

IN THE COURT OF APPEAL OF NEW ZEALAND

CA249/2014
[2014] NZCA 492

BETWEEN RAZDAN RAFIQ
Appellant

AND THE COMMISSIONER OF THE NEW
ZEALAND POLICE
Respondent

Counsel: Appellant in Person
A F Todd for Respondent

Judgment: 7 October 2014 at 10.30 am
(On the papers)

**JUDGMENT OF WILD J
(Review of Registrar's decision)**

A Application for review of Registrar's decision dismissed.

**B Security for costs in the sum of \$5,880 must be paid into Court by Tuesday
11 November 2014.**

REASONS

Introduction

[1] By application filed on 21 July 2014, the appellant seeks a review of the Registrar's decision of 18 June 2014 declining to dispense with security for the costs of this appeal.

[2] The substantive appeal is against a decision of Courtney J refusing leave to allow Mr Rafiq to commence a defamation proceeding against the Commissioner of

Police out of time.¹ The causes of action in respect of defamation alleged to have been published in 2008 and 2009 were time-barred by s 4(6A) of the Limitation Act 1950. Section 4(6A) bars a defamation action brought after the expiration of two years from the date on which the cause of action accrued. Section s 4(6B) gives the Court discretion to grant leave for the action to be brought after the expiration of the two year period if certain grounds are established, and only where it would be just to grant leave.

[3] Courtney J refused leave under s 4(6B) because she found the necessary grounds were not established, namely the delay in bringing the action was not caused by any mistake of fact, nor by any mistake of law; and nor did Mr Rafiq's explanation for the delay make out reasonable cause.²

[4] Security for costs on the appeal was fixed at \$5,880 on 9 May 2014, the day the appeal was filed. On 26 May 2014 the appellant filed an application under r 35(6)(c) of the Court of Appeal (Civil) Rules 2005 (the Rules) seeking to have security for costs dispensed with. As reasons for seeking dispensation, the appellant stated that he cannot afford to pay any security; explained the claimed defamation; outlined why he said there was reasonable cause for the delay in bringing the action; and asserted that in light of those things dispensation should be granted in the interests of justice.

The decision under review

[5] In her decision of 18 June 2014 the Registrar refused to dispense with security for costs for these reasons:

- (a) Limited details of Mr Rafiq's financial position were supplied, and in any event impecuniosity alone does not warrant dispensation from the requirement to provide security for costs.
- (b) The Judge's reasons for refusing leave, which are summarised in [3] above.

¹ *Rafiq v Commissioner of New Zealand Police* [2014] NZHC 814.

² At [7] and [8].

- (c) Mr Rafiq has a history of bringing appeals. The Registrar recorded that this is the eighth appeal lodged by the appellant in the past year. In none of these appeals has he been granted dispensation from providing security for costs. Nevertheless, he has not provided security for costs in any of the previous seven appeals. Five of the appeals have subsequently been abandoned under r 43 of the Rules.
- (d) It is therefore not right to require the respondent to defend this appeal without the usual protection of security for costs, with reference to the Supreme Court's decision in *Reekie v Attorney-General*.³

Grounds for review

[6] In his 21 July application for review of the Registrar's decision, Mr Rafiq submits the Registrar erred in failing to conclude he cannot afford to pay security for costs; in failing to conclude that he has a right of appeal; and in failing to assess the merits of the proposed appeal.

[7] Counsel for the respondent filed a memorandum on 21 August opposing the application for dispensation. She observed that the appellant appeared to rely primarily on his impecuniosity and the alleged public interest in his appeal. She noted that impecuniosity alone is not enough; that the appeal does not disclose any issue of public importance; that the merits of the appeal are weak; and that a solvent appellant would not reasonably wish to prosecute this appeal and the Commissioner should therefore not be exposed to the risk of defending it without the provision of security.

Decision

[8] Having reviewed the Registrar's decision of 18 June I uphold it. The Registrar correctly held that impecuniosity alone does not mean security for costs should be dispensed with.⁴ Quite apart from that, Mr Rafiq provided limited information as to his financial circumstances, and so has not established

³ *Reekie v Attorney-General* [2014] NZSC 63.

⁴ *Reekie*, above n 3, at [20].

impecuniosity. Even if Mr Rafiq is impecunious, his right to access to this Court must be balanced against the interest in preventing “the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not sensibly be pursued by a solvent litigant”.⁵

[9] I consider the proposed appeal has low prospects of success. The High Court only had jurisdiction to grant leave to bring the time-barred defamation action if the requirements of s 4(6B) were made out.

[10] Mr Rafiq does not seek to challenge Courtney J’s findings that his delay was not occasioned by a mistake of fact or law, but instead asserts in his notice of appeal that he did have other reasonable cause. But the only explanation he gave the High Court for his delay was that he was occupied with his studies, and Courtney J held there was “simply insufficient information on which I could conclude that being occupied with (unspecified) studies would justify taking no action for a period of six and seven years [respectively]”.⁶

[11] In his notice of appeal to this Court, Mr Rafiq advances the following new reasons for what he says are his reasonable cause for delay: he was occupied with his studies; with complaints to the Office of the Ombudsman; with complaints to the Privacy Commissioner; with complaints to the Human Rights Review Tribunal; with police cases; and with defamation proceedings.

[12] Given none of these matters was put to Courtney J in the High Court, they have the ring of recent concoctions and they are not compelling.

[13] A reasonable and solvent litigant would not pursue this appeal. The Registrar was right to hold that the respondent should not be required to defend this appeal without the usual security for the costs of the appeal.

⁵ *Reekie*, above, n 3, at [35].

⁶ At [8].

Outcome

[14] The application for review is dismissed. Security for costs in the sum of \$5,880 must be paid into Court by *Tuesday, 11 November 2014*.

Solicitors:
Crown Law Office, Wellington for Respondent