44/11; [2011] VSC 592

SUPREME COURT OF VICTORIA

FERNANDO v PORT PHILLIP CITY COUNCIL & ORS

Hollingworth J

4 November, 9 December 2011

CRIMINAL LAW – INFRINGEMENTS – INFRINGEMENT OFFENDER FAILED TO COMPLY WITH MULTIPLE INFRINGEMENT NOTICES OVER 4-YEAR PERIOD – INFRINGEMENT OFFENDER BROUGHT BEFORE MAGISTRATES' COURT ON INFRINGEMENT WARRANTS – MAGISTRATE DISMISSED APPLICATION BY INFRINGEMENT OFFENDER FOR DISCHARGE OF OUTSTANDING FINES – IMPRISONMENT ORDER MADE IN DEFAULT OF PAYMENT OF INSTALMENT ORDER – FINDING BY MAGISTRATE THAT OFFENDER BLATANTLY AND WILFULLY REFUSED TO PAY FINES – INFRINGEMENT OFFENDER SOUGHT TO APPEAL MAGISTRATE'S ORDERS – NO SUCH APPEAL POSSIBLE – APPEAL DISMISSED: *INFRINGEMENTS ACT* 2006, S160; *CRIMINAL PROCEDURE ACT* 2009, S272.

F. failed to pay numerous infringement penalties (total $14,428.50) and when the matters proceeded to enforcement he was arrested and later appeared before the Magistrates' Court. F. sought to have the whole of the outstanding fines discharged pursuant to s160(3) of the *Infringements Act* 2006 ('Act'). The Magistrate refused the application and made orders for F's imprisonment and was placed on an instalment payment plan meaning that F. would be imprisoned if he failed to make payments in accordance with the monthly payment plan. In making the order, the Magistrate concluded that F. was a defaulter who was part of a recalcitrant group who blatantly and wilfully decided not to pay the fines incurred. Upon appeal—

HELD: Appeal dismissed.

1. The exercise of the power in s160(1) of the Act is subject to the discretionary powers created by ss160(2) and (3). Those sub-sections permit the court to do a number of things, including discharging some or all of the outstanding fines, or adjourning the further hearing of the matter for up to six months. In the case of sub-section (3), the court may also order a lesser period of imprisonment, or make a community based order under the *Sentencing Act* 1991. F'.s application was made under sub-section (3).

2. The court may exercise its power under s160(3) if it is satisfied that "having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh". A court that has made an imprisonment order under s160(1) of the Act may, under s160(4)(b) of that Act, make an instalment order under the *Sentencing Act*. Such an instalment order effectively stays the operation of the imprisonment order, for so long as the infringement offender complies with the instalment order. The magistrate made such instalment orders against F. If an infringement offender defaults on an instalment order, they can be immediately arrested and imprisoned for the default period, without further hearing.

3. Whilst the order made by the Magistrate was a final order, it was not made in a criminal proceeding. Accordingly, F. could not bring the appeal against the Magistrate's order.

4. *Obiter*: The Magistrate's conclusion that F. fitted within the recalcitrant group was perfectly open on the evidence.

HOLLINGWORTH J:

Introduction

1. Between 15 April 2006 and 30 June 2010, the appellant, Mr Fernando, was issued with 52 infringement notices by the various respondent councils and statutory authorities. The infringement notices were for offences which included speeding, parking infringements, driving an unregistered vehicle, breaching a licence condition, using a mobile phone while driving, Citylink offences, disobeying traffic signals, and failing to wear a bicycle helmet.

2. Mr Fernando did not pay the penalty attached to any of the infringement notices within the prescribed time, or at all. The matters proceeded to enforcement and, in each instance, a warrant was issued for the arrest of Mr Fernando.

3. On 2 March 2011, Mr Fernando appeared at the Magistrates' Court of Victoria at Melbourne, in answer to two matters arising from the infringement warrants. The first matter (Case No B10347109) involved 51 infringement warrants totalling $13,773.30, with 116 days of imprisonment to be served in default of payment. The second matter (Case No B10349875) involved one infringement warrant of $655.20, with 6 days of imprisonment to be served in default of payment. Both matters were adjourned to 31 March 2011, to enable Mr Fernando to obtain character references and other material to put before the court.

4. The matters proceeded before Deputy Chief Magistrate Popovic on 31 March 2011. Mr Fernando was represented by a solicitor. None of the respondents appeared, or was required to appear.

5. Mr Fernando sought to have the whole of the outstanding fines discharged, pursuant to s160(3) of the *Infringements Act* 2006. In support of his application, Mr Fernando tendered a number of character references, and gave rather limited evidence about his own financial circumstances and those of his employer.

6. The magistrate reserved her decision. She published reasons and made orders on 15 April 2011. She found that it was not appropriate to exercise her discretion under s160(3). She made orders to the effect that Mr Fernando be imprisoned for a total of 122 days, pursuant to s160(1) of the *Infringements Act*. However, he was placed on instalment payment plans in relation to the total outstanding amount of $14,428.50, meaning that he would only be imprisoned if he failed to make payments in accordance with the monthly payment plans.

7. On 16 May 2011, a notice of appeal was filed in this court, pursuant to s272 of the *Criminal Procedure Act* 2009. The notice seeks to have the orders below set aside, and the matter remitted to the Magistrates' Court for rehearing, on the basis that the magistrate erred in her construction of s160(3) of the *Infringements Act*.

8. On 30 May 2011, Associate Justice Daly granted Mr Fernando leave to appeal out of time, stayed the orders below pending the hearing of the appeal, and made various interlocutory orders relating to the hearing of the appeal.

9. The appeal came on for hearing before me on 4 November 2011. The respondents adopted a variety of positions at the hearing. The Traffic Camera Office, the Victoria Police Toll Enforcement Office and Victoria Police (respectively, the second, sixth and seventh respondents) sought to uphold the decision below. Port Phillip City Council, the first respondent, took what might be described as a neutral position, neither seeking to uphold nor overturn the decision below. The remaining respondents, the Stonnington City Council (the third respondent), Melbourne City Council (the fourth respondent) and the Yarra City Council (the fifth respondent), did not play an active part in this proceeding.

The infringements scheme

10. The *Infringements Act* establishes a scheme for the enforcement of infringement notices issued under various Acts.

11. Infringement notices are served under Division 2 of Part 2 of the *Infringements Act*. A notice requires payment of the penalty specified in the notice within a specified period. In most cases, the person served can either pay the fine (forthwith, or by means of a payment plan if appropriate), or elect to have the matter dealt with in the Magistrates' Court as a summary case.

12. If the person served does not pay or elect, then they are in default, and the enforcement agency may lodge details of the infringement penalty with an infringements registrar at the Magistrates' Court. (s54)

13. The infringements registrar may then issue an enforcement order, which is deemed to be an order of the court. (s59)

14. If payment is not made under the enforcement order, the infringements registrar must issue an infringement warrant under s80. The warrant authorises the seizure of personal property, or the arrest of the infringement offender in order to bring them before the Magistrates' Court. (s82)

15. Section 160(1) of the *Infringements Act* authorises the Magistrates' Court to imprison an infringement offender "for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount." This is the section under which the magistrate made her orders against Mr Fernando.

16. The exercise of the power in s160(1) is subject to the discretionary powers created by ss160(2) and (3). Those sub-sections permit the court to do a number of things, including discharging some or all of the outstanding fines, or adjourning the further hearing of the matter for up to six months. In the case of sub-section (3), the court may also order a lesser period of imprisonment, or make a community based order under the *Sentencing Act* 1991. Mr Fernando's application was made under sub-section (3), but it is necessary to also consider sub-section (2), as the magistrate referred to it in the course of her reasons.

17. The court may exercise its power under s160(2), if it is satisfied:
(a) that an infringement offender has a mental or intellectual impairment, disorder, disease or illness; or
(b) without limiting paragraph (a), that special circumstances apply to an infringement offender.

18. "Special circumstances" are defined in s3(1) of the *Infringements Act* as meaning:
(a) a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable—
(i) to understand that conduct constitutes an offence; or
(ii) to control conduct that constitutes an offence; or
(b) a serious addiction to drugs, alcohol or a volatile substance ... where the serious addiction results in the person being unable—
(i) to understand that conduct constitutes an offence; or
(ii) to control conduct that constitutes an offence; or
(c) homelessness determined in accordance with the prescribed criteria (if any) where the homelessness results in the person being unable to control conduct which constitutes an offence.

19. Section 3(3) is also relevant, as it provides that "nothing in the definition of 'special circumstances' is to be taken as limiting any power of the court to consider the circumstances of any person in a proceeding before the court."

20. The court may exercise its power under s160(3) if it is satisfied that "having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh". It is the construction of these words which is at the heart of this case.

21. A court that has made an imprisonment order under s160(1) of the *Infringements Act* may, under s160(4)(b) of that Act, make an instalment order under the *Sentencing Act*. Such an instalment order effectively stays the operation of the imprisonment order, for so long as the infringement offender complies with the instalment order. The magistrate made such instalment orders against Mr Fernando.

22. If an infringement offender defaults on an instalment order, they can be immediately arrested and imprisoned for the default period, without further hearing.

The court's jurisdiction

23. Before considering the proper construction of s160(3) of the *Infringements Act*, there is a preliminary question to determine: namely, whether this appeal is able to be brought under s272 of the *Criminal Procedure Act*.

24. Instalment orders may be varied or cancelled in certain circumstances, including where the offender's circumstances were not accurately presented to the court, or the offender's circumstances have materially altered. (Section 61 of the *Sentencing Act*)

25. However, there is no right of re-hearing or review in relation to the exercise of the powers under s160 of the *Infringements Act*. Nothing in the Infringements Act creates such a right. Nor does s61 of the *Sentencing Act* apply to the enforcement of infringement penalties.[1]

26. The *Infringements Act* itself creates no appeal rights.

27. Most appeals from the Magistrates' Court in criminal proceedings are brought under s254 of the *Criminal Procedure Act*, which provides that:

> A person convicted of an offence by the Magistrates' Court in a criminal proceeding conducted in accordance with Part 3.3 may appeal to the County Court against—
> (a) the conviction and sentence imposed by the court; or
> (b) sentence alone.

28. It is common ground that s254 does not apply to an order made under s160 of the *Infringements Act*, as there has been no summary hearing conducted in accordance with Part 3.3 of the *Criminal Procedure Act*.

29. Section 272(1) of the *Criminal Procedure Act* provides that "A party to a criminal proceeding (other than a committal proceeding) in the Magistrates' Court may appeal to the Supreme Court on a question of law, from a final order of the Magistrates' Court in that proceeding."

30. There is no doubt that the orders made by the magistrate were "final orders". But, were they orders made in a "criminal proceeding"?

31. "Criminal proceeding" is not defined in the *Criminal Procedure Act*.

32. Section 5 of the *Criminal Procedure Act* provides that:

> A criminal proceeding is commenced by—
> (a) filing or signing a charge-sheet in accordance with section 6; or
> (b) filing a direct indictment in accordance with section 159; or
> (c) a direction under section 415 that a person be tried for perjury.

33. There is no other section in the *Criminal Procedure Act* which provides another means of commencing a "criminal proceeding".

34. Mr Fernando was not brought before the Magistrates' Court pursuant to such a charge-sheet, direct indictment or direction. He was brought there pursuant to an infringement warrant, issued by an infringements registrar under the *Infringements Act*.

35. Section 3 of the *Criminal Procedure Act* defines "proceeding" as follows:

> proceeding, in relation to the Magistrates' Court, includes a committal proceeding but does not include the exercise by the registrar of the Magistrates' Court of any jurisdiction, power or authority vested in the registrar as infringements registrar [.]

36. That is to say, the procedure used to bring Mr Fernando to court is expressly excluded from the definition of a "proceeding" in the *Criminal Procedure Act*.

37. That there is a difference between a "proceeding" under the *Criminal Procedure Act*, and the infringement warrant "procedure" under the *Infringements Act*, is further reinforced by the note to s27 of the *Criminal Procedure Act*[2] and by s99 of the *Magistrates' Court Act*.[3]

38. For these reasons, I am not satisfied that Mr Fernando can bring this appeal against the magistrate's orders under s272 of the *Criminal Procedure Act*. Accordingly, the appeal should be dismissed.

39. Mr Fernando could have sought an order for judicial review in the nature of *certiorari*, under order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005, on the ground of error of law on the face of the record.[4] All counsel agreed that, if I found that the court lacked jurisdiction under s272, in order to avoid the expense and delay of Mr Fernando commencing a separate proceeding out of time, they would not object to my treating the appeal as if it were an application for judicial review under order 56. Had I been persuaded that there was substantial merit in Mr Fernando's case for judicial review, I would have adopted that course, rather than dismissing this proceeding on the formal ground. However, for the reasons which follow, I am not persuaded that Mr Fernando's case has substantial merit.

The decision below

40. After referring to the history of Mr Fernando's offending, and setting out the terms of s160(3), the magistrate turned to consider the submissions made, and the evidence led, on behalf of Mr Fernando.

41. Her Honour noted that Mr Fernando is the founder of the not-for-profit organisation which runs the "Lentil as Anything" restaurants, operates a school canteen and assists persons from various disadvantaged backgrounds. She discussed the organisation's philosophy, and noted that Mr Fernando lives by that same philosophy; the organisation pays his rent, utilities and some expenses, but he "declines to draw an income from the organisation in order that he may make any money made by the business available to other people." She also noted that "Mr Fernando was not able to dispute that he could have drawn funds from the organisation to pay fines."

42. After discussing evidence about Mr Fernando's character, the magistrate made the following fact findings:

> 23 It is obvious that Mr Fernando is held in high regard by many members of the community, including prominent Australians, for the significant contribution he has made and high principles to which he aspires. What is of concern is that Mr Fernando's moral credo does not extend to upholding the laws of the State of Victoria.
> 24 [His solicitor] did not make any submissions, and Mr Fernando did not give any evidence of any hardship which would be caused to him or his family if he was to be incarcerated.
> 25 No specific submissions were made in relation to incarceration being "excessive, disproportionate or unduly harsh". My interpolation[5] of [his solicitor's] submissions was firstly: that Mr Fernando did not have capacity to pay fines due to his lifestyle choice; and, secondly, [...] his enormous contribution to the community, and that these factors combined ought to absolve him from paying his outstanding debt.

43. Her Honour went on to analyse the relevant provisions of the *Infringements Act*, against the Act's legislative history. After observing – correctly – that a purposive construction of the Act was required[6], she considered the parliamentary debates and the Second Reading Speech in order to ascertain the purposes of the Act.

44. Mr Fernando particularly criticises the following parts of her Honour's reasons:

> 36 It is my view that s160(3) of the *Infringements Act* should be read in line with its purposes, namely that there be increased protection for vulnerable members of our community with special circumstances, but for the rest of the community, that is those without special circumstances, the Act provides increased enforcement powers to ensure the integrity of the system.
> 37 The discretion in relation to infringement defaulters without special circumstances provided for in s160(3) must, in my view, be sparingly applied in order to maintain the credibility of the infringements regime and the confidence of members of the community. The legislators have emphasised that magistrates have an overriding discretion in extreme instances of personal hardship. It would not be within the purposes of the Act to apply s160(3) where defaulters have blatantly and wilfully decided that they would neither pay the fines they have incurred [nor] face any consequence for their offending.
> 38 The types of scenarios in which it may be appropriate to apply s160(3) could be:
> • A single parent with young children who would be placed in State care if the parent was incarcerated;
> • A sole family provider, where the family would be left destitute or at risk of dispossession in the event that the infringement defaulter was incarcerated;
> • Where the amount of the infringement debt has completely overwhelmed the defaulter causing him/her to be unable to take any action;
> • Where the defaulter experienced a prolonged period of illness but has since resumed employment.

45. Before considering Mr Fernando's criticisms of those paragraphs, it is desirable to have regard to the context in which the magistrate's reasons were given. The matters proceeded before her on an *ex parte* basis. Mr Fernando's solicitor did not lead evidence, or make submissions, in a way which addressed the statutory test (namely, whether "having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh"). Instead, the case below was effectively argued on the basis that, because Mr Fernando has devoted himself to community work and chosen not to receive a salary, he should therefore be excused from compliance with the law. Her Honour also received no assistance from Mr Fernando's solicitor as to the proper construction of the legislation, and had to go away and find the relevant extrinsic materials for herself.

46. In all the circumstances, for Mr Fernando to urge this court to minutely scrutinise the magistrate's reasons, with a keen eye for looseness of expression, hardly seems fair.[7]

47. Mr Fernando argues that the magistrate erred in law in stating that the *Infringements Act* has drawn a clear distinction between persons with "special circumstances" and the rest of the community, and that the discretion under s160(3) must be sparingly applied to those without special circumstances, in order to maintain the credibility of the infringements regime.

48. In the Second Reading Speech, the Attorney-General made it clear that one of the primary purposes of the Act was to filter out of the infringements system vulnerable people who cannot understand or control their offending behaviour, due to disability, addiction or homelessness.[8] To achieve that end, the *Infringements Act* contains a number of provisions at every stage of the enforcement process, which specifically deal with persons with "special circumstances". Those provisions include s160(2).

49. As mentioned earlier, s3(3) provides that the definition of "special circumstances" is not to be taken as limiting any power of the court to consider the circumstances of any person in a proceeding before the court. Her Honour was aware of and referred to s3(3), in a way that (on a fair reading) does not suggest she misunderstood it.

50. Her Honour said that the discretion under s160(3) must be "sparingly applied in order to maintain the credibility of the infringements regime and the confidence of members of the community."

51. It is clear that parliament was concerned with the integrity or credibility of the infringements regime. For example, the Attorney-General said that a secondary objective of the Act was "to provide additional enforcement sanctions to motivate people to pay their fines in order to maintain the integrity of the system," and that one of the elements of the new system was "firmer enforcement measures to improve deterrence in the system, reducing 'civil disobedience' and the undermining of the rule of law".[9]

52. The Attorney-General also made the following remarks about the power of magistrates:

> The bill gives broader options to magistrates in open court hearings which occur after the execution of an enforcement warrant. By this stage, other enforcement sanctions, instalment payment plans or community work will not have been successful in expiating the fines. These hearings will consider whether a person should be imprisoned, and will determine whether the individual has extenuating circumstances.
>
> Currently, magistrates' powers include being able to discharge the matter if the person has a mental or intellectual disability. If a person has exceptional circumstances, the court can place the person on community work. The term of imprisonment can also be reduced. The bill proposes that magistrates also be able to improve instalment plans and that where imprisonment would be 'excessive, disproportionate or unduly harsh' the magistrate can discharge the fine in all or part, or reduce the term of imprisonment by two thirds. These changes will ensure that imprisonment is, and will remain, a sanction of last resort for the most serious fine defaulters.[10]

53. Mr Fernando argues that her Honour's statement – that s160(3) must be "sparingly applied" to those without special circumstances – is inconsistent with the Attorney-General's statement that imprisonment is "a sanction of last resort for the most serious fine defaulters." At first glance, there seems to be some force in that argument. But, on further consideration, I am persuaded that the two statements can sit side by side.

54. The statement that imprisonment is to remain "a sanction of last resort for the most serious fine defaulters" was made in the course of a discussion about the entire Act, and the whole suite of powers available to magistrates under it. In that context, imprisonment clearly is the last sanction – something to be considered only after all other avenues for payment or discharge of fines have been exhausted.

55. The magistrate's statement that s160(3) must be "sparingly applied" was made in a different context. She was not discussing where s160 falls within the broader suite of powers; rather, she was specifically discussing s160(3).

56. In order to enliven the discretion under s160(3), an applicant must persuade the magistrate that, having regard to the applicant's situation, imprisonment would be "excessive, disproportionate and unduly harsh". I assume that her Honour was intending to convey the idea that s160(3) is not likely to be available in all, or the majority of, cases. But to say that the discretion must be "sparingly applied" is not the most accurate way of summarising these requirements.

57. Similarly, in paragraph [37] of her reasons, the magistrate used the expression, "extreme

instances of personal hardship", as a short-hand summary of the criteria contained in s160(3). Unfortunately, that is also not an accurate summary. The concepts of "excessive, disproportionate and unduly harsh" are not synonymous with "extreme instances of personal hardship", although there may be factual situations which fall within both. However, there may be situations where imprisonment would be "excessive, disproportionate and unduly harsh", but which could not be characterised as an "extreme instance of personal hardship". Equally, there may be situations in which a person's situation may be described as one of "extreme personal hardship", but where (having regard to the nature and extent of the offending, for example) imprisonment would not be excessive or disproportionate.

58. But, there are numerous instances in the magistrate's reasons where she set out the correct statutory test in full, and I do not doubt that she was aware of it. If one is going to summarise statutory criteria, it is obviously desirable to do so as accurately as possible. The use of these inaccurate summaries would cause me concern if they appeared to have influenced her Honour's ultimate decision; but Mr Fernando's case, as presented to her Honour, came nowhere near satisfying the statutory criteria.

59. Finally, Mr Fernando's counsel criticised her Honour's statement (in paragraph [37] of her reasons) that "it would not be within the purposes of the Act to apply s160(3) where defaulters have blatantly and wilfully decided that they would neither pay the fines they have incurred, nor face any consequence for their offending".

60. Parliament was clearly concerned to deal with the problem which was described in the Second Reading Speech as "a small group [who] are recalcitrant and ignore the court's orders"[11] and, through the Act, sought to redress any perception that compliance with the infringements system was optional.[12] Her Honour's reference to defaulters who "have blatantly and wilfully decided that they would neither pay the fines they have incurred, nor face any consequence for their offending" is a reasonably accurate description of the recalcitrant group who were of concern to parliament.

61. It is true that parliament did not seek to deal with this problem group by introducing a provision requiring the court to specifically consider whether the offender's default was "blatant and wilful". But, it does not follow that an offender's state of mind or intentions must be completely irrelevant, in considering whether the offender's situation is such that imprisonment would be "excessive, disproportionate and unduly harsh".

62. If her Honour had said that s160(3) could never apply to a person whose default was wilful and blatant, that would be an incorrect statement of the law. However, I do not read her Honour's words as such a bald statement. Read fairly, and in the context of the reasons as a whole, I conclude that she was saying no more than that one of the purposes behind the Act was to deal with the recalcitrant group who think that compliance with the law is optional.[13]

63. Even where an error of law on the face of the record is made out, relief in the nature of *certiorari* is a discretionary remedy, not a matter of right. Matters which may be relevant to the exercise of the discretion include the utility of the relief, the conduct of the applicant, and the public interest in there being an end to litigation. These discretionary matters were not matters which were addressed before me, as all parties proceeded on the erroneous assumption that this was an appeal under s272 of the *Criminal Procedure Act*, or that the same matters needed to be addressed under that Act and under order 56. In the circumstances, it is not appropriate for me to make any binding findings about whether or not Mr Fernando would succeed in an application under order 56.

64. In the circumstances, I propose simply to dismiss the appeal on the basis that there is no power to bring it under s272.

65. I will hear from the parties as to costs.

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[1] Section 69 of the *Sentencing Act* provides that the Division of that Act which includes s61 "does not apply to the use of the procedures for the enforcement of infringement penalties under the *Infringements Act*."
[2] Section 27 of the *Criminal Procedure Act* deals with summary offences. The note to that section provides that "The procedure set out in the *Infringements Act* 2006 may be used instead of commencing a proceeding

for certain offences. See section 99 of the *Magistrates' Court Act* 1989."
[3] Section 99 of the *Magistrates' Court Act* provides that:
The procedure set out in the *Infringements Act* 2006 may be used instead of commencing a proceeding against a person for an offence –
(a) for which an infringement notice within the meaning of that Act could be issued or served in respect of an offence under an Act or other instrument which establishes the offence; and
(b) which is a lodgeable infringement offence within the meaning of the *Infringements Act* 2006.
[4] The magistrate's written reasons form part of the record: *Administrative Law Act* 1978 s10.
[5] I assume her Honour meant "my interpretation", not "my interpolation".
[6] *Interpretation of Legislation Act* 1984 s35.
[7] This is a matter which may have been relevant to the discretionary aspect of relief in the nature of *certiorari*, were I hearing an application for judicial review.
[8] *Hansard*, Parliament of Victoria, 16 November 2005 at pp 2186-7.
[9] *Ibid* at p 2187.
[10] *Ibid* at pp 2189-90.
[11] *Ibid* at p 2188.
[12] *Ibid* at p 2189.
[13] Were this a merits review, I would observe at this point that her Honour's conclusion that Mr Fernando fits within this recalcitrant group was perfectly open to her on the evidence.

APPEARANCES: For the appellant Fernando: Mr T Marsh, counsel. Victoria Legal Aid. For the first respondent Port Phillip Council: Mr B Stafford, counsel. Elliott Stafford & Associates, solicitors. For the second, sixth and seventh respondents: Mr M Roper, counsel. Solicitor for Public Prosecutions. For the other respondents: No appearance.
