CITATION:	*EJ v Mental Health Review Tribunal* & *Anor* [2024] NTSC 47
PARTIES:	EJ v MENTAL HEALTH REVIEW TRIBUNAL and NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2024-00585-SC
DELIVERED:	2 April 2024
HEARING DATE:	21 March 2024
JUDGMENT OF:	Huntingford AJ

CATCHWORDS:

APPEALS – HEALTH LAW – MENTAL ILLNESS – *Mental Health and Related Services Act 1998* (NT) – Appellant suffering delusional disorder – Appellant in custody for offence of recklessly endangering serious harm – Subject to Parole review – History of non-compliance with medication – Denial of diagnosis and intention to not comply with medication regime unless under order – Appellant seeking suspension of Community Management Order pending determination of appeal –– Consideration of risk of serious harm to self or others – Capacity to give informed consent – Understanding of legal proceedings without interpreter – Procedural fairness

– Consideration of deterioration without medication – Tribunal decision upheld – Likelihood that mental health with deteriorate leading to risk of serious harm to someone else – Application for suspension dismissed

Mental Health and Related Services Act 1998 (NT), s 16(b), 143, s 142(4)

KMD v Mental Health Review Tribunal [2020] NTSC 13, distinguished
CH v Mental Health Review Tribunal & Anor [2017] NTSC 43, applied

REPRESENTATION:

Counsel:

Appellant:	T Noonan
First Respondent:	A Shackell
Second Respondent:	M Thompson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
First & Second Respondents:	Solicitor for the Northern Territory

Judgment category classification:	B
Judgment ID Number:	Hun2403
Number of pages:	14

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

EJ v Mental Health Review Tribunal & Anor
No. (2024-00585-SC)

BETWEEN:

EJ
Appellant

AND:

MENTAL HEALTH REVIEW TRIBUNAL
First Respondent

AND:

NORTHERN TERRITORY OF AUSTRALIA
Second Respondent

CORAM: HUNTINGFORD AJ

REASONS FOR JUDGMENT

(Delivered 2 April 2024)

[1] On 2 February 2024 the first respondent, the Mental Health Review Tribunal (the Tribunal), made a Community Management Order (CMO) pursuant to the *Mental Health and Related Services Act 1998* (NT) (MHRS Act) in relation to the appellant for a period of six months. The Tribunal fixed a review date of 2 August 2024.

[2] The appellant has appealed the Tribunal's decision and, in this application, seeks an order pursuant to s 142(4) of the MHRS Act suspending the operation of the Order pending the determination of the appeal.

[3] The evidence in support of the suspense application is an affidavit of Ms Alecia Buchanan, solicitor for the appellant, promised 1 March 2024, annexed to which is a copy of the application to the Tribunal for a CMO by Dr Thomas Kaye including the Form 15 and a transcript made by Ms Buchannan from an audio recording of the Tribunal hearing held on 2 February 2024. The second respondent relies upon an affidavit of Dr Friedrich Lehmann-Waldau, Psychiatrist, sworn 20 March 2024.

[4] The first respondent does not take an active part in the proceeding.

[5] On 2 April 2024 I made orders dismissing the application for a suspension order and delivered oral reasons. The appeal was subsequently discontinued by consent of the parties. I now publish written reasons of the decision delivered on 2 April 2024.

Background

[6] The appellant is a 31 year old Aboriginal man from Haasts Bluff. He is currently a serving prisoner, having been convicted of the offence of recklessly endangering serious harm as a result of an incident when he threw a three year old girl, not known to him, to the ground. The appellant has been in custody since 24 May 2022 and his sentence will be complete on 23 August 2024, however he became eligible to apply for parole on 24 July

2023. In oral submissions I was told that a review is scheduled to occur on 4 April 2024 in relation to the appellant's parole application, however I do not have any details as to the nature of that review or the likely outcome.

[7] The appellant is currently prescribed depot Paliperidone 150mg every four weeks via intramuscular injection. The CMO requires the appellant to be administered that medication. The evidence before the court shows the appellant was first prescribed Paliperidone in 2021. Although it is not completely clear from the evidence, the Form 15 (Clinical Details and Management Plan re Community Management Order), and the comments of Dr Kaye and the case manager, Tina Milne, at the Tribunal hearing, indicate that the appellant has been regularly receiving depot medication while in prison, since at least June 2023 (when it is referred to in the excerpts of Dr Dorrington's notes in the Form 15) and probably since he was hospitalised and then imprisoned in May 2022.

[8] At the date of the Tribunal hearing the appellant was said to be compliant with his medication regime. However, I note that an Interim CMO was then in place. A copy of that Order was not before this Court but in accordance with the MHRS Act, an Interim CMO must be reviewed by the Tribunal not later than 14 days after it is made. This was the context in which the Tribunal was convened on 2 February 2024 and the order the subject of the suspense application was made.

[9] It appears from the evidence that the appellant was voluntarily, albeit reluctantly, taking medication recommended and prescribed by his treating doctors while in gaol between May 2022 and December 2023 although he was not, until January 2024, subject to an order compelling him to do so.

[10] Notwithstanding that it is clear on the evidence, both in the Form 15 and the evidence of Dr Lehmann-Waldau, that the appellant will no longer accept the administration of Paliperidone unless there is a CMO in place.

Legal principles

[11] There was no dispute as to the legal principles applicable upon an application for an order for suspension under s 142(4) of the MHRS Act.

[12] The applicant must first show that there is a strong *prima facie* case on the appeal and must also satisfy the court that the balance of convenience favours the making of the suspension order.

[13] The Court's power to suspend the Tribunal's order is a discretionary power not to be exercised lightly.

[14] I note that an appeal to the Supreme Court pursuant to s 142(3) of the MHRS Act is a re-hearing as described by Hiley J in *CH v Mental Health Review Tribunal*[1] and the focus of the enquiry on appeal is whether the Tribunal fell into error. That inquiry can involve consideration of factual or discretionary errors, as well as errors of law.

---

1 *CH v Mental Health Review Tribunal &Anor* [2017] NTSC 43 at [15] – [31].

Prima facie case on appeal

[15] The notice of appeal raises four grounds. They are:

a) That the Tribunal erred in finding, pursuant to s 16(b)(ii)(A) of the MHRS Act, that as a result of mental illness, without treatment the appellant is likely to cause serious harm to himself or someone else;

b) That the Tribunal erred in finding, pursuant to s 16(b)(ii)(B) of the MHRS Act, that as a result of mental illness, the appellant is likely to suffer serious mental or physical deterioration unless the order for treatment is made;

c) That the Tribunal erred in finding, pursuant to s 16(b)(iii) of the MHRS Act, that as a result of mental illness, the appellant is incapable of giving informed consent to treatment or has unreasonably refused to consent to treatment; and/or

d) That the decision of the Tribunal should be set aside because the Tribunal denied the appellant procedural fairness by determining the application without providing the appellant access to an interpreter, contrary to s 134 of the MHRS Act.

[16] Section 16 of the MHRS Act sets out three essential criteria which must be met if the Tribunal is to order involuntary treatment or care of a person in the community:

Involuntary treatment in community

The criteria for the involuntary treatment or care of a person in the community are:

(a) the person has a mental illness; and

(b) as a result of the mental illness:

(i) the person requires treatment or care; and

(ii) without the treatment or care, the person is likely to:

(A) cause serious harm to himself or herself or to someone else; or

(B) suffer serious mental or physical deterioration; and

(iii) the person is not capable of giving informed consent to the treatment or care or has unreasonably refused to consent to the treatment or care; and

(c) the treatment or care is able to be provided by a community management plan that has been prepared and is capable of being implemented.

[17] The first criteria, in s 16(a), was not challenged.

[18] The second criteria, in s 16(b), comprises three grounds which must be satisfied. The first sub-ground, that the person requires treatment or care, is not challenged in the appeal.

[19] Sub-ground two is comprised of alternatives, that without the treatment or care the person is: likely to cause serious harm to himself or someone else, or, suffer serious mental or physical deterioration. They were both found by

the Tribunal to be satisfied, although a positive finding as to either is sufficient. Both findings by the Tribunal are challenged in appeal grounds one and two.

[20] The final requirement, in s 16(b), is that the person is not capable of giving informed consent or has unreasonably refused to do so. It appears that the former was relied upon by the Tribunal. That finding is challenged in appeal ground three.

[21] The third criteria, in s 16(c), is that the treatment or care is to be provided by a CMO that has been prepared and is capable of being implemented. There is no appeal against that finding by the Tribunal.

First ground of appeal

[22] In relation to the first ground of appeal the appellant submits that he has a strong prima facie case in reliance upon the decision of Barr J in *KMD v Mental Health Review Tribunal*.[2] That case is authority for the proposition that in considering whether it is "likely" that a person will cause serious harm to themselves or someone else, it is necessary to take into account not only the state of their mental health but also their overall situation, including any applicable legal constraints.[3]

[23] *KMD* was an appeal against an order of the Tribunal that the appellant be involuntarily admitted to hospital for treatment in accordance with s 14 of

2 [2020] NTSC 13.

3 Ibid [25], [31].

the MHRS Act. At the time that the Tribunal's order was made, KMD was subject to indefinite incarceration pursuant to a custodial supervision order made in accordance with Part IIA of the *Criminal Code*. She could only be released into the community by order of the Supreme Court and as such her medium to long-term future circumstances were clear.

[24] The Court found that the Tribunal had fallen into error in finding that the appellant in *KMD* was likely to cause serious harm to someone else, and that it had erred in law because it assessed the likelihood of that occurring on the premise that the appellant would be released from custodial supervision into the community, which was unlikely to occur in the foreseeable future and could not occur without an order of the Supreme Court.

[25] In my view, *KMD* is distinguishable. First, in this case there is some prospect that the appellant will be released on parole during the duration of the order. Secondly, the appellant in *KMD* suffered from a mental illness described as a delusional disorder, a feature of which was that a person may function normally except in relation to the subject matter of the delusion.[4] Although she was not medicated, the triggers for her disorder were not present in gaol. There was no evidence that she was any risk to persons within the custodial environment. Thirdly, the appellant in *KMD* was not taking medication or receiving treatment at the time that the risk assessment was made. This is a different situation where the appellant is seeking to stop

4 *KMD v Mental Health Review Tribunal* [2020] NTSC 13 at [9].

a medication which he has previously received, initially apparently voluntarily. The likelihood that the appellant would cause serious harm to someone else needed to be considered in that light. The risk was described in the Form 15 as "relatively contained" while in gaol but "very high" upon release.[5]

[26] The assessment of the risk in gaol as "relatively contained" should be seen not only in the context of the custodial environment but in view of the fact that the appellant is said in the Form 15 to be "passively adherent with medication currently in a forensic setting".[6] In other words he is medicated in gaol and therefore the likelihood that he will cause serious harm to someone else is reduced.

Second ground of appeal

[27] In relation to appeal ground two, there was also evidence in the Form 15 that if the appellant is not medicated, his mental state will deteriorate. There was evidence before the Tribunal that the appellant suffers from schizophrenia and that his symptoms have previously included paranoid delusions, auditory hallucinations and disordered thinking, and that those symptoms improve when he is medicated and that he has been receiving medication in custody.

[28] Dr Kaye's opinion in the Form 15 was that:

---

5 Affidavit of Alecia Buchanan, promised 01 March 2024, annexure AB-1 'Form 15 Clinical Details and Management Plan re Community Management Order' at page 2.

6 Ibid page 3.

> "There is longstanding documentation of his mental state seriously declining when not on treatment. Often this is also in the context of drug use but note that even during periods of incarceration he has at times declined his medication leading to a deterioration in his mental state."[7]

[29] For the purposes of the application for the suspension of the CMO, the first two grounds do not appear to me to be overwhelmingly strong. I would not, however, go so far as to say that the first two grounds of appeal are unarguable as it may depend on the evidence accepted by the Court on the appeal, noting that on a re-hearing additional evidence may be admitted. I also note the appellant would have to succeed on both to overcome the Tribunal's finding in relation to the criteria in s 16(b)(ii) of the MHRS Act.

Third ground of appeal

[30] The appellant argues that the failure to provide an interpreter at the Tribunal hearing meant that the Tribunal could not reasonably conclude that the appellant lacked capacity to give informed consent because there was a real question whether his failure to consent was caused by a failure to provide education about his illness in a language he could understand. There are, however, in the Form 15, detailed quotes from the medical notes of comments and statements made by the appellant, in English, going back to June 2014 which on their face tend to indicate both that he understands the concept of mental illness and that he denies that he suffers from it.

---

7 Ibid page 4.

[31] There is no suggestion in the medical notes referred to in the Form 15 that the appellant did not understand any of the doctors with whom he had spoken with over several years. There was also evidence in the Form 15 that the appellant has clearly said that if he is not subject to an Order he will no longer take his medication. The appellant is reported as having clearly said the same to treating doctors in June 2023, December 2023 and January 2024. The appellant repeated this to Dr Lehmann-Waldau at Alice Springs Correctional Centre on 12 March 2024, stating that he would not take medication if he was not required to do so under an order.[8] Dr Lehmann-Waldau's evidence is that he had no trouble communicating with the appellant in English and did not think that the appellant needed an interpreter. Although, again, it will depend on the evidence on appeal, in my view this ground is also not particularly overwhelming.

Fourth ground of appeal

[32] The fourth ground raises a different issue, being one of procedural fairness. It depends upon a matter of fact, namely whether the appellant speaks English to a level which enables him to understand the proceedings, and also whether it was "reasonably practicable" for an interpreter to be provided.[9] The understanding of legal proceedings, such as in the Tribunal, is not necessarily the same as understanding in other contexts, including medical

---

8 Noting that this evidence was not before the Tribunal.

9 As provided by s 134 of the MHRS Act that the "Tribunal must, so far as is reasonably practicable, permit a person who is the subject of a review or involuntary detention application to have access to an interpreter to assist the person".

consultations. I will proceed for the purposes of these reasons on the basis that this ground is arguable.

Balance of convenience

[33] The appellant submitted that the balance of convenience favoured making an order for suspension because there is no need for a CMO until the appellant is released. It was pointed out that because the CMO was made on 2 February 2024 it will expire before the expiry of the appellant's custodial sentence. That does not, of course, take into account the imminent consideration of the application for parole, which is a factor weighing in favour of an order based on the elevated risk.

[34] Nor does it take into account that the appellant has been taking medication in gaol but has now indicated, most recently to Dr Lehmann-Waldau in March 2024, that he no will no longer do so if the CMO lapses or is revoked.

[35] In my view there is sufficient evidence that if the appellant discontinues his medication in gaol he is likely to suffer serious deterioration in his mental health. That opinion is set out in the Form 15 which I have already referred to, and also at paragraph [10] of the affidavit of Dr Lehmann-Waldau where he opines that the appellant is "highly likely to relapse into a florid psychotic state if he is not on consistent and ongoing treatment." The appellant's history, which includes not only the offence for which he is currently incarcerated, but also threats to mental health staff at the Alice

Springs Hospital in 2022 and at the Royal Adelaide Hospital in October 2021 is relied upon by Dr Lehmann-Waldau as evidence for that opinion.

[36] Dr Lehmann-Waldau is a consultant psychiatrist employed by Top End Mental Health Service, part of the Northern Territory Department of Health, since October 2023. He attended at the Alice Springs Correctional Centre and met with the appellant and the appellant's case manager on 12 March 2024. Dr Lehmann-Waldau's opinion is that the appellant does not have any side effects from the medication and has tolerated it well.

[37] Therefore, I reject the appellant's submission that the risk of suspension of the CMO is minimal. It seems to me that the risk to the appellant's mental health if his medication is ceased, is not insignificant. On the other hand there is minimal to no evidence that the continued administration of the medication carries any disproportionate risk to the appellant's health.

[38] There is also some evidence that the appellant will pose a risk to staff (custodial and health) or other prisoners in gaol if his medication is discontinued, based upon his previous behaviour when unwell in the Alice Springs Hospital and the Royal Adelaide Hospital before this current period of incarceration. It is significant that all of the risk assessments as to the risk of serious harm to others in gaol have been on the basis that the appellant is taking his medication, something he is now saying he will no longer do without a CMO.

[39] In view of the appellant's stated intention not to comply, it seems that there is a likelihood that upon cessation of the medication his mental health will deteriorate, and that in my view also carries with it a likelihood that he will cause serious harm to someone else. For those reasons the balance of convenience favours maintaining the CMO pending the appeal.

Orders

[40] I confirm the following orders:

1. The application for an order suspending the Order made by the Tribunal is dismissed.

2. The proceeding is referred to the Registrar to make orders for the listing of the appeal.

3. No application for costs.
