

AN OPPORTUNITY MISSED? COMMENT ON *S.I. bhnf C.C. v K.S. bhnf I.S.* [2005] ACTSC 125

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The case of *S.I. by his next friend C.C. v K.S. by his next friend I.S.*¹ (*SI v KS*) is perhaps the most significant case decided under the *Human Rights Act 2004* (ACT) since this legislative bill of rights came into force on 1 July 2004. It is the first, and so far the only, case in which the ACT Supreme Court has been asked to declare that legislation is incompatible with the *Human Rights Act*. It is also the first case in which both the ACT Attorney-General and the ACT Human Rights Commissioner have intervened to make submissions about the application of the *Human Rights Act*. The judgment of Higgins CJ is ground-breaking in the bold approach taken to the interpretation of legislation, apparently pursuant to the *Human Rights Act*. Yet *SI v KS* is also significant for the lack of explicit discussion about the operative provisions of the *Human Rights Act*, and for the questions it leaves unanswered.

The case involved a protection order sought by one child against another child attending the same Canberra high school. On 29 March 2005 the respondent, K.S. had been granted an interim protection order against the appellant in the Magistrate's Court after giving

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¹ [2005] ACTSC 125 (2 December 2005), available at <http://www.courts.act.gov.au/supreme/search/judgments.asp>

some brief oral evidence. The matter was set down for a full hearing on 21 April 2005. The appellant, S.I., was not present at the interim proceedings. He was served with a copy of the interim order on 5 April and shortly afterwards the appellant and his mother sought legal advice from the ACT Legal Aid Commission about contesting the order. His Legal Aid solicitor was not aware of a very recent amendment to the *Domestic Violence and Protection Orders Act 2001* (ACT) ('DPVO Act') which had come into effect on 25 March 2005.

This amendment introduced a new section 51A of the DVPO Act, which effectively required a person who wished to object to a final protection order to note this objection on the endorsement copy of the interim order and return it to the Court. Section 51A (3)(b) states that:

The interim order becomes a final order against the respondent.. if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before the return date for the application for the final order.

Section 51A(4)(b) provides that "*a final order under subsection (3) comes into force.. on the return date for the application for the final order.*"

This amendment was introduced in February 2005 following a review of the ACT protection order system, which examined, among other things, the consistency of the legislation with the Model Domestic Violence Laws 1999, which were the result of a

collaborative project between the Commonwealth and all States and Territories.² The ACT government's response to the review recommended that the ACT legislation 'be amended to provide that interim orders "crystallize" in accordance with section 23 of the MDVL.'³ The commentary on this section in the Model Domestic Violence Laws Report states that the purpose of this provision is "to obviate unnecessary court appearances and consequent trauma for the victims of domestic violence."⁴ It notes that crystallisation only occurs

if the defendant fails to respond within the nominated period or responds with his or her consent to the orders becoming final. The defendant is equally at liberty to prevent crystallisation of orders by lodging an objection and then to oppose the protection application at the subsequent hearing.⁵

It is notable that section 51A of the DVPO Act was introduced after the *Human Rights Act 2004* had come into force, and that it was certified by the Attorney-General Jon Stanhope to be compatible with the *Human Rights Act*.⁶ The compatibility statement itself does not set out the basis for this opinion, but the explanatory statement accompanying the Bill noted generally that any restrictions imposed upon human rights could be justified under section 28 of the *Human Rights Act*.⁷ This section allows limitations on human rights which can be demonstrably justified in a free and democratic

² Domestic Violence Legislation Working Group, *Model Domestic Violence Laws Report*, April 1999, available on the Commonwealth Attorney-General's website: <http://www.ag.gov.au>

³ Jon Stanhope, ACT Attorney-General, *Report on the Review of the Protection Orders Act 2001*, April 2004, available at :

<http://www.jcs.act.gov.au/eLibrary/ReportOnTheReviewOfTheProtectionOrdersACT2001.pdf>

⁴ Domestic Violence Legislation Working Group, *Model Domestic Violence Laws Report*, April 1999, at p113.

⁵ Ibid.

⁶ pursuant to *Human Rights Act 2004* (ACT), s 37.

⁷ Explanatory Statement to the Domestic Violence and Protection Orders Amendment Bill 2005 at page 2.

society, and has been interpreted as imposing a test of proportionality on such limitations.⁸

As the appellant in *SI v KS* had not received legal advice about section 51A, he was unaware of the need to serve notice upon the Court seven days before the hearing, and thus did not complete or return the endorsement copy of the interim order. However, he duly attended the Magistrates Court with his mother on 21 April for the hearing. The matter was listed before a Senior Deputy Registrar, who witnessed the appellant's mother's application to be appointed as the appellant's litigation guardian, but explained that they could not contest the order because it had automatically become a final order 'at one minute past midnight' that morning. The final protection order was signed by a Deputy Registrar, and expressed to be for a period of 12 months.

Although the order had purportedly come into existence before the appointment of the appellant's mother as his litigation guardian, regulation 48(3) of the *Domestic Violence and Protection Order Regulations 2002* (ACT) provided that an order made against a child who did not have a litigation guardian appointed at the time was still a valid order.

The appellant, represented by the Legal Aid Commission, and barrister Chris Erskine, appealed to the Supreme Court to have the final order set aside, and sought a declaration of incompatibility, namely that section 51A of the DPVO Act was not consistent with the right to a fair trial, the right to liberty, and the right to freedom of movement under the

⁸ See eg Department of Justice and Community Safety 'The Human Rights Act 2004 – A plain English Guide' available at < <http://www.jcs.act.gov.au/humanrightsact/Publications/PlainEnglishGuide.doc> >, p 9-10

Human Rights Act. The appellant also contended that regulation 48(3) was beyond the power conferred on the executive under section 106 of the DPVO Act, as this general regulation power, construed in light of the *Human Rights Act*, would not authorise regulations which breached the right to a fair trial.

The *Human Rights Act 2004* (ACT)

The *Human Rights Act* does not contain a direct right of action for a breach of human rights, but protects rights through an interpretive provision and through the power given to the Supreme Court to declare legislation incompatible with human rights.

The interpretive mechanism is contained in section 30(1) of the *Human Rights Act*, which provides that in working out the meaning of legislation, an interpretation that is consistent with the protected human rights is as far as possible to be preferred. 'Working out the meaning' of a law is not limited to resolving the interpretation ambiguous or obscure provisions, it is also defined in section (3)(b) to include '*confirming or displacing the apparent meaning of the law.*' This interpretive provision is complicated by the stipulation in section 30(2) that the interpretive power is subject to the 'purpose test' set out in section 139 of the *Legislation Act 2001*, which requires that the interpretation that would best achieve the purpose of a law is to be preferred over any other interpretation. Thus section 30 of the *Human Rights Act* rather confusingly directs the courts, when constructing legislation, to prefer an interpretation which is consistent with human rights, subject to preferring the interpretation which would best achieve the purpose of the legislation being construed.

If legislation cannot be interpreted to be consistent with human right, the *Human Rights Act* provides in section 32 that the Supreme Court of the ACT may issue a declaration of incompatibility. Such a declaration does not affect the validity of the law, and is thus of less immediate assistance to the parties involved in a particular case. It may, however, result in reform of the law over the longer term, as the declaration must be tabled in the Legislative Assembly, and the Attorney-General must present a written response within 6 months. Both the issues of interpretation and a declaration of incompatibility were raised in the *SI v KS* case.

The *Human Rights Act* requires the notification of both the ACT Attorney-General and the ACT Human Rights Commissioner where the Supreme Court is considering making a declaration of incompatibility in a proceeding.⁹ The Attorney-General has a general right of intervention in any case involving the *Human Rights Act*, whereas the Human Rights Commissioner may intervene with the leave of the court.¹⁰ In *SI v KS* both intervened.

Submissions of the Attorney-General and the Human Rights Commissioner

The Attorney-General and the Human Rights Commissioner, Dr Helen Watchirs, each sought to provide guidance to the Court on the approach to be taken in assessing the compatibility of section 51A of the DVPO Act with the *Human Rights Act*, and to assist the Court with relevant international human rights jurisprudence. The submissions of the Human Rights Commissioner, which were adopted by the appellant, supported the

⁹ *Human Rights Act 2004* (ACT), s 34.

¹⁰ *Human Rights Act 2004* (ACT), s 35 and s 36.

appellant's call for a declaration of incompatibility. The Attorney-General submitted that a declaration was not necessary in these circumstances.

Both the Human Rights Commissioner and the Attorney-General accepted that the natural construction of section 51A was to provide for interim protection orders to crystallize automatically into final orders where the notice of objection was not returned within the specified time. They agreed that the DVPO Act served a critical objective in safeguarding the human rights of victims of violence, and that section 51A had a legitimate aim to avoid delays and difficulties for the victim where the respondent fails to appear at Court. However, while each presented similar submissions about the content of the human right to a fair trial, the Human Rights Commissioner considered that the automatic crystallization of interim orders infringed this right, and was not a justifiable limitation under section 28 of the *Human Rights Act*, while the Attorney-General reached the opposite conclusions.

The fact that the appellant in this case was a child raised additional considerations. The Human Rights Commissioner considered that section 51A provided inadequate protection for children who were respondents to protection orders, and who needed special assistance to defend proceedings. In her view, regulation 48 further undermined the rights of children by providing that a child could not defend proceedings without a litigation guardian, but that a valid order could be made against the child in the absence of such a guardian. The Commissioner found that this amounted to a breach of the rights of children in section 11 of the *Human Rights Act* and the right to equality in section 8 of the

Act. The Attorney-General argued that there were sufficient safeguards in the DVPO Act to ensure that a child's interests and ability to participate in proceedings were protected.¹¹

As the Human Rights Commissioner considered that the natural interpretation of section 51A was inconsistent with human rights, she went on to consider whether the human rights breaches could be cured by re-interpreting the wording of section 51A, pursuant to section 30 of the *Human Rights Act*, rather than proceeding straight to a declaration of incompatibility. The Commissioner cited the judgment of Lord Steyn in *Ghaidan v Godin Mendoza*,¹² where he noted that the equivalent interpretation provision in the UK Human Rights Act may '*require a court to read in words which change the meaning of the enacted legislation so as to make it Convention-compliant*' provided that such an interpretation is compatible with the '*underlying thrust*' of the legislation being construed.¹³ While the Attorney-General did not find it necessary to address an alternative construction of the legislation in his submissions, he endorsed the approach of Lord Steyn in the earlier case of *R v A (No 2)*,¹⁴ in particular that a declaration of incompatibility should be treated as a measure of last resort, to be avoided unless a limitation on rights was explicit or '*stated in terms.*'¹⁵

However, although the Human Rights Commissioner considered that section 30 allowed a broad scope for re-interpreting legislation, she submitted that in this case, the reading in of a whole new procedure to increase the notice period or to allow a proper hearing

¹¹ Submission of the Attorney General, para 133.

¹² [2004] UKHL 30.

¹³ Submission of the Human Rights Commissioner, para 47.

¹⁴ [2002] 1 AC 45 at [44].

¹⁵ Submission of the Attorney General, para 29.

would be difficult. She noted that ‘*As these steps would require a reconstruction of the clear words of section 51A of the DPVO Act the court would need substantial ingenuity to achieve this result.*’¹⁶ Accordingly, the Human Rights Commissioner concluded that a declaration of incompatibility was likely to be the more appropriate response.¹⁷

The Judgment

In his judgment, and indeed during the hearing, Chief Justice Terry Higgins quickly made it clear that in his view, interim orders which crystallize into final orders without a right of review in the Magistrate’s Court would breach the right to a fair trial. He stated that: ‘*it is clear that if the DVPO Act permitted orders to be made with no recourse to set aside such an order, even if made ex parte, it would offend human rights standards.*’¹⁸ Further, he considered that if regulation 48 was to be interpreted as requiring an order to be made against a minor in the absence of a litigation guardian, then this would breach the rights of children protected under the *Human Rights Act*.¹⁹

Although the appellant had requested a declaration of incompatibility under section 32 of the *Human Rights Act*, and the parties’ submissions dealt extensively with this issue, the Chief Justice appears to have decided early on that such a declaration was not necessary, and does not canvas the possibility in his judgment. Instead, his reasons focus exclusively on the issue of interpretation of the DVPO Act and regulations.

¹⁶ Submission of the Human Rights Commissioner, para 49.

¹⁷ Ibid, para 50.

¹⁸ *SI bhmf CC v KS bhmf IS* [2005] ACTSC 125 at para 71.

¹⁹ Ibid para 112.

Higgins CJ considered the legislative history of section 51A of the DVPO Act, and the second reading speech by the Attorney-General where he had stated, in relation to the protection order scheme as a whole, that *'there is a requirement that orders must be sought in a court of law, that the issue be tested and that the potential for a response be provided.'*²⁰ Higgins CJ also noted that the amending legislation had been declared by the Attorney-General to be compatible with human rights, and concluded that:

It is clear therefore, that neither the Attorney-General nor any other member of the Legislative Assembly regarded the proposed provisions of s51A of the DVPO Act as derogating from the right of the appellant to question his liability to be subjected to a personal protection order and having that liability and the extent of it determined by a Magistrate.²¹

This statement appears somewhat at odds with the submissions filed by the Attorney-General in the proceedings which suggested that the Attorney-General (or at least, his legal advisers) had a clear understanding of the self-executing nature of orders under section 51A, and did not consider that a literal interpretation of that section breached human rights.

Nevertheless, Higgins CJ reasoned that although section 51A states that:

The interim order becomes a final order against the respondent...if the respondent does not return the endorsement copy to the Magistrates Court at least 7 days before the return date for the application for the final order,

²⁰ Ibid, para 85, citing Hansard, Debates of the ACT Legislative Assembly, p1160.

²¹ Ibid, para 86.

the correct interpretation of this section, as intended by the legislature, was that the legislation:

(1) empowers but does not mandate the making of a final order in the absence of a conforming objection;

(2) does not oust the other provisions of the DVPO Act relevant to the making of a final order including that it may be made only by a magistrate who is obliged, of course, to act judicially;

(3) does not preclude a magistrate from declining to make a final order against a minor who has no litigation guardian. Indeed, such a result would be likely to follow if no litigation guardian had been appointed at least until that deficiency was remedied.

(4) does not preclude a respondent to an order made ex parte from applying to set it aside, as of right if irregularly made and as a matter of discretion if sufficient cause be shown.²²

²² Ibid, para 98.

Having put forward this construction, Higgins CJ then explored the human rights issues in more depth. He considered the scope of the right to a fair trial and the rights of children under the *Human Rights Act* and the ICCPR rights from which they are derived.

He concluded that:

It is, therefore, apparent that the DVPO Act and Regulations, to be *Human Rights Act* compliant, as the Attorney-General has certified them to be, can only have been intended to be interpreted as I have determined above. Any contrary view would involve a court...making covert orders against a person with no adequate human rights compliant avenue of review.²³

Curiously, the judgment does not at any stage mention section 30 of the *Human Rights Act*, which allows the Court to prefer an interpretation of legislation or regulations which is consistent with human rights. It seems that Higgins CJ considered the operation of the *Human Rights Act* to be self explanatory once a potential inconsistency had been identified. The position is complicated by fact that that the *Human Rights Act* was not the only ground on which Higgins CJ relied in reaching his conclusion on interpretation. He also placed significant weight on the Great Charter (*Magna Carta*),²⁴ which he found would support a conclusion that due process, including the right to a fair hearing, was not to be denied in legislation. Higgins CJ considered that the right to a fair trial in the

²³ Ibid, paras 113-114.

²⁴ Ibid, para 72. The *Magna Carta (1297)* 25 Edw 1 c 29 is continued by the *Legislation Act 2001* (ACT) Schedule 1 and remains part of the ACT law. Although Higgins CJ cites Article 20 of the Magna Carta 1215, as the predecessor of clause 29 in the 1297 version, it appears that the reference should be to Article 39.

Human Rights Act was simply a re-statement of the Charter which still exists as a law of the Territory.

The judgment also relied significantly on the potential breach of the doctrine of separation of powers that would be entailed if final orders could come into effect as an administrative process rather than as the result of a judicial hearing. The Chief Justice noted that “ *Even absent the HR [Human Rights] Act such a result, if it was authorised by the DVPO Act, should be regarded as ultra vires by reference to the principles adopted by the High Court in Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51.*²⁵ For a combination of these reasons, and on the basis of his construction of the legislation, Higgins CJ granted the appeal, and set the final protection order aside.

In some ways, the decision in *SI v KS* might be regarded as a win-win outcome, at least for the interveners. While Higgins CJ rejected the Attorney-General’s analysis of the consistency of section 51A with human rights, he avoided a declaration of incompatibility, which might have been politically sensitive for the government, given that it had certified the legislation to be compatible with human rights. The judgment was consistent with the analysis of the Human Rights Commissioner, but appeared to take an even more robust approach to the scope of the interpretive power in the *Human Rights Act* than she had dared to suggest. Nevertheless, the interveners are likely to have been disappointed that their detailed submissions on the *Human Rights Act* and the international case law were not reflected to a greater extent in the judgment.

²⁵ *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, para 100.

Although on one level the judgment might be taken as endorsing a strong position on judicial re-interpretation of unambiguous wording, following the approach of the House of Lords as expressed in *Ghaidan v Godin Mendoza*,²⁶ the lack of explicit reasoning creates some difficulty in using this judgment as a precedent on the scope of section 30 of the *Human Rights Act*. It seems quite remarkable that section 30 is not mentioned once in the judgment, given the detailed survey provided by Higgins CJ of a range of other relevant legislation, such as the *Magistrates Court Act 1930* (ACT) and the *Magistrates Court Rules 1932* (ACT).²⁷

The issue is also somewhat obscured by the other factors in this case, such as the roles of the *Magna Carta* and the separation of powers arguments in reaching the conclusion about construction. Higgins CJ does not make it clear on which basis the decision rests, and whether, in the absence of the other factors, he would nevertheless reached this construction under section 30 of the *Human Rights Act*.

The need for guidance by the Supreme Court on the scope of section 30 is apparent from the fairly limited use which has been made of the *Human Rights Act* before and after this case. In particular, in the two cases where issues of interpretation have been raised in the Administrative Appeals Tribunal, *Merritt v Commissioner for Housing*²⁸ and *Bragon Traders Pty Ltd v Commissioner for Gaming and Racing*,²⁹ the Administrative Appeals

²⁶ [2004] UKHL 30.

²⁷ SI bhnf CC v KS bhnf IS [2005] ACTSC 125 at para 67-70.

²⁸ [2006] ACTAAT 3.

²⁹ [2004]ACTAAT 37.

Tribunal Members have considered that an uncertainty or ambiguity in the existing legislation is a necessary pre-requisite for the application of section 30. This narrow interpretation does not sit easily with the definition of ‘*working out the meaning*’ of a Territory law in section 30(3)(b) of the *Human Rights Act* which includes ‘*confirming or displacing the apparent meaning of the law*’ (emphasis added).

Commenting more recently on the *SI v KS* case in a speech to new practitioners, the Chief Justice suggested that he had relied on the interpretive power under the *Human Rights Act* in reaching his decision, stating that:

It is a misconception that Human Rights legislation must take the form of an overarching Bill of Rights in order to have teeth. Last year I held that an Act could be interpreted as inferring that a young man had a right to be heard as to whether he would be subject to a Protection Order. The effect of the order would have been to restrict his freedom of movement, and on its face the legislation did not allow the young man to speak in his defence. At first instance he was denied that opportunity. However, by reference to the *Human Rights Act* it was possible to read the legislation in a way that permitted the young man to have a fair hearing before becoming subject to such an order.³⁰

If the judgment in *SI v KS* can be taken as an application of section 30 of the *Human Rights Act*, it appears to endorse the interpretive approach of the House of Lords in *Ghaidan*. Nevertheless, a question remains as to the effect of section 30(2) in the ACT

³⁰ Chief Justice Terry Higgins, ‘Admission Speech to New Practitioners,’ Canberra, 17 February 2006, available at < <http://www.courts.act.gov.au/supreme> >

Human Rights Act, which requires the courts to prefer an interpretation consistent with the purpose of the law. This section has no equivalent in the UK *Human Rights Act*. Does this section require the courts to prefer an approach consistent with the apparent purpose of the legislative provision in question, or should the courts instead focus on the ‘underlying thrust’ or purpose of the legislation as a whole, which would give a broader scope for re-interpretation of a particular section? The decision in *SI v KS* is silent on this issue, but the outcome may suggest the latter approach.

A related question that is left unanswered by the decision is how the dividing line is to be drawn between the interpretive power in section 30 of the *Human Rights Act* and the power to make a declaration of incompatibility under section 32. Although the courts have power to re-interpret legislation to make it compatible with human rights, there must be a threshold at which the legislative intent is so clear that the court cannot override this unequivocal meaning to substitute its own provisions, and should instead issue a declaration of incompatibility. This would then allow the legislature to have the final say as to whether the offending legislation should be amended. Even Lord Steyn in *Ghaidan* was conscious of a “*Rubicon which the courts may not cross*”³¹ in carrying out a human rights interpretation process.

It is arguable that the decision in *SI v KS* was approaching this Rubicon. Section 51A of the DVPO was quite clear on its face, and could not be corrected by simply ‘reading in’ a word or two. Each of the parties apparently considered that the natural meaning of section 51A of the DPVO and legislative intention behind the provision was to establish a

³¹ Lord Steyn, *Ghaidan v Godin Mendoza* [2004] UKHL 30 at para 49.

system whereby interim orders would crystallize into final orders, without hearing, where the respondent failed to return the endorsement copy of the interim order. The interpretation taken by Higgins CJ effectively establishes a new scheme in which Magistrates are interposed and given a discretionary role in making the final orders.

The dividing line between the interpretation power and the power to make declarations of incompatibility under the *Human Rights Act* would seem to be of real significance to the creation of a human rights dialogue. It is arguable that if the balance is tilted too far in the direction of interpretation, the voice of the legislature could be silenced by that of the court, which could re-write even the clearest of legislation in accordance with its own assessment of human rights. This would leave the courts vulnerable to criticism of judicial activism and defeating the will of the people's elected representatives.³²

However if the courts are too timid in their approach to interpretation the *Human Rights Act* may have little impact in improving the quality and application of legislation from a human rights standpoint, especially if the courts are also reticent to issue declarations of incompatibility. It is particularly important that the courts are able to critically re-assess settled interpretations of laws which pre-date the *Human Rights Act*, as such laws and their interpretation will not necessarily have been informed by a human rights perspective. It appears that to serve the objectives of the *Human Rights Act* a robust approach to interpretation must be coupled with a clear demarcation of judicial boundaries.

³² See eg James Allan's criticisms of 'judicial vandalism' in the use of interpretive provisions in 'Portia, Bassiano or Dick the Butcher? Constraining Judges in the Twenty First Century' (2006) 17 KCLJ 1 at p 9-12.

In conclusion, it is certainly arguable that the outcome in *SI v KS* was the correct one, although the approach of the Chief Justice to statutory construction is the most ingenious yet attempted under the *Human Rights Act*. Nevertheless, the decision sets a challenge to those cases which follow, to unearth the implicit reasoning in the judgment so that it can be more readily applied to cases involving other rights protected under the *Human Rights Act* where the *Magna Carta* and the doctrine of separation of powers may have less relevance. It will also be left to future cases to more clearly delineate the boundary between the interpretive power in section 30 and the power to make a declaration of incompatibility under section 32 of the *Human Rights Act*.³³ When this division is more clearly mapped, *SI v KS* may well be regarded as the high water mark of the interpretive approach, with the murky depths of the Rubicon directly beyond.

³³ See for example the recent ex tempore decision of Master Harper in *Pappas v Noble* [2006] ACTSC 39 (27 April 2006).