



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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#### Important Information

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IN THE HIGH COURT OF AUSTRALIA  
DARWIN REGISTRY

APPLICATION FOR SPECIAL LEAVE TO APPEAL FROM THE FULL COURT OF THE  
SUPREME COURT OF THE NORTHERN TERRITORY (D1/2025)

BETWEEN:

**Asher Badari**

First Applicant

**Ricane Galaminda**

Second Applicant

**Lofty Nadjamerrek**

Third Applicant

**Carmelena Tilmouth**

Fourth Applicant

and

**Minister for Housing and Homelands**

First Respondent

**Chief Executive Officer (Housing)**

Second Respondent

**APPLICANTS' SUBMISSIONS**

**Part I: These submissions are in a form suitable for publication on the internet.**

**Part II: Issues**

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The only issue is whether the Full Court of the Supreme Court of the Northern Territory erred by not hearing from the Applicants after it announced on 15 November 2023 that it declined to accept the part referral of the proceeding to the Full Court, and before deciding to determine the proceeding adversely to the interests of the Applicants.

**Part III: Notice of constitutional matter:** No notice is considered necessary.

**Part IV: Reports of the judgments below**

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1. The judgment below is unreported and its medium neutral citation is: *Badari & Ors v Minister for Territory Families and Urban Housing & Anor; Badari & Ors v Minister for Housing and Homelands & Anor; Nadjamerrek & Ors v Chief Executive Officer (Housing)* [2025] NTCA 1 (FCNTJ).

**Part V: Facts**

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2. The Applicants adopt, as background, the summary of facts in the Appellants' submissions dated 26 June 2025 in proceeding D7 of 2025. That summary is only repeated and supplemented here insofar as is relevant to the present referred application for special leave to appeal.

3. On 1 February 2023, the Minister for Housing and Homelands made a determination (**Fourth Determination**) purportedly pursuant to s 23 of the *Housing Act 1982* (NT) (the **Determination power**). The Fourth Determination purported to alter the rents to be paid by the Applicants, among many others.

4. On 31 March 2023, the Applicants by originating motion challenged that determination in the Supreme Court of the Northern Territory (**Fourth Determination proceeding**) (CAB 43-7). Ground 1 was of a similar nature to those upon which the three preceding determinations were challenged in the proceeding which became AP13/22 before the Court of Appeal of the Supreme Court of the Northern Territory (NTCA) and is now D7 of 2025 before this Court (**appeal proceeding**). The remaining non-referred grounds in respect of the challenge to the Fourth Determination were not similar, were based on different evidence and were not considered in the appeal proceeding (CAB 200[5]-[6]).

5. On 30 August 2023, the Chief Justice of the Supreme Court of the Northern Territory made orders by which part of the Fourth Determination proceeding, being ground 1, was referred to the Full Court of the Supreme Court of the Northern Territory (FCNT) to be heard together with the appeal proceeding (and a further proceeding not presently relevant) (CAB

48-60, 199[2]-[3]). Those orders were made by exercise of the power from s 21(1) of the *Supreme Court Act 1979* (NT).

6. On 22 September 2023, the solicitor for the Northern Territory filed in the appeal proceeding an affidavit which annexed a new tenancy agreement for one of the Applicants, Lofty Nadjamerrek. On 9 October 2023, that new tenancy agreement was reflected in an amended originating motion in the Fourth Determination proceeding, along with other changes raising issues different to those in the appeal proceeding (CAB 51-5, 199[4]-200[5]). Those changes led to the parties reconsidering the part referral to the FCNT.
7. The appeal proceeding and the part referral of the Fourth Determination proceeding were called for final hearing on 15 November 2023 before the NTCA and the FCNT (identically constituted) respectively. At the start of the hearing on that day, the parties made submissions to the effect that the FCNT should ‘decline to accept’ the part referral of the Fourth Determination proceeding, pursuant to s 21(2)(b) of the *Supreme Court Act* (CAB 334-6). The Court then announced that it declined to accept the referral made by the Chief Justice on 30 August 2023 (CAB 200[7], 336).
8. On the evening of that hearing day, the lawyers for all parties received an email from the Associate to the Chief Justice in the following terms: (CAB 200[8], 409)

Dear all

I confirm the following Orders made by Court of Appeal in the above matter:

1. The hearing is to continue at 10:00am on 16 November 2023.

The Court notes the following:

· The reference to the Full Court is declined pursuant to s 21(2) of the *Supreme Court Act* (NT). Accordingly the affidavit of Jarrod Clow made on 14 November 2023 in relation to the referral in 2023-01110-SC does not require tendering in the proceedings and is to be dispensed with.

9. No oral submissions were made to the FCNT by any party in respect of the substance of the Fourth Determination proceeding on 15 or 16 November 2023, or since.
10. More than 14 months after the hearing and the FCNT’s clear communication that it had declined the referral, the FCNT published a judgment. That judgment identified in its title that the Fourth Determination challenge was ‘on reference from the Supreme Court exercising Territory jurisdiction’. It detailed the nature of the proceeding and noted that ‘by consent, that particular claim for relief was referred for determination to the Full Court, to be heard together with the other matters’ (FCNT [3]). In the body of the reasons for judgment, the FCNT noted that the referral was ‘to be determined’ and that it ‘raises the

same issues as have been determined above for the purpose of the appeal, and attracts the same findings’ (FCNTJ [160]). Under the heading ‘disposition’, the Court then noted the following (FCNTJ [179]):

For these reasons, the appeal in proceeding AP 13/22 (2237775) should be dismissed, and the same consequence follows in relation to the application for judicial review of the Fourth Determination the subject of proceeding 2023-01110-SC.

11. On the same morning as the reasons were delivered, the lawyers for all parties received another email from the Associate to the Chief Justice in the following terms (CAB 200[9], 411):

Dear all

I confirm the following Orders made by their Honours Chief Justice Grant, Justice Huntingford and Acting Justice Barr in the above matters:

1. The appeal in proceeding AP 13/22 (2237775) is dismissed.
2. The application for judicial review of the Fourth Determinations [sic] in proceedings [sic] 2023-01110-SC is dismissed.
3. In proceeding 2023-01346-SC, leave to appeal is granted and the appeal is dismissed.
4. The Court will hear the parties in relation to the precise form of the Orders which should be made consequent upon the above findings and as to costs.
5. The reasons for decision is published.

12. On 20 February 2025, the Applicants requested sealed orders from the FCNT, as such orders were required to comply with the lodgement requirements for an application for special leave to appeal to this Court (as the Registry of this Court informed the Applicants that the time for the lodgement of an application for special leave to appeal ran from the publication of reasons). Those sealed orders were provided on the same day and the Applicants lodged an application for special leave to appeal on 21 February 2025 (CAB 191-7).

13. The single ground of the application for special leave to appeal is (CAB 193):

The FCNT in giving judgment and orders dismissing proceeding 2023-01110-SC as the FCNT had earlier ‘declined to accept’ the referral of it and the parties were not heard on the possibility that the proceeding would be re-accepted and determined.

14. On 14 March 2025, the Respondents filed a response relevantly agreeing that the application for special leave to appeal should be granted and the appeal to this Court should be allowed. The Respondents accepted that those orders should be made for two independent reasons. First, the Respondents submitted that in circumstances where the FCT had ‘declin[ed]’ to accept the referral of part of the Fourth Determination proceeding, ‘the jurisdiction in respect of the judicial review application remained to be exercised by a single Judge of the

Court, not the Full Court’ (CAB 414[8], see also 414[4]). That conclusion was said to be required by ss 15 and 21 of the *Supreme Court Act*. Second, the Respondents accepted that special leave should be granted and the appeal allowed on ‘the basis identified by the Applicants’, namely, a denial of procedural fairness (CAB 414[9], see also 414[4]). The Respondents suggested that the appeal could be resolved ‘on the papers’ (CAB 414[9]). To reflect that, the parties filed a minute of proposed consent orders with the Court on 21 March 2025 (CAB 445-7).

15. On 8 May 2025, the application for special leave to appeal was referred on 8 May 2025 to a Full Court of this Court ‘for hearing as on appeal’ (CAB 448-9).

## 10 **Part VI: Argument**

16. The judgment of the FCNT purports to consider the previously referred aspect of the Fourth Determination proceeding. The resulting order 2 then dismissed ‘the application for judicial review of the Fourth Determination the subject of proceeding 2023-01110-SC’. That is, order 2 does not purport to just dismiss ground 1, referred and then declined by the FCNT. On its face, it also dismisses the non-referred grounds. That said and read in light of the reasons<sup>1</sup> (especially FCNTJ [160]), order 2 can be read to be concerned only with the previously referred component of that proceeding which related to the interaction between s 41 of the *Residential Tenancies Act 1999* (NT) and s 23 of the *Housing Act 1982* (NT).

20 17. If, contrary to its plain indication that it declined to accept the referral, the FCNT intended to determine that application concerning the Fourth Determination in part or in whole, it was duty bound to inform the Applicants and allow them to make oral submissions as to the substance of why it should not ‘accept in part’ the referral and on why the referred parts of the proceeding should ultimately succeed. The FCNT did neither. Rather, it told the parties it declined to accept the part referral, and then gave judgment and made orders adverse to the Applicants on the substance of the same referral. By doing so, the FCNT denied the Applicants procedural fairness either by:

- (a) denying them a chance to make those submissions; or
- (b) conducting no hearing at all on the substance of the referred proceeding.

30 18. In either scenario, ‘[i]t is not for this Court to attempt to provide the hearing that the appellant[s] ha[ve] not had, or to attempt to give any judgment such as might be thought to

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<sup>1</sup> *Athens v Randwick City Council* (2005) 64 NSWLR 58, [28]; *Oswal v Apache Corporation (No 4)* [2014] FCA 1291, [51].

have been appropriate in the Supreme Court.<sup>2</sup> Rather, the proceeding should be remitted to the FCNT for reconsideration according to law.

19. The same result would follow if the Court accepted the alternative formulation of the error in the Respondents' response to the application for special leave to appeal, namely, that the FCNT erred because after declining to accept the part referral of the Fourth Determination proceeding the FCNT did not have jurisdiction to determine that proceeding, as that jurisdiction had to be exercised by a single judge of the Court by reason of ss 15 and 21 of the *Supreme Court Act*.

20. Special leave should be granted in this proceeding because it is in 'the interests of the administration of justice' that this error in both process and outcome be corrected.<sup>3</sup> The appeal should be allowed for the reasons set out above. Doing otherwise would leave the Applicants, and all other public housing tenants in Northern Territory communities who are subject to the Fourth Determination, exposed to a rent determination that is arguably not lawful.

#### **Part VII: Orders sought**

21. The Applicants seek the orders previously agreed between the parties and the subject of a consent minute of order provided to the Court on 21 March 2025, namely:

- (a) Special leave to appeal granted.
- (b) Appeal allowed.
- (c) Order 2 made on 24 January 2025 by the Full Court of the Supreme Court of the Northern Territory is set aside.
- (d) The matter be remitted to the Full Court of the Supreme Court of the Northern Territory for hearing on the question of whether it should decline to accept the referral of the proceeding under s 21 of the *Supreme Court Act 1979* (NT).
- (e) There be no order as to costs of the application for special leave or the appeal.

#### **Part VIII: Estimate**

22. The Applicants estimate that they will require 5 minutes for their oral argument in chief.

DATED: 26 June 2025



30 **Matthew LL Albert**  
(03) 9225 7999  
matthew.albert@vicbar.com.au



**Julian R Murphy**  
(03) 9225 7777  
julian.murphy@vicbar.com.au

<sup>2</sup> *DWN042 v Republic of Nauru* (2017) 92 ALJR 146, [20]–[21].

<sup>3</sup> *Judiciary Act 1903* (Cth) s 35A(b).

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**Asher Badari**

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and

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**ANNEXURE TO APPLICANTS' SUBMISSIONS**



Pursuant to Practice Direction No 1 of 2024, the Applicants set out below a list of the statutes and statutory instruments referred to in their submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
1.	<i>Housing Act 1982</i> (NT)	Version in force between 1/7/2021 and 1/5/2023	s 23	This version was applicable at the time the Fourth Determination was gazetted.	3/2/2023 (Fourth Determination)
2.	<i>Residential Tenancies Act 1999</i> (NT)	Version in force between 1/4/2021 and 2/1/2024	s 41	As above	As above
3.	<i>Supreme Court Act 1979</i> (NT)	Version in force between 1/6/2023 and 15/3/2024	ss 15 and 21(2)(b)	This version was applicable at the time of the order of the Chief Justice of the Supreme Court of the Northern Territory referring part of the Fourth Determination proceeding to the FCNT and at the time of the hearing before the FCNT; the provisions are unchanged in the later version applicable at the time of the FCNT's orders.	30/8/2023 (order of the Chief Justice of the Supreme Court of the Northern Territory referring part of the Fourth Determination proceeding to the FCNT)  15-16/11/2023 (hearing before the FCNT)  24/1/2025 (orders of the FCNT)