

time within which, pursuant to r 43(1), they must apply for the allocation of a hearing date and file their case on appeal.

Background

[2] Messrs Nottingham and McKinney are self-represented individuals who had their substantive proceedings, brought to challenge the Government's response to COVID-19, struck out.¹ Their appeal to this Court related to the costs award made against them (in favour of the Attorney-General) following the High Court's decision to strike out those proceedings.²

[3] Their notice of appeal was accepted for filing on 13 June 2022. Security for costs were fixed at \$7,060 under r 35 of the Rules. They applied for security to be dispensed with on 16 August. That application was dismissed by the Deputy Registrar on 7 September. Rule 5A(3) provides for a judge to review such a decision pursuant to an informal application made within 20 working days of that date. The applicants applied for such a review on 21 September, within that 20-day period.

[4] In the meantime, on 14 September the applicants' appeal was deemed abandoned pursuant to r 43 of the Rules as they had failed to apply for a fixture or file the case on appeal within the three-month period stipulated by r 43. It is, we note, clear that the r 43 timeframe is not affected by the existence of an outstanding application to review a Registrar's decision declining dispensation with security for costs, although that is not always appreciated by affected parties.³

[5] Having been advised of the position, the applicants made this application for an extension of time to apply for the allocation of a hearing date and file the case on appeal pursuant to r 43(2) of the Rules.

¹ See *Nottingham v Attorney-General* [2022] NZHC 405.

² *Nottingham v Attorney-General* [2022] NZHC 1060.

³ See for example *McGuire v Secretary for Justice* [2019] NZCA 512; and *Nottingham v Maltese Cat Ltd* [2018] NZCA 387.

[6] Were we to grant that application, with the effect of “reviving” the applicants’ appeal that has been deemed abandoned, it would then be appropriate for a judge to consider the question of security for costs.

[7] Rule 43 provides, relevantly:

43 Appeal abandoned if not pursued

- (1) An appeal is to be treated as having been abandoned if the appellant does not apply for the allocation of a hearing date and file the case on appeal within 3 months after the appeal is brought.
- (2) the Court, on an interlocutory application, may—
 - (a) grant an extension of the period referred to in subclause (1);
and
 - (b) grant 1 or more further extensions of any extended period.

Submissions

[8] The applicants say:

- (a) the appeal was wrongly deemed abandoned since the application to dispense with security costs had not been determined or had been determined within the last month (referring to r 43(1B)(c) of the Rules);
- (b) an application to review the Deputy Registrar’s decision has been filed but has been deferred until the abandonment issue is resolved;
- (c) the Court has jurisdiction to grant the extension under r 43(2) and (3);
and
- (d) as soon as the applicants were emailed the notice of result, they responded, seeking clarification given that the security for costs matter had not been resolved.

[9] The Attorney-General opposes the application, saying:

- (a) the proposed appeal is not genuinely arguable;
- (b) there is inadequate explanation as to why the appeal has not been prosecuted diligently;
- (c) the appeal was rightly deemed abandoned under r 43 of the Rules, and the applicants could have applied for an extension under r 43(1B)(b) but failed to do so; and
- (d) Mr Nottingham, having extensive experience in appellate courts, is familiar with the applicable processes.

Analysis

[10] As this Court explained in *Yarrow v Westpac New Zealand*,⁴ the decision of the Supreme Court in *Almond v Read*,⁵ although concerned with r 29A of the Rules, not r 43, applies to any interlocutory application for an extension of time when there is a right of appeal.

[11] The ultimate question when considering the exercise of the discretion to grant or decline an extension of time is what the interests of justice require. Factors identified as likely to require consideration include:⁶

- (a) the length of the delay;
- (b) the reasons for it;
- (c) the conduct of the parties, and particularly the applicant;
- (d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and

⁴ *Yarrow v Westpac New Zealand Ltd* [2018] NZCA 601 at [4].

⁵ *Almond v Read* [2017] NZSC 80; [2017] 1 NZLR 801.

⁶ At [38].

- (e) the significance of the issues raised by the proposed appeal, both to the parties and more generally.

[12] The merits of an appeal may, in principle, be relevant but a decision to refuse an extension of time based substantially on that ground should be made only where the appeal is clearly hopeless.⁷

[13] As the Attorney-General has submitted, the applicants are well-familiar with the applicable appellate processes. They were sent a reminder on 12 August that they needed to apply for the allocation of a hearing and file the case on appeal for their appeal not to be deemed abandoned. Before this Court they have previously sought to argue that a cross-appellant's appeal should be deemed abandoned on the basis that the cross-appellant did not file their case on appeal or apply for a fixture within three months of filing the cross-appeal.⁸ And Mr Nottingham has previously sought to argue that his failure to apply for a fixture or prepare a case on appeal was justified on the basis that his application that security for costs to be waived was pending, an argument which this Court found wanting.⁹

[14] Further, as noted, the Deputy Registrar's decision decline to dispense with security for costs was released on 7 September. The applicants have not suggested that they had insufficient time between then and the r 43 deadline of 13 September to either comply with r 43 or apply for an extension under s 43(1B). Nor, given the reminder to do so on 12 August, have they satisfactorily explained why they did not comply with r 43 before the release of the Deputy Registrar's decision.

[15] In any event, the interests of justice do not favour granting leniency to the applicants. We agree with the respondent that there is no public interest and that the proposed appeal lacks merit. The grounds of appeal include wide-ranging, generalised, claims that the High Court was acting outside of its jurisdiction when awarding costs, its orders breached international human rights norms, it was acting as a "mouthpiece" for the incumbent Government" in a manner "akin to Jews being

⁷ At [39].

⁸ *Nottingham v Real Estate Agents Authority* [2021] NZCA 357.

⁹ *Nottingham v Maltese Cat Ltd*, above n 3, at [5].

denied the right to ... their lives because they did not know the specific dates and acts that sentenced them to death ...” and were generally that the courts are “an intrinsic fault in the makeup of New Zealand as a ‘failed state’”.

Result

[16] The application for an extension of the time to apply for the allocation of a hearing date and file the case on appeal is declined.

[17] The applicants must pay the respondent costs calculated for a standard interlocutory application on a band A basis, and usual disbursements.

Solicitors:
Meredith Connell, Wellington for Respondent