

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 7/2025
[2025] NZSC 23

BETWEEN	LENA NEDELICHEVA DUNCAN Applicant
AND	THE ROYAL NEW ZEALAND SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS INCORPORATED First Respondent
	DISTRICT COURT Second Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: Applicant in person
N H Brown for First Respondent
G M Taylor and I M C A McGlone for Second Respondent

Judgment: 28 March 2025

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B There is no order as to costs.**

REASONS

Introduction

[1] The applicant, Lena Duncan, seeks leave to appeal from a decision of the Court of Appeal declining an application for review of a decision of the Deputy Registrar.¹

¹ *Duncan v The Royal New Zealand Society for the Prevention of Cruelty to Animals Inc* [2024] NZCA 628 (Goddard J) [CA judgment].

The Deputy Registrar had declined the applicant's application for a fee waiver in relation to an application for leave to appeal to the Court of Appeal.

Background

[2] The genesis of the decision of the Court of Appeal is as follows. The first respondent, The Royal New Zealand Society for the Prevention of Cruelty to Animals Inc (the SPCA), filed charges against the applicant alleging breaches of the Animal Welfare Act 1999.² The applicant brought judicial review proceedings against the SPCA and the second respondent, the District Court.³

[3] The SPCA successfully sought strike-out of the parts of the applicant's judicial review claim against the SPCA (the first strike-out judgment).⁴ The applicant filed a notice of appeal in the Court of Appeal on 2 August 2024 against the first strike-out judgment. Subsequently, on 10 August 2024, the applicant applied in the High Court for recall of the first strike-out judgment. The High Court declined the application on 30 August 2024 (the recall judgment).⁵ On the same day, the High Court delivered a judgment fixing costs in favour of the SPCA at \$12,786.50 with disbursements of a little over \$660 (the costs judgment),⁶ and struck out the parts of the applicant's judicial review proceeding brought against the District Court (the second strike-out judgment).⁷

[4] The applicant filed an appeal in the Court of Appeal on 27 September 2024 against the costs judgment and the second strike-out judgment. That appeal has been consolidated with the appeal from the first strike-out judgment.

[5] The applicant unsuccessfully sought leave from the High Court to appeal to the Court of Appeal against the recall judgment. The applicant subsequently sought leave

² We understand that a five-day trial is scheduled to begin on 29 September 2025.

³ The second respondent abides the decision of the Court on the leave application.

⁴ *Duncan v The Royal New Zealand Society for the Prevention of Cruelty to Animals Inc* [2024] NZHC 1818 (Campbell J) [first strike-out judgment].

⁵ *Duncan v The Royal New Zealand Society for the Prevention of Cruelty to Animals Inc* [2024] NZHC 2467 (Campbell J) [recall judgment].

⁶ *Duncan v The Royal New Zealand Society for the Prevention of Cruelty to Animals Inc* [2024] NZHC 2469 (Campbell J) [costs judgment].

⁷ *Duncan v The Royal New Zealand Society for the Prevention of Cruelty to Animals Inc* [2024] NZHC 2471 (Campbell J) [second strike-out judgment].

to appeal from the Court of Appeal against the recall judgment. It was in that context that the applicant applied for waiver of the filing fee of \$1,430 on the ground of inability to pay the fee. The applicant's application for waiver was made under reg 5 of the Court of Appeal Fees Regulations 2001 (the Fees Regulations). Relevantly, reg 5(2) provides that "[t]he Registrar may waive the fee payable" if satisfied:

- (a) on the basis of one of the criteria specified in subclause (3), that the applicant is unable to pay the fee; or
- (b) that the proceeding—
 - (i) ... concerns a matter of general and public interest; and
 - (ii) is unlikely to be commenced or continued unless the fee is waived.

[6] Relevantly, reg 5(3)(b)(i) provides that an applicant is unable to pay the fee sought to be waived if the applicant has not been granted legal aid and is "dependent for the payment of his or her living expenses on a specified benefit ... that is jobseeker support". The applicant's application recorded receipt of jobseeker support.

[7] The Deputy Registrar declined to waive the fee on the basis that the appeal against the recall judgment was not one that a reasonable solvent litigant would pursue.

[8] In dismissing the application for review, Goddard J accepted that the applicant was unable to pay the filing fee in terms of reg 5(2). That was because the applicant received a benefit of the type listed in reg 5(3)(b)(i). Goddard J said that the Court's approach to waiver in those circumstances has to reflect the fact that the Registrar "may" then waive the filing fee. In other words, there is a discretion to grant a fee waiver where an applicant is unable to pay.

[9] After discussing the purposes of imposing filing fees, the New Zealand Bill of Rights Act 1990 (NZBORA) and relevant authority, the Judge noted as follows:⁸

[23] The Fees Regulations must be interpreted in a manner that is consistent with NZBORA. And, critically for present purposes, the discretion conferred on the Registrar and Deputy Registrars under reg 5 of the Fees Regulations must be exercised in a manner consistent with NZBORA.

⁸ CA judgment, above n 1 (footnotes omitted).

[24] It follows that access to justice must be at the forefront of fee waiver decisions, especially in the context of judicial review proceedings.

[10] But, Goddard J said, although only in the “clearest of cases”, a Registrar or Deputy Registrar may decline to waive payment of a filing fee even where the applicant cannot pay where it is clear that the matter is “wholly devoid of merit, is frivolous or vexatious, and would not be pursued by a reasonable solvent litigant”.⁹

[11] In this case, Goddard J noted that access to justice was ensured in relation to the substantive and costs decisions of the High Court. In the context of the consolidated appeal on those matters, the applicant could challenge any aspect of those decisions. The application for leave to appeal against the recall judgment added nothing in terms of access to justice, would not have been pursued by the reasonable solvent litigant, and was frivolous and vexatious. In these circumstances, Goddard J said that the Deputy Registrar was right to decline to waive the filing fee.

The proposed appeal

[12] The case for the applicant essentially is that, having accepted the inability to pay the filing fee, the Court of Appeal was wrong to approach the matter on the basis the applicant should then contribute by paying the fee and that not waiving the fee would act as a deterrent. The applicant’s argument is that this approach is both illogical and unjust. It is to apply the standard applicable to security for costs to fee waivers when the tests are different.¹⁰

[13] The issue about the scope of the power of the Registrar to decline where satisfied a party is unable to pay in terms of reg 5(2)(a) may raise a question of general or public importance.¹¹ However, the criteria for leave are not met in this case. We say that because, as the first respondent notes, the recall appeal was abandoned on 4 February 2025 and a sealed notice of result to that effect was issued under r 26B of the Court of Appeal (Civil) Rules 2003. That appeal is accordingly now moot. In these circumstances, it is not necessary in the interests of justice for this Court to hear an appeal on the approach to fee waiver.

⁹ At [26].

¹⁰ Citing *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737.

¹¹ Senior Courts Act 2016, s 74(2)(a).

[14] There is no appearance of a miscarriage of justice in these circumstances especially as the substantive issues are before the Court of Appeal in any event.¹²

Result

[15] The application for leave to appeal is dismissed.

[16] In the circumstances, we make no order as to costs.

Solicitors:

BVA Ltd (trading as BVA The Practice), Palmerston North for First Respondent

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

¹² Senior Courts Act, s 74(2)(b).