Legal Bulletin

Volume 10 | August - October 2004

Inside this issue:

1. Introduction and forthcoming seminar details

Welcome to the December 2004 edition of the Legal Bulletin, covering developments in domestic and international human rights law during the period 1 August 2004 - 31 October 2004.

To allow for the Christmas break we have scheduled the next Legal Bulletin seminar for Tuesday, 1 February 2004 at 5pm.

That seminar will be given by Julie O'Brien, a Senior Legal Officer at the Commission. Julie will be speaking on the decisions of *Howe v Qantas* and *Jacomb v Australian Municipal Administrative Clerical and Services Union*. The federal Sex Discrimination Commissioner appeared as amicus curiae in both matters and Julie had carriage of those matters on behalf of the Commissioner.

Admission is free and the venue is:

Hearing Room,
Human Rights and Equal Opportunity Commission
Level 8 Piccadilly Tower
133 Castlereagh Street, Sydney

Please email Ms Gina Sanna at legal@humanrights.gov.au if you wish to attend this Seminar.

2. Selected general Australian jurisprudential/ legislative developments relevant to human rights

2.1 Jurisprudence

The following three cases, *Al-Kateb v Goodwin* [2004] HCA 37, *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* [2004] HCA 36 and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* [2004] HCA 38 were heard together by the High Court.

Al-Kateb v Goodwin [2004] HCA 37

http://www.austlii.edu.au/au/cases/cth/high_ct/2004/37.html

The appellant, a Palestinian born in Kuwait, arrived in Australia in 2000. The Minister's delegate rejected the appellant's application for a protection visa, which decision was upheld by the Refugee Review Tribunal and the Federal Court. In June 2002 the appellant informed the Minister that he wished to be returned to Kuwait or Gaza, but at the time of the proceedings the Federal Government had been unable to find any country willing to accept him. In February 2003 the appellant commenced proceedings in the Federal Court seeking a declaration that his continued detention was unlawful, a writ of habeas corpus and prohibition, and mandamus directing the Minister to remove him from Australia. That application was dismissed at first instance and the appellant appealed to the Full Federal Court, which appeal was removed into the High Court. The majority of the High Court dismissed the appeal, Gleeson CJ, Gummow and Kirby JJ dissenting.

Section 196 of the *Migration Act 1958* (Cth) provides that an unlawful non-citizen must be kept in immigration detention until, *inter alia*, they are removed under s 198 of the Act, which requires their removal '*as soon as is reasonably practicable*'.

In the proceedings before the High Court it was not in dispute that the appellant was a stateless person within the meaning of article 1 of the *Convention relating to the Status of Stateless Persons*, which defines a stateless person as being a person '*who is not considered as a national by any State under the operation of its law*', or that the removal of the appellant from Australia was not '*reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future*'.

The appellant argued that his continued detention was not authorised by the Act once it became apparent that there was no real likelihood or prospect of his removal to another country in the reasonably foreseeable future. The majority, McHugh, Hayne, Callinan and Heydon JJ, rejected that argument on the basis that, properly construed, the words in s 198 '*as soon as reasonably practicable*' do not impose any temporal limitation on the length of detention under the Act. In the majority's view, '*unless it has been practicable to remove the non-citizen it cannot be said that the time for performance of the duty imposed by s 198 has arrived*', and that, '*so long as the time of performance of the duty to remove has not expired, s 196 in terms provides that the non-citizen must be detained*', even if that would result in indefinite detention. Consequently, their Honours disagreed with Mr Al Kateb's argument that the purpose of s 198 (the purpose of removal) could be shown to be 'spent' if it could be established that efforts to achieve removal had not been successful.

Gleeson CJ and Gummow J (Kirby J agreeing), in separate judgements, dissented. They held that as the primary purpose of s 198 in relation to the appellant

was removal, that purpose was suspended or spent when removal was not 'reasonably practicable', though it may be revived in the future if and when removal became reasonably practicable. Gleeson CJ further held that, in the absence of any provisions setting out what is to happen in the present circumstances, resort can be held to the fundamental common law principle that courts will not impute to the legislature an intention to abrogate or curtail human rights or freedoms, unless such an intention is manifested by unambiguous language. In the face of legislative silence, his Honour said, no such intention could be implied in this case. Kirby J suggested that the dissenting position was also supported by considerations of international law.

The Court also considered the argument raised by the appellant that his detention contravened Ch III of the Constitution. The majority stated that the detention provided for by the Act did not contravene Ch III of the Constitution, as it retained its legitimate non-punitive purpose of deportation, exclusion or expulsion (discussed in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1). Gummow J (Kirby agreeing) disagreed with the majority on this issue.

Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji [2004] HCA 38

http://www.austlii.edu.au/au/cases/cth/high_ct/2004/38.html

The respondent was an Iraqi national who had been living in Syria prior to his arrival in Australia in 1999. The Minister's delegate rejected the respondent's application for a protection visa on the basis that he had effective protection in Syria, including the right to re-enter and reside in Syria without the risk of *refoulement* to Iraq and did not have a *well-founded fear of persecution* if he were to return to Syria. Accordingly the delegate concluded that Australia did not have any protection obligations to the respondent pursuant to s 36(2) of the *Migration Act 1958*. That decision was later affirmed by the Refugee Review Tribunal.

In February 2001 the respondent requested that he be returned to Syria as soon as possible, and suggested other countries to which he might be sent in the event that arrangements could not be made to send him to Syria. He made a further request in April 2002. In September 2002 the respondent made an application to the Federal Court for a writ of habeas corpus.

At first instance Mansfield J found that the removal of the respondent from Australia was '*not reasonably practicable*' because there was '*no real prospect that the respondent being removed in the reasonably foreseeable future*'. His Honour concluded that s 198 therefore no longer retained a purpose of facilitating removal from Australia as an end reasonably in prospect and as a result ss 196 and 198 no longer mandated the appellant's detention. That decision was affirmed by the Full Federal Court. The Minister then appealed to the High Court.

McHugh, Hayne, Callinan and Heydon JJ allowed the Minister's appeal on the basis of their reasoning in *Al-Kateb v Goodwin* [2004] HCA 37 (see above). Gleeson CJ, Gummow and Kirby JJ (in dissent) would have allowed the appeal, also on the basis of their reasoning in *Al-Kateb*.

Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs [2004] HCA 36

http://www.austlii.edu.au/au/cases/cth/high_ct/2004/36.html

The appellants had been in immigration detention since early 2000. Since November 2001 they had been defending criminal charges in the South Australian Magistrates' Court. They were charged with having escaped from immigration detention from the Woomera Immigration Reception and Processing Centre (Woomera) (which has now closed), contrary to s 197A of the *Migration Act 1958* (Cth). The appellants, in defence of the charges, submitted that the conditions at Woomera were harsh, and as such go beyond anything that could be reasonably regarded as necessary for the purpose of enabling deportation or the processing of visa applications. Hence the appellants argued that their detention at Woomera was not valid immigration detention and therefore their escape did not constitute '*escaping from immigration detention*' for the purposes of s 197A of the Act.

At first instance the magistrate granted their application to have summonses issued seeking material dating back to December 1999 about conditions in Woomera. The respondent successfully appealed to the SA Supreme Court to have the summonses set aside. The appellants then sought leave to appeal to the Full Court of the Supreme Court. The majority of the Full Court refused leave to appeal on the basis that even if the documents were to show that conditions at Woomera were harsh, this was no defence to charges under s 197A. The three men then appealed to the High Court. Since being granted leave to appeal, two of the three had been deported and the criminal charges against them dropped. Mr Behrooz, an Iranian national, remained the sole appellant.

The majority of the High Court dismissed Mr Behrooz's appeal (Kirby J dissenting). The majority held that Mr

Behrooz had no right to escape from Woomera, even if he could show the conditions of detention were harsh. Rather, he was entitled to seek legal redress for any civil wrong or criminal offence committed against him. The majority held that although the information sought by him by way of summons may have assisted him to demonstrate that the conditions of his detention supported such redress, such information would not assist his argument that he was not in immigration detention, or that he was entitled to escape. The majority therefore held that the summonses did not have any legitimate forensic purpose. Kirby J would have allowed the appeal holding that immigration detention under the *Migration Act 1958* (Cth) ceases to be such when the conditions of detention are inhuman or intolerable. Hence, his Honour held that evidence on that issue would have been admissible before the magistrate hearing the escape charges.

Re Kit Wooley; Ex parte Applicants M27/2003 by their next friend GS [2004] HCA 49

http://www.austlii.edu.au/au/cases/cth/high_ct/2004/49.html

The appellants, four children of the Sakhi family, were seeking writs of habeas corpus and prohibition to secure their release from immigration detention, where they had been held for nearly 3 years. The application involved a challenge to the constitutional validity of s 196 of the *Migration Act 1958* (Cth). The applicants argued that s 196 is inconsistent with Ch III of the Constitution as it was 'punitive' in character so far as it applied to children, children lacking the capacity to request removal (and thereby end their detention) and having a special status and vulnerability.

The Court unanimously dismissed the appeal (in separate judgements), applying its decision in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. Their Honours held that any special status that may be attributed to children did not transform non-punitive detention into punitive detention (so as to amount to an invalid exercise of judicial power by the executive contrary to Ch III of the Constitution); nor did the fact that some children may lack the capacity to request removal. In that regard their Honours stated that while some children in detention would lack the capacity to request removal, their parents or guardian could request removal and therefore end their detention.

Three members of the Court (McHugh, Gummow and Kirby JJ) made obiter comments to the effect that if an applicant were able to establish that they were being detained in '*harsh, inhuman and degrading*' conditions (Gummow and Kirby JJ), for an '*inordinately prolonged duration*' (Kirby J), or that the Minister had not complied with his (or her) implied duty in the Act to '*carry out each step involved in processing a visa application in a reasonable time*' (McHugh J), they may be able to establish that their detention was contrary to Ch III of the Constitution.

3. Developments in Australian Federal Discrimination Law

Jacomb v Australian Municipal Administrative Clerical and Services Union [2004] FCA 1250

http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1250.html

The 'special measures' provision of the *Sex Discrimination Act 1984* ('SDA') was considered for the first time by the Federal Court of Australia in a decision handed down on 24 September 2004, *Jacomb v Australian Municipal Administrative Clerical and Services Union* ('*Jacomb*').[1] The 'special measures' provision appears in s 7D of the SDA and provides that a person may take special measures for the purpose of achieving substantive equality between, inter alia, men and women. It is further provided that a person does not discriminate against another person by taking special measures authorised by s 7D (s 7D(2)).

The Sex Discrimination Commissioner appeared as *amicus curiae* in this matter and made submissions in relation to the interpretation of s 7D. The former special measures provision, s 33, was considered by the Human Rights and Equal Opportunity Commission,[2] the Australian Conciliation and Arbitration Commission[3] and the Australian Industrial Relations Commission.[4] The case law on s 33 was, however, of little assistance in relation to the interpretation of s 7D as the section was in substantially different terms.

In *Jacomb* the branch rules of a union provided that particular elected positions on the branch executive and at the state conference were available only to women. A male applicant challenged the rules, alleging that they discriminated against men and were unlawful under the SDA. The essence of the applicant's objection to the rules was that the union policy of ensuring 50 per cent representation of women in the governance of the union (which was the basis of the quotas within the branch rules) exceeded the proportional representation of women in certain of the

[1] [2004] FCA 1250.
[2] *Proudfoot v ACT Board of Health* (1992) EOC 92-417.
[3] *Australian Journalists Association* (C No. 4060 of 1987) per Boulton J, 6 May 1988.
[4] *The Municipal Officers' Association of Australia* [1991] 93 IRCommA, per Moore DP, 6 February 1991.

union branches. Consequently, women were guaranteed representation in particular braches of the union in excess of their membership to the disadvantage of men. The union denied that the applicant had been unlawfully discriminated against and submitted that the branch rules complained of were special measures designed to achieve substantive equality between men and women in accordance with s 7D of the SDA.

Her Honour Justice Crennan found that the branch rules were special measures within the meaning of s 7D. The judgment of Crennan J provides useful guidance as to the scope and interpretation of the special measures provision in the SDA.

The special measures provision in the SDA is limited, in its terms, by a test as to purpose. Section 7D(1)(a) provides that a person may take special measures for the purpose of achieving substantive equality between men and women. The achievement of substantive equality need not be the only, or even the primary purpose of the measures in question (s 7D(3)). Measures fall within the section if the achievement of substantive equality was one of the purposes for which they were taken.

Accordingly, any application of s 7D requires an assessment of whether the measure in question was taken for the purpose of achieving substantive equality. It was accepted by Crennan J in *Jacomb* that the test as to purpose is a subjective test.[5] Her Honour stated 'it is the intention and purpose of the person taking a special measure, which governs the characterisation of such a measure as non-discriminatory.'[6] In applying this test, her Honour was satisfied that the union believed substantive equality between its male and female members had not been achieved and that solving this problem required having women represented in the governance and high echelons of the union so as to achieve genuine power sharing. Crennan J commented that it 'was clear from the evidence that part of the purpose of the rules was to attract female members to the union, but this does not disqualify the rules from qualifying as special measures under s 7D (subs 7D(3))'.[7]

Section 7D also requires the court to consider the alleged special measure objectively. Crennan J appeared to accept the submission of the Sex Discrimination Commissioner that s 7D requires the court to assess whether it was reasonable for the person taking the measure to conclude that the measure would further the purpose of achieving substantive equality.[8] In making this determination, the Sex Discrimination Commissioner submitted that the court must at least consider whether the measure taken was one which a reasonable entity in the same circumstances would regard as capable of achieving that goal. The court ought not substitute its own decision, but should consider whether in the particular circumstances, a measure imposed was one which was proportionate to the goal. Her Honour was satisfied, on the evidence, that the union rules were a reasonable special measure when tested objectively.[9]

Finally, it should be noted that s 7D(4) provides that the taking, or further taking, of special measures for the purpose of achieving substantive equality is not permitted once that purpose has been achieved. This gives rise to the question: when can it be said that measures are no longer authorised because their purpose has been achieved? The judgment of Crennan J in *Jacomb* provides little guidance on this point. Her Honour stated as follows: [10]

> having regard to the inflexibility of the quotas and the express provisions of subs 7D(4), monitoring is important to ensure the limited impact of such measures on persons in the applicant's position. The rules have only been utilised once and there was evidence that elections to the relevant positions were for four-year terms. Accordingly, it is too soon to find that the special measure is no longer needed…However, rules 5 and 9 cannot remain valid as a special measure beyond the "exigency" which called them forth.

It may be that it is a practical consequence of employing special measures that persons or entities must monitor whether the special measures they have employed continue to be required for the purpose of achieving substantive equality. Her Honour did not, however, draw any conclusions in this regard.

Howe v QANTAS Airways Limited [2004] FMCA 242

http://www.austlii.edu.au/au/cases/cth/FMCA/2004/242.html

In a number of cases issues surrounding family responsibilities and requests for part-time work have been considered within the context of the indirect sex discrimination provisions of the *Sex Discrimination Act 1984* ('SDA').[11] *Howe v QANTAS Airways Limited*[12] is the most recent decision in this line of cases. Judgment

[5] [2004] FCA 1250, [61],[64].
[6] Ibid [47].
[7] Ibid [28].
[8] Ibid [34],[62],[65].
[9] Ibid [65].
[10] Ibid [65].
[11] *Hickie v Hunt and Hunt* (1998) EOC 92-910; *Escobar v Rainbow Printing (No 2)* [2002] FMCA 122; *Mayer v ANSTO* [2003] FMCA 209; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584.
[12] [2004] FMCA 242.

was handed down by Driver FM on 15 October 2004. The Sex Discrimination Commissioner appeared as *amicus curiae* in this matter and her role was principally limited to making submissions on the interpretation of the indirect sex provisions of the SDA.

Factual background

The salient factual background to the proceedings can be summarized as follows.

The applicant was employed by Qantas Airways Limited ('Qantas') in the position of Customer Service Manager ('CSM') Long Haul. The applicant fell pregnant in late 2000. In accordance with the terms of the Enterprise Agreement regulating her employment, the applicant was required to cease flying after completing 16 weeks flying from the date of conception. The applicant registered her interest in available ground duties and was offered a position in the engineering department, performing mainly photocopying and filing duties, earning about $30,000 pa. The applicant's remuneration as a CSM was $95,000pa, with a base salary of $64,000. The position in the engineering department was the only position offered and rather than take the position the applicant commenced unpaid maternity leave.

Prior to her return to work following maternity leave, the applicant requested alternative employment arrangements, including; (i) a permanent transfer from long haul to short haul flights; or (ii) rosters as a CSM on long haul restricted to short trips or part time rostering, on the basis of her family responsibilities. Qantas refused the request. The applicant requested a demotion from CSM to flight attendant. The applicant had sufficient seniority as a flight attendant to successfully bid for work patterns that would allow her to accommodate her family responsibilities.

Claims made in the proceedings

The applicant commenced proceedings alleging that Qantas had unlawfully discriminated against her in the course of her employment on the grounds of her sex, pregnancy and family responsibilities. The applicant made the following claims:

- that Qantas unlawfully discriminated against her on the grounds of her pregnancy by failing to pay the applicant her base salary and/or by refusing the applicant's request to access her sick leave entitlements when she was required to cease flying duties by reason of her pregnancy;
- that Qantas unlawfully discriminated against her on the grounds of her family responsibilities by refusing the applicant's request to vary her position from a full time long haul CSM to a part time position or to permit a transfer to short haul flights. The applicant claimed that this refusal constituted a constructive dismissal of the applicant because of her family responsibilities; and
- that Qantas unlawfully discriminated against her on the grounds of her sex within the meaning of s 5(2) of the SDA by refusing the applicant's request to vary her position from a full time long haul CSM to a part time position or to permit a transfer to short haul flights following her return to work.

Driver FM found that Qantas unlawfully discriminated against the applicant by refusing her access to accumulated sick leave contrary to ss 7(1) and 14(2)(b) of the SDA. Qantas was ordered to pay the applicant special damages to be calculated in accordance with the applicant's salary and general damages in the sum of $3,000. Driver FM found against the applicant on the facts in relation to her claims for family responsibilities discrimination and indirect sex discrimination.

Indirect sex discrimination and family responsibilities

An applicant seeking to invoke s 5(2) of the SDA must prove that the respondent imposed or proposed to impose a condition, requirement or practice which has or is likely to have the effect of disadvantaging people of the same sex as the applicant. That definition is subject to s 7B(1) which provides that there is no discrimination if the relevant condition, requirement or practice is reasonable.

The condition, requirement or practice that the applicant alleged was imposed by Qantas was, inter alia, that long haul CSM's be available to work full time. Driver FM found that Qantas did not impose a condition, requirement or practice of full time work. Driver FM's reasoning is set out below:[13]

> the respondent held open the option of the applicant obtaining part time employment. The number of part time places available was limited, but that was a consequence of EBA IV. It was not Qantas which imposed any condition, requirement or practice in relation to the number of part time positions available at any time. Indeed, Qantas did not impose any condition of full time work at all. The respondent was unable to accommodate the applicant's request for part time employment at the time it was made because no positions were at that time available.

[13] Ibid [131]. With respect, Driver FM's reasoning on this issue is not without difficulty. Driver FM does not appear to have considered the point that part-time work was not available to long haul CSM's, and that long haul CSMs were required to demote themselves to the flight attendant category to access part time work at all.

Despite his finding on this aspect of the indirect discrimination claim, his Honour went on to make findings in relation to whether a requirement to work full time was likely to have the effect of disadvantaging people of the same sex as the applicant. These findings were not fundamental or necessary to his Honour's decision and accordingly, should be viewed as obiter dicta.

Driver FM stated that s 5(2) of the SDA has work to do in relation to indirect sex discrimination claims arising by reason of women's family responsibilities.[14] His Honour stated that s 5(2) proscribes indirect sex discrimination which can include discrimination on the grounds of family responsibilities where that discrimination has, or is likely to have, the effect of disadvantaging women.[15]

Driver FM found that it was open to the Court to take judicial notice that as a matter of common observation, women have the predominant role in the care of babies and infant children and that it follows from this that any full time work requirement is liable to disproportionately affect women.[16] His Honour also found that the Court could take judicial notice of this fact after having regard to material which is extraneous to the record, including statistical material. In this regard, his Honour referred to the material cited in the submissions of the Sex Discrimination Commissioner, together with a recent report from the Senate Standing Committee on Family and Community Affairs drawn from his own research.[17]

His Honour rejected Qantas' submission that this construction of s 5(2) (which by definition only protects women) entrenches a stereotypical view that women should be the primary caregivers of young children. In this regard, Driver FM stated:[18]

> The point is that the present state of Australian society shows that women are the dominant caregivers to young children. While that position remains (and it may well change over time) s.5(2) of the SDA operates to protect women against indirect sex discrimination in the performance of that care giving role.

Driver FM also considered the correctness of the decision of Raphael FM in *Kelly v TPG Internet* [2003] FMCA 584. His Honour disagreed with Raphael FM for reasons including those set out in the submissions of the Sex Discrimination Commissioner.[19]

[14] Ibid [106].
[15] Ibid [109].
[16] Ibid [113].
[17] Ibid [113-[115].
[18] Ibid [118].
[19] Ibid [119]-[124].

The applicant has filed an appeal from the whole of the judgment of Driver FM.

Bropho v Western Australia **[2004] FCA 1209**

http://www.austlii.edu.au/au/cases/cth/federal_ct/2004/1209.html

The respondents in this matter sought summarily dismissal of aspects of the applicant's application. The application, before RD Nicholson J, was partially successful.

Background

The primary application relates to the decision taken by the WA Government to 'close down' the Swan Valley Nyungah Community ('the Reserve'), a Reserve previously vested in the Swan Valley Nyungah Community Aboriginal Corporation for the 'Use and Benefit of Aboriginal Inhabitants'. The applicant seeks particularly to challenge the passing by Parliament of the *Reserves (Reserve 43131) Act 2003* (WA) ('the *Reserves Act*') which revokes the vesting order and places the 'care, control and management' of the Reserve in the Aboriginal Affairs Planning Authority. The applicant also challenges actions taken under the *Reserves Act*, notably, a direction given to all persons present on the Reserve to leave.

Relevantly to the present decision, the applicant in this matter seeks:

1. A declaration that the *Reserves Act* is invalid by virtue of s 109 of the *Consitution*, by reason of inconsistency with one or more of ss 9, 10(1), 10(3)(a) and 10(3)(b) of the *Racial Discrimination Act 1975* (Cth) ('the RDA').

2. A declaration that the enactment of the *Reserves Act* contravenes s 9 of the RDA and is therefore of no effect.

3. A declaration that the *Reserves Act* and the actions taken pursuant to it have no lawful effect and are unlawful because they either contravene s 9 or s 12(1)(d) of the RDA or constitute a trespass against the applicant and others whom she represents.

Prior to commencing these proceedings the applicant had not made a complaint of unlawful discrimination to the Human Rights and Equal Opportunity Commission ('HREOC') under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('the HREOC Act') but had commenced proceedings directly in the Federal Court.

Legislation

Section 9 of the RDA makes unlawful both 'direct' and 'indirect' discrimination.

Section 9(1) makes it unlawful to do 'any act' involving a 'distinction, exclusion, restriction or preference' based on race[20] which 'has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'.

Section 9(1A) has the effect of making unlawful the imposition of an unreasonable 'term, condition or requirement' that a person cannot comply with and which has the 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race… of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life'.

Section 10 provides for a right to equality before the law, as follows:

10 Rights to equality before the law

> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
>
> (3) Where a law contains a provision that:
>
> (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
>
> (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
>
> not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

Section 12(1)(d) of the RDA makes it unlawful for a person to 'refuse to permit a… person to occupy any land' by reason of that second person's race.

Section 109 of the *Constitution* provides that '[w]hen a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

Section 46PO of the HREOC Act provides that a person may make an application to the Federal Court or Federal Magistrates Court alleging unlawful discrimination if a complaint under that Act has been terminated by the President of HREOC and a termination notice given to them.

Arguments of respondent

The respondent argued the following in relation to those aspects of the application set out above:

1. The application was in error in seeking to have the Court declare an act in contravention of s 9 of the RDA as 'invalid'. The respondents contended that this section does not provide a basis for a declaration of invalidity, but rather only gives rise to a right to invoke the procedures and obtain the remedies provided in the HREOC Act. The subject of the complaint can only come before the Court if a complaint has first been made to HREOC and terminated as required by s 46PO of the HREOC Act, which had not occurred in the present matter; *Re East; Ex parte Nguyen*[21] ('*Nguyen*').

2. The enactment of legislation is not an 'act' for the purposes of s 9 of the RDA; *Gerhardy v Brown*;[22] *Mabo v Queensland*.[23]

[20] 'Race' is used here as a shorthand for the formulation contained in the RDA: 'race, colour, descent or national or ethnic origin'.

[21] (1998) 196 CLR 354.

[22] (1985) 159 CLR 70, 81 (Gibbs CJ); 92-93 (Mason J); 102-121 (Brennan J); 146 (Deane J).

[23] (1988) 166 CLR 186, 197 (Mason CJ); 203 (Wilson J), 216 (Brennan, Toohey and Gaudron JJ); 242 (Dawson J).

3. An act authorised under a State statute cannot be 'unlawful' under s 9 of the RDA. Where a State Act empowers a person to act in a particular way, their doing so cannot give rise to a breach of s 9 because it does not involve a 'distinction, preference, exclusion or restriction based on race'; *Gerhardy v Brown*;[24] *Aboriginal Legal Rights Movement Inc v South Australia*;[25] *Western Australia v Ward*.[26]

Findings

RD Nicholson J accepted that *Nguyen* was binding authority for the principle that the RDA and HREOC Act provide for an exclusive regime for the remedying of contraventions of the RDA. His Honour therefore struck out those aspects of the claim which sought remedies provided for under the HREOC Act.[27] It was also conceded by the applicant that the enactment of legislation is not an 'act' for the purposes of s 9 of the RDA and the pleadings concerning that aspect of the claim were also struck out.[28]

However, this did not preclude an argument of constitutional invalidity based on s 9 of the RDA. His Honour cited the following passage from *Gerhardy v Brown*:

> The operation of s 9 is confined to making unlawful the acts which it describes…. This is not to say that s 9 of the [Discrimination Act] cannot operate as a source of invalidity of inconsistent State laws, by means of s 109 of the Constitution. Inconsistency may arise because a State Law is a law dealing with racial discrimination, the Commonwealth law being intended to occupy that field to the exclusion of any other law: *Viskauskas v Niland* (1983)153 CLR 280. Or it may arise because a State law makes lawful the doing of an act which s 9 forbids: see *Clyde Engineering Co. Ltd. v Cowburn* (1926) 37 CLR 466 at 490.[29]

RD Nicholson J stated:

> It is important to distinguish each of the following issues from each other:
> (1) whether there is a constitutional inconsistency between a State enactment and the provisions of s 9 of the Discrimination Act;
> (2) whether the enactment by a State of legislation is an 'act' for the purposes of s 9 of the Discrimination Act (it being common ground here that it cannot be);
> (3) whether an act done pursuant to an authorisation in a valid State enactment can give rise to a breach of s 9 of the Discrimination Act;
> (4) Whether acts allegedly in contravention of s 9 attract remedies other than those provided by the Discrimination Act (which, on the authority of *Nguyen*, they could not).
>
> The first of those questions precedes the others and is open to argument independently of them.

It was not necessary for his Honour to decide whether or not inconsistency between the RDA and the *Reserves Act* was made out – for the purposes of the application to strike out it was sufficient to find that the issue is open for argument, which his Honour found that it was.[30]

Hinchliffe v University of Sydney [2004] FMCA 85

http://www.austlii.edu.au/au/cases/cth/FMCA/2004/85.html

This case involved an application brought by a student with vision impairment against the University of Sydney. The applicant alleged that the failure of the University to provide course materials to her in an appropriate format constituted indirect discrimination, contrary to s 22 of the *Disability Discrimination Act 1992* (Cth) ('DDA'). The University maintained that it had not discriminated against the applicant and had done all that it reasonably could to assist her in her studies. Driver FM dismissed the application.

To make out indirect discrimination under s 6 of the DDA it was necessary for the applicant to show that the respondent had required her to comply with an unreasonable requirement or condition with which she was not able to comply and with which a substantially higher proportion of persons without the disability were able to comply.

[24] (1985) 159 CLR 70, 81-82 (Gibbs CJ); 93 (Mason J); 122 (Brennan J).
[25] (1995) 64 SASR 558, 561 (Doyle CJ, with whom Bollen and DeBelle JJ agreed).
[26] (2002) 21 CLR 1, [102]-[103] (Gleeson CJ, Gaudron, Gummow, Hayne JJ).
[27] [2004] FCA 1209, [52].
[28] Ibid [53].
[29] (1985) 159 CLR 70, 92-93 (Mason J); see also 121, 131 (Brennan J); 146 (Deane J).
[30] [2004] FCA 1209, [59].

Driver FM held that the relevant requirement or condition was:

> the requirement or condition imposed by the university that students deal with course materials provided by the university in a single or standard format that the university chose to provide to all students. In other words, students were generally expected to either read course materials in the format that they were given to them or seek themselves to convert those materials into a different format which was preferred by them.[31]

Driver FM noted that, as in the case of *Waters v Public Transport Corporation*,[32] this was a requirement that was 'facially neutral' and was imposed upon the applicant and a class of persons who are not disabled, as well as the applicant. His Honour also noted that, as with *Waters*, it was a requirement which potentially might impact adversely upon the applicant by reason of her disability.

Driver FM did not accept the applicant's characterisation of the relevant requirement or condition as a requirement or condition that:

> [the applicant] undertake her university studies without all of her course materials being provided in an alternative format, either at all or at the same time as other students received their course materials.[33]

His Honour noted that the relevant requirement or condition must be one imposed upon not only the applicant but also on the class of other persons to whom the applicant is to be compared.[34]
Nor did His Honour accept that the relevant requirement or condition was the requirement or condition as proposed by the respondent that:

> [the applicant] achieve a pass grade in the subjects in which she was enrolled in order to meet the requirements to graduate with a Bachelor of Applied Science (Occupational Therapy).[35]

Driver FM stated:

> it is also a mistake to restrict consideration to formal or absolute requirements such as the requirement that students enrolled in the occupational therapy course complete course requirements by achieving a pass grade.[36]

Following *Catholic Education Office v Clarke*,[37] Driver FM noted that the standard necessary to establish an inability to comply with the university's requirement or condition 'requires that the applicant prove a "serious disadvantage" with the result that the applicant could not "meaningfully participate" in the course of study for which she had been accepted.' His Honour held that, to the extent that the applicant and those assisting her were able to reformat the course materials, she was able to comply with the university's condition that she use the course materials provided to her. He held that the inability to comply with the university's requirement was limited to certain material that was not capable of being reformatted into an acceptable format.[38]

Driver FM held that the existence of the position of disability services officer who was available to deal with occasional problems in reformatting course materials was sufficient and adequate and, accordingly, rendered the university's requirement reasonable. He said he found it impossible to believe that had the disability services officer or her successors been informed that the applicant had been provided with course material which could not be reformatted into an acceptable format that they would not have taken steps to ensure better quality material was provided.[39]

Note that the applicant has lodged an appeal against this decision.

Power v Aboriginal Hostels Ltd [2004] FMCA 452

http://www.austlii.edu.au/au/cases/cth/FMCA/2004/452.html

In *Power v Aboriginal Hostels Ltd*, [40] the applicant claimed that the termination of his employment as an assistant manager at a hostel run by the respondent constituted discrimination on the basis of an imputed disability, in contravention of s 15(2)(c) of the *Disability Discrimination Act 1992* (Cth) ('the DDA'). Central to the decision was the s 15(4) of the DDA which provides for an exemption where the person is unable to carry out the inherent requirements of the particular employment. Brown FM upheld the application, finding that the requirements of s 15(4) had not been made out.

[31] [2004] FMCA 85, [108].
[32] (1991) 173 CLR 349.
[33] [2004] FMCA 85, [105].
[34] Ibid [106].
[35] Ibid [105].
[36] Ibid [106].

[37] [2004] FCAFC 197.
[38] [2004] FMCA 85, [115]-[116].
[39] Ibid [122].
[40] This matter had been the subject of an earlier decision of Brown FM (*Power v Aboriginal Hostels Ltd* [2003] FMCA 42) which was overturned on appeal and remitted for further consideration (*Power v Aboriginal Hostels Ltd* [2003] FCA 1475).

Brown FM considered whether, in applying s 15(4), the Court should consider the imputed disability or the actual disability of the applicant.[41] The applicant had been dismissed on the basis of a disability (depression) that he did not have: he did, however have another disability (adjustment disorder) which had 'resolved' prior to his dismissal. Brown FM found that it was the actual disability that was to be considered, stating that 'it would be absurd if the exculpatory provisions of section 15(4) were to be implied to the imputed disability per se'[42] such that an employer could lawfully dismiss an employee on the basis of a disability that they did not have.

Applying *X v Commonwealth*[43] Brown FM referred to the distinction that needed to be drawn between 'inability' and 'difficulty' exhibited by the person concerned in the performance of the inherent requirements of the employment.[44] His Honour noted that whilst the applicant may have found it difficult to perform the tasks of the position of assistant manager of the hostel, 'difficulty' is not sufficient for the purposes of s 15(4): '[r]ather it must be shown that the person's disability renders him or her incapable of performing the tasks required of the position'.[45]

Again applying *X v Commonwealth*, Brown FM noted that 'such inability must be assessed in a practical way'.[46] In his view in this case the only practical way to make the assessment was to examine the medical evidence.[47] Having made that assessment he accepted that the applicant was not incapable of performing the inherent requirements of his position of assistant manager, regardless of the workplace environment, and thus s 15(4) had no application.[48]

The respondent was found to have unlawfully discriminated against the applicant contrary to s 15(2)(c) of the DDA and ordered to pay $15,000 by way of damages.

[41] [2004] FMCA 452, [18]-[22].
[42] Ibid [65].
[43] (2000) CLR 177 at 208.
[44] [2004] FMCA 452, [23].
[45] Ibid [57].
[46] Ibid [58].
[47] Ibid [58] and [68].
[48] Ibid [65] and [68]-[69].

4. Selected Developments in International Law

4.1 Human Rights Committee

Guido Jacobs v Belgium (Communication No. 943/2000) (17/08/2004)

http://www.worldlii.org/int/cases/UNHRC/2004/27.html

Facts

The author applied unsuccessfully to be a non-judicial member of the Belgian High Council of Justice, which is a body responsible, among other things, for the appointment of judges in Belgium. Non-justices assist the justices to avoid too narrow an approach to their work on the Council. The Belgian Judicial Code provides that in both the French and Dutch speaking colleges, 'the group of non-justices in each college shall have no fewer than four members of each sex" (Article 259 bis-1). The Committee considered the author's complaint that these provisions violate the following articles of the International Covenant on Civil and Political Rights: article 2 (application of the Covenant without distinction as to, *inter alia,* sex); article 3 (equal application of the Covenant to men and women); 25(c) (equal access to public service) and article 26 (equality before the law).

Issues

The author claimed that the gender requirement was discriminatory. In his view, such a condition meant that candidates with better qualifications may be rejected in favour of others whose only merit is that they meet the gender quota.

Belgium contended that the objective being pursued was to ensure an adequate number of elected candidates of each sex. It added that the presence of women on the High Council of Justice corresponded to the wish of Parliament to encourage equal access by men and women to public office in accordance with the Belgian Constitution. Belgium therefore argued that the law was in pursuit of a legitimate objective, and that the provision that just over one third of candidates be of a different sex did not result in a disproportionate restriction on candidates' right of access to the civil service. The law complained of was intended to ensure balanced representation of the two sexes and, in Belgium's view, was both the only means of attaining that legitimate goal and also the least restrictive.

Findings of the Committee

The Committee recalled that in order to ensure equality of access to public service (article 25(c)), the criteria and processes for such appointments must be objective and reasonable. The question in this case was whether there was any valid justification for the distinction made between candidates on the basis that they belong to a particular sex.

The Committee noted that the gender requirement was introduced by Parliament with the aim of increasing the representation of and participation by women in the various advisory bodies in view of the very low numbers of women found there. It stated that 'given the responsibilities of the judiciary, the promotion of an awareness of gender-relevant issues relating to the application of law, could well be understood as requiring that perspective to be included in a body involved in judicial appointments.' Accordingly, the Committee concluded that the requirement was objective and reasonably justifiable.

In addition, the Committee noted that the gender clause required there to be at least four applicants of each sex among the 11 non-justices appointed, being just over one third of the candidates selected. In the Committee's view, such a requirement did not amount to a disproportionate restriction of candidates' right of access to public office. Furthermore, and contrary to the author's contention, the gender requirement did not make qualifications irrelevant, since it specified that all non-justice applicants must have at least 10 years' experience. The Committee further found that a reasonable proportionality is maintained between the purpose of the gender requirement, namely to promote equality between men and women in consultative bodies; the means applied; and one of the principal aims of the law, which is to establish a High Council made up of qualified individuals. The Committee therefore found that the author's rights were not violated.

4.2 European Court of Human Rights

Case of Kjartan Asmundsson v Iceland (Application No. 60669/00) (12 October 2004)

http://cmiskp.echr.coe.int///tkp197/viewhbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=40666&sessionId=161720&skin=hudoc-en&attachment=true

Facts

The applicant was seaman until, in 1978, he was struck in the leg by a 200kg stone object causing compound fracture to his ankle. He then had to take work on land. His disability was assessed at 100%, entitling him to a disability pension from the Seaman's Pension Fund. The assessment criteria under the *Seaman's Pension Fund Act* considered whether the claimant was able to carry out the work he had performed before his disability.

In 1992 the Act was amended such that the relevant assessment criteria was no longer whether the claimant could continue the same work as before, but whether he could perform work in general. Under the new criteria, the applicant was found ineligible for any disability pension and the Fund stopped paying him the pension he had been receiving for 20 years.

The Complaint

The applicant argued infringement of his rights under article 1 of Protocol No. 1 of the European Convention on Human Rights ('**ECHR**')), alone and together with article 14. Article 1 of Protocol No. 1 provides for the peaceful enjoyment of possessions, and states that no one shall be deprived of their possessions except in the public interest and except according to domestic and international law. Article 14 states that the enjoyment of ECHR rights shall be secured without discrimination on any ground.

The Supreme Court of Iceland considered that the applicant's ECHR rights had in fact been infringed, but that the measures taken were justified under article 1, Protocol No. 1 because the Pension Fund was undergoing grave financial difficulties.

Findings of the Court

Since Iceland conceded that the applicant's rights had been infringed but contended, along the lines of the Supreme Court decision, that the interference was justified, the Court focussed on the proportionality issue in assessing whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's rights.

The Court found that unjustified differential treatment had occurred. The applicant belonged to a very small group of pensioners who stopped receiving a pension altogether, whereas the majority of recipients continued to receive the same pension. As such, the measures, which operated in a discriminatory manner, were ill-suited to address the public interest goal of redressing

the financial difficulties of the Fund. The applicant was thus 'made to bear an excessive and disproportionate burden which, even having regard to the margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities'. Damages were awarded.

4.3 Other jurisdictions

United Kingdom

The Supreme Court of Judicature Court of Appeal (Civil Division)

The Queen on the Application of "B" & Ors and Secretary of State for the Foreign and Commonwealth Office (18 October 2004)

http://www.courtservice.gov.uk/judgmentsfiles/j2837/b-v-secretaryofstate.htm

Facts

The applicants are two children whose family sought asylum in Australia. In January 2001 they were detained in the Woomera Detention Centre in South Australia and were unsuccessful in their applications for Temporary Protection Visas. In June 2002, the applicants escaped from the Woomera Detention Centre without their family. On 18 July 2002, they entered the British Consulate in Melbourne with a note requesting 'asylum, refugee and humanitarian protection from the Government of the United Kingdom'. The boys' statements detailed the extreme trauma that they said they experienced and witnessed in detention, including exposure to riots, teargas and water cannons, and engaging in acts of self-harm, prolonged hunger strikes and attempted suicide.

The UK Consulate received communication from the Australian Government seeking return of the applicants to their custody. The Consulate also received instructions from London that there were no grounds to consider an asylum request other than in the country of first asylum. This was communicated to the applicants, who left of their own accord and were taken back into Australian custody in the Consulate lift lobby.

[The applicants and their sisters were, in 2003, subsequently the subjects of a decision of the Family Court which ordered their release into the community. This decision was overturned by the High Court, and the children were placed in Community Detention in the house in which they were living.]

Complaint

The applicants contended that the consular officials, having initially afforded protection to them, were under an obligation not to allow their return to Australian custody where they would be at real risk of being subjected to inhuman and degrading treatment (in contravention of article 3 of the European Convention on Human Rights ('**ECHR**')) and to indefinite and arbitrary detention (article 5 ECHR).

Issues raised

1. Article 1 of the ECHR states that 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Do the actions of the UK consular officials fall within the jurisdiction of the United Kingdom?
2. Does the *Human Rights Act* (UK) apply to the actions of the consular officials in Melbourne?
3. Did the actions of the consular officials infringe (a) the ECHR and (b) the *Human Rights Act* (UK)?

Findings of the Court

1. Can the UK Consulate be considered in the jurisdiction of the UK for the purposes of article 1 ECHR?

The Court considered the Strasbourg jurisprudence on this issue, especially *Bankovic and others v Belgium and others* (12 December 2001, admissibility). In *Bankovic,* the Grand Chamber of the European Court of Human Rights equated the jurisdiction referred to in article 1 ECHR with the jurisdiction enjoyed by a State under principles of public international law, and observed that this jurisdiction is primarily territorial. The Court recognised that there were nonetheless circumstances where jurisdiction was not territorial in nature, including in relation to 'the activities of its diplomatic or consular agents abroad'.

The Court was of the opinion that '[i]t is not easy to see that the exercise of this limited authority gives much scope for the securing, or the infringing, of Convention rights', and noted that the Consulate staff did not in their actions assume any responsibility for the protection of the applicants, in which case there was nothing to bring the boys within the jurisdiction of the UK for the purposes of article 1 ECHR. However, the Court concluded that 'it would be unsatisfactory to determine this application on that basis' and, without reaching any positive conclusion, assumed that the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the UK.

2. Does the *Human Rights Act* (UK) apply to actions of consular officials in Melbourne?

The object of the *Human Rights Act* was to give effect to the obligations of the UK under the ECHR. The applicants contended that the *Human Rights Act* applied wherever article 1 obliged the UK to protect ECHR rights, even where that was outside the territory of the UK. The respondents argued that the Act only applied within the UK.

The Court noted that when the European Court of Human Rights considers whether an ECHR right has been infringed, it looks to whether the events at issue fall within the jurisdiction of the Contracting State within the meaning of article 1. It further considered that there was a duty to interpret the *Human Rights Act* in a way that is compatible with ECHR rights, as identified by the European Court of Human Rights. It therefore concluded that the *Act* requires the UK to secure ECHR rights within the jurisdiction identified by the Strasbourg Court, which included the actions of officials in the Melbourne Consulate.

3. Did the actions of the consular officials infringe the ECHR and *Human Rights Act*?

The Court found that the duty to provide diplomatic asylum can only arise under the ECHR where it is compatible with public international law. Where the receiving State requests custody of an asylum seeker, the individual must ordinarily be handed over unless it is clear that that State intends to subject them to treatment so harsh as to constitute a crime against humanity. In this case, international law may impose an obligation to protect the asylum seeker from such treatment. The Court noted that a lesser threat may also justify diplomatic protection, but that international law is ill-defined as to exactly where the threshold will be. As the applicants had escaped from lawful custody, the Court held that the Consulate could not decline to hand them over 'unless this was clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury'.

Noting 'considerable debate at the hearing' as to whether the applicants had experienced treatment that amounted to infringements of article 3 ECHR, the Court considered that the pertinent question was rather whether the boys were in immediate danger of such severe treatment by Australian authorities so as to render it lawful for the UK Consulate to refuse to relinquish them.

The Court concluded that they were not in this kind of danger. It found that

> efforts have been made to ensure that the detention that Australian law requires should be as unobtrusive as possible…Australia is a country which observes the rule of law and where diplomatic officials would not expect the authorities knowingly to impose or permit a regime where children were exposed to inhuman and degrading treatment.

As such, the UK would have infringed their obligations under public international law had they refused to relinquish the applicants into Australian custody. The Court dismissed the appeal.

United States

District Court for the District of Columbia

Fawzi Khalid Abdullah Fahad Al Odah et al v USA (20 October 2004)

http://www.dcd.uscourts.gov/02-828a.pdf

Facts

The applicants, three Kuwaiti nationals detained at Guantanamo Bay Naval Base since 2001, filed petitions for writs of habeas corpus and ancillary claims. At this point, the focus of the litigation is on the habeas petitions. The Supreme Court held in *Rasul v. Bush*, 542 U.S. 124 S. Ct. 2686 (2004), that this Court has jurisdiction to consider such claims.

Issues Raised

The parties were in dispute as to whether the applicants could have access to counsel while pursuing their claims, and what limitations the Government could place on communications between the detainees and their counsel. The Government had agreed to permit meetings between lawyers and the detainees, but proposed to audio and/or video record all meetings with counsel, and to conduct a "classification review" of any written materials brought into or out of these meetings and of the detainees' legal mail, and also to terminate a meeting with counsel at any time.

In response to the Government's national security concerns, the Court proposed a specific framework for counsel access at the August 2004 hearing, which would allow counsel to meet with the applicants unmonitored. Counsel for the applicants agreed to work within this proposed framework, even while recognizing the significant limitations it placed on them if they wanted to have unmonitored communications with their clients. The Government was unwilling to concede that the proposed framework would fully address its national security concerns, but did not indicate why this proposal would be insufficient, except

for unsubstantiated speculation that the lawyers would fail to follow the system.

The Government argued that the Petitioners had no right to counsel, under either the Constitution or any treaties or statutes. The core of the Government's position was that, in the absence of a right to counsel, any relationship they had with their attorneys was at the Government's pleasure and discretion, which in turn entitled the Government to place what limits it saw fit on that relationship. In this decision, US District Judge Colleen Kollar-Kotelly considered two narrow questions: first, whether the detainees were entitled to counsel as they pursue their claims, and second, whether the proposed monitoring and review procedures were allowable.

Finding of the court

1. Are the detainees are entitled to legal representation?

The Court held that the petitioners were entitled to be represented by counsel pursuant to the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651:

> They have been detained virtually incommunicado for nearly three years without being charged with any crime. To say that Petitioners' ability to investigate the circumstances surrounding their capture and detention is "seriously impaired" is an understatement. The circumstances of their confinement render their ability to investigate nonexistent. Furthermore, it is simply impossible to expect Petitioners to grapple with the complexities of a foreign legal system and present their claims to this Court without legal representation. Petitioners face an obvious language barrier, have no access to a law library, and almost certainly lack a working knowledge of the American legal system. Finally, this Court's ability to give Petitioners' claims the "careful consideration and plenary processing" which is their due would be stymied were Petitioners to proceed unrepresented by counsel… The Supreme Court has found that Petitioners have the right to bring their claims before this Court, and this Court finds that Petitioners cannot be expected to exercise this right without the assistance of counsel. Although as the Government maintains, the habeas statute may not confer an absolute right to counsel… the law provides this Court with the discretionary authority to have counsel represent Petitioners in the habeas context. Therefore, the Court, in its discretion and pursuant to this authority, finds that Petitioners are entitled to counsel, in order to properly litigate the habeas petitions presently before the Court and in the interest of justice.

2. The Government may not abrogate lawyer-client privilege

In light of finding above, the Court determined that the Government is not entitled to unilaterally impose procedures that abrogate the lawyer-client relationship and its concomitant privilege covering communications:

> After considering the Government's proposed procedures in light of their impact on the attorney-client relationship, the Court finds that the Government's proposed procedures inappropriately burden that relationship, and that national security considerations can be addressed in other ways…The Court finds that the Government's position is both thinly supported and fails to fully consider the nature of the attorney-client privilege… The Government attempts to erode this bedrock principle with a flimsy assemblage of cases and one regulation. The Government presents no case law, nor any statutory basis indicating that monitoring of attorney-client communications is permissible. The Court is acutely aware of the delicate balance that must be struck when weighing the importance of national security against the rights of the individual.

The Court proposed a framework under which counsel for the applicants would be allowed unmonitored access to their clients and unreviewed written notes and legal mail so long as they agree to treat all information obtained as classified. The Court found that this alternative framework would sufficiently address the Government's national security concerns.

5. Australian and International Privacy Law

5.1 Australian Privacy Law Developments

Appeal Panel of the NSW Administrative Decisions Tribunal.

Vice-Chancellor, Macquarie University v FM (No.2) (GD) [2004] NSWADTAP 37 (3 September 2004)

http://www.austlii.edu.au/au/cases/nsw/NSWADTAP/2004/37.html

This was an appeal against a decision of the Tribunal that Macquarie University had contravened s 18 of the *Privacy and Personal Information Protection Act 1998* NSW when two members of the academic staff (B and C) had, in the course of 3 conversations, disclosed disciplinary history information about a former student, FM, to the then Registrar (A) of the University of New South Wales (UNSW). Subject to certain exceptions

s 18 prohibits the disclosure by public sector agencies of personal information.

At the time FM was enrolled in a postgraduate program at UNSW and was in receipt of a scholarship.

In his enrolment form for UNSW, FM had not fully disclosed his academic history. Subsequent to granting the scholarship, UNSW learnt that FM had failed to complete several postgraduate courses. After an investigation UNSW terminated FM's enrolment and his scholarship. The personal information disclosed by B and C was only one component of a large amount of information obtained by UNSW from several universities that FM had previously attended.

Macquarie University asserted that the disclosure by its staff members was not unlawful as it fell within the terms of a Direction issued by the Privacy Commissioner pursuant to s 41 of the Act:

> '4. A relevant agency need not comply with ... [section] 18 ... if compliance **might** detrimentally affect (or prevent the proper exercise of) any of the agency's investigative functions or its conduct of any lawful investigations (emphasis added).'

The Appeal Panel was satisfied that Macquarie University was engaged in carrying out an investigative function in connection with the UNSW investigation, and held the first conversation was not problematic. B was asked by A why FM left Macquarie University. The information provided by B that FM was terminated by the Discipline Committee might, if it had not been disclosed, have impeded the performance by Macquarie University of its investigative functions. It was privy to this information. It was clearly relevant to the issues being investigated by UNSW and was of obvious relevance to FM's continued enrolment. B acted appropriately in that conversation in referring A's inquiry for documentation to C, who had been the Dean at the relevant time.

However, having discussed the meaning of 'might' in the Direction the Appeal Panel did not believe that the investigative functions 'might' have been detrimentally affected by the non-disclosure of information conveyed in the second and third conversations, namely the recounting of certain incidents involving verbal abuse and physical intimidation on the part of FM.

The Appeal Panel recommended that Macquarie University take steps to develop a policy for circulation to relevant academic and administrative staff which provides guidance on how to comply with the Act when providing detailed background information to tertiary institutions in relation to the disciplinary history of students and former students; and to formally advise FM of the steps that it has taken.

NSW Administrative Decisions Tribunal

MT v Director General, NSW Department of Education & Training [2004] NSW ADT 194 (3 September 2004)

http://www.austlii.edu.au/au/cases/nsw/NSWADT/2004/194.html

MT asserted that the Department had breached the *Privacy & Personal Protection Act 1998* (NSW) as a result of disclosures made by a teacher at her school to: (i) a soccer club President; and (ii) HREOC.

The teacher coached an external soccer team which included MT and fellow students. Having been informed by her friends that MT had recently had an injury and that another could confine her to a wheelchair the teacher accessed MT's general student file including medical advice that she avoid high impact sport. The teacher then requested that MT's mother take legal responsibility in order that MT play in the upcoming grand final. When MT's mother declined, the teacher advised the President of the Soccer Club who in turn approached the mother, and MT did not play.

MT lodged a complaint with HREOC in regard to the Soccer Club not allowing her to play. In response to a letter from HREOC to the Soccer Club President, the teacher provided a letter to HREOC and attached a copy of the school counsellor's report. (This report had been prepared after the counsellor's conversation with the pediatrician. Copies had been provided to some staff and placed on the student's file).

MT alleged various breaches of the Act by the Department, including: s 12 (use and safeguarding of personal information); s 18 (disclosure of personal information); and, s 19 (disclosure of personal information including health information). The Department conceded it was in breach of s 12(c) in failing to have a policy that indicated privacy concerns should be weighed up in considering how personal information is used and in the School's failure to take reasonable steps to safeguard such information.

The Department acknowledged a disclosure of MT's personal information to the Soccer Club President, and the school counsellor's report to HREOC. The Tribunal rejected the Department's submission that 18(1)(c) protected the disclosure to the Soccer Club President. Section 18(1)(c) permits disclosure where it is necessary to prevent or lessen a serious and imminent threat to a person's life or health. The Tribunal held that whilst the teacher had an initial concern for MT's

health his motivation in making this disclosure was to protect himself and the club from a personal injury claim.

The Tribunal rejected the Department's submission that s 25 protected the disclosure to HREOC. Section 25 provides an exemption where non compliance is "lawfully authorised or required", "otherwise permitted" or "necessarily implied" under any Act or law. The Tribunal stated that there would need to have been a direction from HREOC to the Agency for s 25 to apply. The HREOC matter was between MT and the Soccer Club and it could not be the case that the Agency was compelled to comply with a request by HREOC to the Soccer Club. The Tribunal also rejected the submission that s 48(3) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) would protect the disclosure as that section exists to protect witnesses to HREOC and others appropriately involved in its proceedings. The protection does not apply in these proceedings as HREOC did not request information from the Agency.

The Tribunal held that the Department had contravened s 12, s 18, and, for similar reasons, s 19. The tribunal directed that the matter be relisted for a further planning meeting.

5.2 International Privacy Law Developments

United Kingdom

In re S (FC) (a child) (Appellant) House of Lords [2004] UKHL 47, 28 October 2004

http://www.bailii.org/uk/cases/UKHL/2004/47.html

For the purpose of protecting his privacy, CS, a child aged 8, had by his guardian sought an injunction preventing newspapers publishing the identity, including photos, of a defendant in a murder trial and her victim. The defendant, his mother, is charged with the murder of his brother, aged 9, by salt poisoning in 2001.

It was submitted that the child has a right to respect for his private and family life and to protection from publicity which could damage his health and well-being, and risk emotional and psychiatric harm.

Under the *Human Rights Act 1998* courts are required to take into account the rights set out in the *European Convention on Human Rights* (ECHR). It was the interaction between article 8 (right to respect for privacy and family life) and article 10 (freedom of expression) that was at the heart of this appeal by the child against the decision of the Court of Appeal.

The House of Lords noted the 4 propositions on the interplay between articles 8 and 10 that emerged from its decision in *Campbell v MGN Ltd* [2004] 2 WLR 1232: First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test (or ultimate balancing test) must be applied to each.

The Court noted that, whilst article 8 is clearly engaged, the impact upon the child will be indirect: he will not be involved as a witness or otherwise; it will not be necessary to refer to him; no photograph of him will be published; and, there will be no reference to his private life (as the newspapers accepted that they should not refer to the child). It noted that no decision of the European Court of Human Rights had granted injunctive relief to non- parties in respect of publication of criminal proceedings. Moreover, the *Convention on the Rights of the Child* protects the privacy of children directly involved in criminal proceedings (articles 17 and 20) but not if they are indirectly involved.

The Court discussed the importance of the freedom of the press, and the various consequences of granting an injunction in this case. They included: (i) an adult non-party could equally invoke the jurisdiction of the ECHR resulting in serious inhibition of the freedom of the press to report criminal trials; (ii) future requests for injunctions might go beyond the name of the defendant and name and photo of the victim and thus the process of piling exception upon exception to the principle of open justice would be encouraged and gain momentum; and, (iii) newspapers are less likely to give prominence to reports of a trial where the identity of the defendant is not revealed, and informed debate about criminal justice will suffer.

The House of Lords dismissed the child's appeal.