ORDER SUPRESSING PUBLICATION OF ANY ASPECT OF THE JUDICIAL CONDUCT COMMISSIONER'S PROCEEDINGS REFERRED TO IN THIS JUDGMENT, TO THE EXTENT THEY ARE NOT ALREADY IN THE PUBLIC DOMAIN.

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 190

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: 13 February 2025

Counsel: P T Rishworth KC and D A Manning for Applicant
No appearance for First Respondent (abiding the Court's decision)
D J Perkins and I M McGlone for Second Respondent

Judgment: 17 February 2025

Reissued: 18 February 2025

JUDGMENT OF ISAC J
[Application for interim orders]

Introduction

[1] In a decision of 23 January 2025, the Judicial Conduct Commissioner recommended to the Attorney-General that she appoint a Judicial Conduct Panel to inquire into matters concerning the conduct of a serving District Court Judge,

Ema Aitken.[1] The Judge has filed proceedings seeking judicial review of the Commissioner's decision. She also seeks interim orders that:

(a) the Acting Attorney-General ought not appoint a Judicial Conduct Panel based on the Commissioner's recommendation until the Judge's application for judicial review is determined; and

(b) the Court file and record relating to this proceeding shall not be accessed by any person other than a party to the proceeding without the leave of a High Court Judge.

[2] On 12 February 2025, counsel for the Acting Attorney advised the Court that he did not oppose an interim order preventing access to the Court file.[2] However, he opposed continuation of the order concerning the appointment of a panel. I then heard argument from the parties concerning the ongoing need for interim relief at a hearing on 13 February 2025.

[3] Having done so, I am satisfied the interim order directed to the Acting Attorney at [1(a)] above should continue until trial. My reasons follow.

Background in brief and procedural history

[4] On 18 December 2024, The Post published an article reporting that Judge Aitken and her partner had apologised for "verbally attacking" the Deputy Prime Minister, the Rt Hon Winston Peters, the Hon Casey Costello, a Cabinet Minister, and other New Zealand First members at a Christmas party held at the Northern Club. The article went on to outline allegations concerning the Judge's conduct, that of her partner and Mr Michael Reed KC. Similar reports were run by other media outlets.

[5] In response to the articles, [redacted]. Subsequently, the Commissioner also received a referral from the Attorney-General under s 12(2) of the Judicial Conduct

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1 Under s 18 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (JCCJCP Act).

2 The order was sought as it reflects s 19 of the JCCJCP Act which requires that proceedings before the Commissioner are confidential.

Commissioner and Judicial Conduct Panel Act 2004 (JCCJCP Act), relating to the Judge's conduct, [redacted].

[6] [Redacted]. Having considered all the material, in the decision of 23 January, the Commissioner advised the Judge that he would recommend to the Attorney under s 18 of the JCCJCP Act that she convene a Judicial Conduct Panel to inquire into the conduct of the Judge.

[7] 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.

[8] On 29 January 2025, Crown Law on behalf of the Acting Attorney wrote to the Judge's solicitors, inviting the applicant to comment on the Commissioner's recommendation to appoint a panel. The opportunity to respond to the Commissioner's recommendation is referred to by the applicant in this proceeding as the Attorney's "natural justice process".

[9] The Judge through her counsel initially sought and was granted additional time to provide her response. Then on 5 February 2025, she advised the Acting Attorney that she would file proceedings by way of judicial review of the Commissioner's decision on Monday, 10 February 2025.

[10] The applicant then filed proceedings and her application for an interim order. I convened an urgent hearing in the afternoon of 10 February 2025 to consider the application and related procedural orders. Given the urgency with which the matter came on, counsel for the Acting Attorney were not in a position to advise whether the application was opposed and appeared on a *Pickwick* basis. Having considered the position, I was satisfied the interests of justice favoured interim orders of short duration, that would expire at 5pm on Thursday, 13 February 2025, unless renewed by

the Court.[3] I scheduled an urgent hearing in the afternoon of 13 February to enable argument of the position, if the Acting Attorney opposed ongoing orders.

The scheme of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

[11] The scheme of the JCCJCP Act has been considered in decisions of both this Court and the Court of Appeal.[4] I do not propose to repeat what is said there but focus on three key aspects of the legislation.

[12] First, under the Act the Commissioner is not a mere conduit for complaints but a decision-maker.[5] As the Full Court in *Wilson v Attorney-General* observed, the Commissioner decides which complaints are dismissed and which are referred to the Attorney with a recommendation that a panel be appointed:

> [42] … [The Commissioner] must form an opinion whether the complaint, if substantiated, could warrant consideration of the judge's removal or whether there are any grounds for dismissing it. If his opinion is that neither the appointment of a panel nor dismissal of the complaint is appropriate, under the legislation at the time he must refer the complaint to the relevant Head of Bench. So referral to the Head of Bench was the "default option", as counsel put it.
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> [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 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.
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> [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

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3 *Aitken v Attorney-General* HC Wellington CIV-2025-485-65, 11 February 2025 (Minute of Isac J). At the conclusion of the hearing on 13 February 2025, I reserved my decision and continued the interim order until further order of the Court.

4 *Wilson v Attorney General* [2011] 1 NZLR 399 (HC) at [25]–[53]; *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, [2015] NZAR 1 at [43]–[53].

5 *Wilson v Attorney-General,* above n 4, at [42].

> 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.
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> …
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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.

[13] Second, the matters about conduct that are thought to warrant further inquiry must be identified in the Commissioner's recommendation, which defines the scope of the panel's inquiry:[6]

> … That is so because the recommendation is carried into s 21, which authorises the Attorney to appoint a panel to inquire into and report on "any matter or matters concerning the conduct of a Judge that have been the subject of a recommendation by the Commissioner under section 18". The Acting Attorney (in this case) is to make her own decision and for that purpose may call for the Commissioner's files. She cannot add new matters to the Commissioner's recommendation but the word "any" indicates that neither must she refer all matters in the recommendation to the panel. The panel in turn is to inquire into and report on "the matter or matters of judicial conduct referred to it by the (Acting) Attorney", and the special prosecutor is to "present the allegations" about the Judge's conduct. The details of the original complaint may supply context and the panel may consider them to the extent that it thinks them relevant, but its inquiry is "into" the matters about the Judge's conduct identified by the Commissioner and referred to it by the Attorney.

[14] Finally, the Act reflects a constitutional balance between two important principles. The purpose of the Act, defined in s 4, is to "enhance public confidence in, and to protect the impartiality and integrity of, the judicial system".[7] This is achieved by "providing a robust investigation process to enable informed decisions" about the removal of a judge,[8] but also one that provides "a fair process that recognises and protects the requirements of judicial independence and natural justice".[9] Both values are essential to maintaining a free and democratic society and, therefore, public confidence in the judicial branch of government.

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6 At [47].
7 JCCJCP Act, s 4.
8 Section 4(a).
9 Section 4(c).

Principles

[15] Under s 15(1) of the Judicial Review Procedure Act 2016, the Court may make an interim order prohibiting a respondent from taking any further action in exercise of a statutory power if, in its opinion, it is necessary to do so to preserve the position of the applicant. Although s 15(3) prohibits an order being made against the Crown if it is the respondent, s 15(3)(b)(i) allows the court to make an interim order declaring that the Crown ought not to take any further action that is, or would be, consequential on the exercise of the statutory power.

[16] There are no strict tests to apply to an application for interim orders under the Act.[10] Nevertheless, s 15 requires a two-stage approach.[11] First, the Court must be satisfied that an interim order is necessary to preserve the applicant's position pending trial. Second, if the applicant has satisfied the Court it has a position to preserve, the Court has a discretion to grant the interim relief sought.

[17] The first stage of the enquiry involves a statutory threshold which must be crossed to engage the Court's jurisdiction.[12] The Court must consider the existing circumstances, the substantive relief sought and the consequences of not making an order.[13] Justice Henry, in *Woodhouse v Auckland City Council*, described the threshold question in these terms:[14]

> The clear purpose of [s 15] is to give a right of protection on an interim basis to an applicant who may otherwise be unfairly prejudiced by reason of the delay in obtaining a final hearing. The lapse of time may in some circumstances render the practical effect of final relief of little or no value; it may put an applicant in a disadvantaged position which it is later found to have been wrong; or it may result in the right to the final relief sought having expired altogether. Hence the need for an interim preservation of position. It is therefore important to look at what is being sought by way of substantive relief, to see whether there is a position which should be preserved and which

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10 In *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430, Cooke J noted that "there should not be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary."

11 *Carlton & United Breweries Ltd v Minister of Customs* above n 10; *Easton v Wellington City Council* [2010] NZSC 10, (2010) 20 PRNZ 360; *Save the Queen Street Society Inc v Auckland Council* [2021] NZHC 1005 at [22]–[24].

12 Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters), at JR15.04.

13 *Save the Queen Street Society Inc v Auckland Council,* above n 11, at [25].

14 *Woodhouse v Auckland City Council* (1984) 1 PRNZ 6 (HC) at 8.

> is the subject of or at least relevant in a significant way to the substantive application.

[18] At the discretionary stage the Court may take into account a wide range of considerations. Factors commonly considered include the merits of the case, the nature of the review proceedings, the character, scheme and purpose of the legislation under which the impugned decision was made, the factual circumstances including the nature and prima facie strength of the applicant's challenge, the expected duration of an interim order, and the overall interests of justice.[15]

[19] There are therefore two issues for the Court to address.

Is an interim order necessary to preserve the applicant's position?

[20] The first question is whether an interim order is necessary to preserve Judge Aitken's position pending determination of her challenge to the Commissioner's decision.

[21] In keeping with the statement of claim, Mr Rishworth KC, for the Judge, advances two arguments. First, the Commissioner's decision failed to identify the correct legal standard for conduct that might justify removal of a judge. As a result, the Commissioner failed to provide adequate reasons to support the recommendation as required by s 18(2) of the Act. Second, according to s 21(1) of the Act, the scope of a Judicial Conduct Panel's inquiry must be set by the Attorney-General in accordance with the Commissioner's decision. But the Commissioner's decision fails to identify precisely what conduct is or is not in scope for any future panel, and that is an error of law.[16] Any decision by the Attorney-General to appoint a panel would be affected by the same errors.

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15 *McGechan on Procedure,* above n 12, at JR15.05. See also *Save the Queen Street Society Inc v Auckland Council*, above n 11, at [24], where Venning J observed: "When considering whether to exercise [the] discretion the Court will consider all the circumstances of the case, including the apparent strengths and weaknesses of the claim, the competing advantages and detriments to the parties, the status quo, the public and private repercussions, and the overall interests of justice." And see *Minister of Fisheries v Antons Trawling Company Ltd* [2007] NZSC 101 at [3].

16 *Wilson v Attorney-General,* above n 4, at [73] and [94]–[100]; see also *Bradbury v Judicial Conduct Commissioner,* above n 4, at [75]–[76].

[22] The result is that the Judge is faced with a broad and unfocussed range of allegations impairing her ability to make a proper response to the Acting Attorney as part of his natural justice process, and any panel that might be constituted. Mr Rishworth argues that in such a situation, it is not enough that decisions may be unwound if found invalid. Without an interim order, the applicant will be obliged to respond to a decision that does not comply with the constitutional safeguards in the Act. It is that burden, and the need to be protected from it, which necessitates an interim order. A more orderly approach, which avoids prejudice to the applicant through compounding existing errors, is for the judicial review application to be determined prior to any further steps being taken.

[23] Finally, Mr Rishworth argues that a decision by the Attorney appointing a panel is a serious step. If a panel is appointed it carries the Attorney's imprimatur that the conduct alleged is serious enough to warrant consideration of removal from office. There is a likelihood of adverse publicity should the Attorney decide to appoint a panel, and if ultimately the applicant is successful in her proceeding it is possible the Commissioner may not make the same recommendation to the Attorney. She is entitled to a legally correct process and the lawful operation of the Act, and to be free from adverse publicity about her alleged conduct pending correction of the process on review.

[24] For the Acting Attorney, Mr Perkins argued the applicant, like all serving judges of New Zealand courts, enjoys security of tenure. Absent resignation or removal in accordance with the statutory procedures contained in the JCCJCP Act, there is no risk of her removal before her judicial review application is heard next month. The constitutional safeguards in relation to judicial tenure in the JCCJCP Act are not contingent on an interim order. It follows that interim relief is not reasonably necessary to preserve the Judge's position.

[25] Mr Perkins also highlights the purpose of the JCCJCP Act in s 4, which provides:

> **4 Purpose**
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> The purpose of this Act is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by−

> (a) providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office:
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> …
>
> (c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.

[26] The interests underpinning the Act are not for the benefit of any individual judge. They are for the benefit of the community, as they safeguard a free and democratic society by ensuring both judicial accountability and independence. Interim orders at this stage risk undermining that confidence by creating a complex process with significant delay.

Consideration

[27] Interim orders may only be granted where they are necessary to preserve a position.[17] Necessity is measured against the risk a litigant will be deprived of meaningful relief or suffer prejudice pending determination of their proceeding in the absence of an interim order.[18] While an overly technical approach should be avoided, it is not enough to merely say that a step may be taken consequent on an unlawful decision.

[28] However, even where an applicant can be restored to the position they enjoyed before an adverse decision was made, interim relief may still be necessary to relieve the applicant from the adverse effects of a decision pending determination of the challenge. Cooke J in *Greer v Chief Executive of Corrections* said:[19]

> [24] Other considerations also support a broader approach. Like all legislation, s 15 should be interpreted in light of its purpose. There are two evident purposes of the interim relief power — to relieve the applicant from the adverse effects of a challenged decision until the challenge is heard and determined, and to preserve the ability of the Court to grant effective relief if the challenge is successful. The threshold question should be interpreted and applied in light of these purposes.

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17 In *ALT New Zealand Ltd v Attorney-General* [2023] NZHC 2300 at [73], Ellis J observed that in order to have a position to preserve, "the applicants needed to show they are likely to suffer prejudice or loss if interim orders stopping or slowing the process of promulgating the regulations…are not made, and their substantive claim for judicial review ultimately succeeds."

18 In *Greer v Chief Executive, Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571, at [22], Cooke J noted that interim relief can encompass orders placing the applicant in the position it would have been in but for the illegality alleged. It is not limited to preserving the status quo.

19 Footnotes omitted.

> [25] Further, the Judicial Review Procedure Act and its predecessor were not intended to be legislative restrictions on the Court's inherent judicial review powers. Rather, they were designed to provide a complementary procedural regime. Part 30 of the High Court Rules 2016 provides a parallel procedural route recognising the inherent powers. As the Court of Appeal noted in *Taylor v Chief Executive of the Department of Corrections,* the parallel interim relief power in r 30.4 does not have an express threshold requirement of a position to preserve. It would be odd if the fate of an application turned on the precise procedural path that had been followed.

[29] In the present case, there is a degree of circularity in the applicant's argument that she has a position to preserve to the extent it relies on the pleaded errors of law in the Commissioner's decision. While I accept that should the Judge's judicial review proceedings succeed, the appointment of a panel might need to be unwound, that of itself does not meet the requirements of necessity.

[30] Equally, I am not inclined to accept the Attorney's submission that the only relevant position to be preserved is the Judge's continuation in office. Thomas J, writing for a Judicial Conduct Panel, commented on the importance of the two interests identified in the purpose provision of the JCCJCP Act:[20]

> [19] The long and often fraught history of the judiciary demonstrates that the removal of a judge and the process undertaken to do so is no small matter. As the Full Court of the High Court in *Wilson v Attorney-General* observed, the Act presumes that public confidence not only results from increased accountability but also from protecting judicial independence and treating individual judges fairly. The processes and standards contained in the Act seek to regulate and manage the power of removal in a way which achieves a safe balance between the two interests.

[31] Section 21 of the JCCJCP Act vests the power to appoint a Judicial Conduct Panel in the Attorney-General following a recommendation by the Commissioner under s 18. While the Attorney must consult the Chief Justice about the proposed membership of any panel, the Act also makes clear that the Attorney "need not consult the Chief Justice about whether a Panel should be appointed."[21] It follows that the Attorney's decision is not a mere rubber-stamp of the Commissioner's recommendation.[22] It also follows that the Attorney's decision under s 21 is an

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20 *Re an appointment of a Judicial Conduct Panel to inquire into matters concerning the conduct of former Coroner Sarn Herdson* JCP1/2022 (Decision of the Panel on jurisdiction, 23 June 2022) (footnotes omitted).

21 Section 21(2).

22 Without the benefit of argument on the point, it would seem the Attorney may lawfully decline to follow a recommendation of the Commissioner to appoint a panel.

important waypoint in a process holding constitutional ramifications for both the executive and the judiciary.[23]

[32] In *Bradbury v Judicial Conduct Commissioner*, the Court of Appeal recognised the serious nature of a decision by the Attorney to appoint a panel:[24]

> …A filtering exercise [by the Commissioner] 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.

[33] The decision of the Attorney-General under s 21 is therefore the exercise of a significant public power leading to serious consequences for a judge, whether or not removal ensues. I am therefore prepared to accept, at the first stage of the enquiry, that the applicant has a position to preserve. I also accept Mr Rishworth's submission that there is potential prejudice for the applicant if she is required to provide a natural justice response to the Acting Attorney-General concerning a decision of the Commissioner that may be affected by an error of law.

[34] Mr Perkins emphasised that in the proceedings involving former Supreme Court Judge, Justice Bill Wilson, this Court declined to make an interim order.[25] There was no indication, even after the appointment of a Panel in that case, that the Panel would proceed with its inquiry in a way that might undermine the Judge's judicial review challenge. Miller J considered it would only be if the Panel's position changed that an interim order "might" be warranted.[26] In the present case, Judge Aitken's position is at an even more preliminary stage of the process, given a panel has not been appointed. Mr Perkins submits interim relief would therefore be premature.

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23 *Re an appointment of a Judicial Conduct Panel to inquire into matters concerning the conduct of former Coroner Sarn Herdson,* above n 20, at [4], where Thomas J, writing for the Panel, said: "Judicial independence is a cornerstone of a free and democratic society. Judges who do not have security of tenure may be subject to influence and there can be no assurance of fair and impartial justice. Accordingly, the removal of a judge is a serious matter with constitutional ramifications".

24 *Bradbury v Judicial Conduct Commissioner,* above n 4, at [81], citing *Wilson v Attorney-General,* above n 4, at [49]; BV Harris "The Resignation of Wilson J: A Consequent Critique of the Operation of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004" [2011] NZ L Rev 625 at 636; and John McGrath "Accountability of the judiciary" (2014) 25 PLR 134 at 143–144.

25 *Wilson v Attorney General* [2010] NZAR 435.

26 At [19].

[35] However, the position the Court was presented in *Wilson* is different from the present. There the Attorney-General had already decided to appoint a Judicial Conduct Panel based on the Commissioner's recommendation. The decisions of both the Attorney and the Commissioner were then challenged, successfully, and subsequently set aside by the High Court.[27] Unlike *Wilson*, in the present case the Acting Attorney is yet to make a decision concerning the appointment of a panel. The prejudice and position of the applicant is therefore also different. In this case, the claimed prejudice relates to the pending consideration by the Acting Attorney of the Judge's position under s 21 based on errors of law said to affect the Commissioner's recommendation. That question did not arise in the *Wilson* proceedings, when this Court declined to make interim orders.

[36] For these reasons, I accept that the statutory threshold under s 15 is satisfied. The Judge is entitled to a natural justice process under s 21 of the JCCJCP Act involving a decision from the Commissioner free from errors of law, and similarly, to a decision from the Acting Attorney that is free from error. An interim order can therefore be regarded as preserving the applicant's position.

[37] For these reasons it is necessary to consider the exercise of the discretion.

The discretion and the overall interests of justice

[38] Neither counsel made extensive submissions in relation to the relevant discretionary factors. Most if not all the points advanced by the applicant in support of the first issue appear to be relied on in relation to the second. The principal private repercussion Mr Rishworth identified is the prejudice that might accrue to the applicant as a result of engagement with the Acting Attorney's natural justice process. Further prejudice will arise from public reporting of the Acting Attorney's decision, if a panel is appointed.

[39] Mr Perkins for the Acting Attorney made three points. First, in response to the Judge's concern about adverse media publicity following a decision to appoint a panel, the allegations in issue have already attracted public and media attention. Second, the

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[27] *Wilson v Attorney-General,* above n 4.

Judge would have a number of procedural protections before any panel, including its membership—which would involve two sitting or retired judges—the right to be heard, and the availability of judicial review in relation to panel decisions affecting her rights. Third, Judge Aitken may continue to pursue her judicial review application against the Commissioner, and "replead to impugn the Acting Attorney-General's reliance upon the recommendation of the Commissioner".

[40] Mr Perkins emphasised the importance of the character, scheme and purpose of the JCCJCP Act. He argued the Act is an attempt by the legislature to strike a balance between judicial independence and public confidence in the administration of justice by ensuring conduct that constituted misbehaviour can be addressed through removal where warranted. It is open to the Acting Attorney to consider that public confidence in the judiciary is best served through a resolution of the complaints into Judge Aitken's conduct sooner rather than later, which may be through a conduct panel. Any panel might consider removal is not warranted, or that it is. But timeliness will vindicate public confidence in the system, while the more significant the delay, the more there is a risk of damage to the institution. The way should be left open to the Acting Attorney to deal with the referral one way or the other.

Consideration

[41] In my view, the relevant discretionary factors to be considered are:

(a) the merits of the case;

(b) the statutory power in issue;

(c) the public and private repercussions of granting relief;

(d) the duration of the order; and

(e) the balance of convenience and overall justice of the case.

The merits of the case

[42] As set out above at [13], in *Wilson v Attorney-General*, the Full Court found the Commissioner's recommendation must identify the conduct thought to warrant further inquiry. That is because the conduct identified by the Commissioner is carried through into the Attorney's s 21 decision appointing a panel, and in turn defines the scope of the inquiry the panel will undertake.

[43] The applicant says the Commissioner's decision does not explicitly identify the conduct said to be serious enough to warrant consideration of removal. [redacted]

[44] The Judge wishes to argue at the hearing of her application for judicial review that the Commissioner's decision fails to identify adequately the conduct that is to be considered by any future panel. Mr Rishworth pointed to what he said were areas of uncertainty:

(a) [redacted];

(b) the decision does not clearly identify whether the conduct of third parties forms part of the conduct for a panel to consider. While Mr Rishworth acknowledges it would be surprising if the actions of other individuals were at issue, he says allegations concerning the Judge's partner and Mr Michael Reed KC form part of the complaints against the Judge [redacted];

(c) the decision does not address how the alleged "intrusion" by the Judge may amount to misbehaviour potentially meeting the threshold for removal. It is not clear whether the concern is the Judge's alleged demeanour or behaviour [redacted], or whether it stems from the event in question being a political event and the speaker the Deputy Prime Minister.

[45] As the Acting Attorney will abide the decision of the Court, Mr Perkins' submissions in response were circumspect. The issue of the merits of the applicant's claim is for the substantive hearing, but Mr Perkins suggested [redacted]. While it

would be for the Court to determine, if a panel is appointed the Judge would be expected to reply to matters contained in material that is not voluminous.

[46] At this early stage of the proceeding, and without the benefit of a contradictor, all that can be said is that the Judge's claim does not appear to be entirely lacking in merit. Her additional claim, that the Commissioner did not provide adequate reasons, appears to be less strong. But overall, given the grounds of review appear to be at least arguable, the merits of the case tend to favour the grant of interim relief.

The statutory power in issue and the public and private repercussions of relief

[47] It is convenient to consider two discretionary factors—the statutory power in issue and the repercussions of relief—together.

[48] I regard these factors as neutral. On the one hand, delaying the statutory process might, as Mr Perkins argued, cut against a robust and timely complaints process that could in turn undermine public confidence. But on the other hand, a twin value informing the Act and evident from its purpose is the protection of judicial independence. That principle too promotes confidence in the judiciary. Permitting a process leading to removal to proceed when it may be affected by illegality could also be considered to undermine Parliament's objective.

The duration of the order, the balance of convenience and overall justice of the case

[49] Again, I consider these factors together as they are interrelated.

[50] A hearing of the application for judicial review is now scheduled on 17 and 18 March 2025. That will be five weeks from the date proceedings were filed. While a judgment will likely issue sometime after the hearing, the delay, and the duration of any interim order, will be relatively brief.

[51] Should the Judge's application be unsuccessful, the Acting Attorney will be free to make a decision under s 21 with the benefit of the Court's finding that the Commissioner's decision is free from legal error. Equally, if the Commissioner's

decision is ultimately found to be unlawful, any decision by the Acting Attorney to appoint a panel under s 21 might also be set aside.

[52] Without an interim order, there is a risk of prejudice for the Judge, who would be obliged to provide any s 21 natural justice response to the Acting Attorney before her challenge to the legality of the Commissioner's decision (a necessary precursor to the Attorney's s 21 decision) has been resolved. There is also the likelihood of further publicity of a s 21 decision, and the consequences for the Judge arising from that decision recognised by the Court of Appeal in *Bradbury* noted above at [32]. However, the consequences for the Attorney if an interim order is made is a relatively brief delay in the statutory process, while the Judge's criticisms of the Commissioner's decision are resolved. Overall, the brief delay in the statutory process will not undermine the Act's purpose.

[53] Given this, I consider the duration of any interim order, the balance of convenience and the overall justice of the case clearly favour the grant of an interim order. Given the Acting Attorney appears to accept any panel he might appoint would be unlikely to take steps to further its inquiry before the March hearing date, it is difficult to discern any meaningful prejudice for the second respondent arising from an interim order.

What form of order?

[54] The final issue is the form of the order that ought to be made.

[55] Section 15(3)(a) and (3)(b)(i) of the Judicial Review Procedure Act reflect the constitutional convention that the Court does not make mandatory orders against the Crown, and instead makes a declaration that "the Crown ought not" do something. In the present case the application seeks an order in the following terms:

> The Attorney-General (or other Minister exercising their powers) ought not to *decide to appoint a Judicial Conduct Panel* to inquire into, and report on, matters concerning the conduct of Judge Ema Aitken that were the subject of a recommendation by the Judicial Conduct Commissioner dated 23 January 2025, until the application for judicial review is finally determined by the High Court notice of interlocutory application.
>
> (emphasis added)

[56] This form of order can be contrasted with the words of s 15(3)(b)(i), which provides that when making an interim order against the Crown, the Court may declare:

> …that the Crown ought not to take any further action that is, or would be, consequential on the exercise of the statutory power.

[57] At the hearing Counsel clarified that the applicant's intention in limiting the scope of the order to the appointment of a panel is intended to leave it open to the Acting Attorney to decide not to appoint a panel, notwithstanding the Commissioner's recommendation.

[58] While the scope of the order might be thought to be less intrusive than one declaring the Attorney ought not take any further action, as I indicated to counsel at the hearing I do not consider it is appropriate for the Court to make an order that has the practical effect of permitting a decision maker to make only one decision. It could lead to the wrong impression the Court was usurping the power of decision, and would appear to be incompatible with the principles that underscore the form of relief prescribed by s 15(3).

Conclusion and result

[59] The application for an interim order is granted. I declare that the Acting Attorney ought not take any further action that is, or would be, consequential on the Judicial Conduct Commissioner's decision concerning the applicant dated 23 January 2024, until further order of the Court.

[60] By consent, I also make an order directing that the Court file and record relating to this proceeding shall not be accessed by any person other than a party to this proceeding without the leave of a High Court Judge, until further order.

[61] I also make an order suppressing publication of any aspect of the Commissioner's proceedings referred to in this judgment, to the extent they are not already in the public domain. This order is necessary to preserve the Commissioner's duty of confidentiality, contained in s 19 of the JCCJCP Act.

[62] Leave to apply is reserved.[28] So too are the costs of the application.

Isac J

Solicitors:
Richard McLeod, Auckland for the applicant
Crown Law Office, Wellington, for the second respondent.

[28] This includes media organisations, in relation to the suppression order.