



Friday, 3 May 2024

## Weekly Family Law A Weekly Bulletin listing Decisions of Superior Courts of Australia covering family law

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### Executive Summary (One Minute Read)

**Kovac & Kovac** (FedCFamC1A) - appeal allowed because the primary judge had not explained why a “no-time” parenting order was the only order that could be made, and that no ameliorative conditions could be put in place

## HABEAS CANEM

### Panting pooches



# Benchmark

## Summaries With Link (Five Minute Read)

### **Kovac & Kovac [2024] FedCFamC1A 66**

Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction  
Tree J

Parenting - the primary judge made final parenting orders giving the father sole parental responsibility in relation to the parties' two children, and providing that the children live with the father and neither spend time nor communicate with the mother, who was only permitted to send the children cards, gifts and letters on their birthdays, at Christmas, and at Easter - the mother had made complaints of sexual abuse by the father and the paternal grandparents, and the Department had found there was not substance to these complaints, and that the mother's fixation with this put the children at risk, and had put the children into the father's care - the mother appealed - held: although the father and the independent children's lawyer conceded one ground of appeal, the Court still had to be satisfied that the primary judge had fallen into error - reasons for judgment will be inadequate if the appeal court is unable to ascertain the reasoning upon which the decision is based, or if justice is not seen to have been done - "no-time" orders are orders of last resort, and it is therefore incumbent upon a court pronouncing them to explain why no other regime is workable - a finding of unacceptable risk is only the start, not the end of the evaluative process, and necessarily invokes a consideration of the means which might be adequate to sufficiently mitigate the risk to an acceptable level - in assessing risk, the Court must also consider what possible measures are open to ameliorate that risk - where the court makes no orders for time or communication because it is not persuaded that safeguarding conditions would sufficiently ameliorate the risk, it should clearly explain the reasons for that conclusion - the Court could see no careful evaluation of the options available here by the primary judge, and no clear explanation for why the conclusion that a "no-time" regime was the only acceptable outcome - the primary judge had not stated why professional supervision would not deter the mother nor keep the children safe - the primary judge had not explained why the prohibition of any contact be until the children turn 18, and, rather than the blanket prohibition imposed on any time or communication, why could the father not be trusted with the responsibility of determining as an incident of his general parental responsibility that the children should spend time or communicate with the mother - the Court was none the wiser as to what options the primary judge had had in mind when considering ameliorative conditions, nor why they were not sufficiently mitigatory - appeal allowed, and the aspects of the proceedings infected by the primary judge's lack of reasoning remitted for rehearing before another judge.

[Kovac & Kovac](#)

[From Benchmark Friday, 3 May 2024]

# Benchmark

## INTERNATIONAL LAW

### Executive Summary and (One Minute Read)

**R v Secretary of State for the Home Department (UKSC)** - Failed asylum seeker who committed criminal acts within the UK and who thwarted his deportation was lawfully refused government benefits and was not denied his rights under the *European Convention on Human Rights*

### Summaries With Link (Five Minute Read)

#### **R v Secretary of State for the Home Department [2024] UKSC 13**

Supreme Court of the United Kingdom

Lord Lloyd-Jones, Lord Sales, Lord Hamblen, Lord Stephens, and Lady Simler

AM was a national of Belarus. He arrived in the UK in 1998 and claimed asylum. In 2000, he was denied asylum status and removed to Belarus. He was denied entry to Belarus and returned to the UK because he provided Belarus officials with false information that caused the officials to believe that he was not a citizen. Upon his return to the UK, he committed various criminal offences and was classified as a foreign criminal by British authorities. The Government desired to extradite AM to Belarus, but he resisted these attempts. Further, the British authorities refused to grant AM Leave to Remain, which would entitle him to full government benefits. Instead, AM is in 'limbo' status under which (1) he may not seek employment in the UK, (2) he is not entitled to National Health Service benefits, excepting emergency care, (3) he may not open a bank account, (4) he may not enter into a tenancy agreement, and (5) he receives very limited social welfare benefits, at the same level of failed asylum seekers awaiting deportation. Instead, he received a payment card for food, clothing, and toiletries at a subsistence level and government accommodation. As AM may not return to Belarus, he claimed that the British Government's action of placing him in a legal 'limbo' amounted to a denial of his rights under Article 8 of the *European Convention of Human Rights*, and that the Government had to grant him Leave to Remain status that would enable him to obtain full public benefits. Article 8 provides that 'everyone has the right to respect for his private and family life' and that 'there shall be no interference by a public authority in the exercise of this right except as in accordance with law and is necessary in a democratic society in the interests of national security, public safety' - administrative tribunals and then the Court of Appeal agreed with AM, and ordered the Home Secretary to grant AM Leave to Remain status. On review, in a unanimous decision, the Supreme Court reversed the Court of Appeal and held that the Home Secretary did not violate AM's Article 8 rights by placing him in 'limbo' status. The Supreme Court found that AM's attempts to thwart his deportation were highly material factors in evaluating whether the Home Secretary's actions were proportional. The Court added that the



public interest in maintaining effective immigration controls and containing welfare expenditures were relevant considerations. There was also a public interest in maintaining British employment opportunities for those lawfully in the UK. The Court said that, given AM's serious criminal offences, his deportation was in the public interest, and his efforts to undermine that through fraudulent activity were also valid considerations. While AM was entitled to Article 8 protections, the Supreme Court concluded that his extended limbo status was a proportionate means of achieving the lawful aims of the British Government.

[R v Secretary of State for the Home Department](#)





## Poem for Friday

### Song of Hope

**By:** Thomas Hardy (1840-1928)

O sweet To-morrow! –  
After to-day  
There will away  
This sense of sorrow.  
Then let us borrow  
Hope, for a gleaming  
Soon will be streaming,  
Dimmed by no gray –  
No gray!

While the winds wing us  
Sighs from The Gone,  
Nearer to dawn  
Minute-beats bring us;  
When there will sing us  
Larks of a glory  
Waiting our story  
Further anon –  
Anon!

**Thomas Hardy**, (2 June 1840 - 11 January 1928), author and poet, was born in Dorset, England. His father was a stonemason, and his mother who was well read, educated Thomas to the age of 8, at which time Thomas commenced as a student at Mr Last's Academy for Young Gentlemen. On leaving school at the age of 16, due to his family's lack of finances to fund a university education, Thomas became an apprentice architect. Much of his work involved the restoration of churches. In 1862 he enrolled at King's College, London. He is best known for his novels, including *Far from the Madding Crowd*, (1874) and *Tess of the d'Urbervilles*, (1891). He was appointed a Member of the Order of Merit in 1910 and was nominated for the Nobel Prize in Literature in that year. He received a total of 25 nominations for the Nobel Prize for literature during his life. Thomas Hardy died of pleurisy on 11 January 1928. He had wanted his body to be buried with his first wife Emma's remains at Stinsford. She had died in 1912 and much of his poetry was inspired by his feelings of grief following her death. His Executor Sir Sydney Carlyle Cockerell compromised by having Thomas Hardy's heart buried with the remains of his first wife Emma, and his ashes interred at Poets' Corner, Westminster Abbey. At the time of his death his estate was worth 95,418 pounds, the equivalent of over 6 million pounds



today. One of the largest literary societies in the world is the Thomas Hardy Society, based on Dorchester, <https://www.hardysociety.org/>.

**Song of Hope** by Thomas Hardy, read by Dylan Pearse, Music by Irish Folk Group, Kern <https://www.youtube.com/watch?v=Q1qp8sWTi6M>

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