HIGH COURT OF AUSTRALIA

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Details of Filing

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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

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. On 5 July 2023, Brownhill J ordered[1] that KMD, who was on a custodial supervision order (the **CSO**) under Pt IIA of the **Criminal Code**,[2] be released on a non-custodial supervision order (the **NCSO**), as required by s 43ZH(2)(a) where her Honour was not "satisfied on the evidence available that the safety of [KMD] or the public [would] be seriously at risk" if that occurred. A year later, the Northern Territory Court of Criminal Appeal (the **NTCCA**), allowed an appeal, set aside the NCSO and restored the CSO.

3. This appeal, by special leave on four grounds, gives rise to six issues.

4. *First*, what was the appropriate standard of appellate review? The NTCCA majority held it was the correctness standard. KMD says it was the standard identified with ***House*** *v The King* (1936) 55 CLR 499, for reasons set out in [18]–[34] below.

5. *Second*, the NTCCA majority having found that the correctness standard applied, did it then in fact apply the correctness standard? KMD says that it did: see [35]–[42] below.

6. *Third*, did the Criminal Code require KMD to engage with persons preparing reports to satisfy the requirement in s 43ZN(2)(a)(i), such that declining to do so caused the review process to "miscarry" or "skew"? KMD says it did not: see [43]–[49] below.

7. *Fourth*, did the conduct of the hearing before the NTCCA foreshadow that an opportunity would be given to adduce updating evidence as to KMD's year in the community on the NCSO, and if so was the failure to adhere to that course productive of procedural unfairness? KMD says it did, and there was procedural unfairness: see [55]–[61] below.

8. *Fifth*, where the power conferred by s 43ZN requires a view to be formed as to future risk as at the time of the making of an order, was it erroneous for the NTCCA to re-exercise that power without seeking or receiving any evidence as to the period between Brownhill J's judgment and its own, covering KMD's year in the community? KMD says it was: see [62]–[65] below.

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1 For reasons in *The Queen v* ***KMD*** *& Ors* ***(No 5)*** [2022] NTSC 69 (Core Appeal Book (**CAB**), tab 2) and *The King v* ***KMD*** *& Ors* ***(No 6)*** [2023] NTSC 51 (CAB, tab 3).

2 Schedule 1 to the *Criminal Code Act 1983* (NT).

9. *Sixth*, what relief should issue? See [50] (grounds 1 and 4) and [66] (grounds 2 and 3).

Part III: Section 78B notice

10. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

11. The citations for the decisions below are: *The Queen v KMD & Ors (No 5)* [2022] NTSC 69 (CAB 7–92); *The King v KMD & Ors (No 6)* [2023] NTSC 51 (CAB 93–187); *The Chief Executive Officer Department of Health v KMD & Ors* [2024] NTCCA 8 (**CA**) (CAB 200–301).

Part V: Facts

12. KMD was charged with offences arising out of events occurring on 7 May 2013, and was taken into custody that day.[3] In May 2014 she was declared unfit to stand trial,[4] and in July 2014 she was found not guilty by reason of mental impairment.[5] KMD says, and has always said, that she believed it would be harmful to her son for her not to believe the nature of his disclosures to her,[6] that she should have had an ordinary trial and sentence, and that she should not have been put into indefinite detention under Pt IIA of the Criminal Code.[7]

13. Chief Justice Riley then declared her liable to supervision,[8] imposed an interim supervision order[9] and, on 3 June 2015, made the CSO.[10]

14. CSOs have indefinite operation (s 43ZC), but they may be periodically reviewed by the Supreme Court: s 43ZH. On review, the Court must vary the CSO to an NCSO unless satisfied that the safety of the supervised person or the public will be "seriously at risk if the person is released on [an NCSO]" (s 43ZH(2)(a)). If the Court is so satisfied, it may confirm the CSO or vary its conditions, including the place of custody (s 43ZH(2)(b)).

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3 *The Queen v **KMD*** [2015] NTSC 31, [3]–[5], [31] (Riley CJ).

4 *KMD* [2015] NTSC 31, [1] (Riley CJ).

5 *KMD* [2015] NTSC 31, [3] (Riley CJ).

6 See, eg, *KMD (No 6)* [2023] NTSC 51 at [109] (indented quote); *KMD (No 5)* [2022] NTSC 69 at [39].

7 See *KMD (No 5)* at [131] (Brownhill J), CAB 79.

8 *KMD* [2015] NTSC 31, [4] (Riley CJ).

9 *KMD* [2015] NTSC 31, [5] (Riley CJ).

10 *KMD* [2015] NTSC 31 (Riley CJ).

15. In periodic reviews by Hiley J on 26 July 2017[11] and 10 March 2021,[12] the risk described in s 43ZH(2) was found to be present, and the CSO was confirmed, partly because KMD had refused certain treatment,[13] but fundamentally because "she believes that she does not have a relevant mental illness".[14]

16. In 2022 and 2023, Brownhill J conducted a further periodic review. Before her Honour were reports by Dr Mrigendra Das, a consultant forensic psychiatrist forming part of the "Forensic Mental Health Team" (**FMHT**) within the Top End Mental Health Service.[15] He had been "assigned" as KMD's treating psychiatrist, but in practice KMD declined to engage with him or FMHT.[16] Dr Das's evidence was that, for as long as this continued, he anticipated "coming back to court year after year and saying that KMD's risk had not changed".[17] Justice Brownhill found "unacceptable" the proposition[18] that KMD could not be released from custody until she exposed her belief system and thinking to FMHT and accepted (or at least gave consideration to accepting) medication — such that "[i]f, for reasons including her delusional belief system … , she refuses to so engage for the remainder of her life, she would be held in custody until she dies".[19]

17. Justice Brownhill's second judgment gave detailed reasons for assessing that, under the NCSO her Honour proposed to make, KMD would not pose the s 43ZH(2) risk.[20] The Court released KMD on the NCSO with effect on 12 July 2023.[21] For a year, she lived in the community and, as the First Respondent (**CEO (Health)**) accepted at the hearing of the appeal, "essentially complied with the orders imposed".[22] But on 23 July 2024, the NTCCA allowed the appeal by majority (Reeves and Burns JJ, Blokland J dissenting). The CSO was restored, returning KMD to prison.

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11 *The Queen v **KMD** & Ors **(No 3)*** [2017] NTSC 95 (Hiley J).

12 *The Queen v **KMD** & Ors **(No 4)*** [2021] NTSC 27 (Hiley J).

13 *KMD (No 3)* [2017] NTSC 95, [129]–[130] (Hiley J); *KMD (No 4)* [2021] NTSC 27, [59], [63]–[66] (Hiley J).

14 *KMD (No 3)* [2017] NTSC 95, [48] (Hiley J).

15 *KMD (No 5)* [2021] NTSC 147, [24] (Brownhill J), CAB 19.

16 *KMD (No 5)* [2021] NTSC 147, [32] (Brownhill J), CAB 23.

17 *KMD (No 5)* [2021] NTSC 147, [58] (Brownhill J), CAB 29.

18 Cf. *KMD (No 3)* [2017] NTSC 95, [130]; *KMD (No 4)* [2021] NTSC 27, [64].

19 *KMD (No 5)* [2021] NTSC 147, [147] (Brownhill J), CAB 88.

20 *KMD (No 6)* [2023] NTSC 51, [167], CAB 163.

21 Orders of Brownhill J dated 5 July 2023, CAB 190–4.

22 Transcript, p8, Appellant's Book of Further Materials (**ABFM**) 11.

Part VI: Argument

Ground 1: the NTCCA erroneously applied the correctness standard

18. *The majority erred in holding that the correctness standard applied.* The majority applied the "correctness standard" of appellate review, described in ***Warren*** *v Coombes* (1979) 142 CLR 531 as being that a court's "duty … is to decide the case — the facts as well as the law — for itself" (CAB 250, [85]).[23] That is to be contrasted with the standard identified in *House* (1936) 55 CLR 499 for appellate review of judgments "depend[ing] upon the exercise of a judicial discretion",[24] where "discretion" means that more than one answer is legally open.[25] Applying the *House* standard, a court: (1) will disturb the primary judgment only if "some error has been made in exercising the discretion"; and (2) will not disturb it only because the appellate court "would have taken a different course".[26]

19. The majority applied the correctness standard based upon a misunderstanding of *Minister for Immigration and Border Protection v* ***SZVFW*** (2018) 264 CLR 541, [83] (Gageler J) and of *GLJ* (2023) 97 ALJR 857, [16] (Kiefel CJ, Gageler and Jagot JJ). The majority treated these passages as meaning that where a judge's decision is framed so as to be between two outcomes, and is in that sense binary or "stark", it necessarily follows that the correctness standard applies to an appeal from the decision: CAB 47 [83]–[84], 252 [92]–[93].

20. The major premise is wrong: there are "many binary choices to which a [*House*] type standard is applied on appellate review".[27] In ***Singer*** *v Berghouse* (1994) 181 CLR 201, the *House* standard was applied to review of decisions of a "jurisdictional question"[28] that was binary — family provision was or was not adequate.[29] As Gageler J observed in *SZVFW* at [45], the holding in *Singer* was "necessarily to postulate that both

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23 *Warren* (1979) 142 CLR 531, 552 (Gibbs ACJ, Jacobs and Murphy JJ).

24 *House* (1936) 55 CLR 499, 504 (Dixon, Evatt and McTiernan JJ).

25 ***GLJ*** *v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, [15] (Kiefel CJ, Gageler and Jagot JJ).

26 *House* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ).

27 *Mann v R* [2023] NSWCCA 256, [19] (Kirk JA, there giving as one example "decisions to grant adjournments"; N Adams J and R A Hulme AJ agreeing). See also Thomas Prince, "Recurring Issues in Civil Appeals — Part 1" (2022) 96 ALJ 203 at 215, concerning "[d]ecisions posing a binary choice which are nevertheless discretionary".

28 *Singer* (1994) 181 CLR 201, 212 (Mason CJ, Deane and McHugh JJ), agreeing with *Golosky v Golosky* unreported, NSW Court of Appeal, 5 October 1993, at 13–14 (Kirby P).

29 *Singer* (1994) 181 CLR 201, 208 (Mason CJ, Deane and McHugh JJ), 226 (Gaudron J).

determinations" could be "legally permissible" on given facts (underlining added).

21. The standard of review depends not on the number of outcomes theoretically available; it depends on the nature of the legal criteria governing the decision, and in particular whether they "demand[] a unique outcome"[30] or are such that "more than one answer" would be "legally open".[31] The question being "evaluative" or involving "value judgments" does not, *ipso facto*, mean that a decision is discretionary.[32] However, where the nature of the task or the involvement of value judgments means that a second evaluative outcome is "no better than the first" — *i.e.*, both are legally permissible — then the *House* standard of judicial restraint applies.[33]

10 22. The minor premise was also wrong, because s 43ZH(2) does not present a binary choice. The criteria that governed the primary judgment were in s 43ZH of the Criminal Code, read with s 43ZA and assessed upon the principle and considerations in ss 43ZM and 43ZN. The scheme that they erect leaves legally open different answers on given facts, and so attracts the *House* standard. That is so for the following reasons.

23. *First*, the task for the Court under Pt IIA involves interrelationship between s 43ZH(2), s 43ZA and Divs 6 and 7 of Pt IIA. Section 43ZA introduces broad discretion ("subject to the conditions the court considers appropriate"). The test in s 43ZH(2) — risk if a person is released on "a non-custodial supervision order" — cannot be answered purely in the abstract, divorced from what that NCSO might entail. Rather, risk "depends
20 significantly" on what conditions would attach to such an order,[34] which is to be determined by the exercise of the discretion in s 43ZA(1) (within only such limits as would be implied[35]). The decision to be made under s 43ZH(2) is therefore not one "the

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30 *SZVFW* (2018) 264 CLR 541, [49] (Gageler J), see also *GLJ* (2023) 97 ALJR 857, [16] (Kiefel CJ, Gageler and Jagot JJ); ***Moore*** *(a pseudonym) v The King* (2024) 98 ALJR 1119, [15] (the Court).

31 *GLJ* (2023) 97 ALJR 857, [16] (Kiefel CJ, Gageler and Jagot JJ), ***Norbis*** *v Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ, Brennan J agreeing at 536), *Moore* (2024) 98 ALJR 1119, [15] (the Court).

32 *GLJ* (2023) 97 ALJR 857, [15]–[16] (Kiefel CJ, Gageler and Jagot JJ); *Moore* (2024) 98 ALJR 1119, [15] (the Court); *SZVFW* (2018) 264 CLR 541, [49] (Gageler J).

33 *GLJ* (2023) 97 ALJR 857, [15]–[16] (Kiefel CJ, Gageler and Jagot JJ); *Moore* (2024) 98 ALJR 1119, [15] (the Court); *SZVFW* (2018) 264 CLR 541, [49] (Gageler J).

34 *KMD (No 5)* [2022] NTSC, [144] (Brownhill J), CAB 87. Further, CA[3]–[4] (CAB 204), [9]–[12] (CAB 207–212). See also ***Garlett*** *v Western Australia* (2022) 277 CLR 1, [103] (Kiefel CJ, Keane and Steward JJ).

35 *Owners of Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404, 421 (the Court); *PMT Partners Pty Ltd (in liq) v Australian National Parks & Wildlife Service* (1995) 184 CLR 301, 313 (Brennan CJ, Gaudron and McHugh JJ).

making of which is dictated by the application of a fixed rule to the facts".[36]

24. Appropriate NCSO conditions are informed by the level and nature of the risk, as well as the relevant person's circumstances (such as existence of available supports in the community). The precise content of the NCSO by reference to which s 43ZH(2) is considered is thus widely variable. A judge might impose very stringent or very relaxed conditions, depending on their view of risk and circumstances. If, having considered possible and appropriate NCSO conditions, the judge forms the state of satisfaction in s 43ZH(2), there remains discretion — to confirm the CSO in its present form, or to vary the present conditions: s 43ZH(2)(b).

25. Construing s 43ZH(2) as informed by the conditions that might be imposed under s 43ZA is supported by s 43ZN(1)(f), which requires consideration whether the accused person is likely to comply with "the conditions of the supervision order", not of "a" supervision order. This can only meaningfully be considered if the judge turns their mind to what those conditions might be. Conversely, if "a non-custodial supervision order" in s 43ZH(2) meant "any NCSO" (without concrete consideration of what conditions might manage the risk in question), then the judge would have insufficient data to answer the question of risk posed by s 43ZH(2).

26. For this reason, the task does not demand a unique outcome.[37] It is a form of "judgment … depend[ing] upon the exercise of a judicial discretion" — the discretion as to conditions.[38] That attracts the *House* standard. Further, it would be contrary to "dictates of principled decision-making" for decisions under s 43ZH(2) to be reviewed to a correctness standard when such review would turn on a judgment as to conditions likely "no better than the first".[39]

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36 Cf. *Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ, Brennan J agreeing at 536). Similarly: ***Coal and Allied*** *Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, [19] (Gleeson CJ, Gaudron and Hayne JJ) quoting *Jago v District Court (NSW)* (1989) 168 CLR 23, 76 (Gaudron J).

37 Put otherwise, it would be "artificial" to say that "discretion begins" only with the second of the "twin tasks" of deciding the kind and then the conditions of the order: cf. *Singer* (1994) 181 CLR 201, 210–11 (Mason CJ, Deane and McHugh JJ), quoting *White v Barron* (1980) 144 CLR 431, 443 (Mason J). See further *Singer* at 210, identifying that, in provisions there dealt with, "in the first stage of the process" it may become "necessary to embark upon the second stage of the process".

38 *House* (1936) 55 CLR 499, 504 (Dixon, Evatt and McTiernan JJ), underlining added.

39 *Norbis* (1986) 161 CLR 513, 518–19 (Mason and Deane JJ, Brennan J agreeing at 536). Further: *Singer* (1994) 181 CLR 201, 212 (Mason CJ, Deane and McHugh JJ), quoting *Golosky v Golosky* unreported, NSW Court of Appeal, 5 October 1993, at 13–14 (Kirby P); *SZVFW* (2018) 264 CLR 541, [49] (Gageler J).

27. *Second*, appeals are creatures of statute so that their nature is a question of statutory construction.[40] Here, the legislature expressly conditioned the decision as to whether a CSO or NCSO should be imposed on a subjective criterion: whether the court is "satisfied on the evidence" of the risk referred to in s 43ZH(2)(a) and (b). Section 43ZH(2) is thus a paradigm case of the "narrow" kind of discretion identified in *Coal and Allied* as attracting the *House* standard: "where … the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment".[41] In *Coal and Allied*, the question for the primary judge (Boulton J) was whether his Honour was "satisfied" that particular industrial action was (relevantly) threatening to endanger the welfare of part of the population, or to cause significant damage to the Australian economy or an important part of it (see [2]–[3]). Despite that those questions are binary — the action either does or does not threaten so to endanger or cause — the *House* standard applied (Gleeson CJ, Gaudron and Hayne JJ at [20]): "[a]lthough that question had to be determined by reference to the facts and circumstances …, the threat as to which his Honour had to be satisfied was one that involved a degree of subjectivity. In a broad sense, therefore, that decision can be described as a discretionary decision". See also at [28].

28. The same is true in relation to *Singer*.[42]

29. As in *Coal and Allied*, in s 43ZH(2), "the use of the word 'satisfied' … makes it plain that it is the evaluation by the repository of the power (rather than the demonstrable objective existence of specified circumstances) that is the essential precondition."[43] Use of the word "satisfied" is an "established drafting technique" to turn a decision on the formation of a state of mind, rather than on an objective fact.[44] The technique operates in s 43ZH(2), as in administrative contexts, to require a "degree of persuasion" as to a value-

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40 *Coal and Allied* (2000) 203 CLR 194, [11] (Gleeson CJ, Gaudron and Hayne JJ); *SZVFW* (2018) 264 CLR 541, [29] (Gageler J).

41 *Coal and Allied* (2000) 203 CLR 194, [19] (Gleeson CJ, Gaudron and Hayne JJ). Cf *Singer* (1994) 181 CLR 201, 226 (Gaudron J, 'where a subjective assessment … is concerned, appellate review depends on essentially the same considerations as those which apply in cases involving the exercise of a discretion").

42 See the *Family Provision Act 1982* (NSW), s 9(2) in *Singer* (1994) 181 CLR 201, 224–225 (Gaudron J), see then 212 (Mason CJ, Deane and McHugh JJ). See also, *e.g.*, *Chaarani v DPP (Cth)* [2018] VSCA 299 at [38]-[39] (Maxwell P, Beach and Hargrave JJA). Compare ***Enares*** *Pty Ltd v Nimble Money Ltd* (2022) 294 FCR 31 at [36] (Farrell, Markovic and Derrington JJ).

43 *Coal and Allied* (2000) 203 CLR 194, [76(2)] (Kirby J), and similarly at [48].

44 ***Wilkie*** *v The Commonwealth* (2017) 263 CLR 487, [98] (the Court); *Plaintiff* ***M70****/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, [57] (French CJ).

laden matter,[45] and to designate the body whose persuasion or non-persuasion determines the exercise of the power.[46] The correctness standard is incompatible with this feature of s 43ZH(2). It would be unprincipled for an appellate court to determine the correct decision "for itself", when the legal correctness of a s 43ZH(2) decision turns on whether the primary judge attained the required state of satisfaction. Recognising that "guidance may be found in the close analogy between judicial review of administrative action and appellate review of a judicial discretion",[47] use of the criterion of "satisfaction" indicates that appellate review is for legal errors as described in *House*.[48]

30. Turning the function on the satisfaction of a Supreme Court judge was fundamental to achieving the Assembly's object: "these are not questions to be answered by politicians … Courts have the role and responsibility of balancing the rights of individuals with the protection of the community. This legislation will therefore provide for the Supreme Court to determine questions of detention and release".[49]

31. *Third*, the matter on which the court must reach a state of satisfaction is whether the safety of the supervised person or the public will be seriously at risk if the person is released on an NCSO: s 43ZH(2)(a). Predictions of dangerousness are "notoriously

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45 *Minister for Immigration v **Jia** Legeng* (2001) 205 CLR 507, [190] (Hayne J).

46 Compare *Wilkie* (2017) 263 CLR 487, [98] (the Court), *M70* (2011) 244 CLR 144, [57] (French CJ); *Jia* (2001) 205 CLR 507, [73] (Gleeson CJ and Gummow J); *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, [34], [59] (Gleeson CJ, Gummow, Kirby and Hayne JJ); *Minister for Immigration v **Eshetu*** (1999) 197 CLR 611, [131]–[137] (Gummow J); *Buck v Bavone* (1976) 135 CLR 110, 118–119 (Gibbs J); *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 432 (Latham CJ).

47 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 41–42 (Mason J). See further, *Minister for Immigration and Citizenship v **Li*** (2013) 249 CLR 332, [68], [75]–[76] (Hayne, Kiefel and Bell JJ), [110] (Gageler J); *Re Minister for Immigration and Multicultural Affairs; ex parte S20/2002* (2003) 77 ALJR 1165, [68]–[69] (McHugh and Gummow JJ); *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 (Dixon CJ).

48 See *Avon Downs Pty Ltd v Commissioner of Taxation (Cth)* (1949) 78 CLR 353, 360 (Dixon J), "evidently informed" by "the principles governing the review of judicial discretion": *Li* (2013) 249 CLR 332, [68] (Hayne, Kiefel and Bell JJ). See also *Enares* (2022) 294 FCR 31, [36] (Farrell, Markovic and Derrington JJ); *Iqbal v Hotel Operations Solutions Pty Ltd* [2022] NSWCA 121, [45] (Ward P, Simpson AJA); *Commissioner of Taxation v Apted* (2021) 284 FCR 93, [112] (Thawley J, Allsop CJ agreeing).

49 Legislative Assembly, *Debates*, 15 May 2002, 1227. See also 1228.

difficult",[50] and "may be unreliable".[51] They thus "lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions" — attracting *House* review.[52] Further, the adjective "seriously" requires a "judgment as to the nature and extent of the harm said to be in prospect".[53]

32. In *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, the Victorian Court of Appeal held that the primary judge's decision, which turned on satisfaction as to "unacceptable risk", was discretionary, so as to attract the *House* standard (at [38]–[64]). And in *NOM v Director of Public Prosecutions* (2012) 38 VR 618, the Victorian Court of Appeal held that an appeal from a decision under the Victorian legislation cognate to Pt IIA of the Criminal Code attracted the *House* standard, because it was "an appeal from a discretionary, or at the least, quasi-discretionary, judgment" (at [41]–[48]). Earlier, in *RDM v Director of Public Prosecutions* [1999] 2 VR 270, Winneke P appeared (at [65]) to impose an even stricter standard.

33. The predictions required by s 43ZH(2) are evaluative,[54] including in that they leave an area of choice in assigning weight to evidence bearing on risk.[55] The court weighs the magnitude of possible harms and their likelihood,[56] and does so: (1) applying the principle concerning liberty in s 43ZM;[57] (2) having regard to the mandatory

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50 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 123 (McHugh J); see also ***Veen*** *v The Queen* (1979) 143 CLR 458, 464 (Stephen J, "prediction of behaviour … is … most difficult"); *McGarry v The Queen* (2001) 207 CLR 121, [61] (Kirby J, referring to a "realistic acknowledgment of the limitations experienced by judicial officers … in predicting dangerousness accurately and estimating what people will do in the future").

51 ***Fardon*** *v Attorney-General (Qld)* (2004) 223 CLR 575, [12] (Gleeson CJ); see also *Veen* (1979) 143 CLR 458, 464 (Stephen J, describing "[p]redictions as to future violence, even when based upon extensive clinical investigation" as being "prone to very significant degrees of error").

52 *Norbis* (1986) 161 CLR 513, 518 (Mason and Deane JJ); *SZVFW* (2018) 264 CLR 541, [44] (Gageler J); *GLJ* (2023) 97 ALJR 857, [16] (Kiefel CJ, Gageler and Jagot JJ).

53 See, as to "unacceptable", *Garlett v Western Australia* (2022) 277 CLR 1 at [73] (Kiefel CJ, Keane and Steward JJ). And see their Honours at [84] and [86], and Edelman J at [225]–[228]. The precise adjective used is less important than its function: as to the limits of definition using different adjectives, see *M v M* (1988) 166 CLR 69, 78 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).

54 *Garlett* (2022) 277 CLR 1, [29], [55]–[56], [64], [67], [72]–[73], [84], [97] and [107] (Kiefel CJ, Keane and Steward JJ). Predictions as to danger are part of the sentencing function, which is discretionary: ***Thomas*** *v Mowbray* (2007) 233 CLR 307, [28] (Gleeson CJ), [595] (Callinan J); *Fardon* (2004) 223 CLR 575, [226] (Callinan and Heydon JJ); *Veen v The Queen [No 2]* (1988) 164 CLR 465.

55 *Thomas* (2007) 233 CLR 307, [98] (Gleeson CJ), see also *Eshetu* (1999) 197 CLR 611, [137] (Gummow J), ***CDJ*** *v VAJ* (1998) 197 CLR 172, [186(1)] (Kirby J, contemplating *House v The King* review applying "where the decision under appeal is discretionary or involves quasi-discretionary evaluation").

56 *KMD* [2015] NTSC 31 at [39] (Riley CJ); *KMD (No 5)* [2022] NTSC, [50] (Brownhill J), CAB 32; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, [6], [167] (Redlich, Osborn and Priest JJA); Minister for Home Affairs v Benbrika (2022) 366 FLR 32, [49]–[50] (Hollingworth J).

57 See further *KMD (No 5)* [2022] NTSC 69, [50] (Brownhill J), CAB 32.

considerations set out in s 43ZN, many of which are themselves evaluative — *e.g.*, whether there are "adequate" resources for treatment and support in the community, the relationship between the mental impairment and the offending conduct, likelihood of compliance with orders, *etc.*; (3) with regard, indeed, to "any other matter [it] considers relevant" (s 43ZN(1)(g)), which may differ from decision-maker to decision-maker; (4) having regard to other matters inviting value judgment, namely the views of the victim or next of kin concerning the conduct of the supervised person or its impacts, or views of Aboriginal communities: s 43ZL(1)(a)–(b), (3)–(4).

34. For all these reasons, decisions under s 43ZH(2) attract the *House* standard. That serves "the real object of the legislature … to leave scope for the judicial … officer who is investigating the facts and considering the general purpose of the enactment to give effect to [their] view of the justice of the case".[58] The majority erred in finding that the correctness standard was "dictate[d]" in the appeal: CAB 250 [85].

35. *The majority in fact applied the correctness standard.* Consistently with their conclusion at CAB 250 [85], the majority applied the correctness standard. The majority gave brief reasons (CAB 293–301 [180]–[196]) for overturning two lengthy "major judgments".[59] Despite the brevity of their reasons, it is clear that the majority applied the correctness standard. After all, the majority said that identification of the applicable standard "affect[ed] [their] task" (CAB 248, [80]), held the correctness standard applied (CAB 250 [85]), and did not give any indication that (despite this, or alternatively) the majority proposed to apply the *House* standard.

36. Within the "Consideration" section (CAB 293–301 [180]–[196]), express identification of error is limited to CAB 299–301 [192]–[195]. Before those paragraphs, there is a review of the statutory scheme. At [185], the majority considered s 43ZN(2)(a)(i), which required the court to obtain and consider 2 reports, each report being prepared by a person who is a psychiatrist or other expert, before releasing a supervised person from custody. This requirement, they opined, "protects the interests of the supervised person and the interests of the public": CAB 296–7 [185]–[186].

37. The majority found that it was "effectively impossible" for Brownhill J to make a proper assessment of risk where KMD had not spoken with Professor Ogloff, the author of the

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58 *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473 (Dixon CJ).

59 CAB 218 [25] (Blokland J).

s 43ZN(2)(a)(i) report provided by the CEO (Health) (CAB 297 [187]), gave weight to the fact that Professor Ogloff's opinions were therefore "dated and second-hand" (CA[188]), and expressed views about the worth of various witnesses' evidence and the level of relevant skill or experience of one of those witnesses in conducting forensic interviewing for the purpose of determining and diagnosing mental illness (CAB 298–9 [189]). The majority also made observations about the effect of non-engagement on opinions expressed by Dr Das (who was not the author of any s 43ZN(2)(a)(i) report). This passage is correctness-standard reasoning. Had their Honours engaged in *House* review, they would have identified how their differing view of the evidence fell within the *House* rubric, enabling a finding that the satisfaction of the primary judge had miscarried; but they did not so identify.

38. At CAB 299 [191] the majority applied the punitive notion that KMD ought not "be protected from the consequences" of her choices not to consult mental health professionals. Within the statutory framework, that consideration would fall within s 43ZN(1)(g), as a "matter[] the court considers relevant". That the majority considered for itself what was relevant is consistent with their having applied the correctness standard. At CAB 299–300 [192] the majority expressly differed, on two occasions, as to the level of "weight" that should have been given to hearsay representations of KMD, and opinions expressed by Ms Guy (the author of the other s 43ZN(2)(a)(i) report). Again, weight was a matter for the primary judge, subject to *House* error, none being identified. At CA[193] the majority made a finding as to the "balance" of the review and whether it had skewed so as to focus on KMD's interests. That is not the language of *House* error.

39. At CAB 300–301 [194]–[195] the Court then made two findings expressed in terms of whether matters were "reasonably open" to the primary judge. Those findings are properly to be regarded as conclusions based on the preceding non-*House* reasoning. If read as findings of *House* error, they do not follow from the reasoning in the earlier paragraphs, and do not have any supportive reasoning (there being no *House* reasoning in the majority's reasons). The expression "reasonably open" simply reflects the language used in ground 1 (CAB 246 [76]), which the Court expressly (and based on reasons commencing just after quoting it) held attracted the correctness standard (CAB 250 [85]).

40. In any case, so far as the findings resemble the language of *House* at 505, they are closest to the basis that because a decision is "upon the facts unreasonable or plainly unjust", it

can be inferred that some "substantial wrong has in fact occurred" — that wrong being the legal error. This is a basis relied upon when the legal error (in the context of *House*, as to sentencing) is "not discernible".[60] CAB 300–1 [194]–[195] are not an inference of indiscernible error from unreasonableness of outcome.

41. If conclusions that certain of the primary judge's findings were not "reasonably open" were intended to mean that those findings were affected by *House* error, the majority would have identified such an error. It did not: CAB 300–1 [194]–[195] are to be understood as findings to a correctness standard, expressed in terms of the ground of appeal. That understanding is consistent with the introduction, in CAB 300-1 [194], of matters which could not be relevant to the *House* standard, *i.e.*, whether "greater weight" should have been given to evidence from earlier reviews, and whether "the position regarding KMD's mental condition and risk assessment" had changed since earlier reviews.

42. In short, the majority did what it said it would do (CAB 248 [80], 250 [85]) — it applied the correctness standard, resulting in it doing what it "had no right" to do: "substitute its discretion for the discretion entrusted to the primary tribunal".[61] Had the majority applied *House*, it would have dismissed the appeal. That is because, as outlined above, the majority did not identify any *House* error.

Ground 4: erroneous findings that the periodic review "miscarried"

43. Much of the majority's "Consideration" section, after giving an overview of the legislative scheme (CAB 293–6 [180]–[184]), focused on the legislature's requirement that the Court not order a person released from custody unless the Court has "obtained and considered two reports prepared by a person who is a psychiatrist or other expert" (CAB 296 [185], referring to s 43ZN(2)(a)(i)). Here, there were two such reports: one from a clinical and forensic psychologist (Distinguished Professor James Ogloff AM),[62] and one from a clinical social worker (Ms Janet Guy).[63] Ms Guy held a tertiary qualification in social work as well as an associate diploma, and had 20 years of relevant

60 *AB v The Queen* (1999) 198 CLR 111, [130] (Hayne J).
61 *Lovell v Lovell* (1950) 81 CLR 513, 519 (Latham CJ).
62 *KMD (No 6)* [2023] NTSC 51, [10], CAB 99.
63 *KMD (No 6)* [2023] NTSC 51, [17], CAB 102.

experience.[64]

44. There having been the two reports required by s 43ZN(2)(a)(i), that should have been the end of the issue. Instead, the majority held that KMD declining to speak with Professor Ogloff caused the statutory scheme to have been "rendered nugatory" (CAB 297 [187]) or to have "fundamentally miscarried" (CAB 300 [193]). By so declining, she "demanded" that the review "be conducted on her own terms" (CAB 297–8 [188]) so as to "skew[] the focus of the review … to a focus on KMD's interests" (CAB 300 [193]), which "deprive[d]" the judge of "crucial evidence" (CAB 299 [190]), such that it was appropriate to visit evidential "consequences" on KMD (CAB 299 [191]). The consequences appear in CAB 300 [194]: the periodic review "miscarried", such that a finding should have been made that circumstances had not changed since Hiley J's earlier periodic reviews, and greater weight should have been given to the evidence in those reviews and Hiley J's conclusions (CAB 300[194]). That reasoning involved error.

45. Section 43ZN(2)(a)(i) contains no requirement that the reports it contemplates be made following "engage[ment]" with the supervised person. It simply requires expert reports be obtained and considered, which was done (carefully) by Brownhill J. Some persons under supervision may be incapable of "engaging". Some might plainly, in opinions of experts based on a desktop review, either pose no risk or serious, unacceptable risk. On the majority's approach, reviews in all of these cases would miscarry. To read the subsection as either requiring engagement, or as requiring diminished weight be given to reports prepared absent engagement, cannot be justified by Pt IIA's text, context, or purpose. It would involve, impermissibly, reading into the section concepts novel to the legislation, and which the legislature did not itself select.[65]

46. The majority's implication is imprecise. What if KMD had agreed to meet with Professor Ogloff, but had refused to answer certain questions, or had not answered them to his satisfaction? Would the requirement then have been met?

47. The true rule is prescribed by the Parliament in s 43ZN(2)(a)(i): 2 reports, each by a psychiatrist or other "expert" ("a person who holds a qualification or has experience or expertise that is relevant to the mental impairment, condition or disability of an accused person or a supervised person": s 43A), were obtained and considered. Expert witnesses

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64 *KMD (No 6)* [2023] NTSC 51, [17], CAB 102.

65 *Taylor v Owners –Strata Plan No 11564* (2014) 253 CLR 531, [37]– [38] (French CJ, Crennan and Bell JJ).

are expected to acknowledge limitations on aspects of their opinions, as these experts did (CAB 225–6 [41], 281 [152]). Such limitations inform whether the judge is satisfied as required by s 43ZH(2). A supervised person might have engaged, but been non-responsive or guarded. Any such limitation does not result in the scheme "miscarrying", "skew[ing]", or becoming "nugatory" (CAB 297 [187], 300 [193]). Nor does it "deprive" the judge of evidence (CA[190]). The judge was entitled to, and did, receive reports — not reports prepared in a particular way, based on particular engagement or any other stipulation.

48. Comparison may be made with Division 105A of the *Criminal Code* (Cth). At enactment in 2016,[66] s 105A.6 gave the Court the power to appoint a "relevant expert", with whom the offender was required to "attend" an assessment. In 2021, the Parliament inserted s 105A.18D,[67] which gave the Minister the power to require an offender to "attend" an assessment. While offenders were required to "attend", they were not required to participate. This was to be explained to them.[68] If they chose to participate, they had protection against self-incrimination: s 105A.6(5A); s 105A.18D(5). The Court has always been required to have regard to the level of participation in any assessment: s 105A.8 as enacted; s 105A.6B(1)(b) now.

49. None of these features is present in the Northern Territory's Pt IIA scheme. There is no power to direct attendance at assessment; no protection against self-incrimination; no direction to the Court to have regard to the level of participation in any assessment. An affected person declining to participate in production of the reports required by s 43ZN(2)(a)(i) does not undermine the scheme or cause it to "miscarry" or "skew".

Disposition on grounds 1 and 4

50. "The jurisdiction of this Court, once special leave to appeal is given, is to pronounce the judgment or order which the … [NTCCA] should itself have pronounced".[69]

51. Ground 1 contends that the NTCCA should have approached the appeal in accordance

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66 Via the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

67 Via the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth).

68 See s 105A.6(6) as enacted as well as [46] of the revised explanatory memorandum for the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth); s 105A.18D(6) after its insertion, and [136] of the revised explanatory memorandum for the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (Cth).

69 ***Pantorno*** *v The Queen* (1989) 166 CLR 466, 475 (Mason CJ and Brennan J); *Bromley v The King* (2023) 98 ALJR 84, [404] (Edelman and Steward JJ).

with *House*. It did not, but if it had then the appeal would necessarily have been dismissed because the majority's reasons identify no *House* error. For the same reason (no *House* error identified), this Court would now substitute for the NTCCA's orders an order that the appeal be dismissed, restoring the primary judge's judgment. As for ground 4, the basis upon which the majority set aside the primary judge's orders was erroneous. Should ground 1 or 4 succeed, the primary judgment would be restored.[70] The principle of finality supports the same course,[71] especially having regard to the fact that KMD was re-imprisoned by reason of the NTCCA's orders, and would be due her liberty in accordance with the primary judgment if the NTCCA's orders were in error.

10 **Ground 2 and 3: procedural fairness and failure to make substitutive orders on up-to-date evidence**

52. When on 23 July 2024 the NTCCA delivered judgment, KMD had been in the community for more than a year. While there, KMD was subject to conditions that she "be under the care of and receive support from" a team including Ms Guy, a general practitioner, and a staff member of the Top End Mental Health Service or another person nominated by the CEO (Health) to be the Case Manager.[72] That team was "authorised to share information regarding KMD and her mental state with each other and with the Probation and Parole Officer".[73] She was to undertake counselling with Ms Guy "at least weekly", although if Ms Guy considered another interval appropriate, an interval "not greater than
20 fortnightly".[74] She was to attend all medical appointments as directed, be under the ongoing monitoring of a probation officer and obey their directions, wear a monitoring device, and comply with other conditions.[75]

53. During the year prior to the NTCCA determining the appeal, the "risk" (for s 43ZH(2)) that KMD posed was subject to real-world testing and assessment. Evidence as to her re-integration into the community would have been among the best evidence of her

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70 Cf. *Norbis* (1986) 161 CLR 513, 535 (Wilson and Dawson JJ); *Lovell v Lovell* (1950) 81 CLR 513; *Wren v Mahony* (1972) 126 CLR 212, 236 (Menzies J dissenting, though not on the point of principle: "the discretion … is [that of the primary judge], not ours"); *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 72–73 (Deane J).

71 *Leeder v Ellis* (1952) 86 CLR 64, 73. Cf *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [35] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

72 Orders of Brownhill J dated 5 July 2023, order 4(a), CAB 191.

73 Orders of Brownhill J dated 5 July 2023, order 5, CAB 194.

74 Orders of Brownhill J dated 5 July 2023, order 4(f), CAB 191.

75 See respectively, Orders of Brownhill J dated 5 July 2023, orders 4(g), (k), (v), CAB 192–3.

present level of risk in the community. Further, evidence plainly would have been available as to the degree to which she complied with her conditions. Evidence on that matter would inform the consideration mandated in s 43ZN(1)(f). It would also tend to validate or invalidate a prediction on which Hiley J's assessments of risk — concurred in by the NTCCA[76] — were made: that KMD would not "comply" with conditions because she would "complete[ly] refuse[] to engage with medical practitioners";[77] and because "she will not comply with conditions commonly imposed under non-custodial supervision orders designed to minimise risks, such as conditions requiring her to cooperate with mental health professionals and accept their advice or treatment".[78].

10 54. Despite knowing it existed, the NTCCA did not invite evidence of KMD's year in the community or post-dating the proceeding before Brownhill J, nor did it permit an opportunity for KMD to adduce such evidence, or re-exercise any discretion it in fact had upon the basis of any such evidence. This course was: (1) procedurally unfair; and (2) improper in an appeal by way of rehearing.

55. *Ground 2: procedural fairness*. The appeal to the NTCCA was required to be procedurally fair,[79] including in the sense that the conduct of the hearing would be free of practical injustice.[80] A "common form" of such injustice is suffered where, contrary to a "statement of intention", a decision-maker has failed to take a particular procedural step with the consequence that a party loses "an opportunity to make representations".[81]
20 The statement of intention may be a promise, in which case fairness may require that it be kept;[82] or the unfairness may flow simply from "a failure by the decision-making authority to adhere to a foreshadowed line of inquiry".[83] In such cases, "the expectations

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76 CAB 300 [194] ("the… risk assessment had not fundamentally changed since the reviews conducted by Hiley J").

77 *KMD (No 3)* [2017] NTSC 95, [116] (Hiley J).

78 *KMD (No 4)* [2021] NTSC 27, [58] (Hiley J).

79 *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 (the Court).

80 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte* ***Lam*** (2003) 214 CLR 1, [37] (Gleeson CJ).

81 *Lam* (2003) 214 CLR 1, [37] (Gleeson CJ).

82 *Lam* (2003) 214 CLR 1, [33] (Gleeson CJ) (and the authorities there cited), affirmed in *Minister for Immigration and Border Protection v* ***WZARH*** (2015) 256 CLR 326, [35] (Kiefel CJ, Bell and Keane JJ); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 40 (Brennan J).

83 *WZARH* (2015) 256 CLR 326, [35] (Kiefel CJ, Bell and Keane JJ). The injustice is similar to that occurring where a case is conducted such that a party would not "reasonably have apprehended" that an issue given significance in the *ratio* might have that significance (*Re Architects of Australia Association; Ex parte Municipal Officers Association* (1989) 63 ALJR 298, 305 (Gaudron J)) with the vice that "the parties are taken by surprise" (*Pantorno* (1989) 166 CLR 466, 473 (Mason CJ and Brennan J).

of a particular party as to the exercise of the power in question may be relevant to the way in which the repository of the power is to exercise it in the particular case".[84] These cases are expressions of the requirement of fairness in hearings, which requirement "pervades Australian procedural law".[85]

56. The NTCCA foreshadowed this procedural course: first, it would determine whether there was error in the primary judgment; and second, if the finding be that there was, then an opportunity would be given to adduce evidence (to the NTCCA or on remittal) as to KMD's time in the community including as to her compliance with the NCSO. This foreshadowing, and the expectation it created, clearly emerges from transcript.

57. At T-6.42–45 (ABFM 9), having heard and having expressed doubt about the CEO (Health)'s submission that the *House* standard applied, Reeves J said, "surely we have to know what the present position is and we have to know what has happened since [KMD] was released on [the NCSO]." Senior Counsel for the CEO (Health) agreed (T-6.46–7.2, ABFM 9–10), and he agreed that further relevant material existed but was not before the Court (T-7.4–20, ABFM 10). At T-7.38–40 (ABFM 10), Reeves J said, "the practical effect of [the CEO (Health)'s submission] is that if you succeed in this appeal, we will then look at what has happened since." At T-7.44–8.1 (ABFM 10–11), Blokland J said, "[s]o if you were successful … we'd have to come back on another day … with materials". Senior counsel for the CEO (Health) said that there was "disputation as to how [KMD] has been going" (T-8.8–9, ABFM 11). At T-9.17–30 (ABFM 12), the CEO (Health) submitted that, if the *House* standard applied, no further evidence would be necessary, but that if the correctness standard applied (as the Court ultimately found) "that would be different", and "one could adduce further evidence". At T-16.38–17.4 (ABFM 19–20), Burns J asked whether remittal was open (answer from the CEO (Health): yes), and said that in that case "whatever has happened since the original decision could be taken into account" (response from the CEO (Health): yes).

58. At T-68.24–69.30 (ABFM 71–2), Reeves J asked whether, "if [the Court] decided to assess [the statutory question] for [itself], what happens then?", and whether the Court

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84 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*, [48] (McHugh and Gummow JJ), and similarly at [33] (Gleeson CJ). See also *Cumberland v The Queen* (2020) 94 ALJR 656, [24]-[26] (Bell, Gageler and Nettle JJ).

85 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, [141] (Heydon J).

should "base it on the material thus far … ". KMD submitted that "it would be … not an appropriate way of proceeding to base a decision now on the material then in circumstances where your Honours know that there's a field of new facts". Justice Reeves responded thus (in no way indicating a different position): "[w]ell, that's why I raise[d] it at the outset. Because a rehearing is based on the facts and law at the time of the hearing" (T-68.41–42, ABFM 71). KMD said (T-69.2–5, 13–17, ABFM 72) that the correct course was first to determine whether there was error, and "then to have a further hearing as to the appropriate course" (*i.e.*, remitter or further evidence). Conversely (T-69.30–34, ABFM 72), KMD submitted that seeking to make an order on existing material would be "highly undesirable and artificial to the point of really bringing this appeal to a very awkward point". That amounted to agreeing with what was falling from the bench.

59. At T-72.3–17 (ABFM 75), senior counsel for KMD, having evidently misunderstood a question, in fact commenced to make submissions as to what had happened during KMD's time on the NCSO, and was cut off by Blokland J who clarified that her Honour was asking about a different issue and "wasn't meaning for you to go into that" (*i.e.*, the post-release period).[86] Her Honour would not have done that if the Court had then been of a mind to decide the appropriate order without further hearing or further evidence.

60. The uniform proposition from the bench was that, if the correctness standard applied and error was found, updating evidence would be needed. That proposition met acceptance from both sides of the bar table. Nobody suggested that orders could be made <u>without</u> updating evidence. And yet, on 23 July 2024, the NTCCA sat, delivered judgment, and made final orders, including that the NCSO be set aside and the CSO affirmed, without any further hearing or evidence.

61. As in *WZARH* (2015) 256 CLR 326, the point is not whether KMD was entitled to "insist" upon any particular course being followed (*cf.* [38]). The point is that, the particular procedure having been foreshadowed, fairly to depart therefrom required (at least, and this is enough for KMD) that, if the Court came to be of a mind to depart from the foreshadowed course, it give KMD the "opportunity to be heard on the question of how the process should now proceed" ([46]).

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[86] Cf. *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 144 ("You needn't go on as to that"), and then at 146 (the Court).

62. *Ground 3: appeal by way of rehearing error*. In any case, quite apart from any foreshadowed procedural course, it was improper for the Court, knowing as it did that material evidence as to risk existed but was not before it, to press on to re-exercise the primary judge's discretion without inviting that evidence.

63. The appeal to the NTCCA was brought under s 43ZB(2) of the Criminal Code, and had such incidents as arose by implication from that subsection and s 43ZB(3). Section 43ZB(3) confers a jurisdiction on the NTCCA in such appeals to, *inter alia*, quash the supervision order that is appealed and "make another … in substitution for it". That entails that appeals under s 43ZB(2) are by way of rehearing (CA[78]).

64. An appeal by way of rehearing is distinguished from an appeal in the strict sense by its "temporal perspective".[87] On rehearing, the court reviews for error[88] (to the appropriate standard)[89] "based on the facts and the law as they then stand".[90] If the court finds error, it may remit the matter or, on the material ultimately before it (including fresh evidence), give the judgment it considers should have been given at first instance.[91] In the case of a discretionary judgment, if the court decides to re-exercise the discretion (necessarily, on rehearing, by reference to circumstances existing at the time of the appeal), "it is necessary that the parties be given an opportunity to adduce evidence as to those circumstances".[92] Here, for reasons outlined in the context of ground 1, the judgment in issue was discretionary, so that this obligation of fairness applied. Even if the judgment was not discretionary, the question set for the appeal court on rehearing by s 43ZH(2) could only sensibly be answered by reference to the level of risk at the present time, so the situation was sufficiently analogous to a re-exercise of a discretionary judgment that the same rule as to providing opportunity for updating evidence applied.

65. The NTCCA neither remitted the matter, nor gave the parties an opportunity to adduce

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87 *SZVFW* (2018) 264 CLR 541, [31] (Gageler J).

88 *Coal and Allied* (2000) 203 CLR 194, [17] (Gleeson CJ, Gaudron and Hayne JJ); *SZVFW* (2018) 264 CLR 541, [30] (Gageler J).

89 *SZVFW* (2018) 264 CLR 541, [35] (Gageler J).

90 ***Allesch*** *v Maunz* (2000) 203 CLR 172, [23] (Gaudron, McHugh, Gummow and Hayne JJ), underlining added. Similarly *CDJ* (1998) 197 CLR 172, [111] (McHugh, Gummow and Callinan JJ describing an appeal by way of rehearing as requiring that the Court "decide the rights of the parties upon the facts and in accordance with the law as it exists at the time of hearing the appeal").

91 *SZVFW* (2018) 264 CLR 541, [30] (Gageler J); *Fox v Percy* (2003) 214 CLR 118, [22] (Gleeson CJ, Gummow and Kirby JJ), [68] (McHugh J); see also *Allesch v Maunz* (2000) 203 CLR 172, [23] (Gaudron, McHugh, Gummow and Hayne JJ), [44], [55] (Kirby J).

92 *Allesch* (2000) 203 CLR 172, [31] (Gaudron, McHugh, Gummow and Hayne JJ).

contemporary evidence. It took a third course, not legally open, of identifying error and determining to re-exercise the power conferred by s 43ZH(2), but to do so from the temporal perspective of the primary judge.

Disposition on grounds 2 and 3

66. Were KMD to fail on grounds 1 and 4, but succeed on ground 2 or ground 3 (or both), the Court would set aside order 4 of the NTCCA's orders (CAB 302) and either: (1) substitute an order that the proceeding be remitted to Brownhill J to re-exercise the s 43ZH power (*i.e.*, the Court would substitute for the NTCCA's approach an approach that it could have taken, being to find error and remit); or (2) remit the proceeding to the NTCCA so that it may consider, for itself, whether to remit or re-exercise the s 43ZH power.

Part VII: Orders sought

67. KMD seeks the orders set out in its notice of appeal: CAB 315.

Part VIII: Estimated time

68. KMD estimates that she will require 2.5 hours to present oral argument.

21 November 2024

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ANNEXURE TO THE APPELLANT'S SUBMISSIONS

Pursuant to *Practice Direction No 1 of 2019*, the Appellant sets out below a list of the statutes referred to in these submissions.

No.	Description	Version	Provisions
1.	*Criminal Code Act 1983* (NT), Sched 1	As in force at 1 July 2024	Part IIA
2.	*Criminal Code Act 1995* (Cth), Schedule—The Criminal Code	Current, compilation no. 163	Div 105A
3.	*Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth)	As enacted at 7 December 2016	Sched 1, item 1
4.	*Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth)	As enacted at 8 December 2021	Sched 1, item 134