HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

ON APPEAL FROM THE COURT OF APPEAL
OF THE SUPREME COURT OF SOUTH AUSTRALIA

No. A6 of 2022

B E T W E E N: JACOB ARTHUR WICHEN
Appellant

-and-

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Certification

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

Part II: Reply

Ground 1

2. The respondent (at R [27]) submits that the appellant's submission "overlooks that the ordinary meaning [of 'willing'] is silent as to whether the relevant state of mind or inclination to act is to be assessed by reference to circumstances as they exist at the time of the assessment or as they might exist in the future at time when an opportunity to offend presents itself" (and see also R [53]). But the terms of s 59(1a)(a) are not "silent" on that question. The relevant expression in s 59(1a)(a) – "*is* … willing" – is in the present tense. In its ordinary meaning, it directs an inquiry into the state of mind *currently* held by the detainee (ie, at the time of the decision). Of course, the relevant state of mind is a state of mind *about* the future. The appellant does not submit otherwise. The respondent's submission appears to confuse the time when the relevant state of mind is held with the time that is the *subject* of that state of mind. It is the detainee's *presently held state of mind* as to their preparedness to control their sexual instincts *in the future*, if presented with an opportunity to offend, to which the inquiry mandated by s 59(1a)(a) is directed. Of course, on the appellant's construction, predictions as to how the detainee may act in the future are still highly relevant, but as matters to be weighed in the exercise of the judicial discretion to release on licence,

rather than as an absolute bar to the consideration of the discretion.

3. As to R [39]-[41], it is not apparent why it should be assumed that the medical reports required under s 59(2) must be directed to the "threshold" test in s 59(1a)(a). Those reports must be obtained in every case, even where the applicant for release on licence relies on s 59(1a)(b) rather than s 59(1a)(a), and they are clearly not directed to *that* threshold test. On the appellant's construction of s 59(1a)(a), the medical reports will always still be relevant, both because they will provide up-to-date information about a matter which the Court was required to take into account when making the initial order for detention, and because they will bear on the exercise of the discretion to release.

4. The respondent places emphasis on the supposed "operational symmetry" of the statutory scheme which their construction is said to create (R [41], [45]). However, as submitted at A [17], the Court of Appeal's construction produces a statutory scheme that is manifestly asymmetrical in its legal and practical operation. As the respondent correctly states at [45], the Court of Appeal's construction "results in the respective *threshold* risk assessments in ss 57, 58 and 59 being *mirrored*". But the thresholds in s 57 on the one hand, and ss 58 and 59 on the other, work in opposite ways. One is a threshold *enlivening* a *discretion* to detain. The other is a threshold that *requires* detention to continue *unless* the threshold is met, in which case there is a discretion to release. That is not a "symmetrical" regime for detention; it is a regime in which the Court's initial exercise of the discretion to detain makes it virtually impossible for a person to satisfy the precondition for subsequent release (see A [8], [18], [54]). The "symmetry" on which the respondent relies is merely symmetry in the "verbal tests" to be applied; it is not symmetry *in the operation of the statutory scheme* at all.

5. If (as submitted at R [46]) the Court of Appeal at CA [31] was only referring to the "test", and not the legal and practical operation of the detention regime, when it said that a "person would be detained under one test, but potentially amenable to immediate release on licence (or discharge under s 58) under another", then, by allowing that essentially aesthetic consideration to control the construction of s 59(1a)(a), it gave far too much weight to it.[1] However, it is clear that the reasoning of the Court of Appeal went far beyond that. Their Honours referred to the detention regime being "not only

[1] In any case, a significant aspect of the point made at A [37] is textual: the fact that s 57 does not contain an explicit "threshold" (even though, as the parties accept, the Court should not order the detention of a person unless it is found they there is at least a significant risk that they will commit a relevant offence if given an opportunity) means that any sense of aesthetic coherence in the drafting of ss 57-59, based on the neatness of the "threshold tests" "mirroring" each other, is significantly reduced.

capricious" but also "non-sensical"; they supported their reasoning at CA [31] with a quote from a statement of Gageler J that was clearly concerned with substantive "coherence" and not mere aesthetic coherence.

6. The respondent's reliance on "coherence", like the Court of Appeal's reliance on that concept, is misplaced. Neither of the competing constructions produces a regime that is relevantly "incoherent". Moreover, at CA [37] and [38], the Court of Appeal ultimately appears to have turned the relevance of "coherence" on its head by ostensibly requiring the *appellant* to demonstrate that the *respondent's* construction was "incoherent" before adopting a construction more consistent with fundamental rights.

7. The respondent (at R [50]-[53]) submits that the Court of Appeal's construction of s 59(1a) "best achieves" the purpose of protecting the community from the risk posed by sexual offenders who are incapable of controlling, or unwilling to control, their sexual instincts. Of course, any construction that resulted in the prolonged, or indefinite, imprisonment of more convicted sex offenders would, in one sense, "better achieve" the purpose of community protection. The purpose would be *best* achieved if there were no s 58 or s 59 at all. But, in a case such as this, identifying protection of the community as the overall purpose of the scheme does not advance the constructional task much.[2] The very question presented by this appeal is: in what way, precisely, is that purpose pursued? In particular, what is the nature of the threshold that enlivens a judicial discretion to continue detention or to release on licence, *which discretion must itself be exercised in pursuit of that purpose* (and with protection of the safety of the community as the "paramount consideration" in that discretion)? The respondent's reliance on provisions directed to the exercise of the discretion (R [55]) cannot logically control the construction of the precondition for enlivening the discretion in the first place. Indeed, such emphasis on the protection of the community in exercising the discretion might well be unnecessary if the Court were already required to be positively satisfied that any significant risk had been eliminated, before even considering the discretion.

Ground 2

8. There is an apparent tension between the respondent's submissions on ground 1 and on ground 2. As to ground 1, the respondent emphasises that the definition of "unwilling" focusses upon "circumstances as they might arise *in the future*" (R [5(a)]), yet in relation

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[2] See, eg, *Construction, Forestry Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619 at 632-3 [40]-[41], quoting *Carr v Western Australia* (2007) 232 CLR 138 at 142-3 [5]-[7]; *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at 208 [21].

to ground 2, it is submitted that the risk assessment is to be undertaken "by reference to the circumstances which are likely to apply were the person to be released into the community *without condition*" (R [67]) – those being circumstances that could not arise, during the licence period, if the person were released under s 59.

9. What the Attorney-General evidently regarded *R v Humphrys*[3] as having decided (as explained in the second reading speech set out at R [64]), was that "*despite the risks* an offender might pose to the safety of the community", it was appropriate to order the release of the offender as steps could be taken by the Department for Correctional Services and other government agencies to "manage" the risks associated with their release. The Court in *Humphrys* did not determine that the steps that could be taken by the Department for Correctional Services meant that there would *not* be a "significant" risk associated with the release of the offender in that case. That is not surprising, because at that time, there was no threshold requirement for release in the legislation.

10. On the construction advanced by the appellant for the purposes of ground 2:

    (a) Section 59(1a)(a) requires, first, identification by the Court of the *actual* circumstances that would be applicable to the offender were they to be released – including, but not limited to, the nature and effect of conditions to be imposed.

    (b) Secondly, because the constructional question presented by ground 2 arises only if ground 1 fails, it requires the Court to consider whether, if "given an opportunity to commit a relevant offence", there is a significant risk that the person "would fail to exercise appropriate control of [their] sexual instincts" – by reference to the *actual* circumstances that would apply to the person. That includes consideration of not only the existence and nature of the proposed conditions but also the likelihood of the person complying with them, and of the person acting in particular ways if they were to breach the conditions.

    (c) Thirdly, the appellant's construction requires the Court to assess whether the risk, as affected by such considerations (ie, the nature of the conditions, the likelihood of compliance, and the risks in the event of non-compliance) amounts to a "significant" risk of the kind contemplated by the definition of "unwilling" in s 57(1). Unlike in *Humphrys*, the Court could *not* release a person unless positively satisfied that there was not a "significant risk" of the relevant kind.

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[3] (2018) 131 SASR 344. The actual grounds of appeal in *Humphrys* were quite limited: see at 346 [3], but its greater significance would seem to be in what the Attorney-General described it as deciding.

11. Given that any release under s 59(1) must be on conditions (s 59(7) and (8)), there is no rational or compelling reason to disregard that fact when assessing whether there is a "significant risk" of the kind referred to in the definition of "unwilling". Importantly, the appellant's construction does *not* require the Court to *assume* that the offender will comply with the conditions, or to ignore any risk that an offender may fail to comply with conditions or that the conditions may otherwise not be fully effective in eliminating a risk. It merely makes those issues proper subjects for inquiry and consideration in the determination of whether the threshold condition in s 59(1a)(a) is satisfied.

12. At R [63], the respondent appears to submit that the construction adopted by the Court of Appeal should be preferred because the appellant's construction "may leave the safety of the community vulnerable to the significant risk posed by a person released under s 59 should they fail to comply with the imposed licence conditions". That approach effectively forces the Court to proceed on the assumption of the person failing to comply with whatever conditions would be imposed. This is inconsistent with the whole idea of the risk assessment, which requires consideration of the *probability* of an occurrence. It should not be supposed that the Parliament intended to require the Court to ask itself whether there is a "significant risk" on an assumed state of affairs that would not reflect the reality, were the person released. Nor should it be supposed that the Parliament intended to require the indefinite continuing detention of persons who *could* be released on conditions which would result in the risk posed being mitigated to the point where it was not a "significant risk".

Dated: 26 April 2022

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