

**ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR
IDENTIFYING PARTICULARS OF APPLICANT.**

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2013-485-000240
[2013] NZHC 2117**

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| UNDER | the Judicature Amendment Act 1972 |
| IN THE MATTER OF | an application for judicial review of cancellation of passport under the Passports Act 1992 |
| BETWEEN | F Applicant |
| AND | THE MINISTER OF INTERNAL AFFAIRS Respondent |

Judgment: 20 August 2013

**JUDGMENT OF COLLINS J
(As to Costs)**

Introduction

[1] F has discontinued his proceeding against the Minister of Internal Affairs (the Minister). F now seeks costs on a scale 2B basis in respect of the steps he took to commence the proceeding, prepare for and appear at a case management conference, and prepare an affidavit.

[2] The proceeding sought judicial review of a decision of the Minister to cancel F's New Zealand passport. Before the hearing, the Minister revoked his decision to cancel F's passport, and the proceeding was discontinued.

[3] The Minister opposes an award of costs on the basis that the proceeding was not finally determined, and there is no successful party who is entitled to costs.

Background to the proceeding

[4] F was formerly a senior public servant in Fiji. He is now involved in the Fiji freedom and democracy movement. He is a New Zealand citizen living in Sydney and holds a New Zealand passport.

[5] On 16 July 2012, F was notified that the Australian Minister of Foreign Affairs had ordered that his New Zealand passport be surrendered, following a report from the Australian Security Intelligence Organisation. A Notice of Recall and cancellation of passport was signed by the Minister on 17 July 2012 pursuant to s 8A of the Passports Act 1992. This notice was issued because of concerns F posed to New Zealand's national security. Although notified of his right to appeal within 28 days, F feared doing so would endanger his family in Fiji.

[6] On 13 February 2013, F commenced his proceeding in which he challenged the Minister's decision. He claimed that the Minister misdirected himself on the threshold test which requires reasonable grounds for believing that the passport holder was a danger to the security of New Zealand.

[7] On 16 April 2013, after a case management conference, the Minister wrote to F explaining that he had revoked his decision to cancel F's passport with immediate effect. The Minister's decision was based on a determination by the New Zealand Security Intelligence Service that there were no longer national security concerns which required cancellation of F's passport.

Applicant's memorandum on costs

[8] F submits that r 15.23 of the High Court Rules should not prevent him receiving costs. That rule provides that where a plaintiff discontinues a proceeding, the plaintiff must pay costs to the defendant. However, F contends that this presumption can be displaced where the underlying purpose of the proceeding has been achieved, or where the plaintiff has "in substance" succeeded.

[9] F submits he has achieved the purpose of the proceeding, in reversing the cancellation of his passport, and that he is entitled to costs as if he were a successful

party. The relief sought in the statement of claim, a declaration that the Minister's decision was invalid and an order quashing the Minister's decision, has been substantially achieved. F's passport has been returned and he has avoided the withdrawal of his Australian visa. Costs are also sought on the basis that the Minister had a number of opportunities to revoke his decision before the proceeding was commenced.

Respondent's position on costs

[10] The Minister contends that F is not entitled to costs as no court has ruled on the merits of F's proceeding, and thus the underlying purpose of the proceeding has not been achieved. The Minister submits that his revocation was based on F's change in circumstances and not because the proceeding had been commenced. The Minister contends his decision of July 2012 was justified and lawful, and any claim to the contrary should not be vindicated by an award of costs. The Minister says F did not succeed in his proceeding and that he did not establish the Minister's original decision was invalid.

General principle on costs

[11] The general principle prescribed by the High Court Rules is that costs should follow the event, and be awarded to a successful party against an unsuccessful party.¹ Where a proceeding has been discontinued before final determination, r 15.23 of the High Court Rules provides that:

Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[12] The presumption on r 15.23 can be displaced where it would be just and equitable not to apply it.² Because the Minister's revocation of the decision under review, there was no practical reason for F to continue the proceeding and its

¹ High Court Rules, r 14.2(a).

² *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973.

discontinuance was not an acknowledgement of likely defeat.³ Therefore it would be just in the circumstances of this case not to apply r 15.23.

[13] Once r 15.23 is put to one side, the issue remains whether costs should lie as they fall, or whether an order should be made in favour of F.

[14] In exercising my discretion I am reluctant to evaluate the merits of the strengths of the parties' cases, unless the merits of their respective positions is obvious and should affect the costs outcome.⁴ This is not a case where the merits are obvious and I do not consider it appropriate to express a view on the apparent strengths or weaknesses of F's and the Minister's respective positions.

[15] There can be no issue that the Minister acted properly in deciding to review F's circumstances after taking into account the renewed security assessment provided by the New Zealand Security Intelligence Service. The Minister says his decision to revoke his earlier decision was not prompted by any perceived merit in F's case, but rather was an exercise of his independent judgement based on new information that F no longer posed a security risk.

[16] In *Carmel College Auckland Ltd v North Shore City Council*,⁵ the defendant changed its policy after proceedings were initiated, and the plaintiff thereafter discontinued its proceeding. The costs issue was determined by the Court comparing the relief sought in the pleadings with the result actually achieved through the supervening decision. Although the Court found that the merits of the respective parties had not been ruled upon, the plaintiff had achieved what they had set out to achieve in issuing proceeding, and were thus entitled to costs as a successful party.⁶

[17] I do not think I am in the same position as the Judge who determined *Carmel College Auckland Ltd v North Shore City Council* because I do not have sufficient evidence to enable me to conclude that the Minister's decision to revoke his earlier decision was a consequence of the proceeding.

³ *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182 (HC) at 188.

⁴ At 186.

⁵ *Carmel College Auckland Ltd v North Shore City Council* HC Auckland CIV-2007-404-5894, 20 January 2009.

⁶ At [19].

Determination

[18] I am left balancing two competing considerations. F has, on one view of the matter, substantially succeeded because the Minister revoked the decision which was the subject of the judicial review challenge. However, the Minister maintains that his decision was independent of F's application for judicial review and not an acknowledgement of error when the original decision was made to revoke F's passport.

[19] In these finely balanced circumstances, I consider the appropriate course is to let the costs lie where they fall. I cannot determine if the Minister's decision to revoke his decision was independent of F's proceeding and while F has, on one view of matters substantially succeeded, he has also received the benefit of me discounting the effect of r 15.23.

Conclusion

[20] Each party shall bear their own costs.

D B Collins J

Solicitors:
Crown Law Office, Wellington for Respondent