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# Avoiding tragedy: Would the decision of the High Court in *Al-Kateb* have been any different if Australia had a Bill of Rights like Victoria?

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*From 1 January 2008, courts and tribunals in Victoria will be required by s 32 of the Charter of Human Rights and Responsibilities 2006 (Vic) to interpret legislation in a way that is compatible with human rights, so far as it is possible to do so consistently with the legislation's purpose. This article considers how similar interpretative provisions have been applied in the United Kingdom, New Zealand and the Australian Capital Territory, and the extent to which this comparative jurisprudence might be relevant to the Victorian legislation. The article draws on the High Court decision in *Al-Kateb v Godwin* (2004) 219 CLR 562 to help demonstrate the potentially significant effect the Charter may have on judicial decision making in Victoria.*

## INTRODUCTION

It is not for the courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.<sup>1</sup>

The above statement by McHugh J in *Al-Kateb v Godwin* (2004) 219 CLR 562; 78 ALJR 1099; [2004] HCA 37 (*Al-Kateb*) is a dismal yet accurate reflection on the way in which the common law of Australia has failed to protect human rights. In *Al-Kateb*, the High Court held that Australia's system of mandatory detention clearly and lawfully authorised the indefinite detention of a failed asylum-seeker in circumstances where there was no prospect of his removal from Australia within the reasonably foreseeable future. As "tragic"<sup>2</sup> as this may have been for Mr Al-Kateb, the majority of the High Court were not prepared to interpret the relevant legislation in a way that was consistent with the protection of human rights.

Recent developments at the State and Territory level have given the issue of human rights protection in Australia increasing relevance. The Australian Capital Territory and Victoria now have legislatively-enacted bills of rights based broadly on the *Human Rights Act 1998* (UK).<sup>3</sup> Similar moves are on foot in other States<sup>4</sup> and it is possible that the coming years will see the introduction of legislative bills of rights across the country.

Yet the question remains whether these bills of rights will operate to ensure that outcomes clearly contrary to Australia's international human rights obligations can be avoided. This paper considers that question in the context of the Victorian *Charter of Human Rights and Responsibilities 2006* (Vic) (Victorian Charter). Section 32 of the Victorian Charter places an obligation on Victorian courts and tribunals to interpret legislation in a way that is compatible with human rights, so far as it is possible to do so consistently with the legislation's purpose. The *Al-Kateb* decision provides a useful set of circumstances to analyse how s 32 and related provisions might operate in practice.

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<sup>1</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 595 (McHugh J); 78 ALJR 1099; [2004] HCA 37.

<sup>2</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 (McHugh J); 78 ALJR 1099; [2004] HCA 37.

<sup>3</sup> *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>4</sup> The Tasmanian Government has asked the Tasmanian Law Reform Institute to investigate the protection of human rights and make recommendations. A consultation process is underway. The Western Australian Attorney General was reported on 1 April 2006 as saying that he was considering introducing a *Bill of Rights* (*The West Australian*, 1 April 2006). Similarly, the New South Wales Attorney General announced that he supported a Charter of Rights and Responsibilities for New South Wales and that he would raise the matter in the New South Wales Cabinet (*The Sydney Morning Herald*, 20 March 2006).

Given the lack of jurisprudence on the Victorian Charter,<sup>5</sup> the paper considers how similar interpretative provisions have been applied in the United Kingdom, New Zealand and the Australian Capital Territory, and the extent to which this comparative jurisprudence might be applied in the Victorian context. Like the Victorian Charter, the bills of rights in these three jurisdictions are ordinary Acts of Parliament and reflect the “parliamentary rights model”<sup>6</sup> whereby courts do not have the power to strike down legislation. They can be distinguished from constitutional instruments like the *United States Bill of Rights*, *Canadian Charter of Rights and Freedoms* and *South African Bill of Rights*.

The final section of the paper uses the facts of *Al-Kateb* to suggest how the interpretative provisions of the Victorian Charter might be applied in practice. To simplify the analysis, it is assumed that s 32 of the Victorian Charter would be applied in accordance with the jurisprudence of the United Kingdom. It is concluded that the High Court would likely have reached a different conclusion in *Al-Kateb* if Australia had a legislative *Bill of Rights* like Victoria, and that this outcome would have accorded more with Australia’s obligations under international law.

## THE AL-KATEB DECISION

### Mr Al-Kateb’s story

Mr Al-Kateb was a stateless Palestinian.<sup>7</sup> He arrived in Australia by boat in December 2000 without a visa and was placed into immigration detention.<sup>8</sup> He applied for a protection visa but his application was refused and his appeals were unsuccessful.<sup>9</sup> In mid-2002, he wrote to the Minister asking to be removed from Australia. The government was unable to make these arrangements because no other country was willing to take him.<sup>10</sup>

Mr Al-Kateb then sought a declaration in the Federal Court that his continued detention was unlawful. The application was dismissed by von Doussa J even though, in his reasons delivered on 3 April 2003, his Honour found that removal of Mr Al-Kateb from Australia was not reasonably practicable as there was “no real likelihood or prospect of removal in the reasonably foreseeable future”.<sup>11</sup> This finding was never challenged. Mr Al-Kateb appealed to the Full Court of the Federal Court but the matter was removed to the High Court under s 40 of the *Judiciary Act 1903* (Cth).

### Issues for the High Court

Mr Al-Kateb’s case centred around the construction of ss 189, 196 and 198 of the *Migration Act 1958* (Cth).<sup>12</sup> Throughout this paper, these sections will be referred to collectively as “the relevant legislation”. In general terms, they provided that:<sup>13</sup>

<sup>5</sup> There have been two decisions to date referring to the Victorian Charter: *TSL v Secretary to the Department of Justice* (2006) 14 VR 109; 166 A Crim R 69; [2006] VSCA 199 (26 September 2006); *R v Williams* [2007] VSC 2 (15 January 2007). Neither of these decisions provides any specific guidance on the application of s 32.

<sup>6</sup> Hiebert JL, “Parliamentary Bills of Rights: An Alternative Model?” (2006) 69 Mod LR 7.

<sup>7</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 596 (Gummow J); 78 ALJR 1099; [2004] HCA 37. “Stateless person” refers to a person “who is not considered as a national by any State under the operation of its law”: *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117, Art 1 (entered into force 13 March 1974). Despite the fact that Mr Al-Kateb was born in Kuwait, and lived there for most of his life, he was not eligible for citizenship or permanent residence.

<sup>8</sup> Section 189(1) of the *Migration Act 1958* (Cth) provides: “If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person.”

<sup>9</sup> Mr Al-Kateb appealed first to the Refugee Review Tribunal and then to the Federal Court. For a summary of the litigation, see *Al-Kateb v Godwin* (2004) 219 CLR 562 at 602-604 (Gummow J); 78 ALJR 1099; [2004] HCA 37.

<sup>10</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 603 (Gummow J); 78 ALJR 1099; [2004] HCA 37.

<sup>11</sup> *SHDB v Goodwin* [2003] FCA 300 at [9] (von Doussa J).

<sup>12</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 604 (Gummow J) and 614 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>13</sup> It is not relevant for the purposes of this essay to set out the relevant legislation in detail but it can be found in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 605-607 (Gummow J); 78 ALJR 1099; [2004] HCA 37.

- all unlawful non-citizens must be detained (s 189);
- they must be detained until they are removed from Australia, deported or granted a visa (s 196); and
- an officer must remove as soon as reasonably practicable an unlawful non-citizen if (1) he asked the Minister, in writing, to be so removed or ... if (6) the valid application for a grant of a visa had been refused and finally determined and no other valid application had been made (s 198).

Two main questions were before the High Court:<sup>14</sup>

- 1) Did the relevant legislation, when properly construed, purport to authorise the indefinite detention of an unlawful non-citizen in circumstances where there was no real prospect of removing him from Australia?
- 2) If it did purport to authorise such detention, was it invalid because it was beyond the legislative power of the Commonwealth?

By a 4:3 majority, the High Court found that the relevant legislation provided for Mr Al-Kateb's indefinite detention until his removal from the country and that this was within the legislative power of the Commonwealth. The aim of this paper is not to examine in detail the decision in *Al-Kateb*.<sup>15</sup> What follows is a brief overview of the reasoning of the majority and minority judges to provide context for later discussion.

### The majority judgment

In relation to the first question, the majority (McHugh, Hayne, Callinan and Heydon JJ) took a strict legalistic approach to interpreting the legislation, finding that there was no ambiguity in the relevant provisions. The legislation clearly required that detention was to continue until removal, deportation or the granting of a visa.<sup>16</sup> As such, when properly construed, it authorised the indefinite detention of Mr Al-Kateb. As McHugh J said:

The words of ss 196 and 198 are unambiguous. They require the indefinite detention of Mr Al-Kateb, notwithstanding that it is unlikely that any country in the reasonably foreseeable future will give him entry to that country.<sup>17</sup>

Consequently, their Honours held that the words of the three sections were too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.<sup>18</sup> There was also no place for consideration of either international law or the jurisprudence of other common law jurisdictions.<sup>19</sup>

As to the second question, the majority held that the relevant provisions were within the legislative power of the Commonwealth. They did not infringe Chapter III of the *Constitution* because their object was purely protective, rather than punitive.<sup>20</sup> In addition, the *Constitution* could not be read by reference to the provisions of international law.<sup>21</sup>

### The minority judgment

In contrast, the minority judges (Gleeson CJ, Gummow and Kirby JJ) held that the relevant legislation was ambiguous in the sense that it did not address the possibility of such a situation as arose in

<sup>14</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 580 (McHugh J); 78 ALJR 1099; [2004] HCA 37.

<sup>15</sup> Several commentators have already done this: see, eg Curtin J, "Never Say Never: Al-Kateb v Godwin" (2005) 27 Syd LR 355; Allan J, "Do the Right Thing Judging? The High Court of Australia in Al-Kateb" (2005) 24 UQLJ 1.

<sup>16</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 (McHugh J), 643 (Hayne J), 661 (Callinan J) and 662 (Heydon J); 78 ALJR 1099; [2004] HCA 37.

<sup>17</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 (McHugh J); 78 ALJR 1099; [2004] HCA 37.

<sup>18</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 581 (McHugh J) and 643 (Hayne J); 78 ALJR 1099; [2004] HCA 37.

<sup>19</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 642-643 (Hayne J) and 661 (Callinan J); 78 ALJR 1099; [2004] HCA 37.

<sup>20</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 (McHugh J) and 659 (Callinan J); 78 ALJR 1099; [2004] HCA 37.

<sup>21</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589 (McHugh J); 78 ALJR 1099; [2004] HCA 37.

Mr Al-Kateb's case.<sup>22</sup> Consequently, the legislation might be interpreted in two ways:<sup>23</sup> first, that Mr Al-Kateb was to be kept in detention for as long as it took to remove him which, if removal never became practicable, may result in him spending the rest of his life in detention; or, second, that Mr Al-Kateb was to be detained if, and so long as, removal was a practical possibility. If removal became impractical, his detention would come to an end, at least for so long as that situation continued. Their Honours held that this ambiguity could be resolved by a process of statutory construction.<sup>24</sup> By slightly different means, they each concluded that the latter interpretation was preferable.

Chief Justice Gleeson held that the primary purpose of Mr Al-Kateb's detention was to facilitate his removal from Australia.<sup>25</sup> Where that purpose could not be fulfilled, the court had a choice between indefinite detention or suspension of detention.<sup>26</sup> In choosing the latter, his Honour relied on the well-established principle of interpretation, by which courts should not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms unless such an intention was clearly manifested by unambiguous language.<sup>27</sup> According to Gleeson CJ, had the Parliament intended to detain failed asylum seekers indefinitely, contrary to the right to personal liberty, it would have spelt out that intention in the legislation. The fact that it had not done so led his Honour to favour the alternative option of suspension, which was consistent with the protection of personal liberty.

Justice Gummow agreed that the primary purpose of the detention was to facilitate Mr Al-Kateb's removal from Australia but not with such delay that his detention had the appearance of being for an unlimited time.<sup>28</sup> If removal was unlikely to occur, s 198 no longer retained its primary purpose and to that extent its operation was spent.<sup>29</sup> Consequently, the temporal imperative imposed by the word "until" in s 196(1) lost a necessary assumption for its continued operation.<sup>30</sup> To support this construction, Gummow J said that the Court should be reluctant to adopt a reading of the legislation which recognised a power to keep a detainee in custody for an unlimited time.<sup>31</sup>

Justice Kirby agreed with the reasons of Gummow J that the relevant sections of the *Migration Act* did not apply to Mr Al-Kateb's case and, as such, did not sustain his continuing detention.<sup>32</sup> He added that this conclusion was supported by considerations of international law and the common law presumption in favour of personal liberty.<sup>33</sup> The relevant provisions of the *Migration Act* were to be read in light of these abiding values.<sup>34</sup>

The finding of the minority judges on the first issue, that the relevant legislation did not authorise the indefinite detention of Mr Al-Kateb, meant that there was no need for them to consider the second issue regarding the *Constitution*. To the extent that they did consider the second issue, their comments constitute obiter.

<sup>22</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 575 and 577 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37.

<sup>23</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 575 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37.

<sup>24</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 576 (Gleeson CJ), 600, 604, 605, 607-609 (Gummow J) and 614 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>25</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 576 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37.

<sup>26</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 578 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37.

<sup>27</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37 citing *Coco v The Queen* (1994) 179 CLR 427; 68 ALJR 401; 72 A Crim R 32; *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492; 77 ALJR 454; [2003] HCA 2.

<sup>28</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 (Gummow J); 78 ALJR 1099; [2004] HCA 37.

<sup>29</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 (Gummow J); 78 ALJR 1099; [2004] HCA 37.

<sup>30</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 608 (Gummow J); 78 ALJR 1099; [2004] HCA 37.

<sup>31</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 607 (Gummow J); 78 ALJR 1099; [2004] HCA 37, relying on *Lau v Calwell* (1949) 80 CLR 533.

<sup>32</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 615 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>33</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 616 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>34</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 616 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

## THE VICTORIAN CHARTER

### A brief overview

The Victorian Charter came about following a community consultation process involving several thousand people and organisations. It substantially reflects the views and recommendations of the Human Rights Consultation Committee arising out of that process.<sup>35</sup> While the majority of its provisions came into force on 1 January 2007, the obligations on public authorities and the courts will not become effective until 1 January 2008.<sup>36</sup>

The Victorian Charter has as its main purpose the protection and promotion of human rights in Victoria.<sup>37</sup> The human rights it seeks to protect and promote reflect to a great extent the civil and political rights enshrined in the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>38</sup> Given that many of these rights are also found in other regional and domestic human rights instruments,<sup>39</sup> there is a vast body of international law that can be used to interpret their meaning and content.

Modelled principally on the *Human Rights Act 1998 (UK)*, the Victorian Charter establishes a “dialogue model” which promotes institutional interaction between the different arms of government and the community. The Human Rights Consultation Committee found that a “dialogue” model best reflected the wishes of the public and would best ensure the involvement of all arms of government in the promotion of human rights.<sup>40</sup> The framework seeks to ensure that human rights are taken into account when developing, interpreting and applying Victorian law and policy without displacing current constitutional arrangements.<sup>41</sup>

There are three elements to this framework.<sup>42</sup> First, all Bills introduced into Parliament must be accompanied by a statement of compatibility.<sup>43</sup> Second, public authorities have obligations to act compatibly with human rights.<sup>44</sup> Third, courts and tribunals must interpret Victorian statutes and statutory instruments in a manner that is compatible with human rights so far as it is possible to do so consistently with their purpose.<sup>45</sup> It is the third element that is of relevance to this paper.

### Statutory interpretation under the Victorian Charter

Division 3 of Pt 3 of the Victorian Charter<sup>46</sup> sets out new rules and procedures for the interpretation of legislation in Victoria. Section 32(1) provides:

So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

<sup>35</sup> See Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005).

<sup>36</sup> *Charter of Human Rights and Responsibilities 2006 (Vic)*, s 2.

<sup>37</sup> *Charter of Human Rights and Responsibilities 2006 (Vic)*, s 1.

<sup>38</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). Despite the title, it is interesting to note that the Victorian Charter does not contain one “responsibility”.

<sup>39</sup> See, eg *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, European Treaty Series No 5 (entered into force 1 November 1998); *Human Rights Act 2004 (ACT)*; *Human Rights Act 1998 (UK)*; *New Zealand Bill of Rights Act 1990 (NZ)*.

<sup>40</sup> Human Rights Consultation Committee, n 35, Ch 4. See also Victoria, Legislative Assembly, *Parliamentary Debates* (4 May 2006), p 1290 (Rob Hulls, Attorney-General).

<sup>41</sup> Human Rights Law Resource Centre, *Human Rights Law Resource Manual* (2006), Ch 5 at [1.1]; see <http://www.hrlrc.org.au> (viewed 1 April 2007).

<sup>42</sup> *Charter of Human Rights and Responsibilities Bill 2006 (Vic)*, Explanatory Memorandum, p 1.

<sup>43</sup> *Charter of Human Rights and Responsibilities 2006 (Vic)*, s 28.

<sup>44</sup> *Charter of Human Rights and Responsibilities 2006 (Vic)*, s 38.

<sup>45</sup> *Charter of Human Rights and Responsibilities 2006 (Vic)*, s 32.

<sup>46</sup> *Charter of Human Rights and Responsibilities 2006 (Vic)*, ss 32 – 37.

The Explanatory Memorandum states that the object of this subsection is to ensure that courts and tribunals interpret legislation to give effect to human rights.<sup>47</sup> The concept of “human rights” is defined in s 3 of the Victorian Charter to mean “the civil and political rights set out in Part 2”. Section 32(2) expressly permits courts and tribunals to consider international law as well as judgments of domestic, foreign and international courts and tribunals in reading and giving effect to a statutory provision.

It is clear that s 32(1) goes much further than the common law requirement that, where a statute is ambiguous, the courts should favour a construction which accords with Australia’s international human rights obligations.<sup>48</sup> It is an emphatic direction to courts and tribunals to adopt a human-rights-compatible interpretation of *all* statutory provisions “so far as it is possible to do so consistently with their purpose” and regardless of whether there is any ambiguity in the legislation. The reference to statutory “purpose” is to ensure that, in applying s 32(1), courts do not strain the interpretation of legislation so as to displace Parliament’s intended purpose or interpret the legislation in a manner that avoids achieving the object of the legislation.<sup>49</sup> This is consistent with some of the more recent cases in the United Kingdom where a more purposive approach to interpretation has been favoured (see below).

Where a statutory provision cannot be interpreted consistently with a human right, the Supreme Court is empowered to issue a Declaration of Inconsistent Interpretation in accordance with s 36(2). A Declaration does not in any way affect the validity, operation or enforcement of the statutory provision<sup>50</sup> or create in any person any legal right or give rise to any civil cause of action.<sup>51</sup> The Victorian Charter provides for a process by which the Supreme Court must forward a copy of the Declaration to the Attorney-General,<sup>52</sup> who gives it to the relevant Minister.<sup>53</sup> The Minister then has six months from receiving the Declaration to prepare a written response to it and to file that response in Parliament.<sup>54</sup> This process ensures that Parliament has “the final say”.<sup>55</sup>

How the new provisions described above will be applied by Victorian courts and tribunals from 1 January 2008 remains to be seen. At this stage, the primary material on which to consider possible interpretations of the Victorian Charter is the Victorian Charter itself, the Explanatory Memorandum, the Second Reading Speech and the report of the Human Rights Consultation Committee. However, the interpretative provisions of the Victorian Charter reflect similar provisions in the *Human Rights Act 1998* (UK),<sup>56</sup> the *Human Rights Act 2004* (ACT)<sup>57</sup> and the *New Zealand Bill of Rights Act 1990* (NZ).<sup>58</sup> The approaches of the courts in all three of these jurisdictions may be useful to Victorian courts and tribunals once the Victorian Charter comes into force.<sup>59</sup> What follows is a brief overview of

<sup>47</sup> *Charter of Human Rights and Responsibilities Bill 2006* (Vic), Explanatory Memorandum, p 23.

<sup>48</sup> Human Rights Law Resource Centre, n 41 at [6.1] citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 (Mason CJ and Deane J); 69 ALJR 423. See also *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; 67 ALJR 125.

<sup>49</sup> *Charter of Human Rights and Responsibilities Bill 2006* (Vic), Explanatory Memorandum, p 23. See also Human Rights Consultation Committee, n 35, p 82.

<sup>50</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 36(5)(a).

<sup>51</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 36(5)(b).

<sup>52</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 36(6).

<sup>53</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 36(7).

<sup>54</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 37.

<sup>55</sup> Victoria, Legislative Assembly, *Parliamentary Debates* (4 May 2006), p 1290 (Rob Hulls, Attorney-General).

<sup>56</sup> *Human Rights Act 1998* (UK), ss 3 and 4.

<sup>57</sup> *Human Rights Act 2004* (ACT), ss 30 – 32.

<sup>58</sup> *New Zealand Bill of Rights Act 1990* (NZ), s 6.

<sup>59</sup> See *Charter of Human Rights and Responsibilities Bill 2006* (Vic), Explanatory Memorandum, pp 23-24: “A number of jurisdictions have incorporated international human rights into domestic law. Decisions from courts in these jurisdictions including the Australian Capital Territory, Canada, New Zealand, South Africa and the United Kingdom may be relevant.”

how the interpretative provisions have been applied in these jurisdictions. It is by no means an exhaustive exposition of the relevant jurisprudence.<sup>60</sup>

## THE USE OF INTERPRETATIVE PROVISIONS IN OTHER JURISDICTIONS

### The United Kingdom experience

The interpretative provisions of the *Human Rights Act 1998* (UK) are almost identical to those of the Victorian Charter. Section 3(1) provides:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

The interpretative obligation applies to all laws “whenever enacted” and “does not affect the validity, continuing operation or enforcement of any incompatible primary legislation”.<sup>61</sup>

In practice, the s 3 interpretative requirement has been said to involve a clear process.<sup>62</sup> First, the judge must form a preliminary view as to whether the legislation, on its face, is incompatible with human rights. This has been described as “provisional incompatibility”.<sup>63</sup> If there is no provisional incompatibility, s 3 can be ignored. However, if provisional incompatibility arises, s 3 comes into play and the judge must ask whether it is “possible” for the legislation to be “read and given effect” in a way which is compatible with human rights. This may involve modifying the meaning of the words to the extent necessary to achieve compatibility.<sup>64</sup>

Section 3 has been applied by the courts of the United Kingdom on at least 14 occasions since it came into force in 2000 (see Appendix A). In the early years, judges were hesitant in using the interpretative obligation but have recently become “increasingly confident and interventionist”.<sup>65</sup> While the application of s 3 is still an emerging area of law in the United Kingdom, certain principles can be extracted from the case law.

The first is that courts are not bound by previous authority as to what the legislation under consideration means.<sup>66</sup> For example, in *Ghaidan v Godin-Mendoza* (2004) 2 AC 557, the issue before the House of Lords was whether “spouse” in the context of the *Rent Act 1977* (UK) included the same-sex partner of a protected tenant. Their Lordships held that the relevant provisions were discriminatory and infringed the right to respect for home. However, applying s 3, it was possible to read the relevant provisions as extending to same-sex partners. This finding overturned a decision of the House of Lords made a few years earlier, which determined that same sex-couples were not “spouses” for the purposes of the *Rent Act 1977* (UK).<sup>67</sup>

The second principle is that s 3 applies even if there is no ambiguity in the language of the legislation.<sup>68</sup> Courts in the United Kingdom have been prepared to “locate a human rights interpretation of unambiguous language wherever possible”.<sup>69</sup> This has required that the legislation

<sup>60</sup> For a more detailed analysis of the jurisprudence, see Charlesworth H, “Human Rights and Statutory Interpretation” in Corcoran S and Bottomley S (eds), *Interpreting Statutes* (The Federation Press, 2005), p 100. See also Gearty C, *Principles of Human Rights Adjudication* (Oxford University Press, 2004).

<sup>61</sup> *Human Rights Act 1998* (UK), s 3(2)(b).

<sup>62</sup> The process was first outlined by Lord Woolf CJ in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at [75], and has since been adopted by Lord Hope of Craighead in *R v A (No 2)* [2002] 1 AC 45 at [110] and *R v Lambert* [2002] 2 AC 545 at [80].

<sup>63</sup> Gearty C, n 60, p 51.

<sup>64</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at [75].

<sup>65</sup> Charlesworth H, n 60, p 107.

<sup>66</sup> *R v Lambert* [2002] 2 AC 545 at [81] (Lord Hope).

<sup>67</sup> *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

<sup>68</sup> *R v A (No 2)* [2002] 1 AC 45 at [44] (Lord Steyn) and [108] (Lord Hope); *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [29] (Lord Nicholls).

<sup>69</sup> Charlesworth H, n 60, p 114.

under consideration be given a different meaning even if its meaning seemed clear when first construed according to the ordinary principles of interpretation.<sup>70</sup> For example, in *R v A (No 2)* [2002] 1 AC 45, the House of Lords was asked to consider s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) which clearly prohibited a defendant in a sexual offences trial from adducing any evidence about a complainant's sexual history. Applying s 3 of the *Human Rights Act 1998* (UK), their Lordships held that the legislation could be construed in a compatible way by "reading in" an implied provision that evidence which was required to ensure a fair trial should not be treated as inadmissible. This interpretation was adopted despite the unambiguous nature of the prohibition.

The third principle is that, so far as it is possible to do so, s 3 may involve "the reading down of express language in a statute" or the "implication of provisions" to ensure human rights compatibility.<sup>71</sup> For example, in *R v Offen* [2001] 1 WLR 253, the Court of Appeal considered the meaning of s 2 of the *Crime (Sentences) Act 1997* (UK) which required a court to impose a life sentence on a person convicted of two or more serious offences unless there were "exceptional circumstances" which justified it not doing so. The court held that this provision could infringe the right to liberty and the prohibition against torture in certain circumstances. However, applying s 3 of the *Human Rights Act 1998* (UK), "exceptional circumstances" could be interpreted in a less restrictive way such that it did not result in offenders being sentenced to life imprisonment when they did not constitute a significant risk to the public.

The fourth and final principle which emerges from the United Kingdom case law is that s 3 cannot be used to produce a result departing substantially from the fundamental features of a statute.<sup>72</sup> That would be to "cross the constitutional boundary s 3 seeks to demarcate and preserve".<sup>73</sup> As Lord Hope said in *R v Lambert* (2002) 2 AC 545, "the interpretation of a statute by reading words in to give effect to the presumed intention must always be distinguished carefully from amendment".<sup>74</sup> Amendment is a legislative act to be reserved to Parliament. Furthermore, s 3 cannot be used by courts to make decisions for which they are not equipped and which would be better left to Parliament.<sup>75</sup>

A number of different expressions were used by members of the House of Lords in *Ghaidan v Godin-Mendoza* to describe the point at which the act of interpretation would become unconstitutional judicial legislation,<sup>76</sup> such as the dicta of Lord Nicholls that the boundary would be crossed when an interpretation was incompatible with a "fundamental feature" of the legislation.<sup>77</sup> Other descriptions included when an interpretation:

- would be incompatible with the "underlying thrust" of the legislation;<sup>78</sup>
- would not "go with the grain" of the law;<sup>79</sup>
- would call for legislative deliberation;<sup>80</sup>
- would change the substance of a provision completely;<sup>81</sup>

<sup>70</sup> *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [29] (Lord Nicholls).

<sup>71</sup> *R v A (No 2)* [2002] 1 AC 45 at [44] (Lord Steyn). See also *Ghaidan v Godin-Mendoza* (2004) 2 AC 557; *R v Lambert* [2002] 2 AC 545 at [81] (Lord Hope); *R v Carass* [2002] 1 WLR 1714; *R v Offen (No 2)* [2001] 1 WLR 253; 2 All ER 154.

<sup>72</sup> *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at [40] (Lord Nicholls); *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [33] (Lord Nicholls).

<sup>73</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [33] (Lord Nicholls). See also *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at [40] (Lord Nicholls).

<sup>74</sup> *R v Lambert* [2002] 2 AC 545 at [81] (Lord Hope).

<sup>75</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [33] (Lord Nicholls). See also *Bellinger v Bellinger* [2003] 2 AC 467.

<sup>76</sup> These are set out in Charlesworth H, n 60, p 112.

<sup>77</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [33] (Lord Nicholls).

<sup>78</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [33] (Lord Nicholls).

<sup>79</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [121] (Lord Rodger).

<sup>80</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [110]-[113] (Lord Rodger).

<sup>81</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [110]-[113] (Lord Rodger).

- would remove its pith and substance;<sup>82</sup> or
- would violate a cardinal principle of the legislation.<sup>83</sup>

If any of these situations arose, the court would be required to make a Declaration of Incompatibility pursuant to s 4(2). This is essentially the same as the Victorian Declaration of Inconsistent Interpretation.<sup>84</sup>

Declarations of Incompatibility have been made in the United Kingdom on at least 15 occasions (see Appendix B) and overturned on appeal in a further six cases (see Appendix C). All of the offending legislative sections have been remedied by Parliament (or are under consideration with a view to being remedied).<sup>85</sup>

### The New Zealand experience

Section 6(1) of the *New Zealand Bill of Rights Act 1990* (NZ) reads:

Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this *Bill of Rights*, that meaning shall be preferred to any other meaning.<sup>86</sup>

The New Zealand experience has been quite different to that of the United Kingdom, especially in so far as how courts have understood their mandate to interpret legislation in a human-rights-consistent manner. A key difference is that legislative intent has played a more significant role in the assessment of appropriate limits on rights in New Zealand.<sup>87</sup> According to Dr Butler, New Zealand courts have not been as “aggressive” as their counterparts in the United Kingdom.<sup>88</sup> This was recognised by Tipping J in the recent decision of *Hansen v The Queen* [2007] NZSC 7 at [158]:

In England, s 3 appears at times to have been construed as mandating a judicial override of Parliament, if Parliament’s meaning is inconsistent with a right or freedom. That, for me, would be to use s 3 (the New Zealand s 6) as a concealed legislative tool. Whether it is appropriate in England is not for me to say, but I am satisfied it is not appropriate in New Zealand.

The difference in approach can be demonstrated by reference to case law. In *Quilter v Attorney-General* [1998] 1 NZLR 523, the New Zealand Court of Appeal refused to read the word “marriage” in the *Marriage Act 1955* (NZ) as including a relationship between two women because the legislation was “clear” and “to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament”.<sup>89</sup> This decision can be contrasted with the decision of the House of Lords in *Ghaidan v Godin-Mendoza*<sup>90</sup> referred to above.

A more recent example is the decision in *Hansen v The Queen*<sup>91</sup> where the issue before the Supreme Court was whether the reversed onus of proof provisions in s 6(6) of the *Misuse of Drugs Act 1975* (UK) should be given a meaning consistent with the presumption of innocence in s 25(c) of the *New Zealand Bill of Rights Act 1990* (NZ). In five separate judgments and for differing reasons, their Honours were unwilling to find any alternative meaning in the words “until the contrary is proved”,

<sup>82</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [116] (Lord Rodger).

<sup>83</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [116] (Lord Rodger).

<sup>84</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 36(2).

<sup>85</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006), p 17; see <http://www.dca.gov.uk/peoples-rights/human-rights/publications.htm> (viewed 1 April 2007).

<sup>86</sup> *New Zealand Bill of Rights Act 1990* (NZ), s 6.

<sup>87</sup> Charlesworth H, n 60, p 106.

<sup>88</sup> Butler Dr P, *Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand* (paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, Canberra, 21 June 2006), pp 9-10. See *Newspapers Publishers Association of New Zealand (Inc) v Family Court* [1999] 2 NZLR 344; *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260; *Herewini v Ministry of Transport* [1990-1992] 3 NZBORR 113; *Police v Herewini and Smith* [1994] 2 NZLR 306; *Hansen v The Queen* [2007] NZSC 7.

<sup>89</sup> *Quilter v Attorney-General* [1998] 1 NZLR 523.

<sup>90</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557.

<sup>91</sup> *Hansen v The Queen* [2007] NZSC 7.

holding that s 6(6) of the 1975 Act clearly imposed a legal rather than evidential onus on the accused. This decision can be contrasted with the decision in *Lambert*<sup>92</sup> where the House of Lords held that the word “prove” in the context of reverse onus provisions should be read as casting only an evidential burden on the accused.

In *Hansen v The Queen*,<sup>93</sup> McGrath J noted that the language of s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) was not materially different from the equivalent interpretative instruction in s 3 of the *Human Rights Act 1998* (UK).<sup>94</sup> However, there was an “undoubted difference between the meaning given to the provisions by the courts of the two jurisdictions”.<sup>95</sup> His Honour suggested that this difference arose from the constitutional contexts in which the provisions were being interpreted and applied. In New Zealand, the public debates which preceded the enactment of the *New Zealand Bill of Rights Act 1990* (NZ) resulted in the rejection of a proposal to give it the status of a supreme law.<sup>96</sup> The constitutional context therefore reflected a decision that courts should not be empowered to modify legislation.<sup>97</sup>

According to McGrath J, the constitutional context of the United Kingdom was reflected in the fact that the drafter of the *Human Rights Act 1998* (UK) modelled s 3 on language taken from a judgment of the Court of Justice of the European Communities regarding the interpretative obligations of domestic courts under Art 10 of the *Treaty Establishing the European Community*.<sup>98</sup> The language of the Court of Justice was reflected in s 3 to an extent which signalled that the courts should apply s 3 in the same way as required in the European context. Dr Butler has similarly suggested that the difference in approach between the two jurisdictions can be explained by the fact that New Zealand courts do not live in the shadow of the European Court of Human Rights.<sup>99</sup>

A further difference between the New Zealand and United Kingdom models relates to the way in which the New Zealand Supreme Court has applied s 5 of the *New Zealand Bill of Rights Act 1990* (NZ) which provides that the rights and freedoms may be subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. In *Hansen v The Queen*, a majority of the Supreme Court held that s 5 should generally be addressed *before* applying the interpretative requirement of s 6.<sup>100</sup> This method requires a court to first ask whether an apparent inconsistency is nevertheless justified in terms of s 5. If the apparent inconsistency is a reasonable limit that can be demonstrably justified in a free and democratic society, it is legitimised and Parliament’s intended meaning prevails.<sup>101</sup> There is no need to apply s 6 in such a case. Tipping J suggested that this construction recognised “Parliament’s ability to legislate in terms which constitute a justified limit without having its purpose frustrated by a tenable but unintended s 6 interpretation”.<sup>102</sup>

In dissent, Elias CJ held that the method “distorts the interpretative obligation under s 6 from preference for a meaning consistent with the rights and freedoms in Part 2 to one of preference for a

<sup>92</sup> *R v Lambert* [2002] 2 AC 545.

<sup>93</sup> *Hansen v The Queen* [2007] NZSC 7.

<sup>94</sup> *Hansen v The Queen* [2007] NZSC 7 at [244].

<sup>95</sup> *Hansen v The Queen* [2007] NZSC 7 at [244].

<sup>96</sup> *Hansen v The Queen* [2007] NZSC 7 at [239].

<sup>97</sup> *Hansen v The Queen* [2007] NZSC 7 at [246].

<sup>98</sup> *Hansen v The Queen* [2007] NZSC 7 at [246]. The judgment of the Court of Justice of the European Communities is *Marleasing SA v LA Comercial Internacional de Alimentacion SA* [1990] ECR at I-4135 and I-4159.

<sup>99</sup> Butler Dr P, n 88, pp 9-10.

<sup>100</sup> *Hansen v The Queen* [2007] NZSC 7 at [192] (McGrath J), [92] (Tipping J) and [60] (Blanchard J). Elias CJ dissented on this point.

<sup>101</sup> For a summary of this process see *Hansen v The Queen* [2007] NZSC 7 at [92] (Tipping J).

<sup>102</sup> *Hansen v The Queen* [2007] NZSC 7 at [91] (Tipping J).

consistency with the rights as limited by a s 5 justification".<sup>103</sup> His Honour suggested that this approach did not conform to the purpose, structure and meaning of the *New Zealand Bill of Rights Act 1990* (NZ) as a whole.

Finally, it should be noted that there is no provision in the *New Zealand Bill of Rights Act 1990* (NZ) for courts to declare that legislation is incompatible with human rights.

### The Australian Capital Territory experience

The *Human Rights Act 2004* (ACT) came into force on 1 July 2004 as Australia's first *Bill of Rights*. Its interpretative provisions adapt the language of the New Zealand and United Kingdom laws. Section 30(1) provides:

In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

This direction is subject to s 139 of the *Legislation Act 2001* (ACT) which requires that "[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation".<sup>104</sup> Thus, s 30 appears to make a human rights interpretation of legislation available only when it is clear that the Legislative Assembly did not intend otherwise.<sup>105</sup> For this reason, it is arguably weaker than its United Kingdom counterpart in promoting a human rights dialogue. Professor Hilary Charlesworth has observed that s 30 "requires a novel approach" but that "the unusually explicit priority it accords to the purposive rule of statutory interpretation may erode [its] potential".<sup>106</sup> If the Supreme Court is satisfied that a law of the ACT is not consistent with a human right, it may issue a Declaration of Incompatibility.<sup>107</sup>

The precise operation and effect of the ACT interpretative provisions remains largely unexplored.<sup>108</sup> As at April 2007, there had been at least 11 decisions referring to ss 30 and 32 (see Appendix D). In *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation* [2006] ACTCA 9 (Higgins CJ, Connolly and Spender JJ), the Court of Appeal made comments suggesting it endorsed the approach of the United Kingdom House of Lords in *Ghaidan v Godin-Mendoza*.<sup>109</sup> These comments were adopted by Gray J in *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* [2006] ACTSC 122. However, there has not yet been a judgment clarifying exactly how s 30 is to operate, particularly in the context of the purposive approach required under s 139 of the *Legislation Act 2001* (ACT).

### The possible Victorian approach

Given the lack of jurisprudence regarding the ACT interpretative provisions, Victorian courts will either look to New Zealand or the United Kingdom for guidance on the application of s 32 of the Victorian Charter. As outlined above, there are important differences in the way in which the courts of these two jurisdictions have approached their respective interpretative functions. While it is difficult to predict the exact approach that Victorian courts will take to applying s 32, it is possible to make some observations.

The interpretative provisions of the Victorian Charter are modelled much more closely on the equivalent provisions in the United Kingdom. The language is similar and both Acts set up a process by which courts can make a formal statement on the incompatibility of legislation with the protected rights. The New Zealand legislation does not contain such a process and s 6 is worded slightly

<sup>103</sup> *Hansen v The Queen* [2007] NZSC 7 at [6] (Elias CJ).

<sup>104</sup> *Human Rights Act 2004* (ACT), s 30(2).

<sup>105</sup> Charlesworth H, n 60, p 115.

<sup>106</sup> Charlesworth H, n 60, p 117.

<sup>107</sup> *Human Rights Act 2004* (ACT), s 32.

<sup>108</sup> Department of Justice and Community Safety, *Twelve-Month Review of the Human Rights Act 2004* (2006), p 25; see [http://www.jcs.act.gov.au/humanrightsact/Publications/twelve\\_month\\_review.pdf](http://www.jcs.act.gov.au/humanrightsact/Publications/twelve_month_review.pdf) (viewed 1 April 2007); Charlesworth H, n 60, p 116.

<sup>109</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557.

differently, using the word “can” rather than “possible”; although it has been suggested that there is in fact no material difference with the United Kingdom equivalent.<sup>110</sup> Furthermore, the link between the *Human Rights Act 1998* (UK) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>111</sup> means that there is a broad body of European jurisprudence underpinning the United Kingdom legislation which might be attractive to Victorian courts. The New Zealand provisions do not have this same history. These factors make the jurisprudence of the United Kingdom more relevant and useful to Victorian courts.

However, the constitutional context in which the Victorian Charter operates is more similar to New Zealand than the United Kingdom. The introduction of the Victorian Charter was preceded by a public consultation process whereby a decision was made to adopt a model respecting parliamentary sovereignty by which courts should not be empowered to modify legislation. This is similar to the process by which the *New Zealand Bill of Rights Act 1990* (NZ) came into being. Furthermore, the Victorian Charter is not overshadowed by the European Court of Human Rights as is the case in the United Kingdom. For these reasons, a Victorian court might be more persuaded by the “less aggressive” New Zealand approach to applying the interpretative requirement; one in which legislative intent and purpose play a more significant role.

There is also a possibility that Victorian courts might follow the New Zealand method of considering the question of justifiable limits *before* applying the interpretative requirement of s 32. Section 7(2) of the Victorian Charter is in similar terms to s 5 of the *New Zealand Bill of Rights Act 1990* (NZ). It provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Whether or not Victorian courts use s 7(2) in the interpretative process will most likely be determined by an assessment of the purpose, structure and meaning of the Victorian Charter as a whole. Section 7(2) is arguably not in itself a rule of statutory interpretation. It is located in Pt 2 of the Victorian Charter and is directed to those enacting or prescribing limitations. It stands in contrast to s 32 which is clearly a rule of statutory interpretation and is located in Pt 3, Div3 of the Victorian Charter under the heading “Interpretation of Laws”.

Part V of this paper uses the facts of the *Al-Kateb* decision to demonstrate how the interpretative provisions of the Victorian Charter might be applied in practice. It is a speculative exercise only and, to simplify the analysis, it is assumed that the Charter would be applied in accordance with United Kingdom jurisprudence.

## **APPLYING THE INTERPRETATIVE PROVISIONS OF THE VICTORIAN CHARTER TO THE AL-KATEB CASE**

### **No requirement of ambiguity**

As explained above, the preliminary question in *Al-Kateb* was whether or not the relevant provisions of the *Migration Act*, when properly construed, authorised the indefinite detention of Mr Al-Kateb in circumstances where there was no real prospect of removing him from Australia. On one hand, the majority judges found that the legislation clearly and unambiguously required that Mr Al-Kateb be

<sup>110</sup> *Hansen v The Queen* [2007] NZSC 7 at [13] (Elias CJ) and [243] (McGrath J).

<sup>111</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, European Treaty Series No 5 (entered into force 1 November 1998).

detrained indefinitely. Applying traditional statutory interpretation principles, this meant that there was no room for considering whether the legislation contravened fundamental human rights.

On the other hand, the minority judges held that the legislation was ambiguous on this question. The *Migration Act* “[did] not in terms provide for a person to be kept in administrative detention permanently, or indefinitely”<sup>112</sup> nor did it make express provision for suspension of the detention in circumstances where removal was not reasonably practicable.<sup>113</sup> Therefore, their Honours were able to favour the interpretation that best accorded with the protection of fundamental rights.

The point to be emphasised is that s 32 of the Victorian Charter does not require that there be ambiguity in the relevant legislation for a rights-compatible interpretation to be adopted. This has been made clear in the United Kingdom context.<sup>114</sup> Therefore, if the Charter had applied in the *Al-Kateb* case, the majority judges would not have been able to avoid considering human rights issues. They would have been *required* to interpret the relevant provisions of the *Migration Act* compatibly with human rights.

Adopting the United Kingdom approach, this would have involved a three-step process. Firstly, their Honours would have considered whether the relevant provisions of the *Migration Act* were, on their face, incompatible with any of the human rights set out in Pt 2 of the Victorian Charter (“provisional incompatibility”). Second, if the relevant provisions were so incompatible, the judges would have been required to interpret them in a way that was compatible with human rights so far as it was possible to do so consistently with their purpose. Third, if a human-rights-consistent interpretation was not possible without displacing the purpose of the legislation, the court would have been required to issue a Declaration of Inconsistent Interpretation in accordance with s 36(2) of the Victorian Charter.

### Provisional incompatibility?

Adopting this approach, the first question the Court would have had to consider was whether the relevant provisions of the *Migration Act*, on their face, were inconsistent with any of the human rights set out in Pt 2 of the Victorian Charter. As explained, the view of the majority was that the legislation clearly provided for the indefinite detention of Mr Al-Kateb. The concept of indefinite detention enlivens several of the rights protected by the Victorian Charter. The most obvious is the right to freedom from arbitrary detention, which is protected by s 21(2). Other rights that might be triggered include the right to protection from torture and cruel, inhuman or degrading treatment,<sup>115</sup> the right to humane treatment when deprived of liberty,<sup>116</sup> the right to protection of the family<sup>117</sup> and the rights of the child.<sup>118</sup> Whether or not indefinite detention is incompatible with these rights is a question to be answered by reference to international law and the judgments of domestic, foreign and international courts and tribunals.<sup>119</sup>

The right to freedom from arbitrary detention is set out in s 21 of the Victorian Charter as follows:  
21. Right to liberty and security of person

<sup>112</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 575 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37.

<sup>113</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 576 (Gleeson CJ); 78 ALJR 1099; [2004] HCA 37.

<sup>114</sup> *R v A (No 2)* [2002] 1 AC 45 at [44] (Lord Steyn) and [108] (Lord Hope); *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [29] (Lord Nicholls).

<sup>115</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 10 provides “A person must not be – (a) subjected to torture; or (b) treated or punished in a cruel, inhuman or degrading way ...”.

<sup>116</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 22(1) provides “All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person”.

<sup>117</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 17(1) provides “Families are the fundamental group unit of society and are entitled to be protected by society and the State”.

<sup>118</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 17(2) provides “Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child”.

<sup>119</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 32(2). See also *Charter of Human Rights and Responsibilities Bill 2006* (Vic), Explanatory Memorandum, p 23.

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.<sup>120</sup>

The section is modelled on Art 9 of the ICCPR and “embodies safeguards that are well recognised in international law”.<sup>121</sup> As the following discussion shows, these safeguards do not permit the indefinite administrative detention of failed asylum seekers.

Article 9(1) of the ICCPR is in substantially the same terms as s 21(1) – (3) of the Victorian Charter. It certainly contemplates administrative detention but provides that it must be lawful and not “arbitrary”. The United Nations Human Rights Committee has indicated on several occasions that detention for immigration purposes where there is no prospect of removal in the reasonably foreseeable future will constitute “arbitrary” detention in breach of Art 9(1).<sup>122</sup> This is because such detention continues “beyond the period for which a State can provide appropriate justification”,<sup>123</sup> and is “not necessary in all the circumstances of the case”.<sup>124</sup> As the Human Rights and Equal Opportunity Commission argued in its written submissions in *SHDB v Goodwin* [2003] FCA 300:

Put simply, if there is no reasonable prospect of removal, the necessity for continued detention is not apparent, and further detention becomes disproportionate to the end being sought and thus arbitrary.<sup>125</sup>

The unlawfulness of indefinite detention has been confirmed many times by the United Nations Working Group on Arbitrary Detention. The Working Group was established in 1991<sup>126</sup> to investigate instances of alleged arbitrary deprivation of liberty. Its mandate was clarified and extended in 1997 to cover administrative custody of asylum-seekers and immigrants.<sup>127</sup> In 1999, it adopted a set of principles for determining whether or not the deprivation of liberty of asylum seekers and immigrants was arbitrary.<sup>128</sup> Principle 7 provided that “a maximum period should be set by law and the custody may in no case be unlimited or of excessive length”.

It is with this principle in mind that the Working Group visited Australia in June 2002 to investigate detention under the *Migration Act*. It reported as follows:

16. The Working Group finds particularly worrying the lengthy detention of unlawful non-citizens, especially those whose application (for asylum or for permission to remain in Australia) has been refused by a final decision and who are awaiting removal or deportation.<sup>129</sup>

The report recommended that “a reasonable time limit for detention” be set, after which the person “be given a bridging visa and lodged with family or friends, or in a reception centre located in an urban area”.<sup>130</sup>

<sup>120</sup> Subsections (4) – (8) are not relevant for the purposes of this exercise.

<sup>121</sup> *Charter of Human Rights and Responsibilities Bill 2006* (Vic), Explanatory Memorandum, p 16. A similar provision appears in Art 9 of the *Universal Declaration of Human Rights*, GA Res 217A, 3rd sess, 183rd plen mtg, UN Doc A/810 (1948).

<sup>122</sup> *Baban v Australia*, Communication No 1014/2001 (2003) at [7.2]; *Jalloh v The Netherlands*, Communication No 794/1998 (2002) at [8.2]; *Bakhtiyari v Australia*, Communication No 1069/2002 (2003) at [9.3]; *D and E v Australia*, Communication No 1050/2002 (2006) at [7.2].

<sup>123</sup> *A v Australia*, Communication No 560/1993 (1997) at [9.4]; *Baban v Australia*, Communication No 1014/2001 (2003) at [7.2]; *C v Australia*, Communication No 900/1999 (2002) at [8.2]; *Bakhtiyari v Australia*, Communication No 1069/2002 (2003) at [9.2]; *D and E v Australia*, Communication No 1050/2002 (2006) at [7.2].

<sup>124</sup> *A v Australia* Communication No 560/1993 (1997) at [9.2].

<sup>125</sup> Human Rights and Equal Opportunity Commission, *Submissions of the Human Rights and Equal Opportunity Commission, Seeking to Intervene* (2003) at [24]; see <http://www.hreoc.gov.au/legal/intervention/khafaji.htm> (viewed 1 April 2007).

<sup>126</sup> By resolution 1991/42 of the Commission on Human Rights.

<sup>127</sup> By resolution 1997/50 of the Commission on Human Rights.

<sup>128</sup> Commission on Human Rights Working Group on Arbitrary Detention, *Deliberation No 5*, UN Doc E/CN.4/2000/4/Annex 2 (1999).

<sup>129</sup> Commission on Human Rights Working Group on Arbitrary Detention, *Report of Working Group on Arbitrary Detention: Visit to Australia*, E/CN.4/2003/8/Add.2 (2002) at [16].

<sup>130</sup> Commission on Human Rights Working Group on Arbitrary Detention, n 129, at [64], Recommendation 2.

Moving away from international law to the decisions of foreign courts, judges of other common law jurisdictions also have regarded unlimited executive detention with “vigilance and suspicion”.<sup>131</sup> The courts of the United States,<sup>132</sup> the United Kingdom<sup>133</sup> and the Privy Council on appeal from Hong Kong<sup>134</sup> have all been defensive of personal liberty and withheld from the Executive a power of unlimited detention. According to Kirby J, the decisions “illustrate singly, and even more forcefully in combination, the resistance of the judges of the common law, since early times and until the present age, to the notion of unlimited executive power to deprive individuals of liberty”.<sup>135</sup> Despite different techniques of decision-making, the “common thread” running through all of the cases is that unlimited executive detention is “incompatible with contemporary notions of the rule of law”.<sup>136</sup>

In summary, international law and the domestic laws of other common law countries set limits on administrative detention. Detention will only be permissible for such time as it is necessary and can reasonably be justified. Section 21 of the Victorian Charter should be construed as setting the same limits.

It is highly likely that, in certain circumstances, indefinite detention will also infringe the rights protected by s 10 (freedom from torture, cruel, inhuman and degrading treatment),<sup>137</sup> s 22(1) (the right to humane treatment when deprived of liberty),<sup>138</sup> s 17(1) (protection of the family) and s 17(2) (protection of the child) of the Victorian Charter. The court would need to consider each of these rights in the context of the particular circumstances of the case. However, this is beyond the scope of this paper.

Returning then to *Al-Kateb*, the High Court would have had no choice but to conclude that the relevant provisions of the *Migration Act*, insofar as they provided for the indefinite detention of Mr Al-Kateb, were incompatible with the right protected by s 21 of the Victorian Charter. This “provisional incompatibility” would have enlivened the requirement of s 32 to interpret the relevant provisions compatibly with human rights.

### A human-rights-compatible interpretation?

It is clear from the above discussion that a human-rights-compatible interpretation of ss 196 and 198 of the *Migration Act* is one that restricts unlimited detention in favour of personal liberty. It is one that treats the detention of Mr Al-Kateb as being suspended until such time as his removal becomes a real likelihood and his detention becomes necessary for that purpose.

There are a number of different ways in which this interpretation could have been reached in the context of *Al-Kateb*. The decisions of Gleeson CJ and Gummow J are two such examples. Their Honours’ reasoning has been summarised above and need not be repeated now, except to say that the interpretative requirement in s 32 would have undoubtedly strengthened their decisions. Another possible human-rights-compatible interpretation might have involved “reading in” an implied provision that detention was suspended if Mr Al-Kateb could not be removed from Australia within a

<sup>131</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 620 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>132</sup> *Zadvydas v Davis* 533 US 678 (2001); *Rumsfeld v Padilla* 542 US 426; 72 USLW 4584 (2004); *Rasul v Bush* 542 US 466; 72 USLW 4596 (2004).

<sup>133</sup> *R v Governor of Durham Prison; Ex parte Singh* [1984] 1 WLR 704; 1 All ER 983; *A v Secretary of State for the Home Department* [2005] 2 AC 68.

<sup>134</sup> *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

<sup>135</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 619 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>136</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 620 (Kirby J); 78 ALJR 1099; [2004] HCA 37.

<sup>137</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), s 10, comes into play because of the damaging effect that long-term detention might have on the physical and mental health of a person such as Mr Al-Kateb. See *C v Australia*, Communication No 900/1999 (2002).

<sup>138</sup> If indefinite detention infringes s 10, it will also likely infringe s 22(1) of the Victorian Charter. This is because ss 10 and 22(1) are based on Arts 7 and 10(1) of the *International Covenant on Civil and Political Rights* which are said to complement each other: Human Rights Committee, *General Comment 20*, “Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Article 7)” (44th session, 1992) at [2].

certain period. Or it might have been possible to “read down” the language in the *Migration Act* in some way to allow for his release into the community on certain conditions.<sup>139</sup>

Regardless of the specific approach, the important question is whether the existence of the Victorian Charter would have led majority judges of the High Court in *Al-Kateb* to change tack and favour an interpretation defensive of individual liberty. This question turns largely on what their Honours might have considered was the “purpose” of detention under the *Migration Act*. Section 32(1) of Victorian Charter makes it clear that the court must adopt a human-rights-compatible interpretation of statutory provisions, but only insofar as it is possible to do so consistently with the purpose of those provisions.

One possible purpose of the provisions might have been the efficient processing of visa applications and removal of failed asylum seekers from Australia. This was certainly the view of the majority judges in *Al-Kateb*.<sup>140</sup> It is a purpose that would not have been frustrated by the release of Mr Al-Kateb into the community subject to various conditions. Efforts to find a country willing to take him could have continued while he resided in the community. If a country were found, he could have been detained once more and removed to that country as soon as reasonably practicable.

Alternatively, the detention may have been for the purpose of preventing unlawful non-citizens, like Mr Al-Kateb, from entering the Australian community at all. This approach might have found favour with McHugh J, who noted that one of the purposes of detention under the *Migration Act* was “to prevent the alien from entering Australia or the Australian community”.<sup>141</sup> It would have been inconsistent with this purpose to suspend Mr Al-Kateb’s detention and allow him to live in the community until he could be removed, regardless of any conditions that might have been imposed. In these circumstances, their Honours would have had no choice but to issue a Declaration of Inconsistent Interpretation under s 36(2). The Declaration would have been forwarded to the Attorney-General and the Minister who would have had six months to prepare a written response and to file it in Parliament.<sup>142</sup> It is important to note that there would have been no obligation on the Parliament to change the relevant provisions of the *Migration Act*.

From a human rights perspective, the use of s 32 in a way that avoids the need to make a Declaration of Inconsistent Interpretation is obviously preferable. This is consistent with the approach of the courts in the United Kingdom that a human-rights-compatible interpretation is the “prime remedial remedy” and the making of a Declaration “must always be an exceptional course”.<sup>143</sup> However, if a Declaration was the only option in *Al-Kateb*, it might have resulted in amendment of the *Migration Act* by Parliament, thereby avoiding the indefinite detention of Mr Al-Kateb.

## CONCLUSION

While the potential application of s 32 by the High Court in Mr Al-Kateb’s case is necessarily speculative, it is very likely that their Honours’ decision would have been different if Australia had a legislative *Bill of Rights* like the Victorian Charter. The Court’s decision would have been required to be consistent with Parliament’s clear direction that all laws be interpreted compatibly with human rights, as far as possible, and with the legislative purpose. In following this direction, a decision upholding the indefinite detention of Mr Al-Kateb may have been avoided.

In the United Kingdom, the interpretative provisions of the *Human Rights Act 1998* (UK) have been lauded as enabling English judges to “do justice in a way which was not previously open” to

<sup>139</sup> *R v A (No 2)* [2002] 1 AC 45 at [44] (Lord Steyn). See also *Ghaidan v Godin-Mendoza* (2004) 2 AC 557; *R v Lambert* [2002] 2 AC 545 at [81] (Lord Hope); *R v Carass* [2002] 1 WLR 1714; *R v Offen (No 2)* [2001] 1 WLR 253; 2 All ER 154.

<sup>140</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 583 (McHugh J), 638 (Hayne J), 659 and 660 (Callinan J); 78 ALJR 1099; [2004] HCA 37. Heydon J agreed with McHugh J.

<sup>141</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 584 (McHugh J); 78 ALJR 1099; [2004] HCA 37. In supporting this view, McHugh J quoted from *O’Keefe v Calwell* where Latham CJ said that the deportation of an unwanted immigrant was “a measure of protection of the community from undesired infiltration”: *O’Keefe v Calwell* (1949) 77 CLR 261 at 278.

<sup>142</sup> *Charter of Human Rights and Responsibilities 2006* (Vic), ss 36(6), 36(7) and 37.

<sup>143</sup> *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at [50] (Lord Steyn).

them.<sup>144</sup> It is hoped that the Victorian Charter will, upon its entry into force on 1 January 2008, provide the same opportunity to judges in Victoria.

### APPENDIX A: CASES APPLYING S 3(1) OF THE HUMAN RIGHTS ACT 1998 (UK)

Decision <sup>145</sup>	Court	Legislation
<i>R v Offen (No 2)</i> [2001] 1 WLR 253; 2 All ER 154	Court of Appeal	<i>Crime (Sentences) Act 1997</i> , s 2
<i>R v A (No 2)</i> [2002] 1 AC 45	House of Lords	<i>Youth Justice and Criminal Evidence Act 1999</i> , s 41
<i>Cachia v Faluyi</i> [2001] 1 WLR 1966; [2002] 1 All ER 192	Court of Appeal	<i>Fatal Accidents Act 1976</i> , s 2(3)
<i>R v Lambert</i> [2002] 2 AC 545	House of Lords	<i>Misuse of Drugs Act 1971</i> , s 28
<i>Goode v Martin</i> [2002] 1 WLR 1828; 1 All ER 620	Court of Appeal	<i>Civil Procedure Rules</i> , r 17.4(2)
<i>R v Carass</i> [2002] 1 WLR 1714	Court of Appeal	<i>Insolvency Act 1986</i> , s 206
<i>R (Van Hoogstraten) v Governor of Belmarsh Prison</i> [2003] 1 WLR 263; 4 All ER 309	High Court	<i>Prison Rules 1999</i> , r 2(1)
<i>Sheldrake v Director of Public Prosecutions</i> [2004] QB 487	High Court	<i>Road Traffic Act 1988</i> , s 5
<i>R (Sim) v Parole Board</i> [2003] 2 WLR 1374	High Court	<i>Criminal Justice Act 1991</i> , ss 44A(4) and 39
<i>R (Middleton) v West Somerset Coroner</i> [2004] 2 AC 182	House of Lords	<i>Coroners Act 1988</i> , s 11(5)(b); <i>Coroners Rules 1984</i> , rr 36, 42 and 43
<i>Ghaidan v Ghodin-Mendoza</i> [2004] 2 AC 557	House of Lords	<i>Rent Act 1977</i> , Sch 1, [2]-[3]
<i>Beaulane Properties Ltd v Palmer</i> [2005] 3 WLR 554; 4 All ER 461	High Court	<i>Land Registration Act 1925</i> , s 75

<sup>144</sup> *Cachia v Faluyi* [2001] 1 WLR 1966; [2002] 1 All ER 192 at [21] (Brooke LJ).

<sup>145</sup> Appendix A was compiled primarily with reference to the Appendix to the opinion of Lord Steyn in *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at 580-582 and Department of Constitutional Affairs, *Declarations of Incompatibility Made Under Section 4 of the Human Rights Act 1998*: see <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> (viewed 1 April 2007).

Decision <sup>145</sup>	Court	Legislation
<i>Culnane v Morris</i> [2006] 1 WLR 2880; 2 All ER 149	High Court	<i>Defamation Act 1952</i> , s 10
<i>Land v Land (Deceased)</i> [2007] 1 All ER 324	High Court	<i>Forfeiture Act 1982</i> , s 3; <i>Inheritance (Provision for Family and Dependants) Act 1975</i> , s 2

#### APPENDIX B: DECLARATIONS OF INCOMPATIBILITY MADE UNDER S 4(1) OF THE HUMAN RIGHTS ACT 1998 (UK)

Decision <sup>146</sup>	Court	Legislation declared incompatible
<i>R (H) v Mental Health Review Tribunal for North and East London Region</i> [2002] QB 1	Court of Appeal	<i>Mental Health Act 1983</i> , s 73
<i>R v McR</i> [2002] NIQB 58	High Court	<i>Offences Against the Person Act 1861</i> , s 62
<i>International Transport Roth GmbH v Secretary of State for the Home Department</i> [2003] QB 728	Court of Appeal	Penalty scheme contained in Pt II of the <i>Immigration and Asylum Act 1999</i>
<i>R (Anderson) v Secretary of State for the Home Department</i> [2003] 1 AC 837	House of Lords	<i>Crime (Sentences) Act 1997</i> , s 29
<i>R (D) v Secretary of State for the Home Department</i> [2003] 1 WLR 1315	High Court	<i>Mental Health Act 1983</i> , s 74
<i>Blood and Tarbuck v Secretary of State for Health</i> (Sullivan J), (unreported, High Court) 28 February 2003	High Court	<i>Human Fertilisation and Embryology Act 1990</i> , s 28(6)(b)
<i>Bellinger v Bellinger</i> [2003] 2 AC 467	House of Lords	<i>Matrimonial Causes Act 1973</i> , s 11(c)
<i>R (M) v Secretary of State for Health</i> [2003] EWHC 1094	High Court	<i>Mental Health Act 1983</i> , ss 26, 29

<sup>146</sup> Appendix B was compiled primarily with reference to the Appendix to the opinion of Lord Steyn in *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at 580-582 and Department of Constitutional Affairs, *Declarations of Incompatibility Made Under Section 4 of the Human Rights Act 1998*: see <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> (viewed 1 April 2007).

Decision <sup>146</sup>	Court	Legislation declared incompatible
<i>R (Hooper) v Secretary of State for Work and Pensions</i> [2003] EWCA Civ 875	Court of Appeal	<i>Social Security Contributions and Benefits Act 1992</i> , ss 36, 37
<i>R (Wilkinson) v Inland Revenue Commissioners</i> [2003] 1 WLR 2683; 3 All ER 719	Court of Appeal	<i>Income and Corporation Taxes Act 1988</i> , s 262
<i>A v Secretary of State for the Home Department</i> [2005] 2 AC 68	House of Lords	<i>Anti-terrorism, Crime and Security Act 2001</i> , s 23; <i>Human Rights Act 1998 (Designated Derogation) Order 2001</i>
<i>R (Morris) v Westminster City Council (No 3)</i> [2006] 1 WLR 505	Court of Appeal	<i>Housing Act 1996</i> , s 185
<i>R (Gabaj) v First Secretary of State</i> (unreported, High Court) 28 March 2006	High Court	<i>Housing Act 1996</i> , s 185
<i>R (Baiai) v Secretary of State for the Home Department</i> [2006] EWHC 823 and [2006] EWHC 1454 (Admin)	High Court	<i>Asylum and Immigration (Treatment of Claimants, etc) Act 2004</i> , s 19
<i>R (Wright) v Secretary of State for Health</i> [2006] EWHC 2886 (Admin); [2007] 1 All ER 825	High Court	Register established under the <i>Care Standards Act 2000</i>

#### APPENDIX C: DECLARATIONS OF INCOMPATIBILITY MADE UNDER S 4(1) OF THE HUMAN RIGHTS ACT 1998 (UK) BUT OVERTUNED ON APPEAL

Decision that overturned declaration <sup>147</sup>	Court	Legislation declared incompatible
<i>R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions</i> [2003] 2 AC 295	House of Lords	Various provisions of the <i>Town and Country Planning Act 1990</i> ; <i>Transport and Works Act 1992</i> ; <i>Highways Act 1980</i> ; and <i>Acquisition of Land Act 1981</i> .
<i>Wilson v First County Trust Ltd (No 2)</i> [2004] 1 AC 816	House of Lords	<i>Consumer Credit Act 1974</i> , s 127(3)
<i>Matthews v Ministry of Defence</i> [2003] 1 AC 1163	House of Lords	<i>Crown Proceedings Act 1947</i> , s 10

<sup>147</sup> Appendix C was compiled primarily with reference to the Appendix to the opinion of Lord Steyn in *Ghaidan v Godin-Mendoza* (2004) 2 AC 557 at 580-582 and Department of Constitutional Affairs, *Declarations of Incompatibility Made Under Section 4 of the Human Rights Act 1998*: see <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> (viewed 1 April 2007).

Decision that overturned declaration <sup>147</sup>	Court	Legislation declared incompatible
<i>R (Uttley) v Secretary of State for the Home Department</i> [2004] 1 WLR 2278; 4 All ER 1	House of Lords	<i>Criminal Justice Act 1991</i> , ss 33(2), 37(4)(a) and 39
<i>R (MH) v Secretary of State for Health</i> [2006] 1 AC 441	House of Lords	<i>Mental Health Act 1983</i> , s 2
<i>Secretary of State for the Home Department v MB</i> [2006] EWCA Civ 1140; 3 WLR 839	Court of Appeal	<i>Prevention of Terrorism Act 2005</i>

#### APPENDIX D: CASES CONSIDERING SS 30 AND 32 OF THE HUMAN RIGHTS ACT 2004 (ACT)

Decision <sup>148</sup>	Court	Judge
<i>Firestone v Australian National University</i> (2004) 184 FLR 53; [2004] ACTSC 76	Supreme Court	Higgins CJ
<i>R v YL</i> (2004) 187 FLR 84; [2004] ACTSC 115	Supreme Court	Crispin J
<i>Fletcher v Harris</i> (2005) 190 FLR 59; [2005] ACTSC 27	Supreme Court	Higgins CJ
<i>R v Khajehnoori</i> (2005) 156 A Crim R 197; [2005] ACTSC 76	Supreme Court	Gyles J
<i>SI bhnf CC v KS bhnf IS</i> (2005) 195 FLR 151; [2005] ACTSC 125	Supreme Court	Higgins CJ
<i>Bragon Traders Pty Ltd v ACT Gambling and Racing Commission</i> [2006] ACTAAT 3	Administrative Appeals Tribunal	Peedom, President
<i>Pappas v Noble</i> (2006) 199 FLR 116; [2006] ACTSC 39	Supreme Court	Master Harper
<i>R v PJ</i> [2006] ACTSC 37	Supreme Court	Connolly J
<i>R v Caruso</i> [2006] ACTSC 45	Supreme Court	Crispin J
<i>Kingsley's Chicken Pty Limited v Queensland Investment Corporation</i> [2006] ACTCA 9	Court of Appeal	Higgins CJ, Connolly and Spender JJ

<sup>148</sup> Appendix D was compiled with reference to The Australian National University, *ACT Human Rights Act Case Database*: see <http://acthra.anu.edu.au/cases/index.php> (viewed 1 April 2007).

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<b>Decision</b> <sup>148</sup>	<b>Court</b>	<b>Judge</b>
<i>Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority</i> [2006] ACTSC 122	Supreme Court	Gray J