IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 67/2018
[2018] NZSC 95

BETWEEN	PHILLIP JOHN SMITH Applicant
AND	NEW ZEALAND PAROLE BOARD Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	Applicant in person M S Smith for Respondent
Judgment:	16 October 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondent.

REASONS

[1] The applicant is a sentenced prisoner, subject to a term of life imprisonment which was imposed on him in 1996, after he was convicted of murder. On 30 June 2017, the respondent, the New Zealand Parole Board (the Board), declined him parole, having also done so in March 2014 and December 2015.

[2] The applicant commenced judicial review proceedings challenging the Board's decision of June 2017. The application was dismissed.[1]

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1 *Smith v The New Zealand Parole Board* [2018] NZHC 955 (Simon France J) [*Smith* (HC)].

[3] The applicant appealed to the Court of Appeal. Security for costs in the sum of $6,600 was set. The applicant applied for security for costs to be dispensed with under r 35(6)(c) of the Court of Appeal (Civil) Rules 2005, but this was declined by a Deputy Registrar of the Court of Appeal. The applicant applied for a review of the Deputy Registrar's decision by a Judge of the Court of Appeal. Clifford J undertook the review and dismissed the application for review.[2]

[4] The applicant now seeks leave to appeal against the decision of Clifford J.

[5] This Court set out the approach that should be taken to applications for review of decisions of the Registrar of the Court of Appeal in relation to dispensation for security for costs in *Reekie v Attorney-General*.[3] Clifford J applied that decision. The applicant does not seek to challenge the principles set out in *Reekie*: rather he seeks to challenge "whether the Court of Appeal applied those principles correctly".

[6] The focus of the present application is the conclusion reached by Clifford J that the costs of the applicant's proposed appeal to the Court of Appeal outweighed the benefits of the appeal.[4] The applicant wishes to challenge this aspect of Clifford J's decision, particularly insofar as it relates to the argument that the applicant wished to pursue in his appeal to the Court of Appeal relating to s 5 of the New Zealand Bill of Rights Act 1990.

[7] In the High Court, the applicant had argued that s 5 of the Bill of Rights Act required the Parole Board to undertake a proportionality analysis when considering whether or not to grant parole.[5] Simon France J accepted that this was correct in the general sense, but was of the view it added nothing to the statutory scheme contained in the Parole Act 2002 itself, which the Board had followed.[6] He considered the structure and purpose of the scheme of the Parole Act was to produce decisions representing a proportionate balance between safety of the community and the right

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2 *Smith v New Zealand Parole Board* [2018] NZCA 295 (Clifford J) [*Smith* (CA)].
3 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.
4 *Smith* (CA), above n 2, at [12].
5 Section 5 of the New Zealand Bill of Rights Act 1990 provides: "Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".
6 *Smith* (HC), above n 1, at [36].

of an offender not to be detained in prison for community safety reasons any longer than was necessary.

[8] The applicant also argued in the High Court that it was an error meriting the quashing of a parole decision if the reasoning of the Board did not reflect a proportionality methodology. Simon France J considered this point did not arise, given his conclusion that the Parole Act regime incorporated its own proportionality methodology and that the Board had acted in accordance with that methodology.[7] In any event, the applicant was not advocating for immediate parole at the hearing that preceded the parole decision.[8] However, having reviewed the authorities, Simon France J expressed an obiter view that it was not correct to impeach a decision by reference to a person's basic rights without inquiring whether the basic rights had, in fact, been unjustifiably limited.[9] He accepted, however, that the opposite view had been expressed by others.

[9] Clifford J accepted that there may be merit in the applicant's challenge to Simon France J's finding that the proportionality assessment under the Parole Act displaces or was analogous to the proportionality analysis under s 5 of the Bill of Rights Act. Notwithstanding this, he concluded that the benefits of the proposed appeal did not outweigh the costs of it because the most the applicant would gain would be declaratory relief.[10] This was because the essential issue under consideration by the Board when the applicant appeared before it had been the applicant's request that the question of whether the applicant should be granted parole should be deferred for six months. The applicant had accepted that immediate parole was not a realistic possibility. Clifford J was of the view that a reasonable solvent litigant in the applicant's position would not proceed with an appeal on the proportionality argument especially as he was not seeking parole. He considered that the applicant's proposed appeal was not an appropriate case for the proportionality issues to be considered.[11]

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7 At [45].
8 At [7]–[9].
9 At [45].
10 *Smith* (CA), above n 2, at [12].
11 At [17].

[10] In support of his application for leave, the applicant made detailed submissions on the application of the Bill of Rights Act to parole decisions, which, we accept, confirm Clifford J's view that the issue is one worthy of consideration. However, the decision that the applicant seeks to challenge raises that question only tangentially. The question that would arise for consideration by this Court if leave to appeal were given in this case would be whether Clifford J's assessment that the costs of the applicant's appeal to the Court of Appeal outweigh its benefits was wrong.

[11] We do not consider that a miscarriage of justice will arise if leave is not given. This is so because, as Clifford J noted, the applicant was not seeking parole and so even if the proportionality argument were successful, this would have no impact on the parole decision itself.

[12] We do not consider there is sufficient prospects of success in establishing that, contrary to the view of Clifford J, the benefits of the appeal would outweigh its costs, so that it would be appropriate to require the Board to defend the High Court judgment in the Court of Appeal without the protection of security for costs.

[13] The applicant raised three other issues, which, he said, were relevant to dispensing with security for costs. Given our conclusion on the essential point raised in his application, it is not necessary to address these points.

[14] The application for leave to appeal is dismissed. We award costs to the Board of $2,500.

Solicitors:
V J Owen, Wellington for Respondent