CITATION:	*SM v Youth Justice Court & Ors* [2024] NTSC 37
PARTIES:	SM v YOUTH JUSTICE COURT and O'NEILL, Wayne and O'NEILL, Julie Ann
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory Jurisdiction
FILE NO:	2024-01218-SC
DELIVERED:	1 May 2024
HEARING DATE:	24 April 2024
JUDGMENT OF:	Grant CJ

CATCHWORDS:

ADMINISTRATIVE LAW – Jurisdictional error – Misconstruction of statute – Adequacy of reasons

CRIMINAL PROCEDURE – Youth Justice Court proceedings – Serious indictable offence – Summary hearing and determination

Whether Youth Justice Court failed to reach requisite state of satisfaction that 'not appropriate' to hear and determine charges summarily – Reasons not to be scrutinised in over-zealous fashion in judicial review – Decision tantamount to 'blanket' finding that sexual offences involving young complainants not appropriate for summary determination – Misconception of function – Requirement for reasons in s 56(1)(b) of *Youth Justice Act* is to allow parties to see the basis of the Youth Justice Court's decision and to enable superior court to see whether the decision involves jurisdictional defect – Statement of reasons adequate for those purposes – Decision quashed.

Youth Justice Act 2005 (NT) ss 54, 54A, 55, 56, 56A

A child v A Magistrate of the Children's Court (unreported, Supreme Court of Victoria, Cummins J, 24 February 1992), *Acuthan v Coates* (1986) 6 NSWLR 472, *C v Children's Court of Victoria & Ors* [2015] VSC 40, *Craig v South Australia* (1995) 184 CLR 163, *D (a Child) v White* [1988] VR 87, *Director of Public Prosecutions (Vic) v Anderson* (2013) 228 A Crim R 128, *DL (a minor by his litigation guardian) v Magistrate of the Children's Court* (unreported, Supreme Court of Victoria, Vincent J, 9 August 1994), *Goldsmith Pty Ltd v GPT RE Ltd & Ors* [2020] NTSC 30, *Hossain v Minister for Immigration and Border Protection & Anor* (2018) 264 CLR 123, *K v Children's Court of Victoria & Anor* (2015) 303 FLR 281, *Kelly v Rigby* [2021] NTSC 25, *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12, *Macey v Cooper* (1999) 150 FLR 476, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, *Murray v Pinder* [2020] QSC 385, *S Kidman & Co Ltd v Lowndes* [2015] NTSC 90, *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, *Stanley v Director of Public Prosecutions (NSW) & Anor* (2023) 407 ALR 222, *Step v Atkins* [2008] NTCA 5, *Tcherna v Garner* (1999) 154 FLR 243, *Thyer v Whittington* [2017] NTSC 66, *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598, *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, referred to.

REPRESENTATION:

Counsel

Plaintiff:	T Moses
First Defendant:	A Shackell
Second & Third Defendants:	LJ Auld with D Payne

Solicitors

Plaintiff:	Northern Territory Legal Aid Commission
First Defendant:	Solicitor for the Northern Territory
Second & Third Defendants:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

SM v Youth Justice Court & Ors [2024] NTSC 37
2024-01218-SC

BETWEEN:

SM
Plaintiff

AND:

YOUTH JUSTICE COURT
First Defendant

AND:

WAYNE O'NEILL
Second Defendant

AND:

JULIE ANN O'NEILL
Third Defendant

CORAM: GRANT CJ

REASONS FOR DECISION
(Delivered 1 May 2024)

[1] The plaintiff is currently 17 years of age. He has been charged with one count of exposing a child under the age of 16 years to an indecent act contrary to s 132(2)(b) of the *Criminal Code 1983* (NT), and one count of procuring a child under the age of 16 to perform an indecent act contrary to s 132(2)(d) of the *Criminal Code.* Both offences are charged to have been aggravated by the circumstance that the child was

under the age of 10 years. The maximum penalty for each of those offences is imprisonment for 14 years.

[2] These proceedings involve an application by the plaintiff for judicial review of a decision of the Youth Justice Court declining to hear and determine those charges summarily pursuant to s 56(1)(a) of the *Youth Justice Act 2005* (NT).

The grounds of review

[3] The affidavit filed and read in support of the application identified the following grounds of review:

(a) the Youth Justice Court failed to decide in the affirmative the statutory question under s 56(1) of the *Youth Justice Act* of whether it was 'not appropriate' to hear and determine the charges summarily;

(b) the Youth Justice Court determined that the most relevant factor for declining jurisdiction was the plaintiff's right to trial by jury, thereby depriving the plaintiff the statutory right of election for summary determination;

(c) the Youth Justice Court took into account irrelevant considerations (including the broader sentencing powers of the Supreme Court and the right to trial by jury), and failed to take into account relevant considerations (including the seriousness of

the alleged offending, the plaintiff's clean record and the objects and principles of the *Youth Justice Act*).

[4] The second and third grounds of review were not pressed at hearing, but the plaintiff applied to add an additional ground of review, which was that the Youth Justice Court gave inadequate reasons for declining to hear and determine the charges summarily, and in so doing denied the plaintiff procedural fairness and/or acted beyond jurisdiction. That application was not opposed by the second and third defendants.

[5] The affidavit asserted further that these were either jurisdictional errors or errors of law on the face of the record, and properly attracted relief in the nature of *certiorari*.

Certiorari for error on the face of the record

[6] Prerogative relief is generally only available in relation to the decisions of inferior courts in cases of jurisdictional error. The exception is the availability of *certiorari* for non-jurisdictional errors of law appearing on the face of the record. What constitutes the 'record' is limited for the purpose of that remedy. As this Court stated in *Goldsmith Pty Ltd v GPT RE Ltd & Ors*:

> … the scope of the remedy is restricted to errors which form part of the "record". The record will ordinarily include only the initiating process, the pleadings and the actual order or ruling made [*Craig v South Australia* (1995) 184 CLR 163 at 182]. In the absence of some statutory provision to the contrary [*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [88]-[90]], the record of an inferior court for the purposes of *certiorari*

> does not include the transcript, the exhibits or the reasons for decision [*Craig v South Australia* (1995) 184 CLR 163 at 181; citing *R v District Court of Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 488 at 495-496, 501-502; *Hockey v Yelland* (1984) 157 CLR 124 at 131, 142-143; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 667].[1]

[7] As the second and third defendants submit, there is no statutory provision in this jurisdiction which expands the scope of the 'record' for these purposes,[2] and the affidavit material filed in support of the application does not identify an error appearing in either the charges or the actual order or ruling made. For these reasons, the plaintiff did not pursue the claim for this form of relief at the hearing of the application.

Jurisdictional error and inferior courts

[8] That leaves the question of whether *certiorari* will lie in this case for jurisdictional error. In *Craig v South Australia*, the High Court drew a distinction between inferior courts and administrative tribunals in considering what constitutes jurisdictional error.[3] The Court stated:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. … [An] inferior court will fall into jurisdictional error … where it makes an order or decision (including an order or decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial

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1 *Goldsmith Pty Ltd v GPT RE Ltd & Ors* [2020] NTSC 30 at [44].

2 For an example of a statutory extension of that type, see *Supreme Court Act 1970* (NSW), s 69(4).

3 *Craig v South Australia* (1995) 184 CLR 163; cf *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at [67]-[70].

> of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.[4]

[9] The High Court went on to give examples of an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of its functions or powers.[5] Those examples were summarised by the High Court in *Kirk v Industrial Court of New South Wales* to include:[6]

(a) the absence of a jurisdictional fact;

(b) disregard of a matter that the relevant statute requires be taken into account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and

(c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

[10] In *Craig*, the High Court contrasted errors which constitute jurisdictional defect with errors within jurisdiction in the following terms:

> In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly

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4 *Craig v South Australia* (1995) 184 CLR 163 at 177.

5 *Craig v South Australia* (1995) 184 CLR 163 at 177-178.

6 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [72].

> involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error.[7]

[11] Those observations were subsequently qualified by the High Court in *Kirk*.[8] In that case, the Court stated that the categories of jurisdictional error outlined in *Craig* should not be 'taken as marking the boundaries of the relevant field'. In particular, the Court stated that the observation that inferior courts have authority to decide questions of law 'authoritatively' did not answer the question of whether a particular decision is or is not attended by jurisdictional error. In *Kirk*, the appellants had been convicted and sentenced for a crime on an invalid charge and on the basis of evidence received in breach of a statutorily entrenched privilege against self-incrimination. The defects in that case were jurisdictional in nature because the Industrial Court had no power to make the orders in question.

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7 *Craig v South Australia* (1995) 184 CLR 163 at 179-180.

8 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531 at [67]-[70]. See also the analysis of jurisdictional error as formulated in *Craig* and *Kirk* in *McFarlane v Outback Communities Authority* [2024] SASC 54. The more recent High Court authority dealing with the identification of jurisdictional error is the subject of consideration later in these reasons.

[12] As a general proposition, then, relief in the nature of *certiorari* will lie against decisions of inferior courts which are attended by jurisdictional error. However, whether a court should grant prerogative relief is discretionary. This gives rise to a number of threshold considerations.

[13] First, a superior court exercising supervisory jurisdiction of this nature may refuse an application for prerogative relief where there is a statutory avenue of appeal. Section 144 of the *Youth Justice Act* provides that an appeal lies to the Supreme Court from 'a finding of guilt, conviction, order or adjudication made by the Youth Justice Court', and that the provisions of the *Local Court (Criminal Procedure) Act 1928* (NT) relating to appeals from the Local Court apply with the necessary changes. Although the provision for a statutory appeal does not indicate a legislative intention to exclude the prerogative remedies, a superior court may determine in the exercise of the discretion that the statutory right to appeal is the more appropriate course for the applicant to pursue.

[14] The formulation 'conviction, order or adjudication' in s 144 of the *Youth Justice Act* reflects s 163(1) of the *Local Court (Criminal Procedure) Act*. The operation of that provision was considered by the Court of Appeal in *Step v Atkins*[9]. In that decision, the Court tracked the history of the provision and concluded that the right of appeal lies

9 *Step v Atkins* [2008] NTCA 5.

only from an order determining the subject matter of the complaint; that is, from a final and not from an interlocutory order.[10] The decision of the Youth Justice Court in this case did not finally determine the criminal proceedings, or the rights of the parties in the criminal proceedings. Accordingly, it is not a 'conviction, order, or adjudication' of the Youth Justice Court for which there is a statutory avenue of appeal.

[15] The second matter going to the exercise of the discretion relates to the potential fragmentation of the criminal processes where applications for judicial review are made in relation to orders or adjudications which are not final in nature. As this Court observed in *S Kidman & Co Ltd v Lowndes*:

> As the appellant/applicant is seeking judicial review of interlocutory orders, it is necessary … to have regard to the principle that it is highly undesirable to interrupt the ordinary course of criminal proceedings by applications for orders in the nature of prerogative relief commenced for the purpose of challenging interlocutory orders. Superior courts have repeatedly said that the criminal process should not be interrupted by such applications. However, in determining whether to apply this principle or not, the court should have regard to the nature and stage of the proceeding, the effect of the disruption and the availability of any alternative remedy.[11]

[16] It was with regard to that same consideration that the Supreme Court of Queensland observed in *Murray v Pinder* that '[i]nterlocutory applications in the meantime before superior courts, whether pursuant

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10 See *Macey v Cooper* (1999) 150 FLR 476; *Tcherna v Garner* (1999) 154 FLR 243.

11 *S Kidman & Co Ltd v Lowndes* [2015] NTSC 90 at [10].

to the *Judicial Review Act* or by other applications to superior courts, are entertained sparingly'.[12] However, in the present case the matter at issue is how the hearing of the charges should proceed. No plea has been entered, no trial has commenced and there is no alternative remedy by which the plaintiff might press his claim for a summary hearing and determination. Accordingly, the principle against fragmentation does not, in these circumstances and of itself, militate against the exercise of the discretion in favour of the plaintiff.

Procedural history and legislative context

[17] On 13 March 2024, the matter came before the Youth Justice Court for mention. At that time, the plaintiff had been charged with one count of exposing a child to an indecent act contrary to s 132(2)(b) of the *Criminal Code*. At the commencement of the mention, the prosecutor informed the Court that the plaintiff had been charged with a further count of procuring a child to perform an indecent act contrary to s 132(2)(d) of the *Criminal Code*. The offence was said to be constituted by the plaintiff telling the complainant 'to pull down her pants and then to sit on his face'. The prosecutor also advised that the informant would be making application for the Court to decline to hear the charges summarily and to commit them to the Supreme Court pursuant to s 56 of the *Youth Justice Act*. That section provides:

12 *Murray v Pinder* [2020] QSC 385.

Court may decline to hear and determine charge summarily

(1) If, at any stage of the proceedings (prior to a finding of guilt), the Youth Justice Court considers it is not appropriate to hear and determine summarily a charge in respect of an indictable offence for which the Court has jurisdiction, the Court:

(a) may decline to hear and determine the charge summarily; and

(b) if it declines – must give its reasons for declining; and

(i) if dealing with the charge by way of preliminary examination – must continue by way of preliminary examination; and

(ii) otherwise – must continue the proceedings as if the Court had been dealing with the charge by way of preliminary examination.

(2) For subsection (1), it is immaterial whether or not the youth:

(a) has consented under section 55(3) to the charge being heard and determined summarily; or

(b) has elected under section 56A(2) to have the charge heard and determined summarily.

[18] Section 55(3) of the *Youth Justice Act* provides that '[i]f the youth consents, the Youth Justice Court must hear and determine the charge summarily'. Section 56A(2) of the *Youth Justice Act* deals with circumstances in which the youth has not initially consented to a summary hearing and the Youth Justice Court has proceeded to deal with the charge by way of preliminary examination, and provides that 'the youth may, at any time before or during the preliminary examination, elect to have the charge heard and determined summarily'. The effect of s 56(2) of the *Youth Justice Act* is that the Youth Justice Court may decline to hear and determine a charge summarily regardless of whether the youth has consented or elected to

have the matter determined summarily. More than that, the fact of the youth's consent or election for summary determination is entirely irrelevant to the Youth Justice Court's consideration of whether it is not appropriate to hear and determine the offence summarily.

[19] Those provisions form part of a scheme in which s 54 of the *Youth Justice Act* provides that, subject to the exceptions in ss 54A, 55(4) and 56, 'all charges before the Youth Justice Court are to be heard and determined summarily'. The exception in s 54A of the *Youth Justice Act* provides that the Youth Justice Court must deal by way of preliminary examination with charges in respect of an offence punishable by life imprisonment. The exception in s 55(4) of the *Youth Justice Act* provides that the Youth Justice Court must deal with a charge in respect of an indictable offence by way of preliminary examination if the youth does not consent to summary hearing and determination.[13] As already described, the exception in s 56 of the *Youth Justice Act* permits the Youth Justice Court to decline to hear and determine a charge summarily.

[20] After informing the Court of the addition of the second charge, the prosecutor said that the informant would be filing a tendency notice with regard to the allegations extending beyond the single act said to

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13 That exception is subject to the qualifications that consent to summary hearing is not available for those offences attracting a maximum penalty of life imprisonment, and that the defendant's consent is not required for the summary hearing of prescribed property offences in which the value of the property or financial advantage involved does not exceed $50 000.

constitute the first count. The tendency notice will presumably make the common assertion that the evidence in relation to each count was mutually admissible as evidence of a tendency on the part of the defendant to have and act on a sexual interest in the complainant. The ground relied upon by the prosecutor for the Court to decline to hear the charges summarily and to commit them to the Supreme Court was that the matter was relatively complex for the following reasons:

(a) the matter involved offending of a sexual nature by a 15 or 16-year-old accused against a 6-year-old complainant;

(b) the complainant is a vulnerable witness, which would require her evidence to be pre-recorded with an estimate that a day would be required for that purpose;

(c) the foreshadowed tendency argument would require argument and determination before trial;

(d) the duration of the trial was estimated to be something in the order of two days, with the consequence that the pre-recording of evidence, the tendency argument and the subsequent trial would require multiple days of hearing time;

(e) the configuration of the Youth Justice Court would require the complainant to walk past the waiting area for both the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission in order to access the vulnerable witness

room (with the attendant submission that the facilities in the Supreme Court were much better suited to the pre-recording of evidence); and

(f) each of the offences attracted a relatively high maximum penalty of imprisonment for 14 years (with the concession that the Youth Justice Court was empowered to deal summarily with offences attracting that maximum).

[21] The defence opposed the application on the following grounds:

(a) the clear legislative intention was to create the Youth Justice Court as a specialised jurisdiction, and to invest the Youth Justice Court with jurisdiction to hear and determine matters summarily except for those carrying a maximum penalty of life imprisonment;

(b) the matter was not sufficiently complex or serious to warrant proceeding by way of preliminary examination;

(c) there would be no objection to or difficulty with the complainant giving evidence from the vulnerable witness room;

(d) only four witnesses would be required to give evidence, with the consequence that the hearing would not be unduly lengthy;

(e) the conduct alleged was not at the upper end of the scale of objective seriousness, in that there was no allegation of physical

touching or any sexual act taking place in front of the complainant;

(f) the defendant has no criminal history and is in full-time employment and, if found guilty, the likely disposition would not attract a custodial sentence of the duration beyond the jurisdictional limit of the Youth Justice Court;

(g) if the matter proceeded by way of preliminary examination and was committed to the Supreme Court, there would be a significant delay before a trial could be listed.

[22] The decision of the Youth Justice Court was delivered *ex tempore* in the following terms:

> HIS HONOUR: SM was facing one charge of expose child to an indecent act. Today at court a second charge is filed. Both counts are an alleged contravention of 132 but one is (2)(b) and one is (2)(d).
>
> It's trite to observe that the Youth Justice Court's got jurisdiction to hear any matter provided it does not carry a maximum sentence of life imprisonment. There are some nuances in the *Youth Justice Act* in that regard and I note some amendments that I don't fully understand but there isn't any doubt and it's common ground that the court does have jurisdiction to hear the two charges preferred against SM each of which carry a maximum sentence of 14 years' imprisonment.
>
> I note the Youth Justice Court's ceiling on sentences of detention. That, in and of itself, is no reason to accede to the application made under s 56 that the court should decline to hear the matter. And I do accept the defence's submission that in all of the circumstances, if SM is found guilty of both counts 1 and 2, he may well nonetheless receive a sentence different to detention or not exceeding on any objective and proportionate view a sentence of two years' detention.

It's also the compounding or complicating factor of suspension and the like but I don't think that really comes into play having regard to the provisions of s 56 and what the court should be considering. Section 56, the crux of which is that if the court considers it is not appropriate to hear and determine summarily a charge in respect of an indictable offence then the court can decline.

The cornerstone being not appropriate. It doesn't refer to complexity or otherwise, any other issues that might give some insight or illumination to what matters might properly move the court to decline. Nonetheless I think the matters of complexity and potential difficulties in the resolution, issues involved and those both factual and legal issues, all of those things must feed into the equation in my view.

I should state that neither the stage of the list in this court, noting that we're currently working on contested hearings in August this year nor the limited jurisdiction of the court nor the design or layout of the court are reasons to decline to hear the matter under s 56.

However, I do note the Youth Justice Court's a court of summary jurisdiction rather than a superior court of unlimited jurisdiction. Most relevantly the Supreme Court does have significant advantages being the broader sentencing discretion. They can sentence under the *Youth Justice Act* or the *Sentencing Act*.

Most relevantly to my mind, the Supreme Court offers the significant protection to accused persons of trial by jury which is a fundamental tenet of our criminal justice system. That's only in event of contested charges. It's not clear, including because my understanding is not all of the evidence is in, it's not clear that the matter is contested or otherwise but that is certainly a possibility.

I do note that the Supreme Court is accustomed to taking and dealing with evidence from very young complainants and in relation to sexual offences. For those reasons I do decline to hear counts 1 and 2. Seeking to apply s 56 it's then my conclusion that we're in a situation of a preliminary examination in relation to counts 1 and 2.

[23] There followed a discussion of the matters necessary to proceed by way preliminary examination.

The exercise of the discretion not to proceed summarily

[24] There is no superior court authority in this jurisdiction dealing with the proper approach to the exercise of the discretion under s 56 of the *Youth Justice Act* to decline to hear and determine a charge summarily. The plaintiff relies in that respect on a number of Victorian authorities dealing with similar, but not identical, legislative provisions in that jurisdiction.

[25] The first in time is the 1988 decision in *D (a Child) v White*.[14] The relevant Victorian provision at that time vested the Children's Court with jurisdiction to hear and summarily determine all charges against children for indictable offences other than homicide. The grant of jurisdiction was subject to the qualification that the Children's Court had discretion to proceed by way of what was effectively a committal process 'if for any special reason the Court … considers the case to be unsuitable for summary determination'. Although that legislation involved a different statutory formulation by reference to special reason and unsuitability, the principles of more general application were stated to be:

> As the Act invests the Court with embracive jurisdiction in respect of children it should only be relinquished reluctantly. The reason

14 *D (a Child) v White* [1988] VR 87.

> to do so must be special; not matters of convenience or to avoid difficulties.
>
> … The power should be exercised sparingly and reasons for doing so given.
>
> The overall administration of justice is the most important criterion. That is justice as it affects the community as well as the individual.

[26] The Supreme Court went on to say that the special reason must satisfy the object that it would be unsuitable to determine the matter summarily. The circumstances which might give rise to unsuitability were expressed, without purporting to be exhaustive, to include: (1) the particular features of the offence, the degree of planning and complexity, or maturity of the defendant; (2) the antecedents of the defendant or particular features peculiar to the defendant; (3) whether the nature of the evidence might render the case unsuitable for summary determination, eg forensic or scientific evidence; and (4) whether there are co-accused or accessories, and in what jurisdiction the majority of those charges will proceed.

[27] In the result, the Supreme Court held that the magistrate's determination that charges of armed robbery and conspiracy to commit armed robbery were not suitable to be determined summarily did not constitute jurisdictional defect. The magistrate's determination was not that armed robberies by children generally were unsuitable for summary determination. The magistrate's reasons for not proceeding summarily in the subject case were that the defendant's awareness of

the use of a firearm during the robbery bore on his culpability, and that the co-conspirators were to be tried in the court above.

[28] That case was followed in 1994 by *DL (a minor by his litigation guardian) v Magistrate of the Children's Court*.[15] The legislative scheme had been amended in 1989 to provide that the Children's Court must hear and determine charges for indictable offences summarily, other than homicide, unless 'the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily'. The magistrate had determined that the alleged commission of the offences of rape in the presence of the co-accused compounded the gravity of the offending such that the matter should not be determined summarily.

[29] In the subsequent application for judicial review, a judge of the Supreme Court determined that the gravity of the conduct and the defendant's role as instigator were not the only factors to which the magistrate was required to have regard. Other relevant factors included the personal circumstances of the defendant. The Supreme Court concluded that as there was no indication that those other relevant factors had been taken into account, and because the relevant factors which were apparent on the face of the matter did not disclose

15 *DL (a minor by his litigation guardian) v Magistrate of the Children's Court* (unreported, Supreme Court of Victoria, Vincent J, 9 August 1994).

'exceptional features', the magistrate had fallen into error. There was no analysis of whether that error constituted jurisdictional defect.

[30] The next case in time was the 2015 decision in *C v Children's Court of Victoria & Ors*.[16] The magistrate in that matter had also determined that rape charges should not proceed summarily in the Children's Court. The statutory test remained that of 'exceptional circumstances'. In the Supreme Court's assessment, the charges fell within the mid-range of the spectrum of rape offences. The defendant's criminal history was limited, and did not include priors for sexual offences. The Supreme Court referred to an unreported 1992 decision in which it was said that the Children's Court should only surrender its jurisdiction with 'great reluctance'.[17] The Supreme Court's finding of jurisdictional error was predicated solely on the conclusion that 'it was not reasonably open to [the magistrate] to find exceptional circumstances in this case'. It is not clear from the reasons how that was characterised as jurisdictional defect.

[31] The issue again arose later in 2015 in *K v Children's Court of Victoria & Anor*.[18] The defendant in that case had been charged with terrorism offences which the Children's Court declined to hear summarily. The defendant sought judicial review on the basis that it was not open to

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16 *C v Children's Court of Victoria & Ors* [2015] VSC 40.

17 *A child v A Magistrate of the Children's Court* (unreported, Supreme Court of Victoria, Cummins J, 24 February 1992).

18 *K v Children's Court of Victoria & Anor* (2015) 303 FLR 281.

the Children's Court to find that exceptional circumstances existed. It was alleged by the prosecution that at the time of the defendant's arrest he was involved in the construction of improvised explosive devices and in possession of radical propaganda material. On review, the defendant submitted that the refusal to proceed summarily was unreasonable because there were no 'exceptional circumstances'. In support of that contention, the defendant submitted that the alleged offending was not a 'top of the range' example and he had no criminal record. In the alternative, it was argued that the magistrate's reasons for decision lacked an evident or intelligible justification for a finding of exceptional circumstances.

[32] The Supreme Court observed that it was 'settled law' that inadequacy of the Children's Court sentencing jurisdiction constitutes, in itself, exceptional circumstances which would justify uplifting the impugned matter to a higher court.[19] The Supreme Court rejected the submission that exceptional circumstances will only be demonstrated in 'top of the range' offending, and found that the magistrate's reasons provided an evident and intelligible justification for the decision. The Supreme Court began its discussion of the legal principles of judicial review that matter by making reference to the following passage from *Craig*:

> Where available, *certiorari* is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of an

19 *Director of Public Prosecutions (Vic) v Anderson* (2013) 228 A Crim R 128.

> inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record".[20]

[33] That passage draws attention to the fact that judicial review is not a review on the merits, and that the standard of legal reasonableness cannot involve substituting a superior court's view as to how a discretion should be exercised.[21] The Supreme Court described the principles that could be extracted from the previous cases to include:[22]

(a) the Children's Court should relinquish its embracive jurisdiction only with great reluctance;

(b) the gravity of the conduct and the role ascribed to the accused are important matters but are not the only factors to be considered;

(c) other factors for consideration may include the maturity of the offender, the degree of planning or its complexity, and the antecedents of the alleged offender or particular features peculiar to him or her;

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20 *Craig v South Australia* (1995) 184 CLR 163 at 175-176. See also *Police v Lymberopoulos* [2007] SASC 247.

21 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [66].

22 *K v Children's Court of Victoria & Anor* (2015) 303 FLR 281 at [26].

(d) the most important criterion is the overall administration of justice – that is, justice as it affects the community as well as the individual;

(e) the nature of the evidence to be called may render a matter unsuitable for summary determination – evidence about political motivation, or forensic or scientific evidence, may fall within this class; and

(f) 'exceptional', in this statutory context means more than special, it means very unusual.

[34] That last principle draws attention to the fact that the exercise of the discretion under the Northern Territory legislation does not require 'exceptional circumstances', and the Victorian authorities may be distinguished on that basis. The relevant statutory criterion is that it is 'not appropriate' to hear and determine the charge summarily. There is a substantial and substantive distinction between those two tests. While it may be accepted that the legislation in the Northern Territory has also adopted different responses to criminality on the part of young persons and adult offenders, and that a refusal to proceed summarily in the determination of charges against minors should be made only reluctantly, that does not require that the circumstances must be very unusual. As the principles extracted above demonstrate, 'exceptional' means more than 'special'.

[35] There is limited utility in seeking to draw fine points of distinction between ‘special’ and ‘not appropriate’, but a finding that it would not be appropriate to hear and determine a charge summarily does not require that the circumstances be very unusual. It requires only a determination that the charges are not suitable for summary hearing and determination having regard to the relevant circumstances of the alleged offending and the defendant. The circumstances which are relevant will vary from case to case. Although it is not possible to formulate an exhaustive listing of those circumstances, they will include: (1) the nature of the offence; (2) the manner in which the offence was alleged to have been committed, including any aggravating circumstances; (3) whether the offence formed part of a series of offences alleged against the accused; (4) the complexity of the proceeding for determining the charge; (5) the adequacy of sentences available to the court having regard to the nature of the offending and the criminal record of the accused; (6) whether a co-accused has been charged with the same offence, and where that charge is to be determined; and (7) any other matter the court considers relevant.

The identification of jurisdictional error

[36] The plaintiff’s assertion of reviewable error on the part of the Youth Justice Court is made with reference to a number of decisions of the High Court since *Craig* and *Kirk* which are said to lay down an analytical framework for the identification of jurisdictional error.

[37] In *Hossain v Minister for Immigration and Border Protection & Anor*,[23] the High Court considered a determination by the Administrative Appeals Tribunal to affirm the decision of the Minister's delegate to refuse a visa on the basis that two prescribed criteria had not been satisfied. The Minister conceded that the Tribunal had committed an error of law by addressing the question of whether there were compelling reasons for not applying the prescribed criteria as at the time of the visa application, rather than as at the time of its own determination. However, the Minister contended there was no jurisdictional error, because the Tribunal's decision could be sustained on the alternative and valid basis that the public interest criterion had not been satisfied. The plaintiff in this case relies in particular on the following passage in the reasons of the plurality (footnotes omitted):

> Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction. A decision made outside jurisdiction is not necessarily to be regarded as a "nullity", in that it remains a decision in fact which may yet have some status in law. But a decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it was purported to be made as "no decision at all". To that extent, in traditional parlance, the decision is "invalid" or "void".

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23 *Hossain v Minister for Immigration and Border Protection & Anor* (2018) 264 CLR 123.

> To return to the explanation of Professor Jaffe, jurisdictional error is an expression not simply of the existence of an error but of the gravity of that error. In the language of Selway J, the unavoidable distinction between jurisdictional errors and non-jurisdictional errors is ultimately "a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised".[24]

[38] The taxonomy described in that passage was directed to the Full Federal Court's erroneous distinction between decisions involving jurisdictional error and decisions wanting in authority. The plurality ultimately found that even where a decision is made in breach of a condition which the governing statute impliedly requires to be observed, the statute will ordinarily be interpreted as incorporating a threshold of materiality which will not be met if the non-compliance would have made no difference to the decision. In the application of that principle, the error of law made by the Tribunal could not have affected its decision because it was irrelevant to whether the public interest criterion had been met.[25]

[39] The plaintiff then drew attention to *Stanley v Director of Public Prosecutions (NSW) & Anor*.[26] That case involved a failure by the District Court to assess what was expressed to be the paramount consideration of 'community safety' in the relevant provision of the

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24 *Hossain v Minister for Immigration and Border Protection & Anor* (2018) 264 CLR 123 at [24]-[25].

25 The other two members of the High Court essentially concurred that error will only be material in the jurisdictional sense if it deprives a person of the possibility of a successful outcome, other than in extreme cases of denial of procedural fairness or failure to exercise jurisdiction according to the applicable criterion.

26 *Stanley v Director of Public Prosecutions (NSW) & Anor* (2023) 407 ALR 222.

sentencing legislation. On an application for review, the New South Wales Court of Appeal concluded that the failure to give consideration to 'community safety' was an error of law within jurisdiction rather than jurisdictional error. The majority in the High Court accepted the proposition in *Craig* that a failure by a sentencing court to take into account a relevant consideration will not ordinarily constitute jurisdictional error. However, the majority concluded that on proper construction of the statute, the failure to consider what was expressed in the legislation to be the paramount consideration, by reference to the statutorily mandated assessment of whether an intensive correction order or full-time detention was more likely to address the risk of reoffending, demonstrated a misconception of the function being performed in sentencing and therefore went beyond the ordinary case.[27]

[40] Three members of the High Court were in dissent, concluding in essence that the text, context, history and structure of the legislation revealed that the sentencing court's failure to comply with the relevant provisions did not constitute jurisdictional error. In particular, Gageler J (as his Honour then was) stated that the fact a consideration is expressed to be mandatory under the terms of a statute will not be sufficient in and of itself to establish that non-compliance with that consideration constitutes jurisdictional defect. The sentencing legislation under consideration in that matter did not condition the

27 *Stanley v Director of Public Prosecutions (NSW) & Anor* (2023) 407 ALR 222 at [88].

authority of the sentencing court either to impose a term of imprisonment or to make an intensive corrections order on an assessment of which particular sentencing disposition would better address the risk of reoffending.[28]

[41] The final case to which the plaintiff drew attention was the recent decision in *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor*,[29] in which judgment was delivered on 10 April 2024. In its joint reasons, the High Court began by repeating the well-established propositions from the cases already referred to above concerning the categories of jurisdictional error, and the need to construe the governing statute in order to understand the limits of the statutory conferral of decision-making authority and to determine whether jurisdictional error has occurred. The reasons then adverted to the distinction made in *Hossain* between errors which give rise to a realistic possibility that the decision could have been different if the error had not occurred, and those which do not. The two qualifications to that requirement of materiality were said to be errors which are necessarily jurisdictional in nature, such as apprehended or actual bias, and errors in which the potential for an effect on the

28 *Stanley v Director of Public Prosecutions (NSW) & Anor* (2023) 407 ALR 222 at [20], [40]-[45].

29 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12.

decision is inherent in the nature of the error, such as unreasonableness in the final result.[30]

[42] The High Court then laid down what it described as 'practical guidance' about the principles to be applied in assessing the materiality of an error, in the following terms (footnotes omitted):

> Where it is alleged in an application for judicial review that a decision is affected by jurisdictional error constituted by a breach of an express or implied condition of a conferral of decision-making authority by a statute which incorporates a requirement of materiality, there are two questions: has an error occurred; and, if so, was that error material.
>
> The inquiry posited by each question is wholly backward-looking. Both questions are to be answered by reference to the decision that was made and, depending on the nature of the error, how that decision was made. Those are facts in respect of which the applicant for judicial review bears the onus of proof on the balance of probabilities. Proof of these facts ought to be neither difficult nor contentious.
>
> What must be proved to show what decision was made and how it was made will depend upon the nature of the error. In a common case – of which the present is an example – where the error alleged is breach of a condition governing the reasoning to be undertaken by the decision-maker, the applicant's onus of proving the relevant facts is discharged by nothing more than the tender of the decision-maker's statement of reasons.
>
> Where the jurisdictional error alleged is one concerned with the process of the decision making, such as a denial of procedural fairness, what must be proved by the applicant will depend upon the precise error alleged to have occurred in the decision-making process, having regard to any relevant statutory provisions within the applicable legislative framework. Examples of the types of evidence that have been sufficient for establishing the relevant facts in such cases include the appellate record, and evidence of the content of a document or information that was required to be provided as part of the decision-making process.

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30 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12 at [6]-[7].

The applicant must satisfy the court on the balance of probabilities that the alleged error in fact occurred. Unless the error is of a type such as those identified at [6] above (where the error is always material and therefore jurisdictional), whether the error is, or is not, material is determined by inferences drawn from the evidence adduced on the application.

The question in these cases is whether the decision that was in fact made could, not would, "realistically" have been different had there been no error. "Realistic" is used to distinguish the assessment of the possibility of a different outcome from one where the possibility is fanciful or improbable. Though the applicant must satisfy the court that the threshold of materiality is met in order to establish that the error is jurisdictional, meeting that threshold is not demanding or onerous.

What must be shown to demonstrate that an established error meets the threshold of materiality will depend upon the error. In some cases, it will be sufficient to show that there has been an error and that the outcome is consistent with the error having affected the decision. Where the error is a denial of procedural fairness arising from a failure to put the applicant on notice of a fact or issue, the court may readily be able to infer that, if fairly put on notice of that fact or issue, the applicant might have addressed it by way of further evidence or submissions, and that the decision-maker would have approached the applicant's further evidence or submissions with an open mind. In those cases, it is "no easy task" for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome. Importantly, a court called upon to determine whether the threshold has been met must be careful not to assume the function of the decision-maker: the point at which the line between judicial review and merits review is crossed may not always be clear, but the line must be maintained. This case affords an example.

In sum, unless there is identified a basis on which it can be affirmatively concluded that the outcome would inevitably have been the same had the error not been made, once an applicant establishes that there has been an error and demonstrates that there exists a realistic possibility that the outcome of the decision could have been different had that error not been made, the threshold of materiality will have been met (and curial relief will be justified subject to any issue of utility or discretion).[31]

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31 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12 at [9]-[16].

[43] It is important in the application of that passage that it does not entirely elide the concepts of jurisdictional error and materiality. That is, an error will not necessarily be jurisdictional in nature simply because there was a possibility of a different outcome had it not been made. As the decisions in both *Stanley* and *LPDT*[32] make plain, the anterior question in a statutory scheme such as the one presently under consideration is whether on proper construction of the statute there has been a breach of an express or implied condition which the governing statute requires to be observed in order to confer decision-making authority.

[44] That error may take one of a number of forms, such as some misconception of the function being performed, or some misunderstanding of the applicable law, or a denial of procedural fairness, or ignoring relevant material or relying on irrelevant material. It is only if that question is answered in the affirmative that the threshold of materiality comes into consideration, unless the error is one of those which is inherently material in nature. The plaintiff's assertion of jurisdictional error falls to be assessed having regard to those principles.

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32 *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor* [2024] HCA 12 at [4].

Misconception of function

[45] The plaintiff's first assertion in this respect is that the Youth Justice Court did not reach the requisite state of satisfaction that it was 'not appropriate' to hear and determine the charges summarily. That is said to demonstrate a misconception of the function being performed, because the discretion to decline summary hearing and determination had not properly arisen. In particular, the plaintiff contends that the availability of trial by jury, the complexity and potential difficulties of resolution, the broader sentencing powers of the Supreme Court and the Supreme Court's facility for taking and dealing with evidence from very young complainants were not matters which properly informed whether proceeding to summary hearing and determination in the Youth Justice Court was not appropriate. The plaintiff also contends that the Youth Justice Court did not consider the nature and seriousness of the offending conduct or the personal circumstances of the offender.

[46] As the plaintiff accepts, the conferral of the relevant decision-making authority was contingent on the Youth Justice Court being satisfied that the summary hearing and determination of the charges was 'not appropriate'. That is the 'jurisdictional fact' or criterion upon which the exercise of the discretion is conditioned. There can be no doubt that the Youth Justice Court knew and understood that to be so. The Court expressly stated that to be the criterion on which the exercise of the discretion turned. That express acknowledgement was made after

the Court had reminded itself that it was conferred with jurisdiction to hear and determine a charge for any offence which does not carry a maximum penalty of life imprisonment. That constituted a clear recognition of the different treatment accorded to the criminality of young offenders under the statutory scheme. The Court also recognised that the statutory scheme did not provide any express guidance as to the considerations relevant to that determination. Those preliminary observations all correctly addressed the structure and operation of the statutory scheme, and the conditioning of the discretion to proceed by way of preliminary examination.

[47] The Youth Justice Court went on to observe that although the statutory scheme made no reference to the matters of complexity and potential difficulty in the resolution of the charges, they were relevant considerations to take into account. That is consistent with the generally accepted principle that the nature of the evidence and the complexity of the proceedings required to determine the charges might render the case unsuitable for summary determination. It was material in that consideration, although not determinative, that the Supreme Court is more accustomed to taking evidence from child complainants in relation to allegations of sexual offending, and that the assessment of the reliability of allegations of that nature in the Supreme Court is undertaken by a jury rather than a judicial officer as the tribunal of fact. It was open to an experienced judge of the Youth Justice Court to

make an assessment of the procedural, practical and deliberative differences between the two jurisdictions for the purpose of determining whether or not it was appropriate to proceed by way of summary hearing and determination.

[48] The relevance of the 'significant protection to accused persons of trial by jury' is less apparent given that the defendant was legally represented and opposed the application for the Youth Justice Court to decline to proceed by way of summary hearing and determination. However, that would appear to be a matter which the Court considered to go generally to the overall administration of justice as it affected the community, the defendant and the complainant. A finding that the most relevant consideration informing the exercise of the discretion is the significant protection of trial by jury would constitute legal error. However, it is not clear whether the Youth Justice Court was referring to that matter as the most relevant consideration in comparing the deliberative mechanisms of the two courts, or the most relevant consideration in the exercise of discretion. Even if there is legal error apparent in that statement, it is plain from a reading of the reasons as a whole that the Youth Justice Court both identified the correct criterion for the exercise of discretion, and considered the matters relevantly informing the satisfaction of that criterion.

[49] So far as the defendant's personal circumstances were concerned, the Youth Justice Court expressly accepted the defence submission that

even if the defendant was found guilty on both counts he would not be facing any sentence to detention of a duration which would exceed the Court's jurisdictional limit, and perhaps no custodial disposition at all. That acceptance clearly recognised the defence submissions that the conduct alleged was not at the upper end of the scale of objective seriousness, that the defendant has no criminal history and is in full-time employment, and the consequences of those matters in relation to the likely sentencing disposition. That recognition and acceptance is not displaced by the fact that the Youth Justice Court also made the observation that the Supreme Court had the advantage of being able to sentence under both the *Youth Justice Act* and the *Sentencing Act*.

[50] While the plaintiff is no doubt correct to say that it is not enough to decline summary jurisdiction to find that the Supreme Court would be a more appropriate forum, and that the Youth Justice Court did not find expressly that it would be 'not appropriate' to proceed by way of summary hearing and determination, that finding is implicit on a fair reading of the reasons as a whole. However, having regard to the basis on which it was made, that finding was tantamount to a 'blanket' determination that charges involving indecent dealing with children are not appropriate for summary determination.

[51] As already described, the legislative scheme provides for all charges before the Youth Justice Court to be heard and determined summarily, subject only to closely defined exceptions. The plaintiff seeks to

characterise summary determination as the 'default' procedure. While that is superficially attractive as a shorthand description, it is devoid of legal content, it suggests a degree of preordination which is not present, and it is unduly reductive of the scheme established by ss 54, 54A, 55, 56 and 56A of the *Youth Justice Act*. In particular, that scheme specifies the alternative mechanism of preliminary examination where the court considers that to be the appropriate course. However, had the scheme intended to 'carve out' a particular category of offence on the basis that it was inherently inappropriate for summary determination, it was open to the legislature to define that category of offence as an exception.

[52] The features identified by the Youth Justice Court as militating against summary determination in this case are generally present in all cases of indecent dealing with children (with the exception of historical offences where the complainant has reached the age of majority). The fact that some child complainants may be younger than others has nothing necessarily to say about the difficulties which might present in taking evidence specifically, or the appropriateness of summary determination more generally. It should also be noted in that respect that the protections for vulnerable witnesses available under Part 3 of the *Evidence Act 1939* (NT) also have application in the Youth Justice Court. Applications concerning the mutual admissibility of evidence for tendency purposes arising from the fact that there are multiple

counts are now routine. The fact that the charges each attracted a maximum penalty of imprisonment for 14 years was irrelevant given the manner in which the exceptions are defined and the Youth Justice Court's acceptance of the likely disposition in the event of findings of guilt.

[53] As the Victorian Supreme Court observed in *D (a Child) v White*, a finding that a particular category of offence generally – in that case, armed robbery – is unsuitable for summary determination would have constituted jurisdictional defect. Suitability or appropriateness for summary determination in each matter will depend on its circumstances, and the Youth Justice Court did not identify any particular matter which took this case out of the ordinary course. The exercise of the discretion in this particular case constituted a misconception of function for that reason. However, what must also be understood is that finding of jurisdictional defect is unconcerned with the merits of the matter and involves no determination of the manner in which the discretion should be exercised in the circumstances of this case. It may well be that there are features of this case which do take it out of the ordinary course of charges involving indecent dealing with children, but they are not expounded in the reasons for decision.

Adequacy of reasons

[54] The second ground of review advanced by the plaintiff is that the reasons for declining summary jurisdiction were so inadequate as to

deny the plaintiff procedural fairness and/or to take the Youth Justice Court outside its jurisdiction. The finding made in relation to the first ground of review renders it strictly unnecessary to determine this issue, but it was fully argued by the parties and is appropriately determined for that reason. The contention is predicated on the express requirement in s 56(1)(b) of the *Youth Justice Act* that the Youth Justice Court must give reasons for declining to hear and determine a charge summarily. As the plaintiff correctly submits, the content of that requirement is a question of construction which is informed by the nature of the power being exercised.

[55] The plaintiff submits further, on the basis of what was said by McHugh JA (as his Honour then was) in *Soulemezis v Dudley (Holdings) Pty Ltd*,[33] that one of the principal purposes of the requirement to give reasons is so that the parties can see the extent to which their arguments have been understood and accepted. That purpose must be read in light of what was subsequently said by Gleeson CJ, McHugh and Gummow JJ in *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [62]:

> The fact that his Honour did not refer to these matters in his judgment is not decisive. A judge's reasons are not required to mention every fact or argument relied on by the losing party as relevant to an issue. Judgments of trial judges would soon become longer than they already are if a judge's failure to mention such

33 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 279.

> facts and arguments would be evidence that he or she had not properly considered the losing party's case. [34]

[56] In their response to both grounds for review, the second and third defendants draw attention to the fact that the relevant question is whether, when the reasons are read fairly and as a whole, it is clear that the Youth Justice Court applied the correct legal test and determined that it was not appropriate for the charges to proceed summarily. That response draws on the well-recognised approach that an appeal court should read reasons sensibly and in a balanced way, and without taking passages in isolation and out of context. That approach also recognises that appropriate allowance must be made for the exigencies which govern the delivery of reasons in a busy court of summary jurisdiction.[35] The second and third defendants rely in particular on the observation made by Kirby P (as his Honour then was) in the New South Wales Court of Appeal in *Acuthan v Coates*:

> That is also to fall into the error of examining this unedited and unpunctuated record of ex tempore remarks in a busy magistrate's court, as if the transcript were a document to be construed strictly. It is the substance of what the magistrate said and did that the court is concerned with. Any other approach would impose an intolerable burden on magistrates. When that substance is examined, it is sufficiently clear that the magistrate held the correct tests in mind and properly approached the exercise of the discretion reposed in him by the section.[36]

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34 *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [62].

35 *Kelly v Rigby* [2021] NTSC 25 at [12]-[14]; *Thyer v Whittington* [2017] NTSC 66 at [22]-[23].

36 *Acuthan v Coates* (1986) 6 NSWLR 472 at 478-479.

[57] The same approach has been adopted in the judicial review context where the governing statute obliges the decision-maker to provide reasons. Reasons are not to be scrutinised in an over-zealous fashion in the course and for the purpose of judicial review.[37]

[58] The requirement for reasons in s 56(1)(b) of the *Youth Justice Act* is to allow the parties to see the basis of the Youth Justice Court's decision, and to further judicial accountability in the particular sense of being adequate to enable a superior court to see whether the decision does or does not involve jurisdictional defect.[38] As is apparent from the determination in relation to the first ground of review, the statement of reasons was adequate for that purpose.

[59] The plaintiff contends that the reasons in this case were inadequate because they did not deal with the central issue, which is said to be the nature and seriousness of the offences and the circumstances of the offender; and because they would need to be supplemented by assumption in order to make sense of how the Youth Justice Court had reasoned. As to the first proposition, the central issue was whether the summary hearing and determination of the charges would be 'not appropriate'. While the determination involved a consideration of the

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37 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259.

38 See *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480 at [49]-[54] in relation to a statutory requirement for a Medical Panel to give a statement of reasons. The third purpose referred to by McHugh JA in *Soulemezis* was to formulate rules for application in future cases, which purpose has limited relevance to the determination by an inferior court of a matter already governed by an express statutory criterion.

nature and seriousness of the offences and the circumstances of the offender, they were clearly matters which the Youth Justice Court took into account in the assessment of likely penalty in the event of findings of guilt. As to the second proposition, the manner in which the Youth Justice Court reached its conclusion is tolerably clear from the reasons, and it is not enough to constitute invalidity that those reasons may have been differently and more extensively framed.

Order

[60] Accordingly, I make the following orders:

1. The decision of the Youth Justice Court made on 13 March 2024 to decline to hear and determine the charges summarily is quashed.

2. The matter is remitted to the Youth Justice Court for determination in accordance with law.

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