



ANALYSIS

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2008, No. 18

An Act to amend the Judicature Act 1980-81

(25 November 2008)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same, as follows:

1. Short Title and commencement – (1) This Act may be cited as the Judicature Amendment Act 2008 and shall be read together with and deemed part of the Judicature Act 1980-81 (hereinafter referred to as “the principal Act”).
(2) This Act shall come into force on the 1st day of December 2008.
2. Judicial review – The principal Act is amended by inserting after Part I, the following new Part –

**“PART 1A
JUDICIAL REVIEW**

50A. Interpretation – In this Part unless the context otherwise requires –

“application for review” means an application under section 50B(1) of this Act;

“decision” includes a determination or order;

“licence” includes any permit, warrant, authorisation, registration, certificate, approval or similar form of authority required by law;

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“person” includes a corporation sole and also a body of persons whether incorporated or not and in relation to the exercise, refusal to exercise or proposed or purported exercise by any person of a statutory power of decision, includes the High Court;

“Statutory power” means a power or right conferred by or under any Act, or by or under any instrument of incorporation, articles, rules or by-laws of any body corporate to –

- (a) make any regulation, rule, by-law or order, or to give any notice or direction having force as subordinate legislation; or
- (b) exercise a statutory power of decision; or
- (c) require any person to do or refrain from doing any act or thing that, but for such requirement, that person would not be required by law to do or refrain from doing; or
- (d) do any act or thing that would, but for such power or right, be a breach of the legal rights of any person; or
- (e) make any investigation or inquiry into the rights, powers or privileges, immunities, duties or liabilities of any person;

“Statutory power of decision” means a power or right conferred by or under any Act or by or under any instrument of incorporation, articles, rules or by-laws of any body corporate, to make a decision deciding or prescribing or affecting–

- (a) rights, powers, privileges, immunities, duties or liabilities of any person; or
- (b) the eligibility of any person to receive or to continue to receive, a benefit or licence, whether that person is legally entitled to it or not.

50B. Application for review – (1) On an application (which may be called an application for review) the High Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject-matter of the application, by order grant in relation to the exercise, refusal to exercise or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to in any one or more of the proceedings for a writ or order in the nature of mandamus, prohibition or certiorari or for a declaration or injunction against that person in any such proceedings.

(2) Where on an application for review the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid, the Court may, instead of making such a declaration, set aside the decision.

(3) Notwithstanding any rule of law to the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the person who has exercised or is proposing to exercise a statutory power was not under a duty to act judicially, but this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat the applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section.

(4) Where in any of the proceedings referred to in subsection (1) the Court had, before the commencement of this Part, a discretion to refuse to grant relief on any grounds, the Court shall have the like discretion, on like grounds, to refuse to grant relief on an application for review.

(5) Subsection (4) shall not apply to the discretion of the Court before the commencement of this Part, to refuse to grant relief in any of the said proceedings on the ground that the relief should have been sought in any other of the said proceedings.

(6) Without limiting the generality of the foregoing provisions of this section, on an application for review in relation to the exercise, refusal to exercise or purported exercise of a statutory power of decision, the Court, if it is satisfied that the applicant is entitled to relief under subsection (1) may, in addition to or instead of granting any other relief under the foregoing provisions of this section, direct any person whose act or omission is the subject-matter of the application, to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates. In giving any such direction the Court shall –

- (a) advise the person of its reasons for so doing; and
- (b) give to that person such directions as the Court thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration; and
- (c) require the person to report back to the Court as to the decisions taken when the matter was reconsidered.

(7) If the Court gives a direction under subsection (6), the Court may make an order that it could make by way of interim order under section 50F and that section shall apply accordingly, so far as it is applicable and with all necessary modifications.

(8) Where any matter is referred back to any person under subsection (6) –

- (a) that person shall have jurisdiction to reconsider and determine the matter in accordance with the Court's direction notwithstanding anything in any other enactment; and

- (b) the act or omission that is to be reconsidered shall, subject to any interim order made by the Court under subsection (7), continue to have effect according to its tenor unless and until it is revoked or amended by that person.

(9) In reconsidering any matter referred back to a person under subsection (6), that person to whom it is so referred shall have regard to the Court's reasons for giving the direction and to the Court's directions.

50C. Defects in form or technical irregularities – On an application for review in relation to a statutory power of decision, where the sole ground of relief established is a defect in form or a technical irregularity, if the Court finds that no substantial wrong or miscarriage of justice has occurred, it may refuse relief and where the decision has already been made, may make an order validating the decision notwithstanding the defect or irregularity, to have effect from such time and on such terms as the Court thinks fit.

50D. Disposal of proceedings for mandamus, prohibition or certiorari – Where proceedings are commenced for a writ or order of or in the nature of mandamus, prohibition or certiorari in relation to the exercise, refusal to exercise or the proposed or purported exercise of a statutory power, the proceedings shall be treated and disposed of as if they were an application for review.

50E. Disposal of proceedings for declaration or injunction – Where proceedings are commenced for a declaration or injunction or both, whether with or without a claim for some other relief, and the exercise, refusal to exercise, or proposed or purported exercise of a statutory power is an issue in the proceedings, the Court on the application of any party to the proceedings may, if it considers it appropriate, direct that the proceedings be treated and disposed of so far as they relate to that issue, as if they were an application for review.

50F. Interim orders – (1) Subject to subsection (2), at any time before the final determination of an application for review, and on the application of any party, the Court may if, in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes –

- (a) prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the power;
- (b) prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates;

(c) declaring any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and where necessary, to be deemed to have continued in force.

(2) Where the Crown is the respondent or one of the respondents to the application for review, the Court shall not have power to make an order against the Crown under paragraph (a) or paragraph (b) of subsection (1) but instead in such cases the Court may by interim order –

(a) declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the power;

(b) declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the application for review relates.

(3) Any order made under subsections (1) or (2) may be made subject to such terms and conditions as the Court thinks fit and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify.

50G. Procedure – (1) An application for review shall be made by way of motion accompanied by a statement of claim.

(2) The statement of claim shall state –

(a) the facts on which the applicant bases his or her claim to relief;

(b) the grounds on which the applicant seeks relief;

(c) the relief sought.

(3) It shall not be necessary for the statement of claim to specify the proceedings referred to in section 50B(1) in which the claim would have been made before the commencement of this Part.

(4) The person whose act or omission is the subject matter of the application for review, and subject to any direction given by a Judge under section 50H, every party to the proceedings (if any) in which any decision to which the application relates was made, shall be cited as a respondent.

(5) For the purposes of subsection (4), where the act or omission is that of a Judge, Registrar or presiding officer of any Court or tribunal,

(a) that Court or tribunal, and not that Judge, Registrar, or presiding officer, shall be cited as a respondent; but

(b) that Judge, Registrar or presiding officer may file on behalf of that Court or tribunal a statement of defence to the statement of claim.

(6) For the purposes of subsection (4), where the act or omission is that of any 2 or more persons acting together under a collective title, they shall be cited by their collective title.

(7) Subject to any direction given by a Judge under section 50H, every respondent to the application for review shall file a statement of defence to the statement of claim.

(8) Subject to this Part, the procedure in respect of any application for review shall be in accordance with rules of Court.

50H. Powers of Judge to call conference and give directions – (1) For the purpose of ensuring that any application or intended application for review may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without such application, and on terms and conditions as the Judge thinks fit, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.

- (2) At any such conference the Judge presiding may –
- (a) settle the issues to be determined;
 - (b) direct what persons shall be cited, or need not be cited as respondents to the application for review, or direct that the name of any party be added or struck out;
 - (c) direct what parties shall be served;
 - (d) direct by whom and within what time a statement of defence shall be filed;
 - (e) require any party to make admissions in respect of questions of fact, and if that party refuses to make an admission in respect of any such question, that party shall be liable to bear the costs of proving that question, unless the Judge by whom the application for review is finally determined is satisfied that the party's refusal was reasonable in all the circumstances, and accordingly orders otherwise in respect of those costs;
 - (f) fix a time by which any affidavits or other documents shall be filed;
 - (g) fix a time and place for the hearing of the application for review;

- (h) require further or better particulars of any facts, or of the grounds for relief, or of the relief sought, or of the grounds of defence, or of any other circumstances connected with the application for review;
- (i) require any party to make discovery of documents, or permit any party to administer interrogatories;
- (j) in the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court and give such directions as the Judge thinks fit as to its filing;
- (k) exercise any powers of direction or appointment vested in the Court or a Judge by its rules of Court in respect of originating applications;
- (l) give such consequential directions as the Judge thinks necessary.

(3) Notwithstanding any of the foregoing provisions of this section, a Judge may at any time before the hearing of an application for review has been commenced, exercise any of the powers specified in subsection (2) without holding a conference under subsection (1).

50I. Appeals - Subject to the provisions of the Constitution and to Part II of this Act, any party to an application for review who is dissatisfied with any final or interlocutory order in respect of the application for review may appeal to the Court of Appeal.

50J. This Part to bind Crown - This Part shall bind the Crown."

3. Application of Crown Proceedings Act - (1) Section 2(1) of the Crown Proceedings Act 1950 is amended by adding to the definition of the term "civil proceedings", the words: "or proceedings by way of an application for review under Part 1A of the Judicature Act 1980-81 to the extent that any relief sought in the application is in the nature of mandamus, prohibition or certiorari".

(2) In its application to the Crown, this Part shall be read subject to the Crown Proceedings Act as amended by subsection (1).

4. References in enactments – Subject to section 3, every reference in any enactment (other than this Act) to any of the proceedings referred to in section 50B (as inserted by this Act) of the principal Act shall hereafter, unless the context otherwise requires, be read as including a reference to an application for review.

This Act is administered by the Ministry of Justice