Human Rights Law Bulletin

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1. Introduction and forthcoming seminar details

Welcome to the July/August 2005 edition of the Human Rights Law Bulletin (formerly the Legal Bulletin), covering developments in domestic and international human rights law during the period 1 February - 31 June 2005.

Upcoming Seminar: Indigenous Rights under Australian Law

To mark the 30th anniversary of the Racial Discrimination Act ('the RDA'), the HREOC Legal Section is conducting a seminar that will focus on Indigenous rights under Australian law.

The seminar will be chaired by HREOC President John von Doussa QC and will feature two speakers Professor Larissa Behrendt and Jonathon Hunyor:

- Our keynote speaker Professor Larissa Behrendt will discuss contemporary legal challenges facing Indigenous people. Professor Behrendt is Professor of Law and Indigenous Studies and Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney. She holds a Masters of Law and Doctorate from Harvard Law School, and is admitted to the NSW Supreme Court as a Barrister-of-Law (Academic Member). Professor Behrendt has published extensively on property law, indigenous rights, dispute resolution and Aboriginal women's issues.
- Jonathon Hunyor is a Senior Legal Officer with HREOC. He will consider and evaluate the role of the RDA in protecting the rights of Indigenous people. Jonathon was the editor of HREOC's recent publication *Federal Discrimination Law 2005* and has worked previously for the Central Land Council in Alice Springs and the Northern Territory Legal Aid Commission in Darwin.

Admission is free and the seminar will take place on **Wednesday 10 August** 2005 at 5 – 6:30 pm. The venue is:

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

Reservations are essential. Please email Ms Gina Sanna at legal@humanrights.gov.au if you wish to attend this seminar by Tuesday 9 August 2005. We look forward to seeing you there.

2. Selected general Australian jurisprudential developments

Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 29 (26 May 2005)

http://www.austlii.edu.au/au/cases/cth/high_ct/2005/29.html

The appellant, an Iranian national, sought a protection visa on the basis that he had converted to Christianity from Islam after leaving Iran. The appellant claimed that he feared that, if he returned to Iran, that he would be executed by the authorities because of his religious conversion.

The proceedings before the High Court concerned the findings of the Refugee Review Tribunal (RRT) that the appellant did not have a well-founded fear of persecution if he returned to Iran. Central to this conclusion was the finding that 'converts who go about their devotions quietly [in Iran] are not bothered [by authorities]. It is only those who actively seek public attention through conspicuous proselytizing who encounter a real chance of persecution'.

The RRT concluded that if the appellant 'were to practice as a Christian in Iran he would be able to do so in ways he has practiced his faith in Australia without facing a real chance of persecution'. While the RRT accepted that the appellant felt a duty to tell others about his faith 'the evidence is that he is able to do so [in Iran] without facing any serious repercussions providing he does not proselytize'.

The appellant argued that the RRT's reasoning involved the same type of jurisdictional error as that identified in *Appellant 395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473. In that matter, the High Court had held that the RRT had erred in finding that a gay man could avoid persecution by acting 'discretely' were he returned to Bangladesh.

A majority of the Court (Gleeson CJ, Hayne and Heydon JJ, Kirby and McHugh dissenting) in the present case held that the RRT had not erred in its reasoning and dismissed the appeal.

Gleeson CJ found that 'the references to different kinds of behaviour were made in the course of a legitimate process of reasoning on an issue thrown up by the facts of the particular case' (at [2]). His Honour held that it was open to the RRT to distinguish, on the basis of the country information available, between the treatment of Christians who 'maintain a low profile' and those involved in 'aggressive outreach through proselytising' (at [9]). This distinction was 'neither meaningless nor irrelevant' and its application to the appellant involved no error.

Hayne and Heydon JJ distinguished the case from *Appellant 395/2002* on the basis that the RRT did not ask whether the appellant could *avoid* persecution (as it had in *Appellant 395/2002*), but rather (at [168]):

> it asked what may happen to the appellant if he returned to Iran. Based on the material the Tribunal had, including the material concerning what the appellant had done while in detention, it concluded that were he to practice his faith the way *he* chose to do so, there was not a real risk of his being persecuted.

In dissent, McHugh J observed that an 'error in categorisation and classification occurs only where that process of assessment is inapt to the application' (at [40]). Such error was found by McHugh J in the bipartite classification drawn by the RRT between 'proselytising Christians' and 'quietly evangelising Christians'. His Honour concluded that the evidence before the RRT did not support the recognition of such sub-groups in Iran. McHugh J further found that the RRT 'came to unsubstantiated conclusions about the appellant's Christian beliefs and, by classifying the appellant according to its erroneous categories, failed to ask itself important questions about the appellant's chance of facing persecution in Iran'.

Kirby J, also in dissent, noted (at [58]-[59], footnotes omitted):

> There is no postulate in the Refugees' Convention… that, in the exercise of the fundamental freedoms mentioned (including in respect of religion), applicants for protection must act 'quietly', 'maintain a low profile', avoid proselytising their views or otherwise act 'discreetly' in matter so fundamental.
>
> The Tribunal misdirected itself by imposing this classification on the facts and by failing to consider whether, in Iran, the obligation to act in such a fashion would be the result of the denial of fundamental freedoms, thereby occasioning the 'well-founded fear of being persecuted' referred to in the Convention and incorporated in the *Migration Act 1958* (Cth)…

Kirby J discussed extensively religion as a human right and stated (at [131], footnotes omitted):

to reinforce in any way the oppressive denial of public religious practices (or any other feature of freedom essential to human rights) is to participate in the violation of the purposes that the Convention is intended to uphold. It is to disempower the freedom of the individual who applies for protection by demanding that he or she acquiesce in "discreet" conduct ("the quiet sharing of one's faith"). That is not what the reference to "religion" in the Convention is designed to defend. It would be to diminish the capacity of the Convention to protect individuals from abusive national authority to force them, in the respects identified in the Convention, to survive by the concealment of the fundamental freedoms that the Convention mentions. Moreover, effectively, it would place an onus on the victim to justify a demand for a basic freedom rather than to require the putative persecutor who, contrary to the international law of human rights demands that the victim "maintain a low profile", to justify such abusive conduct.

3. Developments in Australian Discrimination Law

HREOC launches *Federal Discrimination Law 2005*

http://www.humanrights.gov.au/legal/fed_discrimination_law_05/index.html

The President of the HREOC launched the latest publication of the legal section *Federal Discrimination Law 2005* on 12 May 2005. The publication is a guide to significant issues arisen in cases brought under federal unlawful discrimination laws, examining the jurisprudence of the Commonwealth Racial, Sex and Disability Discrimination Acts and includes a chapter on the new *Age Discrimination Act 2004* (Cth).
The publication outlines matters of practice and procedure, and analyses the manner in which those issues have been resolved by the Federal Court and Federal Magistrates Court. A chapter is also dedicated to an examination of damages and remedies awarded, including tables summarising damages awarded in the Federal Court and Federal Magistrates court since 13 April 2000.
The publication is available as a free download on the HREOC website or can be purchased from the Commission for $40. The purchaser order form can be found at http://www.humanrights.gov.au/legal/fed_discrimination_law_05/Order_FDL2005.doc

Hurst and Devlin v Education Queensland [2005] FCA 405 (15 April 2005)

http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/405.html

In *Hurst and Devlin v Education Queensland*, the Federal Court has again found that educational authorities who fail to provide Auslan assistance to deaf or hearing impaired students may be indirectly discriminating against those students.[1]
In this case, the applicants, who are both profoundly deaf, claimed that the respondent had indirectly discriminated against them under s.6 and s.22(2) of the *Disability Discrimination Act 1992* (Cth) (DDA) by requiring them to be taught in English, without the assistance of an Auslan teacher or an Auslan interpreter.[2]

Auslan, Signed English and Signing in English

Auslan is the natural language of the deaf. It is a visual spatial language that consists of hand movements, facial expressions, body language, with an element of finger spelling. It is a language quite separate from English and it cannot be used simultaneously with speech because the Auslan grammar and syntax is different to English Speech.[3] By contrast, Signed English is the reproduction of the English language by signs rather than words. It has the same syntax and grammar as English and as such, is not a language separate from English.[4] Signing in English, however, refers to the use of Auslan signs in English word order. Therefore, in order to utilise signing in English, the individual must first learn Auslan.[5]

The Applicants - Tiahna and Ben

The first applicant, Tiahna, is proficient in Auslan (her native language) and Signed English (as a second language), as are her parents. From 1999 until the end of 2001 and from August 2003, Tiahna attended preschools and primary schools operated by the respondent, during which time she was taught in Signed English. The evidence established that Tiahna had developed linguistically and cognitively to an age

[1] See also *Catholic Education Office v Clarke* (2004) 81 ALD 66.
[2] The second applicant also claimed that he had been directly discriminated against on the basis that his teachers had not been competent in Signed English, the mode in which he was receiving his education. This claim was dismissed on the basis that the evidence did not establish that his teachers had lacked competency in Signed English.
[3] [2005] FCA 405, [728]-[741].
[4] Ibid [127]-[128].
[5] Ibid, [129].

appropriate level and her progress at school had been 'extremely good'.[6]

The second applicant, Ben, had attended preschool and primary schools operated by the respondent since March 1997. When he commenced preschool, Ben had no language skills and could not communicate with others, except by gesture. From March 1997 to early 1998, in accordance with his parent's wishes, Ben received his education by oral communication. In 1998, Ben commenced receiving instruction in Signed English. During the period March 1997 to May 2002, Ben's progress at school was limited.[7] The respondent claimed that Ben's failure to progress was not a result of its failure, but rather was a result of Ben's delayed language development, his limited ability to communicate with his family and behavioural issues.[8]

Establishing Indirect Discrimination

To establish indirect discrimination under s.6 of the DDA the applicants had to establish that the respondent required them to comply with a requirement or condition:

(a) with which a substantially higher proportion of persons without the applicant's disability have complied or are able to comply;
(b) which is not reasonable having regard to the circumstances of the case; and
(c) with which the applicants do not or are unable to comply.

Only (b) and (c) were in dispute between the parties.

Reasonableness

Lander J applied the test of 'reasonableness' approved by the Full Federal Court in *Catholic Education Office v Clarke* (*Clarke*).[9] His Honour held that the requirement that the applicants be taught in English without Auslan assistance was unreasonable. In Tiahna's case, it was unreasonable because Auslan was her first language.[10] In Ben's case, it was unreasonable because his progress at school had been so obviously limited.[11] His Honour held that, had the respondent assessed the applicants' educational needs, it would have concluded that it was of benefit to both applicants to receive instruction in Auslan rather than in English.[12]

'Does not or unable to comply'

Lander J held that Ben's poor progress at school was evidence that Ben was unable to comply with the requirement that he be taught in English without Auslan assistance, though his Honour accepted there were other contributing factors to Ben's limited linguistic ability.[13] Lander J held that as there was no evidence establishing that Tiahna had fallen behind her hearing peers by being instructed without Auslan assistance, it could not be said that she was unable to comply with the respondent's requirement.[14] That approach can be compared with the approach taken by Madgwick J at first instance in *Clarke*.[15] Madgwick J held that a deaf student was unable to comply with a requirement that he be taught without Auslan assistance where, by complying with that requirement, he would be put in any substantial disadvantage in comparison to his hearing classmates. Such disadvantage would include "learning in a written language without additional richness which, for hearers, spoken and 'body' language provides, and which, for the deaf, Auslan…can provide".[16]

Frith v The Exchange Hotel and Anor [2005] FMCA 402

http://www.austlii.edu.au/au/cases/cth/FMCA/2005/402.html

In this case, the applicant claimed that she was sexually harassed within the meaning of s.28A of the *Sex Discrimination Act 1984* (Cth) ('SDA') in the course of her employment with the Exchange Hotel by a director of the company, Mr Brindley. The applicant further claimed that the actions of the director amounted to sex discrimination within the meaning of s.14(2) of the SDA.

The applicant complained of acts including; Mr Brindley asking questions about her personal life, including her sex life and whether she had a boyfriend; and Mr Brindley saying words to the effect that if she did not have sex with him, she could not work for him. Mr Brindley denied each of the allegations made by the applicant. The Court accepted the applicant's evidence in relation to the above allegations, finding that she had

[6] Ibid [393], [398], [400].
[7] Ibid [805]-[807].
[8] Ibid [333]-[337]. Ben had limited communication with his mother in Signed English and since June 2003, in Auslan. He was unable to communicate with his father or siblings, except by gesture: [337].
[9] (2004) 81 ALD 66, [115]-[116].
[10] [2005] FCA 405, [798].
[11] Ibid [799].
[12] Ibid [797].
[13] Ibid [805]-[807].
[14] Ibid [809]. While his Honour accepted that that may be as a result of the 'attention which she receives from her mother and the instruction which she no doubt receives from her mother in Auslan', he stated that it was 'a matter on which the experts have not discriminated':[819]-[820].
[15] (2003) 202 ALR 340, [49] affirmed on appeal in (2004) 81 ALD 66, [126]. See also *Travers v State of New South Wales* [2000] FCA 1565, [17].
[16] (2003) 202 ALR 340, [49].

given an accurate report of those events and Mr Brindley had not.[17] Rimmer FM went on to find that Mr Brindley had sexually harassed the applicant within the meaning of s.28A of the SDA and that such conduct amounted to sex discrimination within the meaning of s.14(2) of the SDA. Rimmer FM held the Exchange Hotel vicariously liable for the actions of Mr Brindley pursuant to s.106 of the SDA.

In *Gilroy v Angelov*[18] ('*Gilroy*'), Wilcox J expressed reservations about whether s.14 applied in cases which involved the sexual harassment of one employee by another. His Honour stated that s.28B was enacted specifically to deal with such complaints:

> I have reservations as to whether s 14(1) or (2) applies to this case. I think these subsections are intended to deal with acts or omissions of the employer that discriminate on one of the proscribed grounds. It is artificial to extend the concepts embodied in those sections in such a manner as to include the sexual harassment of the employee by another. As it seems to me, it was because s14 did not really fit that case that s28B was enacted. To my mind, s28B covers this case.[19]

Similarly, in *Leslie v Graham*[20] ('*Leslie*'), Branson J was not persuaded that s.14 applied in cases which involved the sexual harassment of one employee by another. Branson J stated:

> while [the SDA] renders unlawful discrimination by an employer on the ground of sex, it does not render unlawful discrimination by a fellow employee on the ground of sex … I am not persuaded that [the respondent employee's] sexual harassment of [the applicant] constituted discrimination against her by her employer.[21]

Rimmer FM in *Frith* expressly disagreed with the reasoning of Branson J in *Leslie* on this issue. His Honour stated:

> …it seems to me that the SDA *does* render unlawful discrimination by a fellow employee (in this case, Mr Brindley) on the ground of sex. Although it is true that Mr Brindley may not himself have discriminated against Ms Frith on the grounds of sex within the meaning and contemplation of section 14 (because, after all, he was not her employer in his personal capacity), the effect of section 106 is that the Exchange Hotel is deemed to have *also* done the relevant acts thereby triggering the provisions of section 14.
> …
>
> I find, therefore, that the Exchange Hotel has unlawfully discriminated against Ms Frith on the ground of her sex by subjecting her to the kind of detriment referred to in these reasons.[22]

In *Hughes v Car Buyers Pty Limited*,[23] Walters FM had also expressly disagreed with the decision of Branson J in *Leslie* on this issue. Walters FM found that the actions of a fellow employee of the applicant constituted not only sexual harassment, but also sex discrimination within the meaning of s 14(2)(d) of the SDA. Rimmer FM in *Frith* did not, however, refer to the decision in *Hughes v Car Buyers Pty Limited.*

4. Selected Developments in International Law

4.1 Human Rights Committee

Länsman and the Muotkatunturi Herdsmen's Committee v Finland Communication No 1023/2001 (CCPR/C/83/D/1023/2001)

http://www1.umn.edu/humanrts/undocs/1023-2001.html

The authors are both Finish citizens and members of the Muotkatunturi Herdsmen's Committee. The authors allege a violation of their rights as reindeer herders under article 27 of the International Covenant on Civil and Political Rights (ICCPR) in relation to a plan by Finland to log further of the Herdsmen's Committee's grazing areas.

In an earlier complaint to the Human Rights Committee (HRC) in relation to the logging of some 500 hectares, the complainants alleged Finland had violated their rights under article 27. The HRC did not find a violation of article 27 in that complaint. However, in its decision it noted that, "the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture".

[17] [2005] FMCA 402, [75].
[18] (2000) 181 ALR 57.
[19] Ibid 75 [102].
[20] [2002] FCA 32.
[21] Ibid [73]. Branson J did not refer to the decision in *Gilroy*.
[22] [2005] FMCA 402, [80], [82]. Rimmer FM did not refer to the decision in *Gilroy*.
[23] (2004) 210 ALR 645, 653 [41]-[44].

Authors' contentions on the merits

The authors contended that since the 1980s, approximately 1,600 hectares of the Herdsmen's Committee's grazing areas have been logged by Finland, accounting for some 40% of lichen (utilised for feeding reindeer) in that area. They contended that the effect of logging on their herds is that reindeer tend to avoid areas being logged or prepared for logging. They therefore seek other pastures, incurring additional labour for the herders. The authors also contended that logging waste prevents reindeer grazing and compacted snow hampers digging. As well, the logging operations were said to have resulted in a complete loss of lichen in the affected areas, which increases the necessity of providing fodder and threatens the economic self-sustainability of reindeer husbandry, as husbandry depends on the reindeer being able to sustain themselves.

The authors also contended that the reduction by the Minister of Agriculture and Forestry in the maximum number of reindeer allowed may be kept by the Herdsmen's Committee (as permitted under Finnish statute) was a direct result of logging operations, which had been the principal cause of the decline in winter pastures said to necessitate the reduction.

State party's contentions on the merits

Finland acknowledged that the Sami community is an ethnic community within the meaning of article 27 of the ICCPR, and that the concept of "culture" within that provision covers reindeer husbandry, as an essential component of the Sami culture. However, Finland contended that, while "culture" within the meaning of article 27 provides for the protection of the traditional means of livelihood for national minorities (in so far as they are essential to the culture and necessary for its survival), not every measure, or its consequences, which modifies the previous conditions can be construed as a prohibited interference with the right of minorities to enjoy their own culture.

The State party noted that the relevant areas are state-owned and contended that all due care was exercised logging operations. Finland also contended that the logged area to date only accounts for approximately 1.2% of the area administered by the Herdsmen's Committee and the planned logging operations would amount to less logged hectares per year than in the past.

As to the effects of the logging, Finland contended that logging operations would not create long-lasting harm preventing the authors from continuing reindeer herding in the area to the present extent. The State party contended that the low economic profitability was for other factors rather than the effects of logging. The State party also contended that the reduction of reindeer numbers by the State did not constitute evidence of the effects of individual loggings, but rather the effects of the high numbers of reindeer kept in herds. Indeed the State party contended that despite the reductions, overall reindeer numbers remained high by international standards.

Human Rights Committee's (HRC) decision on the merits

In its decision on the merits of the complaint the HRC noted that:

- It was undisputed that the authors were members of a minority for the purposes of article 27 of the ICCPR and as such, have the right to enjoy their own culture.
- It was also undisputed that reindeer husbandry is an essential element of the authors' culture and that economic activities may also come with in the ambit of article 27, if they are an essential element of the culture of an ethnic minority.
- Measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a denial of the rights under article 27.
- In weighing the effects of measures taken by a State party that impact on a minority's culture, the infringement of a minority's right to enjoy their own culture may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by the minority concerned. Thus, the HRC must consider the overall effects of such actions or measures taken over a period of time on the ability of the minority concerned to continue to enjoy their culture in community with other members of their group.

The HRC concluded that, in this case, the effects of logging had not been shown to be serious enough as to amount to a violation of the authors' right to enjoy their own culture in community with other members of their group under article 27. This was for the reasons that:

1. The material before the HRC suggested that factors other than logging explain why reindeer husbandry remains of low economic profitability.
2. Despite the difficulties said to be faced by the authors, the overall numbers of reindeers remain high.

4.2 Other Jurisdictions

England and Wales Court of Appeal

SB, R (on the application of) v Headteacher and Governors of Denbigh High [2005] EWCA Civ 199 (2 March 2005)

http://www.bailii.org/ew/cases/EWCA/Civ/2005/199.html

The applicant sought a declaration that she had been unlawfully excluded from the respondent school and denied her right to manifest her religion (as protected by article 9 of the European Convention on Human Rights (ECHR)) and access to suitable and appropriate education.

Article 9 of the ECHR provides:

(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom … in public or private to manifest his religion or belief …
(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals or the protection of the rights and freedoms of others.

School uniform policy

In 1993 the respondent school adopted a school uniform policy which allowed girls to wear the hijab and the shalwar kameeze. The policy had been developed in consultation with local mosques, students and parents and had the support of the existing school board of governors, the majority of whom were Muslim.

Facts

In 2000 the applicant commenced at Denbigh High School. Up until September 2002 she wore the shalwar kameeze to school. However, in September 2002 she sought to wear the jilbab (a head to toe garment) on the basis that the shalwar kameeze was not an acceptable form of dress for adult Muslim women in public places. The school refused to allow the applicant to wear the jilbab to school on the basis that it did not form part of the school uniform. The respondent also contended that the school uniform (and in particular, the hijab and shalwar kameeze) satisfied the religious requirement that Muslim girls should wear modest dress.

Evidence

The court accepted that the evidence established that "very strict Muslims", who are the minority in the UK, believe that it is mandatory for women to wear the jilbab and "liberal Muslims", the majority of Muslims in the UK, consider the shalwar kameeze (coupled with hijab) to be appropriate dress for women. (The court used those categories for ease of reference, acknowledging that some may find those labels inappropriate).

Judgement

The Court unanimously upheld the application and made the declarations sought by the applicant. Lord Justice Brooke gave the leading judgement, Lord Justices Mummery and Scott Baker agreeing.

Brooke LJ held that the school had limited the applicant's freedom to manifest her religion or belief in public by its school uniform policy and the way that policy was enforced. The question was therefore whether the respondent could justify that limitation under article 9(2).

Brooke LJ held that in determining whether the limitation of the applicant's right to manifest her religion was justified, the school should have adopted the following decision-making structure:

1. Has the claimant established that she has a relevant Convention right which qualifies her for protection under Article 9(1)?
2. Subject to any justification that is established under Article 9(2), has that Convention right been violated?
3. Was the interference with her Convention right prescribed by law in the Convention sense of that expression?
4. Did the interference have a legitimate aim?
5. What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim?
6. Was the interference justified under Article 9(2)?

In the absence of adopting that decision making structure, Brooke LJ held that the school was not entitled to resist the declarations sought by the applicant.

However, Brooke LJ suggested that his judgement should not be taken as meaning that it would be impossible for the respondent to justify its stance if it were to reconsider its uniform policy and determine not

to alter it in any significant respect. Brooke LJ stated that matters which the respondent might consider in determining whether the policy was justified under article 9(2) include:

i) Whether the members of further religious groups (other than very strict Muslims) might wish to be free to manifest their religion or beliefs by wearing clothing not currently permitted by the school's uniform policy, and the effect that a larger variety of different clothes being worn by students for religious reasons would have no the School's policy of inclusiveness;
ii) Whether it is appropriate to override the beliefs of very strict Muslims given that liberal Muslims have been permitted the dress code of their choice and the School's uniform policy is not entirely secular;
iii) Whether it is appropriate to take into account any, and if so which, of the concerns expressed by the School's three witnesses as good reasons for depriving a student like the claimant of her right to manifest her beliefs by the clothing she wears at school, and the weight which should be accorded to each of these concerns;
iv) Whether there is any way in which the School can do more to reconcile its wish to retain something resembling its current uniform policy with the beliefs of those like the claimant who consider that it exposes more of their bodies than they are permitted by their beliefs to show.

In determining some of the factors to be considered under article 9(2), Brooke LJ suggested that it ought to be borne in mind that the UK is not a secular state there being express provision for religious education and worship in schools in the *Schools Standards and Framework Act 1998* (UK).

United Kingdom House of Lords

R v Secretary for the Home Department; ex parte Bagdanavicius & Anor [2005] UKHL 38

http://www.bailii.org/uk/cases/UKHL/2005/38.html

Background

The applicants, a husband and wife and their 3 year old son, are Lithuanian nationals. The husband is of Roma ethnic origin, though the wife is not. The applicants arrived in the UK in December 2002 and claimed asylum under the Refugee Convention on the basis that they were subjected to persistent harassment and violence in Lithuania by the wife's brother and his associates because of the husband's ethnic origin. The applicants were determined not to be refugees. They now asserted that the UK would be in breach of its obligations under article 3 of the European Convention on Human Rights (ECHR) if they were returned to Lithuania.

Article 3 of the ECHR provides:

> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Issue

The issue was whether the applicants had to establish that they would be at a real risk of being treated in a manner contrary to article 3 by non-state agents on their return to Lithuania, or whether they had to establish that they were at a serious risk of such treatment and that Lithuania would fail to discharge the positive obligation inherent in article 3 to provide a reasonable level of protection from such harm. In this regard, the Secretary of State conceded that the applicants faced a real risk of harm by non-state agents if they were returned to Lithuania; the applicants conceded that Lithuania would provide a reasonable level of protection against the violence threatened.

Judgement

Lord Brown of Eaton-Under-Haywood gave the leading judgement, Lords Hope of Craighead and Walker of Gestingthorpe and Baroness Hale of Richmond agreeing.
Lord Brown of Eaton-Under-Haywood restated the principle that article 3 of the ECHR applies in cases where the danger from expulsion emanates from non-state agents, where it can be shown that the risk of being treated contrary to article 3 is a "real risk".

However, his Lordship rejected the applicants' contention that extraditing states have an **absolute** obligation under article 3 not to expose a person to the risk of being treated in a manner inconsistent with article 3. Affirming current European Court of Human Rights jurisprudence, his Lordship held that inherent in determining whether there is a "substantial or real risk" of being treated contrary to article 3, it is necessary to make an assessment of whether the receiving state would provide reasonable protection:

> [H]arm inflicted by non-state agents will not constitute article 3 ill-treatment unless in addition the state has failed to provide reasonable protection. If someone is beaten up and seriously injured by a criminal gang, the member state will not be in violation of article 3 unless it has failed in its positive obligation to provide reasonable protection against such criminal acts [or such proscribed treatment].

In obiter, his Lordship also suggested that the protection afforded to applicants under article 3 is similar to that offered under the *Refugee Convention* and, as such, "in the great majority of cases, an article 3 claim to avoid expulsion will add little if anything to an asylum claim".

5. Australian Privacy Law

5.1 Australian Cases

Rivera v Australian Broadcasting Corporation [2005] FCA 661 (25 May 2005)

http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/661.html

On 30 September 2004, Mr Rivera commenced proceedings in the Federal Court against the Australian Broadcasting Corporation ('ABC') seeking damages and auxiliary relief by way of injunction arising from the broadcast in mid September 2004 of a television program called 'Reality Bites'. Mr Rivera claimed the ABC breached certain provisions of the *Trade Practices Act 1974* (Cth) or, the *Privacy Act 1988* (Cth), or alternatively that the program was defamatory of Mr Rivera or involved a breach of confidential information supplied by him.

Justice Hill dismissed Mr Rivera's application on the basis that the Court did not have jurisdiction to hear and determine it. His Honour found that the Court had no jurisdiction to hear the *Trade Practices Act* claim. His Honour also found that the Court had no jurisdiction under the *Privacy Act* to grant relief in respect of the acts done or practices engaged in by the ABC to the extent that those acts or practices would breach the *Privacy Act*. No jurisdiction is conferred on the Federal Court directly for claims of defamation or for breach of confidence. These are claims within the jurisdiction of State courts. Because no jurisdiction was found to exist in respect of the matters pleaded under the *Trade Practices Act* or the *Privacy Act*, the claims sought to be advanced in respect of defamation or breach of confidence did not form part of a 'matter' in respect of which the Court had accrued jurisdiction.

Relevantly, for present purposes, we set out the reasons the Court found that it lacked jurisdiction under the *Privacy Act* to grant relief in respect of acts or practices of the ABC to the extent that those acts or practices would breach the provisions of the Act.

The ABC is an agency specified in Division 1 of Part II of Schedule 2 of the *Freedom of Information Act 1982* (Cth) ('FOI Act'). Section 7(1)(a)(i)(C) of the *Privacy Act* states that a reference to acts or practices will be a reference to acts done or practices engaged in by an agency other than an agency specified in Division 1 of Part II of Schedule 2 of the FOI Act. Section 7(1)(c) then states that a reference to acts or practices includes acts done or practices engaged in by an agency specified in Division 1 of Part II of Schedule 2 of the FOI Act other than an act done or practice engaged in 'in relation to a record in relation to which the agency is exempt from the operation of that Act'. [24] The ABC is exempt from the FOI Act in respect of 'documents'[25] 'in relation to its program material and its datacasting content'.

Justice Hill concluded that in relation to any information which the ABC may have collected in regard to Mr Rivera, the ABC was exempt from the operation of the *Privacy Act* for the relevant information would be a record that related to the program material of the ABC. His Honour pointed out that this was the intention of s.7 of the *Privacy Act* and referred to the Explanatory Memorandum where it was stated that the effect of s.7(1) was that references to acts and practices are to those done or engaged in by:

> agencies listed in Part II of Schedule 2 of the FOI Act, which are mostly Commonwealth agencies engaged in competitive commercial activities (eg…Australian Broadcasting Corporation…), except in respect of records of their competitive commercial or other specified activities.

The ABC had submitted, in the alternative, that it was exempt from the operation of the *Privacy Act* by reason of ss.7(1)(ee) and 7B of the Act. Hill J found that the ABC had not adduced evidence such as to exclude any acts of the ABC under s.7(1)(ee).

[24] 'Record' is defined in s.6 of the *Privacy Act* to include documents as well as databases and pictorial representations of a person.

[25] 'Document' is defined in s.4 of the FOI Act to include, relevantly, '(iv) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device; (v) any article on which information has been stored or recorded, either mechanically or electronically; (vi) any other record or information…'

5.2 Federal Privacy Commissioner Case Notes

On 29 June 2005, the Privacy Commissioner published case notes numbered 8 to 18 in respect of finalised complaints that are considered to be of interest to the public. The case notes are listed below, together with a link to each case note.

- ***K v Credit Provider [2005] PrivCmrA 8***
  http://www.privacy.gov.au/publications/casenotes/ccn8_05.doc

- ***L v Insurer [2005] PrivCmrA 9***
  http://www.privacy.gov.au/publications/casenotes/ccn9_05.doc

- ***M v Australian Government Agency [2005] PrivCmrA 10***
  http://www.privacy.gov.au/publications/casenotes/ccn10_05.doc

- ***OPC v Banking Institution [2005] PrivCmrA 11***
  http://www.privacy.gov.au/publications/casenotes/ccn11_05.doc

- ***N v Australian Government Agency [2005] PrivCmrA 12***
  http://www.privacy.gov.au/publications/casenotes/ccn12_05.doc

- ***OPC v Employment Services Company [2005] PrivCmrA 13***
  http://www.privacy.gov.au/publications/casenotes/ccn13_05.doc

- ***O v Australian Government Agency B [2005] PrivCmrA 14***
  http://www.privacy.gov.au/publications/casenotes/ccn14_05.doc

- ***P v Telecommunications Service Provider [2005] PrivCmrA 15***
  http://www.privacy.gov.au/publications/casenotes/ccn15_05.doc

- ***Q v Credit Provider B [2005] PrivCmrA 16***
  http://www.privacy.gov.au/publications/casenotes/ccn16_05.doc

- ***R v Internet Service Provider [2005] PrivCmrA 17***
  http://www.privacy.gov.au/publications/casenotes/ccn17_05.doc

- ***S v Credit Provider [2005] PrivCmrA 18***
  http://www.privacy.gov.au/publications/casenotes/ccn18_05.doc