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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 57/2019
[2020] NZSC 18

BETWEEN	MINISTER OF JUSTICE First Appellant	
	ATTORNEY-GENERAL Second Appellant	
AND	KYUNG YUP KIM Respondent	

Hearing:	4 December 2019
Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	U R Jagose QC, A F Todd and G M Taylor for Appellants A J Ellis and B J R Keith for Respondent
Judgment:	10 December 2019
Reasons:	12 March 2020

JUDGMENT OF THE COURT

A **Order made declaring that following the hearing on 4 December 2019 the Court has determined there is no impediment to Arnold J sitting on the panel to hear the substantive appeal.**

B **The panel to hear the appeal will comprise Glazebrook, O'Regan, Ellen France, Arnold and French JJ.**

REASONS
(Given by Ellen France J)

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Introduction

[1] The Court gave leave to hear an appeal and cross-appeal relating to the decision of the Court of Appeal in *Kim v Minister of Justice of New Zealand* (the appeal).[1] The approved question is whether the Court of Appeal was correct to quash and remit the Minister of Justice's decision to surrender the respondent under s 30 of the Extradition Act 1999.

[2] In the lead up to the hearing, which took place on 25 and 26 February 2020, an issue arose about the composition of the panel to hear the appeal. A hearing took place on this aspect on 4 December 2019 and the Court issued a results judgment on 10 December 2019. In that judgment an order was made declaring that the Court had determined there was no impediment to Arnold J sitting on the panel to hear the appeal. The judgment also recorded that the panel to hear the appeal will comprise Glazebrook, O'Regan, Ellen France, Arnold and French JJ. After setting out the background, we provide our reasons for that judgment.

How the issue about the composition of the panel arose

[3] To put the judgment in context, we need to explain how the issue about the composition of the panel arose.

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[1] *Kim v Minister of Justice of New Zealand* [2019] NZCA 209, [2019] 3 NZLR 173 (Cooper, Winkelmann and Williams JJ) [*Kim* (CA)]. Leave to appeal and cross-appeal granted: *Minister of Justice v Kim* [2019] NZSC 100 (Glazebrook, O'Regan and Ellen France JJ).

[4] Section 81(1) of the Senior Courts Act 2016 (the Act) envisages that the appeal will be heard by a panel of five judges. The panel would ordinarily comprise five permanent members of the Court, subject to issues such as a conflict of interest or absence. As matters transpired, two of the six permanent members of the Court, Winkelmann CJ and Williams J, are not able to sit on the appeal. That is because both formed part of the coram which heard the respondent's appeal in the Court of Appeal.

[5] One of the remaining four permanent members of the Court, William Young J, is chairing the Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019 (the Royal Commission).[2] Counsel assisting that inquiry is Andrew Butler. Mr Butler is also counsel for the Human Rights Commission which has been granted leave to intervene on the appeal. In the minute of 2 October 2019 granting leave to the Commission to intervene, the Court asked counsel for the parties to the appeal to advise if they considered there was an issue with William Young J sitting on the panel to hear the appeal given Mr Butler's involvement and, if so, to outline the reasons for any concern.[3]

[6] Counsel for the appellants took no issue with William Young J remaining on the panel. Mr Edgeler for the respondent considered the Judge should not sit because of Mr Butler's involvement. Counsel also raised a question about the appropriateness of a permanent member of the Court sitting at the same time as also having been appointed to, and chairing, a Royal Commission.

[7] The particular issue relating to William Young J was resolved by the Judge's decision not to sit. The unavailability of three members of the permanent Court led to the addition of Arnold and French JJ to the panel.[4] Arnold J is an acting Judge of the

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2 Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019 Order 2019, cl 6(2).

3 *Minister of Justice v Kim* SC 57/2019, 2 October 2019 at [7].

4 In this situation, s 110(1) of the Senior Courts Act 2016 provides that the Chief Justice, in consultation with the President of the Court of Appeal, may appoint a Court of Appeal judge as an acting Supreme Court judge. As a matter of Supreme Court policy, the most senior member of the Court of Appeal who is available to sit and who is not conflicted will be appointed as an acting judge to hear and determine a proceeding or proceedings: Supreme Court of New Zealand "Practice in Relation to Acting Judges" (6 March 2017) Courts of New Zealand <www.courtsofnz.govt.nz>. But the statute is clear that only one member of the Court of Appeal appointed under s 110(1) may sit in a particular case: s 110(3).

Court.[5] The Judge is the chairperson of the Government Inquiry into Operation Burnham and Related Matters.[6] The Court asked the parties for submissions on whether or not issues of eligibility to sit on the appeal applied to an acting judge who is a member of a government inquiry under the Inquiries Act 2013.[7]

[8] The question of the composition of the panel to hear the appeal was then set down for a hearing. By that stage, the respondent took the position that the fact that William Young J was no longer sitting had resolved any issues from a practical point of view. The respondent took no issue with Arnold J sitting on the panel. The Court considered that, the issue of eligibility having been raised in the first instance, it was nonetheless necessary to decide whether or not there was any question as to the eligibility of Arnold J to sit. The hearing accordingly proceeded before a panel of three members of the permanent Court.

[9] The respondent questioned the jurisdiction of the Court to sit as a panel of three where there was no interlocutory application from a party. We address that issue as a preliminary point.

Jurisdiction

[10] The relevant provisions governing this issue are set out in the Act. Reference can be made first to s 79 which sets out the general powers of the Court. Relevantly, s 79(2) states that:

> In a proceeding, the Supreme Court may, as it thinks fit, make—
>
> (a) any ancillary order; and
>
> (b) any order or decision on an interlocutory application; and
>
> (c) any order as to costs.

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5 Section 111(1) of the Senior Courts Act makes provision for the Governor-General, on the advice of the Attorney-General, to appoint one or more acting judges of the Supreme Court. Section 111(2) sets out the eligibility for appointment of an acting judge under s 111(1), namely, that he or she is a retired judge of the Supreme Court of less than 75 years of age.

6 "Establishment of the Government Inquiry into Operation Burnham and Related Matters" (12 April 2018) *New Zealand Gazette* No 2018-go1763.

7 *Minister of Justice v Kim* SC 57/2019, 14 October 2019 at [3].

[11] As noted above, s 81(1) provides that for the hearing and determination of a proceeding the Court comprises five judges of the Court.

[12] Under s 82(1) orders and directions on an interlocutory application may be made or given by a single judge. That does not apply to an order or direction that determines the proceeding or disposes of a question or an issue that is before the court in the proceeding.[8] The judges of the Supreme Court who together have jurisdiction to hear and determine a proceeding may review the decision of a single judge on an interlocutory matter.[9]

[13] Section 84 deals with the procedure if judges are absent. Section 84(1) provides that:

> [The] section applies if, because of the death or unavailability of 1 or 2 of the Judges of the Supreme Court who are about to begin or have begun hearing a proceeding, only 3 or 4 of those Judges remain available to hear and determine the proceeding.

[14] In this situation, the remaining judges are required to decide whether to adjourn the proceeding, re-hear it or continue.[10] Section 84(3) provides for the procedure if the remaining judges decide that the proceeding may continue.

[15] The point made by Mr Ellis on behalf of the respondent was that s 79(2)(b) cannot be invoked because there was no interlocutory application before the Court.[11] That was because the respondent no longer saw the composition of the panel as an issue as William Young J was not sitting. Mr Ellis also noted that, while one judge may make an interlocutory order, the Act envisages review of such an interlocutory order by five members of the Court and that would not be possible here.

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8 Section 82(2).
9 Section 82(4)(a).
10 Section 84(2).
11 The respondent also queries whether the issues involve an "ancillary order" as in s 79(2)(a).

[16] Taking the last point first, it may be in that situation the principle of necessity would apply.[12] However, we do not need to resolve that question. That is because we agree with the submission of the Solicitor-General that nothing in the Act prevents the Court from sitting as a bench of three to make a decision about the composition of the panel. As the Solicitor-General submits, there is support for that proposition in r 5 of the Supreme Court Rules 2004. Rule 5(1) provides for the Court to give directions "in relation to any matter that arises in a case".[13]

[17] It is also relevant that, under the Act, each of the heads of the Senior Courts are required to prepare and publish guidelines setting out the respective Courts' approach to recusal.[14] Where there is an objection to a judge sitting, the Recusal Guidelines of this Court envisage that all the judges available other than the judge whose ability to sit is in question will decide the question of composition.[15] It would seem odd, to say the least, that the Court had no means of determining whether there should be recusal in such a situation where the challenges to eligibility meant a panel of five members could not be constituted.

[18] Accordingly, we considered we had jurisdiction to sit as a panel of three members of the permanent Court to determine the question of the composition of the panel and the application of the Recusal Guidelines. Obviously, our decision to do so as a panel of only three reflects the particular combination of facts that has arisen in this case.

[19] We turn then to the substantive question.

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12 Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Oxford, 2009) at 99–100; and Michael Taggart "Acting Judges and the Supreme Court of New Zealand" (2008) 14 Canta LR 217 at 229–230. See generally Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [19.11]. See also *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3] per Blanchard J and [80] per McGrath J, citing *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 at [6]. For an example of the application of the doctrine of necessity in a different context see *Rabson v Judicial Conduct Commissioner* [2017] NZSC 96 at [2].

13 See also r 7 which enables a permanent judge to exercise a power conferred under the Rules to give directions or to decide a matter, apart from the determination of an application for leave to appeal or an appeal.

14 Section 171.

15 "Supreme Court of New Zealand Recusal Guidelines" (1 March 2017) Courts of New Zealand <www.courtsofnz.govt.nz> at [7].

Effect of acting Judge's membership of a government inquiry

[20] The way this case has been argued, the substantive aspect raises two questions:

(a) How is ineligibility to sit to be determined in this case?

(b) Is there a basis for disqualification here?

[21] The first question also requires consideration of whether the position is any different for an acting judge than it is for a permanent member of the Court. We deal with each question in turn.

What is the test for ineligibility?

[22] The appellants' submission is that the test for ineligibility is that set out by this Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd*.[16] That test requires the Court to consider whether, subject to qualifications relating to waiver or necessity, a fair minded observer might reasonably consider that the judge might not bring an impartial mind to the resolution of the question before the judge.[17] Applying that test, the appellants say there is nothing disqualifying Arnold J (or for that matter William Young J) from sitting.

[23] The respondent's position is that if a permanent member of the Supreme Court has been appointed to a Royal Commission or an inquiry, that judge should not sit on the Court for the duration of his or her membership of the Commission or inquiry and should not sit whilst there is active or contemplated litigation in relation to the Commission or inquiry. The respondent says there are particular concerns with a permanent member of a final appellate court who is on a Commission or inquiry sitting in that period. Those concerns can be summarised as issues going to the independence and impartiality of the judge and of the Court,[18] and implications in terms of the workload of the Court. The respondent highlights also that there is no means of

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16 *Saxmere*, above n 12.

17 At [3] per Blanchard J, [37] per Tipping J, [56] per McGrath J and [127] per Anderson J. See also at [121] and [124] per Gault J.

18 Citing the New Zealand Bill of Rights Act 1990, ss 25(a) and 27; and the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14(1) (right to an independent and impartial court).

appellate correction of this Court. In addition, the respondent says there are issues about the lack of disclosure of the process leading to the appointment of William Young J to the Royal Commission.

Our assessment

[24] The starting point is that both Judges are members of, respectively, a Royal Commission and a Government Inquiry. Such appointments are permitted under the Act so long as the Chief Justice has approved the appointment. Section 142(1) provides that:[19]

> A Judge or an Associate Judge must not undertake any other paid employment or hold any other office (whether paid or not) without the approval of the Chief Justice in consultation … with the appropriate head of court.

[25] Reference should also be made to s 143(1)(b) which requires the Chief Justice to "develop and publish a protocol containing guidance on … the offices, or types of offices, that he or she considers may be held consistent with being a Judge".[20]

[26] The introduction to the Protocol prepared pursuant to s 143(1) notes that the requisite approval "may be given only if the Chief Justice in consultation with the appropriate head of Court or appropriate head of Court is satisfied that … holding the office is consistent with judicial office".[21] Paragraph [1(b)] of the Protocol, dealing with general provisions, records:[22]

> It is generally not consistent with judicial office for a Judge to … hold an office if the amount of time required to carry out the responsibilities of that … office, (and the responsibilities of any other such … office) interferes with the Judge's discharge of his or her judicial duties.

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19 The Canadian equivalent to s 142 is found in ss 55 and 56 of the Judges Act RSC 1985 c J-1. Section 55 prohibits a judge from engaging in another occupation or business other than judging. Section 56 requires appointment of a judge to a commission to be authorised by legislation or by the lieutenant governor in council. The Canadian Judicial Council sets out the process to be followed in considering requests that a judge act in such a role: Canadian Judicial Council *Protocol on the Appointment of Judges to Commissions of Inquiry* (JU14-21/2010, August 2010) <www.cjc-ccm.ca>. Amongst other matters, the Chief Justice is to consider the effect of the absence of a judge on the court's workload.

20 In contrast, s 144(1) states that "[a] Judge must not practise as a lawyer."

21 "Protocol Containing Guidance on Extra-Judicial Employment and Offices" (9 March 2017) <www.courtsofnz.govt.nz>.

22 See also [1(c)] which deals with the situation where the position changes so that holding the office subsequently interferes with the discharge of judicial duties. It will not be treated as interfering with the discharge of duties if alternative arrangements have been made for those duties to be carried out, for example, by an acting judge: at [1(d)].

[27] Service on government committees and inquiries is dealt with expressly in [8], which provides:[23]

> (a) It is not consistent with judicial office for a Judge to accept appointment by Executive Government to any other office or to conduct any inquiry.
>
> (b) The exceptions are:
>
> (i) appointment to an office or an inquiry where appointment is approved by the Chief Justice; or
>
> (ii) participation is authorised by or required by statute.

[28] In terms of the requirement for approval by the Chief Justice, in the context of considering the approach to be taken to the Inquiries Act, the Law Commission recommended that when a judge was to be appointed the practice of wider consultation in accordance with principles adopted by the Council of Chief Justices of Australia and New Zealand should be followed.[24]

[29] The respondent draws support for the submission that a Commissioner should not sit as a judge from debates about the desirability of judicial appointments to inquiries.[25] Some of that material canvasses potential objections to such appointments in terms of both the potential effect on the independence and impartiality of the judge and the relevant court and on the implications for judicial workloads.[26] It is not however necessary for us to engage in that debate. As we have said, both Judges have been appointed and appointment is permitted. The issue then is whether there is

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23 This approach is consistent with The Bangalore Principles of Judicial Conduct which provide that a judge may serve as a member of a government commission "if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge": Judicial Group on Strengthening Judicial Integrity "The Bangalore Principles of Judicial Conduct" (2002) at [4.11.3].

24 Law Commission *A New Inquiries Act* (NZLC R102, 2008) at [12.5]–[12.6].

25 For example, Jack Beatson "Should judges conduct public inquiries?" (2005) 121 LQR 221; Shimon Shetreet and Sophie Turenne *Judges on Trial: The Independence and Accountability of the English Judiciary* (2nd ed, Cambridge University Press, Cambridge (UK), 2013) at 249–257; and George Winterton "Judges as Royal Commissioners" (1987) 10(1) UNSWLJ 108 at 120–121. See also HP Lee and Enid Campbell *The Australian Judiciary* (2nd ed, Cambridge University Press, Melbourne, 2013) at 189–192. The Law Commission noted in this context that involvement in an inquiry "may be seen as detracting" from judicial independence and impartiality but said it did not have "a strong view" about whether sitting judges should serve on such inquiries. The Commission saw that question as "dependent on the substance or form of the inquiry … and judicial resources at the time": Law Commission, above n 24, at [12.15] and [12.17].

26 See for example Winterton, above n 25, at 111 and 120.

anything to prevent the Judges sitting on the Court during their membership of the Royal Commission or the Inquiry.

[30] Both the Senior Courts Act and the Inquiries Act are silent on the point. The Inquiries Act does not refer expressly to judicial membership but contains a number of provisions promoting the independence of inquiries set up under that Act. In particular, s 10 provides that in exercising its powers and performing its statutory duties "an inquiry and each of its members must act independently, impartially, and fairly". Further, under s 26, an inquiry has immunity for matters related to the inquiry.[27] Finally, in any application for judicial review of an inquiry, "the inquiry, and not the chairperson or members of that inquiry, must be cited as the respondent".[28]

[31] Nor, as a matter of practice, has membership of such an inquiry been seen to necessarily prevent the judge from sitting. The appellants in their written submissions provided information about the various judicial appointments to such inquiries who have continued to carry out judicial obligations at the same time.

[32] The position is therefore that there is no general bar on a judge who has been appointed to a commission or inquiry from sitting. It follows that the question must be whether there is something in the particular case that affects the eligibility of the judge to sit.

[33] That was the approach adopted in *Wikio v Attorney-General*.[29] MacKenzie J in that case dealt with, amongst other matters, a challenge to the ability of Robertson J to sit on the Court of Appeal whilst he was also President of the Law Commission. In this context, the Judge considered some of the Australian authorities noting that, there, the Commonwealth of Australia Constitution Act 1900 (Cth) (the Constitution) gives "express legal force" to the doctrine of separation of powers.[30] That was a reference to Chapter III of the Constitution which provides that the "judicial power of the

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27 Unless the inquiry acted in bad faith: Inquiries Act 2013, s 26(2).
28 Section 35.
29 *Wikio v Attorney-General* (2008) 8 HRNZ 544 (HC).
30 At [138].

Commonwealth" is vested in the "High Court of Australia, … and in such other courts as it invests with federal jurisdiction".[31]

[34] One of the cases MacKenzie J discussed was *Grollo v Palmer*.[32] In that case the High Court of Australia upheld the validity of the conferral of power to issue telecommunications interception warrants on any federal judge who consented to appointment to undertake that function. For present purposes the case is relevant for the discussion in the majority judgment of the three ways in which appointment to a non-judicial function such as an inquiry may be incompatible with the judicial function and so invalidate the particular appointment. The majority referred to the following:[33]

> Incompatibility might consist in so permanent and complete a commitment to the performance of non-judicial functions by a judge that the further performance of substantial judicial functions by that judge is not practicable. It might consist in the performance of non-judicial functions of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired. Or it might consist in the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge to perform his or her judicial functions with integrity is diminished.

[35] Referring to the test set out in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* to determine whether the conferral of a particular non-judicial function is permissible,[34] MacKenzie J in *Wikio* said there was no comparable rule in New Zealand.[35] The lawfulness of conferral of membership of the Law Commission was not a question for judicial determination. That was because s 9(3) of the Law Commission Act 1985 provides expressly that a judge may be President of the Commission. The only issue for judicial resolution was whether there were problems in terms of the capacity of the individual office-holder to perform the judicial function in issue, in that case, to hear the second applicant's appeal with integrity and in accordance with judicial process.[36] There was no suggestion that capacity was lacking. That was the answer to that aspect of the case.

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31 Commonwealth of Australia Constitution Act 1900 (Cth), s 71.

32 *Grollo v Palmer* (1995) 184 CLR 348.

33 At 365. See also *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

34 *Wilson*, above n 33, at 17.

35 *Wikio*, above n 29, at [144]–[145]. We agree with the submissions for the appellants that these sorts of considerations may be matters for consideration by the Chief Justice under s 142 of the Senior Courts Act and the Protocol.

36 At [147].

[36] We see no reason to apply any test other than that set out in *Saxmere* in order to determine whether the Judge is disqualified. Applying that test requires consideration of, first, the circumstances relevant to the possible need for recusal because of apparent bias and, second, whether those circumstances lead to a reasonable apprehension that the Judge may not be impartial.[37]

[37] It is common ground that there may be some cases where membership of a Royal Commission or a government inquiry may affect eligibility to sit. We agree. But we envisage such an outcome would result because some feature of the particular case gave rise to a reasonable apprehension of bias applying the *Saxmere* test. That might be, for example, because of the closeness of the subject matter of the appeal on which the judge is to sit to that of the commission or the inquiry, or it may be because of some particular issue arising in relation to the conduct of the commission or the inquiry.

[38] As to whether there is any difference between permanent and acting members of the Court in this respect, the argument for the respondent is, in essence, that because an acting judge is retired, he or she is more independent than a permanent member and workload issues assume less importance.

[39] Taking the latter first, whether or not workload issues are a factor may depend on practical issues such as the number of acting judges available at a particular point in time. But these issues are, in any event, not relevant to the present exercise. More generally, we see no difference as a matter of principle. That is because the matters that might give rise to perceptions of a lack of impartiality apply equally.[38] Questions of financial security, for example, may be no less acute in the absence of a defined benefits pension scheme.[39] We accordingly approach the matter of an acting judge in the same way, that is, by applying the *Saxmere* test.

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37 *Saxmere*, above n 12, at [4] per Blanchard J, [38] per Tipping J and [93] per McGrath J.

38 Taggart, above n 12, at 220 expressed criticism of the discretionary nature of the power to appoint acting judges of the Supreme Court in s 23 of the Supreme Court Act 2003 (the predecessor to s 111 of the Senior Courts Act).

39 This aspect is considered in relation to acting judges of the High Court in *R v Te Kahu* [2006] 1 NZLR 459 (CA) at [34]–[40], discussed in Joseph, above n 12, at [21.3.3(7)].

Any basis for disqualification in this case?

[40] We turn then to the present case. The first point to note is that the appeal concerns the correctness of the decision of the Minister of Justice that the respondent should be surrendered to the People's Republic of China to face trial there. The Court of Appeal in the decision under appeal quashed the Minister's decision and held it must be reconsidered in light of the matters set out in the judgment.[40] Second, the Government Inquiry of which Arnold J is a member was established to inquire into and report on a number of aspects relating to the conduct of New Zealand Defence Force (NZDF) forces in Operation Burnham (an operation undertaken in August 2010 with the Afghan Crisis Response Unit and the Armed Forces of the United States, in Tirgiran Valley in Baghlan Province, Afghanistan).[41]

[41] We were not directed to any matter in terms of the subject matter of the Inquiry or in its conduct which might give rise to any apprehension of a lack of impartiality on the part of the Judge in hearing the appeal. There is no bar to the Judge sitting on the present appeal because of membership of that Inquiry.

Disclosure

[42] The respondent sought disclosure of information about aspects of the appointment process for William Young J as chairperson of the Royal Commission. The Court responded by minute advising it did not intend to answer those questions, noting that the answers to some of the questions were "not within the Court's knowledge".

[43] The respondent conceptualises disclosure of this material as equating to the type of disclosure seen as necessary in *Saxmere*. It is not necessary for us to resolve

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40 *Kim* (CA), above n 1, at [277]–[278].

41 There was a second mission to Tirgiran Valley in October 2010 ("Operation Nova"). The Inquiry's terms of reference records that in March 2017, the book *Hit & Run* by Nicky Hager and Jon Stephenson was published (Nicky Hager and Jon Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, Nelson, 2017)). The terms of reference state the book "contained a number of serious allegations against NZDF personnel involved in the Operations. While NZDF has strongly denied these allegations, and has endeavoured to respond to them, they have had an impact on its public reputation, which an independent review can address": "Establishment of the Government Inquiry into Operation Burnham and Related Matters", above n 6, at 1.

this as it is not a live issue in respect of William Young J. But we add that we do not see how disclosure of the process followed in respect of that appointment would have assisted with the application of the *Saxmere* test.

Postscript

[44] One of the counsel for the respondent, Mr Keith, is a special adviser to the Operation Burnham Inquiry. As we understand it, he was appointed to undertake a particular exercise, a declassification procedure. For completeness, we record neither party saw any issue with the ability of Mr Keith to continue to act for the respondent arising out of this role in that Inquiry.

Result

[45] For these reasons, the Court made the following orders: first, an order declaring that following the hearing on 4 December 2019 the Court has determined there is no impediment to Arnold J sitting on the panel to hear the substantive appeal; and, second, that the panel to hear the appeal will comprise Glazebrook, O'Regan, Ellen France, Arnold and French JJ.

Solicitors:
Crown Law Office, Wellington for Appellants
Marshall, Bird, Curtis, Auckland for Respondent