**IN THE KIRIBATI COURT OF APPEAL**
**APPELLATE JURISDICTION**
**HELD AT BETIO**
**REPUBLIC OF KIRIBATI**

**Civil Appeal 5 of 2021**

**Civil Appeal 6 of 2021**

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| **BETWEEN** | **ATTORNEY-GENERAL** | **APPELLANT** |
| **AND** | **DAVID LAMBOURNE** | **RESPONDENT** |

**Hearing:** 19 August 2022

**Coram:** Blanchard JA
Hansen JA
Heath JA

**Counsel:** Mr Ravi Batra and Mr Monop Mweretaka for Appellant
Mr Perry Herzfeld SC, Mr Daniel Reynolds and Ms K Kabure for Respondent

**Judgment:** 26 August 2022

**JUDGMENT OF THE COURT**

**Introduction**

[1] In a judgment delivered on 11 November 2021 (Civil Case No 6 of 2021), reported at [2022] 1 LRC 630, Chief Justice Hastings made declarations to the effect that the respondent holds office as a judge of the High Court of Kiribati until death, resignation or removal from office in accordance with s83 of the Constitution of Kiribati; that s5(2)(a) of the High Court Judges (Salaries and Allowances) Act 2017 (as amended) is inconsistent with the Constitution and therefore void to that extent; and that the exercise of a statutory discretion by public officials must recognize the constitutional nature of a judge and be in accordance with the Constitution. Civil Appeal 5 of 2021 is against those declarations.

[2] In a subsequent judgment of 7 December 2021 (Misc App No.92 of 2021) the Chief Justice made the following order:

> The respondent is to ensure that the relevant officer of the Ministry of Foreign Affairs and Immigration takes immediate steps to issue 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.

Civil Appeal 6 of 2021 is against that order.

**The Facts**

[3] The facts are not in dispute, although the good faith of the two Judges in respectively bringing and deciding the case has been questioned by the Attorney-General's counsel on this appeal.

[4] On 10 May 2018 Te Beretitenti signed an appointment of the respondent, David Lambourne, an Australian citizen resident in Kiribati, as a Judge of the High Court. It is not in dispute that the respondent was fully qualified for the appointment. Neither the appointment document nor the requisite advice of the Chief Justice and the Public Service Commission to Te Beretitenti under s 81(2) of the Constitution stated any term limit or period of the appointment, nor had any been mentioned at the meeting at which it was resolved to give that advice, nor even in the prior invitation seeking expressions of interest in the position.

[5] The appointment was expressed as commencing on 1 July 2018. The respondent thereafter sat as a High Court judge. He was twice issued with one-year permits or visas to enter, reside and work in Kiribati, the second of which expired on 10 July 2020.

[6] On 27 February 2020 he had travelled to Australia on annual leave intending to return to Kiribati on 6 April, but Kiribati closed its borders because of the COVID-19 pandemic on 19 March. The Government arranged repatriation flights from November 2020 but the respondent, despite his representations, was never included in the persons authorized to travel on them.

[7] Then, on 1 March 2021, the respondent was informed by the Chief Registrar that the Secretary of the Public Service Commission had said he would not be issued a work permit unless he signed a contract of employment in respect of his position as a judge limiting his appointment to a three year term. He strongly objected to this requirement but after having been advised by the Chief Registrar on 30 March 2021 that payment of his salary and allowances would otherwise cease, he relented and signed the contract document tendered by the Government. He says that he did so, as a matter of "practical necessity", because of the decision to withhold his salary and in order to resume his duties, obtain an immigration permit and secure a place on a repatriation flight. The contract tendered to him which he signed in these circumstances recorded an appointment by Te Beretitenti for the period of three years only, ending on 30 June 2021.

[8] Even though the respondent had signed the contract and payment of his salary and allowances, including arrears, was then made and his work permit was approved until 30 June 2021, no place on a repatriation flight was ever made available to him. The Government takes the position that he ceased to be a Judge of the High Court on 30 June 2021. It was, and remains, the respondent's case that he was validly appointed as a Judge as from 1 July 2018 for an indefinite period and that his signing of the three year contract could not, as a matter of constitutional law, affect the appointment made in 2018, so that he still holds office as a High Court judge and will do so until death, resignation or removal from office under s.83(2) of the Constitution.

[9] In the proceeding in the High Court brought on 12 August 2021 he sought, inter alia, a declaration to that effect and declarations that the withholding of his salary and other remuneration and the refusal to issue him a visa to reside and work in Kiribati are unconstitutional. The proceeding is in the form of an application under s.88 of the Constitution which authorises the High Court to determine whether any provision of the Constitution has been contravened and to declare accordingly.

**Events preceding the hearing in this Court**

[10] Notices of Appeal by the Attorney-General against the Chief Justice's decisions were filed in December 2021. A hearing in January 2022 had to be vacated when there was delay in swearing in a new Judge of this Court. The present panel of the Court then prepared to hear the appeals in March 2022, but the fixture had to be vacated because Kiribati went into lockdown because of the pandemic. A new hearing date of 21 July 2022 was fixed by agreement with the parties.

[11] Then on 30 June it was announced that the Chief Justice had been suspended from office for alleged misconduct. A charge or charges of misconduct have also been made against Mr Lambourne. (Those charges against both men are brought under s83(4) of the Constitution, and we have been given no particularised information about them.)

[12] On the afternoon of 20 July counsel for the Attorney-General made an application, not previously signaled, for the appeal hearing to be adjourned for several months so that the Attorney could apply to amend her Notice of Appeal in order to allege bias on the part of the Chief Justice arising out of the views he had expressed in an article published in the October 2021 issue of *Judicature International*, and also to instruct expatriate counsel to represent her. (The Attorney is now represented by Mr Batra of New York.)

[13] We heard the application on 21 July and agreed to adjourn the appeal hearing only until 11 August. We pointed out that the suspension of the Chief Justice created a considerable difficulty because there are only three Court of Appeal Judges (a fourth has been appointed but has not been sworn in under s.82 of the Constitution despite numerous requests since December 2021). The warrants of two of us were due to expire on 15 August. We could not be reappointed by Te Beretitenti under s 91(1)(a) of the Constitution unless he acted in accordance with advice to do so from the Chief Justice acting with the Public Service Commission. That advice cannot be given while the Chief Justice is suspended from office. Therefore, if the commencement of the appeal hearing were to be deferred until after 15 August, enabling us to carry on under s94, there was no prospect of any hearing taking place in the foreseeable future. That would have been grossly unfair to the respondent and, indeed, would have risked bringing the legal system of Kiribati into disrepute.

[14] We therefore required the Attorney-General to file and serve any application to amend her notice of appeal by 5:00 pm on 21 July (which she did) and set a timetable for written submissions to enable a hearing on 11 August. A further application by the Attorney for a lengthy adjournment was made informally through the Registrar on 1 August and was likewise declined.

[15] Then on the afternoon of 10 August 2022 the Attorney-General filed and served notices that each of the appeals was abandoned. The notices referred to Rule 43 of the Court of Appeal Rules, but that rule applies only to criminal appeals. In a civil proceeding the leave of the Court of Appeal is required and, as the appellant now accepts, the appeals remain on foot until the Court orders them to be dismissed.

[16] In the meantime, on 1 August 2022, with the border having re-opened, Mr Lambourne had arrived in Kiribati on a visitor's visa, under the terms of which he was not permitted to work. On the morning of 11 August, when the Court had been due to hear the appeals, he was served with a deportation order alleging that he had been "working without a proper work visa" and he was taken to the airport by immigration officers and police so that he could be put on a Fiji Airways flight to Nadi due to depart at 11.50 am.

[17] An urgent application to prevent his deportation was made to us. We concluded that it was reasonably arguable that this Court had jurisdiction to deal with the application and that the appeals remained on foot for the purpose of granting ancillary relief. We also concluded that, in view of counsel for the Attorney-General's acceptance that there was no prejudice to the State of Kiribati, the balance of convenience favoured a grant of interim relief. We ordered

that the Attorney-General and any person exercising authority under the Kiribati Immigration Act 2019 should take all steps necessary to ensure that the respondent was not deported from Kiribati pending further order of the Court. We set the respondent's application down for hearing on 19 August and established a timetable leading to that hearing. (The hearing on 11 August commenced the appeal proceedings before us in terms of s94.)

[18] Immigration officers and police nevertheless still attempted to put Mr Lambourne on the plane but were unsuccessful because the airline, having seen our order, very responsibly refused to carry him. The respondent was however taken to a motel and detained there. Te Beretitenti, purporting to act under s.138 of the Constitution, then issued a document headed "Warrant" that stated that it recalled, vacated and nullified the respondent's appointment of 10 May 2018 as a Judge of the High Court and reappointed him for a term that had already expired on 30 June 2021. This is said to have been done to correct a "mistake" in the original warrant of appointment.

[19] A further occurrence after our judgment of 11 August was that a second deportation order was issued, this time in reliance on s.79 of the Immigration Act which can apply where the Minister has certified that person is a threat or risk to security (as defined in s.4). The second deportation order was signed by Te Beretitenti "as a Minister of Immigration".

[20] A further urgent application was then made to us seeking (a) an extension of our order so that it would prevent deportation under the second deportation order and (b) a grant of bail so that Mr Lambourne would not be detained pending the hearing set for 19 August. At a hearing on 12 August we granted that application, taking the view that it was reasonably arguable that a deportation under s.79 would be unlawful because the existence of a security risk could not be made out; and we ordered Mr Lambourne's release on bail upon conditions, citing the decision of the New Zealand Supreme Court in *Zaoui v Attorney-General*.[1]

[21] In accordance with the timetable we had set, counsel for Mr Lambourne filed a notice of motion for extension of time to file a respondent's notice in Civil Appeal 6 of 2021 (see para [2] above) seeking leave to adduce further evidence in the form of an affidavit of 16 August 2022 by Mr Lambourne. The relief sought by the respondent's notice is that the Chief Justice's order of 7 December 2021 be varied to provide for:

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1 *Zaoui v Attorney-General* SC Civ 13/2004; [2005] 1 NZLR 630 at [30] – [43].

(a) declarations that (i) a deportation liability notice and the two deportation orders of 11 August 2022 and (ii) the warrant document concerning the respondent's appointment of the same date, are all invalid; and

(b) a permanent order directed to the Attorney-General and all persons exercising authority under the Immigration Act to take all steps necessary to ensure that:

(i) the respondent is immediately issued with a visa under the Act enabling him to enter and reside in Kiribati and perform his functions as a judge; and

(ii) he is not deported from Kiribati or detained on account of his visa status for so long as he continues to hold office as a judge.

[22] The respondent's Australian passport was taken from him on 12 August to facilitate his deportation. He also seeks an order that it be returned to him forthwith.

**Notice of Opposition and Cross-Motion**

[23] On 17 August 2022 the Attorney-General, through Mr Batra, filed a notice of opposition to the respondent's notice and a "cross-motion". Mr Batra confirmed to us during the hearing on 19 August that this was not intended to operate as a withdrawal of his client's notices of abandonment and that the two appeals remained abandoned, subject to the leave of this Court. He explained that the Attorney-General nevertheless takes the view that because the respondent has applied for leave to file a respondent's notice seeking a variation of the High Court's order of 7 December 2021, his client is entitled to have the judgment of Chief Justice Hastings of 11 November 2021 declared invalid by this Court, as well as declarations of the validity of the deportation liability notice, the two deportation orders and the instrument signed by Te Beretitenti on 11 August concerning Mr Lambourne's appointment. The appellant's notice also seeks a permanent order directing that necessary steps to deport Mr Lambourne be taken and that his passport be returned to him when he is deported.

[24] The primary thrust of the case for the appellant is now that Mr Lambourne's original application to the High Court, in respect of which Chief Justice Hastings made his declarations and order, was fundamentally flawed since his argument concerning the absence of any term limit to his appointment was made "fraudulently" because he had known at the time of his appointment in 2018 that he was being appointed, in accordance with custom or "usages" (to

quote his oath of office), only to a 3 year term. It is also asserted that the Chief Justice knew that he himself was acting unconstitutionally when he upheld Mr Lambourne's "dishonest" argument and that he must have known that it was not made in good faith.

[25] We should add at this point that the allegation of bias which had previously been signaled in relation to the *Judicature International* article was, in both the written and oral submissions of Mr Batra, almost entirely overtaken by this argument so that it has not been necessary for us to address it. In any event, we consider that it stemmed from a misreading of the Chief Justice's article and that it would not have been sustained. The criticism the Chief Justice had made in the article was directed to the provisions of a Bill before the Maneaba ni Maungatabu which was also strongly criticised by others and, as a consequence, did not get enacted. The Chief Justice did not in his article express a firm view on the final form of the legislation which he discussed in his judgment. In our view, a fair-minded lay observer would not reasonably have apprehended that in light of his article the Judge might not bring an impartial mind to the resolution of the issues in Mr Lambourne's case: *Ebner v Official Trustee in Bankruptcy*.[2]

[26] The Attorney-General's approach on the present appeals is, to say the least, unorthodox, but then again the present circumstances are most unusual, with the relevant operations of the High Court paralysed by the suspension of both its Judges and with the ability of this Court to function after the delivery of this judgment similarly affected because only one of us will then continue in office, and replacements sufficient to form a quorum will not be able to be appointed in a manner complying with the Constitution. We therefore decided to allow Mr Batra to advance arguments in support of his cross-motion notwithstanding the abandonment of the appeals.

[27] We do not find it necessary to consider any of the Chief Justice's findings other than those directly bearing on the question of whether he was entitled to conclude that Mr Lambourne's appointment in 2018 was not for a fixed period (of three years or otherwise). No argument on his other findings was addressed to us by Mr Batra.

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2 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

**Further affidavit evidence**

[28] Both parties have recently filed affidavits and sought leave to have them admitted on appeal as new evidence. Neither party raised objection and we are satisfied all of the affidavits should be admitted.

[29] In an affidavit of 16 August 2022 Mr Lambourne deposes that he is a citizen of Australia but has been a resident of Kiribati since 21 March 1995. He says he held a residence permit issued under s.9 of the Immigration Ordinance (Cap 41) from that date until the Ordinance was repealed on 29 April 2020, and thereafter until 10 July 2020 he was deemed to hold an equivalent visa under the 2019 Act by virtue of item 4 of Schedule 1 of that Act. He was out of Kiribati when its borders closed in response to the COVID-19 pandemic on 19 March 2020 but was unable to secure approval to return to Kiribati from the ministerial committee tasked with managing repatriation flights that commenced in November 2020.

[30] He further deposes:

> "[13] On Thursday, 4 August 2022 I attended at my chambers at the High Court in Betio. The purpose of doing so was not to perform any work. The primary purpose was to sort out several matters relating to provision of my entitlements of office. It was also a quiet place where I could prepare material requested by my legal team, and where I could utilize the Court's law library to undertake research relevant to the present appeals and my first instance proceeding referred to above. I met with the Chief Registrar, to discuss the fact that the police officer who had performed the functions of tipstaff and driver had died during my absence from Kiribati and had not been replaced. The Chief Registrar agreed that the Chief Justice's tipstaff/driver, Sergeant Bunaua, would drive for me in the meantime. I also asked the Chief Registrar to liaise with the Secretary for Foreign Affairs and Immigration to ensure that I was issued with the appropriate visa, in line with the Chief Justice's order of 7 December 2021. There were also some administrative matters that required attending to, including submission of a travel claim relating to my return journey, and arrangements for replacement of the washing machine at my residence. I did not spend the whole day at the Court, leaving early in the afternoon.
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> [14] I returned to my chambers on Monday, 8 August 2022. I had received a message from my executive secretary earlier that morning to the effect that she understood that the Acting Commissioner of Police had given a direction to Sergeant Bunaua that he was not to drive for me. I wanted to discuss with the Chief Registrar why the arrangement had fallen through. My executive secretary told me that the Chief Registrar was not available to meet with me, as he would be at the hospital for the day. I emailed the Chief Registrar to advise that, given my entitlement to a car and driver under section 10 of the High Court Judges (Salaries and Allowances) Act 2017, if he was unavailable to organise an alternative driver, then I would have no choice but to drive myself. After following up on the administrative matters initiated the previous Thursday, I left the Court.

[15] I returned to the courthouse on Wednesday, 10 August. The issue regarding provision of a driver had not been resolved. I was told by my executive secretary that the Chief Registrar was again unavailable to meet with me. I spent a number of hours in my chambers, continuing to attend to the matters I had commenced on the previous Thursday. I left in the late afternoon.

[16] At no time since my return to Kiribati have I worked, or otherwise, so far as I am aware, been in breach of the terms of the temporary visa issued to me on my arrival on 1 August 2022."

[31] Mr Lambourne also deposes that he has not been served with a Deportation Liability Notice in respect of the second deportation order - the one signed by Te Beretitenti. He says he has never been informed on what basis he has been declared to be a threat or risk to security.

[32] In response, the appellant has submitted brief affidavits by two of the court staff which, it is said, reveal that Mr Lambourne had come to the courthouse and done some work there contrary to the terms of his visa. We review them at [52]-[53] below.

**Constitutional provisions**

[33] The relevant provisions of the Constitution concerning the office of a Judge of a senior court are as follows:

> **Appointment of judges of High Court**
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> **81.** (1) The Chief Justice shall be appointed by the Beretitenti, acting in accordance with the advice of the Cabinet tendered after consultation with the Public Service Commission.
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> (2) The other judges of the High Court, if any, shall be appointed by the Beretitenti, acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission.
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> ...
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> **Tenure of office of judges of the High Court**
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> **83.** (1) Subject to the provisions of this section, the office of a judge of the High Court shall become vacant upon the expiration of the period of his appointment to that office.
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> (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 two other members, one 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 that judge should be removed under this section.

(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.

**Judges of the Court of Appeal**

**91** (1) the judges of the Court of Appeal shall be –

(a) the Chief Justice and the other judges of the High Court; and

(b) such persons, possessing the qualifications prescribed in s.81(3) of this Constitution, as may be appointed from time to time by the Beretitenti acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission.

(2) An appointment under paragraph (b) of the preceding subsection shall be for a period of time or for the trial or hearing of particular causes or matters, as may be specified in the instrument of appointment.

...

**Tenure of office of judges of the Court of Appeal**

**93** (1) Subject to the provisions of this section, the office of a judge of the Court of Appeal shall become vacant upon the expiration of the period of his appointment to that office.

...

**Judge may sit after his appointment has terminated**

**94.** A judge of the Court of Appeal whose appointment has terminated otherwise than by reason of his removal from office may sit as a judge of that Court for the purpose of giving judgment or otherwise in relation to any proceedings commenced before him while his appointment was subsisting.

**The High Court judgment**

[34] Having set out factual findings, which we have summarised above, the Chief Justice referred to what he called the assumptions made by deponents in their affidavits. The respondent was aware that all previous appointments of High Court judges, bar one, had been of judges from outside Kiribati and he assumed that the decision not to fix a term for his appointment was because he was already admitted to practice in Kiribati. On the other hand, deponents for the appellant said that there was a long-established practice that foreign judges would sign a contract of services and that the Office of the Beretitenti was of the belief that there was a fixed-term contract and that "the Judiciary" had not admitted that there was no contract until the time of the respondent's second application for a work permit.

[35] Section 83(1) stated that the office of a High Court judge became vacant "upon the expiration of the period of his appointment" to that office but there is no definition of the duration of that period. The Chief Justice said this phrase clearly contemplated a period of appointment that expires - a fixed term appointment - but could also encompass an appointment until a fixed retiring age, if specified in the instrument of appointment, and a life appointment, again if that were so specified. Mr Lambourne had submitted that in the absence of such specificity the term of the appointment defaulted to a life appointment. The Chief Justice acknowledged that in common law jurisdictions such appointments were "increasingly rare". But, provided that the period of appointment was not determined at a later date by the executive, which would not be consistent with the principle of judicial independence, s.83 could be interpreted to accommodate a period of appointment that is indefinite. "An indefinite period is still a period".

[36] Therefore, the Chief Justice said, s.81 did not exclude an appointment for an indefinite period which was capable of expiring on death, resignation or removal under s.83. He contrasted the appointment provision for Court of Appeal judges who, unlike High Court judges, can only be appointed, under s.91(1)(b), "for a period of time or for the trial or hearing of particular causes or matters, as may be specified in the instrument of appointment": s.91(2).

[37] Turning to what had occurred in the present case, the Chief Justice said that both the formal procedure for the appointment and the instrument of appointment itself complied with the Constitution, which did not, in his view, exclude an indefinite appointment if no shorter or defined term was expressed in the appointment. No contract was offered at the time of the appointment. Its absence did not affect the validity of the appointment. The Chief Justice found it difficult to accept that the members of the executive assumed that there was a contract specifying a defined term. The appointing authority controlled the appointment. It was not for the appointee to offer a contract or point out a departure from "long established" practice. In the circumstances it was not unreasonable for the respondent to have assumed that the absence of a contract meant that the terms and conditions that in the past had been placed into a contract were now covered by the 2017 Act and the Judicial Salaries and Allowances Regulations 2018 made under it. (We note, however, that these regulations were not made until 17 September 2018.)

[38] The Chief Justice made two findings: first, that the appointment was for an indefinite period; and second, that any later determination of the period of appointment by the executive branch was inconsistent with s.83, the instrument of appointment and the principle of judicial independence requiring security of tenure.

[39] The Chief Justice then made the following declarations:

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

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

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

**The respondent's submissions**

*(a) This Court's jurisdiction and powers*

[40] Having affirmed this Court's jurisdiction to continue to hear the matter notwithstanding the appellant's formal abandonment of her appeals, because they remain on foot until leave is given by the Court, Mr Herzfeld then submitted that r.22 of the Court of Appeal rules gave the Court ample power to extend the time for the filing of a respondent's notice seeking a variation of the High Court's order of 7 December 2021 (r.22(1) & (4)) and to admit further evidence on questions of fact (r.22(2)). He referred also to r.15(1) under which the appeal is by way of rehearing.

*(b) The first deportation order*

[41] Mr Hertzfeld next submitted that the deportation liability notice and both the deportation orders were unlawful. He said that under s78(1) of the Kiribati Immigration Act 2019 a person holding a temporary visa can be deported only if an immigration officer considers that there is sufficient reason to revoke their visa and deport them. This state of satisfaction on the part of the immigration officer must not be formed unreasonably in the *Wednesbury* sense: *Teangana v Tong*.[3] Section 78(4) also gives the holder of a temporary visa who is liable for deportation the right, not later than 10 days after the service of a deportation liability notice, to appeal to the Minister against his or her liability to deportation on humanitarian grounds. Section 84 provides that deportation must not occur until the time for bringing that appeal has expired or, if the person appeals, the appeal is determined. That had not been complied with. Section 78(3), prohibiting an appeal where the person holds a limited purpose visa, did not apply in this case because Mr Lambourne's visitor's visa was not a limited purpose visa.

[42] The deportation order signed by Secretary Foon said that Mr Lambourne had breached the condition of his visa "by working without a proper work visa". Mr Herzfeld submitted that was contrary to the order of the Chief Justice which required the issue to Mr Lambourne of a visa enabling him to perform his duties and functions as a judge.

[43] As to whether Mr Lambourne had engaged in any work (defined in s4 as "any activity undertaken for gain or reward"), counsel said that mere attendance at chambers provided no basis for concluding that he was working, and his affidavit demonstrated that he had not done

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3 *Teangana v Tong* [2004] KICA 18 at [47], referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

so. Nor could the deportation order be justified under s75 because Mr Lambourne was not unlawfully in Kiribati.

[44] Mr Herzfeld also drew attention to s83 which provides that "liability to deportation ceases after a person has been lawfully resident in Kiribati for more than 10 years". The respondent's affidavit showed that he has been resident in Kiribati since 1995.

*(c) The second deportation order*

[45] Mr Herzfeld then turned to the deportation order issued by Te Beretitenti, again emphasising that the issuer's certification must be made reasonably. He pointed out that it had been made after our order of 11 August 2022 and said that it was in breach of that order. There was, in any event, simply no basis upon which it could reasonably be concluded that the respondent was a threat or risk to "security", as defined in s.4. This second deportation order had, once more, incorrectly stated that Mr Lambourne was unlawfully in Kiribati and it had been served without any fresh deportation liability notice, as required by s81(1).

*(d) The s138 instrument*

[46] Counsel gave three reasons for contending that the instrument issued by Te Beretitenti on 10 August was invalid. First, it had been intended to circumvent the declaration made by the Chief Justice on 11 November 2021 that the respondent holds office as a judge for an indefinite period and was therefore issued in bad faith and unreasonably. Secondly, under s83(3) & (4) of the Constitution, a Judge of the High Court cannot be removed except by a process requiring advice by an independent tribunal and a resolution of the Maneaba ni Maungatabu. Thirdly, even if s.138 could be applied, it permitted revocation of an appointment only "in like manner" as the appointment itself, namely if Te Beretitenti acts in accordance with the advice of the Chief Justice sitting with the Public Service Commission.

*(e) Permanent injunctive relief*

[47] Mr Herzfeld explained that his client is seeking a permanent order in substantively the same terms as the interlocutory relief this Court has already granted, together with an order for the return of Mr Lambourne's passport. He submitted that it was now necessary for an order to be expressed more broadly than the order of the Chief Justice of 7 December 2021. It should now be directed to precluding any deportation or detention of the respondent as long as he holds office as a judge. The relief sought was within the parameters of what had been

sought in Mr Lambourne's originating summons in the High Court, taking into account the changed circumstances in which this appeal has been conducted. Mr Lambourne had been told that the passport had been seized to facilitate his deportation. As deportation was not permissible, it should be returned.

*(f) Costs*

[48] The respondent sought costs on the appeals and the applications made pursuant to his Respondent's Notice and on the various applications in relation to the deportation orders.

**The Attorney-General's submissions**

[49] Mr Batra described the claim brought by the respondent in the High Court and the judgment of the Chief Justice as a "judicial coup" that, he said, had altered the balance of constitutional power sharing in Kiribati to reduce the power of the executive branch of the Government and enhance the power of the judicial and legislative branches. The High Court had created an "unconstitutional judgeship-for-life" so that Mr Lambourne could now profit by getting paid for life. Counsel went so far as to describe the proceeding in the High Court as "fraudulent" and a "scheme to defalcate monies from Kiribati's treasury for a lifetime job not permitted in the constitution". He even suggested, if we correctly understood him, that the members of this Court either were or would become complicit in this scheme if we did not overturn the decision of the Chief Justice, rendering us liable to a suspension order and a reference to a tribunal under s83(5).

[50] The basis of this argument was that, as Mr Batra submitted, the respondent had known full well when his appointment as a judge was made in 2018, and later when he brought his proceeding, that he was in truth only being appointed for a three year term in accordance with well-established practice in Kiribati. It was said he had admitted this in his affidavit in the High court supporting his originating summons. This showed his lack of good faith. It was also shown by the fact that he had then waited until his term had expired before seeking for the first time to advance his claim to a lifetime appointment. This made his originating summons fraudulent, as the Chief Justice must have known. Mr Batra said that the finding of the Chief Justice that s.81(2) of the Constitution permitted an appointment for an indefinite period was both wrong and contrary to established practice in Kiribati. Section 83(1) made it clear that there must be a "period" of any appointment. An appointment for life was not an appointment for a period. Further, appointments for life were unknown in Commonwealth countries.

[51] Counsel accepted that this Court had jurisdiction and power to determine the respondent's notice of motion but said that it should simply be dismissed as lacking any merit because it was "all predicated on the fraudulent originating summons". He did, however, address a response to some of the matters raised by Mr Herzfeld. He accepted that the deportation orders could be challenged in this Court. But he submitted that, far from being unlawful, the first deportation order was justified by the fact that Mr Lambourne had indeed been working, as he said appeared from the affidavits of Lolin Iuta, officer in charge of the immigration office at the relevant time and Tarawa Taubo, Senior Registrar of the High Court.

[52] Lolin Iuta had deposed that on 4 August the Chief Registrar had confirmed that "David continued to work when he visited his office and used the office vehicle". He had made a demand for his tipstaff to drive him. The deponent had seen Mr Lambourne "standing inside his office compound". That had confirmed for the immigration officer that Mr Lambourne had been working contrary to his visa conditions.

[53] Mr Taubo had said that the respondent had asked for his office transport to pick him up from his residence, but no transport was sent as he was suspended. He had been dropped off at the court by his wife on 4 August and spoke with the Chief Registrar insisting that he was still entitled to come to work as he was only suspended from performing the functions of a judge. He came again to the office using his own transport but had taken the office transport home. He continued to use it despite a written directive not to do so, coming to the office again on 10 August, after which the vehicle was collected from his residence.

[54] It was submitted that there was thus a reasonable basis for Mr Foon's conclusion that the respondent had been working. The use of the vehicle had been a use of State property.

[55] As for the second deportation order, Mr Batra's argument was that the Court could not look behind the order. He said that Mr Lambourne had been declared to be a threat or risk to the security of Kiribati. That was a declaration made by Te Beretitenti to which the Court must give "maximum deference". It was not open to any court to say otherwise where an order related to a matter of State security.

[56] Counsel said that Te Beretitenti's issuance of the new warrant on 10 August 2022 in reliance on s138 of the Constitution was lawful. He had merely been correcting what Mr Batra called a mistake in the original warrant. The requirement for a "precedent condition", namely the advice of the Chief Justice acting with the Public Service Commission, had existed in 2018 when the original warrant was issued. That satisfied the requirement that the replacement

warrant be issued "in like manner". Section 138 allowed the correction of a mistake in the original warrant.

**Discussion**

*(a) The Court's jurisdiction and powers*

[57] Although both parties accepted that we possessed the requisite jurisdiction and power to determine the matters they put before us, we should explain how it comes about that the Court can deal with those matters notwithstanding that the appellant has given, and not withdrawn, its notices of abandonment of the two appeals.

[58] As Mr Herzfeld pointed out, there is no rule enabling an appellant in a civil proceeding to abandon the appeal by giving a notice to the Court, as can expressly be done by an appellant in a criminal appeal: see r.43. Withdrawal of a civil appeal therefore requires the leave of the Court, as it does in other common law countries. That is because in civil cases there may well be some issues still needing determination, the most common of which are the fixing of costs and the lifting of stays or temporary injunctions. So, the appeal process continues despite any notice of abandonment until the Court formally dismisses the appeal.

[59] An appeal court's exercise of ancillary powers can be extensive when circumstances require. This Court has under s11 of the Court of Appeal Act "all the powers, authority and jurisdiction of the High Court" for "all the purposes of and incidental to" an appeal hearing and determination. The section says that is in addition to anything that may be prescribed by rules of court. Rule 22(1) of the Court of Appeal Rules says that in relation to an appeal, the Court has "all the powers and duties as to amendment or otherwise of the High Court". These include, under r.22(2), the power to receive further evidence, especially but not exclusively of matters which have occurred after trial.[4] They also include, under r.22(3), the power to "make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties". Under rr.22 and 27 the Court can grant an extension of time, which we do, without opposition, in respect of the respondent's s.19(1) notice.

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4 For the conditions which must be fulfilled if fresh evidence is to be received, see *Ladd v Marshall* [1954] 1 WLR 1489 at 1491, followed in *Tataua v Attorney General* [2013] KICA 15 at [6].

[60] The Court can, in circumstances such as the present, exercise the High Court's powers to enforce its own orders either by way of interlocutory or permanent relief. It can also exercise the High Court's inherent power to grant bail, as occurred in the *Zaoui* case in New Zealand.

*(b) Whether the respondent acted in bad faith*

[61] With due respect to Mr Batra, his attempt to characterise the behaviour of the two High Court judges as fraudulent in relation to the proceedings is quite hopeless and we reject it. Indeed, counsel should have been aware that in Kiribati, as in all the jurisdictions with which we are familiar, it is considered unethical for counsel to make any allegation of fraud, let alone against a judge, without a solid foundation of proof. That was completely lacking here and, significantly, had never been asserted in the High Court.

[62] Mr Batra relied heavily upon the fact that no previous appointment of a High Court judge had been for an indefinite period. Mr Lambourne knew this, as Mr Batra was able to show us by reference to Mr Lambourne's affidavit in support of his originating summons, which the Chief Justice must have read. If they both knew that, it was submitted, the proceedings were brought and decided in bad faith or dishonestly; Mr Lambourne was trying to put himself in the position of being able to claim a judge's salary for life, at the expense of the Government and people of Kiribati.

[63] But as soon as what Mr Lambourne actually said in his affidavit is examined, this unworthy argument falls apart. Mr Lambourne deposed:

> "No term of appointment is specified in my instrument of appointment. I had not discussed with the Chief Justice whether my appointment would be for a fixed term. I was aware at the time that all previous appointments to the High Court had been for a fixed term, but all of those appointments, bar one, had been of judges from outside Kiribati. The Chief Registrar's circular had not said whether the appointment would be for a fixed term or otherwise. I assumed that the fact that I had been appointed from among those already admitted to practise in Kiribati contributed to the decision not to fix a term for my appointment."

[64] In fact Mr Lambourne had a very good reason to believe that those advising Te Beretitenti had intended not to recommend fixing any term because Mr Lambourne came from the ranks of the local Kiribati profession. He had for many years been a resident of Kiribati. The Chief Justice took the view that the Constitution allowed for an appointment without a fixed term. We think, on balance, that he was right to do so, largely for the reasons he gave.

[65] Section 81(2) says nothing about any term, and it is not implicit in the use of the word "period" in s83(1) that there must be a fixed term. As the Chief Justice said, "[a]n indefinite period is still a period". It is notable that the Maneaba itself proceeded on exactly that basis when, in 2017, the year before Mr Lambourne's appointment, it enacted the High Court Judges (Salaries and Allowances) Act. Section 5(2) expressly recognised that some future appointments might not be for a fixed term. (There were no such existing appointments in 2017.) That can be seen from the opening words of the subsection: "Where the appointment was made for a fixed term ....". So, it was contemplated that some might not be. The statute also provided for the terms and conditions of service of High Court Judges, thereby seeming to make any contract unnecessary. Section 18 authorised the making of regulations which would fill in further detail. When made, in 2018, they were deemed to commence with the Act.[5]

[66] It is unsurprising that the matter appears to have been seen this way both by the Maneaba and the Chief Justice. We observe that in *The Bar Association of Belize v The Attorney General of Belize*,[6] a decision of the Caribbean Court of Justice on 15 February 2017, the Court recorded, without expressing any reservation, the concession of Senior Counsel on both sides of the case that the phrase "for such period as may be specified in the instrument of appointment" of a judge in the Constitution of Belize could be construed "as permitting the issue of an instrument of appointment with no specified period of tenure".

[67] It is significant also that there is a striking contrast between the constitutional position of a High Court Judge under s81(2) and that of a Court of Appeal Judge, appointed pursuant to s91(1)(b), under s91(2). Section 81 says nothing about any term of appointment. Section 91(2), in contrast, requires that a Court of Appeal Judge's appointment "shall be for a period of time or for the trial or hearing of particular causes or matters, as may be specified in the instrument of appointment".

[68] It is in reality somewhat misleading to characterise an appointment without a fixed term as an appointment for life since the Judge is liable to removal from office under s.83(2) if unable to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause), as well as for misconduct. A judge could not expect to continue to draw

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5 It is a curiosity that Court of Appeal Judges are included in the Schedule to the 2017 Act. That appears to have been done because the Chief Justice and all the High Court Judges are also Court of Appeal Judges by virtue of s91(1)(a) of the Constitution. Plainly it was not intended to apply to Court of Appeal Judges appointed under s91(1)(b), who are not High Court Judges and for whom the Act's terms and conditions of service are not apposite.

6 *The Bar Association of Belize v The Attorney General of Belize* [2017] CCJ 4 (AJ) at [23].

a salary and allowances if unable or unwilling to do his job. And while he adequately performs his judicial functions he cannot fairly be accused of improperly "profiting" from his position, as Mr Batra would have it.

[69] In submissions filed before Mr Batra was instructed, the Government suggested that "the Judiciary" was somehow at fault because the respondent was not asked in 2018 to sign a contract including a fixed term. But it was not for Mr Lambourne to seek out a contract when none was tendered to him. If there was to be a contract along with the appointment, it was for the Government to proffer it. Any fault lies with the advice given to Te Beretitenti by the previous Chief Justice and the Public Service Commission (an arm of Government). Certainly, Chief Justice Hastings could never be blamed. Nor, in our view, could the respondent.

[70] Lastly on this issue, we have noted Mr Batra's comment that a lifetime appointment is unknown in the Commonwealth. It is of course far from unknown in the United States of America, where it is not thought to unbalance the separation of powers, and once was normal elsewhere in the common law world, even in countries such as Australia which have constitutions.

[71] For these reasons, we hold that there would have been no basis, as is now asserted by the appellant, for disturbing the Chief Justice's judgment and declarations of 11 November 2021, even if the appeal against that decision had not been abandoned.

*(c) The first deportation order*

[72] The first order specified that the respondent's liability for deportation was because he had breached "the condition of a temporary visa (visitor's visa) … by working without a proper work visa". In compliance with the Chief Justice's order of 7 December 2021, the respondent should have been issued with "a proper work visa" so that he could perform his duties and functions as a judge. But even if that had not been so, it is clear that he had not been working on his visits to the courthouse. Not only does his description of what he was doing there reveal that it was not "work" as defined in s4, but even in the affidavits from court staff nothing is described that could possibly qualify as "work". Being driven by a Government driver, or driving himself in a Government car, is not working. Nor is activity related to these proceedings or his private affairs, even if done in chambers set aside for him. Mr Foon's decision that the respondent had been working was unreasonable (or, as it is sometimes put, legally irrational) and cannot stand. The first deportation order was invalid and of no effect.

*(d) The second deportation order*

[73] The order signed by Te Beretitenti stated that Mr Lambourne's liability for deportation was on the ground that he had been declared a threat or risk to security, which is defined in s4 as follows:

> "security" –
> (a) means-
> (i) the defence of Kiribati:
> (ii) the protection of Kiribati from acts of espionage, sabotage, and subversion, whether or not they are directed from or intended to be committed in Kiribati:
> (iii) the identification of foreign capabilities, intentions, or activities in or relating to Kiribati that adversely affect Kiribati's international well-being, reputation, or economic well-being:
> (iv) the protection of Kiribati from activities in or relating to Kiribati that-
> (A) are influenced by any foreign organisation or any foreign person; and
> (B) are clandestine or deceptive, or threaten the safety of any person; and
> (C) adversely affect Kiribati's international well-being, reputation, or economic well-being:
> (v) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act:
> (vi) the prevention, investigation, and detection of organised crime, including transnational organised crime; and
>
> (b) in an international security context, also includes the safety and stability of the international community through co-operative measures such as international conventions and other arrangements or agreements between countries.

[74] No attempt has been made by the Attorney-General to explain how Mr Lambourne could rationally be considered a security risk under any of the heads of risk in this definition. When we questioned Mr Mweretaka about it during the hearing on 12 August he seemed at something of a loss to justify the order in terms of the definition, suggesting at one point that (unspecified) people might gather at the respondent's residence. But he did not, or could not, say why that posed a risk to the State.

[75] Mr Batra contended that because Mr Lambourne had been declared to be a risk to the security of Kiribati, the Court was absolutely precluded from examining the Government's justification for the deportation order. He invoked a doctrine, apparently of American origin but unknown in jurisdictions with which we are familiar, under which a Court must give "maximum deference" to the executive's decision. We do not accept that any such doctrine forms part of the law of Kiribati. While in security matters any court will proceed very cautiously and will not

lightly question the judgment of a Minister, as can be seen, for example, in the recent decision of the United Kingdom Supreme Court in *R (on the application of Begum) v Special Immigration Appeals Commission*,[7] there must be, at the very least, some explanation in general terms of why the executive cannot be expected to reveal its reasons. In the present case it was not suggested that there was some risk to the State if reasons were given. There was no explanation of the basis for the order even by a general reference to a part of the statutory definition. Frankly, we found the notion that Mr Lambourne is actually a security risk to be far-fetched. There is a distinct appearance that, realizing its weakness on the first deportation order, the Government simply tried to patch things up by reaching for the "threat or risk to security" criterion.

[76] There may well be a further difficulty with both orders in that Mr Lambourne has, according to his affidavit, been lawfully resident in Kiribati for more than 10 years - in fact since 1995. If so, his liability to deportation on any ground would appear to have ceased under s83. We take this no further as the matter was not pursued during oral argument, noting however that Mr Lambourne's assertion was not contradicted by the appellant.

[77] We should not overlook Mr Batra's argument, raised in his written submissions but rightly not pursued at the hearing, that s79(3) precludes an appeal against liability to deportation under this section. The "appeal" referred to is an appeal to the Minister under Part 6 of the Act on humanitarian grounds. The subsection does not prevent recourse to the High Court or, in the present circumstances, to this Court.

*(e) The warrant issued under s138*

[78] We expressed the provisional view in our interlocutory decision on 12 August that Te Beretitenti's use of the s.138 power to amend or revoke the warrant issued to the respondent in 2018 was of doubtful validity because that power was exercisable only "in like manner", which meant that there had to have been prior advice to do so from the Chief Justice acting with the Public Service Commission, which clearly there had not been.

[79] We are not persuaded that this provisional view was wrong. The advice in 2018 said nothing about any fixed term, nor apparently had that been discussed between the Chief Justice and the Public Service Commission and it had not been mentioned when the judgeship was advertised. Advice which did not mention a term could hardly be translated into notional

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7 *R (on the application of Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [2021] 2 All ER 1063 (SC) at [70]-[71].

advice in 2022 to do what Te Beretitenti did on 11 August, especially when Sir John Muria CJ who participated in 2018 no longer held office. We take Mr Herzfeld's point, also, that there must be a real question mark over whether s.138 can override the protective provisions in s.83(3) & (4), where the new warrant would have had the effect of removing Mr Lambourne from his office as a judge.

**Result**

[80] We have concluded that, with the abandonment of the appeals, the declarations in the Chief Justice's judgment of 11 November 2021 and his order of 7 December 2021 must be confirmed. That order precludes the deportation of Mr Lambourne while he remains a judge. The two deportation orders and the s.138 appointment warrant must be set aside. The respondent must consequently be freed from his bail terms. The respondent's passport should now be returned to him. Mr Lambourne should be awarded costs against the Attorney-General in respect of both appeals and the applications made in this Court on his behalf.

**Orders**

[81] Accordingly, we make the following orders:

(a) The respondent is granted an extension of time until 19 August 2021 to file a Respondent's Notice under r19(1) in Civil Appeal 6 of 2021;

(b) Both parties are granted leave to adduce the further evidence set out respectively in the respondent's affidavit of 16 August 2022 and in the affidavits of Lolin Iuta and Tarawa Taubo of 17 August 2022;

(c) The declarations made in para [101] of Chief Justice Hastings' judgment of 11 November 2021 and the order made in his judgment of 7 December 2021 are confirmed;

(d) The deportation liability notice and the two deportation orders, all of which were issued to the respondent on 11 August 2022, are hereby declared invalid and quashed;

(e) The respondent is released from his bail terms;

(f) The instrument dated 11 August 2022 purporting to recall, vacate and nullify the respondent's appointment of 10 May 2018 as a Judge of the High Court and to reappoint him for a term that expired on 30 June 2021 is hereby declared invalid;

(g) The respondent's Australian passport is to be returned to him forthwith by the Ministry of Foreign Affairs and Immigration;

(h) The appellant's cross-motion is dismissed;

(i) The appellant must pay the respondent's costs of or relating to:

(i) Civil Appeals 5 & 6 of 2021

(ii) The Respondent's Notice and Notice of Motion

(iii) The appellant's Cross-Motion; and

(iv) The interlocutory applications on 11 & 12 August 2022;

(j) The costs are to be fixed by the Chief Registrar if not agreed by the parties;

(k) Civil Appeals 5 & 6 of 2021, having been abandoned by notices to the Court, are dismissed.

Blanchard JA

Hansen JA

KIRIBATI COURT OF APPEAL
TE BOWI N MANGATANG I KIRIBATI


Heath JA