the disposal of the Applicants appeal": paragraph 18 of his decision dated 19 July 2024. This has been complied with by the Beretitenti. It is common ground that the sum in issue amounts to $84,338.11

53. As noted in the agreed Chronology of Events (see paragraph 9 above), on 13 May 2022 the Beretitenti established a Tribunal under s.83(4) of the Constitution to investigate the allegations of misbehavior against the Respondent. On 16 May 2022 he ordered that the suspension be without salary and other emoluments. The appellant argues that this the Beretienti was entitled to do pursuant to s.83(5) of the Constitution which provides:

"(5) If the question of removing a judge of the High Court from office has been referred to a Tribunal under the preceding subsection the Beretitenti may suspend that judge from performing the functions of his office, and any such suspension may at any time be revoked by the Beretitenti and shall in any case cease to have effect if the Tribunal advises the Maneaba that that judge should not be removed from office. "

54. The appellant submitted that while s.83(5) does not expressly confer a power to suspend without pay, authority to do so is conferred on the Beretitenti by s.46(1) of the Constitution. As s.46(2) is also relevant, we set out s.46 in its entirety:

"46. (1) In the exercise of any function conferred upon him by this Constitution or any other law the Beretitenti shall, unless it is otherwise provided, act in his own deliberate judgment and shall not be obliged to follow the advice tendered by any other person or authority.

(2) Where the Beretitenti is by this Constitution or any other law directed to exercise any function in accordance with the advice of any person or authority, he may, before acting in accordance with such advice, once refer it back for reconsideration by the person or authority concerned."

55. The respondents disagree and argue in reliance on s.83(5):

"There is no provision in the Constitution that permits the Beretitenti to suspend the salary of a sitting judge simply because a tribunal has been appointed. A judge in those circumstances remains a judge of the High Court. It is only when the Tribunal advises the Maneaba ni Maungatabu that the judge should be removed, the Maneaba then resolves to remove the judge and the Beretitenti then removes the judge in accordance with that resolution, that the judge ceases to hold judicial office. Until that point, the judge remains a constitutional office-holder and is entitled to continue to receive all remuneration attached to the office."

56. A close scrutiny of s.83(5) supports the Respondents interpretation and the findings of the learned Commissioner in the lower court. The operative words are that the Beretitenti may suspend the judge concerned "from performing the *functions* of his office". This is not a suspension from his "*holding*" that office, this is merely a suspension from duty pending the outcome of an investigation under s.83(4). There is no express power conferred for this to be a suspension without salary. The Respondents correctly note that:

"Section 83(5) says nothing about withholding payment. The suspension provided for by section 83(5) is a suspension from performing the functions of office. It is not a suspension from holding the office. Only if the Tribunal inquiry culminates in an accepted recommendation that the judge be removed from office would the judge cease to hold office. But in the interim, the judge under investigation remains a judge of the High Court, and although suspended from performing judicial functions, they are not to be deprived of their salary merely because someone has made allegations against them, and those allegations are being investigated."

57. To hold otherwise would mean as noted by the Respondents that the commencement of a Tribunal inquiry could be used as a mechanism for "de facto removal from judicial office" of the judge concerned. As further noted by the Respondents:

"The outcome of a tribunal inquiry cannot be known in advance. The inquiry may result in the judge being removed from office; equally, it may result in the judge being cleared of any wrongdoing and resuming their judicial duties. If the Beretitenti had power to suspend the judge's salary pending the outcome of the inquiry, he would have power effectively to punish that judge for conduct that had not even been investigated yet and that might ultimately be disproved or shown not to amount to judicial misconduct. It would also give the Beretitenti the power to deprive a sitting judge of their livelihood: which, if the inquiry went on for long enough, could force the judge to resign and seek employment elsewhere."

58. This cannot be the result intended by the framers of the Constitution. And s.46 does not operate to produce such a result. With due respect to the Appellants, s.46(1) cannot be read in isolation, it must be considered in conjunction with s.46(2). Reading the two provisions together indicates that s.46 was intended to apply to where the Beretitenti has received "advice" from some "person or authority". In such a case "Where the Beretitenti is by this Constitution or any other law" directed to exercise his legal functions "in accordance with the advice of any person or authority", the Beretitenti is conferred a discretion viz that "he may before acting in accordance with such advice", and on a one time only basis, refer such advice back to the relevant person or authority "for reconsideration." Plainly the authority conferred on the Beretitenti by this provision can only be exercised in the particular circumstances prescribed. And in that event he is then empowered to "act in his own deliberate judgment" and is under no obligation to follow the advice tendered. In fact, he is further empowered to refer the matter back to the relevant "person or authority" for reconsideration.

59. S.46 does not apply to the situation before the court where the Beretitenti is required by s. 83(4) to himself exercise, without the benefit of "advice tendered by any other person or authority," the Constitutional function of deciding "whether the question of removing a judge .....ought to be investigated." Whether s.46 applies to the issue of removal of a judge from office pursuant to a resolution of the Maneaba under s.83(3) and whether the Beretitenti retains a discretion in that regard is a different matter altogether and for present purposes requires no consideration.

60. The appellants argument also breaches s.113(3) of the Constitution which provides:

"113 (3) The remuneration prescribed under this section in respect of the holder of any such office and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of

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

S.113(5) applies this provision to the office of a judge of the High Court of Kiribati.

61. In ***Lambourne v AG*** [2021] KIHC 8 at para. 102, Chief Justice Hastings said:

"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."

62. In relation therefore to salary during suspension being withheld, we uphold the decision of the lower court and find that while the Respondent was validly suspended from duty, there is no legal basis for withholding his salary during the period of the suspension. We order that the sum of $84,338.11 paid into court plus interest thereon at the rate of 5% per annum until payment is now due and payable to the Respondent.

63. In respect of this appeal we order that the Appellant shall pay the Respondents costs to be taxed if not agreed.

DATED this 01st day of May 2025

Sir Salika, JA Nelson, JA Khan, JA