Federal Court of Australia

Dallow v Ferguson [2021] FCA 1124

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **ANDERSON J** |
|  |  |
| Date of judgment: | 17 September 2021 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE** – application for extension of time for leave to appeal under r 36.05 of the*Federal Court Rules 2011* (Cth) – where the applicant was incarcerated in prison and stated that he faced difficulty in filing the application for leave to appeal – where there is no merit in the applicant’s application – application denied  |
|  |  |
| Legislation: | *Federal Court Rules 2011* (Cth) |
|  |  |
| Cases cited: | *Allbeury v Corruption and Crime Commission* [2012] WASCA 84; 42 WAR 425*Ferguson v Dallow (No 3)* [2021] FCA 177*Ferguson v Dallow (No 4)* [2021] FCA 513*Ferguson v Dallow (No 5)* [2021] FCA 698*Gallagher v Durack* [1983] HCA 2; (1983) 152 CLR 238*Hili v The Queen* [2010] HCA 45; (2010) 242 CLR 520 *House v The King* (1936) 55 CLR 499*Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344*Jackamarra v Krakouer* (1998) 195 CLR 516*Jones v Toben (No 2)*[2009] FCA 477*Kalanje v Minister for Immigration and Multicultural Affairs* [2006] FCA 1618*Kazal v Thunder Studios Inc (California)* [2017] FCAFC 111; (2017) 256 FCR 90*Lowndes v the Queen* (1999) 195 CLR 655*Martin v Norton Rose Fulbright Australia* [2019] FCAFC 234*Mentink v Minister for Home Affairs*[2013] FCAFC 113*Parker v R* [2002] FCAFC 133*Postiglione v The Queen* (1997) 189 CLR 295*Vaysman v Deckers Outdoor Corporation Inc* [2014] FCAFC 60; (2014) 222 FCR 387*Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 |
|  |  |
| Division: |  |
|  |  |
| Registry: | Tasmania |
|  |  |
| National Practice Area: | Federal Crime and Related Proceedings |
|  |  |
| Number of paragraphs: | 52 |
|  |  |
| Counsel for the Applicant: | Professor K Karunadasa |
|  |  |
| Solicitor for the Applicant: | Tai Lawyers Darwin |
|  |  |
| Counsel for the Respondent: | Ms J Sawyer |
|  |  |
| Solicitor for the Respondent: | Page Seager |

ORDERS

|  |  |
| --- | --- |
|  | TAD 34 of 2021 |
|  |
| BETWEEN: | KANE DALLOWApplicant |
| AND: | MICHAEL DARREL JOSEPH FERGUSONRespondent |

|  |  |
| --- | --- |
| order made by: | ANDERSON J |
| DATE OF ORDER: | 17 September 2021 |

THE COURT ORDERS THAT:

1. The applicant’s application for an extension of time under r 36.05 of the *Federal Court Rules 2011* (Cth) in which to file a notice of appeal be dismissed.
2. The applicant pay the respondent’s costs of the application on a lump sum basis in an amount to be agreed or in default of agreement such lump sum be fixed by a Registrar of the Court.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ANDERSON J:

## Introduction

1. This is an application for an extension of time in which to file an appeal to this Court under r 36.05 of the *Federal Court Rules 2011* (Cth) (**Rules**).

## Background

1. The applicant in this proceeding, Mr Kane Dallow (**Mr Dallow**) was sentenced to serve a term of imprisonment of nine months from 28 June 2021 to 27 March 2022, having been found guilty of four charges of contempt of court, including one charge of scandalising the Court, on 28 June 2021, by the sentencing judge in *Ferguson v Dallow (No 5)* [2021] FCA 698 (***Ferguson v Dallow (No 5)***).
2. Rule 36.03 of the Rules provides that an appellant must file a notice of appeal within 28 days after the date on which the judgment was pronounced. Therefore, any notice of appeal with respect to *Ferguson v Dallow (No 5)* was required to be filed by 26 July 2021. The applicant did not file a notice of appeal by that date. The notice of appeal was filed on 13 August 2021, being 18 days late. The applicant therefore requires an extension of time under r 36.05 of the Rules to file a notice of appeal.
3. On 13 August 2021, Mr Dallow through his solicitor, Mr Jeffrey Ian Thompson (**Mr Thompson**), filed an application for an extension of time under r 36.05 of the Rules with an accompanying affidavit.
4. In his affidavit, Mr Thompson deposed that on 3 August 2021, he received a text message from Mr Dallow’s husband requesting his assistance to lodge an application for appeal.
5. Following receipt of this text message, Mr Thompson caused a telephone call to be made to the applicant at his location in Risdon Prison in the evening of 3 August 2021. Mr Thompson deposed that he obtained what he described as “limited instructions” from Mr Dallow during that telephone conversation.
6. On 4 August 2021, Mr Thompson caused a further telephone call to be made to Risdon Prison to obtain further instructions from Mr Dallow. Mr Thompson deposed that he requested (presumably to the prison staff) the first available appointment to speak with Mr Dallow via telephone, and was able to organise for a telephone conversation to be made with Mr Dallow on 9 August 2021 at 2:30 PM.
7. Mr Thompson stated that during the telephone call with Mr Dallow on 9 August 2021, Mr Dallow stated the following:

During the telephone conversation on 9 August 2021 the Applicant Kane Dallow stated to me that

a) After the sentence was handed down on 28 July 2021 [sic] he was unsure as to whether he could appeal the sentence.

b) He had tried to find but was unable to obtain any legal representation in respect of the matter whilst in Risden Prison [sic].

c) He had sought assistance from a Planning Officer at the prison named [redacted] who had told him that she had no idea how he could go about appealing his sentence.

d) He had sought assistance from a solicitor acting for him in another matter named [redacted] from [redacted] in Launceston. But was advised that she could not assist him in Federal Court matters.

e) He had sought assistance from a Legal Aid Duty Solicitor who visited the prison who advised they thought Legal Aid would not fund a Federal Court matter.

f) That the prison would not let him hand over documents relating to submissions he had made to his partner to be passed on to a legal representative.

g) That being incarcerated in Risden Prison [sic] he had been significantly prejudiced is seeking assistance relating to appealing his Federal Court matter.

h) That there had been 15 lock downs in the prison during the 44 days he had spent there due to staff shortages. Those lockdowns had caused further delays in him attempting to address the matter.

1. Rule 36.05 of the Rules requires that any application for an extension of time be accompanied by a draft notice of appeal that complies with rr 36.01(1) and (2).
2. Rule 36.01 of the Rules requires a notice of appeal to be in accordance with the correct form, in this case, Form 122. The notice must state briefly but specifically, the grounds relied on in support of the appeal: r 36.01(2)(c).
3. On 24 August 2021, I heard the application. On that occasion, Professor Karunadasa, who appeared for the applicant, made an application for an adjournment to enable the applicant’s legal representatives to obtain further instructions from the applicant. I granted that adjournment and ordered that by 4.00 p.m. on 2 September 2021, the applicant file and serve an amended notice of appeal, any further affidavit material and written submissions. The applicant sought a further extension of time in which to file material to 12 noon on 3 September 2021, which I granted. Notwithstanding this, the applicant did not file the material until the afternoon of 6 September 2021. Further, no amended draft notice of appeal in support of the applicant’s claim was filed.
4. On 6 September 2021, the applicant filed an amended application for extension of time which purported to include the proposed grounds of appeal relied upon by the applicant. Those grounds are as follows:
5. Ground 1 – The sentencing judge has erred in imposing an excessive punishment.
6. Ground 2 – The sentencing judge failed to distinguish between civil and criminal contempt.
7. Ground 3 – The sentencing judge erred in overstating the seriousness of each of the contempts.
8. Ground 4 – The sentencing judge erred in that the sentence was arbitrary and the sentence was one of imprisonment.
9. Ground 5 – The sentencing judge did not give due weight to the evidence placed before him and consequently the decision falls into the category of an arbitrary decision.
10. Ground 6 – The sentencing judge erred by not giving appropriate weight to the fact that the applicant was legally unrepresented and did not have an opportunity to present the mitigating factors at the time of sentencing.
11. These grounds are more extensive than the initial three grounds of appeal filed with the Court on 13 August 2021. The application proceeded before me on the basis of the six grounds of appeal outlined above and contained in the applicant’s amended application dated 5 September 2021.

**Principles applicable to an extension of time for leave to appeal**

1. The exercise of power to grant an extension application under r 36.05 involves an exercise of the Court’s discretion.
2. The principles applicable to the exercise of the Court’s discretion are well established, and were set out by Wilcox J in *Hunter Valley Developments Pty Ltd v Cohen* (1984) 3 FCR 344 at [348]-[349], which were adopted by the Full Federal Court of Australia (**Full Court**) in *Parker v R* [2002] FCAFC 133 at [6], where the Full Court identifies that:
3. Applications for an extension of time are not to be granted unless it is proper to do so; the legislated time limits are not to be ignored.
4. There must be some acceptable explanation for the delay.
5. Any prejudice to the respondent in defending the proceedings that is caused by the delay is a material factor militating against the grant of an extension.
6. The mere absence of prejudice to the respondent is not enough to justify the grant of an extension.
7. The merits of the substantial application are to be taken into account in considering whether an extension is to be granted.
8. It is a matter for the applicant to demonstrate that there should be a departure from the time to file an appeal. In *Martin v Norton Rose Fulbright Australia* [2019] FCAFC 234, Besanko, Flick and Abraham JJ observed at [20], that:

The nature of the discretion conferred upon the Court to make such an order is well-settled. Although it is routinely accepted that the discretion has been described as “unfettered”, the starting point for any exercise of discretion is that the requirement to file an appeal within time is a manifestation of the public interest in bringing disputes to finality; any exercise of discretion to depart from that starting point must be soundly based: cf. *Reaper v Baycorp Collections PDL (Australia) Pty Ltd* [2014] FCA 426 at [12] per Tracey J (“*Reaper*”); *AZAEY v Minister for Immigration and Border Protection* [2015] FCAFC 193 at [10] per North, Besanko and Flick JJ.

1. Such considerations are not exhaustive however, and the outcome of an application for an extension of time will depend upon the particular circumstances of the case: *Mentink v Minister for Home Affairs*[2013] FCAFC 113 at [32]-[38] (Griffiths J, with Edmonds J agreeing).
2. Leave will not be granted where there are no reasonable prospects of success on the appeal: *Kalanje v Minister for Immigration and Multicultural Affairs* [2006] FCA 1618 at [5]. The applicant will have no real prospects of success where the case is devoid of merit or clearly fails; is hopeless; or is unarguable. In making an assessment the Court is not required to go into too great a detail, but is to “assess the merits in a fairly rough and ready way”: *Jackamarra v Krakouer* (1998) 195 CLR 516 at [7]-[9].

**Consideration**

1. I accept the explanations provided in Mr Thompson’s affidavit filed with the Court on 13 August 2021, and I consider the difficulties faced by the applicant during his time at Risdon Prison are an acceptable reason for the delay in filing the notice of appeal.
2. I am also satisfied on the evidence that a delay of 18 days will not prejudice the respondent should an extension of time be granted. However, as the authorities referred to above make clear, the mere absence of prejudice to the respondent is not enough to justify the grant of an extension of time. The merits of the substantive application must be taken into account in considering whether an extension of time is to be granted. I now turn to consider the proposed grounds of appeal to make an assessment of whether the applicant has any real prospect of success on appeal or whether the case is devoid of merit.

# proposed ground 1

1. By this ground, the applicant contends that the sentencing judge’s sentence was manifestly excessive.
2. The applicant submits that the sentencing judge erred in law in imposing a manifestly excessive sentence. The applicant submits that the sentencing judge failed to consider alternative punishments such as a fine. The applicant also submits that the sentencing judge failed to take into account the applicant’s personal circumstances when sentencing. For these reasons, the applicant submits, that the sentencing judge had not weighed the evidence before him in an appropriate manner.
3. The respondent submitted that the principles on which an applicant must succeed on an appeal against sentence are well settled and may be distilled as follows:
4. To succeed the applicant must demonstrate that the sentencing judge made an error in the exercise of his discretion: *House v The King* (1936) 55 CLR 499 at 505.
5. Appellate intervention is not justified simply because the result is markedly different from other sentences, rather, it is warranted only where the difference is such that, in all the circumstances, the appellate court concludes that there must have been some misapplication of principle, even though where and how is not apparent from the statement of reasons: *Hili v The Queen* [2010] HCA 45; 242 CLR 520 (***Hili***) at [59]-[60] referring to *Dinsdale v The Queen* [2000] HCA 54 and *Wong v The Queen* [2001] HCA 64; 207 CLR 584.
6. An appellate court must not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different form the sentencing judge: *Lowndes v the Queen* (1999) 195 CLR 655.
7. The sentencing judge should be afforded ‘wide measure of latitude’: *Postiglione v The Queen* (1997) 189 CLR 295.
8. The respondent submits that establishing a “tariff” or a sentencing range is especially problematic in contempt matters and may in fact be unachievable: *Allbeury v Corruption and Crime Commission* [2012] WASCA 84; 42 WAR 425 at [251], per Buss JA (as his Honour then was), with McLure P and Mazza JA agreeing.
9. A review of contempt sentences as a ‘yardstick’ was undertaken by Besanko J in *Vaysman v Deckers Outdoor Corporation Inc* [2014] FCAFC 60; (2014) 222 FCR 387 (***Vaysman***) commencing at [126] through to [137]. At [137] Besanko J identified that:

“The many and varied circumstances which may give rise to a contempt of court means that it is difficult to identify a range of appropriate sentences for contempt or a standard sentence for a serious contempt (*Hili* at 537, [54]). I do not think it possible to say that, in 2010, the standard or prevailing sentence for a serious contempt of court was 12 months imprisonment. That said, the sentence imposed by the primary judge in this case was three times as long, or at least twice as long, as the sentences previously imposed. This was no doubt a most serious contempt of court, but beyond that the primary judge did not identify any factors which would justify a sentence which was so out of the ordinary. With respect to the primary judge, I think the sentence of three years imprisonment was manifestly excessive (*Wong v The Queen* [2001] HCA 64; (2001) 207 CLR 584 at 591 [6] per Gleeson CJ; *Hili* at 534-538 [45]-[57]).”

1. The respondent submits the sentence imposed for each contempt was appropriate having regard to the fact the sentencing judge correctly characterised each of the contempts as “*serious instances of contempt*”: *Ferguson v Dallow (No 5)* at [29]. In relation to each of the contempts, I accept the respondent’s submissions as to the seriousness of each instance of contempt as follows:
2. The first contempt was a breach of an order of Justice Kerr made on 2 December 2020 by publishing a video entitled “Legal Update” (referred to in the proceedings as the (**Third Video**)) that indirectly re-published the defamatory allegations that were subject to the Order of Justice Kerr on 2 December 2020. The sentencing judge found this was “beyond reasonable doubt an intentional breach”: *Ferguson v Dallow (No 3)* [2021] FCA 177 (***Dallow (No 3)***) at [70]; his Honour ruled out an inadvertent, accidental or reckless breach because the applicant himself conceded in cross examination that he knew and understood the effect of the order at [72]; and ultimately the Court concluded the breach could only have been a deliberate one: [73].
3. With respect to the second contempt, the applicant was required by an order of Justice White on 9 December 2020 to take down the Third Video within two hours of the orders or as soon thereafter as was reasonably possible. The applicant failed to remove the video until approximately five hours after the order was made. The sentencing judge found the applicant “deliberately refused to comply with the order to remove the Third Video from YouTube”, in circumstances where the applicant “had the capability to immediately to [remove the video from YouTube] without travelling back to Launceston”: *Ferguson v Dallow (No 3)* at [80].
4. With respect to the third contempt, the applicant breached the order of Justice White made on 19 February 2021 by publishing a new video entitled “Broken Parliament” (referred to in the proceedings as the (**Fourth Video**)), which indirectly re-published the allegations subject of the 19 February 2021 Order. The sentencing judge found that it was beyond reasonable doubt that the applicant intentionally disobeyed the orders of White J and rejected any other explanation that the video could have been intended to convey any other meaning that was asserted by the applicant: *Ferguson v Dallow (No 4)* [2021] FCA 513 (***Dallow (No 4)***) at [28].
5. Lastly, the fourth contempt arose out of the same circumstances as the third contempt but was a charge of scandalising the court. The sentencing judge found “beyond reasonable doubt that the [applicant] intended his comments about the “ring of protection” to include this court, and that the public would so understand them”: *Ferguson v Dallow (No 4)* at [39] and that an assertion [by the applicant] that a member of the executive can have the court do his or her bidding was serious one: *Ferguson v Dallow (No 4)* at [42].
6. I also accept the respondent’s submissions that in sentencing the applicant, the following aggravating factors were noted by the sentencing judge and these factors warranted denunciation and an immediate penalty of imprisonment:
7. The applicant had a high degree of culpability in respect of each contempt: *Ferguson v Dallow (No 5)* at [30].
8. The contempt charges which involved publication of allegations in contravention of court orders on YouTube and the internet, had the potential to cause substantial harm to the respondent. The potential for harm was acknowledged by the applicant during evidence he gave in the proceedings: *Ferguson v Dallow (No 5)* at [36].
9. The applicant demonstrated deliberate and ongoing defiance of court orders throughout the proceedings. The contempt allegations were not a single instance, but repeated and sustained defiance of the orders of the court. His later contempts were committed whilst under charge for his earlier contempts.
10. I accept the respondent’s submission that the sentencing judge appropriately considered that given the applicant’s ongoing defiance of court orders, specific deterrence was a weighty sentencing factor: *Ferguson v Dallow (No 5)* at [48]-[49]. General deterrence also loomed large as it does in all contempt proceedings where charges of intentional disobedience of orders and scandalising the court were concerned.
11. The sentencing judge in sentencing the applicant noted the absence of any mitigating factors. These findings are as follows:
12. The applicant had not entered a plea of guilty to any of the charges, and in fact pleaded not guilty to any of the charges of contempt: *Ferguson v Dallow (No 5)* at [33].
13. The applicant never expressed any apology to the court, or remorse for his conduct: *Ferguson v Dallow (No 5)* at [35].
14. The sentencing judge explicitly rejected the applicant’s claims to have been acting in the public interest: *Ferguson v Dallow (No 5)* at [33].
15. The sentencing judge rejected the applicant’s attempted apology to the respondent, finding the apology was sent just 48 hours before the sentencing hearing and the content did not express any contrition for the applicant’s actions: *Ferguson v Dallow (No 5)* at [40].
16. The Court was not presented with antecedents or personal circumstances that would warrant mitigation: *Ferguson v Dallow (No 5)* at [42].
17. The sentencing judge correctly noted that the only mitigating factor was the applicant’s absence of any prior convictions for contempt or similar offences.
18. The sentencing judge undertook a detailed consideration of all relevant factors in arriving at the sentence to be imposed. That evaluation included considering the cumulative total of the sentence. The sentencing judge made provision for the sentence on the third and fourth contempt charges to be served concurrently and gave consideration to the principle of totality: *Ferguson v Dallow (No 5)* at [53]-[55].
19. I am satisfied that the sentencing judge’s consideration does not demonstrate any misapplication of principle and that the sentence imposed could not be said to fall outside the range of appropriate sentences for contempt.
20. In terms of the length of imprisonment that is to be imposed on contemnors that have been found guilty on charges of serious contempts, Besanko J, with whom Siopis J agreed, said in *Vaysman*that, it is difficult to identify a range of appropriate sentences for contempt or a standard or prevailing sentence for a serious contempt. That is due to the many and varied circumstances that can give rise to the particular contempt and the factors to which the Court can have regard in assessing what sentence is appropriate in the factual scenario at the time of sentencing.
21. There is no maximum penalty for contempt and the circumstances surrounding contempts of court may vary considerably. Nevertheless, it is appropriate to consider comparable cases because they constitute or may constitute a yardstick against which to examine a proposed sentence: (*Hili* at [54]).
22. In *Gallagher v Durack* [1983] HCA 2; (1983) 152 CLR 238 (***Gallagher***), the contemnor was sentenced to a term of three months’ imprisonment for one charge of contempt of the kind that scandalised the Court. The contemnor in that case suggested that the Court was not independent. Comparatively in this case, the applicant stated that the judiciary is not independent from the Executive arm of the government and that not only can the Executive control the Court, but that the Courts are actively engaged in a conspiracy to protect it. This is a far more serious accusation than that voiced by the contemnor in *Gallagher*.
23. In*Kazal v Thunder Studios Inc (California)* [2017] FCAFC 111; (2017) 256 FCR 90, the contemnor was sentenced to serve a total of 15 months imprisonment in relation to four charges of contempt, including publishing prohibited material on his fleet of vans as well as online.
24. In *Vaysman* at [137], the contemnor, among other charges of contempt, was found guilty of manufacturing and selling counterfeit footwear in contrary to Court orders. Besanko J, with whom Siopsis J agreed found that a sentence of three years imprisonment was manifestly excessive, and the contemnor’s sentence was then reduced to two years imprisonment.
25. In *Jones v Toben (No 2)*[2009] FCA 477, Lander J imposed a sentence of three months imprisonment on a respondent who had committed a wilful and contumacious contempt of Court on 24 occasions by publishing material on the internet that was in breach of Court orders and of an undertaking given to the Court.
26. Having regard to the sentences imposed by this Court in the above authorities, the sentencing judge, in sentencing the applicant to a total of nine months’ imprisonment in relation to each of the four contempts is consistent with the kinds of sentences that have been imposed in comparable cases within this Court.
27. I am satisfied that there is no demonstrated error in the manner in which the sentencing judge exercised his discretion. I am satisfied that the substantive appeal has no reasonable prospects of success and that leave for an extension of time in which to file the notice of appeal should be refused.

# proposed ground 2

1. By this proposed ground of appeal, the applicant contends that the sentencing judge failed to distinguish between civil and criminal contempt. This ground of appeal is completely without merit. Whilst contempt can be characterised as either civil or criminal, the sentencing judge determined that all four charges were criminal contempt. That much is plain from the sentencing judge’s reasons in *Ferguson v Dallow (No 3)* at [54]-[57] where the sentencing judge found that the first and second charges were criminal because of the applicant’s deliberate and intentional breach of the court orders. The sentencing judge also found that charges 3 and 4 were criminal contempt in *Ferguson v Dallow (No 4)* at [13]-[16]. The applicant prior to the sentencing hearing was on notice that the four contempts had been found to be criminal in nature by reason of *Dallow (No 3)* and *Dallow (No 4)* and as a consequence of the respondent’s sentencing submissions at [3].
2. This proposed ground has no reasonable prospect of success.

# proposed ground 3

1. By this proposed ground of appeal, the applicant contends that the sentencing judge erred in overstating the seriousness of each of the contempts. The applicant submits that because the videos which he published on his YouTube channel and on his website did not have a wide audience that the risk of harm that could be occasioned by any publication was minimal as it was unlikely many people would see the publications.
2. I reject this submission. The seriousness of the grossly defamatory statements was referred to by the sentencing judge in the redacted parts of *Dallow (No 3)* at [67]-[69] and the confidential annexure A as well as the sentencing judge referring to the deliberate and serious nature of each of the contempts in *Dallow (No 5)* at [22]-[29]. The contempts are as the sentencing judge observed in *Dallow (No 5)* at [22] self-evidently deliberate and serious.
3. This proposed ground of appeal has no reasonable prospect of success.

# proposed ground 4

1. By this proposed ground of appeal, the applicant contends that the sentence imposed by the sentencing judge was arbitrary.
2. The submissions advanced by the applicant in support of this proposed ground have no reasonable prospect of success.
3. The sentencing judge’s reasons provide a comprehensive consideration of the factors which were relevant to the sentence to be imposed for each contempt. There is no substance to the claim that the sentence imposed for the contempts was arbitrary. It was the result of the sentencing judge applying the correct principles to the facts as found and then evaluating the appropriate sentence. It is in no way possible to characterise the sentencing judge’s well considered assessment of the facts and the subsequent sentence imposed on the applicant as arbitrary.

# proposed ground 5

1. This proposed ground of appeal, as best as I can understand it, contends that the sentencing judge did not give due weight to the evidence placed before him and consequently the decision (the sentencing decision) falls into the category of an arbitrary decision. For the reasons given in respect to proposed ground 4 above, there is no prospect of this proposed ground succeeding on appeal.

# proposed ground 6

1. By this proposed ground of appeal, the applicant submits that the sentencing judge erred by not giving appropriate weight to the fact that the applicant was legally unrepresented and did not have an opportunity to present the mitigating factors at the time of sentencing. The applicant represented himself at the sentencing hearing. The applicant was afforded every opportunity by the sentencing judge to present the mitigating factors which he relied upon at the sentencing hearing. I am not satisfied that this proposed ground of appeal enjoys any prospect of success.

# disposition

1. For the reasons given, leave for an extension of time within which to file the notice of appeal will be refused as the substantive appeal has no reasonable prospects of success.
2. The application will be dismissed. The applicant will pay the respondent’s costs of the application on a lump sum basis which, in default of agreement, will be fixed by a Registrar of the Court.

|  |
| --- |
| I certify that the preceding fifty two (52) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Anderson. |

Associate:

Dated: 17 September 2021