



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

BETWEEN:

KMD
Appellant

and

CEO (DEPARTMENT OF HEALTH NT)
First Respondent

and

THE KING
Second Respondent

and

CEO (ATTORNEY-GENERAL FOR THE NT)
Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST RESPONDENT

Part I: FORM OF SUBMISSIONS

This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Preliminary procedural issue with affidavit of KMD filed 31 January 2025

1. The Court cannot receive the affidavit as evidence (rather than as a submission) because this is an appeal in the strict sense: *Coal and Allied* (2000) 203 CLR 194 (**JBA V3 T16**), [12].

The appropriate standard of review in the NTCCA

2. Characterisation of a judicial process as discretionary (in the sense of tolerating a range of outcomes) or as demanding a unique outcome involves construction of the governing statute: **RS [15]-[16]**; *SZVFW* (2018) 264 CLR 541 (**JBA V5 T35**), [49], [150]-[151]; *GLJ* (2023) 97 ALJR 857 (**JBA V9 T64**), [15]-[16]; *Moore* (2024) 98 ALJR 1119 (**JBA V9 T70**), [15].
3. Section 43ZH(2) imposes a fixed legal criterion which is controlling: **RS [17]-[19]**. The legislation permits of only one correct answer: *Norbis* (1986) 161 CLR 513 (**JBA V6 T39**), 518; *Moore* (2024) 98 ALJR 1119, [15].
4. Other provisions (e.g. ss 43ZH(1) and 43ZA) feature language consistent with the conferral of a discretion (“may”, what the court “considers ... appropriate”). See also ss 43I(3), 43O, 43R(5), 43Y(1) (such orders as the court “considers just”): **RS [20]**.
5. The subject matter of s 43ZH is serious, affects the public and demands a uniquely correct outcome: **RS [22]-[23]**; *GLJ* (2023) 97 ALJR 857, [17], [21], [26]; *SZVFW* (2018) 264 CLR 541, [153]. Contrast situations involving purely individual interests and balancing of competing considerations.
6. The correctness standard serves to achieve justice in each individual case (*SZVFW* (2018) 264 CLR 541, [41]) and to meet the objects of the Act: ss 43ZM, 43ZA(2).
7. The first instance judge in the scheme has no particular expertise warranting restraint by the appeal court: **RS [24]**; *SZVFW* (2018) 264 CLR 541, [153].

8. The “evaluative” nature of the exercise does not mean the correctness standard is inapt: **RS [33]-[35]**; *Moore* (2024) 98 ALJR 1119, [15]; *SZVFW* (2018) 264 CLR 541, [25], [46]. There are multiple examples of evaluative exercises where the correctness standard has been held to apply: **RS [34]**; *Moore* (2024) 98 ALJR 1119, [18] (s 137 *Evidence Act*); *Connelly* (2024) 73 VR 257 (**JBA V9 T62**), [38]-[40] (whether injury is “very considerable”); *Bauer* (2018) 266 CLR 56 (**JBA V6 T45**), [61] (whether evidence has “significant probative value”); *Naaman* (2018) 365 ALR 179 (**JBA V10 T73**), [15] (unacceptable risk of committing a serious terrorism offence).
9. The requirement to be “satisfied” of a factum does not signify a discretion: **RS [30]-[32]**; *Naaman* (2018) 365 ALR 179 (NSWCA), [15], [18] and [20] (**JBA V10 T73**).
10. The binary nature of the outcome is a relevant factor supporting the correctness standard: **RS [19]**; *Mann* [2023] NSWCCA 256 (**JBA V9 T67**), [19]; *GLJ* (2023) 97 ALJR 857, [23].
11. There is a necessary connection between the criterion in s 43ZH(2) and the power to impose conditions in s 43ZA: **RS [26]-[29]**. A determination of the “appropriate” conditions to be imposed would be discretionary in the relevant sense. However, contemplating a potential set of conditions bearing on safety of the person and the public for the purposes of s 43ZH(2) does not convert the exercise into a discretionary one: *Naaman* (2018) 365 ALR 179, [15], [20], [59]-[60], [98].
12. The CCA’s conclusion is consistent with the treatment of analogous provisions: **RS [21]**; *GLJ* (2023) 97 ALJR 857; *Connelly* (2024) 73 VR 257, [38]; *Dwyer* (2008) 234 CLR 124 (**JBA V3 T18**), [40]-[41]. *Singer* (1994) 181 CLR 201 (**JBA V7 T48**) does not support the appellant’s case: 208, 211-2, 227-8; *SZVFW* (2018) 264 CLR 541, [45].

Materiality of ground 1 if the CCA erred

13. If the CCA should have reviewed expressly for *House v King* error, it found such error in any event: **RS [37]-[38]**; CCA [76], [193]-[196] (**CAB 245-7, 300-301**); *Moore* (2024) 98 ALJR 1119, [14], [16].

Ground 4: Majority imposing requirement to engage with psychiatrists

14. Fairly read, the majority did not treat s 43ZN(2) as imposing a legal rule that a person cannot be released upon an NCSO unless they have engaged with the relevant experts:

RS [39]-[41]. Their Honours were making orthodox observations about the state of the evidence. They considered the forensic consequences for the appellant of not so engaging, given the history and facts of this case: CCA [185]-[190] (**CAB 296-299**).

Grounds 2 and 3: Procedural fairness and failure to invite tender of further evidence

15. Both grounds fall to be determined by consideration of the transcript: **RS [42]**. The exchanges recorded must be read fairly in the context of an adversarial process where the parties were represented by counsel, and the respective roles of the Court and parties were well known: **RS [50]**; *GLJ* (2023) 97 ALJR 857, [19]. The relevant question is whether the appellant was deprived of a reasonable opportunity to present her case: **RS [43]**; *Lam* (2003) 214 CLR 1 (**JBA V6 T47**), [37]; *WZARH* (2015) 256 CLR 326 (**JBA V5 T36**), [35].
16. Viewed fairly and objectively, no reasonable expectation was created by the Court that the parties would be given a further hearing in the event that error was found: **RS [44]-[46]**; ABFM pp 6.44-45; 7.1-15; 8.29-34, 9.1-12; 9.47; 10.1-2; 12.17-24; 18.21-23, 20.15-16; 71.28-35; 72.1-5; 72.14-33; 75.17.
17. The appellant must be taken to have understood that it was a matter for her to seek to adduce any further evidence relevant to a re-exercise of the discretion: *GLJ* (2023) 97 ALJR 857, [19]. The Court did not forestall this and did not need to invite any application: **RS [47]**; cf *Cumberland* (2020) 94 ALJR 656 (**JBA V9 T61**).

Relief and disposition

18. If the appellant is successful on any of the grounds of appeal, the Court should set aside order 4 and remit the matter to the CCA: **RS [54]-[56]**; **CAB 302**. It would not be practical or appropriate for this Court to review the trial judge's reasons to decide whether they were affected by *House v King* error. Nor can the Court itself re-exercise the power: A2 (2019) 269 CLR 507 (**JBA V6 T44**), [115]. The relevant material is not before the Court (**CAB 304-9**) and the point has not been properly argued. The Court refused special leave in respect of ground 5 in the application for special leave, which invited the Court to adopt the dissenting view of Blokland J: **CAB 312, Order 2**.

Dated: 10 February 2025


Stephen Free SC