43/11; [2011] VSC 642

SUPREME COURT OF VICTORIA

TAHA v BROADMEADOWS MAGISTRATES' COURT & ORS BROOKES v MAGISTRATES' COURT OF VICTORIA & ANOR

Emerton J

28, 29 July, 16 December 2011

ADMINISTRATIVE LAW – STATUTORY CONSTRUCTION – PROCEDURAL FAIRNESS – JURISDICTIONAL ERROR – POWER OF THE MAGISTRATES' COURT TO MAKE IMPRISONMENT ORDERS FOR FAILURE TO PAY FINES UNDER S160(1) OF THE *INFRINGEMENTS ACT* 2006 (VIC) – SPECIAL PROVISION MADE FOR INFRINGEMENT OFFENDERS WITH MENTAL IMPAIRMENTS AND INTELLECTUAL DISABILITIES IN S160(2) OF THE *INFRINGEMENTS ACT* 2006 (VIC) – NEED TO CONSIDER THE AVAILABILITY OF ORDERS IN SS160(2) AND 160(3) BEFORE MAKING AN ORDER UNDER S160(1) OF THE *INFRINGEMENTS ACT* 2006 (VIC) – DUTY TO INQUIRE INTO CIRCUMSTANCES OF INFRINGEMENT OFFENDERS – ORDERS MADE BY MAGISTRATES' COURT SET ASIDE: *INFRINGEMENTS ACT* 2006 (VIC) S160; *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* 2006 (VIC) SS6, 8, 21, 24, 32, 38.

Two persons, Taha (T.) and Brookes (B.) appeared before the Magistrates' Court in relation to orders for outstanding fines. Both persons were legally represented at the hearings. In T's case, he had an intellectual disability and B. was suffering from a mental illness. Under the *Infringements Act* 2006 ('Act') each of them would have been eligible to have had the fines waived or reduced or a lesser term of imprisonment imposed or measures other than imprisonment imposed. In T's case, his intellectual disability was not mentioned to the Magistrate and in B.'s case the Magistrate refused to entertain submissions concerning her mental health and personal circumstances as she had no supporting documents. The Magistrates made orders for imprisonment for non-payment of the fines without regard to the possibility that less draconian orders could have been made under ss160(2) or (3) of the Act. Upon application to quash—

HELD: Applications granted. Orders set aside. Matters remitted to the Magistrates' Court for determination according to law.

1. Section 160(1) of the Act confers on the Magistrates' Court the power to order that an infringement offender be imprisoned for the specified period, but sub-ss (2) and (3) contemplate the making of special orders for certain infringement offenders. These include persons, like T. and B. who have intellectual impairments or mental illnesses.

2. The Act, read as a whole, affords protection to vulnerable people who are inappropriately caught up in the infringement system, in that it contains a series of filters to remove vulnerable people from the infringement regime. If the filtering mechanisms up to the point of an infringement warrant being issued have been unsuccessful, or if the fines have not otherwise been paid, the Act provides for the Magistrates' Court to retain a range of options to prevent imprisonment other than as a last resort.

3. The role or function of the Court under s160 of the Act, and whether it is permitted to 'sit back' and have no regard to the possibility that the offender has an intellectual disability or mental illness that would enliven the powers in sub-ss (2) or (3) unless raised by the infringement offender, will depend on how the powers conferred by s160 of the Act are to be construed.

4. Section 160 of the Act must be construed in a unified fashion, and that the power conferred by sub-s (1) must be exercised by reference to the powers contained in sub-ss (2) and (3). By enacting s160, the legislature has given the Court a variety of powers to make different kinds of imprisonment and related orders. Those powers give the Court a range of options to deal with the kinds of offenders who commonly come before the Court, having exhausted all the other possibilities for repayment or expiation of the fines. The powers in s160 comprise a 'package' of measures, to which the Court must have regard as a whole when deciding how best to deal with the individual infringement offender.

5. The interpretation of s160 that least infringes the rights in ss21 and 24(1) of the *Charter of Human Rights and Responsibilities Act* 2006 is one that requires the Court to address the possibility that the alternative orders in sub-ss (2) or (3) may be available before making an imprisonment order under sub-s (1). This requires the Court to consider the individual circumstances of the infringement offender. In undertaking this task in a manner that least infringes the right to the equal protection of the law in s8(3) of the *Charter*, the Court may be required to make inquiries of the infringement

offender aimed at ascertaining whether he or she answers one or more of the descriptions in sub-ss (2) or (3). It is in the nature of an intellectual disability or a mental illness that it may prevent the offender from triggering the operation of sub-ss (2) or (3) by raising the condition with the Court. It would defeat the purpose of sub-s (2), in particular, if it could only be enlivened by the actions of a person burdened by a condition that may disable them from forming and exercising the necessary judgement to do so.

6. Hence, while sub-ss (2) and (3) require the Court to be 'satisfied' of the matters described therein before making any of the alternative orders, that does not mean that it is left to the infringement offender to satisfy the Court of those matters. The Court may reach the requisite state of satisfaction as a result of its own inquiries and from information that emerges during the course of the s160 hearing as a result.

7. In failing to address the possibility that orders could be made under sub-s (2) or sub-s (3) in lieu of an imprisonment order under sub-s (1), and by simply making an imprisonment order under s(1) because T. did not raise with the Court his intellectual disability, the Magistrate misapprehended or misconceived the nature of the Court's function under s160 of the Act. The Court took the view that it was not required by s160 of the Act to address the possibility that alternative orders in sub-ss (2) or (3) could be made before making an imprisonment order unless T. first raised that fact that he had an intellectual disability. This was a misconception of the nature of the Court's jurisdiction to make an imprisonment order under sub-s(1).

8. Moreover, because conduct resulting from the misconception of the Court's function under s160 of the Act and the failure to accord procedural fairness were co-extensive, the failure to accord procedural fairness caused the Court to make a decision of a kind that was beyond its powers. Jurisdictional error was therefore also to be found in the Court's failure to accord procedural fairness to T.

9. In relation to B. the Magistrate misconceived the Court's function under s160 of the Act in that he proceeded to make an imprisonment order under sub-s (1) without addressing the possibility that it might be open to the Court to make the alternative orders under sub-ss (2) or (3) and without considering B.s particular circumstances.

10. In B.'s case, the Court was informed by the duty lawyer acting for B. that sub-s (2) was – or might be – enlivened because B. suffered from a mental illness. In those circumstances, the Court should have made inquiries to enable it to determine whether it was appropriate to make orders under sub-ss (2) or (3) before making an imprisonment order under sub-s (1). The requirement that the Court be 'satisfied' of one or more matters in sub-s (2)(a) and (b) or of the matter in sub-s (3) did not impose an obligation on the offender to provide proof in the conventional sense. The Court could satisfy itself through its own inquiries. If documentary evidence of B.'s mental illness was required by the Court, the s160 hearing should have been adjourned in order for that evidence to be obtained and put before the Court.

11. Accordingly, the orders made against T. and B. were set aside and the matters remitted to the Magistrates' Court for determination according to law.

EMERTON J:

General Introduction

1. These proceedings concern the nature of the power of the Magistrates' Court of Victoria to make orders for imprisonment for non-payment of fines under the *Infringements Act* 2006 (Vic) (the 'Act'). Each of the plaintiffs has applied for judicial review to set aside orders made in the Magistrates' Court at Broadmeadows under the Act, the *Sentencing Act* 1991 (Vic) and the *Magistrates' Court Act* 1989 (Vic) consisting of an imprisonment order made pursuant to s160(1) of the Act, an instalment order for the payment of outstanding fines and a warrant of imprisonment in default of payment of any instalment under the instalment order.

2. The plaintiff in proceeding no. 6192 of 2010, Mr Taha, has an intellectual disability; the plaintiff in proceeding no. 5540 of 2010, Ms Brookes, suffers from a mental illness. Under the Act, each of them would have been eligible to have the fines in respect of which the imprisonment orders were made waived or reduced, a lesser term of imprisonment imposed and/or measures other than imprisonment ordered. However, in neither case did the Magistrate exercising powers under the Act consider the plaintiffs' eligibility for such orders or measures.

3. In substance, both applications for review concern the construction of s160 of the Act

conferring on the Court[1] the power to make imprisonment and related orders in respect of unpaid fines and whether, in each case, the Court was required to inquire into the circumstances of the plaintiff before ordering that the plaintiff be imprisoned for one day in respect of each penalty unit incurred.

4. In each proceeding, I have concluded that the Magistrate erred by misconstruing his function under s160 of the Act, that this gave rise to jurisdictional error, and that the orders should be set aside. There should be no criticism of the learned Magistrate, however. The Act is largely untested, and the regime that it institutes does not fall within conventional parameters. Ultimately, I have concluded that the *Charter of Human Rights and Responsibilities* 2006 (Vic) (the 'Charter'), in combination with other principles of interpretation, required s160 of the Act to be construed so as to ensure that the plaintiffs' disability or illness was considered by the Court before the imprisonment orders were made. Given the circumstances in which the power under s160(1) of the Act was exercised in each case, the Court was required to make inquiries about the particular circumstances of each plaintiff in order to establish whether alternative orders under ss160(2) or (3) should be made.

The *Infringements Act*

5. In 2006, the PERIN system previously contained in Schedule 7 to the *Magistrates' Court Act* was replaced by the new infringement arrangements in the Act. The Act established a common process for issuing and enforcing infringement notices[2] by a wide variety of State and local government agencies, as well as bodies such as universities and hospitals.

6. The Act establishes the following scheme for the imposition and enforcement of infringement notices:

> (a) A person served with an infringement notice by an agency must pay the infringement penalty within the specified period (s14).
>
> (b) Alternatively, a person served with the infringement notice may—
> (i) have the matter referred to the Magistrates' Court to contest the offence (s16);
> (ii) apply to the relevant agency for internal review on the grounds that the issue of the infringement notice was contrary to law or involved a mistake of identity, that 'special circumstances' apply to the person, or that the infringing conduct should be excused having regard to 'exceptional circumstances' (s22); or
> (iii) apply to the relevant agency for a payment plan (s46).

'Special circumstances' is defined in s3 of the Act to mean a mental or intellectual disability, disorder, disease or illness, or a serious addiction to drugs, alcohol or a volatile substance, which results in the person being unable to understand that conduct constitutes an offence or to control such conduct, or homelessness where it results in the person being unable to control conduct which constitutes the offence. 'Exceptional circumstances' are not defined.

> (c) In the case of an application for review made on the grounds of 'special circumstances', the agency may confirm the decision, withdraw the infringement notice and serve an official warning, or it may simply withdraw the infringement notice (s25).
>
> (d) Where a person applies for a payment plan, the enforcement agency is obliged to offer a payment plan to a person who meets the eligibility criteria set out in guidelines[3] issued by the Attorney-General under s5 of the Act (s46(3)). Those guidelines currently refer to persons in receipt of a Centrelink or Veterans Affairs pensions or concession cards and Centrelink health cards. In other cases, the agency has a discretion to offer a payment plan, but the guidelines require the agency to take into account matters such as the financial hardship of the applicant.
>
> (e) If the person does not pay the infringement penalty and does not pursue any of the other options referred to, the enforcement agency may lodge details of any outstanding amount of penalty with the Infringements Registrar at the Court (s54).
>
> (f) The Infringements Registrar may then make an enforcement order requiring the person to pay the infringement penalty and any prescribed costs (s59(1)). An enforcement order is deemed to be an order of the Court (s59(2)).
>
> (g) When an enforcement order has been made by an Infringements Registrar, a revocation of that

order can be sought by the enforcement agency, the person against whom the order has been made or a person acting on behalf of a person to whom 'special circumstances' are thought to apply (s65). If the order is not revoked and the application was made by the person or someone acting on their behalf, the matter may be referred to the Court (s68).

(h) If a person to whom an enforcement order notice is sent does not pay the outstanding amount of the fine or fines, or defaults on a payment under a payment order, the Infringements Registrar must issue an infringement warrant (s80).

(i) The issuing of an infringement warrant authorises the person to whom it is directed to seize and sell the personal property of the person named and, if there is not sufficient property to pay off the outstanding amount, to arrest the person named in the warrant and:

(i) deal with the person by issuing a community work permit under Division 1 of Part 12 of the Act, if appropriate;
(ii) admit the person to bail; or
(iii) if neither of these options is available, to take the person to a prison or a police gaol for the purposes of being dealt with under Division 2 of Part 12. A person arrested under an infringement warrant is an 'infringement offender' (s3).

(j) Division 1 of Part 12 of the Act confers power on the sheriff to release an infringement offender, subject to certain criteria, on a community work permit (ss147, 148). However, a community work permit may not be issued:
(i) if the amount of outstanding fines under the infringement warrant exceeds an amount equivalent to the value of 100 penalty units (s147(2)); and
(ii) unless the sheriff is satisfied that the offender has the capacity to perform community work and is reasonably unlikely to breach the conditions of a community work permit (s147(3)).

(k) Division 2 of Part 12 applies to an infringement offender who is not eligible for a community work permit or is not issued with a community work permit within 48 hours of being arrested, or who fails to comply with a community work permit or has such a permit cancelled (s158). It contains s160 of the Act, which enables the Court to make imprisonment and other orders.

7. Section 160 of the Act provides:

(1) The Court may order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount.

(2) If the Court is satisfied—
(a) that an infringement offender has a mental or intellectual impairment, disorder, disease or illness; or
(b) without limiting paragraph (a), that special circumstances apply to an infringement offender—
the Court may—
(c) discharge the outstanding fines in full; or
(d) discharge up to two thirds of the outstanding fines; or
(da) discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period of one day in respect of each penalty unit, or part of a penalty unit, to which the remaining undischarged amount of the outstanding fines under the infringement warrant or warrants is an equivalent amount; or
(e) adjourn the further hearing of the matter for a period of up to 6 months.

(3) If the Court is satisfied that, having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh the Court may—
(a) order the infringement offender to be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the amount of the outstanding fines is an equivalent amount; or
(b) discharge the outstanding fines in full; or
(c) discharge up to two thirds of the outstanding fines; or
(ca) discharge up to two thirds of the outstanding fines and order that the infringement offender be imprisoned for a period that is up to two thirds less than one day in respect of each penalty unit, or part of a penalty unit, of the penalty units to which the undischarged amount of the outstanding fines is an equivalent amount; or
(d) adjourn the further hearing of the matter for a period of up to 6 months; or
(e) make a community based order under Division 4 of Part 3 of the *Sentencing Act* 1991.
(4) If the Court has made an order under sub-s (1), (2)(da), (3)(a) or (3)(ca) for imprisonment in default

of payment of outstanding fines—
(a) a warrant to imprison may be issued under section 68 of the *Magistrates' Court Act* 1989; and
(b) the Court may make an instalment order under the *Sentencing Act* 1991 in respect of the payment of the outstanding fines.

8. Section 160(1) of the Act therefore confers on the Court the power to order that an infringement offender be imprisoned for the specified period, but sub-ss (2) and (3) contemplate the making of special orders for certain infringement offenders. These include persons, like Mr Taha and Ms Brookes, who have intellectual impairments or mental illnesses.

9. In the case of Mr Taha and Ms Brookes, however, the Magistrate did not have regard to their impairment or illness – in the case of Mr Taha, because his intellectual disability was not raised at all; in the case of Ms Brookes, because she had no evidence to support the existence of her mental illness and asked for her matter to be dealt with straight away rather than for it to be adjourned.

The enforcement process

10. The process for the issuing and enforcement of infringement notices under the Act is, as the Attorney-General said in his Second Reading Speech for the *Infringements Bill* 2005, 'highly automated'.[4] It unfolds administratively, first through the actions of the agency, then through the actions of the Infringements Registrar, and finally through the Court. Whether this last step in the process involves the exercise of administrative or judicial power was argued at some length in these proceedings. Ultimately, I have found it unnecessary to decide this question.

11. It appears from the evidence before this court that the procedure adopted by the Court for hearings in respect of infringement offenders brought before it pursuant to an infringement warrant[5] is something of an amalgam of the 'automated' processes leading up to the s160 hearing and the Court's conventional procedures for the conduct of a criminal trial. Ms Sophie Delaney, a Senior Lawyer at Victoria Legal Aid, deposed[6] to inquiries that she had made of the Acting Senior Registrar at the Broadmeadows Magistrates' Court regarding the procedure for a s160 hearing. She was informed that Registry staff (presumably, the Infringements Registrar) prepare a paper file for the Magistrate which sets out the details of the infringements, their monetary value, whether any payments have been made and, if so, what amounts have been paid, as well as the number of days imprisonment corresponding to the unpaid infringements. Usually, a staff member from Registry (presumably, the Infringements Registrar) will assist the Court by presenting at the s160 hearing the information that has been prepared.

12. Mr Tom Munro, the Managing Lawyer at Victoria Legal Aid's Broadmeadows office deposed[7] that he appeared as duty lawyer for Mr Taha at the Broadmeadows Magistrates' Court on 26 February 2010 when the impugned orders were made. Mr Munro has acted as a duty lawyer at Magistrates' Courts for eight years and has extensive experience dealing with infringement matters and the full range of criminal matters listed in the Magistrates' Court. Like Ms Delaney, Mr Munro deposed that the prosecution of s160 hearings is undertaken by a Court Registrar (presumably, the Infringements Registrar), who normally simply informs the Magistrate about the quantum of the outstanding fines, if money has been paid and, if there is an existing payment scheme, whether it is up to date.

13. The s160 hearing is thus conducted both like and unlike a criminal trial. The agency that has imposed the fine plays no role in the hearing. The Infringements Registrar appears in a quasi prosecutorial role in order to place before the Court certain basic information about the payment or non-payment of fines and the amount of time the offender could be imprisoned for to expiate the fines. The Court relies on any evidence about the offender's circumstances being adduced by or on behalf of the infringement offender. Unless the s160 hearing is adjourned, it is the first and last time the infringement offender comes before the Court. There has been no prior determination in relation to the commission of the underlying offences or any other hearing in which the circumstances of the offender or the offending will have been exposed to the Court.

14. The Act contemplates that imprisonment orders be made in the restricted context described.

15. Each of Mr Taha and Ms Brookes was represented before the Court by Victoria Legal Aid

duty lawyers with whom they had conferred briefly beforehand. It was common ground that the Court's attention was not drawn to Mr Taha's intellectual disability by the Infringements Registrar, or by Mr Taha or his counsel. It was also common ground that no material about Ms Brookes' mental illness was put before the Court by the Infringements Registrar, or by Ms Brookes or her counsel. As a result, those matters were not taken into consideration when the Court exercised the power conferred by s160(1). Imprisonment orders were made without regard to the possibility that less draconian orders could be made under ss160(2) or (3).

Proceeding No. 6192 of 2010 – Mr Taha — Introduction

16. Mr Taha is a young man who has had numerous encounters with the law. In 2006, 2007 and 2008, Mr Taha received a large number of fines which he did not pay. The fines were principally imposed as a result of Mr Taha travelling on public transport without a valid ticket and refusing to give his name and address to ticket inspectors. He also incurred fines for driving an unlicensed vehicle and for failing to wear a helmet.

17. Enforcement orders were made in relation to Mr Taha's unpaid fines by an Infringements Registrar under s59 of the Act on various dates from 2007 to 2010. An infringement warrant authorising Mr Taha's arrest was ultimately issued in relation to 30 of these enforcement orders and, on 3 February 2009, Mr Taha was arrested and bailed to appear at the Broadmeadows Magistrates' Court on 26 February 2009. On that day, the Court ordered Mr Taha to be imprisoned for 100 days in respect of unpaid fines totalling $11,250.20 (the 'imprisonment order').

18. The imprisonment order combined an order for imprisonment with an order that the unpaid fines be paid by instalments. It was in the following form:

> In default of payment of unpaid amounts in this case being the total of $11250.20, the offender is to be imprisoned for 100 days.
>
> Instalments of $80.00 each month – First payment 1/4/2009.

19. The effect of the imprisonment order was that Mr Taha would be required to pay the unpaid fines by instalments of $80.00 per month, in default of which he would be imprisoned without further order of the Court.

20. Mr Taha paid $1,280.00 of the outstanding amounts and then stopped paying. As soon as he stopped making payments, he became liable to be arrested and imprisoned. In August 2010, the police attended his parents' home, where he lives, to arrest him. Mr Taha avoided arrest because he was hospitalised at Orygen Youth Health at the time, apparently in order to receive treatment for depression.

21. Mr Taha has an intellectual disability, having an IQ of only 61. At the time the imprisonment order was made, he was certified by the Secretary of the Department of Human Services to have an intellectual disability. In May 2008, as an intellectually disabled person, he was placed on a Justice Plan under the Sentencing Act following convictions for theft and related offences. At all relevant times, he received a disability support pension by reason of his intellectual disability. However, Mr Taha's intellectual disability was not raised in the Court when the imprisonment order was made and, accordingly, the Court had no regard to Mr Taha's intellectual disability when it made the imprisonment order.

22. Because the Court was not aware of Mr Taha's intellectual disability, Mr Taha was not given the benefit of the orders that could have been made under s160(2) of the Act to reduce, if not eliminate, the period of imprisonment imposed on him and/or his liability to pay the fines.

23. By amended originating motion dated 29 July 2011, Mr Taha seeks relief in the nature of *certiorari* to set aside the imprisonment order on the following grounds:

> (1) The learned Magistrate breached the duty that he had to make inquiries into the question of whether Mr Taha had an intellectual disability within the meaning of s160(2) of the Act;
>
> (2) Mr Taha was denied procedural fairness because the hearing was conducted by the learned Magistrate absent knowledge that Mr Taha had an intellectual disability;

(3) The learned Magistrate made an error in relation to a jurisdictional fact, namely whether Mr Taha had an intellectual disability within the meaning of s160(2) of the Act;

(4) [Not pursued]

(5) The learned Magistrate committed jurisdictional error in that he failed to comply with his obligation under s38(1) of the Charter to act compatibly with, and to give proper consideration to, the human rights contained in ss8, 21 or 24 of the Charter when making the imprisonment order against Mr Taha; and

(6) The learned Magistrate committed jurisdictional error in that he made an imprisonment order under s160(1) without considering the availability of options under ss160(2) and (3) and thereby misconstrued s160 of the Act such that he misapprehended the limits of his functions and powers.

24. Although Mr Taha relied on each of the above grounds, his counsel, Mr Holt, told the Court that Grounds 1, 3 and 5 flowed from the construction of the statute advanced in Ground 6. Mr Holt's submissions therefore focussed on whether the Court misconstrued s160 of the Act such that it misapprehended the limits of its functions and powers, and whether Mr Taha was denied procedural fairness because the hearing was conducted without the knowledge that Mr Taha had an intellectual disability.

25. The substance of Mr Taha's argument was that s160 of the Act, properly construed, imposed on the Court a duty to make inquiries in relation to the matters referred to in (at least) sub-s (2), and that the failure to make such inquiries resulted in the failure to exercise the jurisdiction conferred on the Court by that provision. In the alternative, it was submitted that the Court's failure to make inquiries gave rise to a breach of procedural fairness because the hearing was not conducted by reference to Mr Taha's intellectual disability, as it was required to be.

26. Mr Taha relied on the Charter in order to support the interpretation of s160 advanced by him, having regard to the requirement in s32 of the Charter that all statutory provisions, so far as it is possible to do so consistently with their purpose, be interpreted in a way that is compatible with human rights. The human rights said to be relevant in the present context were the right to equality before the law (s8(3)), the right to liberty and security (s21) and the right to a fair hearing (s24(1)). Mr Taha contended that, consistent with these rights, s160 of the Act required the Court to make inquiries directed to establishing whether he had an intellectual disability for the purposes of s160(2) before making the imprisonment order under s160(1).

27. The Victorian Equal Opportunity and Human Rights Commission (the 'Commission') intervened in the proceeding to make submissions supporting the interpretation of s160 advanced by Mr Taha by reason of the interpretative obligation in the Charter. In the alternative, the Commission submitted that the Court had an obligation to provide a fair and public hearing in accordance with s24(1) of the Charter by reason of the direct application of the Charter to courts and tribunals to the extent that they have functions under Part 2 of the Charter.

28. The defendants'[8] principal submission in response to Mr Taha's application for review was that the decision to make the imprisonment order under s160(1) was not amenable to judicial review, in that it did not involve jurisdictional error, and no error of law on the face of the record was (or could be) alleged.[9] The Magistrates' Court of Victoria is an 'inferior court' and its decisions are susceptible to review only in the very narrow sense described by the High Court in *Craig v South Australia*[10] and more recently in *Kirk v Industrial Court of New South Wales*.[11] The defendants submitted that the Court was entitled to and did exercise jurisdiction under s160(1) to make the imprisonment order, and that it was able to do so without regard to its powers under sub-s (2). Mr Taha was legally represented and his legal representative did not inform the Court or produce evidence of Mr Taha's intellectual disability. According to the defendants, the Court was under was no duty to inquire whether Mr Taha had an intellectual disability.

29. The defendants further submitted that no question arose under the Charter because sub-ss (2) and (3) were expressed sufficiently broadly that they would clearly oblige the Court to take into account the Charter rights identified by Mr Taha, but only if the jurisdiction of the Court to make a decision under sub-ss (2) or (3) was enlivened. Mr Taha had presented no evidence to suggest that the Court's jurisdiction under sub-ss (2) or (3) was enlivened. Moreover, even if it had been enlivened, there was no evidence to suggest that the Court did not take into account

those rights to which Mr Taha referred that were relevantly drawn to the Court's attention at the time of the hearing.

30. As a matter of general principle, the defendants submitted that s32 of the Charter could not be used to convert a court of adversarial process into a court of inquisition for the purposes of s160 of the Act.

31. Finally, the defendants submitted that s24(1) of the Charter, which confers a right to a fair and public hearing, did not impose on the Court a duty to inquire.

32. The issues arising for determination on Mr Taha's originating motion can therefore be summarised as follows:

> (a) Did the Court misconstrue s160 of the Act in purporting to exercise jurisdiction under s160(1) to make an imprisonment order without regard to sub-ss (2) and (3)?
>
> (b) If so, was the Court required to inquire as to Mr Taha's particular circumstances before making an imprisonment order?
>
> (c) In the alternative, did the rules of procedural fairness and/or s24(1) of the Charter impose on the Court a duty to inquire as to Mr Taha's particular circumstances before making an imprisonment order?
>
> (d) In either case, did a failure by the Court to inquire into Mr Taha's particular circumstances before making an imprisonment order constitute jurisdictional error?
>
> (e) If there has been jurisdictional error, should an order in the nature of *certiorari* be made?

The proper construction of s160 of the Act

33. Although Mr Taha raised a number of distinct grounds of review, his argument turned principally on the construction of s160 of the Act. He submitted that a construction should be preferred that links the exercise of the power in sub-s (1) to the powers given to the Court by subs-ss (2) and (3). Such a construction requires the Court to have regard to whether sub-ss (2) and (3) are enlivened when exercising the power under sub-s (1) to make an imprisonment order. Mr Taha therefore submitted that s160 required the Court to inquire into his particular circumstances, including as to whether he had an intellectual disability, before making the imprisonment order.

34. To similar effect, the Commission submitted that, compatibly with the Charter, s160 of the Act must be interpreted in a manner permitting the power to make an imprisonment order under s160(1) to be exercised only after proper consideration has been given to the individual circumstances of the person concerned to determine whether an order under that section is appropriate in all the circumstances or whether, instead, any of the alternatives to imprisonment in sub-ss (2) and (3) are available and appropriate.

35. According to Mr Taha and the Commission, this construction of s160 should be preferred to a construction that requires consideration of the individual circumstances of the person only if the person seeks to make out a positive case under sub-ss (2) or (3) for the following reasons:

> (a) it is consistent with the text and context of s160, read as a whole;
> (b) it gives effect to the purpose of s160 and the Act as a whole;
> (c) it is consistent with the common law presumption against interference with fundamental rights, in this case the individual's right to be at liberty; and
> (d) having regard to those matters, it is mandated by s32 of the Charter.

Text and context

36. Section 160(1), by its terms, empowers the Court to order an infringement offender to be imprisoned for a period of one day in respect of each penalty unit to which the amount of outstanding fines is equivalent. Subsections (2) and (3) also provide for the making of imprisonment orders, but give the Court a range of options for dealing with infringement offenders who are vulnerable. Pursuant to sub-ss (2) and (3), the Court may impose a lesser period of imprisonment than the period specified in sub-s (1), reduce the fines that remain outstanding and/or discharge fines entirely. It may also simply adjourn the proceeding for up to 6 months.[12]

37. It was submitted on behalf of Mr Taha that s160(1) cannot be considered otherwise than in conjunction with sub-ss (2) and (3) because the word 'may' in sub-s (1) is given content by the options for the Court contained in sub-ss (2) and (3). Read in isolation, sub-s (1) would empower the Court to do only one of two things: imprison the infringement offender for the period of time that is specified (one day for each penalty unit) or not imprison the infringement offender. However, if s160(1) contains a stand alone power, and if it is not exercised to make an imprisonment order, the Act is silent as to whether the person remains an infringement offender and/or liable to pay the fines. By contrast, sub-ss (2) and (3) deal specifically with what happens to the outstanding fines if the Court chooses not to imprison the infringement offender for the specified period or at all. It is therefore necessary to have regard to sub-ss (2) and (3) in order to give content to the word 'may' in sub-s (1).

38. According to Mr Taha, a 'unified' view of s160, which mandates consideration of all the matters in s160 as a prerequisite to making an order to imprison, is consistent with the objects and purposes of the Act. The Act, read as a whole, affords protection to vulnerable people who are inappropriately caught up in the infringement system, in that it contains a series of filters to remove vulnerable people from the infringement regime. If the filtering mechanisms up to the point of an infringement warrant being issued have been unsuccessful, or if the fines have not otherwise been paid, the Act provides for the Court to retain a range of options to prevent imprisonment other than as a last resort.

39. It was therefore Mr Taha's submission that 'at some level' the Court is bound to consider the application of sub-ss (2) and/or (3) when called upon to exercise the power to make an imprisonment order. What this involves will depend on the particular circumstances of the person before the Court. In this case, the Magistrate had before him a person with a large number of fines that had accumulated and remained unpaid over a long period of time. Questions could have been asked about how that situation had arisen, because the Act recognises that there is a significant risk for certain members of the community that, as counsel submitted, "the infringement system will simply wash over them in an automatic fashion and spit them out the other end without them ever being able to properly engage with it at all".[13]

40. Counsel for Mr Taha acknowledged that a duty to inquire would impose an unusual obligation on a Magistrate. However, he submitted that what should occur in a s160 hearing was very different from what would occur in a criminal proceeding in light of the protections available to accused persons in a criminal proceeding that were not available in a s160 hearing. The power to make an imprisonment order is an extraordinary statutory power and the Act contains very few protections for the people who appear for the first time before the Court as infringement offenders. In light of the fact that the s160 hearing was usually the first and last time the infringement offender came before the Court, to impose an obligation on the Court to inquire would avoid the unhappy circumstance that had arisen in the present case where an imprisonment order had been made against an infringement offender when it was common ground that he had an intellectual disability and that an imprisonment order would probably not have been made had his intellectual disability been known.

41. For their part, the defendants submitted that s160(1) contains a separate and distinct power from the powers in ss160(2) and (3), and that the former could be exercised by the Court without reference to the latter. Section 160(1) conferred on the Court a power to make an imprisonment order and that power could be exercised without reference to the powers conferred by sub-ss (2) and (3) if those powers were not enlivened by the offender satisfying the Court that he or she fell into one of the categories described. The defendants submitted that that there was no basis for construing s160 to be immune from ordinary sentencing principles that require mitigating factors to be raised and proved by a defendant.[14] This, according to the defendants, is consistent with the fact that s160(2) requires the Court to be 'satisfied' of the condition or circumstances of the infringement offender. A positive finding by the Court that Mr Taha was not intellectually disabled was not an essential precondition for the valid exercise of the power under s160(1).

42. The defendants also submitted that it was unlikely that the legislature intended the Court to be the inquisitor, to collect the information and then to satisfy itself of the matters referred to in sub-ss (2) and (3) because, generally speaking, that is not the role or function of a court. The failure of counsel to make inquiries and/or the failure of the infringement offender to disclose

the relevant matters that would set counsel on a train of inquiry could not be converted into a failure by the Court to consider and inquire about material not placed before it.

43. It is true that in the common law system, it is generally neither the role nor the responsibility of the Court to independently explore the possibility that there may be mitigating factors enabling an offender to be excused or to enjoy a lesser penalty. There is no duty on a sentencing judge, in the absence of explicit submissions by counsel, to embark upon an inquiry as to whether any principles in *R v Verdins*[15] might be enlivened by the evidence tendered on the plea.[16] Where a prisoner is represented by counsel, a sentencing judge will not ordinarily be required to consider any possible effects of psychological or psychiatric disability which may go in mitigation of penalty, other than those expressly relied on by counsel.[17] In the adversarial system, the parties put before the court the matters that they wish the court to consider.

44. However, the role or function of the Court under s160 of the Act, and whether it is permitted to 'sit back' and have no regard to the possibility that the offender has an intellectual disability or mental illness that would enliven the powers in sub-ss (2) or (3) unless raised by the infringement offender, will depend on how the powers conferred by s160 of the Act are to be construed.

45. Mr Taha argued that s160(1) confers a discretion that is only given content by reference to the options given to the Court in sub-ss (2) and (3), because if no imprisonment order is made, s160(1) makes no provision for the fines to be waived or discharged. I agree that the fact that there is specific provision for the fines to be waived or discharged under sub-ss (2) and (3) makes it unlikely that the legislature intended by silence to confer a power to discharge the fines under sub-s (1). Moreover, s160(4), which provides for the issuing of a warrant to imprison and the making of an instalment order in respect of the outstanding fines, only applies where the Court has made an imprisonment order.

46. The absence of any express power to deal with the outstanding fines if the Court decides not to order the offender to be imprisoned under s160(1) may well limit the utility of the power in sub-s (1). However, if Mr Taha is correct and there is in fact no discretion not to make an imprisonment order if sub-ss (2) and (3) are inapplicable, this would lead to an unsatisfactory outcome. The Court would be required to make an imprisonment order under sub-s (1) in every case unless satisfied of one or more of the matters referred to in sub-ss (2) and (3), namely that:

> (a) the infringement offender has a mental or intellectual impairment, disorder, disease or illness;
> (b) 'special circumstances' apply to the infringement offender; or
> (c) having regard to the offender's situation, imprisonment would be excessive, disproportionate and unduly harsh.

47. Such a construction would deprive the Court of the discretion not to make an imprisonment order in respect of an infringement offender who did not have a mental or intellectual impairment, disorder, disease or illness, was not addicted to drugs, alcohol or a volatile substance, was not homeless and for whom imprisonment would not be excessive, disproportionate and unduly harsh. In other words, there would be no discretion in respect of the 'common or garden' variety infringement offender. The Act would require that person to be imprisoned for the term specified in sub-s (1) and no less.

48. Although sub-s (3) is probably sufficiently broad to enable the Court to avoid having to imprison a person if it would be unjust or inappropriate to do so, it is unlikely in my view that the legislature intended to require the Court to send people to prison for one day in respect of each penalty unit, especially for relatively minor offences, unless they were able to invoke sub-ss (2) or (3).

49. Nonetheless, I agree that s160 must be construed in a unified fashion, and that the power conferred by sub-s (1) must be exercised by reference to the powers contained in sub-ss (2) and (3). By enacting s160, the legislature has given the Court a variety of powers to make different kinds of imprisonment and related orders. Those powers give the Court a range of options to deal with the kinds of offenders who commonly come before the Court, having exhausted all the other possibilities for repayment or expiation of the fines. In my view, the powers in s160 comprise a 'package' of measures, to which the Court must have regard as a whole when deciding how best to deal with the individual infringement offender.

Purpose

50. A 'unified' construction of s160 is supported by the objects and purposes of the Act read as a whole.[18] The purpose or object underlying the Act must be discerned having regard to the Act as a whole and the various ways in which it makes provision for persons with mental illnesses and intellectual disabilities, and persons who suffer from addiction or homelessness.[19] The Act contains a number of measures to remove such persons from the infringement system or to ameliorate its harshness, including processes for internal review of infringement notices and for the revocation of enforcement orders based on special circumstances, and provides alternatives to arrest and imprisonment once an infringement warrant has been issued. Importantly, the Act recognises in the definition of 'special circumstances' that an intellectual impairment, mental illness or addiction may prevent the person from understanding that conduct constitutes an offence or from being able to control such conduct. The definition of 'special circumstances' thereby recognises, in effect, that there are people in the community who, through disability, illness or addiction, lead lives that are chaotic and cannot manage their affairs in an organised and rational way. Those people are highly vulnerable in the infringement system and should not be 'processed' through the system without regard to their special circumstances.

51. The Second Reading Speech for the *Infringements Bill* describes the new infringements model as having as its primary purposes 'to improve the community's rights and options in the process and to better protect the vulnerable who are inappropriately caught up in the system'.[20] The protection of 'the vulnerable' is expressed to be achieved by the introduction of measures at various stages 'to filter people out of the system who cannot understand or control their offending behaviour (e.g. people with mental or intellectual disabilities, the homeless, and people with serious addictions)'.[21] Provision was made to cater for people with 'special circumstances', including enabling review of an infringement notice on that basis. This was described as:

> ... a critical change to filter the vulnerable in the community out of the infringements system. People with special circumstances are disproportionately, and often irrevocably, caught up in the system. In a just society, the response to people with special circumstances should not be to issue them with an infringement notice.[22]

52. As a result, so the Attorney-General said, the Bill contained a series of filters 'to prevent people with special circumstances being channelled into a highly automated enforcement process.'[23]

53. In respect of the Court's powers at the 'back end' of the enforcement process, the Second Reading Speech contains the following passage:

> In 2000 the Parliament passed amendments to the *Magistrates' Court Act* to prevent people being arrested on enforcement warrants and automatically taken to prison. Anyone arrested on a warrant must now appear before a magistrate in open court. The policy of avoiding people being imprisoned for infringement fine defaults is continued in this Bill and enhanced.
>
> The Bill gives broader options to magistrates in open court hearings which occur after the execution of an enforcement warrant.
>
> By this stage, other enforcement sanctions, instalment payment plans or community work will not have been successful in expiating the fines. These hearings consider whether a person should be imprisoned, and will determine whether the individual has extenuating circumstances.[24]

54. The Attorney-General clearly contemplated that the Court would consider the extenuating circumstances of individual offenders. He went on to describe the additional powers that had been conferred on Magistrates, including powers to approve instalment payment plans, to discharge fines in whole or in part and to reduce any term of imprisonment where imprisonment would be 'excessive, disproportionate or unduly harsh'.[25] He said:

> These changes will ensure that imprisonment is, and will remain, a sanction of last resort for the most serious fine defaulters.[26]

55. The Explanatory Memorandum for the Bill also makes reference to expanding the options available to the Court to consider the personal circumstances of infringement offenders brought before it under an infringement warrant.[27]

56. In my view, these aids to interpretation show the Act to be directed, among other things, to ensuring that:

> (a) vulnerable people inappropriately caught up in the infringement system are to be filtered out of the system at various stages;
>
> (b) where the filtering mechanisms in the Act have not succeeded or the fines have not otherwise been paid, the Court retains a range of options for dealing with the vulnerable infringement offender; and
>
> (c) imprisonment of the vulnerable offender for non-payment of fines is to be a measure of last resort.

57. A construction of s160 that would promote these purposes or objects is one that is to be preferred over one that would not.

Common law presumption

58. Moreover, statutory provisions are to be construed by reference to the common law presumption that the legislature did not intend to abrogate or curtail fundamental rights unless that intention is clearly and unambiguously expressed.[28] In this case, the Parliament has clearly and unambiguously expressed its intention to confer on the Court the power to imprison infringement offenders. However, as Maxwell P and Weinberg JA said in *RJE v Secretary to the Department of Justice*,[29] an interpretation should be favoured that 'produces the least infringement of common law rights' – in that case as in this, the 'right to liberty'.[30] Applying the presumption, an interpretation of s160 which produces the least infringement of the right to liberty should be favoured.

The Charter

59. A 'unified' construction is also supported by the Charter, which requires s160 to be interpreted compatibly with human rights, so far as it is possible to do so consistently with its purpose. Compliance with the interpretative obligation in s32 means exploring all 'possible interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights'.[31] Where Charter rights are engaged, s32(1) elevates the common law presumption against interference with rights to a statutory requirement in interpreting Victorian statutes.[32]

60. The Commission provided thoughtful and comprehensive submissions to the Court on the operation of the Charter, referring to the right to liberty in s21, the right to a fair hearing in s24(1) and the right to the equal protection of the law in s8(3) of the Charter.

61. The right to liberty (including the right not to be arbitrarily detained) and the right to a fair hearing are reflected in the objects and purposes of the Act that have been identified. In the context of s160 and the scheme of the Act generally, they require consideration of whether imprisonment is reasonable in all the circumstances, and a hearing in which regard is had to the infringement offender's particular circumstances. The right to equal protection of the law in s8(3) of the Charter is important, having regard to Mr Taha's intellectual disability and the recognition by the legislature that intellectually disabled people may be inappropriately caught up in the infringement system. The need for special treatment for persons with intellectual disabilities is reinforced by s8(3) of the Charter, which provides:

> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

62. Mr Taha and the Commission submitted that, as a person with an intellectual disability will be less capable than a person without such a disability of informing the Court of the circumstances necessary to enliven the Court's powers to make orders other than imprisonment, an interpretation of s160 which relies upon the infringement offender to raise circumstances enlivening the Court's powers under sub-ss (2) or (3) may discriminate indirectly against intellectually disabled offenders. This is because s160, interpreted so as to impose an onus on the disabled person to raise the disability, would impose a requirement that:

> (a) a person with an intellectual impairment may not be able to comply with; and
>
> (b) a higher proportion of people without an intellectual disability would be able to comply with; and
>
> (c) was not reasonable. [33]

63. I accept that the interpretation of s160 that least infringes the rights in ss21 and 24(1) of the Charter is one that requires the Court to address the possibility that the alternative orders in sub-ss (2) or (3) may be available before making an imprisonment order under sub-s (1). This requires the Court to consider the individual circumstances of the infringement offender.

64. Furthermore, in undertaking this task in a manner that least infringes the right to the equal protection of the law in s8(3) of the Charter, the Court may be required to make inquiries of the infringement offender aimed at ascertaining whether he or she answers one or more of the descriptions in sub-ss (2) or (3). It is in the nature of an intellectual disability or a mental illness that it may prevent the offender from triggering the operation of sub-ss (2) or (3) by raising the condition with the Court. It would defeat the purpose of sub-s (2), in particular, if it could only be enlivened by the actions of a person burdened by a condition that may disable them from forming and exercising the necessary judgement to do so.

65. Hence, while sub-ss (2) and (3) require the Court to be 'satisfied' of the matters described therein before making any of the alternative orders, that does not mean that it is left to the infringement offender to satisfy the Court of those matters. The Court may reach the requisite state of satisfaction as a result of its own inquiries and from information that emerges during the course of the s160 hearing as a result.

Conclusion on construction

66. Having regard to the text of s160, the Act read as a whole so as to expose its underlying objects and purposes, and the requirement that s160 be interpreted, so far as it is possible to do so consistently with its purpose, in a way that is compatible with the rights to liberty, a fair hearing and to the equal protection of the law, s160 must be construed in a unified fashion so as to require the Court, before making an imprisonment order under sub-s (1) to consider the availability of the less draconian orders under sub-ss (2) or (3) and, for that purpose, to have regard to the individual circumstances of the infringement offender. Because of the nature of the conditions or circumstances that sub-ss (2) and (3) seek to cater for, the Court may be required to actively elicit the relevant information from the infringement offender.

67. What steps must be taken will depend on the case before the Magistrate. A course of questioning will not be required in every case, least of all a standard course of questioning. In Mr Taha's case, however, there were 'flags' that should have prompted the Court to ask questions directed to ascertaining whether he had an intellectual disability, a mental health problem or some other condition that prevented him from successfully negotiating both the public transport and infringement systems. Mr Taha presented as a young person who had accumulated a very large number of fines over a long period for repeated offences of the same kind. The amount of money involved was significant, particularly for a person on a pension. The Court placed Mr Taha on an instalment plan, so it must have inquired about his ability to meet payments. It is likely the Court was told that he received a pension or allowance of some kind. It would not have been a large step for the Court to have asked what kind of pension Mr Taha received. This would have revealed his disability. Moreover, the Court's own records showed that Mr Taha was the subject of a Justice Plan, which told the Court that Mr Taha had an intellectual disability. Although the Magistrate was not aware of the Justice Plan, and had no direct access to the relevant record while on the bench, it would not have been difficult for the Court, through the Infringements Registrar or otherwise, to have made searches of its own records and to have informed the Magistrate of the results.

68. In my view, given the circumstances of Mr Taha's offending and the level of fines outstanding, an inquiry as to whether Mr Taha qualified for orders under ss160(2) or (3) was required by s160 of the Act.

Procedural fairness

69. Mr Taha submitted in the alternative that the Court's failure to take the necessary steps to consider his intellectual disability was a breach of the rules of procedural fairness, because the fact of his intellectual disability, had it been known, would have led to the s160 hearing being conducted in a different way. Mr Taha's is a claim of a breach of procedural fairness 'without fault', because there is no allegation that the Court was aware of the intellectual disability and elected not to take it into account.

70. In a related submission, the Commission relied on the Charter to submit that, in exercising the powers conferred on the Court by s160 of the Act, the Court was bound by force of s6(2)(c) or s38 of the Charter to act compatibly with the right to a fair hearing in s24(1). By failing to consider the availability and appropriateness of the alternatives to imprisonment in sub-ss (2) and (3) prior to making the imprisonment order under sub-s (1), the Court had, in the absence of any compelling justification for that failure, acted incompatibly with Mr Taha's right to a fair hearing guaranteed by s24(1) of the Charter and had thereby acted unlawfully.

71. It is unnecessary to resort to the Charter to resolve this question. It can be most easily answered by reference to the rules of procedural fairness, which are coextensive with the requirements of a 'fair' hearing in this case.

72. It is trite law that the rules of natural justice and procedural fairness are 'neither standardized nor immutable'[34] and that their content may vary, requiring adjustment according to the circumstances of the particular case.[35] Importantly, an evaluation of the realities rather than the legalities of the situation is required when dealing with the question of what fairness demands in the circumstances.[36] The procedural consequences of the rules of procedural fairness depend on the particular statutory framework within which they apply and upon the exigencies of the particular case.[37]

73. The statutory framework is the Act, and s160 in particular. The procedure adopted must fairly reflect the nature of a s160 hearing and the interest or interests at stake. In a s160 hearing, what is at stake is the liberty of the infringement offender. The infringement offender is susceptible to imprisonment despite there having been no hearing in relation to the infringement offences themselves and no other hearing in which matters potentially relevant to the exercise of the Court's powers under sub-ss (2) and (3) could have been exposed. The 'highly automated' nature of the process leading up to the s160 hearing gives rise to the need for proper procedures to be observed at the s160 hearing.

74. While the Court did not in a formal sense deny Mr Taha a hearing, in a practical sense, it did. By dissociating the powers in sub-ss (2) and (3) from the power to make an imprisonment order in sub-s (1) and by purporting to exercise the power in sub-s (1) without addressing the possibility that sub-ss (2) or (3) may be enlivened, it denied Mr Taha the opportunity to avail himself of the protections in sub-ss (2) and (3).

75. In my view, therefore, Mr Taha was denied procedural fairness by the Court when it made the imprisonment order.

Was there jurisdictional error?

76. In *Craig v The State of South Australia*,[38] the High Court described the circumstances in which an inferior court, such as the Magistrates' Court of Victoria, would fall into jurisdictional error:

> 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. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ 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 of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.[39]

77. The High Court went on to say as follows:

> ... an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues [the] statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case.[40]

78. The High Court observed in this context that the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern in this category of case.[41]

79. In my view, however, in failing to address the possibility that orders could be made under sub-s (2) or sub-s (3) in lieu of an imprisonment order under sub-s (1), and by simply making an imprisonment order under s (1) because Mr Taha did not raise with the Court his intellectual disability, the learned Magistrate misapprehended or misconceived the nature of the Court's function under s160 of the Act. The Court took the view that it was not required by s160 of the Act to address the possibility that alternative orders in sub-ss (2) or (3) could be made before making an imprisonment order unless Mr Taha first raised that fact that he had an intellectual disability. This was a misconception of the nature of the Court's jurisdiction to make an imprisonment order under sub-s (1).

80. Moreover, because conduct resulting from the misconception of the Court's function under s160 of the Act and the failure to accord procedural fairness are co-extensive, the failure to accord procedural fairness caused the Court to make a decision of a kind that was beyond its powers. Jurisdictional error is therefore also to be found in the Court's failure to accord procedural fairness to Mr Taha.

Conclusion

81. The orders made against Mr Taha by the learned Magistrate should be set aside and the matter remitted to the Court for determination according to law.

Proceeding No. 5540 of 2010 – Ms Brookes — Introduction

82. The plaintiff in this proceeding, Ms Tarni Brookes, has also had a great many encounters with the law, largely as a result of driving a motor vehicle. Between 1999 and 2001, Ms Brookes incurred a large number of fines for traffic offences. At the time, she was a single parent of young children and was receiving fortnightly payments from Centrelink, which was her only source of income.

83. Ms Brookes deposed[42] that in 2001, she was diagnosed with post traumatic stress disorder as a result of ongoing abuse by her former partner. Between 1991 and 1999, Ms Brookes' former partner physically and mentally abused her and, in 2001, she obtained a restraining order against him. Thereafter, he stalked and harassed her and damaged her property. She moved house on many occasions. Ms Brookes deposed that she could never relax and was always checking her windows and locks to make sure they were secure. As a result of this these circumstances, she harmed herself by cutting her wrists and attempted suicide on three or four occasions. She also abused alcohol and drugs.

84. On 2 September 2004, Ms Brookes was arrested on 68 warrants issued under the PERIN procedure. She was bailed to appear before the Broadmeadows Magistrates' Court on 13 October 2004. She did not appear as required by the terms of her bail. On 10 May 2006, a warrant was issued for her imprisonment.

85. Over two years later, on the morning of 24 October 2008, Ms Brookes was arrested by the Sheriff acting on the warrant issued in May 2006. By this time, there were 75 charges outstanding against her. Ms Brookes deposed[43] that upon arrest, she was taken to the Broadmeadows Police Station, strip-searched by two female police officers and placed in a cell on her own. She stated that she was very confused and upset by what was occurring and suffered an anxiety attack. During the course of the morning a lawyer, who she now knows to be Paul Houston of Victoria Legal Aid, consulted her through the narrow opening in the cell door. Ms Brookes does not recall much of the conversation but recalls Mr Houston stating that she had to pay the fine by instalments. She told him that she had no money, but he advised her that her only option was to pay the fines.

86. Ms Brookes deposed that a short time later she was brought into Court. She was scared and concerned about what would happen to her children. The Magistrate told her that she could pay the fines by instalment, and she agreed to this course. She was told that if she missed any of the payments she would be imprisoned.

87. The Court made orders in respect of Ms Brookes in the following form:

> In default of payment of unpaid amounts in this case being the total of $15,164.50, the offender be imprisoned for 134 days.
>
> Instalments of $45.00 each month – First payment 1/12/2008

88. Mr Paul Houston of Victoria Legal Aid deposed[44] that he appeared for Ms Brookes at the s160 hearing. He took instructions regarding the abuse she had suffered and informed Ms Brookes that her mental health and personal circumstances would enable the Magistrate to reduce or discharge the fines, or adjourn the hearing. Mr Houston deposed that he brought Ms Brookes' circumstances to the attention of the Court. However, as he had no supporting documentation, the Court would not entertain submissions relating to Ms Brookes' mental health and personal circumstances. Ms Brookes would not permit Mr Houston to seek an adjournment to obtain the necessary evidence, and instructed Mr Houston to pursue an instalment order.

89. Ms Brookes placed before this court a psychological report of Gerry Egan dated 19 April 2001 and a psychological report of Dr Kaylene Evers dated 9 August 2010. Each of these reports concludes that she suffers from a mental illness.

Grounds and submissions

90. Ms Brookes seeks an order in the nature of *certiorari* setting aside the imprisonment order on three grounds:

> (a) The Court failed to have regard to a relevant consideration, namely her mental illness, in fixing the sentence;
>
> (b) The failure of the Court to adjourn the matter amounted to a denial of natural justice in all the circumstances;
>
> (c) The Court came under a duty to inquire into Ms Brookes' mental health and its failure to inquire was, in all the circumstances, unreasonable.

91. In respect of the first ground, the failure to have regard to a relevant consideration, Ms Brookes submitted that the Court imposed on her the maximum possible sentence that could be imposed for the offending in question and plainly therefore did not take her mental illness into account. The Court was bound to take that matter into account by the terms of s160 of the Act or by reason of the scope, subject matter and purpose of the Act. It was not dispositive that Ms Brookes was unable to prove that she suffered from mental illness on the day of the hearing. Her mental health problems were made known to the Court, but the Court refused to act on them without documentary proof.

92. As to the second ground, Ms Brookes submitted that the failure to adjourn amounted to a denial of natural justice in that she was not able to properly present her case, and that, had she been able to do so, the Court's powers under sub-ss (2) and (3) would have been enlivened. Ms Brookes' decision to proceed on the day is relevant to, but not determinative of the question of whether she was denied natural justice, because natural justice may require an adjournment, even when none is sought. If the Court was not prepared to act on the submissions or oral testimony of Ms Brookes, it should have granted her an adjournment to enable her to gather evidence to make out her case.

93. Finally, Ms Brookes submitted that the decision of the Court not to inquire into her mental health was unreasonable in the *Wednesbury* sense.[45] Information about her mental health could have been readily obtained. Once the matter was raised and the Court formed the view that it could not be satisfied without documentary evidence, the appropriate course was for the Court to make inquiries either indirectly by adjourning the matter with a direction to Ms Brookes to obtain the evidence required, or directly by issuing witness summonses to her doctors to give evidence about her mental health.

94. The defendants' response to these grounds is that they involve neither jurisdictional error nor an error of law on the face of the record, and *certiorari* may issue against an inferior court only where such errors exist. Failing to take into account a relevant consideration cannot be characterised as jurisdictional error in the sense that *Craig* and *Kirk* contemplate. The alleged denial of natural justice suffers from the same difficulty. In any event, so the defendants submit, the Court did not deny Ms Brookes the opportunity to have her matter adjourned. Rather, the proposal for an adjournment was rejected by Ms Brookes. As to the *Wednesbury* unreasonableness ground, the defendants contend that what is raised is again a non-jurisdictional error and that even if the ground could be argued, it could not be made out because no duty to inquire into Ms

Brookes' mental health existed and, in any event, the Magistrate did inquire and afforded her an opportunity to adjourn the matter.

95. Ms Brookes' counsel filed lengthy written submissions in reply, arguing that the Magistrate exercising power under s160 of the Act was exercising administrative power and sitting as persona designate and that this court was therefore not constrained by the narrow form of judicial review described in *Craig* as applying to inferior courts. Counsel also submitted that *Kirk* had broken down the distinction between errors within and outside of jurisdiction. According to counsel, *Kirk* adopted a 'functionalist account' of jurisdictional error and it was 'simply a particularly grave error'. The error made by the Magistrate was therefore a jurisdictional error.

Conclusion

96. The grounds and submissions advanced on behalf of Ms Brookes were based on the proposition that the decision made by the Court to impose a term of imprisonment on Ms Brookes was an administrative decision which was amenable to review as such. It is unnecessary to decide whether that was the case. The orders made by the Magistrate in respect of Ms Brookes must be set aside for the same reasons as those made in respect of Mr Taha. The learned Magistrate misconceived the Court's function under s160 of the Act in that he proceeded to make an imprisonment order under sub-s (1) without addressing the possibility that it might be open to the Court to make the alternative orders under sub-ss (2) or (3) and without considering the Ms Brookes' particular circumstances.

97. In this case, the Court was informed by the duty lawyer acting for Ms Brookes that sub-s (2) was – or might be – enlivened because Ms Brookes suffered from a mental illness. In those circumstances, the Court should have made inquiries to enable it to determine whether it was appropriate to make orders under sub-ss (2) or (3) before making an imprisonment order under sub-s (1). The requirement that the Court be 'satisfied' of one or more matters in sub-s (2)(a) and (b) or of the matter in sub-s (3) does not impose an obligation on the offender to provide proof in the conventional sense. The Court may satisfy itself through its own inquiries. If documentary evidence of Ms Brookes' mental illness was required by the Court, the s160 hearing should have been adjourned in order for that evidence to be obtained and put before the Court. Insofar as Ms Brookes has raised a ground for review that picks up on this error, it is the natural justice ground, which is the same as Mr Taha's procedural fairness ground, although formulated somewhat differently.

98. The circumstances here are to be distinguished from those recently before the Court of Appeal in *McWhinney v Melbourne Health*.[46] Because of the nature of a s160 hearing, a Magistrate adjourning the hearing of his or her own motion in circumstances to enable information to be provided so that the powers in s160 could be exercised in accordance with the law would not be inconsistent with the neutrality of the judicial officer or the nature of the adversarial system.

99. Ms Brookes must be granted leave to bring her application for review out of time. The orders made against Ms Brookes by the learned Magistrate should be set aside and the matter remitted to the Magistrates' Court for determination according to law.

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[1] The Magistrates' Court of Victoria is the 'Court' for the purposes of the *Infringements Act* 2006 (Vic) s3. I shall refer to it as 'the Court' in this judgment. Where necessary, the Supreme Court of Victoria will be referred to as 'this court'.

[2] To which the Act applies.

[3] Attorney-General's Guidelines to the *Infringements Act* 2006.

[4] Victoria, *Parliamentary Debates,* Legislative Assembly, 16 November 2005, 2188 (Rob Hulls).

[5] Which I will refer to as a 's160 hearing'.

[6] In her affidavit made on 28 January 2011.

[7] By affidavits made on 29 November 2010 and on 27 January 2011.

[8] Other than the Magistrates' Court, which appeared only to assist the Court as to its infringement procedures and on any particular points of law, and agreed to abide by the decision of the Court.

[9] This court was told that no transcript was available. The only record are the orders themselves.

[10] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 ('*Craig*').

[11] [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 ('*Kirk*').

[12] Pursuant to s160(3)(e), the Court may also make a community based order under Division 4 of Part 3 of

the *Sentencing Act*.
[13] Transcript of Proceedings, *Taha v Broadmeadows Magistrates' Court; Brookes v Magistrates' Court of Victoria* , (Supreme Court of Victoria, Emerton J, 28 July 2011) 19.
[14] *R v Olbrich* [1999] HCA 54; (1999) 199 CLR 270, 281 [25]; (1999) 166 ALR 330; (1999) 73 ALJR 1550; (1999) 108 A Crim R 464; (1999) 18 Leg Rep C7, the High Court accepted that if the prosecution seeks to have the sentencing judge take a matter into account in passing sentence, it will be for the prosecution to bring that matter to the attention of the judge and, if necessary, call evidence about it.
[15] [2007] VSCA 102; (2007) 16 VR 269; (2007) 169 A Crim R 581.
[16] *R v Zander* [2009] VSCA 10, [36] (Nettle JA); *Wassef v R* [2011] VSCA 30, [18] (Redlich JA).
[17] *R v Azzopardi* [2011] VSCA 372; *R v Zander* [2009] VSCA 10, [36] (Nettle JA).
[18] A construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not: *Interpretation of Legislation Act* 1984 (Vic) s35(a).
[19] The purpose of the Act expressed in s3 is of little assistance. It simply refers to a new framework for the issuing and serving of infringement notices for offences and the enforcement of infringement notices, and to amending various Acts of Parliament.
[20] Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2185 (Rob Hulls). A second objective is to provide additional enforcement sanctions to motivate people to pay their fines in order to maintain the integrity of the system.
[21] Ibid.
[22] Ibid 2187.
[23] Ibid 2188.
[24] Ibid 2189.
[25] Ibid.
[26] Ibid 2189-2190.
[27] Explanatory Memorandum, *Infringements Bill 2005* 32.
In the 'Attorney-General's Guidelines to the *Infringements Act 2006*' made under s 5 of the Act, the Act is expressed to be directed to 'addressing the needs of people in special circumstances and providing people with more information about infringements and more avenues by which to expiate (make amends without conviction) the matter'. The principles on which the Act is based and what the 'improved infringement system' seeks to achieve include:
• A requirement that individual circumstances be taken into account;
• A recognition of genuine special circumstances, both at the time the infringement notice issues and during the enforcement process;
• Improved protection for all individuals, as well as for people in special circumstances (ie. mental or intellectual disability, homelessness, serious addictions, those in genuine financial difficulty).
[28] As Gleeson CJ said in *Al-kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562, 577; (2004) 208 ALR 124; (2004) 78 ALJR 1099; 79 ALD 233, courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights and freedoms in question and has consciously decided upon the abrogation or curtailment.
[29] [2008] VSCA 265; (2008) 21 VR 526; (2008) 192 A Crim R 156.
[30] Ibid 537 [37].
[31] *Momcilovic v R* [2010] VSCA 50; (2010) 25 VR 436, 464 [103]; (2010) 265 ALR 751.
[32] Ibid 465 [104].
[33] These are the elements of indirect discrimination under s9 of the *Equal Opportunity Act* 2010 (Vic). An intellectual disability is a relevant attribute for the purposes of s6 of the *Equal Opportunity Act* 2010 (Vic).
[34] *Public Service Board (NSW) v Osmond* [1986] HCA 7; (1986) 159 CLR 656, 676; 63 ALR 559; (1986) 60 ALJR 209 (Deane J) cited in *MH6 v Mental Health Review Board* [2009] VSCA 184; (2009) 25 VR 382, 391 [29].
[35] *Heatley v Tasmanian Racing and Gaming Commission* [1977] HCA 39; (1977) 137 CLR 487, 514; (1977) 14 ALR 519; (1977) 51 ALJR 703; *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 16 [48]; (2003) 195 ALR 502; (2003) 77 ALJR 699; (2003) 72 ALD 613; (2003) 24 Leg Rep 8.
[36] *MH6 v Mental Health Review Board* [2009] VSCA 184; (2009) 25 VR 382, 391 [30].
[37] Ibid 391 [31].
[38] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[39] Ibid 177.
[40] Ibid.
[41] Ibid 178. Although the High Court in *Kirk* said that it was not possible to attempt to mark out the metes and bounds of jurisdictional error (573 [71]) and referred to 'unexpressed premises' about what is meant by jurisdictional error, apparently by reference to *Craig* (573 [69]), and to the fact that the reasoning in *Craig* was not to be seen as providing a rigid taxonomy of jurisdictional error (574 [73]), nothing in *Kirk* detracts from the statement in *Craig* that misconstruing the statute so as to misconceive the nature of the function being performed constitutes jurisdictional error by an inferior court.
[42] In her affidavit sworn 28 February 2011.
[43] In her affidavit sworn 28 February 2011.
[44] In his affidavit sworn 24 May 2011.
[45] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223;

[1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
[46] [2011] VSCA 22.

APPEARANCES:
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Case No SCI 2010 05540 (Brookes): For the plaintiff Brookes: Mr RJC Watters, counsel. Matthew White & Associates, solicitors. For the first defendant (Magistrates' Court of Victoria): Ms R Orr, counsel. Victorian Government Solicitor's Office. For the second defendant (State of Victoria): Dr SB McNicol, counsel. Director of Public Prosecutions.
