

Annex 1b

BARRISTER

3 August 2022

By email:

Mauri Madam Chairperson

**Allegations to be Investigated by the Independent Tribunal established by Te Beretitenti HE Taneti Maamau**

I refer to your letter of 18 July. As you know, I wrote to you on 20 July acknowledging receipt and saying that I would respond to the allegations in greater detail once I had investigated the position. You have said the Tribunal has been tasked to consider a number of allegations and I now respond to them.

- a) *Annual leave was taken in breach of your appointment and the law (Judicial Salaries and Allowances Regulations (2016)). Two issues are related:-*
  - (i) *Leave was taken without mutual agreement between yourself and the Government – the Minister of Justice as stipulated in the abovementioned Regulations, nor the Beretitenti as the one who signed your appointment;*
  - (ii) *The number of days taken as leave were above your entitlement for the period of time served as Chief Justice;*

**Response**

This is the first time the Chief Justice has been notified that leave has been an issue. Without knowing the particulars of what is alleged, I make the following points:

- a) The Chief Justice took no annual leave during the time he was present in Kiribati.
- b) Annexed hereto and marked with the letter "A" are a number of copies of emails relating to confirmation by the Secretary of Justice about the Chief Justice's annual leave at Christmas, that he did not need to complete a full year before taking leave and, as part of the "new normal", days in quarantine would not be counted as leave days.
- c) The Chief Justice was in quarantine in both Australia and New Zealand in December 2021.
- d) From January to his suspension on 29 June 2021, Kiribati went into lockdown, the Chief Justice developed and issued a COVID protocol for the Judiciary, and attended remotely Senior

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Management meetings. He opened the 2022 legal year, and heard remotely as many cases each week as could be scanned to him. Following those hearings, he issued decisions, a practice that continued until 29 June 2022. Indeed, the virtual hearings worked so well that it became the practice of the Chief Justice to permit virtual appearances by counsel if, for reasons of health or travel, they could not be physically present in Court.

- e) The Chief Justice's attempts to return to Kiribati were hindered by the lack of commercial flights, quarantine requirements in New Zealand, Australia and Fiji, the lack of NZ Government flights, and by having to decline an offer of an Australian Government flight because his mother in Florida was having emergency heart surgery. The Secretary of Justice herself emailed support for his decision. Annexed hereto and marked with the letter "B" is a copy of the Secretary's email. It should be noted that, following her operation, the Chief Justice visited his mother and spent an afternoon at his Duke University graduation ceremony. Family considerations are a very important part of the Chief Justice's life, as indeed they are for the people of Kiribati.
- f) The Chief Justice himself succumbed to COVID. He nevertheless continued to administer the Court and conduct hearings remotely, recommend the appointments of staff and Magistrates, participate in virtual conferences and do other work as Chief Justice. He was also engaged in securing funding from the Pacific Justice Sector Programme for projects including Magistrates' conferences, a law report series, statutes consolidation and engaged in developing a protocol with Oranga Tamariki in New Zealand to ensure that Kiribati Judicial Officers have sufficient information before authorising the adoption of Kiribati children to New Zealand.
- g) Finally, on 18 May 2022, the Chief Justice was told Te Beretitenti thought it was "best for his safety to return to Kiribati after the report is submitted to the August Parliament session". The Chief Justice interpreted this message as advice from the highest level not to return to Kiribati. Annexed hereto and marked with the letter "C" is a copy of that email. Notwithstanding this advice, the Chief Justice has continued to work remotely.

- b) You had ordered the release of salary for Judge Lambourne through a signed MOU, under your hand. This is seen as inappropriate as this is the administrative responsibility of the Chief Registrar, as the accounting officer for the recurrent budget of the Judiciary. This occurred before your decision to preside over the same issue in court, listed on 12th August 2021. Ethically, you should have recused yourself from hearing the case, given you have dealt with the matter administratively.*

#### **Response**

- a) This allegation raises very important constitutional issues. Once the Judiciary budget has been approved, expenditure within each line item is a matter for the Judiciary with executive oversight. The payment or non-payment of judicial salaries is within the prerogative of the Judiciary and is not a matter for the Executive Branch.
- b) In my experience as a barrister of the High Court of New Zealand for over 40 years, I believe it is a standard procedure in any case to preserve the status quo ante pending resolution of an issue to be tried. On 13 August 2021, the Chief Justice issued an inter-office memorandum to the Chief Registrar asking the Registrar to preserve the status of

the Puisne Judge's salary until his claims were resolved. On 21 September 2021, the Chief Justice then issued a direction in identical terms. The Government's lawyer was present in Court when that decision was made. On 11 November 2021, the Chief Justice rescinded that direction and, having heard from the Government's lawyer, re-issued the direction in identical terms. This matter is now before the Court of Appeal and I understand that it will be heard on 11 August 2022.

- c) Ethically, it would be improper not to ensure that one party does not disadvantage the other party before the case is heard.
  - d) Then there is the question of recusal. No application for recusal was ever made, despite time being allocated to hear one. It is customary for those seeking a Judge to recuse himself or herself to file an application and then the application can be heard in Court. Following that the Judge will give a decision which is appealable. This is not the sort of thing that is done informally.
- c) *You had published an article entitled 'A personal Journey through the rule of Law in the South Pacific' in the Judicature International in October 2021. The article has been seen to reflect your views on, i) the Kiribati High Court Judge tenures, ii) the standard practice for judges in Kiribati to be on contract appointment, and iii) and the amendment to the High Court Judges Salaries and Allowances 2021. With the matter before you, or pending in court, ethically you should have refrained from making those public comments.*

#### Response

There are a number of points which need to be made:

- a) The concern is less with the article and more with the views expressed in the article. The Chief Justice made no attempt to hide those views. The views he expressed in the article were expressed to the Government in April 2021, long before Lambourne J filed his action in the High Court. The Government of Kiribati was aware of the Chief Justice's views, and that his views were shared by the Commonwealth Magistrates' and Judges' Association. Annexed hereto and marked with the letter "D" is a copy of emails on this issue from April and May 2021. Notwithstanding its knowledge that the Chief Justice had those views, the Government of Kiribati did not bring an application for the Chief Justice to recuse himself from the Lambourne case despite the Chief Justice allocating time to hear such an application.
- b) When those views were expressed and discussed openly in Parliament, the Lambourne matter was not before the Chief Justice or any other judicial officer.
- c) Had a recusal application been made, the Chief Justice would have considered the absence of any other judge to hear the Lambourne matter, the seriousness of the question to be tried, the need to avoid delay, and the inevitability of an appeal to the Court of Appeal regardless of the outcome. To have recused himself would have been a dereliction of his duty as a Judge.

- d) Turning to the article itself, it recounts what happened in April and May 2021 and expresses the Chief Justice's view which, as I have said, was communicated to the Government of Kiribati at the time. The article discusses how the passage of legislation affected the Chief Justice taking up his role. It contains no reference to Lambourne J's claim because none had yet been made. The Secretary of Foreign Affairs and Immigration wrote to the NZ Deputy High Commissioner about this matter on 23 June 2022 but the letter was not forwarded to the Chief Justice until 30 June 2022, the day after his suspension. The article has been the subject of correspondence between the Government of Kiribati and me. In the circumstances, I consider it is appropriate to provide you with a copy of the letter I sent to the Government. Annexed hereto and marked with the letter "E" is a copy of that letter which makes it very clear it was never intended by the Chief Justice that his article be a criticism of the Kiribati legal system.
- e) Part of the role of Chief Justice is to defend judicial independence and the rule of law. A Chief Justice's freedom of expression on these matters is vital to that role.

#### **Conclusion**

Thank you for giving me the opportunity to respond to these allegations. I submit that nothing in these allegations approaches the level of inability or misbehaviour required by the Constitution to invoke s 83. The Chief Justice has done nothing wrong; he has been acting in accordance with his judicial oath.

In my view, the Executive invoked s 83 to prevent the Chief Justice hearing the Lambourne claim before the hearing was to start. The various grounds set out in your letter could have been resolved much earlier, either through quiet communication (in respect of the leave issue) or by an appeal to the Court of Appeal (in respect of salary and recusal issues).

Please contact me if you wish to receive any further information.

I am available to appear in person (by Zoom) if the Tribunal thinks it appropriate.

Yours sincerely,