

[2] Dr Deliu applied for security for costs to be dispensed with. That application was declined by the Deputy Registrar for detailed reasons given in a decision dated 13 December 2023. The Deputy Registrar accepted that Dr Deliu was impecunious based on the information he had provided. She was also satisfied that Dr Deliu had provided genuine reasons why he had not sought legal aid for the appeal. However, she declined the application to dispense with security for costs for reasons that may be summarised as follows:

- (a) The appeal lacked merit.
- (b) There was little utility in the appeal.
- (c) The potential benefits did not clearly outweigh the potential costs.
- (d) A reasonable and solvent litigant would not pursue the appeal.
- (e) The appeal raised no issue of public interest.
- (f) If unsuccessful on the appeal, costs were likely to be awarded against Dr Deliu in the usual way.
- (g) The respondent should not be required to defend the decision under appeal without the usual protection of security for costs.

[3] Dr Deliu has exercised his right of review of this decision. The matter has been referred to me.

Relevant principles

[4] The principles relevant to dispensation of security for costs were reviewed in *Reekie v Attorney General*.² An application to dispense with security is “likely to be

² *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

based on one of two broad grounds”:³

- (a) costs are unlikely to be ordered against an appellant, and for this reason, security should not be required; or
- (b) the appellant either cannot pay or will suffer severe hardship if payment is required.

[5] Under the second ground, the Court stated that security costs should only be dispensed with if the Registrar is “of the view that it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security”.⁴

[6] The Court further considered that “the discretion to dispense with security should be exercised so as to”:⁵

- (a) preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and
- (b) prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.

[7] A reasonable and solvent litigant would not proceed with an appeal which is hopeless, or with an appeal where the benefits (economic or otherwise) are outweighed by the costs (economic or otherwise).⁶ This can include whether the appeal raises issues of public interest and the merits of the appeal.⁷

[8] The review function of the judge in relation to security for costs is to be exercised *de novo*.⁸

Are costs likely to be ordered in the usual way?

[9] Dr Deliu says the Deputy Registrar erred in her assessment of this issue. He says his paramount appeal ground is that the High Court gave undue deference to

³ At [19].

⁴ At [31].

⁵ At [35].

⁶ At [35].

⁷ At [27](e), [35] and [41].

⁸ At [23].

the Crown without applying the *Hansen* test.⁹ He says this was required because he was engaging his human right to judicial review under s 27 of the New Zealand Bill of Rights Act 1990. He submits that costs are not likely to be ordered against him because:

6. Crucially, the Crown never addressed why it was permissible for the High Court to minimize the Bench's consideration of my application for judicial review without applying the *Hansen* test.

7. Thus, we now have the Honourable Justice Harvey, Crown Law Office and Registry of this Court all ignoring my simple argument that: (I) my right to judicial review is a human right protected by s 27 of the New Zealand Bill of Rights Act 1990, (II) Justice Harvey openly limited that right in the Judgment under appeal and (III) his Honour did so without reference to *Hansen*, much less the analysis or steps required before a human right can be diminished, and thereby erred in law.

8. The fact that a High Court Justice, senior Crown lawyer and experienced Deputy Registrar are all unable to address why my submission is wrong tends to indicate that I am right, at least sufficient[ly] for present purposes to show that I have an arguable head of appeal such that if I succeed then I will obviously not get a costs award against me. As such, costs are not likely to be ordered in the usual way and [the decision of the Deputy Registrar] ought to be reversed.

[10] I agree with Dr Deliu that if he succeeds on appeal, he is not likely to be ordered to pay costs. However, it does not follow that if he fails, he is not likely to be ordered to pay costs. I do not accept the claimed logic of the last sentence of Dr Deliu's submission quoted above. Rather, I agree with the Deputy Registrar that costs on this appeal are likely to follow the event in the usual way. I do not see any question of public interest arising on the present appeal that could displace the normal incidence of costs.

Potential costs and benefits of the appeal

[11] Dr Deliu's ultimate objective in pursuing this appeal is to have criminal charges against him stayed. He acknowledges that success in his complaint against the prosecutor would not, on its own, result in staying the charges. However, if he succeeds on judicial review, he says Crown Law will be able to "deal with the substance and hopefully agree with [him] that [he] was subjected to prosecutorial

⁹ *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1.

misconduct, which [he will] then use to try and stay the charges”. He summarises the strategic importance of the appeal in this way:

14. So [the Deputy Registrar] erred in oversimplifying the process. Succeeding in the instant proceeding thus not only does advance me to my ultimate goal but indeed is the best, if not only realistic, way to get there.

15. [The Deputy Registrar] thus erred when she determined that the benefits of the proceeding are unclear and so do not clearly outweigh the potential costs as the instant appeal is a legitimate piece on the chessboard that if played well helps get me to checkmate and no grandmaster would surrender such a piece.

[12] I accept that Dr Deliu, if unconstrained by the normal discipline of costs, genuinely perceives there is a potential strategic advantage to be gained by the pursuit of this appeal. However, the more important question is whether a reasonable and solvent litigant would pursue it.¹⁰ I agree with the Deputy Registrar that a reasonable and solvent litigant would not pursue the appeal. In my assessment, any prospective benefit from playing this “piece on the chessboard” as a step towards “hopefully” obtaining Crown Law’s agreement that he was subject to prosecutorial misconduct is vanishingly small and plainly outweighed by the likely cost.

Merits

[13] Dr Deliu raises the following grounds in his notice of appeal:

- (a) The High Court was “**universally wrong**”. This Court must conduct a re-hearing in accordance with the approach set out in *Austin, Nichols & Co Inc v Stichting Lodestar*.¹¹
- (b) Having ruled that the decision was amenable to review, the High Court erred in law in according any deference to it.
- (c) The High Court was “**plain wrong**” in finding that the decision-maker had not erred in fact and in failing to take into account Dr Deliu’s “meticulous, extensive and detailed arguments to the contrary”.

¹⁰ *Reekie v Attorney-General*, above n 2, at [35].

¹¹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

In breach of natural justice, no valid reasons were given to justify the High Court's conclusion.

- (d) The High Court erred in fact and in law in determining that the decision-maker was not disqualified for apparent bias.

[14] My assessment, which is necessarily preliminary and based only on the materials currently filed, is that the appeal faces serious challenges and has little chance of succeeding.

Conclusion

[15] I am sceptical of Dr Deliu's claim that if security for costs is not dispensed with, he will be unable to pursue this appeal. In any case, I do not consider that the respondent should be required to defend the judgment under appeal without the usual protection of security for costs.

Result

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

[17] The date for payment of security for costs in the sum of \$7,060 is deferred until 29 March 2024.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent