IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2025-485-65
[2025] NZHC 987

UNDER	the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 and the Judicial Review Procedure Act 2016
IN THE MATTER	of an application for Judicial Review
BETWEEN	ELIZABETH MARGARET AITKEN Applicant
AND	JUDICIAL CONDUCT COMMISSIONER First Respondent
AND	ATTORNEY-GENERAL Second Respondent

Hearing: 17 March 2025

Counsel: P T Rishworth KC, D A Manning and S Lamain for Applicant
N Whittington for First Respondent
I M C A McGlone for Second Respondent
T C Stephens KC and J B Orpin-Dowell assisting the Court

Judgment: 29 April 2025

Reissued: 1 May 2025

JUDGMENT OF ISAC J
[Application for judicial review]

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Introduction

[1] In the evening of 22 November 2024 the Northern Club hosted two social engagements. The first was a private business dinner organised by New Zealand First. The event was attended by the Deputy Prime Minister, the Rt Hon Winston Peters, and at least one other member of Cabinet, the Hon Casey Costello.

[2] In a nearby room a second engagement was taking place. This was an end of year function attended by members of the District Court bench based in Auckland and their partners to mark the retirement of two judges of that Court.

[3] During the course of the evening an exchange took place involving the applicant, Judge Ema Aitken, and a person or persons involved in the New Zealand First function. As a result, complaints were made about the Judge's conduct to the Judicial Conduct Commissioner. The Commissioner determined that the conduct could, if established, warrant consideration of the Judge's removal. In a decision of 16 January 2025 he recommended to the Attorney-General that she appoint a Judicial Conduct Panel to enquire into what had occurred.

[4] Judge Aitken now seeks judicial review of the Commissioner's decision. She argues the Commissioner's decision is unlawful on four grounds:[1]

(a) First, the Commissioner failed to articulate any legal standard against which he measured the applicant's alleged conduct before determining to recommend the appointment of a Conduct Panel.

(b) Second, the Commissioner failed to provide any, or any sufficient, reasons for his decision, contrary to requirements of s 18(2) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (JCCJCP Act).

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[1] While the statement of claim makes brief reference to the Commissioner's decision being "unlawful and / or unreasonable", the case for the applicant at the hearing was advanced solely on the basis of illegality.

(c) Third, the Commissioner's decision was not based on "sufficient enquiry" to enable him to form an opinion required under s 15(1) of the JCCJCP Act.

(d) Finally, the decision fails to clearly identify the scope of the eventual Panel inquiry, as required by the Act.

[5] Underlying the Judge's concerns is the view that if the decision is referred back to the Commissioner for reconsideration, he will be obliged to undertake a further iterative investigation of the underlying facts in reaching a fresh decision. The Judge says this will involve, as a minimum, provision of the Judge's account of the evening to New Zealand First for its response. It is argued that on such investigation, aspects of the Judge's account may be accepted, removing the "political dimension" from the complaints. If this were to occur, the Judge contends there would be no reason to refer the alleged conduct for inquiry, and the complaints could be resolved by the Head of Bench.

[6] These proceedings were filed on 10 February 2025. At that time Judge Aitken sought interim orders to preserve her position pending resolution of her application for judicial review. The Acting Attorney, the Hon Paul Goldsmith, had by that time taken on decision making functions under the Act after the Attorney stepped aside.[2] I subsequently granted the Judge's application for interim orders in a judgment of 17 February 2025.[3]

[7] Subsequently, the Acting Attorney advised he would abide the Court's decision on the substantive application. The Commissioner also abides. As a result, and with the agreement of the parties, I appointed Mr Stephens KC and Mr Orpin-Dowell as counsel to assist.

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2 As the Attorney had referred the matter to the Commissioner for consideration, from 24 January 2025 the Minister of Justice, the Hon Paul Goldsmith, became the Acting Attorney-General for the purpose of determining whether to appoint a Judicial Conduct Panel.

3 *Aitken v Judicial Conduct Commissioner* [2025] NZHC 190.

Statutory scheme and the Commissioner's role

[8] The Full Court of the High Court in *Wilson v Attorney-General* observed that the JCCJCP Act created a regime for investigating complaints against judges and dealing with them according to their seriousness.[4] Its purpose—set out in s 4—is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by doing three things:[5]

(a) providing a robust investigation process to enable "informed decisions" to be made about the removal of judges from office;[6]

(b) establishing an office for the "receipt and assessment of complaints" about the conduct of judges;[7] and

(c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.[8]

[9] The Act provides a four stage investigation process, which allows for informed decisions to be made while providing a fair procedure:

(a) The Commissioner undertakes a preliminary examination of the complaint and determines whether to take no action,[9] dismiss the complaint,[10] refer the complaint to the appropriate Head of Bench, or recommend to the Attorney-General that they appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the alleged conduct.[11]

(b) If the Commissioner makes a recommendation to the Attorney, the Attorney must decide whether to appoint a Judicial Conduct Panel to

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4 *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC) at [25].
5 At [25].
6 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (JCCJCP Act), s 4(a).
7 Section 4(b).
8 Section 4(c).
9 Section 16.
10 Section 17.
11 Section 18.

inquire into, and report on, any matter or matters concerning the conduct of a judge that are subject to the Commissioner's recommendation.[12] The Attorney may decide not to appoint a Judicial Conduct Panel, or may only appoint the Panel in relation to some of the matters that are the subject of the Commissioner's recommendation.

(c) If the Attorney decides to appoint a Judicial Conduct Panel, its task is to hold hearings and provide a report to the Attorney at the conclusion of its inquiry.[13] The report must set out the Panel's findings of fact; the Panel's opinion as to whether consideration of removal of the Judge is justified; and the reasons for the Panel's conclusion.[14]

(d) If the Panel concludes that consideration of removal is justified, the Attorney must in their "absolute discretion" determine "whether to take steps to initiate the removal" of the Judge.[15] What that step is depends on what judicial office the Judge holds. High Court Judges may be removed by the Sovereign or the Governor-General "acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office".[16] District Court Judges may be removed by the Governor-General on "the advice of the Attorney-General" on the "grounds of inability or misbehaviour".[17]

[10] Complaints about judges are made to the Commissioner.[18] Complaints may be made "regardless of whether the subject matter of the complaint arises in the exercise of the Judge's judicial duties or otherwise".[19] The Commissioner must deal with complaints "as soon as practicable after receiving" them.[20]

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12 Section 21(1).
13 Section 32(1).
14 Section 32(2).
15 Section 33(1).
16 Constitution Act 1986, s 23.
17 District Court Act 2016, s 29(1).
18 JCCJCP Act, s 11.
19 Section 11(1).
20 Section 14(4).

[11] Under s 15(1), the Commissioner is required to conduct a "preliminary examination" of each complaint and form an opinion as to whether:

(a) there are any grounds for exercising their power under s 15A to take no further action in respect of the complaint;

(b) there are any grounds for dismissing the complaint under s 16;

(c) the subject matter of the complaint, if substantiated, could warrant referral of the complaint to the Head of Bench under s 17; or

(d) the subject matter of the complaint, if substantiated, could warrant consideration of the removal of the Judge from office by way of a recommendation under s 18.

[12] The Commissioner's powers in conducting the preliminary examination are limited. The Commissioner may:

(a) seek the Judge's response to the complaint;[21]

(b) make any inquiries into the complaint that they think appropriate;[22]

(c) obtain any court documents (including, for example, the transcript of a hearing) that is relevant to their inquiry;[23] and

(d) consult the Head of Bench.[24]

[13] The Commissioner has no compulsory powers to acquire information, summons witnesses, or require people to assist them. That is because it is not their function to make factual findings. Rather, the Commissioner's role when considering referral to a Head of Bench or the Attorney is to make a preliminary evaluation of

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21 Section 15(2).
22 Section 15(4)(a).
23 Section 15(4)(b).
24 Section 15(4)(c).

whether the matters in the complaint have a prima facie sufficient basis in fact, and whether they are sufficiently serious to warrant consideration of removal.[25]

[14] After conducting a preliminary examination and forming the opinion required by s 15(1), the Commissioner must take one of the actions provided for in ss 15A, 16, 17 or 18, as outlined above at [11].[26]

[15] Central to the Judge's case is s 18 of the Act. It sets out the requirements that must be met before the Commissioner may make a recommendation to appoint a Conduct Panel:

> **18 Commissioner's power to recommend that Attorney-General appoint Judicial Conduct Panel**
>
> (1) The Commissioner may recommend to the Attorney-General that he or she appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the alleged conduct of a Judge if the Commissioner is of the opinion that—
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> (a) an inquiry into the alleged conduct is necessary or justified; and
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> (b) if established, the conduct may warrant consideration of removal of the Judge.
>
> (2) The Commissioner must give reasons with his or her recommendation under subsection (1).
>
> (3) The Commissioner must give the complainant and the Judge who is the subject of the complaint written notification of any action taken under subsection (1).

[16] Finally, proceedings before the Commissioner are generally private. Section 19 of the Act provides the Commissioner is subject to a duty of confidentiality. In practical terms this means the reasons for the Commissioner's decision, and the decision itself, are generally only disclosed to a judge who is the subject of a complaint, and the complainant (consistent with s 18(3) above). They are not publicly available.

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25 *Wilson v Attorney-General*, above n 4, at [69].
26 JCCJCP Act, s 15(5).

The role of a Judicial Conduct Panel

[17] Unlike the Commissioner, a Judicial Conduct Panel has a fact-finding role. In this regard:

(a) One of the Panel's functions is to "inquire into, and report on" the matter or matters of judicial conduct referred by the Attorney.[27]

(b) A Panel has and may exercise the same powers as conferred on Commissions of Inquiry by ss 4 and 4B to 8 of the Commissions of Inquiry Act 1908.[28] Among other things, this gives a Panel the powers:

(i) to receive evidence, including to take evidence on oath;[29]

(ii) of investigation, including to inspect and examine documents, require persons to produce documents, and require any person to furnish information;[30] and

(iii) to summon witnesses.[31]

(c) When a Panel is formed, special counsel must be appointed to present the allegations about the conduct of the Judge.[32]

(d) The Panel must conduct hearings, which are presumptively in public.[33] The Judge who is the subject of the inquiry is entitled to appear and be heard at the hearing and to be represented by counsel.[34]

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27 Section 24(1).
28 JCCJCP Act, s 26(1).
29 Commissions of Inquiry Act 1908, s 4B. See also s 2A in relation to the application of the Inquiries Act 2013.
30 Section 4C.
31 Sections 4D and 5.
32 JCCJCP Act, s 28.
33 JCCJCP Act, s 29.
34 Section 27(1).

Background

[18] There is no doubt that an interaction occurred at the Northern Club during the evening of 22 November 2024 involving the Judge and at least three attendees of the New Zealand First function. Either on the way to, or returning from the bathroom, it appears by accident the Judge found herself at the door leading into the New Zealand First engagement.

[19] What occurred next is set out in two different accounts: one provided by New Zealand First Party Secretary, Ms Holly Howard, and the other by the Judge.

[20] On 27 November 2024 Ms Howard provided the Northern Club with a letter containing the following outline:

> As you will be aware, there were a string of disruptions across the evening caused by guests from a function in a neighbouring room…[Our] board member responsible for events, has asked that I formally convey our version of events in relation to the disruptions and confrontations we faced.
>
> The string of disruptions was triggered in the first instance by an older female, slim build wearing a long yellow dress, from the neighbouring function who overheard a snippet of the speech being given by the Rt. Hon. Wintson Peters, as she passed by heading to the bathroom. Without the context of the full speech or statement, she believed that he was lying. At this time, I was standing just inside the door of our function room. She looked at me and directly, loudly, exclaimed, "He's lying!. How can you let him say that?". She then attempted to enter the room, while continuing to yell. I intercepted the woman and had her step back into the hallway where she continued to yell and make a scene. Unwilling to argue with her, I thanked her repeatedly for her feedback and asked to please leave us be. In a threatening manner, the woman aggressively told me that there were a room full of judges next door and they would be very interested to hear about this. She then left.
>
> Taking on board her warning, I remained in the foyer/common space for the remainder of the evening.

[21] The second account — that of the Judge —is set out in a 10-page letter of 16 January 2025 to the Commissioner. The Judge acknowledged the importance of the constitutional obligations of judges, including independence and the maintenance of comity with the executive and the legislative branches of government. However, in essence, the Judge said that given what in fact occurred those constitutional obligations had not been infringed. The exchange in question had been "momentary and accidental". She had mistakenly walked past the wrong room, unaware that it was

a New Zealand First function or that the speaker was Deputy Prime Minister. She made eye contact with a guest she thought she recognised. While at the entrance of the room, the Judge overheard a comment by an unknown speaker, along the lines that law schools are now teaching that tikanga Māori overrides the Westminster system. She then made two comments to a single guest (whom she subsequently realised was the Hon Casey Costello). The first comment — "that's not true" — was inaudibly mouthed to the person with whom the Judge had made eye contact. The second comment was along the lines that what was being said by the speaker "was not true and that it was misinformation". The Judge said that this comment was made "in a normal speaking tone and volume without raising my voice".

[22] When subsequently allowing two people to usher her away, the Judge told a woman accompanying her that there was a room full of Judges who might take a different view of what the speaker was saying. It was only then that the Judge was able to see who the speaker was, although she did not learn the function was for New Zealand First for weeks. Nor had she seen signage outside the function either on her way to, or from, the bathroom.

[23] The Judge did not believe the person she spoke to initially was Ms Howard. She thought Ms Howard may have been "the woman who came up to me, placed her hand on my shoulder and walked me down the corridor."

[24] The Judge's response makes it clear she does not accept the account of events set out in Ms Howard's narrative or reported by media. The Judge said:[35]

> I believe there has been inaccurate reporting of my actions, particularly in what appears to be a report prepared for the Northern Club, which was subsequently reported in the media.

[25] Later she turned to Ms Howard's account directly, and advised the Commissioner:

> Simply put, I do not agree with all of Ms Howard's description of my actions...

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35 Later in the letter, the Judge reiterated the point: "I believe the inaccurate information recorded in the Northern Club report has caused a misinterpretation of my actions, which has led to the concerns raised by the complainants about my conduct. I hope this statement will clearly explain the events of that evening, outline my conduct, and address the concerns which have been raised. I am aware this statement can be provided to the complainants."

[26] As counsel assisting submitted, these two accounts of what occurred fall at the opposite ends of a spectrum. At one end the Judge inadvertently walked past the wrong room, unaware it was a political function or that the speaker was the Deputy Prime Minister and made two brief comments to a single person in response to what an unknown speaker was saying. When ushered away the Judge said there was a room full of judges nearby who might take a different view to that of the speaker.

[27] At the other end of the spectrum the Judge interrupted a clearly marked private political function and loudly accused the Deputy Prime Minister of lying during a speech he was giving. She persisted in shouting and making a scene while attempting to enter the function room. On being asked to leave, the Judge called in aid her judicial office, apparently to bolster her position that the Deputy Prime Minister was lying, and implied that other judges would also agree with her position. On this account her behaviour reflected on not only the personal discharge of her judicial office but also that of other judges.

The Commissioner's decision

[28] Ms Howard's narrative of events was reported in articles appearing in *The Post* and *The New Zealand Herald* on 18 December 2024. Those reports caused the Commissioner on the same day to open an own motion preliminary examination, and to write to the Judge to ask for her response.

[29] Ms Howard's letter then became part of a bundle of papers prepared by a lawyer for the Northern Club, and was ultimately provided to the Attorney-General. Later on 18 December 2024 the Attorney made a referral to the Commissioner in relation to the Judge's alleged conduct under s 12(2) of the JCCJCP Act. The Northern Club report, and a photograph of a New Zealand First banner outside the Party's function, was then supplied to the Judge by the Commissioner on 19 December 2024. In his covering letter, the Commissioner referred to the letter from the Attorney and another complaint that had been received by this time. The Commissioner went on to say:

> I am again inviting you to respond to these matters as you may see fit but I reiterate the point that I may share any comment you do make with others as part of any steps I may decide to take.

[30] This resulted in the Judge's detailed response in the letter of 16 January 2025.

[31] The Commissioner issued his decision on 23 January 2025. After setting out the background and the complaints, the decision records, correctly, that s 15 required the Commissioner to conduct a preliminary examination of the complaints and form an opinion on the four statutory options available to him for dealing with it.[36]

[32] Having referred to the summary of the "limited jurisdiction" and function of a commissioner's preliminary examination in *Siemer v Judicial Conduct Commissioner*, the decision records that the Commissioner was satisfied there were no grounds for dismissal of the complaints, or to conclude no further action was justified in terms of s 16(1) and s 15A(1) respectively.[37]

[33] Those conclusions left open whether the complaints should be referred to the Head of Bench, or whether a recommendation to the Attorney under s 18(1) was appropriate. On the Commissioner's assessment of all the available information, he was satisfied, in keeping with the two limbs of s 18(1)(a) and (b) that:

> (a) an inquiry into the alleged conduct was necessary or justified; and
>
> (b) if established, the conduct may warrant consideration of removal of the Judge.

[34] The Commissioner then set out five reasons for his conclusion, in accordance with s 18(2). As the reasons are briefly stated I set them out in full:[38]

> 15. Section 18(2) requires me to give reasons for the recommendation that a Panel be appointed.
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> 16. **First**, there are the comments attributed to the New Zealand First Party Secretary (Holly Howard) recorded in the Summary of Events on 22 November 2024 included with the material provided by the Attorney-General as follows:

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36 Namely take no further action, dismiss the complaint, refer it to the Head of Bench, or recommend the Attorney convene a Judicial Conduct Panel.

37 *Siemer v Judicial Conduct Commissioner* [2013] NZHC 1853 at [11].

38 Emphasis in original.

> *"While walking to the restrooms, Judge Aitken walked through the Wintergarden (WG) foyer and passed the NZF function which was taking place in the WG. As Judge Aitken was passing, Mr Peters was making a speech to the assembled NZF guests. Overhearing something Mr Peters said, Judge Aitken addressed Ms Howard in a loud voice, saying "He's lying! How can you let him say that?". Judge Aitken then attempted to enter the room while continuing to shout."*
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> *"Ms Howard intercepted her and asked her to return back to the foyer. However, Judge Aitken continued to shout and make a scene. Ms Howard thanked her for her feedback and asked her to leave. Judge Aitken then told Ms Howard that there was a room full of judges next door, and that they would be very interested to hear about this. Judge Aitken then left the WG foyer."*
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> *"However because she was concerned that Judge Aitken might return, Ms Howard remained in the foyer for the remainder of the evening."*

17. In that connection, I record that I have noted the Judge's comment (in her letter of 16 January 2025) about inaccurate reporting and incorrect information about her conduct. Those are matters for a Panel to consider.

18. **Secondly**, there are the Judge's own acknowledgements in her letter to New Zealand First of 10 December 2024 as attached to the Attorney-General's letter to me of 18 December 2024 including:

> *"My comments were rude, uncalled for, and inappropriate. I sincerely apologise to all attending the function, and in particular, to the Deputy Prime Minister and other Ministers present."*

19. **Thirdly**, in that letter to New Zealand First the Judge said:

> *"I would like to apologise unreservedly for the disruption I caused to your function at the Northern Club on Friday night 22 November."*

20. **Fourthly**, in his letter of 16 December 2024 to the President of New Zealand First (also as attached to the Attorney-General's letter to me of 18 December 2024) the Head of Bench (His Hon Chief District Court Judge Heemi Taumaunu) made certain comments including:

> *"Judge Aitken regrets her conduct and has written a letter of apology to express this, which I enclose here. I add to this my own apology. This behaviour of the judge on this occasion was entirely inappropriate and, as she admits, rude."*
>
> and

> *"I have made it clear to Judge Aitken that this was an unacceptable series of events. I apologise unreservedly on behalf of the District Court."*
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> 21. In that connection, I have noted the Judge's comments on the background to those apologies.
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> 22. I have also noted (from section 15A(3)) that an apology is not, by itself, a reason why further consideration of a complaint would be unjustified.
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> 23. **Fifthly**, I refer to the comment of Alan Galbraith KC quoted in paragraph 9 above that it is questionable whether the complaint is within my jurisdiction. His opinion is that it does not bear on judicial functions or judicial duty and should be dismissed under section 16(1)(b). That section requires me to form an opinion on that issue. Given a principle purpose of the Act is to enhance public confidence in the judiciary, my view (in keeping with the observations of Justice Kós quoted in paragraph 10 above) is that a merit determination of that issue is for the Panel to make, not for me.
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> 24. I do not agree with Mr Galbraith (in terms of section 15A(1)) that further action by me would be unjustified in all the circumstances.

[35] In accordance with s 18 of the Act, the Commissioner then concluded that the "subject matter of these complaints", if substantiated, could warrant consideration of removal. The conclusion and the conduct in issue was recorded as follows:

> 25. In accordance with section 15(1)(d) I have formed the opinion that the subject matter of these complaints, if substantiated, could warrant consideration of the removal of the Judge from office by way of a recommendation under section 18.
>
> 26. Therefore, I will now move to recommend to the Attorney-General that she appoint a Judicial Conduct Panel to inquire into the conduct evident from the information contained within this decision and its attachments".

[36] The attachments to the decision were the Attorney-General's letter of referral and its attachments (including the Northern Club report containing Ms Howard's letter), the Judge's letter of response, four letters written by people in support of the Judge, and the letter of Mr Galbraith KC setting out his opinion.

First alleged error: no articulation of the legal standard against which the allegations were measured

[37] The Judge's first challenge to the Commissioner's decision is that it fails to articulate the legal standard against which the allegations are to be measured.

The Judge's case

[38] Only conduct which "may warrant consideration of removal of the Judge" can result in a recommendation to the Attorney to convene a Conduct Panel.[39] In the present case the Commissioner's decision made no reference to s 29 of the District Court Act, which provides that a District Court Judge may be removed "only on grounds of inability or misbehaviour". The words "inability or misbehaviour" do not appear in the decision at any point. Nor is there any articulation of the appropriate legal standard by way of synonyms for the statutory terms, or reference to the standard for removal set out in the leading authorities, particularly the Full Court's decision in *Wilson v Attorney-General*, and the Court of Appeal's decision in *Bradbury v Judicial Conduct Commissioner*.[40] While in *Wilson* the Commissioner's statement of the applicable standard was ultimately considered sufficient by this Court, the Judge says in the present case the Commissioner has simply failed to articulate any standard at all.

[39] The cases that set out the legal standard are also cases in which the standard was applied. It follows that the need to articulate the standard cannot be separated from applying it to the facts of a case (or the alleged facts). Mr Rishworth KC submitted that, properly understood, the Full Court's decision in *Wilson* requires the Commissioner to explicitly identify the standard of conduct meeting the threshold in s 18(1)(b) of the Act. The Commissioner must then go on to assess the allegations against that standard to provide reasons sufficient to meet the statutory requirement to provide them. The need to state the standard is not only consistent with the requirement to give reasons in s 18(2) of the Act, but in fact the Commissioner "could not properly carry out his function without undertaking the task", namely identifying a standard against which a Judge's conduct fell to be considered.[41]

[40] This is not a mere technical error. The requirement that the Commissioner articulate the legal standard is consistent with the purpose of the Act, requiring a "robust" and "fair" process that protects the requirements of judicial independence and

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39 JCCJCP Act, s 18(1)(b).
40 *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1.
41 *Wilson v Attorney-General,* above n 4, at [54].

natural justice. Had the standard been identified, it may well have been that the Commissioner would not have considered reference to a Panel was warranted.

[41] Relying on Canadian and British authority, Mr Rishworth argued the failure to identify the legal standard amounting to misbehaviour inevitably led to error in the Commissioner's evaluation of the complaints.[42] Without an identifiable legal standard to guide the analysis, the Commissioner failed to distinguish between different available interpretations of the Judge's conduct. Some interpretations might warrant removal, but others, including inadvertent lack of awareness of the political nature of the social function, would not.

[42] Mr Rishworth argued that if the legal test had been identified, and the Commissioner on further enquiry was able to "excise the political dimension" from the allegations, all that is left is an interruption to a social gathering that would not reach the threshold for removal. Previous authorities have also recognised that where a decision-maker has an obligation to provide reasons, identifying the appropriate legal standard is a necessary element of the decision-maker's reasoning.[43]

[43] Finally, a primary contention advanced by the Judge in relation to all grounds of review, including the first, is that the Commissioner was obliged to take additional steps to narrow the extent of differences between the two accounts of the evening before completing his preliminary examination. Mr Rishworth argued — consistent with the third ground of review — that the Commissioner was obliged to take the Judge's account back to New Zealand First to see whether Ms Howard agreed with aspects of it. On further enquiry, Ms Howard might accept the Judge was not aware it was a New Zealand First function, or that the speaker she heard was the Deputy Prime Minister, at the time of making her comments. This might result in the "political

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42 *Rees v Crane* [1994] 2 AC 173, [1994] 1 All ER 833 (PC); *Hearing on the Report of the Tribunal to the Governor of the Cayman Islands – Madam Justice Levers* [2010] UKPC 24; *Hearing on the Report of the Chief Justice of Gibraltar, Re* [2009] UKPC 4; *Ontario (Justice of the Peace) v. Ontario (Justices of the Peace Review Council)* [2023] O.J. No. 2661 at [106]–[127]; Therrien v Canada (Minister of Justice) [2001] 2 SCR; M*oreau-Bérubé v. New Brunswick (Judicial Council)* 2002 SCC 11, [2002] 1 S.C.R. 249; *Re Camp* (Can. Judicial Council, 2017); *Re Phillips (Disposition Reasons)* (Ont. Justices of the Peace Review Council, 2013); *Re Zabel* (Ont. Judicial Council, 2017).

43 See *Singh v Chief Executive Officer, Department of Labour* [1999] NZAR 258 (CA) and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

aspect" of the complaint being "excised by dint of the Judge's explanation". If that were to occur, the seriousness of the alleged conduct would be materially altered, such that a decision to recommend referral to a Conduct Panel would not be appropriate.

[44] In reply, counsel assisting, Mr Stephens, submitted that at no point during the Judge's response to the complaints did she suggest that if Ms Howard's claims were made out they could not warrant consideration of removal. The letter provided by the Judge acknowledged the seriousness of the allegations but as counsel put it, the Judge says "it didn't happen that way."

[45] Once that context is understood, it is clear the Commissioner was writing a confidential decision about a complaint referred to him which included a response from the Judge providing an alternative account of the relevant events. The Commissioner did not need to articulate the standard because the convention against staying out of the political fray had not been put in issue. On the contrary, the Judge accepted the importance of political independence by the judiciary and the need to respect comity between the branches of government. That explains why the Commissioner's decision focussed on Ms Howard's account and the apologies given by the Judge and the Chief District Court Judge. The standard had not been put in issue; but Ms Howard's account had been. It is to that issue the Commissioner's decision speaks.

Analysis

[46] In *Wilson v Attorney-General* the Court observed that the threshold to be met before the Commissioner may recommend referral to a Conduct Panel is a low but definite one, requiring the formation of a highly provisional opinion about the alleged conduct:[44]

> [43] The opinion that the Commissioner must form before he recommends that a panel be appointed is highly provisional; it is that an inquiry into "alleged" conduct is "necessary or justified" and "if established" the conduct "may" warrant "consideration of" removal of the judge. The Commissioner does not find the facts; that is one of the prescribed functions of a panel, if the Attorney chooses to appoint one. Nor does the Commissioner fix the standard

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[44] *Wilson v Attorney-General,* above n 4. See also *Bradbury v Judicial Conduct Commissioner,* above n 40, at [73]–[82].

> by which the judge's conduct or capacity will be assessed, initially by the panel, and ultimately by the House of Representatives. None the less, the Commissioner must form an opinion on the information that he has available to him following his preliminary examination. That opinion may result in the complaint being dismissed.
>
> [44] An opinion must be honestly held, reasonably open on the facts available and based on the correct legal standard. In this case the opinion must be that there is sufficient substance to the complaint to warrant the appointment of a panel; the Commissioner must believe both that the facts alleged in the complaint are sufficiently plausible to justify further investigation and that the conduct, if established, may be serious enough to warrant consideration of removal rather than referral to the Head of Bench. It is a low threshold, as Mr Goddard emphasised, but a definite one. To acknowledge that the Commissioner's decisions are provisional is not to accept that he can recommend a panel where he is unable to form the opinion required by s 15(1). In that case he must (under the legislation at the time) refer the complaint to the Head of Bench.
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> [45] The Act says nothing about the standard for removal, although it recognises that removal is a serious matter and that some misconduct may merit the lesser sanction of referral to the Head of Bench for appropriate action.

[47] Later, the Court reiterated that it is not appropriate to attempt a rigid categorisation or definition of the types of conduct that will amount to misbehaviour.[45] The Court emphasised that:[46]

> As always, context is everything, and the point where conduct crosses the line between misconduct and misbehaviour justifying removal will be a matter of fact and degree. We have already observed that it is not for the Commissioner to reach a final conclusion regarding the standard to be applied, if only because he will not know the full facts. Enunciation of the standard is a matter for the panel and, ultimately, the House.

[48] The decision of the Court of Appeal in *Bradbury* addresses the approach of the Commissioner to implausible complaints, or those that are speculative. Here the Commissioner has an important role in screening meritless allegations as a means of providing some protection of judicial independence:[47]

> [80]…As counsel for the Commissioner states, if there is a proper evidential basis for a complaint, the Commissioner has to form a view as to the seriousness of the alleged conduct and whether it is sufficiently serious to warrant consideration of removal under s 18, insufficiently serious to warrant any inquiry under s 15A, or somewhere in between, in which case it would be referred to the Head of Bench under s 17.

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45 *Wilson v Attorney-General,* above n 4, at [64].
46 At [64].
47 *Bradbury v Attorney-General,* above n 40.

> [81] Policy considerations support this approach. A filtering exercise of the sort we envisage is a means of providing some protection of judicial independence and in this way maintaining public confidence in the judiciary. Although the panel process does not lead inexorably to removal, the mere fact of the appointment of a panel is a serious matter for the Judge and a source of considerable pressure.

[49] In the present case it is certainly correct that the Commissioner's decision does not expressly set out any standard of conduct that might warrant removal, either by reference to s 29 of the District Court Act, or the decision in *Wilson v Attorney-General*.

[50] *Wilson v Attorney-General* involved a range of discrete allegations of misconduct by the Judge made by different complainants covering successive time periods. The Commissioner in that case ultimately found that the appropriate standard against which to assess each allegation did not require an element of moral turpitude.[48] He expressed the standard to be applied in this way:[49]

> Misbehaviour could include conduct that, although not dishonest, fell so far short of accepted standards of judicial behaviour as to warrant the ultimate sanction of removal.

[51] Applying that standard, the Commissioner found that some, but not all, of the allegations were sufficiently serious if made out to warrant consideration of the Judge's removal. Justice Wilson in subsequent judicial review proceedings then put in issue whether the standard applied by the Commissioner, omitting a requirement for moral turpitude, was legally correct. That led the Full Court to consider authorities both in this country and overseas to conclude that, as a matter of law, the Commissioner had identified and applied an appropriate standard.[50] As some of the allegations under consideration could not meet even that standard, the Commissioner had to identify the appropriate legal standard against which each allegation was considered in order to make the evaluation necessary to reach an opinion under s 15. It is in that context that the Full Court said that it was "necessary for the Commissioner to identify an appropriate standard against which the Judge's conduct fell to be

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48 Justice Wilson's argument in favour of a requirement of moral turpitude arose from written advice given to the government by the then Solicitor-General, Mr JJ McGrath QC, in September 1997 in respect of the conduct of Judge Beattie. The Solicitor-General advised that "…moral turpitude, in my opinion, is a necessary element of misbehaviour".

49 At [55].

50 At [57]–[59].

considered" and that "[he] could not properly carry out his function without undertaking that task".[51]

[52] *Wilson* is not authority for the proposition that it is an error of law in every case if the Commissioner fails to expressly state the applicable standard.[52] The present case involved a single allegation of misconduct where the applicable standard is not in issue. If Ms Howard's account is ultimately preferred, and a "political dimension" to the Judge's conduct is made out, there can be no serious argument the alleged conduct may warrant consideration of removal.[53]

[53] None of this should be taken to suggest the Judge's account is not correct, that Ms Howard's account should be preferred, or that if there is a factual inquiry into the events the Judge should be removed. But as Mr Stephens argued, this was a straightforward case for the Commissioner on the statutory criteria. The Judge does not argue for a different standard to be applied. Instead, the Judge's response to the complaint is to deny that she behaved in the manner alleged, or that her conduct involved any political dimension. She did not argue to the Commissioner, and does not argue in this Court, that if the alleged conduct taken at its highest is established it could not warrant consideration of removal. As *Wilson* and *Bradbury* acknowledge, the Commissioner's opinion required under s 15 is highly provisional. It is a low threshold. He does not find facts and has no power to undertake a forensic enquiry into disputed matters of significance to the determination of the merits of a complaint. Those functions are performed by a Conduct Panel, if appointed, sitting with the powers of a Commission of Inquiry.

[54] Decision-makers must turn their mind to the legal test on which their decision rests. But an express reference to the terms of s 29 of the District Court Act was not a legal requirement of the JCCJCP Act.[54] It is plain from the Commissioner's decision

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51 At [54]–[55].

52 For instance, at [64] the Court said "We have already observed that it is not for the Commissioner to reach a final conclusion regarding the standard to be applied, if only because he will not know the full facts. Enunciation of the standard is a matter for the panel and, ultimately, the House."

53 The Guidelines on Judicial Conduct 2019, at [18] and [50] make it clear that judges must avoid extra-judicial statements that could expose the judge (and the judiciary) to political attack, and should avoid political controversy.

54 I also note here that the majority of the British and Canadian authorities Mr Rishworth referred to in support of his argument that the standard must be enunciated involved substantive decisions by

that he applied the correct test for consideration of removal to the material before him. His "failure" to explicitly refer to "misbehaviour" or s 29 is not therefore an error of law material to the decision. This was not a case close to the line where the failure to set out the standard could give rise to a concern the Commissioner had not turned his mind to the appropriate test.

[55] For these reasons, I am unable to accept the Judge's first challenge to the Commissioner's decision.

Second alleged error: "no or no sufficient reasons for the decision"

[56] The Judge's second challenge relates to the requirement that the Commissioner provide reasons for his decision under s 18(2). The Commissioner's reasons for making the recommendation under s 18(1) are set out above at [34]. But before turning to consider the Judge's second challenge some additional context is helpful. On 10 December 2024 the Judge provided her Head of Bench, Chief Judge Taumaunu, with a letter of apology addressed to New Zealand First. The apology described her actions as "rude, uncalled for and inappropriate". She said:

> I would like to apologise unreservedly for the disruption I caused to your function at the Northern Club on Friday night 22 November.
>
> My comments were rude, uncalled for and inappropriate. I sincerely apologise to all attending the function, and in particular, to the Deputy Prime Minister and any other Ministers present.
>
> I would like to take this opportunity to clarify one matter—I did not realise that it was the Deputy Prime Minister who was speaking when I made these comments, or that the event was a NZ First function. My intrusion would have been inappropriate at any event but at an event such as this, it is all the more regrettable.

[57] The Chief Judge also issued a letter of apology. It recorded that the Judge had given him "an account of the evening". After enclosing the Judge's letter of apology, the Chief Judge added his in these terms: "The behaviour of the judge on this occasion was entirely inappropriate and, as she admits, rude." He said he had made it clear to

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the equivalent of a Conduct Panel to recommend removal of a judicial officer. This reflects the different nature of the decisions of conduct panels, which is to make determinations of matters of fact and law.

the Judge that "this was an unacceptable series of events" for which he apologised "unreservedly on behalf of the District Court".

[58] Those apologies predated any media reporting of the events by approximately a week.

[59] In addition, as part of her response to the complaints, the Judge provided the Commissioner with five letters supporting her position. Two were letters from other District Court judges who attended the judges' function, but neither witnessed the interactions with the New Zealand First function. There were also two character references from retired judicial officers. Finally, the Judge also supplied a three-paragraph letter from Mr Alan Galbraith, which set out his view that it was "questionable whether the complaint is within the Commissioner's jurisdiction", but in any case it "should be dismissed under s 16(1)".[55] Alternatively, Mr Galbraith's view was that, in light of the Judge's written response, her apology, and 20 years of public duty, the Commissioner would be "justified in determining under s 15A(1) that further action in respect of the complaint would be unjustified."

The Judge's case

[60] The Commissioner's reasons were required to directly address why he recommended appointment of a Conduct Panel "to inquire into any matter or matters concerning the alleged conduct of a Judge". Judge Aitken argues the reasons articulated in the Commissioner's decision did not meet this requirement because they did not logically explain the basis for the decision.

[61] The law recognises that, even without a statutory requirement for them, reasons show "openness in the administration of justice" and are "critical to the maintenance of public confidence in the system of justice".[56] Reasons help people to understand why judicial authority has been exercised in a particular way, and facilitates the courts' supervisory jurisdiction to ensure decisions have been made lawfully.[57] It will be insufficient for a decision-maker to simply state a conclusion in the words of the

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55 This line of argument is not pursued in the Judge's application for review.
56 Relying on *Lewis v Wilson & Horton Ltd* above n 43, at [76] and [79].
57 Relying on *Lewis v Wilson & Horton Ltd* above n 43, at [76]–[82].

empowering statute; a statutory requirement to state reasons is a requirement to say "why", which cannot be accomplished by merely repeating the existence of the statutory criteria.[58]

[62] Mr Rishworth argued that as a matter of law a decision-maker required to give reasons must articulate the legal standard to be applied and the articulated reasons must also be tied back to the standard. It is not enough to say the standard goes without saying. Support for this view was said to come from the decisions in *Chan v Minister of Immigration* and *Singh v Chief Executive of the Department of Labour*. In the latter case, Keith J writing for the Court of Appeal observed that a statement of reasons in the context of that case required "a reference to the relevant law and legal principles".[59] The Supreme Court's recent decision in *A v Minister of Internal Affairs* was also relevant. There, the Court found the relevant decision-maker was required to turn their mind to and engage with the Bill of Rights when considering whether it was reasonable to limit affected rights when deciding to cancel a passport.[60]

[63] Turning to the reasons provided by the Commissioner in the present case, the first reason was no more than a quotation of Ms Howard's account of the alleged conduct. There was no attempt by the Commissioner to evaluate the conduct in terms of any standard, or an effort to reach a conclusion on whether the allegations warranted a recommendation to appoint a Conduct Panel or a reference to the Head of Bench. The same shortcoming is inherent in the remaining reasons.

[64] The Commissioner's second, third and fourth reasons refer to the apologies by the Judge and the Chief District Court Judge to New Zealand First. But the Judge's apology had no probative value in relation to the allegations because it was provided before she had received Ms Howard's account, and could not be taken as an admission, as the Commissioner appears to have done. Similarly, Chief Judge Taumaunu's apology on behalf of the District Court had "no salience as a reason" supporting the Commissioner's opinion on whether the conduct met the standard of misbehaviour.

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58 Relying on *Singh v Chief Executive Officer, Department of Labour* above n 43, at 263 and *Patel v Removal Review Authority* (1994) NZAR 419 (HC) at 424–425, applied in *Butler v Removal Review Authority* [1998] NZAR 409 (HC) at 420–421.

59 *Singh v Chief Executive Officer, Department of Labour,* above n 43, at 263.

60 *A v Minister of Internal Affairs* [2024] NZSC 63, at [133]–[139].

More fundamentally, the decision does not make clear how or why the apologies were relevant to the decision to recommend the appointment of a Conduct Panel.

[65] The fifth reason, which was no more than a rejection of a legal opinion provided by the Judge from Mr Galbraith, is not a rational basis on which to recommend the appointment of a Conduct Panel. As a result, none of the matters advanced in the decision as "reasons" truly count as adequate reasons, such as would satisfy the requirement in s 18(2) of the Act.

[66] In reply, Mr Stephens submitted where a decision maker is required to give reasons, those reasons must be adequate to the occasion. That is a highly fact and context specific enquiry. In the present case, the Commissioner's decision is not a merits determination of the underlying allegations and does not involve factual or legal conclusions. Further, decisions of the Commissioner are confidential, and accordingly open justice, which is usually one of the key reasons for the duty to give reasons, is not strongly engaged.

[67] While the decision does not explicitly record why the identified conduct — set out in Ms Howard's letter — met the standard for removal, this was a confidential decision directed primarily to the Judge as the party disappointed by the result. What the Judge had put in issue were the facts, not whether Ms Howard's account could warrant consideration of removal. As Mr Stephens put it, Judge Aitken's response to the complaint was to say "I don't accept those facts". The Commissioner's decision therefore addressed the key issue identified by the Judge herself in her response to the Commissioner.

[68] In the circumstances of a preliminary consideration where the Commissioner does not resolve factual issues, the decision is confidential, and available to the complainant and the Judge but not speaking more widely to the world, the articulated reasons were sufficient to explain the Commissioner's decision. This explains why some matters are mentioned in the decision and not others. It also explains why there is an emphasis on a factual dispute and no discussion why Ms Howard's account warrants consideration of removal if established.

Analysis

[69] Although the reasons for the Commissioner's decision are briefly stated, I am unable to accept the Judge's criticisms of their sufficiency.

[70] There is no general common law duty on a decision-maker to provide reasons.[61] However, where a statute specifically requires reasons, the reasons given must be "adequate to the occasion".[62] The standard of adequacy is flexible and is a context and fact-specific question.[63] Relevant factors include:[64]

(a) the function and role of the decision-maker;

(b) the significance of the decision;

(c) the rights of appeal available; and

(d) the context and time available to make the decision.

[71] The requirement for adequacy does not prevent reasons from being stated briefly or abbreviated.[65] As counsel assisting put it, adequacy "has no minimum word count; it is the substance, not the length, that is important."

[72] In the present case the duty to give reasons in s 18(2) has to be understood in the context of the statutory decision being made and its place in the overall scheme of the Act. It is also important to distinguish between the context in which the Commissioner gave his reasons and the context of many of the leading cases on adequacy of reasons relied on by the Judge.

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61 *Lewis v Wilson & Horton Ltd* above n 43, at [75].
62 *R v Awatere* [1982] 1 NZLR 644 (CA) at 649.
63 *Rayonier New Zealand v Canterbury Regional Council* [2024] NZHC 1478 at [166].
64 *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* [2017] NZHC 2387, [2018] NZRMA 1 at [103]–[104].
65 *Lewis v Wilson & Horton Ltd*, above n 43, at [81].

[73] The occasions on which the adequacy of reasons have been judicially considered are typically instances of judicial or quasi-judicial decision-making.[66] Those cases involve merits determinations (sometimes finally) on questions of fact and law. In most instances the judgment or report arising from the decision is provided to the public and in some cases there will be third parties who have some interest in the result. The reasons must make sense to those who are not intimately acquainted with the facts, the detail of the dispute, and relevant legal principles. In these contexts, more detailed reasons may be required to explain how and why the decision-maker resolved factual questions, settled legal issues, and exercised a discretion.

[74] By contrast, when recommending the establishment of a Conduct Panel, the Commissioner is performing a different function. First, as I have noted, the Commissioner's decision is "highly provisional" in nature.[67] The Commissioner neither finds the facts, as that is a matter for a Conduct Panel, nor fixes the standard by which a Judge's conduct or capacity is assessed. Nor does the Commissioner decide whether to constitute a Panel. That is a decision for the Attorney.[68]

[75] By law, the Commissioner's reasons are confidential to the complainant and the Judge in question. He is not writing a decision for the world at large. Open justice, one of the three main purposes underpinning the duty to give reasons, is not obviously engaged. It is the hearing of any Conduct Panel that takes place, presumptively, in public.[69] Similarly, the Panel produces a report that sets out its findings of fact, opinion as to whether removal of the Judge is justified, and the reasons for its conclusion.

[76] The standard of conduct that warrants removal has been acknowledged in *Wilson* to defy precise definition or identification.[70] Where a plausible complaint is received, the Commissioner must make his decision on the assumption that the

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66 See for example *Lewis v Wilson & Horton Ltd,* above n 43, at [165]; *Belgiorno-Nettis v Auckland Unitary Plan Independent Hearings Panel* above n 64; *Patel v Removal Review Authority* above n 58; *R v Mental Health Review Tribunal, ex parte Pickering* (1986) 1 All ER 99 (QB); *Ngāti Hurungaterangi v Ngāti Wahiao* [2017] NZCA 429, [2017] 3 NZLR 770.

67 *Wilson v Attorney-General*, above n 4, at [43].

68 JCCJCP Act, s 21(1).

69 *Lewis v Wilson & Horton Ltd*, above n 43, at [81].

70 *Wilson v Attorney-General*, above n 4, at [59] quoting the Australian decision, *Parliamentary Commission of Inquiry Re The Honourable Mr Justice Murphy: Ruling on Meaning of "Misbehaviour"* (1986) 2 Aust Bar Rev 203 at 230.

conduct could be established. In that context, it is neither realistic nor desirable for the Commissioner to make detailed statements about whether the standard is met. As the Full Court said in *Wilson*, it is not for the Commissioner to reach a final conclusion regarding the standard of removal to be applied: "enunciation of the standard is a matter for the panel and, ultimately, the House".[71]

[77] This observation highlights a misunderstanding on the applicant's part about the standard applied by the Commissioner. The Commissioner's provisional opinion is limited to whether identified conduct, if established, is serious enough to warrant consideration of removal. In contrast, it is the substantive decision-makers under the Act who define the standard warranting removal and assess the conduct against that standard. What was required of the Commissioner in the present case were reasons that explained why the Commissioner formed the opinion that:

(a) the underlying complaint is sufficiently plausible to warrant further investigation; and

(b) the conduct, if established, is sufficiently serious to *warrant consideration* of removal of a judge.

[78] Against those considerations, the reasons provided by Commissioner were adequate.

[79] In his first reason, the Commissioner identified the conflicting accounts of Ms Howard and the Judge. The decision sets out Ms Howard's account of the events. The Commissioner then noted that, in her response of 16 January 2025, the Judge considers there had been inaccurate reporting and incorrect information—which is how the Judge described the Northern Club report in her letter. This is not a situation where the Commissioner could be expected to resolve the factual conflicts during a preliminary examination. It warrants further investigation, and as the Commissioner noted, that is a matter for a Conduct Panel.

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71 *Wilson v Attorney-General,* above n 4, at [64].

[80] Mr Rishworth also criticised this reason for failing to evaluate the alleged conduct in terms of any standard and whether it may warrant removal. However, the Commissioner's first reason is directed at the existence of a prima facie factual basis to support the complaint rather than an analysis of whether the claimed conduct is serious enough to warrant referral.

[81] As noted above at [56]–[58], in his second to fourth reasons, the Commissioner set out acknowledgments of the Judge and the Chief Judge regarding the conduct. In doing so, the Commissioner appears to have outlined why, in his opinion, the conduct was sufficiently serious to warrant consideration of the Judge's removal. Essentially, the Commissioner highlighted the seriousness of the situation is apparent from the Judge's own apology for her conduct as she understood it, and the fact that the Chief Judge felt compelled to apologise on behalf of his Court. That is so even though the Judge did not have Ms Howard's account at the time she made her apology.[72]

[82] The Judge suggests in expressing these reasons the Commissioner failed to appreciate that the Judge had not accepted the New Zealand First version of events. However, the Commissioner knew of the factual differences in the two accounts and expressly referred to it, saying that was a matter for the Panel to consider.[73] The Commissioner was not in my view purporting to resolve the factual dispute by reference to the Judge's apology, or treat it as an admission of the accuracy of Ms Howard's account. Rather, the Commissioner used the acknowledged seriousness of the events on the Judge's own account to indicate the overall seriousness of the allegations before him.[74]

[83] In that way, the Commissioner has (concisely and in broad terms) set out the basis on which he formed his opinion both that the matter was worthy of further investigation and that the matter was sufficiently serious. More detail as to precisely

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72 As counsel assisting submitted, both Judges accepted that the behaviour was inappropriate and rude. The fact they were willing to describe the incident on the Judge's own version of events in such terms "illustrates the seriousness of New Zealand First's version of events."

73 At [17] he said. "I record that I have noted the Judge's comment … about inaccurate reporting and incorrect information about her conduct. Those are matters for a Panel to consider." At [21] he says, "I have noted the Judge's comments on the background to those apologies."

74 I also note that within the Judge's apology itself she clarifies that while she did not realise that it was the Deputy Prime Minister speaking when she made the comments, "my intrusion would have been inappropriate at any event".

what the Judge was said to have done wrong was not required or desirable. Nor was it necessary to go to the lengths Ms Manning urged, involving a breakdown of the conduct into various categories of permutation or inference, before determining which permutation was the correct one, and only then assessing whether the conduct as found (by the Commissioner) could meet an articulated standard for removal.

[84] Finally, the Commissioner's fifth reason, where the Commissioner referred to the comments of Mr Galbraith, was not a reason for referring the complaint to a Conduct Panel. Rather, it was a reason for not dismissing the complaint under s 16.

[85] Overall, the Commissioner's reasons were sufficient to explain, albeit succinctly, how he reached the opinions that he did. The rationale for his decision is understandable in the context of the case, and I agree with counsel assisting that the reasons provided were adequate for the occasion:

(a) They described the alleged conduct, setting out the details of the complaint.

(b) They explained the Judge's response, which was to say that the reporting of the incident was inaccurate and the Northern Club report contained incorrect information.

(c) They conveyed that the Commissioner considered there was a genuine factual contest on what was not a trivial matter, and so required a Conduct Panel's investigation.

(d) They went on to explain why the alleged conduct was sufficiently serious to warrant consideration of removal, evidenced by the apologies and acknowledgments from the judiciary (explicitly recognised by the Commissioner to have been made on the Judge's version of events and not those of Ms Howard).

Third alleged error: decision not based on a sufficient preliminary examination

[86] The Judge's third ground of review is really at the heart of her application for judicial review. That is because the applicant claims there has not been a properly thorough investigation as part of the Commissioner's preliminary examination, and on reconsideration a different outcome is possible.

The Judge's case

[87] The Judge's case is that the Commissioner's decision was not based on a preliminary consideration that was sufficient to form the requisite opinion on removal in terms of s 15(1). In the present case, the Commissioner needed to take the Judge's letter setting out her account back to the complainants, and in particular Ms Howard, to ascertain her response. Consistent with the argument under the first ground, and as discussed at [42], it is said that on reading the Judge's account, aspects of it may be accepted by New Zealand First which might ultimately lead to the political dimension being "excised".

[88] During the hearing, Mr Rishworth and Ms Manning argued that both *Wilson* and *Bradbury* supported the Commissioner undertaking an "iterative approach" to complaints, involving potentially more than one engagement with a Judge, complainants or potential witnesses. In *Wilson*, the Commissioner had interviewed Justice Wilson and several witnesses to narrow the ground surrounding the Judge's approach to one of his disclosures to the Supreme Court, and the advice he had received from counsel before making that disclosure. And in *Bradbury*, the complaint had been reformulated three times before the Commissioner, involving different details, allegations and materials. In the present case, one view of the material available to the Commissioner would suggest an unfortunate accident of circumstances that could not warrant consideration of removal, while at the high water mark there has been a breach of constitutional convention by a judge interrupting a private political party function. In essence it is said that without further investigation it was not possible for the Commissioner to determine which version was the correct one. He was therefore unable to properly form an opinion as to referral to a Conduct Panel or the Head of Bench.

[89] Mr Rishworth submitted there were two sources for the obligation to make further inquiries of Ms Howard or New Zealand First. First, it arises from the Commissioner's obligation to observe natural justice when performing his functions. Before forming his opinion, fairness required the Commissioner to obtain New Zealand First's response to see if the extent of the factual controversy could be narrowed and, if so, consider the narrowed position against the applicable standard.

[90] Second, the obligation was said to derive from s 15A(2)(a) and (b) of the Act, which empowers the Commissioner to take no further action in respect of a complaint where it has been resolved to the complainant's satisfaction, or where the complaint is genuine and made in good faith, but is based on a misunderstanding. More was required in the present case before the Commissioner could be satisfied Ms Howard and New Zealand First had not accepted the Judge's apology and explanation,[75] or that the differences between the two accounts was not the result of differing perceptions or interpretations of events.

[91] Referring to the Judge's statement of claim, Mr Orpin-Dowell argued the present claim, properly understood, is really one of unreasonableness. The Judge is required to establish that no reasonable decision-maker in the position of the Commissioner could have proceeded without New Zealand First's response to the Judge's account. But it cannot seriously be argued that it was not open to the Commissioner to form his opinion based on the complaint and the Judge's response to it.

Analysis

[92] I have concluded the third ground of review is unsustainable for several reasons.

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[75] Mr Rishworth identified in submissions at the hearing that the complainants appear to be the Attorney, the Commissioner himself, and a member of the public, M. However, if the Attorney is to be treated as a complainant in the present case, her letter of referral of 18 December 2024 to the Commissioner made it clear she did not accept the Judge's explanation in her letter of apology of 10 December 2024 that the Judge did not know the Deputy Prime Minister was the speaker or that it was a New Zealand First Function.

[93] First, the challenge involves a significant degree of speculation as to what might occur in the event the Commissioner referred the Judge's letter to New Zealand First and Ms Howard for a response. Of course, it is possible that Ms Howard might resile from facts or statements that are relevant to assessing the seriousness of the alleged conduct. However, that is not the only possible response. It is also unclear where the iterative investigation the applicant envisages should end, or what its boundaries might be.

[94] That leads to the second and fundamental concern. That is the absence of any legal requirement for the Commissioner to undertake the additional enquiries contended for. On the contrary the Act, *Wilson* and *Bradbury* make it clear that the Commissioner does not undertake a forensic investigation, and he certainly does not make findings of fact.[76] While in *Wilson* the Commissioner undertook several interviews with various people including the Judge, there was no legal requirement to do so. I have previously outlined the limited role of the Commissioner, compared to a Panel, above at [12]. In short, where a plausible complaint exists establishing a prima facie case of conduct that might warrant consideration of removal, the Commissioner is under no legal obligation to continue the preliminary examination.

[95] The Judge's third ground ultimately rests on the premise that the Commissioner's role is to undertake sufficient enquiries to determine what has occurred before forming an opinion. In other words, he must determine the facts sufficiently before disposing of the complaint. This overstates the legal bounds of the Commissioner's role, and is inconsistent with the Act and the leading authorities.[77]

[96] Beyond this, I do not accept that the Commissioner's obligation to comply with the principles of natural justice in s 15(3) of the Act rendered the Commissioner's preliminary investigation unlawful. Those principles, to the extent they were relevant,

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[76] Under s 15(4)(a), the Commissioner may, for the purposes of a preliminary investigation, "make any inquiries into the complaint that he or she thinks appropriate".

[77] *Wilson v Attorney-General*, above n 4, at [43]–[44]; *Bradbury v Judicial Conduct Commissioner*, above n 40, at [32]–[33], [65] and [69]. In particular, I note that the applicant referred to the reformulation of the complaint in *Bradbury*. However, this involved the complainant himself reformulating the complaint in front of the Commissioner, rather than the Commissioner requiring reformulation as part of the investigation process.

required the Judge to know the case she was to answer and to be afforded an opportunity to respond. Those requirements were clearly met.

[97] For these reasons, I agree with Mr Orpin-Dowell that not only was it reasonable for the Commissioner to proceed without New Zealand First's response to the Judge's letter, it was not open to him to undertake the sort of iterative investigation the Judge wishes to pursue. It would not be lawful for the Commissioner to seek to excise the political element of the complaint by drawing conclusions about the Judge's knowledge or state of mind. As counsel assisting suggested, if a Conduct Panel is appointed the Judge's awareness of relevant facts will be a matter to be determined from all the circumstances, including her account. Ms Howard and New Zealand First cannot speak to what the Judge knew or did not know, other than by way of mere opinion.[78]

Fourth alleged error: decision does not determine the initial scope of the Panel enquiry

[98] The fourth and final ground of review is that the Commissioner's decision is unlawful because it failed to clearly identify the matters concerning the alleged conduct of the Judge that had been referred to the Attorney for consideration.

The Judge's case

[99] For the Judge, Ms Manning challenged the legality of the Commissioner's decision on the basis that it fails to identify the scope of the inquiry to be undertaken by a Conduct Panel. The Commissioner was obliged to identify both what was in and out of scope.

[100] This is a significant omission because as *Wilson* recognises, it is the Commissioner's decision which defines the initial scope of a Conduct Panel's

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[78] In passing I note the Judge's case before this Court involved a binary characterisation of the alleged conduct as either containing a political dimension or not. This argument assumed that consideration of removal could only be warranted if a political component were made out. However, there could be permutations of behaviour that have little or no political element that might still warrant consideration of removal. These are not matters the Commissioner can resolve during a preliminary examination for the reasons set out above.

inquiry.[79] Section 21(1) of the Act provides that the Attorney appoints a Conduct Panel to inquire into "any matter or matters concerning the conduct of a Judge that have been the subject of a recommendation by the Commissioner under s 18". In turn, under s 24(1), the Panel must inquire into "the matter or matters of judicial conduct referred to it by the Attorney-General on the recommendation of the Commissioner".[80]

[101] First, as a result of the language the Commissioner uses, the sweep of matters now apparently within the remit of a Conduct Panel includes all of the allegations contained in the articles by *The Post* and *The New Zealand Herald*. Those articles refer extensively to alleged conduct involving the Judge's partner and Mr Reed. The articles could be taken to suggest the Judge orchestrated, or had been part of, a combined attack on the New Zealand First event. But no reasons have been provided by the Commissioner to explain how the Judge could be responsible for the conduct of third parties, in breach of the requirement in s 18(2).

[102] Ms Manning also referred to the Guidelines for Judicial Conduct, which say that "situations may arise in which the activities or careers of relatives [of judges] attract consideration of the principles [within the guidelines]".[81] If the Commissioner intended matters involving the conduct of third parties to be sent forward to a Conduct Panel, he was obliged to reach an opinion as to why, and provide reasons for it. Equally, if the Commissioner did not intend for those matters to be referred to the Conduct Panel, he needed to form an opinion and clearly exclude them from his recommendation. He failed to do so.

[103] Second, the materials attached to the decision include the letter of referral from the Attorney. In that letter, the Attorney expresses doubts about the Judge's explanation, contained in her apology, that at the time of the exchange she did not know who the speaker was or that it was a New Zealand First function. Ms Manning argued this was essentially a complaint about the integrity of the Judge's explanation. The same criticisms are made by the Judge in relation to this apparent allegation; the

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79 JCCJCP Act, s 18(1)(a) and s 21(1), and Wilson at [46]–[47] and [94].

80 However, under s 24(3) of the JCCJCP Act, a Conduct Panel may also inquire into "any other matters concerning the conduct of the Judge" that arise in the course of dealing with the referral from the Attorney.

81 Relying on Guidelines for Judicial Conduct 2019, at [89]–[92].

Commissioner needed to form an opinion on whether this aspect of the Judge's conduct was or was not within the scope of his referral, and that opinion had to be clearly expressed with accompanying reasons. If it was not intended to form part of the referral, it ought to have been expressly excluded.

[104] Third, it is not clear from the decision whether the media reports, which formed part of the basis for the initial investigation and are referred to in the decision, are relevant to the Conduct Panel's inquiry.

[105] Finally, the gravamen of the Judge's conduct warranting consideration of removal has not been identified in the decision. The Commissioner has not said whether the matters he has referred to the Attorney turn on a characterisation of the alleged conduct as a political act or simply a breach of social etiquette. The decision simply fails to untangle these two very different interpretations of the events. In short, the Commissioner was obliged to say if the Judge's conduct falls to be considered as a breach of constitutional convention and, if so, provide reasons for that conclusion.

[106] All this led Ms Manning to argue that the matters which appear to have been encompassed in the Commissioner's decision should have been placed into four categories, similar to the approach taken by the Commissioner in *Wilson*. In the first category is the nature of the intrusion and the Judge's comments. These could be considered in two ways: as a knowing political intrusion, or as an uninvited social intrusion. The Commissioner needed to clearly identify which category he considered the conduct fell into before he could form the requisite opinion.

[107] The second category relates to the integrity allegation made by the Attorney. The inference, according to Ms Manning, is that the Attorney has referred aspects of the Judge's letter of apology to the Commissioner, bringing the Attorney's comments within scope as conduct subject to a complaint. But the plausibility of this complaint had to be assessed by the Commissioner against the "exculpatory material" provided by the Judge and her 20 years of public service and good character.

[108] Third, there is the category of allegations involving the conduct of third parties. This ought to have been out of scope but ostensibly is included within the Commissioner's referral.

[109] Fourth, Ms Manning referred to another complaint made to the Commissioner by a member of the public, M. This complaint made allegations that the incident illustrated political bias. While M's complaint may not be considered to be important as it was not in the attachments to the Commissioner's decision, according to the approach in *Wilson* it formed part of the referral and should have been expressly taken out of scope.

[110] Finally, counsel argued that the Court of Appeal's decision in *Bradbury* required the Commissioner to undertake factual assessments of matters raised in complaints as part of his role. It was open to the Commissioner to find, based on the Judge's explanation, that she did not knowingly enter the political fray, and to conclude that there is no plausible factual basis on which to find her conduct was sufficient to warrant removal. The Commissioner's failure to approach his preliminary examination correctly renders the decision unlawful.

Analysis

[111] The Commissioner's decision defines the initial scope of the "matters concerning the alleged conduct" of the Judge under s 18(1) indirectly. At [2] of the decision, the Commissioner records by way of background that in his initial email to the Judge of 18 December 2024, he was treating as "a complaint" media reports "of an incident said to have occurred at the Northern Club". He then explicitly records the reports were published on 18 December 2024 in *The New Zealand Herald* and *The Post* newspapers.[82] At [13] and [14] of the decision, the Commissioner records that his conclusions in terms of ss 15A(1) and 16(1), left open whether he should refer "the complaints" to the Head of Bench, or recommend to the Attorney the appointment of a Conduct Panel. Then at [16] of the decision, the Commissioner recorded that the first reason for making the recommendation to appoint a Panel "are the comments attributed to the New Zealand First Party Secretary (Holly Howard) recorded in the

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82 At paragraph [3].

Summary of Events…included with the material provided by the Attorney-General". The Commissioner then set out the relevant summary of Ms Howard's account in full (see paragraph [20] above). Finally, as already noted, at [25] and [26] of the decision the Commissioner recorded the "outcome" of his decision in this way:

> 25. In accordance with section 15(1)(d) I have formed the opinion that *the subject matter of these complaints*, if substantiated, could warrant consideration of the removal of the Judge from office by way of a recommendation under section 18.
>
> 26. Therefore, I will now move to recommend to the Attorney-General that she appoint a Judicial Conduct Panel to inquire into the conduct *evident from the information contained within this decision and its attachments*. I will notify the Judge and the Head of Bench along with the complainants M and D.
>
> (emphasis added).

[112] This ground of review turns on a natural reading of the Commissioner's decision. When approached in this way, the conduct "evident from the information contained within [the Commissioner's] decision and its attachments" is obviously the brief engagement between the Judge and people attending the New Zealand First function. That is the subject matter identified by the Commissioner as worthy of consideration of removal and referred to the Attorney for consideration under s 18(1).

[113] It is clear from the decision that the Commissioner considered Ms Howard's account could, if substantiated, warrant consideration of removal given it suggests a possible breach of constitutional convention by the Judge. There is no requirement for the Commissioner to intrude on the merits of the conflicting accounts by seeking to characterise the events as Ms Manning argued as either a "knowing political intrusion", or a "breach of social etiquette." That characterisation requires a factual evaluation falling outside the role of the Commissioner and falls squarely within the statutory function of a Conduct Panel.

[114] The central point in *Wilson* is that the conduct which is thought to warrant further inquiry must be identified in the Commissioner's recommendation, as that recommendation determines the initial scope of the Panel inquiry.[83] The wording of the Commissioner's recommendation in *Wilson* was problematic because there were

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[83] *Wilson v Attorney-General*, above n 4, at [69].

numerous grounds of complaint about discrete matters, some which the Commissioner considered warranted consideration of removal and some which did not. In that case, the language of the Commissioner's final recommendation failed to distinguish between the two. The Full Court found the result of the imprecise language used was the inclusion in the referral to the Attorney of matters that had been found insufficient to warrant consideration of removal. This was an error of law leading the Court to set aside the decision.

[115] That issue does not arise in the present case. The complaints before the Commissioner relate to a single incident. The Commissioner formed the opinion this conduct, if established, may warrant consideration of removal. In contrast to *Wilson*, there was no need to refer some aspects of the complaint and exclude others from the scope of the recommendation. Unlike *Wilson*, in the present case the referral does not sweep within it matters that the Commissioner found did not warrant consideration of removal. Moreover, and contrary to the Judge's submissions, it does not lead to any uncertainty or unfairness.

[116] With that general conclusion, I move to address the Judge's specific arguments about the scope of the conduct referred to the Attorney for consideration.

The conduct of the Judge's partner and Michael Reed KC

[117] In her pleaded case, the Judge contends that it is unclear whether the Commissioner's recommendation extends to the conduct of her partner Dr Galler and that of Mr Reed.

[118] I do not accept this argument. The jurisdiction under the Act is limited to dealing with complaints about the "conduct of a Judge".[84] There is no jurisdiction under the Act to inquire into the conduct of a person who is not a judge. Unlike *Wilson*, this is not a case where the wording of the Commissioner's recommendation could sweep in matters beyond the scope of the intended reference.

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[84] JCCJCP Act, ss 4(b), 5 (definition of "complaint"), 8(1)(c), 12(1), 12(2), 12(3), 15(5), 18(1), 21(1), 24(3), and 28(2).

[119] Similarly, the complaints contain no allegation or suggestion that the Judge orchestrated or colluded with her partner and Mr Reed in their subsequent interactions with the New Zealand First function. The Commissioner did not need to exclude from the scope of his reference an allegation that had not been made against the Judge.

Lack of integrity in the Judge's response to the complaints

[120] The Attorney's letter of referral to the Commissioner, like the Commissioner's decision, identifies the relevant conduct in issue by reference to Ms Howard's account. After setting out the summary drawn from the Northern Club report, the Attorney then referred to the apology of the Judge, and the Judge's advice that she did not realise who the speaker was or that the event was a New Zealand First function. In response to that suggestion the Attorney referred to the presence of "a large NZF banner" beside the door to the function room, before concluding that:

> Judge Aitken would have NZF believe that she did not see the signage, that she did not recognise the Deputy Prime Minister's voice, and yet her husband, Dr Galler, turned up after she had finally left the event to continue to interrupt people lawfully going about their business.

[121] That is not a complaint about the Judge's conduct subject to referral under s 12(2) of the Act. It is simply the Attorney's opinion, expressing scepticism about an aspect of the Judge's apology. It forms no part of the Commissioner's decision, and it is not part of the matter or matters concerning the alleged conduct of the Judge forming part of the recommendation to the Attorney. Again, there was no need for the Commissioner to exclude something that did not form part of the subject matter of a complaint.

The relevance of media reports

[122] The Judge argues that the Commissioner failed to identify whether media reports, which are referred to in the decision, are relevant to any Panel's inquiry.

[123] However, as I have found, there is no uncertainty about the scope of the recommendation, or the "matter or matters concerning the alleged conduct of [the] Judge". Two media reports are referred to at the beginning of the Commissioner's decision, when the Commissioner describes the "background" that led to the

complaints. As the decision indicates, those reports were the catalyst for the Commissioner initiating an own motion investigation under s 12(3). That is presumably why the Commissioner has referred to them. But they were not attached to the decision, and the brief reference to those reports does not expand the scope of any subsequent inquiry. The terms of the Commissioner's recommendation define the limits of the matters that may be referred to a Conduct Panel by the Attorney. But the terms of the recommendation do not define the evidential materials the Panel may consider in carrying out its functions.

The gravamen of the complaint

[124] Finally, I do not accept the Judge's submission that the Commissioner's recommendation is required to provide "particulars" identifying the gravamen of the complaint. Particulars are specific facts which are alleged to provide clarity about the focus of a criminal charge or cause of action. They give substance to the right of a party to know the case against them.

[125] In the present case there is no confusion or lack of clarity about the conduct in issue. The Judge's apology and her letter of response to the Commissioner demonstrate she appreciates the matter in issue.[85] A judge's alleged entry into the political fray significantly elevates the seriousness of a complaint. The Judge's letter to the Commissioner acknowledged that context.

[126] Beyond this, the provision of particulars would require the Commissioner to embark on a fact finding exercise that I have already found is not consistent with the limits on his powers in the Act or the relevant authorities. Matters of factual refinement would be for a special counsel, if a Conduct Panel is appointed.

[127] Accordingly, the fourth challenge must also be dismissed.

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[85] The Judge was plainly clear enough about the scope of the conduct in issue because her detailed response to the Commissioner recorded she would not address matters of conduct concerning her partner or Mr Reed, but she did go on to provide a detailed account of what occurred in her brief interaction with Ms Howard and others.

Relief

[128] Given the conclusions I have reached, it is unnecessary to consider the discretion to grant relief. However, there is no reason to consider the applicant has suffered substantial prejudice, or that the result could be any different.[86] The Commissioner had received information constituting a plausible allegation. It was not a *Bradbury* situation, where it was open to dismiss the complaint on a summary basis. Having received a response from the Judge putting in issue the accuracy of aspects of Ms Howard's account, the only reasonable decision in my view was for the Commissioner to recommend to the Attorney consideration of appointment of a Conduct Panel.

[129] Ultimately, if the Acting Attorney accepts the Commissioner's referral and appoints a Conduct Panel, the Panel will be comprised of three members, two of whom will be serving or retired judicial officers, or a senior legal practitioner.[87] A retired judge or a serving judge must be its chair.[88] A judge referred to a Conduct Panel may not be removed where the Panel does not recommend it.[89] This is a significant personal and constitutional protection for a judge and a safeguard of judicial independence from political interference. If appointed it is for a Panel, not the Commissioner or the Attorney-General, to consider the matters the Judge has advanced in response to the complaints.

Conclusion and result

[130] For the foregoing reasons, the application for judicial review is dismissed.

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86 Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at 74.2.3 citing *Rees v Firth* [2011] NZCA 668, [2012] 1 NZLR 408; *Tauber v Commissioner of Inland Revenue* [2012] NZCA 411, [2012] 3 NZLR 549; *Te Ua v Secretary for War Pensions* [2014] NZHC 1050. Jessica Gorman and others *McGechan on Procedure*, (online ed, Thomson Reuters) at [16.02(3)] citing *Wislang v Medical Practitioners Disciplinary Committee* [1974] 1 NZLR 29 (SC), *Attorney-General v District Court at New Plymouth* [2002] 1 NZLR 414 (HC), *and Attorney-General v Waikato Regional Airport* [2002] 3 NZLR 433 (CA) (overturned on other grounds by the Privy Council in *Waikato Regional Airport Ltd v Attorney-General* [2004] 3 NZLR 1).

87 JCCJCP Act, s 22(1)(a)(i)-(iii).

88 JCCJCP Act, s 22(2)(a)-(b).

89 JCCJCP Act, s 33(2).

[131] The interim orders must also come to an end. However, I continue them for 48 hours after issue of this judgment, after which they will expire if not renewed.

[132] Originally I made an order supressing publication of any aspect of the Commissioner's proceedings referred to in the judgment, to the extent they were not already in the public domain. During the hearing on 17 March 2025, I rescinded that suppression order except in relation to "the names of the complainants". With consent of the parties, I now vary that suppression order to permit publication of Ms Howard's name only.[90]

[133] If costs are in issue, the parties may file memoranda, although I would encourage resolution of the question between the parties.

Isac J

Solicitors:
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Crown Law, Wellington for second respondent

[90] There had already been several media reports identifying Ms Howard's involvement.