



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 13 Jul 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: M41/2026
File Title: Charisiou v. The King
Registry: Melbourne
Document filed: AMENDED Form 27E - Reply
Filing party: Appellant
Date filed: 13 Jul 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M41 of 2026

BETWEEN:

DEMETRIOS CHARISIOU
Appellant

and

THE KING
Respondent

10

AMENDED APPELLANT’S REPLY

Part I: Certification

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

Part II: Concise reply

A. The appeal is not about mercy

2. The respondent reframes the first issue as whether the exercise of mercy requires exceptional circumstances (RS [4], [6]). The first issue does not concern the “residual discretion of mercy” (RS [9]); it concerns whether family hardship is irrelevant to — and must be excluded from — the instinctive synthesis, absent exceptional circumstances. The question is one of relevance, not of grace.
3. The mercy framing begs the question: by characterising reliance on family hardship as an appeal to a discretionary, non-obligatory act operating “outside ... the adjudgment and punishment of criminal guilt” (RS [15]), the respondent presupposes the very matter in issue — that hardship is not a circumstance relevant to sentence in its own right, but a plea for exceptional dispensation.¹ Its own taxonomy tells against it: having accepted a “mercy inherent within the sentencing discretion” (RS [11]–[12]), the respondent offers no reason why family hardship must be confined to the prerogative-like mercy described in *Markovic* (RS [13]–[16]) rather than weighed, as a relevant circumstance, within the first category.

20

¹ *Totaan* at 27 [47] (Bell CJ); *Zerafa* at 298 [140] (Beech-Jones J); CA [125]–[160] (Walker JA).

4. The distinction that matters is drawn by the respondent's own authority. Family hardship may bear upon sentence through its effect on the offender — anguish which makes imprisonment more burdensome — a conventional mitigating factor “not subject to the ‘exceptional circumstances’ limitation”; or it may bear upon sentence in and of itself, regardless of its impact on the offender.² This appeal concerns only the latter, objective aspect: the subjective aspect was found below to have been taken into account.³ The question is whether the effect of a sentence on the family members themselves is a relevant circumstance, absent a threshold.

10 5. Nor is mercy the only basis upon which the common law admits that objective aspect. In South Australia, the welfare of an offender's dependants is weighed as a public interest against the public interest in condign punishment: the court acts “out of consideration of the welfare of the family, and society's interest in their welfare, and not merely as an act of mercy to the offender”.⁴ The respondent's dichotomy — mitigation “properly so-called” or prerogative-style mercy, with nothing between — is wrong.

6. There is thus no “coherence in the common law” of the kind asserted (RS [29]). The English cases collected at RS [21]–[25] predate the modern English position of structured proportionality.⁵ And the attempt to confine *Zerafa*, *Totaan* and *Carter* to s
20 16A(2)(p) (RS [33]–[36]) fails: the criticism in those cases was directed at the four rationales for the threshold — the same four, none statutory, that the respondent adopts (RS [32]) — and it applies “with equal logic to the common law hardship principle”.⁶

7. The examples posed at RS [38] answer themselves — through weight, not threshold: in each, the gravity of the offending would overwhelm any mitigation. Nor do they distinguish the competing approaches: on the respondent's own case, exceptional

² *Markovic* at [5], [20]; CA [96] (Walker JA) (CAB 149), labelling these the “subjective” and “objective” aspects of family hardship.

³ CA [69] (Priest and Beach JJA) (CAB 143); CA [97(a)] (Walker JA) (CAB 149–150).

⁴ *Neill v Police* [1999] SASC 270 at [24] (Doyle CJ); *R v Buckskin* [2010] SASC 138 at [109]–[110] (Kourakis J: “the court must necessarily weigh the public interest in imposing a sentence which sufficiently serves the purposes of punishment and deterrence against the public interest in the welfare of the children and dependents of the offender”); *Adams* at [35]–[38], [60] (Livesey P).

⁵ *R v Petherick* [2012] EWCA Crim 2214 at [17]–[24] (Hughes LJ): sentencing “inevitably engages not only [the offender's] own article 8 family life but also that of her family”; the response is structured proportionality, not exceptionality. See also *Foster v R* [2023] EWCA Crim 1196 at [41]. *Bernard* and *R v S*; *R v M* (RS [25]) concerned the offender's own ill-health, not hardship to the offender's family.

⁶ *Carter* at [61] (McCallum J).

hardship fell to be considered in each, gravity notwithstanding.⁷ And consistency is not served but defeated: the threshold itself violates equal justice, discriminating “between like offenders by reference to the degree (as opposed to the existence) of hardship”.⁸

8. In any event, s 5(2)(g) declares that the inquiry is one of relevance. It commands the Court to have regard to “the presence of any aggravating or mitigating factor concerning the offender or ... any other relevant circumstances”. And where Parliament intended an “exceptional circumstances” threshold for the showing of “mercy”, it has said so expressly: s 70(1)(e), concerning orders under Pt 3BA.
9. Abandoning an exceptional circumstances precondition does not mean hardship will reduce the sentence otherwise imposed in every case; it just means that the Court may consider hardship and accord it the weight it deserves. Accordingly, justice is served through the process of instinctive synthesis, not by a rigid rule of exclusion.⁹

B. The construction of s 5(2)(g)

10. The respondent's construction of s 5(2)(g) (RS [51]–[61]) fails on its own terms. The genus said to confine “any other relevant circumstances” does not exist: the matters listed in s 5(2)(a)–(f) are heterogeneous. The words “concerning the offender” qualify “aggravating or mitigating factor”; carrying them across the disjunctive “or” reads them into the Act twice. Each limb has distinct work: the opening words accommodate the subjective aspect of family hardship, a mitigating factor concerning the offender; only the general words can accommodate the objective aspect.¹⁰ On the respondent's reading the general words do nothing that the opening words do not already do, rendering them otiose (cf RS [60]–[61]).

⁷ So too in the comparative jurisprudence: the graver the offence, the less likely that the interference with the family's own rights will be disproportionate (*Petherick* at [23]; *S v M* [2007] ZACC 18 at [43]–[44] (Sachs J)); and regard to the family exists “to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm”, not to permit parents to avoid punishment: *S v M* at [35].

⁸ *Totaan* at 27 [47] (Bell CJ). The frame-of-reference response (RS [37], [40]) restates the problem: exceptionality is judged against a comparator the threshold gives no principled means of selecting.

⁹ Contrary to RS [41], nothing is thereby “stripped” from sentencing judges: leniency on the ground of family hardship remains, weighed in the synthesis — which is all the Fox passage quoted at RS [41] describes.

¹⁰ CA [133] (Walker JA) (CAB 159); see also CA [136]: constructions confining the general words to the offender would render them “otiose”.

11. The construction also proves too much. The respondent accepts that s 5(2) is not exhaustive and that common law sentencing principles continue to apply (RS [50]);¹¹ accepts that the general words “leave room to incorporate reference to the common law” (RS [60]); and defends *Markovic*, under which exceptional hardship is considered in sentencing. Yet it concludes that s 5(2)(g) “leaves no room” for the effect of a sentence on an offender's family “as part of the sentencing process” (RS [60]). If that were so, even exceptional hardship could not be considered, and *Markovic* itself was wrongly decided. The construction cannot be reconciled with the rule it defends.

10 **C. The Charter applies and affects the meaning of s 5(2)(g)**

12. The question under RS [62] is not whether s 32 “authorise[s] a departure” from statutory meaning that is otherwise “clear”. The statutory meaning is informed by the *Charter* as part of the process of construction; it does not operate at some secondary stage: *Momcilovic v The Queen* (2011) 245 CLR 1 at [51] (French CJ) and [565] (Crennan and Kiefel JJ).
13. The “mediate/immediate” distinction (RS [65]–[67]) is interesting but irrelevant. The purposes stated in s 5(1) — most obviously s 5(1)(a), punishment “just in all the circumstances” — are of the widest import and impose no constraint upon the construction of s 5(2)(g) for which the appellant contends (AS [45(c)]). Unless the construction of s 5(2)(g) is constrained by s 5(1) — and it is not — s 32(1) applies with full force to s 5(2)(g).
14. RS [68] mischaracterises Construction B. The appellant does not contend that every *Charter* right is imported as necessarily relevant: engagement, and the weight engagement carries, depend wholly on the circumstances of the particular case (AS [47]). Nor is openness a vice: by “any other relevant circumstances” Parliament expressly left the range of relevant matters open. And that outcomes vary “depending on the individual offender” describes sentencing itself: equal justice requires that relevantly different cases produce different outcomes.¹²
15. The submission that s 17(1) can have no application because it speaks of protection by “society” and the “State”, and a court is neither (RS [69]), misunderstands the

¹¹ *Elias v The Queen* (2013) 248 CLR 483 at 493 [25], cited at RS fn 88.

¹² *Green v The Queen* (2011) 244 CLR 462 at [28] (French CJ, Crennan and Kiefel JJ).

argument. The appellant does not contend that the sentencing court is itself bound to “apply” s 17(1); the contention is interpretative: s 32(1) requires s 5(2)(g) — a provision of an Act of the State — to be construed compatibly with the entitlement of families to protection by the State;¹³ the addressee of the right is beside the point.¹⁴ In any event, the asserted dichotomy is untenable: the Courts of Victoria comprise the judicial branch of the State.¹⁵

16. As for the submission at RS [70] that this case is a poor vehicle for considering the effect of s 17 on sentencing because the appellant's children are older than 18: as the Respondent accepts, “the terms of s 17(1) focus on the protection of ‘families’” (RS [69]), and there can be no dispute that s 17(1) is engaged here. As Walker JA observed at CA [131] (CAB 158):

the claimed hardship will affect the appellant’s wife, his adult children and his mother. As the respondent accepted, these persons comprise the appellant’s family for the purposes of s 17(1).

17. Finally, RS [71] concedes the substance of the appellant's case: family hardship, once admitted as relevant, sounds in weight within the instinctive synthesis. The objection that a matter of weight “cannot justify the imposition of less than an offender's just desert” assumes the uniquely correct sentence that *Markarian* denies.¹⁶ And hardship's suggested loss of potency “in truly deserving cases” is illusory: exceptional circumstances attract commensurate weight.

Dated: 9 July 2026



Saul Holt KC
07 3369 5907
sholt@8pt.com.au
Counsel for the Appellant



Astrid Haban-Beer
(03) 9225 8284
astrid@vicbar.com.au



Joshua Underwood
(07) 3505 1001
junderwood@8pt.com.au

¹³ *Charter*, s 6(2)(b): the interpretative function under s 32 is a function “under ... Division 3 of Part 3”.
¹⁴ The entitlement is, moreover, that of the family members themselves: sentencing “inevitably engages not only [the offender's] own article 8 family life but also that of her family” (*Petherick* at [17]), adopted in CA [147] (Walker JA) (CAB 163).
¹⁵ *Constitution Act 1975* (Vic), Pts III, IIIA; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 111–115 (McHugh J).
¹⁶ *Markarian v The Queen* (2005) 228 CLR 357 at [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ): “there is no single correct sentence”.