Kiribati

Speaker v. Attorney-General: Re Section 32(5) of the Constitution of Kiribati

High Court of Kiribati
Maxwell C.J.
8 July 1987

Practice and procedure – whether actions for declaration as to interpretation of constitution possible – whether Speaker of Manaeba ni Maungatabu had standing to seek declaration as to the entitlement of Beretitenti to assume office following election – Constitution of the Republic of Kiribati, section 88(6); Western Pacific High Commission High Court (Civil Procedure) Rules 1986, Order 58.

Constitutional law – whether Beretitenti entitled to assume third term of office after election under Constitution of Republic of Kiribati having been deemed first Beretitenti without election – Constitution of the Republic of Kiribati, sections 31(2), 43(5)

Section 32(5) of the Constitution of the Republic of Kiribati, 1979, provides:

> A person may assume office as Beretitenti after election on not more than three occasions.

In 1979 Ieremia Tabai had assumed office as first Beretitenti of Kiribati under section 31(2) of the Constitution of 1979, there having been no election held. In 1982 and 1983 he assumed further terms of office as Beretitenti after having been elected. On 13 May 1987 he was elected Beretitenti a third time. The Speaker of the Maneaba ni Maungatabu brought these proceedings by way of an originating summons purporting to be under section 88(6) of the Constitution (which allows questions of interpretation of the Constitution to be brought before the High Court by the Speaker). The originating summons sought a declaration as to whether Ieremia Tabai was entitled to assume office as Beretitenti of Kiribati having regard to the fact that he would be entering into his fourth term of office, albeit that it would be only his third term of office after an election. On the High Court's order the Attorney-General was joined as a defendant to the action. The Speaker argued that the intent of section 32(5) was to limit presidential terms of office to three and that a purposive interpretation required that section 32(5) be construed so that the first assumption of office pursuant to section 32(1) was deemed to have been an assumption after an election. On this view the Beretitenti would not have been entitled to assume office on 13 May 1987 since that would have been his fourth term of office after an "election".

HELD:

(1) Section 88(6) of the Constitution permits the Speaker of the Maneaba ni Maungatabu to make application to the High Court to determine any question as to the interpretation of the Constitution. In distinction to other subsections of section 88, subsection (6) does not permit actions for a declaration. In any event the originating summons filed by the Speaker was

not, despite its wording, seeking interpretation of the Constitution but in reality was seeking a declaration that in view of section 35(2) of the Constitution the Beretitenti was not entitled to assume office on 13 May 1987: 1. 150.

(2) Order 58 of the Western Pacific Commission High Court (Civil Procedure) Rules 1964 provided that an applicant for a declaration must have an interest arising under the instrument in respect of which the declaration is sought. Here the Speaker had not disclosed any way in which, in his capacity as Speaker, his interests were affected by the assumption of office by Ieremia Tabai. Accordingly he had no standing to seek a declaration that the Beretitenti was not entitled to assume office under the Constitution. Further and in any event, since Ieremia Tabai had already assumed office before this proceeding was commenced, the issue was no longer live and no declaration could be issued: *l.* 260.

Gouriet v. *Union of Post Office Workers* [1978] A.C. 435; [1977] 3 W.L.R. 300; [1977] 3 All E.R. applied.

(3) If, contrary to fact, the Speaker's application was treated as one seeking the Court's opinion as to the meaning of section 32(5), then that section was not ambiguous and neither logic nor law called for it to be given a strained construction. The section ought to be interpreted according to its plain meaning. Accordingly the Beretitenti was entitled to assume office on 13 May 1987 since that was only his third assumption of office after an election. His first assumption of office had not been after an election and therefore did not count for the purposes of section 32(5). The application ought therefore to be dismissed: *l.* 490.

Other cases referred to in judgment:

Attorney-General of the Gambia v. *Jobe* [1984] A.C. 689; [1984] 3 W.L.R. 174 (P.C.).

Hinds v. *The Queen* [1977] A.C. 195; [1976] 2 W.L.R. 366; [1976] 1 All E.R. 353.

Ministry of Home Affairs v. *Fisher* [1980] A.C. 319; [1979] 2 W.L.R. 889; [1979] 3 All E.R. 21.

Myer Queenstown Garden Plaza Pty. Ltd. v. *Port Adelaide Corporation* (1975) 11 S.A.S.R. 504

Reference by the Queen's Representative Cook Islands [1985] L.R.C. (Const.) 56

In Re New Ireland Provincial Constitution (Papua New Guinea) [1985] L.R.C. (Const.) 92

Reference by the Governor in Council Concerning the Continental Shelf Off Shore Newfoundland Canada [1985] L.R.C. (Const.) 159

Action:

Originating summons for declaration that Beretitenti not entitled to assume office.

T. Teiwaki for the Speaker of the Maneaba ni Maungatabu

T. Tabane for the Attorney-General of the Republic of Kiribati

MAXWELL C.J.

Judgment:

On 29 May 1986 the Honourable Speaker of the Maneaba ni Maungatabu filed an originating summons. The originating summons reads as follows:

In the matter of Interpretation of the Constitution
and
In the Matter of an Application by Beretitara Neeti, Speaker of the Maneaba ni Maungatabu for Interpretation of section 32(5) of the Constitution.

SUIT NO.

LET ALL PARTIES concerned attend before the High Court at Betio on Monday 1st June 1987, at 9.00 o'clock in the forenoon or as soon thereafter as the Court may be heard upon an application on the part of Beretitara Neeti, Speaker of the Maneaba ni Maungatabu for a Declaration whether in view of section 32(5) of the Constitution, Beretitenti Ieremia Tabai, was entitled to assume office as Beretitenti of Kiribati on the 13th day of May 1987.

This summons was taken out by Beretitara Neeti, Speaker of the Manaeba ni Maungatabu.

Dated this 28th day of May 1987.

The originating summons is supported by an affidavit of eight paragraphs sworn to by the Honourable Speaker.

For the purpose of this decision I shall set out in full the affidavit. The affidavit is headed "Affidavit in support of Ex Parte Originating Summons" and reads:

Affidavit in support of Ex Parte Originating Summons

I, Beretitara Neeti, Speaker of the Maneaba ni Maungatabu make oath and say as follows:

(1) That I am the deponent herein and Speaker of the Maneaba ni Maungatabu.

(2) That in my capacity as a Speaker of the Maneaba ni Maungatabu I am entitled under section 88(6) of the Constitution to make application to this Honourable Court to hear and determine any question as to the interpretation of the Constitution.

(3) That on the 12th day of July (i.e. Kiribati Independence Day) Ieremia Tabai was deemed to have assumed office as first Beretitenti by virtue of section 31(1) of the Constitution.

(4) That in 1982 Ieremia Tabai assumed office as Beretitenti after election pursuant to section 32 of the Constitution.

(5) That in 1983 Ieremia Tabai again assumed office as Beretitenti after election pursuant to section 32 of the Constitution.

(6) That on 13th May 1987 Ieremia Tabai again assumed office as Beretitenti after being declared elected following the Presidential election held on 12th May 1987.

(7) That it is in the National interest that this Honourable Court declare as a matter of interpretation of the Constitution, whether having regard to section 32(5) of the Constitution Ieremia Tabai was entitled to assume office as Beretitenti on the 13th day of May 1987 as aforementioned?

WHEREFORE I swear to this affidavit in support of this Ex Parte Originating Summons.

Before dealing with the real issues raised it is pertinent to ask these questions:

(1) What is the purpose of this application?
(2) Is it to ask the Court to interpret section 32(5) of the Constitution or to declare that the Honourable Ieremia Tabai G.C.M.G. is not entitled to assume office by virtue of section 32(5) of the Constitution.

The format of the Originating Summons clearly indicates the lack of competence and lack of knowledge of practice and procedure of this Court, on the part of the person who drafted the notice of summons. It is evident that neither the Honourable Speaker nor Mr Teiwaki drafted the notice of application.

This case deals with an important constitutional issue. Care ought to have been taken in drafting the notice and the affidavit in support, stating precisely and in clear terms the issue which the court is being asked to determine. Nothing should be left to be inferred.

In Kiribati, the words "Suit No." are not used as part of the heading of an action in papers filed in this court. It is also not the practice for the applicant or litigant to fill in the date and time for hearing of any matter, before filing the matter in court. The fixing of date and time are matters for the Chief Justice.

The application and the arguments of Mr Teiwaki clearly show that what the Court is being invited to do is to declare that the Honourable Ieremia Tabai is not entitled to assume office as the Beretitenti of Kiribati on 13 May 1987, in view of section 32(5) of the Constitution.

The title of the originating summons belies the real intention behind the application as indicated above.

The Honourable Speaker, in my opinion, is not asking this Court to interpret the provisions of section 32(5) of the Constitution. If that is his intention, this has not been stated precisely and in unambiguous terms.

Section 88(6) of the Constitution under which this application is brought provides as follows:

> S.88(6) Subject to the provision of this Constitution, the High Court shall have original jurisdiction *to hear and determine any question as to the interpretation* of this constitution.

Section 88 of the Constitution as a whole deals with three different situations namely:

(a) The situation where a person alleges that a provision of the Constitution has been contravened and that his interests are being or are likely to be affected by such contravention.

By subsection (1) that person may apply to the High Court for a declaration. In other words the person aggrieved can apply to Court by an action for declaration. Subsection (2) gives the Court power to hear the action and subsection 3 tells the Court what action to take when the applicant is seeking a relief. Subsection 4 forbids the Court from entertaining any action dealing with issues involving section 60 and section 117 of the Constitution, unless the action or application is made in accordance with the provisions of those sections.

Section 60 deals with questions as to membership of the Maneaba ni Maungatabu and section 117 deals with the nomination of a representative of the Banaban Community to sit in the Maneaba ni Maungatabu.

(b) The second situation which section 88 deals with is the power given to the Beretitenti to refer to the High Court under section 66(5) of the Constitution, a Bill, asking it to declare whether such a Bill, if assented to, would be inconsistent with the constitution.

(c) The third situation deals with the power given to,
  (i) the Beretitenti acting in accordance with the advice of the Cabinet,
  (ii) the Attorney-General, and
  (iii) the Speaker to make an application to the High Court to hear and determine any question as to the interpretation of the Constitution.

An application under section 88(6) of the Constitution cannot, in my view, be by way of an action for declaration.

If the application was to be by way of an action for declaration, the draftsmen would have used the phrases which were used in subsections 1, 2 and 5. In subsection 1, the expression used is:

> that person *may apply* to the High Court *for a declaration* and for relief.

In subsection 2 the expression used is,

> *and to make a declaration accordingly.*

In subsection 5, the expression used is,

> the High Court shall have jurisdiction *to make a declaration as to* whether any Bill referred to it . . . would be inconsistent with this constitution.

These differences in the wording of the subsections must be seen as emphasizing the differences in approach in relation to the rights of an applicant who is applying under those subsections.

A counsel who is an expert in constitutional matters or is experienced in matters of practice and procedure would have noticed the differences in the wording of the various subsections and decided which form of application is appropriate.

As commented by Professor Maitland in his book *Sources of English Legal System*, the forms of action are dead, but they still rule us from the grave. The abolition of the forms of action has not meant the abolition of the law. Practice and procedure derived from them.

The action taken in this case, in my view, has only one purpose, and this is that the Court should declare that by virtue of section 32(5) of the Constitution, Honourable Ieremia Tabai is not entitled to assume office on 13 May 1987 as the Beretitenti of the Republic of Kiribati.

Having made these criticisms about the form and procedure adopted in this case, I now turn to deal with the issues of this action for a declaration that by virtue of section 32(5) of the Constitution, the Honourable Ieremia Tabai is not entitled to assume office on 13 May 1987, as Beretitenti of Kiribati.

It is on the basis of this assumption and of the facts deposed in paragraph 7 of the affidavit in support, that I made the order that the Honourable Attorney-General be joined as a defendant to the action.

An action for declaration has its peculiar rules and procedure. Thus under the Western Pacific High Commission High Court (Civil Procedure) Rules 1964, which are in operation here, Order 58 provides as follows:

Order 58

r.1 Any person claiming to be interested under a deed, will or other instrument may apply by Originating summons for the determination of any question of construction arising under the instrument and for a declaration of rights of the persons interested.

r.2 Not applicable.

r.3 The Court may direct such persons to be served with the summons as it may think fit.

r.4 The application shall be supported by such evidence as the court may require.

r.5 The Court shall not be bound to determine any such question of construction if in its opinion it ought not to be determined on originating summons.

It seems to me that the Honourable Speaker has brought this application with this Order in mind, because what he is asking the Court to construe is an instrument – a constitutional instrument.

The Honourable Speaker applying to this court by way of declaration on originating summons takes upon himself the burden of showing that his interest as the Speaker of the Naneaba ni Maungatabu is affected by Honourable Ieremia Tabai's assumption of office on 13 May 1987 as the Beretitenti of Kiribati.

The right conferred by section 88(6), in my opinion, is in his right as a Speaker of the Maneaba ni Maungatabu, for matters affecting his office and his functions as a Speaker.

The section does not, in my opinion, give the Honourable Speaker the right to apply for the interpretation of a provision of the Constitution which does not touch on his office or functions, as a Speaker.

In *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435 [1977] 3 W.L.R. 300; [1977] All E.R. 70, the House of Lords in England categorically repudiated the notion that declaration proceedings should be instituted to vindicate a public right by an individual who had suffered no special damage or had no private right that was endangered; in such a case the decision to bring civil proceedings either *ex relatione* or *ex proprio motu* rests at common law in the unreviewable discretion of the Attorney-General.

No clearer statement of the law governing an action by an individual to enforce a public right can bear more authority than this. This statement of law is accepted by most courts in the Commonwealth countries. I adopt this statement of law as applying to Kiribati.

This principle of law is recognized by section 88(6) which makes it possible for the Beretitenti on the advice of the Cabinet to ask for an interpretation of any provision of the Constitution except those covered by section 88(4) of the Constitution.

The Beretitenti as Head of Government and Cabinet is given that power in the interest of the Cabinet system. Similarly the Attorney-General is given the same power in the interest of the public, and the Speaker is given similar power in the interest of Parliament and its members.

The Honourable Speaker cannot, in my view, apply in the interest of the public, which is the reason for this action as he deposed in paragraph 7 of his affidavit. It is only the Honourable Attorney-General who can apply for a declaration on any issue

that affects national interest, or the public in general.

The principles which the courts have evolved to guide them in exercising their discretion to grant a declaration are:

(a) that a declaration will not be awarded to a plaintiff or an applicant who is unable to show that he is engaged with another party in a controversy in which his legally recognized interests are directly affected.

(b) that the court will not make a declaratory judgment, unless all the parties interested are before it. Even if a competent defendant is before the court as in this case, the court will decline to make a declaration affecting the interests of persons who are not before it. In *Myer Queenstown Garden Plaza Pty. Ltd.* v. *Port Adelaide Corporation* (1975) 11 S.A.S.R. 504, an Australian case, a declaration challenging the validity of regulations on the ground, inter alia, that a ministerial certificate of consent was improperly given, was held not challengeable in a proceedings to which the Minister was not a party.

(c) that the court will not make a declaratory judgment where the question is a dead issue.

The affidavit deposed to by the Honourable Speaker in support of the originating summons has not disclosed any fact to show how, in his capacity as Speaker of the Maneaba ni Maungatabu, his interest which is legally recognized, is directly affected by the assumption of office as Beretitenti of Kiribati, by the Honourable Ieremia Tabai, thereby raising an issue which this Court is being asked to resolve.

There is no issue joined between the Honourable Speaker and the Honourable Ieremia Tabai and, more important, the Honourable Speaker has not made the Honourable Ieremia Tabai a defendant to this action.

The assumption of office by the Honourable Ieremia Tabai took place on 13 May 1987. From that date, the issue whether he should assume office or not assume office is a dead issue. Therefore this Court will not make the declaration sought.

This should have been the end of this case.

Now assuming that I am wrong in holding that what the Honourable Speaker has asked the Court for is an action for the declaration, and that the correct view is that he is asking the Court to express its opinion as to the meaning of section 32(5) of the Constitution, as it affects the Honourable Ieremia Tabai, bearing in mind the facts contained in the affidavit.

The proper procedure which should have been taken is to formulate series of questions based on the facts contained in the affidavit and then refer those questions to the court for its opinion.

Guidance for this approach can be found in the following cases:

(1) *Reference by the Queen's Representative Cook Islands* [1985] L.R.C. (Const.) 56.

(2) *Re New Ireland Provincial Constitution (Papua New Guinea)* [1985] L.R.C. (Const.) 92.

(3) *Reference by the Governor in Council concerning the Continental Shelf Off Shore New Foundland Canada* [1985] L.R.C. (Const.) 159.

An experienced counsel would find no difficulty in formulating questions which the Honourable Speaker would want to put to the Court for an opinion.

Let me assume that the question that was intended to be asked is whether the Honourable Ieremia Tabai was entitled to assume office as the Beretitenti of Kiribati on 13 May 1987 in view of the provisions of section 32(5) of the Constitution.

The facts disclosed in the affidavit sworn to by the Honourable Speaker are that on 12 July 1979 – the Kiribati Independence Day – the Honourable Ieremia Tabai was deemed to have assumed office as the first Beretitenti of Kiribati by virtue of section 31(1) of the Constitution. In 1982 and 1983 he assumed office, after the general election of these two periods, by virtue of section 32(4) of the Constitution. On 13th May 1987 after another general election he again assumed office as Beretitenti of Kiribati having been duly declared as the Beretitenti of Kiribati.

On the basis of these facts the Honourable Speaker now asks whether, in view of the provisions of section 32(5) of the Constitution, the Honourable Ieremia Tabai is entitled to assume office again on 13 May 1987.

It is pertinent to point out here that two attempts were made earlier by Dr Harry Tong to challenge the Honourable Ieremia Tabai's right to seek nomination for election as Beretitenti on the basis of this same provision of section 32(5) of the Constitution.

These applications were heard by Mr Justice Topping and dismissed. For his ruling and judgment see the unreported High Court Civil cases No. 4/87 and No. 6/87 dated 16 March 1987 and 11 May 1987 respectively.

Section 32(5) of the Constitution which is cited as an authority for the view that the Honourable Ieremia Tabai is not entitled to assume office on 13 May 1987 provides as follows:

> S.32(5) A person may assume office as Beretitenti after election not more than three occasions.

Mr Teiwaki representing the Speaker urged me to adopt the purposive approach in construing the above subsection. To back up his argument, he submitted the following reports.

(1) The Report of the Constitutional Convention of 1977 p. 6.
(2) The Report of the Select Committee on the recommendation of the Constitutional Convention p. 12.
(3) The Report of the Gilbert Islands Constitutional Conference p. 7.

He also cited the following cases:

(1) *Hinds* v. *The Queen* [1977] A.C. 195; [1976] 2 W.L.R. 366; [1976] 1 All E.R. 353
(2) *Ministry of Home Affairs* v. *Fisher* [1980] A.C. 319; [1979] 2 W.L.R. 889 [1979] 3 All E.R. 21
(3) *Attorney-General of the Gambia* v. *Jobe* [1984] A.C. 689; [1984] 3 W.L.R. 174 (P.C.)

I shall discuss these cases and reports later. In the meantime I shall deal with Mr Teiwaki's various submissions and arguments.

His first contention is that on a purposive approach to construing Constitutional instruments, the Honourable Ieremia Tabai is not entitled to be the Beretitenti today.

He contents that looking at section 32(5) of the Constitution, it is apparent that the purpose of that provision is to set a limit on the number of times that one person can be the Head of State. He further contended that his limitation was considered by those who drew up the Constitution. They saw the danger in one person holding the highest political office indefinitely after an election, and wanted to guard against this. He referred to the various reports quoted above, in support of his contention. He submits that the limitation should apply to the first Beretitenti, given that sound reason dictates that it should apply uniformly.

He contended that there is nothing in Part I of Chapter 4 of the Constitution that makes a special case for the first Beretitenti of the Republic.

He submits that the onus is on Honourable Ieremia Tabai to establish that the first Beretitenti of Kiribati is a special case, and that the Constitution has made an express provision for a special case in his favour.

When I reminded him that the Honourable Ieremia Tabai is not a party to the application, he replied saying that it was left to the Honourable Attorney-General to establish that.

He contended further that Part I Chapter 4 of the Constitution allows a person to become a Beretitenti in one of two ways namely,

(a) By election – see section 32(4) – and
(b) By section 35(2) and (5) of the Constitution.

He submits that section 31(2) of the Constitution does not create a third way of assuming office as a Beretitenti. The subsection creates a legal fiction requiring the first Beretitenti to be treated as if he had assumed office under either section 32(4) or section 35(2) or section 35(5). Therefore section 32(5) applies and prevents him seeking office for a fourth time.

He contends that the phrase assumption of office does not denote a mental or physical act on the part of the Beretitenti who becomes Beretitenti. It simply makes a change of status.

He further contended that the word deemed should be equated with the word election and suggested that section 32(5) should read thus:

> A person may assume office as Beretitenti after he is deemed to have assumed office on not more than three occasions.

He then submitted that the Honourable Beretitenti Ieremia Tabai is not entitled to be the Beretitenti of Kiribati.

Mr Tabane, before making his submission, asked the Court to rule on a point of law which he considered important. The point was that the application under section 88(6) is subject to section 38 of the Constitution.

I ruled that the application is not subject to the provisions of section 38. Section 38 provides as follows:

> 38(1)The Chief Justice shall have superintendence over election to the office of Beretitenti . . .
>
> (2) Any question which may arise as to whether
>
> (a) any provision of this constitution or any law relating to the election of a Beretitenti under section 32 of this Constitution has been complied with or
>
> (b) any person has been validly elected under that section shall be referred

to and determined by the Chief Justice whose decision shall not be questioned in any court.

440 This action does not apply to an application under section 88(6) because section 88(6) deals with applications for interpretation and not applications on election matters, hence I ruled that section 38 does not affect this application.

Mr Tabane then contended that the application before the court is to test whether the Beretitenti can assume office after the 1987 election. He submits that section 31(1) should be read as it is. He referred to the Constitution of the Gilbert Islands in force on 1 February 1978 Chapter 3, which dealt with the election of the Chief Minister. That Chapter clearly shows that the Chief Minister is elected by the members of the House of Assembly and the Governor. The electorate played no part in the election of the Chief Minister.

450 He then submitted that to incorporate the word "deem" into section 32(5) is erroneous, and that if the draftsmen of the Constitution had wanted section 31(2) to be subject to section 32(5) they would have made it so in clear terms. He finally submitted that the Beretitenti is entitled to assume office as the Beretitenti of Kiribati on 13 May 1987.

These are the arguments for and against the assumption of office as Beretitenti by the Honourable Ieremia Tabai.

The question now is, which of these views expressed is the true meaning of section 32(5), as it applies to the facts deposed to in relation to the assumption of office by the Honourable Ieremia Tabai on 13 May 1987?

460 Section 32(5) means what it says, that in other words is, that a person who assumed office as a Beretitenti three times, after an election, may not assume the office of Beretitenti.

This meaning is accepted by counsel for the Speaker. Therefore section 32(5) needs no interpretation. The application in essence is not for interpretation of the provision of the constitution.

The real question is, can that meaning prevent the Honourable Ieremia Tabai from assuming office on 13 May 1987, given the fact that he was the Beretitenti of Kiribati in 1979, 1982 and 1983?

The facts show that in 1979 the Honourable Ieremia Tabai assumed office under 470 section 31(2) of the Constitution which is not assumption by election. But in 1982 and 1983 he assumed office under section 32(4) of the Constitution, that is after an election.

Mr Teiwaki's argument is that given the purposive approach of interpretation which was adopted in the various cases which he cited, sound reason dictates that the limitation applied to elected holders of the office of Beretitenti by section 32(5), should be applied uniformly to include the first Beretitenti who was deemed to have assumed office in 1979, that is, not by election.

The authorities cited by the counsel in support of the view canvassed dealt with the fundamental human rights provisions of the Constitution. This is an area of law 480 which the courts have always regarded as of vital importance in any democratic society, hence the purposive approach is invariably adopted in cases dealing with human rights.

The issue before me does not involve fundamental human rights, for this reason I shall not adopt the purposive approach nor discuss those cases in that they are not relevant to the issue before me.

The main aim for adopting the purposive approach is to avoid absurdity and manifest inconveniences.

I can see no compelling reason, either in logic or law, for me to hold that, because the purpose of section 32(5) is to limit the period a person can assume the office of Beretitenti, I should adopt the purposive approach of interpretation in a situation where there is no ambiguity in the meaning of the words used in the section.

It will be, to say the least, a very strained construction to read "deemed" as meaning "election". I find it difficult to accept Mr Teiwaki's suggestion that the section should read,

> A person may assume office as Beretitenti after a deemed assumption on not more than three occasions.

This is repugnant to the plain expression used by the drafters of the Constitution. It is absurd to extend the provisions of that section to a situation where a person is not elected to the office but deemed to have assumed the office.

The reasons for urging this Court to adopt the purposive approach as I see it, are these,

(1) The first Beretitenti should not be treated differently from other Beretitenti, who assume office under section 32(4), section 35(2) and section 35(5) of the Constitution.

(2) The dangers of one person holding the highest political office after election indefinitely can lead to arrogance in the exercise of power and disregard for others.

These reasons have no merit in them. The draftsmen of the Constitution were aware of these facts as shown by the various reports on the constitutional convention cited to this court. If they had wanted to limit the first Beretitenti from assuming office after the expiration of the term of the first Beretitenti as provided under the Kiribati Independence Order 1979, which incidentally forms part of the Constitution, they would have done this expressly, as was done in the case of the Vice-President or other office holders.

The Kiribati Independence Order 1979 section 6(2) provides as follows:

> S.6(2) Where any office of Minister (other than the office of Chief Minister) is established under the existing Orders immediately before Independence Day an equivalent office shall be deemed to have been established as from that day under the Constitution and any person holding that office immediately before that day shall be deemed to have been appointed immediately after the assumption of office by the first Beretitenti of the Republic of Kiribati to *hold the equivalent office in accordance with the provisions of the Constitution.* [The emphasis is mine.]

Section 7 of the Kiribati Independence Order 1979 makes similar provisions for Members of the Maneaba ni Maungatabu and for the Speaker.

The result of these provisions is that Ministers, Members of the Maneaba ni Maungatabu and the Speaker who held office just before independence, at independence held their offices in accordance with the provisions of the Constitution. Nothing was mentioned about the first Beretitenti under these provisions.

The imagined dangers as I termed them, do not exist only where the assumption of office is for more than the three times. In my view, the dangers could exist during the first or second term of office.

It may not be realized that a Beretitenti has to resubmit himself to the electorate and the members of the Maneaba for re-election every four years.

The guarantee against mismanagement, arrogance and excesses in the exercise of power is the resubmission of a Beretitenti to the electorate and members of the Maneaba, it does not depend on limiting the period in office.

If one is asked the question, When may a person not assume office as provided under section 32(5) of the Constitution? The obvious answer must be, after election on three occasions.

If one is asked again was the first Beretitenti's assumption of office as Beretitenti on 12 July 1979 by election as provided under the Constitution, the answer will clearly be, No.

It will be absurd to hold as the counsel for the applicant has urged me to hold, that the first Beretitenti can assume office only two more times after the expiration of the term of his deemed assumption of office, against the clear words of section 32(5), when the section speaks of election and the Beretitenti was not elected as provided under the Constitution in 1979. To be elected as Beretitenti under the Constitution a person must first be elected as a member of the Maneaba ni Maungatabu then nominated by election by secret ballot and finally by a national election.

I therefore hold that on the facts before me and for the reasons I gave above, that the provision of section 32(5) does not preclude the Honourable Ieremia Tabai G.C.M.G. from assuming office as the Beretitenti of Kiribati on 13 May 1987. I also hold that his assumption of office on 13 May 1987 is not ultra vires section 32(5) of the Constitution.

No order as to costs.

Right of Appeal explained.

Reported by: P.T.R.