

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA238/2018
[2018] NZCA 295**

BETWEEN PHILLIP JOHN SMITH
 Applicant

AND NEW ZEALAND PAROLE BOARD
 Respondent

Counsel: Applicant in person
 M S Smith for Respondent

Judgment: 7 August 2018 at 2.30 pm
(On the papers)

**JUDGMENT OF CLIFFORD J
(Review of Registrar's Decision)**

- A The application for review of the Deputy Registrar's decision refusing to dispense with security for costs is declined.**
- B Security for costs in the sum of \$6,600 must be paid into Court by 28 August 2018.**
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REASONS

Introduction

[1] Mr Smith applies for review of the Deputy Registrar's decision to decline to dispense with security for costs on Mr Smith's appeal.

Background

[2] Mr Smith appeals against a decision of Simon France J in the High Court dated 7 May 2018 dismissing Mr Smith’s application for judicial review.¹ Mr Smith had applied for judicial review in respect of a decision by the respondent, the Parole Board, declining Mr Smith parole.

[3] Simon France J held that the Parole Board had considered all relevant considerations.² Simon France J accepted that proportionality was relevant to parole decisions, but declined to make a declaration to that effect.³ He reasoned that the Parole Act 2002 “inherently involves a proportionality assessment”, displacing the procedural formalities of an inquiry pursuant to s 5 of the New Zealand Bill of Rights Act 1990.⁴ On the facts, the Parole Board “did undertake a proportionality assessment” pursuant to the scheme of the Parole Act.⁵

[4] Mr Smith filed a notice of appeal against that decision. Security for costs was fixed at \$6600. On 17 May 2018, Mr Smith applied to dispense with security for costs, on the basis that he is impecunious, and the appeal has merit and raises a question of public importance (being the application of s 5 of the New Zealand Bill of Rights Act in the parole context). The Deputy Registrar declined the application on 27 June 2018.

[5] Mr Smith now applies for review of the Deputy Registrar’s decision under r 7(2) of the Court of Appeal (Civil) Rules 2005. He relies on the following grounds:

- (a) He is impecunious (in fact, insolvent) and is unable to pay security for costs;
- (b) He has been successful in all applications he has brought before the High Court as a self-represented litigant, other than the judgment under appeal; and

¹ *Smith v New Zealand Parole Board* [2018] NZHC 955.

² At [32].

³ At [49].

⁴ At [45].

⁵ At [37]–[39].

(c) The appeal has a strong prospect of success.

Analysis

[6] The relevant principles are well-established. The default position is that security for costs should be provided in relation to an appeal to this Court.⁶ Departure from that principle is exceptional.⁷ Security for costs should only be dispensed with if it is right to require the respondent to defend the judgment under challenge without the protection as to costs that the security provides.⁸

Impecuniosity

[7] Mr Smith says he is impecunious.

[8] Mr Smith has been granted a fee waiver on the appeal, but that is not determinative.⁹

[9] The onus is on the appellant to provide evidence that they are financially unable to pay security.¹⁰ Mr Smith has provided no evidence of this, although he says he can provide “a statement of financial position if he is required to do so”.

[10] However, as the Deputy Registrar recognised, impecuniosity does not, in and of itself, justify an order dispensing with security for costs.¹¹ Security should only be dispensed with in circumstances where a reasonable and solvent litigant would reasonably wish to proceed with the appeal.¹² A reasonable and solvent litigant would not proceed with an appeal that is hopeless, or where the benefits to be obtained are outweighed by the costs of the appeal.¹³

⁶ Court of Appeal (Civil) Rules 2005, r 35(2).

⁷ *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [28].

⁸ At [31].

⁹ At [42].

¹⁰ Court of Appeal (Civil) Rules, r 35(2).

¹¹ *Reekie*, above n 7, at [20].

¹² At [35].

¹³ At [35].

The merits

[11] On that basis, the Deputy Registrar was correct to go on to consider the merits of the appeal. If the merits of the appeal are weak, or the costs outweigh the benefits, then there is no reason to dispense with security for costs.

[12] In my view, the costs of the appeal outweigh the benefits of the appeal. The first two grounds of Mr Smith's notice of appeal allege that the High Court erred in finding that proportionality in the parole context does not engage s 5 of the New Zealand Bill of Rights Act and that the minimum impairment limb of the proportionality analysis is modified by the Parole Act. In essence, Mr Smith is challenging Simon France J's finding that the proportionality assessment under the Parole Act displaces or is analogous to the proportionality analysis under s 5 of the New Zealand Bill of Rights Act. There may be something in that. However, I am satisfied that the benefits of the proposed appeal do not outweigh the costs of it. The most Mr Smith would gain would be declaratory relief — namely, a declaration that s 5 of the New Zealand Bill of Rights Act does apply in the parole context. But, if Mr Smith were to be unsuccessful on appeal, then he would be liable for costs of at least \$8,920. In my view, a reasonable and solvent litigant in Mr Smith's position would not proceed — especially as he is not seeking parole.

[13] The third, fourth, and fifth grounds of appeal allege that the High Court made a number of other errors — including finding that the Parole Board's failure to explain why an alternative to imprisonment could not meet 'the undue risk to the safety of the community test' was not necessary because Mr Smith did not seek parole; that Mr Smith's release plan, risk factors and early warning signs were taken into account by the Parole Board; and that the Mr Smith's PPG results were not a relevant consideration. As the Parole Board notes, however, these factors were of little significance to the outcome — because the Parole Board rejected the low risk assessment of Mr Smith that was a pre-condition to that material being given weight so as to alter the practical outcome of the decision. The chance of these grounds of appeal being successful on appeal to this Court is minimal. Further, and as the Deputy Registrar noted, the benefit to be obtained would be that the Parole Board would reconsider its decision. This does not mean that the Parole Board would grant

Mr Smith parole. The chance of the Parole Board granting Mr Smith parole is minimal — Mr Smith did not seek immediate parole and the Parole Board has assessed Mr Smith as high risk.

[14] The sixth ground of appeal is that the Parole Board did not actually consider Mr Smith for parole. There is no merit in this ground of appeal — the Parole Board expressly found “risk is undue and parole is declined”.

[15] In this context, I also note that Mr Smith has not applied for legal aid. As the Supreme Court noted in *Reekie v Attorney-General*, an appellant who “is not prepared to submit the proposed appeal to such assessment” “may not be well placed to obtain dispensation” of security for costs.¹⁴ This is because the appeal has not been subjected to a cost-benefit analysis by Legal Aid Services.

Other factors

[16] I now consider the other factors that are relevant to an application to dispense security for costs. First, and by reference to the relevance of an appellant’s history of unsuccessful litigation to the question of security for costs, Mr Smith says he has been successful in all of the applications he has brought before the High Court as a self-represented litigant. I acknowledge that Mr Smith has had some measure of success in the High Court, but that factor is not determinative of the present application.

[17] Secondly, public interest considerations. I acknowledge, as does the Parole Board and the Deputy Registrar, that there is some public interest in the issue of “how public bodies exercising statutory discretion are to consider rights that are guaranteed by the New Zealand Bill of Rights Act”. Mr Smith has pointed to helpful academic commentary on the matter. However, for the reasons I noted above when considering the merits of the appeal, I do not consider that this is an appropriate case for those matters to be considered. The costs of the appeal outweigh the benefits of the appeal.

¹⁴ *Reekie*, above n 7, at [38].

[18] For those reasons, I conclude that it is not appropriate to require the Parole Board to defend the High Court judgment without the protection of security for costs. Accordingly, I agree with the Deputy Registrar's decision not to dispense with security for costs.

Result

[19] The application for review of the Deputy Registrar's decision refusing to dispense with security for costs is declined.

[20] Security for costs in the sum of \$6,600 must be paid into Court by 28 August 2018.