

CASE NOTES

The Impacts of Re: Faith Barton-Keene v Hon. Davis Steven and Dr Eric Kwa and Ors ((2019) N7780) on Judicial Review of Administrative Decisions

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Introduction

This case relates to an application for leave for judicial review of the decision of the Attorney General, Hon. Davis Steven to revoke the acting appointment of the then Acting Solicitor General, Ms Faith Barton-Keene. The issue raised in this case is whether the decision by the Attorney General, which was the subject of a previous judicial review proceeding, is amenable to another judicial review.

Facts of the case

The plaintiff, Ms Faith Barton-Keene applied to the National Court (the Court) seeking leave for a judicial review of the decision of the first defendant, Attorney General, Honourable Davis Steven to revoke her acting appointment as Acting Solicitor General. Ms Keene was appointed acting Solicitor General on 15th December 2017 when her tenure as Solicitor General lapsed. On 6th December 2018, the Attorney General wrote to Ms Keene in a Memorandum advising her of his decision to retire her as Acting Solicitor General and the appointment of Mr. Tanuvasa Tauvasa as Acting Solicitor General.

In early December 2018, Ms Barton-Keene filed an application for leave for judicial review of the decision by the Attorney General in *Faith Barton Keene v Hon. Davis Steven, Dr Kwa and The State* (2019) N7780. Ms Barton-Keene argued that there was no gazettal notice giving effect to the Attorney General's decision and therefore, she remained Acting Solicitor General. The court in that matter refused leave and dismissed the leave application on the basis that available administrative remedies were not exhausted – particularly, that Ms Barton-Keene had not appealed to the Public Service Commission.

The plaintiff applied to seek leave of the National Court for judicial review based on the same decision of the Attorney General on the grounds that the Attorney General's decision, pursuant to the *Attorney General Act*, is an administrative decision made by a public authority therefore, subject to judicial review. On the other hand, the defendants argued that the decision of the Attorney General is not subject to judicial review as the issues raised by the plaintiff were *res judicata* in that the court had already determined the previous application by the plaintiff based on the same decision.

Whether the decision of the Attorney General, which was subject of a previous judicial review proceeding, is amenable to judicial review?

This was the threshold issue the court had to determine before considering whether the application satisfied the principles for leave to be granted. The court relied on the principles set out in *Felix Alai v*

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*Nakot Waina & Ors*¹ and *Zachery Gelu v Maurice Sheehan*² and refused leave for the following reasons:

1. the decision to revoke the acting appointment was the subject of the previous application for judicial review by the plaintiff. That matter was considered by the Court and leave was refused thus, the plaintiff cannot apply to the same Court for leave to review the same decision; and
2. the decision by the Court in the previous matter is final - the plaintiff cannot reargue that primary decision. The previous decision was that all administrative remedies were not exhausted, particularly, appeal to the Public Service Commission therefore, the application for leave should be for leave to review the decision of the Public Service Commission rather than the Attorney General's decision.

The Principle in Felix Alai case

In this matter, the court held that the decision by the court to grant leave for judicial review is interlocutory in nature however, if the court refuses leave then that decision is final which in effect brings the whole proceeding to an end. The court stated that:

If leave to apply is refused, there is no question that the decision is final because the decision brings to an end those proceedings.³

Thus, in this case, the previous application was considered and leave was refused. In effect, the decision of the court was final.

The Principle in Zachery Gelu case

The court in this matter discussed factors to consider in deciding whether to grant or refuse leave for review. One of these factors is that 'judicial review process is available in respect of a decision once only'.⁴ The court stated:

..if application for leave or the substantive application is determined and disposed off, the same decision should not be subject to another round of judicial review proceedings.⁵

In this case, the decision of the Attorney General was subject of the previous judicial proceeding. That proceeding was determined and disposed off when the court refused to grant leave. Therefore, the plaintiff cannot apply to the same court based on the same facts. Rather, as a general rule, the proper decision to challenge, is the decision of the Public Service Commission, as the appellate body and not the primary decision.⁶ As stated by Justice Nablu:

The National Court only has jurisdiction to review the decision of the appellate body and does not have jurisdiction to consider the scope of matters or new issues which were not before the appellate body.⁷

Conclusion

This case sets out the principle that the decision of the court to refuse leave in an application seeking leave for judicial review based on an administrative decision is final and therefore, the same administrative decision cannot be subject to another round of judicial review proceeding. This case also clarifies that a person who holds public office on an acting or temporary basis cannot claim the same rights to legal redress as would a substantive office holder.

¹ (2015) SC1615.

² (2013) N5498.

³ *Felix Alai v Nakot Waina* (2015) SC1615.

⁴ *Zachery Gelu v Maurice Sheehan* (2013) N5498.

⁵ Ibid.

⁶ *Martin Kenehe v Allan Jogioba & Ors* (2008) N4025.

⁷ *Faith Barton-Keene v Hon. Davis Steven and ors* (2019) N7780.