



## Judgment Summary

Supreme Court  
Australian Capital Territory

---

Thursday, 22 February 2024

### Henderson v The King

Loukas-Karlsson, Baker and McWilliam JJ

---

The Court of Appeal has allowed an appeal against sentences imposed for offences of possession and transmission of child abuse material. The Court found that the sentencing judge erred in two respects. First, in finding “exceptional circumstances” must exist before an Intensive Corrections Order could be imposed in respect of the offences. Second, in sentencing the appellant on a basis that was inconsistent with the charge. The Court did not alter the primary sentence imposed by the primary judge - a total effective sentence of 2 years and 4 months imprisonment – but held that the offender should be eligible for release on a recognisance order after nine and a half months’ imprisonment.

Section 20(1)(b) of the *Crimes Act 1914* (Cth) provides that where a Court sentences a person convicted of a “Commonwealth child sex offence” to a term of imprisonment, the Court cannot order the offender be released immediately on entering a recognisance release order unless there are “exceptional circumstances”. However, this section is only addressed to release under recognisance where an offender is sentenced to full-time imprisonment but immediately released on a recognisance. In the Australian Capital Territory, a federal offender may be sentenced to an ICO pursuant to s 20AB of the *Crimes Act* (which applies specified State and Territory sentencing legislation to federal offenders). Section 20AB does not require that exceptional circumstances be present before an ICO is imposed.

The trial judge further erred in sentencing the appellant on the basis that he possessed the child abuse material for more than one day and using this evidence as a “circumstance of aggravation”, when the indictment charged the appellant with possessing the child abuse material for a single day.

On resentencing, the appellant adduced fresh evidence concerning violence he had been subject to whilst in custody. The Court found that hardship in custody is a relevant consideration in determining the sentence to be imposed, although the extent of and reason for the hardship will be relevant to the weight to be given to that evidence. In the present case, the hardship experienced by the appellant was not found to be significantly different to that experienced by other offenders who are sentenced to a term of imprisonment. The Court did not consider the appellant’s experience in custody to lessen the weight to be given to the need for punishment or deterrence.

