THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2010 3281

P J B — Appellant

v

MELBOURNE HEALTH — First respondent

STATE TRUSTEES LTD — Second respondent

JUDGE:	BELL J
WHERE HELD:	Melbourne
DATE OF HEARING:	31 January 2011
DATE OF JUDGMENT:	19 July 2011
CASE MAY BE CITED AS:	Patrick's Case
MEDIUM NEUTRAL CITATION:	[2011] VSC 327

ADMINISTRATIVE LAW – appeal from Victorian Civil and Administrative Tribunal – appointment of administrator who would probably sell person's home – whether person unable to make reasonable judgments about their estate when they understood money and were meeting obligations of ownership – whether tribunal erred in law in interpreting appointment provisions – whether appointment power available – interpretation of provisions affecting fundamental common law rights and freedoms and basic human rights – right to choose where to live, against arbitrary interference with home and to own and quietly enjoy property – principle of legality – application to interpretation of general but non-ambiguous provisions – application where legitimate dispute about scope of permitted interference with rights and freedoms – relevance of *Convention on the Rights of People with Disabilities* – *Guardianship and Administration Act 1986* (Vic), ss 4(2), 46(1)-(4) – *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 7(2), 32(1), (1), 38(1),(2), 39(1).

HUMAN RIGHTS – discretionary appointment of administrator by Victorian Civil and Administrative Tribunal – appeal on grounds of error of law – whether tribunal misinterpreted appointment provisions – interpreting legislation consistently with human rights – scope and application of principle of legality – scope of human rights to equality, to choose where to live, against arbitrary interference with privacy and home and deprivation of property not in accordance with law – jurisprudential value of decisions of Human Rights Committee – whether tribunal a public authority – whether appointment of administrator incompatible with human rights and therefore unlawful – challenging discretionary decisions for human rights unlawfulness in error of law appeals – proportionality – nature and standard of review – intensity of review – whether tribunal to be afforded a 'margin of appreciation' or 'deference' – weight and latitude in proportionality analysis – 'arbitrarily' – *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 7(2), 32(1), (2), 38(1),(2), 39(1).

APPEARANCES:	Counsel	Solicitors
For the appellant	Mr Paul Bingham	Mental Health Legal Centre Inc
For the first respondent	No appearance	
For the second respondent	No appearance	
For the Attorney-General for the State of Victoria (intervening)	Ms Joanna Davidson	Victorian Government Solicitor's Office
For the Victorian Equal Opportunity and Human Rights Commission (intervening)	Ms Tessa Van Duyn	Solicitor for the Victorian Equal Opportunity and Human Rights Commission

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HIS HONOUR:

INTRODUCTION

1 Patrick is aged 58 years, suffers from a mental illness and has been an involuntary patient in a hospital operated by Melbourne Health for over ten years. In a stable condition under his compulsory medication, he has met from the hospital the few practical and financial obligations of owning a modest home in a Melbourne suburb.

2 Patrick wants to return home and live independently in the community. This is quite unrealistic because experience shows he would stop taking his medication, which he wrongly believes he does not need. His mental health would seriously deteriorate, leading to another of his frequent readmissions to hospital and a long, slow recovery. Also, he cannot care for himself properly due to physical disabilities.

3 The hospital wants to move Patrick to supported accommodation in a hostel, which he opposes. Thinking the move would be more likely to succeed if Patrick did not continue to own his home, the hospital took action to address that issue. It applied to the Victorian Civil and Administrative Tribunal for an administrator to be appointed over his estate.

4 Under the *Guardianship and Administration Act 1986* (Vic), the tribunal decided Patrick was a person with a disability who was unable to make reasonable judgments about his estate and needed an administrator. Accepting Patrick had a 'very strong connection with his home', it decided nevertheless that judgments about his estate could not be separated from where it was in his best interests to live. It appointed State Trustees Ltd to be an unlimited administrator, knowing it would probably sell Patrick's home, rejecting Patrick's brother, who would not.

5 In this court, Patrick appeals against the tribunal's order on a question of law. He contends he manages his finances and home reasonably well and the administration order unjustifiably interferes with his human rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic). He seeks orders setting aside the appointment and remitting the matter to the tribunal for reconsideration according to law.

GROUNDS OF APPEAL

Notice of appeal

6 By leave granted by the court, the appeal is brought under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) 'on a question of law'. It has been notified by Melbourne Health and State Trustees that they will not take part in the appeal. No submissions have been received from them on any issues.

7 The notice of appeal specified eight questions of law, out of which arose eight grounds of appeal. The appeal was conducted by reference to those grounds, which I summarise here:

(1) Taking into account considerations which where not relevant to the proper exercise of the power in s 46 of the *Guardianship and Administration Act*, being to sell the home to prevent Patrick from behaving in certain ways.

(2) Misinterpreting s 46 by concluding that, on the proper application of that section, appointing the administrator could not be separated from where it was in Patrick's best interests to live.

(3) Misinterpreting s 46 by concluding an administration order could and should be made if it was in Patrick's best interests when s 4(2) prevented an order being made unless it was not possible to give effect to his wishes.

(4) Taking into account an irrelevant consideration, being whether Patrick was unwilling or unable to take medication and live independently in the community.

(5) Coming to a conclusion for which there was no evidence, being that a decision needed to be made at the time about whether the house should be sold.

(6) Coming to the conclusion for which there was no evidence that Patrick may or may not be meeting all his financial obligations when the evidence was that he was.

(7) Failing to take into account as a relevant consideration under s 4(2)(c) the wishes of Patrick that his brother should be the administrator if one was to be appointed.

(8) Taking into account a consideration which was not relevant on the proper interpretation of s 46, being that State Trustees would be appointed to be the administrator as Patrick has appointed it to be his executor under his will.

Notice of questions arising under Charter

8 After considering the submissions made on Patrick's behalf, I determined that questions of law arose with respect to the application and interpretation of the Charter. At my direction and pursuant to s 35(1), he gave notice of those questions to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission, and also to Melbourne Health and State Trustees.

9 The questions of law which arose with respect to the application and interpretation of the Charter were specified in the notice as follows:

> 2(a) The questions of law which arise that relates to the application of the Charter of Human Rights and Responsibilities ('the Charter') is:
>
> (i) When exercising its jurisdiction under the *Guardianship and Administration Act 1986*, and particularly its jurisdiction to appoint an Administrator under s 46(1), is the Tribunal acting as a public authority under the Charter within ss 4(1) and ss 38(1)?
>
> (ii) In an appeal under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* raising human rights issues of this kind, should the Court afford what, if any, margin of appreciation to the decision of the Tribunal and does the decision of the Tribunal in the present case come within or exceed any such margin?
>
> 2(b) The questions which arise with respect to the interpretation of a statutory provision in accordance with the Charter:-
>
> (i) Accepting the authority of *R v Momcilovic* (2010) 265 ALR 751, and given the requirement in s 32(1) of the Charter to interpret the provisions of the *Guardianship and Administration Act 1986* so far as it is possible to do so, consistently with their purpose, in a manner that is compatible with human rights, what is the proper interpretation of ss 4(2) and ss 46(1) of the *Guardianship and Administration Act 1986* and did the Tribunal so interpret those provisions?
>
> (ii) On the proper interpretation of those provisions, was the Tribunal required to exercise its discretion to appoint an Administrator in a manner that was compatible with the human rights of the person in terms of s 7(2) of the Charter?;
>
> 3 Did the Tribunal so exercise that discretion?

10 In response to the notice, the court has received written submissions about the application and interpretation of the Charter from Patrick, the Attorney-General and the commission. The Attorney-General and the commission have confined themselves to the issues of principle which were raised and have not gone into the

merits of the appeal. The court has not received submissions on those issues from Melbourne Health or State Trustees.

11 I will begin with the legal framework governing the order which the tribunal made.

GUARDIANSHIP AND ADMINISTRATION ACT

Purposes and core principles

12 The purpose of the *Guardianship and Administration Act* is to enable persons with a disability to have a guardian or administrator appointed if they need one (s 1).[1] The objects of the Act include providing for the appointment of a Public Advocate (s 4(1)(b)) and enabling the making of guardianship and administration orders (s 4(1)(c)). The provisions of the Act show it has the broader purpose of enabling the interests of persons whose faculties are impaired by disability to be protected when they cannot make reasonable judgments themselves by reason of the disability and need someone to do so for them. As the Full Court of the Supreme Court of Western Australia said of analogous legislation in *Re Guardianship and Administration Board*,[2] the purpose of such legislation is:

> to ensure that [the person's] financial affairs and other welfare is not jeopardised by improvident, or ill-considered personal decisions or action, or by unscrupulous or ill-advised influence of relatives, friends and others who may deliberately or inadvertently exploit the vulnerability of the person in need of assistance and protection. [3]

13 Under s 4(2), three core principles – the least restrictive means, the best interests of the person and the wishes of the person – determine decision-making under the *Guardianship and Administration Act.* As Cavanough J held in *XYZ v State Trustee Ltd*,[4] the principles apply without qualification to the exercise of all powers and discretions under the Act, including the appointment of administrators in s 46(1). The principal of personal autonomy must be taken into account under other provisions.[5]

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1 Section 1 defines 'disability' exhaustively to mean 'intellectual impairment, mental disorder, brain injury, physical disability or dementia'.
2 (2003) 27 WAR 475.
3 Ibid, 490 (EM Heenan J, Anderson, Steytler, Miller and McLure JJ agreeing).
4 (2006) 25 VAR 402, [34]-[35].
5 Sections 15(a)(i), 28(2)(b) and (c) and 49(2)(a).

14 The least restrictive means principle requires the adoption of means which are the least restrictive of the freedom of decision and action of the person with the disability (s 4(2)(a)). The significance of this principle has been repeatedly emphasised by this court, as by Fullagar, Tadgell and JD Phillips JJA in *McDonald v Guardianship and Administration Board*:

> Consideration must be given to the question whether other and less restrictive means than an administration order might meet the need of the [represented person]. Moreover, if an administration order is made, the order must be that which is in the circumstances the least restrictive of the freedom of decision and action of the [person]. Plainly enough, the [legislation] recognises that administration orders may be designed to vary in their reach and their intrusiveness; and it is expected that any administration order made will be tailored to the circumstances, being privative only the extent actually required. [6]

15 As well as being specified in the general provisions of s 4(2)(a), this principle is specified in particular provisions of the Act. It is a function of the public advocate to promote the provision of services which minimise the restrictions on the rights of persons with a disability (s 15(a)(ii)). An order for the appointment of a guardian (s 22(2)(a) and (5)) or administrator (s 46(2)(a) and (4)) cannot be made without considering, and any order must implement, the least restrictive means principle.

16 The best interests of the person principle requires the best interests of the person with a disability to be promoted (s 4(2)(b)). It is the primary principle in relation to the making and operation of guardianship and administration orders. Thus, orders for the appointment of a guardian (s 22(3)) or administrator (s 46(3)) cannot be made without the tribunal being satisfied that the order is in the best interests of that person. To be eligible for appointment as a guardian (s 23(1)(a)) or an administrator (s 47(1)(c)(i)), the person must satisfy the tribunal that they will act in the best interests of the person. The primary obligation of a guardian (s 28(1)) and administrator (s 49(1)) is to exercise their powers in the best interests of the person.

17 The wishes of the person principle is that the wishes of the person with the disability are to be given effect to wherever possible (s 4(2)(c)). The court has also repeatedly

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6 [1993] 1 VR 521, 531-532.

stressed its importance.[7] In making an order by way of guardianship (s 22(2)(a)) or administration (s 46(2)(b)), the wishes of the person with the disability must be considered, where ascertainable.[8] So too in determining who is to be a guardian (s 23(2)(ab)) or an administrator (s 46(2)(b)). Guardians (s 28(2)(e)) and administrators (s 49(2)(b)) must exercise their powers in consultation with the person as far as possible, subject to their primary responsibility to act in their best interests (ss 28(1) and 49(1)).

18 Personal autonomy is inherent in the least restrictive means and the wishes of the person principles. The purpose of requiring the adoption of the least restrictive means is to leave the person with as much personal autonomy as possible over their personal and financial affairs. The same value is inherent in the requirement to give effect to the person's wishes, where ascertainable and wherever possible. Specific provisions of the Act emphasise the importance of promoting, maintaining and enhancing the personal autonomy of persons with a disability. It is a function of the public advocate to facilitate the provision of services which promote the development and ability of persons with a disability to act independently (s 15(a)(i)). Orders for guardianship (s 22(1)(b)) and administration (s 46(1)(a)(ii)) can only be made when the person is unable, by reason of their disability, to make reasonable judgments for themselves. I have already referred to the application of the least restrictive means principle and the wishes of the person principle when making and administering such orders. Further, a guardian (s 28(2)(c)) and administrator (s 49(2)(a)) must exercise their powers in such a way that, as far as possible, encourages and assists the person to make reasonable judgments themselves. However, the best interests of the person is the primary consideration.

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7 *Moore v Guardianship and Administration Board* [1990] VR 902, 916-917 (Gobbo J); *Qumsieh v Guardianship and Administration Board* [1998] VSCA 45, [6] (Winneke P. Brooking and Ormiston JJA); *XYZ v State Trustees Ltd* (2006) 25 VAR 402, [29], [33]-[34] (Cavanough J).

8 Section 46(2)(b) was introduced by the *Guardianship and Administration (Further Amendment) Act 2006* (Vic), making explicit what Cavanough J found to be implicit in *XYZ v State Trustees Ltd* (2006) 25 VAR 402, [34].

19 In *McDonald v Guardianship and Administration Board*,[9] Fullagar, Tadgell and JD Phillips JJA said:

> Guardianship and administration orders are calculated to achieve, at the instance of any person at all, a far-reaching deprivation of the freedom of action not only of represented persons but or near relatives of such persons. This is not to deny that there may be cases where the jurisdiction [to make such orders] may be justifiably invoked. The [legislation], however, prescribes very important safeguards against the making of inappropriate guardianship and administration orders.[10]

It is the core principles that prescribe those safeguards.

Appointing guardians

20 Section 22(1) permits a guardian to be appointed by order if the tribunal is satisfied that the person has a disability, 'is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to his or her person or circumstances' and is in need of a guardian. The core principles and personal autonomy must be considered.[11] There are provisions governing eligibility to be a guardian which reflect the personal nature of their responsibilities.[12]

21 Under the provisions, a guardian may be appointed with plenary[13] or limited[14] powers. A plenary guardian has all the powers and duties of a parent with respect to a child,[15] including the power to decide where[16] and with whom[17] the person is to live, whether and what work the person is to do[18] and what health care should be provided in their best interests.[19] The administrator can legally substitute their decisions for those of the person in every respect in relation to matters within their authority as guardians,[20] but must always act in their best interests[21] and as far as

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9 [1993] 1 VR 521.
10 Ibid, 530.
11 Section 22(2)-(5).
12 Section 23.
13 Section 24(1).
14 Section 25.
15 Section 24(1).
16 Section 24(2)(a).
17 Section 24(2)(b).
18 Section 24(2)(c).
19 Section 24(2)(d).
20 Section 24(2).
21 Section 28(1)

possible respecting their personal autonomy and wishes.[22] These provisions thus deal with matters concerning the accommodation, care and circumstances of the person rather than matters relating to their property and estate.

Appointing administrators

22 The unlimited administrator was appointed to Patrick's estate by order under s 46(1)-(4) of the *Guardianship and Administration Act*. To make such an appointment, s 46(1)(a) requires the tribunal to be satisfied that:

> the person in respect of whom an application for an order appointing an administrator is made –
>
> (i) is a person with a disability; and
>
> (ii) is unable to make reasonable judgments in respect of the matters relating to any part of her or his estate by reason of the disability; and
>
> (iii) is in need of an administrator of her or his estate; …

23 The power in s 46(1) is discretionary. As Cavanough J held in *XYZ v State Trustees Ltd*,[23] s 46(1)(a) specifies 'three separate and cumulative requirements'. That the tribunal is satisfied of the matters referred to in s 46(1)(a) is a condition precedent to the jurisdiction to exercise that discretion. Only if those requirements are satisfied does the discretion to appoint an administrator arise. In determining whether the person is in need of an administrator, and in making any order, the tribunal must specifically consider and apply the core principles (ss 4(2)(a),(b) and (c) and 46(2)(a) and (b), (3) and (4)).

24 The purpose for appointing an administrator has been considered. In *Edwards v Edwards*,[24] J Forrest J held an administrator under the *Guardianship and Administration Act* was 'responsible for preserving and protecting the assets of the represented person'. In *Re Guardianship and Administration Board*,[25] the court said an administrator under analogous legislation was responsible for:

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22 Section 28(2).
23 (2006) 25 VAR 402, [44].
24 (2009) 25 VR 40, [12]
25 (2003) 27 WAR 475.

> conserving the property and financial resources of the disabled person to ensure that they are available for his or her own needs, welfare and enjoyment and are not dissipated ... [and] in cases where expenditure or imminent disposition of property are necessary or advantageous, … scrutinising the transaction to see that it is justifiable or provident having regard to all the circumstances, bearing always in mind the continuing and future needs of the person whose estate is under administration. [26]

25 Under the *Guardianship and Administration Act*, an administrator may be appointed with limited or unlimited powers.[27] One with unlimited powers 'has the general care and management of the estate of a represented person.'[28] For that purpose, the administrator has the power to take possession of[29] and sell[30] the person's property, to collect their income[31] and execute and sign documents on their behalf.[32] Ownership of the property of the person is not thereby transferred to or vested in the administrator as such, but it becomes totally and exclusively managed and controlled by them and the person loses their capacity to deal with their property in every way.[33] The administrator can legally substitute their decisions for those of the person in every respect in relation to their estate,[34] but must always act in their best interests[35] and as far as possible respecting their personal autonomy and wishes.[36]

Public Advocate

26 It is a purpose of the *Guardianship and Administration Act* to provide for the appointment of a public advocate (s 4(1)(b)). The public advocate is appointed by the Governor in Council for a period of seven years (s 14(1), (2) and cl (1)(a)(b) of Schedule 3) and must take an oath or make an affirmation of office (cl 3 of Schedule 3).

27 The functions of the public advocate are to promote and facilitate the provision of services and facilities for persons with a disability (s 15(a)), to promote public awareness of the legislation and the need to protect these persons from abuse and

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26 Ibid, 490 (EM Heenan J, Anderson, Steytler, Miller and McLure JJ agreeing).
27 Section 48(1).
28 Section 58B(1)(a).
29 Section 58B(1)(b).
30 Section 58B(2)(g).
31 Section 58B(2)(a).
32 Section 58B(2)(m).
33 Section 52(1)-(2) (the interests of third-parties acting bona fide and without notice are protected by s 52(3)).
34 Section 48(3).
35 Section 49(1).
36 Section 49(2)(a) and (b).

exploitation, to protect their rights (s 15(c)) and to conduct investigations and report to the responsible minister (s 15(d)).

28 The powers and duties of the public advocate include being appointed as a guardian or administrator (s 16(1)(a)), making applications to the tribunal for the appointment of a guardian or administrator (s 16(1)(b)), submitting reports to the tribunal (s 16(1)(d)), advocating on behalf of persons with a disability (s 16(1)(e)(f)) and investigating complaints or allegations concerning their alleged exploitation or abuse (s 16(1)(h)). The advocate has powers of visitation (s 27(1)), to obtain information from people, governments and service providers for the purposes of investigations concerning persons with a disability (s 16(1)(ha)) and to inspect premises (s 18A(1)(a)) and records (s 18A(1)(d)).

29 These powers and duties are supplemented by the provisions of the *Victorian Civil and Administrative Tribunal Act*. By cl 33 of Schedule 1 of that Act, the public advocate may intervene and is entitled to be joined as a party to a proceeding under the *Guardianship and Administration Act*. By cl 35, the tribunal may refer a matter to the public advocate for investigation and report (sub-s (1)), which the public advocate must carry out (sub-s 2)) and the tribunal must consider (sub-s (3)).

30 The tribunal was also operating within a human rights framework, as follows.

PROTECTING HUMAN RIGHTS

Charter

31 The main purpose of the *Charter of Human Rights and Responsibilities Act* is 'to protect and promote human rights'.[37] The Charter is based on the fundamental principle, expressed in the Preamble, that 'all people are born free and equal in dignity and rights' and 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'.

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37 Section 1(2)(a) - (e).

32 The bedrock value of human rights is that every individual without exception has a unique human dignity which is their birthright. The dignity of the individual and their entitlement to human rights protection 'cannot be separated from universal human nature'[38] and is to be respected whether the person is able or disabled. This principle was stated with pellucid clarity by Brennan J in *Marion's Case* which, like the present, concerned the human rights of a person with a mental disability:

> Human dignity is a value common to our municipal law and to international instruments relating to human rights. The law will protect equally the dignity of the hale and hearty and the dignity of the weak and lame; of the frail baby and of the frail aged; of the intellectually able and of the intellectually disabled. Thus municipal law satisfies the requirement of the first paragraph of the 1971 United Nations Declaration on the Rights of Mentally Retarded Persons which reads:
>
> > 'The mentally retarded person has, to the maximum degree of feasibility, the same rights as other human beings.'
>
> Our law admits of no discrimination against the weak and disadvantaged in their human dignity. Intellectual disability justifies no impairment of human dignity, no invasion of the right to personal integrity. [39]

33 The different treatment of people because of their disability and not their individual needs gives rise to a grievous loss of dignity and personal self-worth, as well as a deep sense of grievance. People who are treated to their disadvantage by reference to their disabled attribute and not as valuable individuals are thereby made to feel reduced and stigmatised. The harm which this causes to the individual was explained by Iacobucci J in *Law v Canada*:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within … society. [40]

34 The Charter provides a framework for protecting and promoting the human rights of all natural persons,[41] including persons with a disability. It does so by specifying the

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38 *South West Africa Cases (2nd Phase)* [1966] ICJR 6, 297 (Judge Tanaka).

39 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 266.

40 [1999] 1 SCR 497, [53].

41 Section 6(1) provides that only persons have human rights. Section 3(1) defines 'person' to mean 'a human being'.

relevant rights in Part 2 (ss 7-27), requiring legislation to be interpreted compatibly with those rights, if it can be (s 32(1)), establishing a scrutiny mechanism to ensure the human rights compatibility of new legislation (ss 28-30), requiring a public authority to act compatibly with human rights, subject to contrary law (s 38(1) and (2)) and conferring certain additional functions on the Victorian Human Rights and Equal Opportunity Commission (ss 40-43).

35 The engagement of human rights in the Charter brings into operation the principle of interpretation in s 32(1) and the obligation of public authorities in s 38(1) to act compatibly with human rights (subject to contrary law: s 38(2)), which are both issues in the appeal. It is therefore necessary to identify which human rights were engaged and whether the tribunal was a public authority when it made the administration order.

Human rights engaged

Scope of human rights

36 Human rights are engaged when the act or decision of a public authority places limitations or restrictions on, or interferes with, the human rights of a person. For the purpose of determining whether there is such a limitation, restriction or interference, rights are interpreted purposively and, in the words of Warren CJ in *Re Application under the Major Crime (Investigative Powers) Act 2004*,[42] 'in the broadest possible way'. Following that decision, Hargrave J said in *Director of Public Prosecutions v Ali (No 2*) that the general approach was to interpret the rights in the Charter 'broadly and in a non-technical sense.'[43] Speaking of the *New Zealand Bill of Rights Act 1990*, Elias CJ said in *R v Hansen*[44] that the 'meaning of the right is to be ascertained from the "cardinal values" it embodies.' In reference to the *Canadian Charter of Rights and Freedoms*, Dickson J said in *R v Big M Drug Mart Ltd*[45] that the 'meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose*

42 (2009) 24 VR 415, [80]; followed in *Castles v Secretary to the Department of Justice* [2010] VSC 310, [55] (Emerton J).
43 [2010] VSC 503, [29].
44 [2007] 3 NZLR 1, [22].
45 [1985] 1 SCR 295, [116].

of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.' Reasonable and demonstrable limitation of the right is not taken into account when identifying its scope.[46]

37 In the present case, the tribunal appointed an unlimited administrator to Patrick's estate, which consisted mainly of his home. The tribunal correctly decided he was a person with a disability by reason of his mental ill-health. It decided he was not capable of making reasonable decisions about his estate by reason of that disability. By force of statute, the appointment of the administrator transferred complete management and control of Patrick's estate exclusively to the administrator.

38 The potentially grave impact of an administration order on an individual cannot be doubted. As was held by Fullagar, Tadgell and JD Phillips JJA in *McDonald v Guardianship and Administration Board*:[47] 'Guardianship and administration orders are calculated to achieve, at the instance of any person at all, a far-reaching deprivation of the freedom of action … of represented persons'. Their Honours went on to say:[48] 'The appointment of an administrator under the [legislation] is also obviously capable of being gravely intrusive upon the rights of a represented person'. In *XYZ v State Trustees Ltd*,[49] Cavanough J said statutory administration affected the 'civil liberties and … dignity' of the individual. It is now necessary to look more closely at the nature of this impact.

39 The tribunal did not identify which of Patrick's human rights were engaged but it did proceed on the basis that his human rights were affected and that the interference had to be justified.

40 Patrick submitted that the rights engaged were freedom of movement (s 12), privacy and home (s 13) and property (s 20). The commission relied on equality (s 8), freedom

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46 See generally *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, [75]-[91] (Bell J); *Director of Housing v Sudi* [2010] VCAT 328, [90] (Bell J).

47 [1993] 1 VR 521, 530.

48 Ibid, 531-532.

49 (2006) 25 VAR 402, [43].

of movement and privacy. The Attorney-General submitted the principal right engaged was privacy and home.

Equality

41 Section 8(3) of the Charter specifies the human right to 'the equal protection of the law without discrimination' and to 'effective protection against discrimination'. The discrimination to which this right refers is discrimination within the meaning, and on the basis of the attributes listed in s 6, of the *Equal Opportunity Act 1995* (Vic).[50] Those attributes include 'impairment', which is itself defined in s 4(1) to include 'a mental or psychological disease or disorder'.

42 I analysed the scope and application of the equality right in *Lifestyle Communities Ltd (No 3)*.[51] It is sufficient to say here that it is a right of fundamental importance which is high in the hierarchy of rights recognised in the Charter.

43 The provisions of the *Guardianship and Administration Act* allowing for the appointment of an administrator to the estate of a person with a disability are directed at and therefore discriminatory in their application towards persons with a mental illness, like Patrick. As he is suffering from a mental disorder, he is a person with a disability under s 3(1) of that Act. By reason of having the attribute of being disabled in that manner, he is liable to have an administrator appointed in respect of his estate when a person without that attribute would not be so liable.[52] When the administrator was appointed, the equality right in s 8(3) was therefore engaged.

44 The *Guardianship and Administration Act* is but one of many statutes which are discriminatory in this sense for the very reason that it is directed at this category of person. Being enacted to provide necessary protection for and meet the special needs of people with disabilities, the human rights limitations in the legislation would in general terms be justified under s 7(2) of the Charter. But the engagement of the equality right in s 8(3) has consequences which still must be considered, both in terms

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50 Definition of 'discrimination' in s 3(1) of the Charter.
51 [2009] VCAT 1869, [105]ff.
52 Section 8(1) of the *Equal Opportunity Act*.

of the interpretation of the specific provisions of the *Guardianship and Administration Act* and the lawfulness of the particular exercise of the powers and discretions which they confer. The values and interests represented andprotected by the human right to equality are at the heart of Patrick's complaints.

Freedom of movement

45 Section 12 of the Charter provides that '[e]very person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live'.

46 I identified the scope of the right to freedom of movement in *Re Kracke and Mental Health Review Board*.[53] It protects a person's liberty of movement in Victoria and their freedom to choose where to live.

47 Patrick is not currently free to move freely within Victoria, or to choose where to live, because he lives in detention in a hospital pursuant to an involuntary treatment order made under the *Mental Health Ac 1986* (Vic). But the appointment of the administrator over his estate will probably restrict his future choice of where to live because the administrator is likely to sell his home. The tribunal did not find, and the evidence does not establish, that Patrick will never be well enough to return to his home. His strong connection with his home has not been severed, indeed quite the contrary.

48 Section 12 of the Charter reflects the correlative right in art 12 of the *International Covenant on Civil and Political Rights*.[54] For the reasons I give below, in determining the scope of the former I will here take into account the general comments and findings of the Human Rights Committee in relation to the scope of the latter.

49 Of art 12 of the covenant, General Comment 27 states (among other things) that it protects the right of persons 'to establish themselves in a place of their choice'[55] and

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53 [2009] 29 VAR 1, [578]-[588].

54 Opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976, in accordance with Article 49).

55 Officer of the High Commissioner for Human Rights, Human Rights Committee, General Comment 27 (1999), [5].

'to reside in a place of one's choice'.[56] For a woman (and therefore for all people), it protects her right 'to choose her residence'.[57]

50 The committee has interpreted art 12 as conferring a right to choose to live in a particular place, not just in a particular area. Thus, in *Lovelace v Canada*,[58] a statutory restriction on the right of a Canadian Indian to live in a particular reserve was found to interfere with this right (although in a justified way).[59] Accordingly, a leading text describes the freedom of choice of residence as 'a freedom to set up permanent or temporary residence at any location within a State Parties territory.'[60]

51 As with the right to home in s 13(a), whether there has been an interference with the right to freedom of movement in s 12 should be approached in a simple and non-technical manner. Such interference can be caused directly or indirectly by a process of law and seeking or attempting to activate such processes are also encompassed (see below).[61]

52 Where a person resides in their own home and wishes to continue to do so, taking legal steps to transfer complete and exclusive management and control of the home to an administrator, including the power to sell the home against the person's wishes, and actually effecting such a transfer by the appointment of an administrator, represents an interference with their freedom to choose where to live. Where a person is in mental health detention, wishes to return to their home as their choice of residence and their connection with the home has not been severed, taking those steps or effecting such a transfer is likewise an interference with that freedom. The right to freedom of movement in s 12 is therefore engaged in the circumstances of this case.

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56 Ibid [7].
57 Ibid [6].
58 Communication No 24/1977: Canada, 30/7/1981, CCPR/C/13/D/24/1977.
59 Ibid [16].
60 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004) [12.06].
61 *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328, [34] (Bell J).

Privacy and home

Engagement

53 Section 13(a) of the Charter provides: 'A person has the right – (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with'. Due to their special needs and vulnerability, people with a mental illness are at particular risk of interference with their human rights to privacy and home. An important purpose of the Charter is to afford due protection against that interference, where it is arbitrary or unlawful. As Emerton J said in *Castles v Secretary, Department of Justice,*[62] the right to privacy is 'of considerable amplitude'.

54 In *Re Kracke and Mental Health Review Board*, I identified the scope of the right to privacy in s 13(a) of the Charter as follows:

> The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.
>
> The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.[63]

Later, in *Director of Housing v Sudi*,[64] I described the rights in s 13(a) in full:

> The rights to privacy, family, home and correspondence in section 13 (a) are of fundamental importance to the scheme of the Charter. The purpose of the rights is to protect and enhance the liberty of the person - the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure everybody can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society. The rights protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family and that capacity for communication (by whatever means) with others which is their correspondence, each of which is indispensable for their personal actuation, freedom of expression and social engagement.[65]

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62 [2010] VSC 310, [79].

63 (2009) 29 VAR 1, [619]-[620].

64 [2010] VCAT 328,[29].

65 See generally Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 377 ff.

55 The purpose of the human right against arbitrary or unlawful interference with the home is the protection of the security and autonomy of the person in their home. It is in their home that a person is able to be themselves in the private and personal sense. That is fundamentally important for the person's social and family life and the attainment of their full potential as an individual. The great personal significance of the home to the individual is amply demonstrated by the present case. Patrick is much attached to his home. It is where he spent many years being a husband and step-father.

56 Patrick is not presently living in his home. He is living in a psychiatric hospital as an involuntary patient under an order made pursuant to the *Mental Health Act 1986*. He has been living in the hospital for some years and is not expected to return to the community in the near future. This raises the question whether his house is his home for the purposes of s 13(a) of the Charter.

57 In *Director of Housing v Sudi*, I identified how a person's home is to be identified for human rights purposes:

> In human rights, identifying a person's 'home' is approached in a common-sense and pragmatic way. It depends on the person showing 'sufficient and continuous links with a place in order to establish that it is his home'.[66] Manfred Nowak, speaking of article 17(1) of the ICCPR, says 'the home symbolises a place of refuge where one can develop and enjoy domestic peace, harmony and warmth without fear of disturbance.'[67] If someone's links with the place where they live are 'close enough and continuous enough', that is their home.[68] The general approach is 'to apply a simple, factual and untechnical test, taking full account of the factual circumstances but with very little of legal niceties.'[69] The concept of 'home' in human rights is autonomous[70] and is not based on 'domestic notions of title, legal and equitable rights, and interests'[71] In short, it is a question of fact, not law. [72]

58 Applying these principles here, Patrick's house is his home for the purposes of the human right to home in s 13(a) of the Charter though he is not living there by reason

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66 *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [9] (Lord Bingham), [67] (Lord Hope) (approving *Buckley v United Kingdom* (1996) 23 EHRR 101 and other Strasbourg authorities).
67 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 399.
68 *Kay v Lambeth London Borough Council* [2006] 2 AC 465, [28] (Lord Bingham).
69 Ibid [10] (Lord Bingham).
70 Ibid [61] (Lord Hope).
71 Ibid [27] (Lord Stein).
72 [2010] VCAT 328,[32].

of his involuntary detention in a psychiatric hospital. He owns the house (with the public housing authority), sees it as his home and has continuous links with it. It is not an investment property. It has not been leased, temporarily or at all. Patrick is meeting the financial obligations of an owner. It is where he had many years of married life and was a father to his step-children. As the tribunal found, he has a 'very strong connection with his home'. His domestic occupation of the house has only been disturbed by his mental illness and its consequences.

59 The house being Patrick's home for the purpose of this human right, it is next necessary to determine whether the appointment of the administrator constituted a limitation, restriction or interference with that right.

60 Also in *Director of Housing v Sudi*, I identified how the question of interference with home is to be determined:[73]

> Likewise, the question of what amounts to an 'interference' with the rights in s 13(a) is approached in a 'simple and untechnical' manner.[74] This is Manfred Nowak, again speaking of article 17(1) of the ICCPR: 'Every invasion of that sphere paraphrased by the term "home" that occurs without the consent of the individual affected... represents interference.'[75] Evicting or seeking to evict someone living in social housing is interfering with the human rights relating to their home.[76] Any attempt to do so, directly or indirectly or by process of law, constitutes such interference.[77] Serving a notice to quit and bringing possession proceedings constitute such interference.[78] The latter is especially applicable in the present case. Where a family is living in the premises, such actions also constitute an interference with the human rights relating to their family.[79] Other decisions which deprive a person of, or impair their capacity to live in, their home also constitute an interference, such as denying them planning permission[80] and undertaking enforcement measures,[81] and withdrawing a permission already held, rendering people homeless.[82]

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73 [2010] VCAT 328,[34].

74 *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [12] (Lord Bingham).

75 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 400

76 *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [23] (Lord Bingham); *Kay v Lambeth London Borough Council* [2006] 2 AC 465, [28] (Lord Bingham).

77 *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [70] (Lord Hope, citing *Lambeth London Borough Council v Howard* (2001) 33 HLR 58, [30] (Sedley LJ).

78 *McCann v United Kingdom* [2008] ECHR 385, [47].

79 *Harrow London Borough Council v Qazi* [2004] 1 AC 983,[70] (Lord Hope, citing *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 70, [67] (Lord Woolf CJ).

80 *Buckley v United Kingdom* (1997) 23 EHRR 101, [60] and [81].

81 *Chapman v United Kingdom* [2001] 33 EHRR 18, [78].

82 *Connors v United Kingdom* (2005) 40 EHRR 9.

61 The appointment of an unlimited and exclusive administrator to a person's estate removes their capacity to control and manage their own property and financial affairs, including that property which is their home. The administrator can exercise a power of sale of the property even against the wishes of the person. In the present case, the tribunal acknowledged the appointment of the administrator would probably result in the sale of Patrick's home, against his wishes. That was a practical purpose of the appointment. Appointing an administrator over Patrick's estate was therefore an interference with his human right to home in s 13(a) of the Charter.

62 In the circumstances, appointing the administrator engaged Patrick's human rights to privacy and home in s 13(a) of the Charter.

63 An issue arises as the meaning of the term 'arbitrarily' in s 13(a) and, in that context, the relevance and weight to be given to the opinions of the Human Rights Committee in relation to the same term in art 17(1) of the covenant. In *WMB v Chief Commissioner of Police,*[83] Kaye J doubted the jurisprudential value of findings of the committee and declined to follow its views on the concept of arbitrariness in the covenant as these might assist in the interpretation of 13(a). I will consider those issues here.

Human Rights Committee

64 The weight to be attached to the opinions of the committee is an important question. It influences the interpretation and therefore the scope of the human rights protection which is afforded by s 13(a) and other provisions of the Charter.

65 The committee is established by the covenant, under which it has 18 members[84] who are elected by secret ballot[85] and serve in their personal capacity[86] for four years.[87] Members are eligible for re-election.[88] Only 'persons of high moral character and recognised competence'[89] are eligible for membership of the committee. It has a

83 [2010] VSC 219, [49].
84 Article 28(1).
85 Article 29(1).
86 Article 28(2).
87 Article 32(1).
88 Ibid.
89 Article 28(3).

secretariat which is provided by the United Nations in New York but it is not a formal part of that organisation.

66 The main work of the committee is to receive and consider reports from the state parties to the covenant in relation to giving effect to the rights in the covenant.[90] As one such party, Australia provides these reports, which the committee considers and comments on. Provision of reports is mandatory, which enables the committee 'to monitor states compliance with the rights created in the covenant'.[91] The committee may also provide general comments to state parties on the proper interpretation and application of the covenant.[92] Under the Optional Protocol to the covenant, which Australia has also ratified, the committee can receive and consider complaints from individuals that their rights under the covenant have been violated.[93]

67 In his 'authoritative commentary'[94] on the covenant, Professor Manfred Nowak describes the committee as a 'quasi-judicial organ',[95] being 'a body of experts largely independent of the UN and State parties'.[96] As it is not a court, its decisions do not have internationally binding effect.[97] But as a 'relatively autonomous *treaty-based organ*',[98] it is not part of the political framework of the United Nations and its opinions on the scope and operation of the covenant are highly influential. In his oft-cited commentary, Professor Nowak draws heavily on the jurisprudence of the committee.

68 In their book on the Charter and the *Human Rights Act 2004* (ACT), Caroline Evans and Simon Evans discuss the committee in relation to human rights law in Australia. They point out that recently the committee has been comprised of a majority of people having post-graduate degrees in law from leading international universities, current or former professors of international human rights law and former chief justices of

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90 Article 40(1) and (4).
91 Caroline Evans and Simon Evans, *Australian Bills of Rights* (2008) [6.40].
92 Article 40(4).
93 Article 2.
94 *Minister for Immigration Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, [143] (Black CJ, Sundberg and Weinberg JJ).
95 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd ed, 2005) 669.
96 Ibid 668.
97 Ibid 669.
98 Ibid.

domestic, supreme or constitutional courts.[99] Due to the independence and expert qualifications of the committee members, its work is 'far less tainted by politics that many of the other parts of the United Nations human rights system'.[100] In consequence:

> The decisions of the committee are … the closest thing to United Nations case law for the ICCPR, and are useful as they reflect the authoritative and independent views of a group of experts on international human rights law. [101]

69 A standard international text[102] of cases, materials and commentary on the covenant and the committee contains a description of the composition, work and function of the committee on which I have drawn here. The findings and general comments of the committee are set out and discussed at length as international law jurisprudence. The authors say the work of the committee is 'not overly politicised' and they refer to certain safeguards to ensure its 'political impartiality'.[103] Of the members in 2003, they say 'almost all … have expert human rights qualifications, and no direct connections with their governments.'[104] Therefore the committee fulfilled 'the requisite criteria of independence and expertise.'[105]

70 When called on to interpret the covenant in a domestic setting, Australian courts have frequently made reference to the findings and general comments of the committee. I would refer, for example, to the judgments of Mason CJ and McHugh J, and Dawson J, in *Dietrich v R*,[106] McHugh J (a 'body of international jurisprudence') in *Woolley; Ex parte Applicants M276/2003*[107] and Kirby J in that[108] and other[109] cases. In the states

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99 Caroline Evans and Simon Evans, *Australian Bills of Rights* (2008) [640] – [645].
100 Ibid [6.40].
101 Ibid [6.44].
102 Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Material and Commentary* (2nd ed, 2004).
103 Ibid, [1.33].
104 Ibid, [1.34].
105 Ibid.
106 (1992) 177 CLR 292, 306-307 (Mason CJ and McHugh J), 348 (Dawson J).
107 (2004) 225 CLR 1, [109].
108 Ibid [200]-[207].
109 *Cornwell v The Queen* (2007) 231 CLR 260, 321; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 128; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614, 662-663. Cf *Al-Kateb v Godwin* (2004) 219 CLR 562, 642 (Hayne J) and *Roach v Electoral Commissioner* (2007) 233 CLR 162, 225 (Heydon J).

and territories there is McMurdo P ('an expert committee') and Philippides J in *Aurukun Shire Council v Chief Executive Officer of Liquor, Gaming and Racing*[110] and Refshauge J in *Blundell v Sentence Administration Board* (ACT).[111] Black CJ, Sundberg and Weinberg JJ considered the jurisprudential value of the views of the committee in *Minister for Immigration Multicultural and Indigenous Affairs v Al Masri.*[112] Accepting the opinions of the committee did not have precedential authority in Australian courts, their Honours said it was nonetheless 'legitimate to have regard to them as the opinions of an expert body established by the [covenant]'.[113] Referring to the approach adopted in relation to other treaties,[114] their Honours said it was also appropriate to have regard to 'works of scholarship in the field of international law, including opinions based on the jurisprudence developed within international bodies, such as the committee'.[115] They included the commentary of Professor Manfred Nowak in that category.

71 In this court, Vickery J[116] and Emerton J[117] have noted s 32(2) of the Charter and relied on the findings and general comments of the committee, and other international jurisprudence, when interpreting the Charter. With respect, I join with Emerton J in saying '[t]his is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in an international context.'[118] Further, Hollingworth J[119] has noted that the human right in s 25(1) of the Charter is based on art 14(2) of the *International Covenant on Civil and Political Rights* and had regard to General Comment 30[120] of the Human Rights Committee in relation to the scope of that right.

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110 (2010) 237 FLR 369, [34] (McMurdo P), [241] (Philippides J).
111 (2010) 245 FLR 424, [169].
112 (2003) 126 FCR 54.
113 Ibid [148].
114 *Johnson v Johnson* (2000) 201 CLR 488, 501-502 (Kirby J); *Commonwealth v Hamilton* (2000) 108 FCR 378, 387 (Katz J citing *Commonwealth v Bradley* (1999) 95 FCR 218, 237 (Black CJ)); *R v Sin Yau-Ming* [1992] 1 HKCLR 127, 141 (Silke VP, Kempster and Penlington JJA)).
115 (2003) 126 FCR 54, [148].
116 *Nolan v MBF Investments Pty Ltd* [2009] VSC 244, [155]-[172].
117 *Castles v Secretary, Department of Justice* [2010] VSC 310, [69], [75],[100], [109]-[112].
118 Ibid [70].
119 *Sabet v Medical Practitioners Board Hollingworth* (2008) 20 VR 414, [163]-[164].
120 Office of the High Commissioner for Human Rights, Human Rights Committee, General Comment 30

72 On this analysis, the Human Rights Committee is an independent body of human rights experts established under the *International Covenant on Civil and Political Rights*. Although it is not a court, it is quasi-judicial in character. Its decisions and general comments are not binding precedents and it our duty to form an independent view on the matters in issue. But the opinions of the committee represent an important body of jurisprudence on the interpretation and application of the covenant. Australian courts of high authority have referred to and relied on the opinions and general comments of the committee when interpreting the provisions of the covenant or domestic legislation to which it is relevant.

73 Section 32(2) of the Charter provides that '[i]nternational law and judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'. This provision enhances the capacity of the courts to consider such sources in the exercise of their ordinary powers of interpretation.[121] The explanatory memorandum says of s 32(2) that the decisions of 'treaty monitoring bodies including the human rights committee, will be particularly relevant'.[122] That is especially so when identifying the scope of the human rights in the Charter, which reflect to a large extent those specified in the covenant.

'Arbitrarily'

74 Turning now to arbitrariness, we have seen the right in s 13(a) of the Charter is to have your privacy, family, home or correspondence not 'unlawfully or arbitrarily interfered with'. The Attorney-General submits that these terms define the scope of the right and, contrary to my decision in *Re Kracke and Mental Health Review Board,*[123] are not mere examples of when a limitation is reasonable and justified under s 7(2).

75 I made the decision in *Kracke* before the judgment of the Court of Appeal in *R v*

(21 August 2007)

121 See *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [2001]-[2002] (Bell J).

122 Explanatory memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic), [2844]-[2845].

123 (2009) 29 VAR 1, [109].

Momcilovic,[124] which held that s 7(2) was not relevant at the interpretation stage of a human rights analysis. I should therefore re-examine the scope of the right in s 13(a) in terms of the internal content of the right without regard to s 7(2).

76 In *WBM v Chief Commissioner of Police*[125] Kaye J held that 'arbitrary' in s 13(a) was an ordinary English word whose meaning was to be derived from the dictionary. In his Honour's view, the word arbitrary in s 13(a) meant 'a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim'.[126] His Honour also referred to the dictionary definition of the word, which is 'to be decided by one's liking' or 'capricious' (OED).[127] This is a view I respect but cannot accept. It reduces the standard of protection in the right to *Wednesbury* unreasonableness.

77 In my view, in s 13(a) and other provisions of the Charter, 'arbitrarily' is not used as an ordinary English word but as a term having a particular meaning which is embodied in art 17(1) of the covenant. By using this term in s 13(a), the legislature instituted a greater degree of human rights protection for the people of Victoria than would have flowed from using the word in the ordinary sense. To reject this meaning of the term would significantly reduce the protection which Parliament intended to confer.

78 It is very clear from the express terms of the Charter, as well as the report of the consultative committee,[128] the second reading speech of the Attorney-General[129] and the explanatory memorandum[130] that the human rights specified in Part 2 were drawn largely from the *International Covenant on Civil and Political Rights.* There are exceptions and the wording in some cases is materially different, which should be

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124 (2010) 25 VR 436, [35] (Maxwell P , Ashley and Neave JJA).

125 [2010] VSC 219.

126 Ibid [51].

127 Ibid.

128 *Human Rights Consultative Committee, Rights, Responsibilities and Respect: The Report of the HRCC* (2005) 26-45.

129 Victorian Parliamentary Debates, Legislative Assembly, 4 May 2006, 1290-1291 (Rob Hulls).

130 Explanatory memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 7. The explanatory memorandum states that s 13 of the Charter was 'modelled on article 17 of the Covenant': ibid, 13.

taken into account where relevant. But in relation to the unlawful and arbitrary aspect, the terms of art 17 of the covenant[131] are not materially different to the terms of s 13 of the Charter.[132] Such textual differences as do exist between the two do not bear on the meaning of these terms.

79 Given that origin and taking s 32(2) into account, I must conclude that Parliament intended to place in s 13(a) the concept of arbitrariness which is embodied in the protection afforded by art 17(1) of the covenant. That makes the views of the committee on the scope of that protection particularly relevant.

80 In General Comment 16, the committee gave this opinion on what is arbitrary for the purpose of art 17(1) of the covenant:

> The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the covenant and should be, in any event, reasonable in the particular circumstances. [133]

81 It is well understood that 'reasonable in the particular circumstances' has a particular meaning in this context and does not mean reasonable on the merits. The committee made that clear in *Toonen v Australia,*[134] where it gave this further explanation:

> The committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. [135]

82 Later the committee applied these principles in *A v Australia,*[136] which concerned detention in custody. Of arbitrariness in art 9(1) of the covenant, the committee said:

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131 Article 17 of the covenant provides: '(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.'

132 Section 13 of the Charter provides: 'A person has the right – (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and (b) not to have his or her reputation unlawfully attacked.'

133 Office of the High Commissioner for Human Rights, Human Rights Committee, General Comment 16 (8 April 1988), [4].

134 (1994) 69 ALJ 600.

135 Ibid [8.3].

136 (1997) 4 BHRC 210.

> the Committee recalls that the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Further, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. [137]

83 Drawing on the jurisprudence of the committee, Professor Nowak has given an account of the origin and content of the prohibition against arbitrary interference with the rights specified in art 17(1) of the covenant. It too makes clear that the word 'unreasonable' is here used not as meaning unreasonable on the merits but as meaning disproportionate in the legal sense:

> with respect to permissible interference with privacy, family, home and correspondence, Art. 17 does not contemplate a mere formal limitation clause results from the prohibition of 'arbitrary interference' ('immixtions arbitraires'). The term 'arbitrary' is based on Art. 12 of the UDHR and can be found in Arts. 6(1), 9(1) and 12(4) of the Covenant. In conformity with the historical background and the corresponding remarks on Art. 6, it is reiterated here that regardless of its lawfulness, arbitrary interference contains elements of injustice, unpredictability and unreasonableness. Moreover, the expression 'arbitrary' suggests a violation by State organs. In evaluating whether interference with privacy by a State enforcement organ represents a violation of Art. 17, it must especially be reviewed whether, in addition to conformity with national law, the specific act of enforcement had a purpose that seems legitimate on the basis of the Covenant in its entirety, whether it was predictable in the sense of rule of law and, in particular, whether it was reasonable (proportional) in relation to the purpose to be achieved. [138]

84 Like the Charter, the covenant contains other provisions which prohibit unlawful or arbitrary interference with a human right. The same broad concept of arbitrariness applies. One example we have seen already is art 9(1), which specifies the right 'to liberty and security of the person' and not to be 'subjected to arbitrary arrest or detention'. The views of the committee and Professor Nowak on the concept of arbitrariness in art 9(1) were carefully examined by Black CJ, Sundberg and Weinberg JJ in *Minister for Immigration Multicultural and Indigenous Affairs v Al Masri.*[139] On the basis of that examination, their Honours held that arbitrary in that article meant 'unproportional or unjust'.[140] It was arbitrariness in that sense which

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137 Ibid [9.2].

138 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 382-383 (footnotes omitted.)

139 (2003) 126 FCR 54.

140 Ibid [152].

Refshauge J applied under s 18 of the *Human Rights Act* in *Blundell v Sentencing Administration Board (ACT)*.[141]

85 I therefore conclude that the human right in s 13(a) not to have your privacy, family, home or correspondence 'arbitrarily' interfered with extends to interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought. Interference can be arbitrary although it is lawful.

86 Further, we will see that the 'principle of legality' in the interpretation of legislation is that provisions will not be interpreted to abrogate or curtail 'fundamental common law rights or freedoms' without that intention being 'clearly manifested by unmistakable and unambiguous language'[142]. As Vickery J held in *Nolan v MBF Investments Pty Ltd*,[143] the 'protection of a person's home from arbitrary interference is reflected in all of the major international human rights instruments and the Victorian Charter.'[144] That right is therefore 'unequivocally a fundamental human right [which] enlivens the "principle of legality"'.[145]

Property

87 Section 20 specifies the human right that 'a person must not be deprived of his or her property other than in accordance with law.' In applying this right, the three issues are whether the person has 'property', whether the person is 'deprived' of that property and whether the deprivation is not 'in accordance with law'. Neither 'property' nor 'deprived' is defined. On first principles, these terms would be interpreted liberally and beneficially to encompass economic interests and deprivation in a broad sense. 'In accordance with law' has a particular meaning in this context.

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141 (2010) 245 FLR 424, [165]-[170].
142 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30] (Gleeson CJ).
143 [2009] VSC 244.
144 Ibid [179].
145 Ibid [180].

88 The right to property in s 20 of the Charter does not come from the *International Covenant on Civil and Political Rights*, which only goes so far as to prohibit discrimination on grounds of property (art 26). The First Protocol to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[146] goes further than both the Charter and the covenant. Article 1 of that protocol specifies a right to the peaceful enjoyment of possessions as well as the non-deprivation principle. There is a significant body of authority in the courts in the United Kingdom[147] and Europe[148] on this right.

89 That jurisprudence assists in relation to what amounts to a deprivation of property in human rights legislation such as the Charter. It is well-established that a formal expropriation is not required (although it does suffice) and a de facto expropriation is sufficient. Citing earlier authorities, in *Zwierzynski v Poland* the European Court of Human Rights gave this statement of principle:

> The Court recalls that in order to establish whether or not there has been a deprivation of possessions it is necessary not only to consider whether there has been a formal taking or expropriation of property, but also to look beyond appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are 'practical and effective', it has to be ascertained whether that situation amounted to a de facto expropriation. [149]

I will apply this approach in determining whether there has been a deprivation of property within s 20 of the Charter in the present case.

90 Again on first principles, 'property' in s 20 would encompass real and personal property, such as land, chattels and money, as well as other economic interests which do not need to be considered here. The main property at issue in the present case is Patrick's home, which is a house on land in a suburb of Melbourne of which he is a joint owner. That home is clearly property for the purposes of s 20.

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146 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

147 See Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2009) vol 1, ch 18.

148 See Pieter van Dijk et al, *Theory and Practice of the European Convention on Human Rights* (4th ed, 2006) ch 17.

149 (2004) 38 EHRR 6, [69] (citing *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35 and *Brumarescu v Romania* (2001) 33 EHRR 35).

91 Section 20 requires any deprivation of a person's property to be 'in accordance with law'. That requires but is not confined to bare legal authorisation for the deprivation. The principle of lawfulness in s 20 is of fundamental importance and wider.[150] To be in accordance with law, the law concerned must be publicly accessible, clear and certain and not operate arbitrarily.[151] But the right in s 20 does not extend to compensation for deprivation of property.[152]

92 Turning to the present case, the appointment of the administrator did not deprive Patrick of his property in the sense of transferring ownership of his estate to someone else. Nor did it result in him being deprived of the use or benefit of his property in the direct sense. But it vested complete and exclusive management and control of his property in the administrator, now and for the future, including the power to sell it in Patrick's name. Appointing the administrator took that management and control, and that power of sale, away from Patrick and transferred to the administrator for the duration of the order. In my view, that was a de facto deprivation of property which engaged the right in s 20. However, the provisions of the *Guardianship and Administration Act* plainly answer the description of a 'law' within that provision, and this judgment will determine whether that deprivation was 'in accordance with' that law. Therefore, the engagement of the right in s 20 does not take matters further in this case.

93 Separately to the Charter, the right to ownership and peaceful enjoyment of property is an ancient feature of the common law, established by the time of *Magna Carta 1297,*[153] which is still in force in Victoria.[154] According to Blackstone, the right of property is inherent in every person and 'consists in the free use, enjoyment and

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150 See generally Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (2009), vol 1, [18.113]-[18.114]; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008)[2210]; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, [168]-[197] (Bell J).

151 *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307, [34] (Lord Bingham, speaking of the analogous requirement in the *Human Rights Act 1998* (UK)).

152 *Halwood Corporation (in liquidation) v Roads Corporation* [2008] VSC 28, [108] (Osborn J).

153 Clause 39 provides that a freeman shall not 'be disseised of his freehold' save 'by law of the land'.

154 Sections 3 and 8 of the *Imperial Acts Application Act 1980* (Vic); see *Antunovic v Dawson* [2010] VSC 377, [38]-[48] (Bell J).

disposal of all his acquisitions, without any control of diminution, save only by the laws of the land'.[155] In *Grey v Harrison*,[156] Callaway JA (Tadgell and Charles JJA agreeing) said 'it is one of the freedoms which shape our society, and an important human right, that a person should be free to dispose of his or her property as he or she thinks fit'. Protecting the right to property is a purpose of the civil and criminal law, as is protecting the personal integrity of the individual.

94 Protecting the right to own and peacefully enjoy property is encompassed by the principle of legality in the interpretation of legislation, which I will later apply. Bennion says the principle is that 'by the exercise of state power the property and other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.'[157] Early in the life of the Australian federation, Griffith CJ held in *Clissold v Perry*[158] that statutes 'are not to be construed as interfering with vested [property] interests unless that intention is manifest'. Referring to that authority, French CJ recently said in *R & R Fazzolari Pty Ltd v Parramatta City Council*:[159]

> [the] application to property rights of this long-standing interpretive principle is consistent with international developments in the recognition of human rights since World War II …the right to property was recognised in the Universal Declaration of Human Rights an in various other international instruments.[160]

95 Accordingly, Patrick's property right of ownership of his home is a fundamental common law right for the purpose of the application of the principle of legality.

96 That brings me to the application of the Charter to the tribunal.

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155 William Blackstone, *Commentaries on the Laws of England* (1765) vol 1, 134.

156 [1997] 2 VR 359, 366.

157 Francis Bennion, *Bennion on Statutory Interpretation* (5th ed, 2008) 846 (being as aspect of his 'principle of doubtful penalisation').

158 (1904) 1 CLR 363, 373.

159 (2009) 237 CLR 603, [44].

160 Universal Declaration of Human Rights 1948, Art 17; American Declaration of the Rights and Duties of Man 1948, Art 23; European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Protocol 1, Art 1; American Convention on Human Rights 1969, Art 21; African Charter on Human and Peoples' Rights 1981, Art 14 (footnote in quoted text). Article 17 of the *Universal Declaration of Human Rights* (GA Res 217A (iii), UN Doc A/810 at 71 (1948)) provides: '(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property'.

Application of Charter to tribunal

Submissions of parties

97 We have seen that s 38(1) of the Charter requires public authorities to act compatibly with human rights (subject to contrary law: s 38(2)). The issue arises whether the tribunal is a public authority within s 4(1) and is therefore bound by this obligation when it makes administration orders under s 46(1) of the *Guardianship and Administration Act* (question 2(a)(i) of the Charter notice)).

98 Patrick and the commission submitted that, when exercising this power, the tribunal is acting in an administrative capacity and therefore is a public authority within s 4(1)(j) of the Charter. Question 2(a)(i) in the Charter notice should therefore be answered yes.

99 The Attorney-General submitted the tribunal was not a public authority under s 4(1), and hence was not bound by s 38(1) of the Charter when exercising its jurisdiction to make an administration order. The tribunal was a 'court or tribunal' within s 4(1)(j), but it was not, when exercising that jurisdiction, acting in an 'administrative capacity'. That expression was intended to exclude courts or tribunals exercising judicial or 'quasi-judicial' functions, as the parliamentary materials indicated.[161] The identification in the explanatory memorandum of 'quasi-judicial' powers indicated that parliament had in mind a third category beyond the usual binary division of non-judicial powers. The third category of power is hybrid and exercisable by bodies required to exercise a mix of judicial-like and administrative functions. On account of their 'court-like' or 'judicial-like' complexion, bodies exercising quasi-judicial powers must also be given protections which ensure their independence and impartiality. For that reason, they have been excluded from the obligations which bind public authorities under s 38(1). This interpretation was supported by the separate treatment of 'courts and tribunals', parliament and public authorities in s 6 and the inclusion of tribunals in addition to courts in s 4(1)(j).

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161 Explanatory memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), 2825 (relating to clause 4 of the Bill) (Rob Hulls).

100 The Attorney-General further submitted that the original jurisdiction of the tribunal in respect of guardianship orders can be distinguished from its review jurisdiction. When exercising the same powers as an administrative decision maker, it is understandable that the Charter should apply to the tribunal, as it did to that decision maker. But the power to make guardianship and administrative orders has been variously given to courts and tribunals in Australia, including the Family Court of Australia. When exercised by that court in relation to children, such a power is judicial and corresponds to the parens patriae jurisdiction of the state courts.[162] In exercising those powers under the *Guardianship and Administration Act*, the tribunal is therefore not acting administratively, but judicially or quasi-judicially. Therefore, it is acting in a manner intended to be excluded from the obligations of s 38(1) of the Charter.

101 I will commence addressing these submissions by identifying the source and nature of the jurisdiction of the tribunal to make administration orders and the means by which that jurisdiction is exercised. This will also be relevant later on the issue of the weight to be afforded to the decisions of the tribunal.

Guardianship and administration jurisdiction

102 Under the *Victorian Civil and Administrative Tribunal Act*, the tribunal has two types of jurisdiction – '(a) original jurisdiction; and (b) review jurisdiction' (s 40). Original jurisdiction is the jurisdiction of the tribunal other than its review jurisdiction (s 41(1)). Review jurisdiction is jurisdiction conferred on the tribunal by or under an enabling enactment to review a decision of a decision-maker (s 42).

103 The predecessor of the tribunal was the Administrative Appeals Tribunal which was established by the *Administrative Appeals Tribunal Act 1984* (Vic). Under s 67 of the *Guardianship and Administration Board Act 1986* (Vic), it had jurisdiction to review

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162 *P v P* (1994) 181 CLR 583, 604-605 (Mason CJ, Deane, Toohey and Gaudron JJ).

decisions of the board. The guardianship and administration jurisdiction of that tribunal was review jurisdiction.[163]

104 The *Guardianship and Administration Act* (as it is now named) no longer confers review jurisdiction on the tribunal. The Guardianship and Administration Board has been abolished and its functions are performed by the Victorian Civil and Administrative Tribunal.[164] The nature of these functions has not changed. The review decision-making tier has simply been removed from the system. The *Guardianship and Administration Act* now confers jurisdiction directly on the tribunal to make decisions, such as to appoint guardians (s 22(1)) or administrators (s 46(1)). Hence, the jurisdiction of the tribunal under the *Guardianship and Administration Act* is original jurisdiction for the purposes of s 40(a) of the *Victorian Civil and Administrative Tribunal Act*.[165]

105 Subject to variation for certain types of proceedings (s 58(2)), if the tribunal is to be constituted in a proceeding by one member only, that member must be a legal practitioner (s 64(2)(a)). Clause 31(1) of schedule 1 contains such a variation. It provides that, except in specific cases, the requirement for a member sitting alone to be a legal practitioner does not apply to a proceeding under the *Guardianship and Administration Act*. One such exception is that a rehearing application under Division 1 of part 6 of that Act must be determined by a senior member or presidential member and always by a member who is senior to the member who heard the case at first instance (s 31(3)). In the present case, the tribunal heard and determined Patrick's rehearing application and was constituted by an acting deputy president sitting the guardianship list of the human rights division where the decision at first instance was made by a senior member sitting in that list.

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163 See generally *McDonald v Guardianship and Administration Board* [1993] 1 VR 521, 527ff (Fullagar, Tadgell and JD Phillips JJA).

164 Section 116 and 117 of the *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic).

165 To avoid doubt, s 42(2) of the *Victorian Civil and Administrative Tribunal Act* confirms that the rehearing and reassessment jurisdiction of the tribunal under part 6 of the *Guardianship and Administration Act* is also original jurisdiction.

Guardianship list of human rights division

106 Under s 157(2) of the *Victorian Civil and Administrative Tribunal Act*, the rules committee of the tribunal may make rules establishing divisions of the tribunal, and lists within those divisions. By r 2.01(1) of the *Victorian Civil and Administrative Tribunal Rules 2008*, the tribunal exercises it functions in the administrative division, the civil division and the human rights division. By r 2.03(4)(b), the guardianship list of the human rights division was established.

107 Rule 2.04(1) requires a presidential member nominated by the president to be in charge of a list. A presidential member is the president, a vice president or a deputy president of the tribunal.[166] A person is not eligible to be appointed as a presidential member unless they have been admitted to practice in Victoria for five years.[167] Deputy presidents hold office for five years and on a full-time basis.[168]

108 The tribunal made the administration order concerning Patrick in the guardianship list of the human rights division. It is appropriate here to note, and later to take into account, that the tribunal was constituted by John Billings, who was for many years a deputy president of the tribunal and the presidential member appointed by the president under the rules to be in charge of that list. At the time he made the decision, he was an acting deputy president and in charge of that list. Acting deputy president Billings has very considerable experience and undoubted expertise in relation to guardianship, and has published articles and made presentations to conferences in this area.

Tribunal is a public authority

109 The proper interpretation of 'public authority' and the other concepts in s 4(1) of the Charter is to be ascertained from the language of the provisions,[169] understood in the first instance in the context of the purpose of the provisions and the scheme of the

166 Definition of 'presidential member' in s 3 of the *Victorian Civil and Administrative Tribunal Act*.
167 Section 12(2).
168 Section 12(3).
169 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, [92] (Hayne and Heydon JJ).

Charter as a whole.[170] Under s 35(a) of the *Interpretation of Legislation Act 1984* (Vic), the Charter is to be interpreted in a manner which promotes its underlying purpose. By s 1(2) of the Charter, that purpose is to 'protect and promote human rights'. Under s 38(1) and other provisions, a critical means of doing so is imposing a legal obligation on public authorities to act compatibly with human rights, subject to contrary law (s 38(2)).

110 The concept of a public authority is thus critical to the achievement of the purposes of the Charter. Like comparable human rights legislation in the Untied Kingdom[171] and New Zealand,[172] the definition of 'public authority' in s 4(1) should be given a beneficial interpretation which is consistent with that purpose.

111 According to the scheme of the definition, s 4(1)(a)-(h) specifies who or what is a public authority, subject to the exclusions in pars (i), (j) and (k). Section 4(1)(b) includes as a public authority 'an entity established by a statutory provision that has functions of a public nature', subject to those exclusions. To complete the scheme, s 4(2)(a)-(e) specifies (non-exclusively) several factors that may be taken into account in determining whether a function is of a public nature. From the statutory scheme, the terms of s 4(1)(b) and the guiding factors in s 4(2), it can be seen that the focus of the definition is on matters of substance, not form or technicalities. This accords with the statement in the second reading speech that the 'intent is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature.'[173] As we will see, the discarded and formalistic category of 'quasi-judicial' functions does not fit into the framework of the definition and would defeat its purpose.

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170 *CIC Insurance Pty Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-382 (McHugh, Gummow, Kirby and Hayne JJ); *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 414, [127] (Warren CJ).

171 *Aston Cantlow Parochial Church Council v Wallbank* [2004] 1 AC 546, [28] (Lord Hope).

172 *R v N* [1999] 1 NZLR 713, 721; *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 [70] (Randerson J).

173 Victorian Parliamentary Debates, Legislative Assembly, 4 May 2005, 1293 (Rob Hulls).

112 As I held in *Re Kracke and Mental Health Review Board*,[174] the tribunal is an entity established by statutory provision (s 8(1) of the *Victorian Civil and Administrative Tribunal Act*) having functions of a public nature within s 4(1)(b) of the Charter, being functions connected to or generally identified with functions of government (s 4(2)(b)). Under s 38(1) (subject to s 38(2)), it would be wholly bound to act compatibly with human rights, except for the exclusions in s 4(1)(j).

113 The exclusion in s 4(1)(j) is that the definition of public authority 'does not include – (j) a court or tribunal except when it is acting in an administrative capacity'. There is no definition of 'tribunal', but clearly the Victorian Civil and Administrative Tribunal is a tribunal within s 4(1)(j). By virtue of that exclusion, it is a public authority only when acting in an administrative capacity. Subject to s 6(2)(b),[175] which is not relevant in the present case, the tribunal is not bound to act compatibly with human rights when it is acting in a judicial (or legislative) capacity.

114 In support of the submission that s 4(1)(j) operates to exclude the tribunal from being a public authority when it is acting in a judicial capacity and in a 'quasi-judicial' capacity, the Attorney-General relies on the following comments in the explanatory memorandum to the Charter of Human Rights and Responsibilities Bill 2006 in reference to clause 4(1)(j):

> Courts and tribunals and members of Parliamentary Committees are also bound by the Charter, when acting in an administrative capacity (paragraphs (g) and (j)). For example, they are considered to be public authorities when hiring staff. The obligation to comply with the Charter does not, however, extend generally to Parliament or Parliamentary proceedings or to the courts when acting in a judicial or quasi-judicial capacity (paragraphs (i) and (j)).[176]

115 Under s 35(a) of the *Interpretation of Legislation Act* and the ordinary rules of interpretation, the explanatory memorandum forms part of the context in which s 4(1)(j) is to be interpreted. It is not, however, part of the Charter. The proper interpretation of the statutory provision is not governed by extraneous materials,

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174 (2009) 29 VAR 1, [258].

175 As to which, see *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, [236] ff (Bell J); *Secretary, Department of Human Services v Sanding* [2011] VSC 42, [159] ff (Bell J).

176 Explanatory memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), 2825.

including those to which reference is permitted under the modern approach to statutory interpretation, and the words used in such materials 'must not be substituted for the text of the law'.[177]

116 In *Re Kracke v Mental Health Review Board*,[178] I pointed to several difficulties which were inherent in the reference in the explanatory memorandum to 'courts when acting in a quasi-judicial capacity'. Nothing which the Attorney-General has submitted in the present case has persuaded me that my analysis was incorrect.

117 The most fundamental difficulty is that 'quasi-judicial' is not a category which fits into the framework of legislative, judicial and administrative capacities on which the definition of public authority in s 4(1) is based (see also s 6(2)). As Hollingworth J held in *Sabet v Medical Practitioners Board*,[179] the relevant distinction in s 4(1) of the Charter is between acting in an administrative as against a judicial or legislative capacity in the public law sense. Whether a court or tribunal is acting quasi-judicially provides little or no insight into the legal character of their function in that sense and is a distraction. As I held in *Re Kracke and Mental Health Review Board*[180] by reference to authorities of long standing, a administrative decision made by a decision-maker who is required to act judicially remains administrative in character.

118 In my view, safer assistance in ascertaining the proper interpretation of s 4(1)(j) is provided by the note under that provision, which is:

> Note: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedure.

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177 *Re Bolton; ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ). DC Pearce and RS Geddes, *Statutory Interpretation in Australia*, (9th ed, 2011) [3.24] contains a list of authorities in which this principle has been applied.

178 (2009) 29 VAR 1, [271]-[281].

179 (2008) 20 VR 414, [119]-[127].

180 (2009) 29 VAR 1, [279], citing *Pancontinental Mining Ltd v Burns* (1994) 52 FCR 454, 463 (von Doussa J); *Lamb v Moss* (1983) 76 FLR 296, 321 (Bowen CJ, Sheppard and Fitzgerald J); *Royal Aquarium & Summer & Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, 452 (Lopes LJ).

119 Under s 36(3A) of the *Interpretation of Legislation Act*, this note is part of the Charter. Unlike the explanatory memorandum, the note is not just part of the context in which the meaning of the provision is ascertained. Being part of the provision which it explains, the note and provision must be read together in the process of interpretation. The note refers to committal proceedings, issuing warrants, listing cases or adopting practices and procedures. These functions, when performed by a court or tribunal (as the case may be), are administrative in nature in the public law sense, reflecting the legal categories on which the definition of public authority in s 4(1) is based.[181]

120 The concept of a 'quasi-judicial' function was employed by the courts as a threshold test for determining (for example) whether a tribunal was obliged to observe the rules of natural justice. As courts acting judicially were obliged to observe those rules, it was then thought necessary by analogy that only 'quasi-judicial' tribunals would also be so obliged. For the rules of natural justice to apply to a tribunal, the courts searched for a 'super-added duty to act judicially'.[182] So, in *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*,[183] whether the commissioner was bound to follow the rules of natural justice depended on whether the commissioner was an 'administrative body … designed to proceed … in a quasi-judicial manner'[184] or had 'quasi-judicial'[185] functions.

121 The term 'quasi-judicial' has a certain utility in some contexts for designating bodies which are not courts but which have court-like functions. For example, in the international context, we have seen the Human Rights Committee established under the *International Covenant on Civil and Political Rights* being described as a quasi-judicial organ. But in common law jurisdictions in the administrative law context, this

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181 For example, a committal proceeding is administrative in nature (*Grassby v R* (1989) 168 CLR 1, 11-12 (Dawson J); *Lamb v Moss* (1983) 76 FLR 296, 321) (Bowen CJ, Sheppard and Fitzgerald JJ), and issuing warrant is an exercise of administrative, not judicial, power (*Hilton v Wells* (1985) 157 CLR 57, 78 (Mason and Deane JJ)).

182 *R v Legislative Committee of the Church Assembly; ex parte Haynes Smith* [1928] 1 KB 411, 416 (Lord Hewart CJ); *Franklin v Minister of Town and County Planning* [1948] AC 87, 103 (Lord Thankerton); *Nakkuda Ali v Jayaratne* [1951] AC 66.

183 (1963) 113 CLR 475.

184 Ibid 494 (McTiernan and Taylor JJ).

185 Ibid 500 (Kitto J).

category has been discarded because it was seen to be formalistic,[186] distracting[187] and not directed at the real issues,[188] as its application in the context of the Charter would certainly be, in my view. For the English authorities, it is sufficient to refer to *Ridge v Baldwin*[189] and *Durayappah v Fernando*.[190] In Australia, *Kioa v West*[191] (among other cases) established that the application of the rules of natural justice did not depend on whether the decision-maker was acting in a quasi-judicial manner, for the duty applied generally 'in the making of administrative decisions which affect rights, interests and legitimate expectations', subject to statutory exclusion.[192]

122 There is no support elsewhere in the explanatory memorandum for the reference to 'quasi-judicial' capacities as part of the exclusion in s 4(1)(j). The second reading speech does not refer to the limitation in these terms. The form of s 4(1)(j) (with the note) in the Charter is that which was recommended in the draft legislation proposed by the consultative committee.[193] The report of the committee said it was necessary to exclude courts exercising judicial power from the definition for federal constitutional reasons.[194] As the Victorian Civil and Administrative Tribunal, and potentially other tribunals, can also exercise judicial power,[195] tribunals were probably included in the draft definition for the same reason. None of this supports the proposition that tribunals exercising administrative functions quasi-judicially were intended to be excluded from the definition of a public authority.

123 In my view, when acting in an administrative capacity in its original and review jurisdiction, the tribunal is a public authority under s 4(1)(b) of the Charter and bound

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186 See Mark Aaronson, Bruce Dwyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 379-380.

187 *Kioa v West* (1985) 159 CLR 550, 584 (Mason J).

188 *Re Nicholson and Haldimand–Norfolk Regional Board of Commissioners of Police* (1978) 88 DLR (3d) 671, 680-682 (Laskin CJ, Richie, Spence, Dickson and Estey JJ).

189 [1964] AC 40, which was endorsed by the High Court of Australia in *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222.

190 [1967] 2 AC 337.

191 (1985) 159 CLR 550.

192 Ibid 584 (Mason J).

193 Human Rights Consultative Committee, 'Rights, Responsibilities, Respect': The Report of the Human Rights Consultation Committee (2005), par (h) of the definition of 'public authority' in s 3.

194 Ibid 59. I should not be taken to endorse those reasons.

195 See the authorities collected in *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, [275]-[276], [296] (Bell J).

by s 38(1) to act compatibly with human rights (subject to contrary law: s 38(2)). The question which now must be determined is whether the tribunal is acting in an administrative capacity when exercising jurisdiction under the *Guardianship and Administration Act*, particularly when making administration orders.

124 In *Re Kracke v Mental Health Review Board*,[196] I examined the authorities on the legal character of powers exercised by courts and tribunals. From that analysis, the following general principles may be discerned:

- it is necessary to determine the capacity in which the court or tribunal is acting when exercising the particular power[197]
- it is a legislative function to create new rules of law having general application while it is an administrative function to apply such rules to particular cases;[198] it is a judicial function to make binding determinations of existing legal right, while it is an administrative function to exercise discretionary authority to make orders creating new rights and obligations, especially on the basis of policy considerations[199]
- history, precedent and legal tradition operate to characterise certain powers as plainly judicial, including the determination of criminal guilt and actions in contract and tort[200] and, generally, actions for the enforcement of existing legal rights[201]
- making a binding and authoritative determination of legal rights and duties according to existing legal principles is judicial;[202] but, as a necessary incident of acting in an administrative capacity, courts and tribunals can also make final decisions between contending parties in ways that affect their legal rights and duties[203]

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196 Ibid [283]-[299].

197 See s 4(1)(j) of the Charter.

198 *Minister for Industry and Commerce v Tooheys Ltd* (1982) 60 FLR 325, 331 (Bowen CJ, Northrop and Lockhart JJ); *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ).

199 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 191 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

200 *Attorney-General (Commonwealth) v Breckler* (1999) 197 CLR 83, 109 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) following *Federal Commissioner of Taxation v Monroe* (1926) 38 CLR 153, 175 (Isaacs J).

201 *Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 148 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

202 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffths CJ); *Re Cram; ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140, 148-49 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258, 259 (Mason CJ, Brennan and Toohey JJ); *Prentis v Atlantic Coastline* (1908) 211 US 210, 226 (Holmes J).

203 *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 544 (Viscount Dunedin LC, Lord Blanesburgh, Lord Russell, Anglin CJ); *Re Ranger Uranium Mines Pty Ltd; ex parte*

- certain powers may be administrative or judicial in character, depending on whether it is a court or tribunal which is exercising the power, and its purpose;[204] the mechanism for enforcing the decision, determination or order may be a guide in borderline cases[205]

125 Applying these principles to the present case, we have seen that the jurisdiction of the tribunal under the *Guardianship and Administration Act* is original jurisdiction for the purposes of the *Victorian Civil and Administrative Tribunal Act*. It is a jurisdiction to make guardianship and administration orders, which are orders for the appointment of substitute decision-makers for persons with a disability. The power to make such orders is discretionary in nature and involves the application and consideration of protective criteria, being the core principles and the personal autonomy of the person. The powers are subject to rehearing on the merits and also to regular reassessment. The Public Advocate has statutory protective functions and appearance rights in the tribunal. The powers of the tribunal are similar in nature to the powers of the Mental Health Review Board (when exercised in the board's original jurisdiction) and the tribunal (when exercised in the tribunal's review jurisdiction) under the *Mental Health Act*, which are administrative.[206] In my view, the functions of the tribunal under the *Guardianship and Administration Act* to appoint guardians and administrators are administrative in the public law sense and the tribunal performs those functions in its original jurisdiction in that capacity.

126 The Attorney-General relies on the judicial nature of the powers of the Federal Court of Australia to make decisions in its welfare jurisdiction with respect to the guardianship of children.[207] These powers correspond to the parens patriae jurisdiction of the state courts in relation to disabled persons.[208] By analogy, submits

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Federated Miscellaneous Workers Union of Australia (1987) 163 CLR 656, 666 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

204 *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar, Kitto JJ).

205 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 269-271 (Mason CJ, Brennan and Toohey JJ).

206 *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, [331] (Bell J).

207 *P v P* (1994) 181 CLR 583, 604-605 (Mason CJ, Deane, Toohey and Gaudron JJ).

208 Ibid.

the Attorney-General, powers of that nature, exercised by the tribunal in its guardianship and administration jurisdiction, are also judicial.

127 The nature of the traditional parens patriae jurisdiction of the courts provides no support for characterising as judicial the powers of the tribunal under the *Guardianship and Administration Act*. By authorities which I recently analysed in *Secretary, Department of Human Services v Sanding*,[209] a proceeding in the parens patriae jurisdiction of a court is not 'an ordinary lis between parties'[210] because the paramount consideration is the welfare of the child. Such proceedings are 'essentially non-adversarial, non-party proceedings'.[211] In *J v Lieschke*,[212] Wilson J said neglect proceedings under the child welfare legislation in New South Wales were 'neither civil nor criminal in nature. They are therefore sui generis'.[213] So too, in *Reynolds v Reynolds*,[214] Mason J said the jurisdiction of the Family Court of Australia in custody cases was 'very different from ordinary inter partes litigation'.[215]

128 In *Scott v Scott*,[216] the House of Lords made the point that a judge in this jurisdiction was really acting as an administrator. The leading judgment was delivered by Viscount Haldane LC. Cases concerning wards of court and lunatics, his Lordship said, were not standard cases, for this reason:

> The judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to relegate his procedure in the interests of those whose affairs are in his charge. [217]

His Lordship went on to describe the jurisdiction of the court in such cases as 'parental and administrative':

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209 [2011] VSC 42, [179]-[185].
210 *In re K (Infants)* [1963] 1 Ch 381, [402] (Upjohn J); approved on appeal in *In re K (Infants)* [1965] AC 201, 216, 240 (Lord Evershed and Lord Devin).
211 *Humberside County Council v R* [1977] 1 WLR 1255.
212 (1987) 162 CLR 447.
213 Ibid 451.
214 (1973) 47 ALJR 499.
215 Ibid 501, 502; followed in *M v M* (1988) 166 CLR 69, 76 (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).
216 [1919] AC 417.
217 Ibid, 437.

> In the two cases of wards of Courts and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. [218]

129 It is clear from these authorities that powers of the kind conferred on the tribunal by the *Guardianship and Administration Act* are not of their nature plainly judicial. Such powers (or at least some of them) might be capable of being characterised as judicial or administrative, depending on the other indicia, and especially whether the powers are being exercised by a court or a tribunal. In the present case, the other indicia point strongly to the conclusion that the guardianship and administration jurisdiction of the tribunal is administrative in nature, though it be original and not review jurisdiction, and I so conclude. When exercising those powers, the tribunal is therefore a public authority under the Charter under s 4(1)(b) and (j) and bound by s 38(1) of act compatibly with human rights (subject to contrary law: s 38(2)). Question 2(a)(i) in the Charter notice will therefore be answered yes.

Convention on the Rights of Persons with Disabilities

130 Another source of human rights protection should be noted. Following the United Nations *Declaration on the Rights of Mentally Retarded Persons*, to which Brennan J referred in *Marion's Case*, the United Nations made the *Convention on the Rights of Persons with Disabilities*.[219] As Vickery J said in *Nicholson v Knaggs*,[220] the convention marks a 'paradigm shift' in approach to persons with disabilities. His Honour describes the shift thus:

> It reflects a movement from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising that rights and making decisions based on free and informed consent as active members of society.[221]

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218 Ibid. In the recent case of *Hogan v Hinch* (2011) 85 ALJR 398, [21] French CJ cited these remarks with approval.

219 Opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

220 [2009] VSC 64, [13].

221 Ibid.

131 This convention, to which Australia is a party,[222] states general principles which may be of importance to the application of the *Guardianship and Administration Act* in the contemporary setting, as the tribunal correctly recognised in the present case.

132 The first paragraph of the preamble to the convention, like the Charter, recognises the 'inherent dignity and worth and the equal and inalienable rights of all members of the human family' (paragraph (a)). The preamble (paragraphs (b) and (d)) goes on to refer to the *International Covenant on Civil and Political Rights* on which the Charter is based, and other relevant instruments and principles. By art 1, the purpose of the Convention is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'

133 The first principle of the convention is '[r]espect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons' (art 3).[223]

134 Concerning measures relating to the exercise of legal capacity by persons with a disability, the convention requires the state party to provide for:

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222 The convention was ratified by Australia on 17 July 2008. The Optional Protocol to the convention was ratified by Australia on 21 August 2009. When Australia ratified the Convention, it made the following declaration:

Australia recognises that persons with a disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.

223 Article 3 provides in full:

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
(b) Non-discrimination;
(c) Full and effective participation and inclusion in society;
(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
(e) Equality of opportunity;
(f) Accessibility;
(g) Equality between men and women;
(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

> appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests. [224]

135 As the ownership of property and the control and management of financial affairs, the convention requires the state party to ensure:

> the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property. [225]

136 The convention recognises the rights of persons with a disability to live independently in the community, and specifically 'to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement (art 19(a)). It recognises their right to respect for home and the family (art 23).

137 Such is the legal framework within which the tribunal made its decision to appoint the administrator. Now to the order which was made and the basis for it.

PROCEEDINGS IN TRIBUNAL

Applications

138 On 22 May 2009, the program manager of Melbourne Health applied to the tribunal for guardianship and administration orders under ss 19 and 43 of the *Guardianship and Administration Act*. The application gave details of Patrick's disabilities as chronic schizophrenia and delusional disorder. It said his income was the disability support pension and his expenditure consisted of a fortnightly housing repayment. His assets were described to be a 70% share in his home, which he owned with the Director of Housing.

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224 Article 12(4).
225 Article 12(5).

139 The application described the issues to be determined in these terms:

> Guardian – [Patrick] insists that he doesn't have a mental illness, he wants to be discharged of medication, no area mental health service to be involved. He wants to go home – he is unable to care for himself at home, doesn't cook or attend to domestic tasks, poor personal care – refuses treatment for physical ailments – refuses all treatments which would enable him to not have pain from back etc.

140 It attached a letter to the tribunal from Patrick's treating psychiatrist, which said:

> [Patrick] is a 56 year old man with 18 year history of Psychiatric Service involvement, dating from 1991. His diagnosis currently is Delusional Disorder. During his long history he has also had a diagnosis of, Schizoaffective and chronic treatment resistant schizophrenia.
>
> During his 18 years of illness he has had 106 admissions to mental health facilities. This resulted from his almost complete lack of insight and consequent poor compliance with medication. [Patrick] has been unwilling to adhere to any treatment regime, particularly following discharge. He does not consider that he has any form of mental illness, does not see the need for medication and refuses any involvement from the area mental health service. As a result of his delusional ideas he spends much of his day seeking legal avenues to solve his problems; this includes spending large amounts of money on faxing, getting taxis to and from hospital to attend government facilities that he also believes employ him. His condition has deteriorated over recent years, and this deterioration has been associated with impaired ability to adequately care for himself, to meet his own basic needs and to participate meaningfully in the community.
>
> [Patrick] is participating in the Shared Home Ownership arrangement with the Director of Housing, Home Loans Programme. As [Patrick] spends significant periods away from home when hospitalised, his home remains vacant. When at home he has no food in his cupboards, and spends a large portion of his pension on take away foods.
>
> [Patrick's] mental health impacts on his ability to make informed choices regarding his physical and mental health.

141 On 27 August 2009 the tribunal dismissed the application for the guardianship order. It was not pressed because Patrick was the subject of an involuntary treatment order under the *Mental Health Act*. The tribunal granted the application for the administration order and appointed State Trustees to be the administrator. It was in similar terms to the order which is under appeal.

142 On the same day, Patrick applied under s 60A(1) for a rehearing of the application for the administration order. Under s 60D(2), the tribunal stayed the operation of the order pending the determination of the rehearing application.

143 The tribunal commenced the rehearing application in September 2009. The parties were Patrick, Melbourne Health and State Trustees. The proceeding was adjourned to enable Patrick to obtain independent psychiatric assessment and Melbourne Health to update its existing assessments. The tribunal was not then satisfied that the existing reports addressed the question of Patrick's capacity to manage his financial affairs. The final hearing was held on 19 February 2010.

144 The tribunal received substantial written and oral evidence, of which the following is a summary.

Evidence before tribunal

Summary

145 The written evidence before the tribunal consisted of a medical report dated 6 October 2009 from a consultant independent psychiatrist (exhibit BS-4), a medical report from a consultant treating psychiatrist dated 28 July 1998 (exhibit BS-5), a neurological assessment dated 29 November 2006 (exhibit BS-6), an occupational therapy assessment dated 8 October 2008 (exhibit BS-7), a memory assessment dated 28 January 2009 (exhibit BS-8), a social worker's assessment report dated 18 November 2009 (exhibit BS-9), an occupational therapy assessment dated 20 November 2009 (exhibit BS-10), a report from Patrick's present consulting treating psychiatrist (co-written with a senior registrar dated 1 December 2009) (exhibit BS-11) and the report of the Office of the Public Advocate dated 24 July 2009 (exhibit BS-12).

146 At the hearing, oral evidence was given by Patrick's consultant treating psychiatrist, the social worker, the program manager of the hospital who was the applicant for the administration order, the consultant independent psychiatrist and Patrick.

147 I have read and considered all of the evidence before the tribunal. For the purposes of these reasons, it is sufficient that I set out the following.

Program manager

148 In oral evidence, the program manager told the tribunal the treating team obtained extra funding to assist Patrick in the community. There was a trial discharge to a supported residential service ('SRS'). A community treatment order was made with a residential condition to live at this service. Patrick refused to participate. He would not even get into the car taking him there. He became extremely violent and abusive towards staff, including her. He was 'just, yes, just outrageous'. They took all his belongings to the SRS. They told him to make his own way there, then contacted the police. The police found him at home. They took him to the SRS, where he upset some clients and staff and went home again. The SRS contacted the hospital they could no longer accept him. The community treatment order had to be revoked and he was picked up at home and taken back to the hospital. He came voluntarily.

149 The program manager deposed:

> Ultimately the reason why we … have applied for this administration order, is that so we can, you know, his finances are an issue. Under our – we're going to be impartial from that decision. We feel that if we provided or put [Patrick] in an SRS accommodation, he wouldn't be able to financially afford to live in both – have both. He wouldn't be able to afford to pay his mortgage and his – and his, you know, standing charges of his bills, and also pay for a placement in SRS. The disability pension does not allow for both. That is our ultimate, you know, application; that's where we sit. That's why we applied for an administration order.

She went on to say that they had costed out the situation. An SRS would take about 95% of his income. She agreed with the tribunal's calculation that it would be 'very tight and it … may or may not be viable', if he kept his house. She expressed no further conclusions on that subject. She said the costs of an aged care hostel were similar to an SRS, but she could not say what the cost of a hostel would be. Her evidence was not that the house had to be sold for Patrick to go into an aged care hostel, which she said was the option she was 'hoping' for.

150 The program manager disagreed that they were making the application because Patrick kept absconding, which was inconvenient. She said he was at risk when he was not in a secure and supported location, such as when he was at home. He caused anxiety and stress, and a burden on community resources. The police would have to

be involved, with all of the factors it caused. She said there were a lot of issues, and it was not about inconvenience in terms of health services. She agreed the application was not based purely on financial considerations. She said the financial and health grounds were intertwined. But the ultimate reason was financial. Patrick needed to live in a residential supported facility, rather than independently, and for that to happen a decision needed to be made about his home.

151 The program manager agreed that, if Patrick was transferred to a hostel, it would be on a community treatment order with a residential condition. He would still be required to take his medication. If he became unwell or aggressive, the order would be cancelled and he would be brought back to a hospital. She said living in a hostel would be similar to living in a hospital – it would be locked, secure and his medication would be administered. What they wanted to do was break the present cycle. An SRS was not locked. She said Patrick should live in an environment which was similar to the hospital, which was why he needed to go into a hostel.

Social worker

152 The social worker provided a written report and gave oral evidence to the tribunal.

153 The report was prepared to assess Patrick's current needs, particularly his discharge needs. He was adamant he wished to return home and live independently in the community, but the treating team doubted he was capable of doing so.

154 Patrick's clinical history was set out. There had been some 104 admissions since 1991. Most recently, he had been admitted to the unit in 2006 on an involuntary basis under s 12 of the *Mental Health Act*. That followed a failed three-month transfer to a community care unit, at which he refused to have depot medication and from which he absconded. He was brought to the hospital by the CAT team when his community treatment order was revoked.

155 The report gave details of Patrick's psychiatric condition and family history. There was psychiatric illness and suicide in the family. Details of his modest schooling and

employment were given. He left his employment in 1991 after having delusions that his employer and the police were engaged in fraudulent behaviour. This was investigated and found not to be proven. He had attempted suicide shortly after leaving and had not worked since.

156 Patrick was married for 18 years. The couple separated in 1998 after several years of relationship difficulties, probably exacerbated by his mental condition. Patrick was at risk of social isolation due to limited contact with friends and family. His only support was from one of his brothers. He refused to engage with community services as he felt he did not have an illness. He did not engage in community activities at, and was isolated in, the hospital ward. He had limited interaction with the patients and staff. He did attend community meetings in the ward, which was his only interaction with people.

157 Patrick had a serious back injury, poor mobility and walked with a frame. His back condition was expected to deteriorate. If released into the community, he says he would use public transport. This would involve high risks which Patrick did not understand. He had poor living and household management skills. He could not clean his house, first saying this would not be necessary, but most recently accepting he would need some home help. He could not and did not clean himself properly, and said this was unnecessary, which meant he was at risk of developing rashes and skin disorders. He did not buy soap, detergent or washing powder. He said he would spend as much time as possible at home in bed, and live on takeaway food. He was often unkempt, bare-footed, unshaven and not fully washed.

158 It was of great concern to the treating team that Patrick lacked insight into his psychiatric condition, that he intended to stop all medication on discharge, and that he constantly wanted to go home, where he would undoubtedly become socially isolated, properly clean neither himself nor his home and where his mental condition was bound to deteriorate, placing himself and others at risk. At home, he had internal and emergency telephone access only.

159 The report described Patrick's current mental state. Several instances of delusional thinking were given. He was seen to be at high risk of non-compliance with medication, not engaging with mental health services, becoming verbally and physically abusive, self-neglecting (not meeting his physical or mental health needs e.g. diet/oral intake, personal hygiene etc), serious injury secondary to falling and social isolation. The serious potential implications of these risks were set out.

160 The report recommended Patrick be placed in a low level care facility (hostel). He could not be managed within the community, as demonstrated by the number of admissions over many years. He was well managed in a secure facility, such as the hospital. He should have a guardian appointed to make decisions on his behalf, as he was unable to manage his mental illness.

161 In her oral evidence, the social worker emphasised the risks to Patrick and other people due to decompensation. He was a struggle to care for, even in a locked environment. Their attempt to transfer him to supported residential accommodation failed due to him absconding. An SRS provided a supporting environment but is not a locked facility. Also, no bond is required so he would have had more options with keeping his property. It was because the SRS accommodation failed that the treating team decided an aged care hostel would be more suitable, as it was more restricted. They had sent Patrick's case for aged care assessment and had been informed that he could be taken when the time was right. She said there would be more costs associated with a hostel, but he would be adequately cared for, in terms of food, living in a clean and stable environment and taking his medication. Whether the house needed to be sold before he could go into a hostel needed to be explored, she said. She could not say what the costs of would be and it depended on the hostel. Her evidence was not that the home would have to be sold before he could go into aged care accommodation.

162 As to financial management, in the report the social worker said that Patrick conceded he could manage his funds independently and intended to pay all his bills via direct debit. She said he struggled with budgeting, as evident from him spending $25 a day

on diet coke at the ward vending machine. He told her he withdrew $270 per week at the ATM machine, which he used to buy takeaway food and soft drinks. All his home bills/outgoings were paid by direct debit. The social worker said, at home, he would struggle financially due to his poor spending habits, into which he had poor insight.

163 In her oral evidence, the social worker said Patrick was being well cared for in a supportive environment. Therefore it was not much of an issue at present what he spent his money on. But in the community, he would have to pay for his medication, and a range of other things, and prioritise his spending. Spending $270 per week on takeaway food and drink was not more than he could afford in his present environment, and he was not failing to budget properly at the moment, although they had to turn the coke machine off – there were issues with his weight. But living independently in the community, she was concerned about his ability to make financial decisions and prioritise how he would spend his money, in the sense of eating properly and meeting his nutritional needs. His problems would unravel in the community, in terms of his health and how he prioritised his budgeting.

164 The social worker acknowledged the positive change in Patrick wanting home help and personal care. But that was not what led to the application for the administration order. It was his unwillingness (due to his lack of insight) to engage with mental health services. He would not now be suitable for living independently at home.

165 In relation to Patrick's home, she said she thought it would need to be sold, but that would need to be explored if an administration order were to be made.

Consultant treating psychiatrist

166 Patrick's consultant treating psychiatrist and the senior registrar at the hospital wrote a (five page) joint report, and the psychiatrist gave oral evidence.

167 The report said Patrick's present diagnosis was a delusional disorder. It gave an account of his medical history and his 106 admissions to mental health facilities. He had an almost complete lack of insight into his need for medication, which was

unlikely to change, given his history. Patrick had responded well to treatment, but continued to say that he does not need it and would discontinue it if discharged. He was medically incapable of living independently in the community, and the report supported the reports of the social worker and the occupational therapist in this regard.

168 The doctors expressed concern about the significant stress and disability to Patrick and to those trying to manage him in a community service. When living in the community, it was not uncommon for him to be walking the streets in the early hours of the morning, at risk due to vulnerability or misadventure. He was usually amiable, but capable of violence.

169 Further, prior to his most recent admission, Patrick had decompensated markedly when living at home. He was neglecting his self-care, not eating properly and becoming increasingly aggressive and abusive. He had to be admitted to hospital as an involuntary patient.

170 The report described his chronic back pain, due to disc degeneration and other conditions. These conditions caused him significant pain and disability and impaired the mobility which would be necessary for independent living. His physical condition was deteriorating.

171 In his oral evidence, the consulting treating psychiatrist said he saw Patrick in the emergency department prior to his most recent (and lengthy) admission. He had decompensated quite severely in the community. He was so disturbed on this return to hospital that he had to be kept in a seclusion room until his medication took effect. The psychiatrist said Patrick eventually responded to the treatment and settled into the hospital unit very well.

172 Asked about Patrick's capacity to manage his financial affairs, the psychiatrist said Patrick understood the nature and extent of his estate, but that when he was off his medication, he became very unwell and was not able to look after himself, either physically or mentally. He was able to understand aspects of his finances and knew

what money was. He understood the value of money and the standard for notes and could manage them in terms of the mechanics But he could not manage the complexity of living on his own, his house, debts, daily food and living within his budget.

173 The psychiatrist said the property was a major issue for Patrick and he did not wish to relinquish it. It was very important to him, especially given the losses he had suffered in his life. But his decisions about things like his house were impacted by his mental illness, and he could not live independently in the community. When asked about Patrick's capacity to live independently in the future, the psychiatrist's evidence was guarded. He said he 'certainly can't read into the future', but given Patrick's history, this was unlikely. If he lived by himself in his house, he would stop taking his medication, decompensate and be back in hospital. But selling the house was a very serious issue, and doing so could also lead him to decompensate.

174 The psychiatrist said he disagreed with the opinion of the consulting independent psychiatrist. That doctor had seen Patrick in a snapshot of time when he was functioning at a better level due to his treatment.

Consultant independent psychiatrist

175 The consultant independent psychiatrist provided a written report and also gave oral evidence.

176 The report (two pages) set out Patrick's medical history and treatment. It said Patrick had good insight, good knowledge of his assets and $5,000 in the bank. The psychiatrist expressed the opinion that Patrick could make major decisions for himself, could manage his own finances and presently was of sound mind. It was better to leave his financial decisions to himself.

177 In oral evidence, the psychiatrist said he had available and considered a number of Patrick's previous (and extensive) medical reports, and so was familiar with his medical history. He said he saw him only once on 6 October 2009, for 45 minutes. He

said Patrick had a chronic condition and could not live independently. He agreed with the diagnosis of delusional disorder.

178 In response to a question from the tribunal about Patrick's capacity to manage his financial affairs if he went home and stopped taking his medication, the psychiatrist said 'I would revise my opinion'. He later said Patrick's judgment would be very poor if he stopped taking his medication. He agreed with the opinion of the consultant treating psychiatrist in that respect.

Patrick

179 Patrick told the tribunal he had looked after his finances since being 16 years of age and no one had ever tried to take that away from him. He had purchased his own home and maintained his finances when he was married. He owned 71.2% of his property and the Director of Housing owned the other 28.8%. He paid rent on that latter proportion.

180 He now accepted he needed, and was willing to accept, home help assistance when he went home. He has filled out the necessary forms for Brimbank Council to provide that assistance.

181 He told the tribunal he would be worse off financially if he went into supported accommodation, and opposed going there. He did not want to go into an aged care nursing home or hostel. He did not like where he was and wanted to go home. He said the authorities had given him experimental drugs and electric shock treatment, which was against the law. He got a letter of apology for that.

182 Patrick said his medication keeps him awake at night. He wanted to go home, where he would have nothing to do with mental health services. He said the medication brought back drug-related memories – one brother had suicided by hanging himself and another had died in mental health seclusion.

183 He disagreed that he was mentally ill. He told the truth about the fraudulent activity in his workplace and other matters. His many previous admissions were due to

misdiagnoses and wrong medication. Even when he had been legally discharged, they had made him take medication. If he cut his ties with mental health, he would be a lot happier and escape his daily grief.

184 He said he was one of nine children. Four brothers and his father were deceased. If anyone was going to look after his financial affairs, it should be his brother. His brother's view was that the home should not be sold. He agreed that he had appointed State Trustees to be the executor of his will, but that was on his solicitor's advice. He did not want State Trustees to be his administrator. People had said he would have to 'fight for 10 cents'. It would cause him a great deal of stress for his home to be sold. He said: 'It is the marital home and it's got memories and where my wife brought up the two step-children'.

185 After receiving that evidence, and the submissions of the representatives of the parties, the tribunal reserved its decision. On 17 May 2010 it made an unlimited administration order, for which it gave the following reasons (in summary).

Decision of tribunal

186 The tribunal said Patrick had a 20 years history of mental illness, having been admitted to mental health services over 100 times since the early 1990s. He had lived alone since being widowed a few years ago and had a number of siblings. It said the purpose of the rehearing was 'more or less said to be to have an administrator who could make decisions in relation to [Patrick's] home'. That was because his treating team considered he was not able to live there, especially if he ceased to take his medication.

187 The tribunal referred to the many medical reports which were filed on behalf of Melbourne Health, and the one psychiatric report filed on behalf of Patrick. It referred to the extensive evidence which was given, both in writing and orally, which I have already summarised.

188 Patrick's siblings did not attend the hearing, although one had attended earlier hearings. The tribunal received into evidence a letter (undated) from Patrick's sister expressing her opposition to the sale of the house and the view that he was capable of managing his financial affairs, as he had already done.

189 The tribunal found the consultant independent psychiatrist had qualified his opinion in his oral evidenced in a way which brought him into substantial agreement with the consultant treating psychiatrist, whose evidence the tribunal would have preferred in any event. The tribunal found it was satisfied that Patrick had a disability by reason of which he was unable to make reasonable decisions 'about his estate, especially his property' and 'in relation to his home'. The tribunal said that decisions about Patrick's home, which was his main asset, 'cannot be sensibly separated from decisions about where it is in his best interests to live'.

190 As there was a 'strong possibility' an administrator would decide to sell the home, the tribunal accepted that appointing an administrator would involve a limitation on Patrick's human rights. It did not specify which rights were limited. That brought proportionality under s 7(2) of the Charter into operation. In that regard, the tribunal applied the approach to proportionality expounded in *R v Oakes*,[226] which had been approved in *R v Momcilovic*.[227]

191 As to whether appointing an administrator would be a proportionate exercise of the discretion to do so, the tribunal said:

> An administration order in this case may have the ultimate result of severing of [Patrick's] very strong connection with his home. I am satisfied however of these things. [Patrick] has a disability. By reason of his disability he is unable to make reasonable decisions in relation to his home. Notwithstanding some stabilisation of his condition as the result of the care he has been given, his declared intention to reject medication in future is a strong factor among a number of factors that support that conclusion. Decisions need to be made about his home. [Patrick] therefore needs an administrator to make those decisions. Although he wishes not to have an administrator, in my view it would be in his best interests to have an administrator empowered to make decisions about his home. The measures contemplated for [Patrick] are designed to protect him from continuing the pattern of behaviour that has been severely detrimental to him but which also has placed some health care

226 [1986] 1 SCR 103, [67] – [67] (Dickson CJ).
227 (2010) 25 VR 436 (Maxwell P, Ashley and Neave JJA).

> professionals and other persons at risk. I consider that those measures are rationally connected to the objective. Given [Patrick's] circumstances, including his present and future economic circumstances, an administrator may reasonably decide that nothing short of sale would be viable. I see the effects of the measures as proportional to the objective. Sale of his home may indeed be 'irreversible and extreme' but I am satisfied that less restrictive options have failed time and time again and would be likely to fail again.

192 The tribunal decided that appointing the administrator did not

> offend the principles contained in the *Convention on the Rights of Persons with Disabilities* – read as a whole – for a decision to be made on behalf of a person who has a cognitive impairment that, in his best interests, he not return to accommodation at which he would not or could not receive the treatment and care he needs: see, for instance, the principle of proportionality in Article 12.

193 The tribunal did not resolve the evidence about the cost of Patrick going into supported accommodation in the community, such as an aged care hostel. It did not find that his house would have to be sold before he could go into such accommodation. Nor did the tribunal find that selling his home would actually break the pattern of behaviour that had been detrimental to him, or worsen that pattern.

194 As to appointing State Trustees and not Patrick's brother, the tribunal said the brother had not attended the final hearing. Further, 'the fact that he had already decided against the sale of the property weighed against his appointment'. The tribunal took into account Patrick's reasons for not wanting State Trustees as his administrator, but held that his reasons 'did not appear sound'. It also took into account that Patrick had appointed State Trustees to be the executor under his will.

195 Finally, the tribunal held that it would be in Patrick's best interests to appoint State Trustees to be his administrator, and at the present time. It would then be necessary for State Trustees to investigate the matter and make decisions in Patrick's best interests, bearing in mind s 4 of the *Guardianship and Administration Act* (especially the least interference principle) and s 49 (which required, among other things, consultation, taking into account Patrick's best interests and encouraging his self-determination). The tribunal declined to make a limited order.

Administration order

196 The tribunal made the administration order in these material terms:

> The Tribunal is satisfied that the proposed represented person has a disability; is unable by reason of that disability to make reasonable judgments about his estate; and needs an administrator.
> The Tribunal orders that:
> 1. State Trustees Limited, 168 Exhibition Street, MELBOURNE 3000, be appointed administrator of the estate of the represented person with all the powers and duties conferred by Part 5 Divisions 3 and 3A of the *Guardianship and Administration Act 1986*.
> 2. State Trustees Limited is entitled to the following remuneration (inclusive of GST) from the estate of the represented person for acting as administrator:
> A. A commission on gross income received at a rate not exceeding:
> (i) 3.3% in respect of Centrelink or Department of Veterans' Affairs pensions; and
> (ii) 6.6% in respect of all other income.
> B. A once only capital commission not exceeding 4.4% of the gross value of any assets of the estate; and
> C. A fee not exceeding 1.1% per annum on the capital sum invested in the common fund of State Trustees Limited.
>
> For any services provided to the estate State Trustees Limited or its subsidiary STL Financial Services Limited is entitled to remuneration at a rate not exceeding the amount set in the scale of charges lodged with the Treasurer and published in the Government Gazette.
> 3. This administration order be reassessed no later than 30 June 2013.
> 4. This order shall continue to have effect until further order of the Tribunal.
> 5. The administrator shall immediately notify the principal registrar in writing of any change of address of the represented person or the administrator.
>
> The represented person, the applicant, or any other person, may apply to the Tribunal of a reassessment of this order at any time.

197 It is from this order that the appeal has been brought. The order has been stayed by the tribunal pending the determination of the appeal, in which the following submissions were made.

SUBMISSIONS OF PARTIES IN APPEAL

Appellant

198 Patrick submitted making an administration order was a serious interference with his civil liberties and human rights. The order was designed to permit, and was likely cause, the sale of his house, which was very dear to him. The order was not authorised by s 46(1) of the *Guardianship and Administration Act*. Nor was it the least restrictive course, as required by s 4(2).

199 The purpose of the appointment was to prevent Patrick from returning to live at his home. That was a statutorily impermissible purpose. The evidence established he was capable of managing, and was managing, his own finances. The doctors may be frustrated at their lack of progress and perceive he is using his home as a medical refuge. They may consider he cannot live independently at home because he would not take his medicine. They might think he would make improved medical progress if the home was not a residential option for him. But an administration order is not an adjunct to medical treatment. Its purpose is to protect property. An administration order ought not to be used to deprive a mentally ill person of their property.

200 Even if an administration order could lawfully be made, it was wrong to make one in unlimited terms. That was not the least restrictive option. At most, the order should have required the administrator to manage his finances and maintain his home.

201 The tribunal committed an error of law by deciding that decisions about Patrick's assets could not be separated from decisions about the best place for him to live. Under s 46(1)(ii), an administration order could only be made if the person could not make reasonable decisions about their estate by reason of their disability. That condition was patently not satisfied, and his medical treatment was a totally different matter.

202 The order could not be made unless it was in his best interests (s 46(3)). But that test did not apply unless Patrick could not make reasonable decisions about his estate by reason of his illness (s 46(1)(a)), appointing an administrator was the least restrictive option (s 46(2)(a)) and it was not possible to give effect to his wishes (s 46(2)(b)). Those conditions were not satisfied.

203 That he was unwilling voluntarily to take his medication was irrelevant to whether he was capable of making reasonable decisions about his estate, for he had made such decisions in the past despite his illness. The tribunal erred in law in taking this into account.

204 There was no evidence to support the tribunal's conclusion in that there was a need to make an immediate decision about selling his home.

205 The tribunal was patently wrong to conclude that he may or may not be meeting his financial commitments, for the evidence showed clearly that he was. The evidence of the consultant treating psychiatrist which was relied on by the tribunal was not that Patrick was not managing his financial affairs. It was that he was not able to live independently because of his mental illness.

206 It was contrary to ss 4(2)(c) and 46(2)(b), both of which referred to the person's wishes, not to appoint Patrick's brother as the administrator because had already decided against selling the home. It was irrelevant that he was less likely to sell the home.

207 Taking into account that Patrick had appointed State Trustees, and not his brother, to be the executor of his will was also irrelevant.

208 As to the Charter, the court should not afford the decision of the tribunal any margin of appreciation. That concept was developed to accommodate different approaches to dealing with human rights issues in the various parliaments of Europe[228] and was not relevant under Victoria's domestic legislation. Further, there was already an acceptable limit on the role of the court, because an appeal under s 148(1) of the *Victorian Civil and Administrative Tribunal Act* was confined to a question of law. To expand that limit by adding a margin of appreciation would mean a decision which was infected with error of law would not be set aside. Question 2(a)(ii) in the Charter notice should be answered no. In the alternative, any margin of appreciation was narrow where, as here, the stakes were critical to the individual's enjoyment of his key rights,[229] and the decision of the tribunal exceeded that margin.

209 Accepting *R v Momcilovic*,[230] the court should explore all possible interpretations of the provisions in question and adopt the one which least infringed Charter rights.[231]

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228 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, [236]-[238] (Kirby J).

229 *Buckley v United Kingdom* (1996) ECHR 39, [74] and *Connors v United Kingdom* (2004) ECHR 223, [81] as cited in *Director of Housing v KJ* [2010] VCAT 2026, [95] (Member A Dea).

230 (2010) 25 VR 436, [35] (Maxwell P, Ashley and Neave JJA).

So applying s 32(1) of the Charter to the proper interpretation of ss 4(2) and 46(1) supported each of grounds of error of law relied on. Further, the tribunal was required to exercise the power to appoint an administrator compatibly with s 7(2) of the Charter. Applying the classic test of proportionality,[232] it could not be argued that the limitations on Patrick's human rights which the tribunal's decision brought about were justified in terms of that section.

210 Finally, the tribunal's decision was not consistent with article 19(a) of the *Convention on the Rights of Persons with Disabilities*.

Attorney-General (on Charter)

211 The Attorney-General submitted that, when determining whether a public authority had acted compatibly with human rights, the court's role is different to that of the primary decision maker. The distinction in administrative law between assessing the merits as against the legality of an administrative decision applies to the review of decisions for compatibility with human rights under the Charter. This is especially so in appeals on questions of law. The appeal cannot succeed simply because the court takes a different view. There must be an error of analysis, such as applying the wrong standard or test. Therefore, in regard to questions of fact or the application of judgments or discretions to facts, appropriate weight should be given to the primary decision. The extent of that weight depends on the particular circumstances, such as (a) the specialist expertise and experience of the primary decision maker in matters of that kind; (b) the extent to which the relevant human right requires a balance to be struck; (c) the extent to which the primary decision maker has given careful consideration to the human rights issues; and (d) the extent to which the decision involved findings of fact and whether there was contradictory evidence.

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231 Ibid, [103] (Maxwell P, Ashley and Neave JJA).

232 *R v Oakes* [1986] 1 SCR 103, [67]-[71](Dickson CJ).

212 In appeals to the court under s 148(1) of the *Victorian Civil and Administrative Tribunal Act*, the same approach should be applied. As under the *Human Rights Act 1998* (UK), weight should be given to the decision of the tribunal.[233]

213 The human right engaged is privacy, family home and correspondence in s 13(a) of the Charter. The right is against unlawful or arbitrary interference. 'Arbitrarily' in s 13(a) does not involve proportionality and *Re Kracke and Mental Health Review Board*[234] was wrongly decided on that point.

214 The term 'margin of appreciation' has a distinct meaning in international law. It is applied by the European Court of Human Rights to limit proportionality scrutiny of the conduct of member states to the *European Convention on Human Rights*. By conceding a margin of appreciation to each national system, the court recognises that states may vary in their application of human rights according to local needs and conditions.[235] It is more appropriate to speak of affording weight than a 'margin of appreciation' or 'deference' (question 2(a)(ii) of the Charter notice).

215 Courts in the United Kingdom do not apply a margin of appreciation in cases under the *Human Rights Act*.[236] The principles operating in that country[237] and Australia[238] should be applied in the context of s 38(1). Weight should be afforded to the primary decision. That is not a principle of deference. It arises out of basic administrative law principles respecting the exercise of discretionary powers.

216 The weight to be given will depend on the circumstances, including the field in which the tribunal operates, the criteria for appointing its members and the extent and transparency of its reasons.[239] The considerations applying in the United Kingdom,

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233 Jack Beatson et al (eds), *Human Rights: Judicial Protection in the United Kingdom* (2008) [3-92], [3-182], [3-247]; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009) 167ff.

234 (2009) 29 VAR 1.

235 *Sahin v Turkey* (2004) 41 EHRR 109, 131-132.

236 *R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 326, 380 (Lord Hope).

237 *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, 240 (Lord Hoffmann).

238 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J) and *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 40 (Mason J).

239 *Corporation of the City of Enfield v Development Assessment Commission & Anor* (2000) 199 CLR 135, 154-155 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

include the expertise of the tribunal,[240] the uncontradicted evidentiary basis of its findings[241] and the adequacy of its reasons.[242] That is especially be so in relation to proportionality assessments which involve a balancing of competing interests and questions of mixed fact and law, as against questions of pure engagement and breach. This approach recognises the court is not as well placed to strike the balance as the primary decision-maker, and weight should therefore be afforded to its assessment.[243] Less weight is attached where the issue is whether a right has been interfered with, or an unqualified right has been breached.[244]

217 Those considerations applied to the present case. The tribunal has specialist experience and expertise in the guardianship and administration area. The principal right in issue is the privacy right in s 13(a), which is qualified – it protects against unlawful and arbitrary interference. While assessing arbitrariness is not the same as assessing proportionality, it requires consideration of a number of factual matters, including the best interests of the individual and whether less restrictive means could be used. The reasons of the tribunal are carefully considered.

218 When interpreting ss 4(2) and 46(1) (question 2(b)(i) of the Charter notice), *R v Momcilovic*[245] applies and s 7(2) is excluded from the interpretation of statutory provisions in accordance with s 38(1) of the Charter.[246] I accept the submission of the Attorney-General that I am bound by this decision.

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240 Jack Beatson et al (eds), *Human Rights: Judicial Protection in the United Kingdom* (2008) 284; *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279 [30] (Hale LJ, with whom Clarke LJ and Butterfield J agreed); *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49 (Baroness Hale, Lord Hope agreeing).

241 *R (Gillan and another) v Commissioner of Police of the Metropolis and another* [2006] 2 AC 307, 340 (Lord Bingham).

242 See *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420, 1432 (Baroness Hale), 1434 (Lord Mance), 1429 (Lord Rodger); *South Buckinghamshire District Council v Porter and another* [2002] 1 WLR 1359, 1377 (Brown LJ, Gibson and Tuckey LJJ agreeing); *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116 (Lord Bingham).

243 Beatson et al (eds), *Human Rights: Judicial Protection in the United Kingdom* (2008) 273.

244 *R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 236, 380-381 (Lord Hope); *R (Bloggs 61) v Secretary of State for the Home Department* [2003] 1 WLR 2724, 2746 (Auld LJ, Mummery and Keene LLJ agreeing).

245 (2010) 25 VR 436, [35], [75], [102] (Maxwell P, Ashley and Neave JJA).

246 Ibid [74], [77].

219 Sections 4(2) and 46 of the *Guardianship and Administration Act* comply with human rights. That Act contains provisions protecting people from unlawful and arbitrary interference with their rights under s 13(a) of the Charter. In particular, the disabled person must be a party to the proceeding (s 43(3)), the person must have a disability, be unable to make reasonable judgments about their estate by reason of that disability and be in need of an administrator (s 46(1)(a)(i), (ii) and (iii)), the tribunal must consider whether there are less restrictive means (s 46(2)(a)) and the wishes of the individual (ss 4(2)(c), 46(2)(b) and 47(2)(a)), the order must be in the person's best interests (ss 4(2)(b) and 46(3)) and it must be the least restrictive action in the circumstances (ss 4(2)(a) and 46(4)). There are strict eligibility criteria for administrators (s 47), who must act in the person's best interests (s 47(1)(c)(i)). The balance struck in the *Guardianship and Administration Act* complied with Australia's obligations under the *Convention on the Rights of Persons with Disabilities*.[247]

220 If the tribunal is a public authority within s 38(1), whether the tribunal has complied with s 38(1) depends on the scope of the right (including any qualifying terms) and the general reasonable limits provision in s 7(2). As the second reading speech indicates, s 7(2) is linked with the concept of compatibility.[248]

221 Finally, there will be no infringement of Patrick's privacy and home rights under s 13(a) of the Charter if the scheme of the *Guardianship and Administration Act* is complied with because its provisions protect against unlawful and arbitrary interference with that right. Ordinarily, the substantive and procedural provisions of the *Guardianship and Administration Act* will ensure both proper consideration of human rights and compatibility of the ultimate decision with those rights. The procedural obligation in s 38(1) is satisfied if the decision-maker seriously turns his or her mind to the human rights issues, and the countervailing interests and obligations were identified.[249]

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247 The Attorney-General also referred to the declaration which Australia made when ratifying that convention (see above).

248 Referring to Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls).

249 *Castles v Secretary, Department of Justice* [2010] VSC 310, [185] (Emerton J).

Victorian Equal Opportunity and Human Rights Commission (on Charter)

222 The Victorian Equal Opportunity and Human Rights Commission submitted the court should not afford the tribunal a margin of appreciation (question 2(a)(ii) of the Charter notice). The European context was not analogous and the courts in the United Kingdom did not apply it.[250] Further, as there, the court here should not appropriate a merits review role.[251] The focus must be on the lawfulness of the decision under s 38(1) of the Charter. This represented a new standard of review.

223 Applying legality under s 38(1), as the standard of review the court should follow the approach to applying s 6(1) of the *Human Rights Act 1998* (UK) in *Huang v Secretary of State for the Home Department*[252] and *(R) Begum v Denbigh High School.*[253] That is to apply an objective test of proportionality which involved a greater degree of intensity than standard judicial reviews.[254] The court must afford some margin to the tribunal with respect to the exercise of its discretion to appoint the administrator, for otherwise the court will appropriate the role of primary decision-maker, which it must not do.[255]

224 Applying s 32(1) of the Charter to the interpretation of ss 4(2) and 46(1) of the *Guardianship and Administration Act* (question 2(b)(i) of the Charter notice), *R v Momcilovic*[256] establishes these six propositions: (1) the meaning of a statutory provision must be ascertained by applying s 32(1) at the outset, in conjunction with other principles of statutory interpretation; (2) compliance with s 32(1) requires the adoption of the least possible infringing interpretation, as identified from the existing framework of interpretative rules, including the principle of legality; (3) the presumption against interference with fundamental rights must now be understood to extend to the protections of the human rights in the Charter; (4) ambiguity is not

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250 *Handyside v United Kingdom, R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 326, 380 (Lord Hope).

251 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 36 (Brennan J), and *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 40 (Mason J).

252 [2007] 2 AC 167, 184 (Lord Bingham, Baroness Hale, Lord Carswell and Lord Brown).

253 [2007] 1 AC 100, [30] (Lord Bingham).

254 Jack Beatson et al (eds), *Human Rights: Judicial Protection in the United Kingdom* (2008) 3-92.

255 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

256 (2010) 25 VR 436 (Maxwell P, Ashley and Neave JJA).

required for the application of presumption; (5) the most Charter-compliant possible interpretation is to be preferred; (6) justification under s 7(2) is relevant only to making a declaration of inconsistent interpretation under s 36, which does not arise in the present case, because a Charter-compliant interpretation is available.

225 The commission submitted the provisions of the *Guardianship and Administration Act* must be interpreted in accordance with the objects in s 4(2) of that Act. The relevant object is s 4(2)(b), namely that 'the best interests of a person with a disability are promoted'. The 'best interests' of the person must be understood by reference to art 3 of the *Convention on the Rights of Persons with Disabilities*, reference to which is permitted by s 32(2) of the Charter.[257] The convention informs the nature and scope of each relevant right where the rights of persons with disabilities are in issue. Within that framework, s 4(2) requires the tribunal to take into account the least restriction principle and the wishes of the person. The proper interpretation of the relevant provisions of the *Guardianship and Administration Act* is the one which gives primacy to Patrick's best interests, having regard to his rights as protected in the Charter and the *Convention on the Rights of Persons with Disabilities*.

226 Each proceeding under the *Guardianship and Administration Act* is as unique as each person is unique.[258] Therefore that Act should be administered with a flexibility of approach which is consistent with the infinite variety of circumstances which are raised when making guardianship and administrative orders.

227 Section 32(1) requires legislation to be interpreted consistently with human rights if possible. This implies that the *exercise* of the discretion under s 46 *of Guardianship and Administration Act* must be compatible with human rights. [259] This is not because the empowering provision incorporates the justification test in s 7(2), which is foreclosed

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257 Section 32(2) provides: 'International law and judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'. In reference to having resort to international jurisprudence, the commission submitted that *WBM v Chief Commissioner of Police* [2010] VSC 219, [48]-[57] (Kaye J) should not be followed.

258 In *XYZ* [2007] VCAT 1196, [47] Billings DP said: 'Just as each person is unique so is each proceeding under the *Guardianship and Administration Act 1986* unique'.

259 *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [2008]-[2011] (Bell J); *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [77]-[78], [85], [90]-[91] (Bell J).

by the decision in *R v Momcilovic*. It follows from the effect of s 32(1) on the scope of the discretion which is permitted by the provision. Attention must therefore be paid not to the interpretation of the empowering provision but to the compatibility of the *exercise* of the discretion with human rights.[260]

228 This is consistent with the principle of legality[261] which, according to *R v Momcilovic,*[262] is embodied in s 32(1) as a legislative command. The relationship between s 32(1) and the principle of legality is that described by Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*[263] as the relationship between that principle and s 3 of the *Human Rights Act* (UK). Therefore, when exercising the discretion in s 46(1) to make an administration order, the tribunal has to act compatibly with the person's human rights.

229 In the commission's submission, s 38(1) has two limbs. The first makes it unlawful to act[264] in a way which is incompatible with a human right. The second is procedural and requires public authorities to give 'proper consideration' to relevant human rights in making decisions. The second limb makes the human rights in Part 2 of the Charter a mandatory relevant consideration for all decisions made by public authorities. Therefore such authorities are required to give consideration to whether any human rights are engaged and, if so, whether any limitation is justified. Decisions of public authorities are subject to a higher standard of scrutiny than under the traditional 'relevant considerations' grounds of judicial review.[265] While s 38(1) does not mandate a particular outcome, which is for the public authority to determine,[266] the range of outcomes is constrained by the requirements of that provision. The 'proper'

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260 *Slaight Communication Incorporated v Davidson* [1989] 1 SCR 1038, 1058, 1078 (Lamer J); *Michaud v Quebec (Attorney General)* [1996] 3 SCR 3; *Quebec (CDPDJ) v Montreal (City)* [2000] 1 SCR 665 and *R v Lord Saville; Ex parte A* [1999] 4 All ER 860.

261 *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309, 329 (Gleeson CJ); *K-Generation* (2008) 237 CLR 501, [47] (French CJ); *Coco v The Queen* (1994) 179 CLR 427, 436-7 (Mason CJ, Brennan, Gaudron and McHugh JJ).

262 (2010) 25 VR 436, 446 (Maxwell P, Ashley and Neave JJA)

263 [1999] 3 WLR 328.

264 Section 3(1) defines 'act' to include failing to act or proposing to act.

265 Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 124-125; and *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291, 292 (Gummow J).

266 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-43 (Mason J).

consideration which s 38(1) requires is one which was reasonable under s 7(2). The reference by Emerton J in *Castles v Secretary, Department of Justice*[267] to identifying the countervailing interests or obligations should be understood in that light.

230 The limitation in s 38(2) on the operation of s 38(1) is not relevant where a range of possible courses of action are open. Here, s 38(1) limits the available courses of action to those which were demonstrably justified according to the criteria in s 7(2).

231 Accordingly, all decisions made by the tribunal with respect to the appointment of an administrator over Patrick's estate, and all actions taken when dealing with the application for the appointment of that administrator, had to be assessed for lawfulness under s 38(1) of the Charter. The Charter rights which were engaged are the right to freedom of movement (s 12), the right to privacy (s 13), the right to equality before the law (s 8) and the right to a fair hearing (s 24). Those rights were engaged because a decision to make an administration order involved a reasonably foreseeable result that his home would be sold.

232 The court must afford a certain margin of appreciation to the decision of the tribunal with respect to the exercise of its discretion to appoint the administrator. The breadth of that margin depended on the nature of the rights which were restricted and the purpose of the limitation, which must be determined by the court on an objective basis. The proper interpretation of the relevant provisions of the *Guardianship and Administration Act* was one which gave primacy to Patrick's best interests, having regard to his rights as protected in the Charter and the *Convention on the Rights of People with Disabilities*.

233 Now to the determination of the substantive issues in the appeal.

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267 [2010] VSC 310, [286].

ERROR OF LAW IN INTERPERTING ADMINISTRATOR APPOINTMENT PROVISIONS

Interpreting scope of statutory discretions compatibly with human rights

234 Patrick's grounds of appeal fall into two overlapping and alternative categories: misinterpreting s 46 of the *Guardianship and Administration Act* (grounds 2, 3 and 8) and improperly exercising the discretion to appoint the administrator (grounds 1, 4, 5, 6 and 7). Human rights considerations are relevant in both categories. I here consider the first.

235 As we have seen, relying on my decisions in *Re Kracke and Mental Health Review Board*[268] and *Lifestyle Communities Ltd (No 3),*[269] the commission submitted the lawfulness of the appointment of the administrator under s 38(1) of the Charter turned on whether the exercise of the discretion to make the appointment was compatible with human rights, not on the interpretation of the provision conferring the discretion (s 46(1)). I cannot accept that submission for two reasons.

236 First, in *Kracke* and *Lifestyle Communities Ltd* I was discussing the exercise of open-ended discretions in a manner which was compatible with human rights. Under the *Guardianship and Administration Act,* the discretion to appoint a guardian or administrator is not open-ended. The purpose of the power is benevolent and the discretion is circumscribed. Identifying the scope of the discretion by statutory interpretation which takes human rights into account is essential.

237 Second, in saying that open-ended discretions must be exercised compatibly with human rights if they can be, which proposition I maintain, this does not necessarily mean that interpretation of the provision conferring the discretion can be overlooked. That would transfer the focus of analysis in all cases to the individual exercise of the discretion, which would make the meaning of the provision 'ambulatory'[270] in human rights terms. As was held by Maxwell P, Ashley and Neave JJA in *R v Momcilovic,*[271] the first obligation of the court is to interpret the provision consistently with human

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268 (2009) 29 VAR 1, [289]-[290].
269 [2009] VCAT 1869, [77]-[78], [85], [90]-[91].
270 *Morse v The Police* [2011] NZSC 45, [14] (Elias CJ).
271 (2010) 25 VR 436, [29].

rights, if it can be, in accordance with s 32(1). By that means, the object of the Charter to protect and promote human rights can be achieved. Moreover, interpreting the enabling provision is central to the judicial responsibility of the court to supervise for compatibility with human rights (unlawfulness under s 38(1)) and thereby provide guidance about the general operation of the provision. The same consideration might apply to boards and tribunals having responsibility for human rights adjudication.

238 That brings me to the proper interpretation of the administrator appointment provisions in the light of s 32(1) of the Charter.

Applying s 32(1) of the Charter

239 In *R v Momcilovic*,[272] Maxwell P, Ashley and Neave JJA held that, when applying s 32(1), 'the first step, necessarily, is one of statutory interpretation.'[273] Whether a provision infringes human rights can only be addressed when 'the meaning of the provision has been ascertained.'[274] Section 32(1) of the Charter, like s 35(a) of the *Interpretation of Legislation Act*, is a statutory directive requiring courts and tribunals to carry out the interpretative task in a particular way and formed part 'of the body of rules governing' that task.[275] The significance of s 32(1) was that the Parliament had embraced the principle 'in emphatic terms'.[276] Moreover, the rights which s 32(1) is to promote are those in the Charter.[277]

240 Section 32(1) requires the interpretation of the relevant provisions so far as it is possible to do so consistently with their purpose, in a way that is compatible with human rights. Maxwell P, Ashley and Neave JJA held the test of consistency was with the purpose of the provision in question, not the legislation as a whole.[278] All

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272 (2010) 25 VR 436.
273 Ibid [29].
274 Ibid.
275 Ibid [102].
276 Ibid [104].
277 Ibid. I do not take the court to have held the common law principle of legality, which protects fundamental common law rights and freedoms, has in Victoria been replaced by s 32(1), which protects the human rights in the Charter, rather that s 32(1) operates like that principle in the process of interpretation, and by reference to the human rights in Part 2, with the added emphasis which comes from it being a statutory command.
278 Ibid [75].

'possible' interpretations should be explored, and the interpretation which 'least infringes Charter rights' should be adopted.[279] The possible interpretations are determined by reference to the existing framework of interpretative rules, including the principle against interference with rights.[280] That was the 'powerful presumption' explained by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* as follows:[281]

> courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.[282] As Lord Hoffmann recently pointed out in the United Kingdom,[283] for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be subject to the basic rights of the individual.[284]

241 In the passage in *Coco v The Queen* which Gleeson CJ cited, Mason CJ, Brennan, Gaudron and McHugh JJ referred with approval the particular application of what became known as the principle of legality by Lord Browne-Wilkinson in *Marcel v Commissioner of Police*[285] and his Lordship's extra-judicial comments on the same subject.[286]

242 In *R v Momcilovic*, Maxwell P, Ashley and Neave JJA held the application of the presumption did not depend on the existence of ambiguity in the statutory language.[287] In that connection, their Honours referred with approval to the judgment of Elias CJ in *R v Hansen*[288] in which her Honour relied on the judgment of Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Pierson*[289] as well as the judgments of Lord Steyn and Lord Hoffmann in *R v Secretary of State for the*

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279 Ibid [103].
280 Ibid.
281 (2003) 211 CLR 476, [30].
282 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (footnote in quotation).
283 *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131.
284 See also *Annetts v McCann* (1990) 170 CLR 596, 598,(Mason CJ, Deane and McHugh JJ).
285 [1992] Ch 225, 234 (Viscount Nicolas Browne-Wilkinson).
286 Right Honourable Lord Browne-Wilkinson, 'The Infiltration of a Bill of Rights', [1992] *Public Law* 397, 404-408.
287 (2010) 25 VR 436, [103].
288 [2007] 3 NZLR 1, 12.
289 [1998] AC 539, 587-9.

Home Department; Ex parte Simms.[290] The principle which Elias CJ stated was:[291]

> apparent meaning yields to less obvious meaning under common law presumptions protective of bedrock values.[292] The common law had, I think already evolved beyond requiring ambiguity before interpreting legislation to conform wherever possible with human rights instruments and fundamental values of the common law.[293]

This principle will be directly relevant in this appeal.

Principle of legality

243 In *R v Momcilovic*, Maxwell P, Ashley and Neave JJA also cited[294] the judgments of Gleeson CJ in *Al-Kateb v Godwin*[295] and French CJ in *K-Generation Pty Ltd v Liquor Licensing Court.*[296]

244 Gleeson CJ dissented in the result in *Al-Kateb v Godwin,*[297] but it is the principles he stated and applied which are important here. His Honour described the presumption against interference with rights and freedoms as the 'principle of legality', and referred to early[298] and more recent[299] decisions of the High Court and to *Maxwell on Statutes*. As Elias CJ later did in *R v Hansen*,[300] Gleeson CJ also referred[301] to the judgments of Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Pierson*[302] and Lord Hoffmann in *R v Secretary of State for the Home Department; Ex parte Simms*,[303] in which the principle was explicated, also by reference to *Maxwell on Statutes*. In *Elextrolux Home Products Pty Ltd v Australian Workers Union*,[304] again relying on Lord Steyn in *R v Secretary of State for the Home Department; Ex parte*

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290 [2000] 2 AC 115, 130E (Lord Steyn), 131F (Lord Hoffmann).
291 [2007] 3 NZLR 1, 12.
292 *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *R v Pora* [2001] 2 NZLR 37 (CA).
293 *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] 2 AC 539; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] AC 115; *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718, [17] (Lord Hoffman).
294 (2010) 25 VR 465, 436, fn 169.
295 (2004) 219 CLR 562.
296 (2009) 237 CLR 501.
297 (2004) 219 CLR 562, 577.
298 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).
299 *Coco v The Queen* (1994) 179 CLR 427; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [30] (Gleeson CJ).
300 [2007] 3 NZLR 1, 12.
301 (2004) 219 CLR 562, 577.
302 [1998] AC 539, 587-589.
303 [2000] 2 AC 115, 131.
304 (2005) 221 CLR 309.

Pierson,[305] Gleeson CJ said the presumption of the statutory interpretation was 'an aspect of the principle of legality which governs the relations between Parliament, the executive and the courts … [and] the rule of law.'[306]

245 In *K-Generation Pty Ltd v Liquor Licensing Court,*[307] French CJ referred to the presumption against a parliamentary intention to 'encroach upon fundamental rights and freedoms at common law'.[308] In respect of that principle, his Honour referred to *Potter v Minahan*,[309] *Bropho v Western Australia*[310] and *Coco v The Queen*.[311] His Honour said the presumption was an aspect of the 'principle of legality' which was recognised in the United Kingdom and referred[312] to *R v Secretary of State for the Home Department; Ex parte Simms*.[313]

246 There have been other judgments of the High Court in which the principle of legality has been discussed.[314] Most recently, in *Lacey v Attorney-General* (Qld),[315] French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ said statutes, absent clear language, would not be interpreted 'so as to infringe upon fundamental common law principles, rights and freedoms', this being 'the principle of legality in statutory interpretation'.[316] Moreover, in *R v JS*[317] Spigelman CJ said in the New South Wales Court of Appeal

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305 [1998] 2 AC 539.

306 (2005) 221 CLR 309, [21] referring to a passage (at [1998] 2 AC 539, 589) in which Lord Steyn refers to *Raymond v Honey* [1983] 1 AC 1 and *R v Secretary of State for the Home Department; ex parte Leech* [1994] QB 198, which I will analyse below.

307 (2009) 237 CLR 501.

308 Ibid 520.

309 (1908) 7 CLR 277, 304 (O'Connor J).

310 (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ).

311 (1994) 179 CLR 427, 436-437 (Mason CJ, Brennan, Gaudron, McHugh JJ).

312 Ibid.

313 [2000] 2 AC 115, 131 (Lord Hoffman).

314 See *Daniels Corporation International Pty Ltd v Australian Consumer and Competition Tribunal* (2002) 213 CLR 543, 582 (Kirby J); *Attorney-General (Western Australia) v Marquet* (2003) 217 CLR 545, [180] (Kirby J); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ approving the statement of Gleeson CJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 that the principle of legality 'governs the relations between Parliament, the executive and the courts'); see also *Zheng v Cai* (2009) 239 CLR 446, 455-456 (French CJ, Gummow, Kiefel and Bell JJ).

315 [2011] HCA 10.

316 Ibid [17].

317 (2007) 175 A Crim R 108.

that this presumption was part of 'the unifying concept of the principle of legality'.[318]

247 I will go into the English cases because they state principles of application which assist in resolving problems of interpretation involving interference with rights and freedoms where there is a no simple binary choice between an interpretation which is unmistakably open and one which is not. There is no such choice in the present case. The purposes of the *Guardianship and Administration Act* are benevolent. For those purposes, its provisions unmistakably authorise some interference with a person's rights and freedoms, and even drastic interference when that is called for. In doing so, the legislation strikes a balance between respecting the person's rights and freedoms and authorising what is necessary in their best interests. In this case, Patrick accepts the provisions have that general operation, but not, in his submission, to authorise the drastic interference in his case. The problem of interpretation is to determine the scope of the permissible interference in this context.

248 In such cases, it surely necessary to go beyond stating an oracular conclusion that a 'strict' interpretation means the legislation does not authorise the drastic interference or that the legislation unmistakably permits it. That is not the nature of the interpretative problem. It is hardly pertinent to say the legislation should be interpreted strictly when it unmistakably authorises some or even a substantial interference with rights. It is equally unhelpful to say the legislation contains provisions having that unmistakable effect when there is legitimate dispute about the scope of operation of those provisions, properly interpreted. It is necessary to engage more intensely and explicitly with the purposes of the legislation and its impact on individual rights and freedoms and then determine where, on a proper interpretation of the provisions, the legislative balance has been struck. The principle of legality allows this to be done, and transparently.[319]

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318 Ibid [34], (Mason P, McClellan CJ at CL, Hidden and Howie JJ agreeing).

319 Speaking extra-judicially, Spigelman CJ has said the reasoning process in applying the principle of legality has often been 'distinctly fuzzy', with the true reasoning being inherent in the conclusion but not explained: Hon JJ Spigelman AC, 'Principle of legality and the clear statement principle', (2005) 79 *Australian Law Journal* 769, 779.

249 It is generally recognised that it was Lord Steyn in *R v Secretary of State for the Home Department; Ex parte Pierson*[320] who first described it as the principle of legality.[321] In the passage in that judgment to which Gleeson CJ referred in *Al-Kateb v Godwin*[322] and also in *Elextrolux Home Products Pty Ltd v Australian Workers Union*,[323] and to which Maxwell P, Ashley and Neave JJA referred with approval on *R v Momcilovic*,[324] Lord Steyn gave several examples of the application of the principle, including *Raymond v Honey*[325] and *R v Secretary of State for the Home Department; Ex parte Leech*.[326] Subsequently, in *R v Secretary of State; Ex parte Simms*,[327] Lord Steyn (Lord Browne-Wilkinson and Lord Hoffmann agreeing) applied *R v Secretary of State for the Home Department; Ex Parte Leech*[328] and *R v Secretary of State for the Home Department; Ex parte Pierson*.[329] Then, in *R (Daly) v Secretary of State for the Home Department*,[330] the House of Lords adopted the same approach. In that case, Lord Bingham (Lord Steyn agreeing) referred[331] to *Raymond v Honey*, *R v Secretary of State for the Home Department; Ex Parte Leech, R v Secretary of State of the Home Department; Ex parte Simms* and *R v Secretary of State for the Home Department; Ex parte Pierson*.

250 Beginning with *Raymond v Honey*,[332] here a prisoner wrote a letter to his solicitors in reference to legal proceedings. The governor read the letter and stopped it. The prisoner attempted to issue proceedings for contempt of court against the governor, but the governor stopped the transmission of the papers. Section 47(1) of the *Prison Act 1952* (UK) allowed rules to be made 'for the regulation and management of prisons'.[333] The governor relied on rr 33 and 37A of the *Prison Rules 1964* (UK) which

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320 [1998] AC 539, 587.
321 The evolution in this common law presumption of statutory interpretation up to 1998 is described and analysed by Murray Hunt, *Using Human Rights Law in English Courts* (1998) 174-185.
322 [2004] 219 CLR 562, [19] (Gleeson CJ).
323 (2005) 221 CLR 309, [21] (Gleeson CJ).
324 (2010) 25 VR 465, [103].
325 [1983] 1 AC 1.
326 [1994] QB 198.
327 [2000] 2 AC 115, 129-130.
328 [1994] QB 198.
329 [1998] AC 539, 589.
330 [2001] 2 AC 532.
331 Ibid [7], [10] and [12].
332 [1983] 1 AC 1.
333 Section 47(1) of the *Prisons Act*.

were expressed in general terms and allowed prisoner correspondence to be stopped. The House of Lords dismissed the governor's appeal against a determination that stopping the papers for the contempt application was a contempt of court.

251 Lord Wilberforce began by stating the applicable common law principles, which were that obstructing justice was a contempt of court and that prisoners had a right 'to have unimpeded access to a court'.[334] From that premise of first identifying the right which was at issue, his Lordship interpreted the prison legislation and rules. He held that the general terms of the regulation-making provision were 'quite insufficient to authorise hindrance or interference with so basic a right' and the rules had to be similarly interpreted.[335] Lord Bridge[336] adopted the same reasoning.

252 *Marcel v Commissioner of Police*[337] concerned documents which were seized under legislation by the police during a criminal investigation. Some of them were subject to legal professional privilege. The legislation placed no limits on their use. When the police sought to present the documents in court and show them to private persons for non-police purposes, Sir Nicholas Browne-Wilkinson VC granted interims injunctions to prevent both.

253 To interpret the legislation, Sir Nicholas started with the 'fundamental human rights' of 'property and privacy', and then recognised 'a public interest which requires some impairment of these rights'.[338] Although the legislation was in general terms, not ambiguous and silent on the subject, it was held to manifest 'some limitation on the purposes for which seized documents could be used'.[339] Parliament was to be presumed not 'to have legislated so as to interfere with the basic rights of the individual to a greater extent than was necessary to serve the protection of the public interest'[340] and the injunctions were issued accordingly. On appeal, Dillon LJ[341] and

334 *Raymond v Honey* [1983] 1 AC 1, 10, 12-13 (Lord Elwyn-Jones, Lord Russell and Lord Lowry agreeing).
335 Ibid 13.
336 Ibid (Lord Lowry agreeing).
337 [1992] Ch 225, 234.
338 Ibid, 234.
339 Ibid.
340 Ibid.
341 Ibid, 255-256.

Nolan LJ[342] agreed with this reasoning, but not fully with the result. With Sir Christopher Slade, their Lordships confined the injunction to preventing disclosure of the documents to private parties for non-police purposes.

254 In *R v Secretary of State for the Home Department; Ex parte Leech*,[343] the prisoner's correspondence with his solicitor was being censored by the governor. Under the same general rule–making provision of the legislation, there was a rule permitting the governor to read and examine any letter or communication and stop it if its contents were objectionable or of inordinate length.[344] The governor relied on that rule. Allowing the prisoner's appeal against the refusal of the trial judge to grant judicial review of the governor's actions, Neill, Steyn and Rose LJJ held the legislation did not authorise a rule having such wide application.

255 In the judgment of the court, Steyn LJ said the key issue was to determine when 'the discretion [in the rules] may be exercised in respect of letters passing between a solicitor and client',[345] which was to be addressed as an issue of interpretation of the rule-making provision and the rule.

256 His Lordship began by identifying the common law rights of the prisoner, which included the right to the confidentiality of their correspondence, the higher right to communicate confidentially with their solicitor[346] and the fundamental right of unimpeded access to a court.[347] From that premise, he considered the interpretation of the provision and the rule.

257 Holding that the power in the provision to make rules to regulate prisons must (by necessary implication) authorise rules imposing some limits on prisoner correspondence,[348] the issue was whether correspondence between a prisoner and his

342 Ibid, 260.
343 [1994] QB 198.
344 Rule 33(3) of the *Prison Rules*.
345 [1994] QB 198, 208.
346 Ibid 209.
347 Ibid 210, applying *Raymond v Honey* [1983] 1 AC 1.
348 [1984] QB 198, 209.

solicitor could be examined, read and stopped.[349] To determine that issue, Steyn LJ applied the test of 'whether there is a self-evident and pressing need for an unrestricted power' of that nature.[350]

258 After examining the justification put forward on behalf of the governor, Steyn LJ held that no 'demonstrable need' or 'objective need' had been established.[351] Accepting that some screening of correspondence between a prisoner and a solicitor was justified,[352] his Lordship held the 'intrusion must, however, be the minimum necessary to ensure the correspondence is in truth bona fide legal correspondence'.[353] The rule-making power was therefore to be interpreted as permitting screening of that limited nature. As the prison rule went well beyond that scope, it was ultra vires.[354]

259 In *R v Secretary of State for the Home Department; Ex parte Simms*,[355] the prison authorities refused to allow journalists to visit prisoners in prison unless they signed undertakings not to use any information obtained for journalistic purposes. Under the same general rule-making provision of the legislation, there was a rule generally prohibiting visits by journalists,[356] subject to special discretionary exceptions always requiring the undertaking to be given.[357] Upholding the order of the trial judge for judicial review of a decision of the prison authority, the House of Lords declared the rules to be invalid.

260 Lord Steyn[358] considered the validity of the decision of the prison authority by reference to the validity of the prison rule. That turned on the interpretation of the rule and of the rule-making provision in the legislation. The matter was not approached by considering the validity of the exercise of the discretion.

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349 Ibid 212.
350 Ibid.
351 Ibid 213.
352 Ibid 213.
353 Ibid 217.
354 Ibid 218.
355 [2000] 2 AC 115.
356 Rule 37 of the *Prison Rules.*
357 Ibid, r 37A.
358 Lord Browne-Wilkinson and Lord Hoffmann agreeing; Lord Hobhouse and Lord Millet adopted a similar approach and reached the same conclusion.

261 In interpreting these provisions, Lord Steyn again first identified the common law rights of the prisoner. In that regard, his Lordship held: 'The starting point is the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible'.[359] His Lordship referred to the foundation of that right (which was not absolute) in the common law and in the European Convention on Human Rights and then discussed the importance of the right, in terms of the fundamental values which it represented, in the factual setting of the case before the court. That factual setting was the identification of serious miscarriages of justice by investigative journalists.[360]

262 Having identified the common law and human rights of the prisoners, Lord Steyn examined the evidence presented on behalf of the prison authorities in justification of the interpretation which they sought. Applying the 'pressing social need' test in *R v Secretary of State for the Home Department; Ex parte Leech*[361] and other cases, his Lordship held the evidence did 'not establish a case of pressing need which might prevail over the prisoner's attempt to gain access to justice'.[362] In reaching that conclusion, his Lordship took into account 'the principle that the more substantial the interference with fundamental rights the more the court will require by justification before it can be satisfied that the interference is reasonable in the public law sense.'[363]

263 Therefore the rules could not be interpreted as preventing access by journalists to prisoners, subject to exception and on the undertaking condition.[364] Applying the principle of legality expounded by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department; Ex parte Pierson*,[365] Lord Steyn held the rules had to be interpreted as being subject to 'the fundamental and basic rights asserted by the [prisoners] in the present case'.[366] So read down, the rules were valid.

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359 [2000] 2 AC 115, 125.
360 Ibid 125-127.
361 [1994] QB 198.
362 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 129-130.
363 Ibid, 130, citing *R v Ministry of Defence; Ex parte Smith* [1996] QB 517, 554 (Sir Thomas Bingham MR).
364 Ibid 130.
365 [1998] AC 539, 573-575, 587-590.
366 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130.

264 This line of authority was affirmed by the House of Lords in *R (Daly) v Secretary of State for the Home Department*,[367] which was another prison management case. The issue was whether s 47(1) of the *Prison Act* authorised a rule or policy which permitted prisoners' cells to be searched in their absence. The policy allowed the cell search staff to examine but not read a prisoner's legal correspondence to ensure it was bona fide correspondence between the prisoner and their legal advisor and did not conceal anything else. The applicant prisoner wanted to remain in his cell during the examination of his legal correspondence to ensure it was not improperly read. Allowing his appeal against the refusal by the lower courts of his application for judicial review, the House of Lords held the policy was not authorised by the legislation.

265 The court approached the issue as one of interpretation of the rule-making provision according to the 'orthodox application of common law principles' of interpretation, not according to the *Human Rights Act 1988* (UK).[368] The focus of the analysis was not on the exercise of the discretion to conduct the search and examine the correspondence, but on whether the policy under which that was done was authorised by the provision. Lord Bingham,[369] with whom the other Law Lords agreed,[370] referred to and applied *Raymond v Honey*,[371] *R v Secretary of State for the Home Department; Ex parte Leech*,[372] *Secretary of State for the Home Department*; *Ex parte Simms*[373] and *R v Secretary of State for the Home Department; Ex parte Pierson*.[374]

266 It was accepted by the parties that prisoners had a fundamental common law right that the confidentiality of their privileged correspondence be retained and protected. That being so, Lord Bingham first asked whether 'the policy infringes in a significant way' on that right.[375] As the policy did so,[376] it was next necessary to ask whether

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367 [2001] 2 AC 532.
368 Ibid [23] (Lord Bingham).
369 Ibid, [7]-[12].
370 Ibid [24] (Lord Steyn), [29] (Lord Cooke), [34] (Lord Hutton), [36] (Lord Scott).
371 [1983] 1 AC 1.
372 [1994] QB 198.
373 [2000] 2 AC 115.
374 [1998] AC 539.
375 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [15].

there was any ground for infringing that right.[377] As some examination of prisoners' legal correspondence was necessary for the security and good order of prisons,[378] the next necessary was:

> Whether, to the extent that it infringes a prisoner's common law right to privilege, the policy can be justified as a necessary and proper response to the acknowledged need to maintain security, order and discipline in prisons and to prevent crime. [379]

After examining the policy against those principles, Lord Bigham concluded

> Section 47(1) of the 1952 Act does not authorise such excessive intrusion, and the Home Secretary accordingly had no power to lay down or implement the policy in its present form. I would accordingly declare paragraphs 17.69 to 17.74 of the Security Manual to be unlawful and void insofar as they provide that prisoners must always be absent when privileged legal correspondence held by them in their cells is examined by prison officers. [380]

267 Lord Steyn concluded that the policy could not be justified in its then blanket form as the 'infringement of prisoners' rights to maintain the confidentiality of their privileged legal correspondence is greater than is shown to be necessary to serve the legitimate public objectives already identified'.[381]

268 In *Edwards v Edwards*,[382] J Forrest J applied the principle of legality to the interpretation of the *Guardianship and Administration Act* in a manner which is consistent with these authorities. The issue was whether the appointment of an administrator under s 46(1) meant the person could not make a will. It was contended that s 52(2) had that effect, for it made void every 'dealing, transfer, alienation or charge by any represented person in respect of any part of the estate'.

269 In applying the principle, J Forrest J started[383] with the 'important human right'[384] established at common law to make a will. Then his Honour noted that the

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376 Ibid [16].
377 Ibid [17].
378 Ibid.
379 Ibid [18].
380 Ibid [21].
381 Ibid [19].
382 (2009) 25 VR 40.
383 Ibid, [59].
384 Applying *Grey v Harrison* [1997] 2 VR 359, 366 (Callaway J, Charles and Tadgell JJA agreeing).

interpretation being asserted would remove that right.[385] In refusing to adopt that interpretation, he took into account that there was no need for such removal because 'whether the will was valid is [an] issue to be determined by the application of the principles of testamentary capacity.'[386] In the absence of clear words, he was therefore not prepared to interpret the legislation as implying that removal.[387]

270 On those authorities, the principle of legality is a strong presumption that legislative provisions are not intended to override or interfere with fundamental common law rights and freedoms and basic human rights. The presumption is displaced only by express language or necessary implication indicating unambiguously and unmistakeably that the legislation was intended to have this effect. The application of the presumption is not triggered by ambiguity in the meaning of the statutory language but by any substantial restricting or limiting impact by legislative provisions on such rights and freedoms.

271 Applying this principle to legislation which unmistakably intends some interference to be authorised but the scope of the permitted interference is in issue, it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision. In that regard, the more substantial is the infringement with the right or freedom, the more is required to show that the interference is necessary to meet the aims postulated and the interference should be the least necessary for that purpose.

272 Now to the application of these principles in this case.

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385 (2009) 35 VR 40, [60].
386 Ibid, [48] (applying *Kantor v Vosahlo* [2004] VSCA 235).
387 Ibid, [61].

Scope of s 46 of *Guardianship and Administration Act*.

273 Applying the principle of legality as specified in s 32(1) of Charter and under the ordinary principles of interpretation, I begin by identifying the human rights which are engaged. For the reasons I have given already, the human rights under the Charter of equality (s 8(3)), freedom of movement and choice of home (s 12) and privacy and home (s 13) are engaged. Further, the fundamental common law right to protection of the home from arbitrary interference and to ownership and quiet enjoyment of property are also engaged. These are of high order importance and protect Patrick's fundamental interest in having and living in his home and doing so in the place of his choice and in the ownership and quiet enjoyment of his property. The rights are of particular importance to him as a person with a disability who is in psychiatric detention as he has a strong, personal and continuing connection with his home. The importance of these rights is reinforced by the provisions of the *Convention on the Rights of Persons with Disabilities*.

274 Turning to the nature of the interference, s 46(1)-(4) authorises the appointment of an unlimited administrator. By force of the legislation, the exclusive power of complete management and control of Patrick's estate will automatically be transferred to the administrator. While the administrator is required to administer the property in the person's best interests, and the administration order must be regularly reviewed, the person will lose control of their money, bank accounts and property, real and personal. Short of transferring absolute ownership of the property to the administrator, it is difficult to conceive of a more drastic interference with the person's rights and interests in their estate.

275 It is next necessary to consider whether there has been established a substantial and pressing need for an interference of that drastic nature. The general purpose of appointing an administrator is 'protective'[388] and benevolent. It is to enable the estate of the person to be administered properly in their best interests when they are unable to perform this function for themselves by reason of their disability and need an

388 *Daynes v Public Advocate* (2005) 24 VAR 121, [29] – [38] (Smith J).

administrator to do it for them. This is a high public policy purpose which is clearly based on a substantial and pressing social need. People with a disability are extremely vulnerable. Appointing an administrator may be vitally necessary and important in their best interests, even given the very serious consequences.[389]

276 At issue, however, is whether the provisions are so wide in scope as to authorise the appointment of an unlimited administrator in circumstances like those before, and for the purposes specified by, the tribunal.

277 Under the provisions, an appointment can be made when the person is not making 'reasonable judgments' about 'matters relating to' their estate by reason of their disability.[390] The person must be 'in need' of an administrator.[391] The appointment must be in the 'best interests' of the person.[392] The 'least restrictive' means must be considered,[393] as must be the ascertainable wishes of the person.[394]

278 I do not find these provisions to be ambiguous. But the language is general, so much so that, on one view, the provisions might authorise an appointment for the purposes identified by the tribunal. That is the interpretation which was implicitly adopted by the tribunal. On that view, the 'matters relating to all or any part of' the estate in s 46(1)(a)(ii) are not confined to matters relating to the estate as property and extend to matters which bear on the person's medical or social interests or their behaviour. So interpreted, going to the home as a 'therapeutic refuge' when Patrick is not capable of living there independently is an unreasonable judgment about a 'matter relating to' his estate because it relates to how he uses that estate, being his home. If that provision is to be so interpreted, the other provisions of s 46 would be seen in the

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389 See *McDonald v Guardianship and Administration Board* [1993] 1 VR 521, 530 (Fullagar, Tadgell and JD Phillips JJA); *Re Guardianship and Administration Board* (2003) 27 WAR 475, 490 (EM Hennan J, Anderson, Steytler, Miller and McLure JJ agreeing).

390 Section 46(1)(a)(ii).

391 Section 46(1)(a)(iii).

392 Section 46(3).

393 Section 46(2)(a).

394 Section 46(2)(b).

same light. However, there are profound human rights difficulties with this interpretation.

279 It must be recognised that the medical and social staff at the hospital, and the tribunal, were trying to avoid another turn of the cycle in which Patrick would return (or abscond) home, stop taking his medication, severely decompensate and then be forcibly readmitted to psychiatric detention. The evidence, which was accepted by the tribunal, was that appointing an administrator would assist in the management of his behavioural difficulties, and facilitate his placement in more suitable long-term accommodation consistent with his medical and other needs, because selling his home would mean he did not have his own home to go to. Although I have serious doubts that this would be so, and the reasoning smacks of the 'paternalism' which Cavanough J criticised in *XYZ v State Trustees Ltd*,[395] I will defer to the tribunal's views in this regard.

280 But the facts were that Patrick was making reasonable judgments about his estate in practical and financial terms. Despite being mentally ill and living as a patient in a psychiatric hospital, he understood money and could operate his bank accounts. Making modest regular payments on his house did not take much effort and was within his capacity. It was not the evidence, and the tribunal did not find, that Patrick was letting his home deteriorate or fall into disrepair, was failing to take some necessary step to protect the home, such as removing squatters, or was allowing the home to be exploited to his disadvantage by family or friends. Nor was there evidence or a finding that he would not recover his health sufficiently to be able to return to his home. Assuming he was expected to live at the hospital, or in some other secure facility in the community, for a long time, the evidence did not address, and the tribunal did not discuss, whether Patrick would be unable to continue to manage his finances and the house, as he had done for many years. On the same assumption, there was no evidence or discussion about whether the best way of protecting or managing Patrick's estate was to keep or sell the house, or the relative

395 (2006) 25 VAR 402, [66].

economic and other merits of these options. The social and medical witnesses did not depose, and the tribunal did not find, that the house had to be sold in order to provide funds for him to be transferred into supported accommodation, or for any other necessary medical or social need, now or in the future. The general discussion in the evidence of that subject fell far short of that. It was not known whether moving Patrick to a hostel would be successful, temporary or permanent. Yet on the interpretation of the provisions adopted by the tribunal, the discretion to appoint the administrator was available in the circumstances.

281 I refer to these facts and considerations in this interpretative context because they illustrate that there is no substantial and pressing need to interpret the provisions in the way that the tribunal did.

282 It is not necessary to do so for someone's personal circumstances or accommodation to be addressed. Such circumstances are specifically dealt with under the guardianship provisions of the *Guardianship and Administration Act*, which I have already described. Under those provisions, a guardian can make decisions in relation to the accommodation needs of the persons, including where and with whom they are to live.[396] For a person with a mental illness who is the subject of an involuntary treatment order under the *Mental Health Act*, the person will either be in psychiatric detention in a hospital (as Patrick is) or under a community treatment order which (s 14(3)(b)) may specify where the person is to live.

283 Nor is it necessary to do so for someone's medical interests to be addressed. The guardianship provisions allow a guardian to make necessary decisions in relation to a person's health.[397] People have access to medical treatment under the general health system or, in the case of a person with a mental illness, the *Mental Health Act.*

284 Under the general health system and that legislation, a person is not denied access to medical attention which they need because they have property, and it is their choice

396 Section 24(2)(a) and (b).
397 Section 24(2)(d).

whether they will improve the standard of their medical attention beyond the social minimum by utilising their property. Patrick is exercising that freedom of choice by retaining his home, and many people in the community would do exactly that, even though this may restrict their residential and medical choices in certain ways.

285 There are many reasons why people make genuine and legitimate choices of this kind, even though (equally genuinely) their friends, family, carers or doctors may think the choice is not in their best interests and has seriously inconvenient consequences for them. So important to the individual is their property and home that this personal freedom of choice is respected in the law, particularly in the fundamental common law rights and freedoms and basic human rights which are engaged in such a case. Those rights and freedoms are equally possessed (although needed more) by people with a mental illness.

286 The irreversible and extreme step of severing a person's connection with their home and denying them freedom of choice about where to live is a drastic interference with their fundamental common law rights and freedoms and their basic human rights. It would take a substantial and pressing need to justify interpreting the provisions of s 46(1)-(4) of the *Guardianship and Administration Act* as authorising the appointment of an administrator to take this course. There is a substantial and pressing need where the person is incapable of making reasonable judgments about matters relating to their estate (in whole or in part) as real or personal property in practical, financial or management terms, but not otherwise. The general purpose of the administration order provisions is to enable the property and financial resources of the person to be preserved, conserved and not dissipated and to be maintained and applied for their welfare and benefit. Administration orders must be made for that purpose. The provisions of s 46(1)(a)(ii) must be interpreted and applied as authorising the appointment of an administrator on this basis only. The other provisions of s 46 must be interpreted and applied accordingly.

287 Under s 32(1) of the Charter, s 46(1)-(4) must be interpreted compatibly with human rights so far as that is possible consistently with the purpose of those provisions. I

have identified the purpose of the provisions as protective and benevolent and being for the appointment of an administrator to control and manage the estate and financial affairs of people with disabilities. An interpretation cannot be adopted which is inconsistent with that purpose. The possible interpretations must be explored within the framework of the ordinary rules of interpretation, having regard to that purpose. The interpretation which least infringes human rights must be adopted. The interpretation which I have identified in that way and adopted is the one which is consistent with the purpose of the provisions and least infringes human rights.

288 I therefore conclude the tribunal erred in law in the interpretation which it adopted of s 46(1)-(4) of the *Guardianship and Administration Act.*

289 It remains to consider Patrick's alternative grounds that the tribunal committed errors of law in exercising the discretion to appoint an administrator to his estate, whether or not it misinterpreted the applicable provisions.

ERROR OF LAW IN EXERCISING DISCRETION TO APPOINT ADMINISTRATOR

Error of law appeals, *Wednesbury* unreasonableness and human rights

290 We have seen that s 46(1)(a) of the *Guardianship and Administration Act* confers a discretion to appoint an administrator where the tribunal is satisfied of the matters specified in sub-pars (i), (ii) and (iii). In this appeal under s 148(1) of the *Victorian Civil and Administrative Tribunal Act*, Patrick submits the tribunal committed errors of law in exercising that discretion, this being the second category of grounds in his notice. In that regard, he relies on s 38(1) of the Charter.

291 Section 38(1) and (2) of the Charter provides:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Sub-section (1) does not apply if, as a result of a statutory provision, or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a

different decision.

Example

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

292 When the tribunal makes an administration order under s 46(1) of the *Guardianship and Administration Act*, it is a pubic authority under the Charter and bound to comply with s 38(1), subject to s 38(2). I have already given my reasons for reaching that conclusion.

293 Patrick submits the appointment of the administrator was unlawful because it was incompatible with human rights and contrary to s 38(1). The issue arises whether incompatibility with human rights can give rise to an error of law for the purposes of an appeal of this nature.

294 Section 148(1) of the *Victorian Civil and Administrative Tribunal Act* provides that a 'party to a proceeding may appeal, on a question of law, from an order of the Tribunal'. By s 148(7), the court may make orders 'affirming, varying or setting aside the order of the Tribunal' (par (a)), and certain other orders. Whether Patrick can rely on incompatibility with the human rights in the Charter depends on whether this is permitted by s 39(1) of the Charter.

295 Here is s 39(1) of the Charter:

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

Section 39(2) protects a person's existing rights to seek relief in respect of the decision of a public authority and is not relevant.

296 To apply s 39(1) in this case, it is necessary to ask whether the appellant, in the appeal, 'may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful'. If the answer to that question is positive, then 'that person may seek that relief or remedy on a ground of

unlawfulness arising because of this Charter'.

297 Section 39(1) does not create a new cause of action or other proceeding for obtaining a relief or remedy in respect of unlawfulness arising under the Charter.[398] It attaches unlawfulness arising under the Charter as a ground to existing causes of action or proceedings by which relief or remedy may be obtained in respect of the act or decision on a ground of unlawfulness arising otherwise than because of the Charter. It then operates to make that relief or remedy available in that cause of action or proceeding on the ground of unlawfulness arising under the Charter, whether or not that relief or remedy is granted on a ground of unlawfulness not arising in that way. The capacity of parties to rely on incompatibility with human rights in legal proceedings, the authority of courts and tribunals (having the jurisdiction) to grant relief or remedy where unlawfulness on that ground is established and the human rights protection of the community have been enhanced to that significant extent.

298 In judicial review proceedings in this court,[399] relief or remedy may be sought in respect of an act or decision of a public authority which is unlawful because it does not comply, for example, with the principles stated in *Associated Principle Provincial Houses Ltd v Wednesbury Corporation.*[400] According to the classic formulation of Lord Greene MR, in such proceedings:

> The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. [401]

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398 *Sabet v Medical Practitioners Board* (2008) 20 VR 414, [104] (Hollingworth J).
399 See order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
400 [1948] 1 KB 223.
401 Ibid 233-4.

299 Therefore, in judicial review proceedings in which any relief or remedy may be sought on grounds of *Wednesbury* unreasonableness, s 39(1) permits the applicant to rely on a ground of unlawfulness arising under the Charter. Where Charter unlawfulness is established, the relief or remedy which could be sought on the ground of *Wednesbury* unreasonableness can be granted by the court on a ground of unlawfulness arising under the Charter, whether or not the unreasonableness ground is determined.

300 In statutory appeals to this court on a question of law, such as those under s 148(1) of the *Victorian Civil and Administrative Tribunal Act*, the court exercises original jurisdiction which 'is not appellate… [but] is in the nature of judicial review'.[402] In the appeal, relief or remedy in respect of an act or decision of a public authority can be sought on grounds of *Wednesbury* unreasonableness, as well as other administrative law grounds, such as improper purposes and breach of the rules of natural justice.[403] Those grounds, if established, are errors of law.

301 Taking *Wednesbury* unreasonableness as an example, it is an error of law within s 148(1) for the tribunal to ignore relevant considerations or take irrelevant considerations into account which it was bound to take into account or ignore, or to make a decision which is manifestly unreasonable in the *Wednesbury* sense.[404] Of course that must be so, for it is not just an error of law but a jurisdictional error for a board, tribunal or other public authority (not being a court) to offend against those principles.[405]

302 It follows that, in appeals under s 148(1) of the *Victorian Civil and Administrative Tribunal Act*, where the appellant may seek relief or remedy on the ground that the tribunal has committed an error of law which is based on *Wednesbury* unreasonableness, the court may grant relief or remedy under s 148(7) on the ground

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402 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 207 CLR 72, [15] (Gaudron, Gummow, Hayne and Callinan JJ).

403 *Sabet v Medical Practitioners Board* (2008) 20 VR 414, [105] (Hollingworth J).

404 *Bell Corporation Victoria v Stephenson* (2003) 20 VAR 280, [36] (Ashley J).

405 *Craig v South Australia* (1995) 184 CLR 163,177-179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

that the decision of the tribunal (when acting as a public authority) is unlawful because of s 38(1) of the Charter.

303 In this appeal, Patrick has sought relief or remedy on the ground that the tribunal took irrelevant considerations into account and his submissions generally embrace the ground that the tribunal's decision was legally unreasonable in the *Wednesbury* sense. Under s 39(1) of the Charter, he is therefore entitled to rely on unlawfulness arising under the Charter as a ground for obtaining the relief or remedy specified in s 148(7) of the *Victorian Civil and Administrative Tribunal Act,* whether or not those other grounds of unlawfulness are determined.

Unlawfulness for incompatibility with human rights under s 38(1)

304 We have seen that, under s 38(1), the act or decision of a public authority will be unlawful if it is 'incompatible with a human right' or proper consideration to a human right was not given. The concept of compatibility with human rights in s 38(1) calls up the concept of justification in s 7(2).

305 Section 7(2) provides:

> (2) 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-
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> (a) the nature of the right; and
>
> (b) the importance of the purpose of the limitation; and
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> (c) the nature and extent of the limitation; and
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> (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.

306 Reading s 7(2) with s 38(1), an act or decision of a public authority will be unlawful under s 38(1) if it limits a human right in a manner which is not reasonable and demonstrably justified as specified in s 7(2), unless s 38(2) applies.

307 The function and operation of s 7(2) has been analysed by Maxwell P, Ashley and

[406] Warren CJ in *Re Application under the Major Crimes (Investigative Powers) Act 2004*[407] and me as the president of the tribunal in *Re Kracke and Mental Health Review Board*[408] and *Lifestyle Communities Limited (No. 3)*.[409] On that analysis, s 7(2) is a general limitations provision giving effect to the principle that human rights are not absolute and can be subject to reasonable limits which are demonstrably justified in a free and democratic society.

308 In *R v Momcilovic*,[410] Maxwell P, Ashley and Neave JJA accepted that proportionality is at 'the heart of the inquiry mandated by s 7(2) of the Charter.' Their Honours referred extensively to the judgment of Dickson CJ in *R v Oakes*,[411] which is the leading international authority on the concept of proportionality. Section 7(2), with its enumerated factors, is derived from s 36 of the *Constitution of the Republic of South Africa 1996*. As Warren CJ said in *Re Application under the Major Crimes (Investigative Powers) Act 2004*,[412] these considerations 'broadly correspond to the proportionality test identified in *Oakes*'. In *Re Kracke and Mental Health Review Board*,[413] I discussed the nature of the enumerated factors by reference to the authorities, including the South African authorities.

309 In proceedings by way of judicial review or appeal on a question of law, as in the present case, the court may be required to determine whether an act or decision of a public authority is unlawful under s 38(1) for being incompatible with human rights. Judicially reviewing a decision of a public authority for unlawfulness under s 38(1) on grounds of incompatibility with human rights requires the court to consider and apply the proportionality test in s 7(2), which is a matter of law. That judicial function has been described as 'review for proportionality'[414] or 'supervising for

406 (2010) 25 VR 436, [137]-[147].
407 (2009) 24 VR 415, [144]-[150].
408 (2009) 29 VAR 1, [98]-[196].
409 [2009] VCAT 1869, [316]-[333].
410 (2010) 25 VR 436, [147].
411 [1986] 1 SCR 103. .
412 (2009) 24 VR 415, [148]
413 (2009) 29 VAR 1, [137]-[161].
414 Aileen Kavanagh, *Constitutional Review and the UK Human Rights Act* (2009) 255.

proportionality'.[415] In *Castles v Secretary, Department of Justice*,[416] Emerton J described this 'is a key part of the Court's role.' The jurisdiction of the court to make this determination is of fundamental importance, for it is a jurisdiction to declare and enforce the law, which is 'an essential characteristic of the judicature'.[417] In exercising this jurisdiction, the court is exercising its judicial authority to protect and vindicate the human rights of the individual, as contemplated by the Charter.

310 When the court so applies s 7(2), the onus of establishing that the limitation is demonstrably justified lies on the party seeking to uphold the justification. The standard of justification is stringent. Where matters of fact are involved, cogent evidence may be necessary. While the civil standard of proof applies, a high degree of probability is required, because limiting human rights is involved. [418] The function of the court is to make an independent and objective judgment for itself about whether the limitation is justified under s 7(2) and therefore whether the act or decision is unlawful as incompatible with human rights or compatible and therefore lawful.[419] The better was the consideration given to human rights at first instance, the harder it will be to challenge the act or decision concerned; but it is the actual compatibility of the act or decision with human rights that is at issue, not the quality of the reasoning supporting it.[420]

311 The so-called 'procedural' limb of s 38(1) that 'proper consideration' be given to relevant human rights requires public authorities to do so in a practical and common-

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415 *Morse v The Police* [2001] NZSC 45, [10] (Elias CJ).

416 [2010] VSC 310, [145].

417 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

418 *R v Momcilovic* (2010) 25 VR 436, [144] (Maxwell P, Ashley and Neave JJA); *Re Application under the Major Crimes (Investigative Powers) Act* 2004 (2009) 24 VR 415, [147] and [148] (Warren CJ); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, [145]-[146] (Bell J).

419 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [23] (Lord Bingham), [27] (Lord Steyn); *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, [67] (Lord Nicholls); *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, [51] (Lord Nicholls); *A v Secretary of State for the Home Department* [2005] 2 AC 68, [40] (Lord Bingham); *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [30] (Lord Bingham); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, [11] (Lord Bingham, Lord Hoffmann, Baroness Hale, Lord Carswell and Lord Brown).

420 *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, [67] (Lord Nicholls); *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, [51] (Lord Nicholls); *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [30] (Lord Bingham).

sense manner. As Emerton J said in *Castles v Secretary, Department of Justice*,[421] there is 'no formula' and the authority must 'seriously turn his or her mind' to the human rights impact of what is proposed and identify 'the countervailing interests or obligations'. That can be done in a variety of ways which may be suited to particulars circumstances. Decisions-makers are not expected to approach the application of human rights like a judge 'with textbooks on human rights at their elbows', said Lord Hoffmann in *R (SB) v Denbigh High School*.[422]

312 However, s 38(1) requires the act or decision to *be* compatible with human rights. 'What matters is the result',[423] said Lord Hoffmann in the same case. A consideration by the person who did the act or made the decision will not be 'proper', however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights in terms of s 7(2). In cases in which the issue legitimately arises, objectively and independently determining whether the act or decision is or is not compatible with human rights is the judicial function of the court. That function is not confined to, although it may involve, assessing whether adequate consideration was given to relevant rights (for example, it may be relevant to the weight to be given to the reasons of the public authority).

313 This court is the superior court in the State of Victoria in the Australian federation. Subject to the High Court of Australia, it administers in this jurisdiction the unified common law of the nation.[424] It cannot perform functions which are inconsistent with the institutional integrity of the court within the federal judicial framework established by the Commonwealth Constitution.[425] The High Court has pronounced general principles in relation to how the courts carry out their judicial review (or cognate appellate) jurisdiction in this constitutional setting. In understanding the

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421 [2010] VSC 310, [185], [186]. Her Honour's views are consistent with the approach in the United Kingdom: see *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [31] (Lord Bingham).

422 [2007] 1 AC 100, [68]; see also *Castles v Secretary, Department of* Justice [2010] VSC 310, [145] (Emerton J).

423 [2007] 1 AC 100, [68].

424 *Lipohar v R* (1999) 200 CLR 485, [43] (Gaudron, Gummow and Hayne JJ); *Kirk v Industrial Court of New South Wales* (2009) 239 CLR 531, [99] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).

425 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 96 (Toohey J), 103 (Gaudron J), 116-119 (McHugh J), 127-128 (Gummow J); *Wainohu v New South Wales* [2011] HCA 24, [44] (French CJ and Keifel J), [105] (Gummow, Hayne, Crennan and Bell JJ).

nature of this court's function under ss 7(2) and 38(1), account should be taken of those principles.[426] Of that judicial review jurisdiction, in *Minister for Aboriginal Affairs v Peko-Wallsend Limited*[427] Mason J said '[t]he limited role of a court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind'. Moreover, in *Attorney-General (NSW) v Quin*,[428] Brennan J made this oft-cited observation: 'The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.' [429]

314 Consistently with those principles, when judicially reviewing for unlawfulness under ss 38(1) and 7(2), the court does not reconsider a primary act or decision on the merits. The jurisdiction of the court is supervisory, not substitutionary. It is to determine whether the act or decision is unlawful by reference to the human rights standards in the Charter, not to make a determination on the merits of the matter which is in substantive issue. Relief cannot be granted simply because it takes a different view of the act or decision on the merits. Emerton J in *Castles v Secretary, Department of Justice*[430] said the court did not enter into 'fine tuning arrangements'. Giving judgment for the House of Lords in *Huang v Secretary of State for the Home Department*,[431] Lord Bingham said that, even with the proportionality approach, 'it remains the case that the judge is not the primary decision-maker.' Expressing the same conclusion in *R (Daly) v Secretary of State for the Home Department*,[432] Lord Steyn referred to an influential article by Professor Jeffrey Jowell:

> Judges are not being set free to second-guess administrators on the merits of their policies. The respective roles of judges and administrators in a democratic society, and their competence, are fundamentally distinct and will remain so. Stricter scrutiny and the abandonment of *Wednesbury* obscurity does not mean that courts will be entitled to

426 Cf *Kirk v Industrial Court of New South Wales* (2009) 239 CLR 531, [99] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).
427 (1986) 162 CLR 24, 40.
428 (1990) 170 CLR 1.
429 Ibid, 36; cited with approval *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
430 [2010] VSC 310, [145].
431 [2007] 2 AC 167, [13].
432 [2001] 2 AC 532, [548].

ignore the limitations and competence of their own role. [433]

315 While not amounting to merits review, judicially reviewing for unlawfulness under ss 7(2) and 38(1) is a more intensive, and is intended to be a more intensive, standard of judicial review than traditional judicial review on (say) *Wednesbury* unreasonableness grounds.[434] Returning to *Huang v Secretary of State for the Home Department*,[435] Lord Bingham said the proportionality approach 'calls for a more exacting standard of review'[436] which is not, like *Wednesbury* unreasonableness, 'a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety.'[437] It is a 'high standard of review', said Emerton J in *Castles v Secretary, Department of Justice.*[438]

316 The difference between judicial reviewing for unlawfulness against applicable human rights standards and doing so for unlawfulness against the *Wednesbury* unreasonableness standard was explained by Lord Steyn in his 'justly-celebrated and much-quoted'[439] judgment in *R (Daly) v Secretary of State for the Home Department*.[440] In his Lordship's view, the proportionality criteria 'are more precise and more sophisticated than the traditional grounds of review'.[441] Lord Steyn went on to identify certain differences between the two standards of review, of which these are relevant to us:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relevant weight accorded to interests and considerations. [442]

317 It can be seen that, by its very nature as a standard of review, proportionality draws

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433 Jeffrey Jowell QC, 'Beyond the Rule of Law: Towards Constitutional Review' [2000] *Public Law* 671, 681 (footnotes omitted).
434 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, [30] (Lord Bingham).
435 [2007] 2 AC 167.
436 Ibid [13].
437 Ibid [11].
438 [2010] VSC 310, [145].
439 *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, [13] (Lord Bingham).
440 [2001] 2 AC 532.
441 Ibid [27].
442 Ibid.

the court more deeply into the facts, the balance which has been struck and the resolution of the competing interests than traditional judicial review. This gives rise to the issue of how the court is to provide effective judicial protection for human rights whilst at the same time respecting the administrative function of the public authority under its legislation and not drifting into merits review. One important way of addressing that issue is by affording weight and latitude to the acts and decisions of primary decision-makers.

Weight and latitude

318 Question 2(a)(ii) of the Charter notice raised the issue of the way in which the court, in exercising its jurisdiction in this appeal, should approach the decision of the tribunal. In particular, should the court afford the tribunal any 'margin of appreciation'? Patrick, the Attorney-General and the commission made submissions in writing on that question, which I have already summarised.

319 The courts have developed principles which seek to reconcile the twin demands of enforcing and protecting human rights as a judicial function and respecting the administrative function of the public authority for taking the act or making the decision on the merits.[443] These principles have been referred to as principles of 'deference' and 'respect'. According to a leading text in the United Kingdom,[444] such principles have been applied 'alongside, and interchangeably with, a host of other terms, such as "discretionary area of judgment",[445] "relative institutional competence",[446] "policy decisions",[447] "margin of discretion"[448] and "degree of

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443 This area of the law has generated a great deal of academic and extra-judicial comment: see the list of works in Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008) [3-182], fn 441, to which should be added Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs a Doctrine of "Due Deference"', in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (2003) 337; Aileen Kavanagh, *Constitutional Review Under the UK Human Rights Act* (2009) chapters 7-9; and KM Hayne, 'Deference – an Australian Perspective', [2011] *Public Law* 75, 88-89 (Hayne J writing extra-judicially).

444 Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008) [3-183].

445 *R v DPP Ex p. Kebilene* [2000] 2 AC 326, 381 (Lord Hope).

446 *A v Secretary of State for the Home Department* [2005] 2 AC 68, [29] (Lord Bingham); *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 AC 307.

447 *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, 69 (Lord Woolf CJ).

448 *R (Countryside Alliance) v Attorney-General* [2007] QB 305, [118] (Sir Anthony Clarke MR).

latitude"'.[449] Another term is the 'margin of appreciation'.

320 The expression 'margin of appreciation' refers to the principle applied by the European Court of Human Rights at Strasbourg in deciding whether a national court, legislature or public authority has violated human rights under the *European Convention on Human Rights*. In doing so, the court accepts that different states might give effect to the standards in the convention in different ways. Therefore, when considering the necessity for an interference against a pressing social need (proportionality), the court 'leaves to the Contracting States a margin of appreciation'.[450] The scope of the margin depends on 'the importance of the right …, the nature of the restricted activities and the aim of the restrictions.'[451]

321 Because the function of domestic courts in the United Kingdom under the *Human Rights Act* is not the same as the international court at Strasbourg under the convention, a 'margin of appreciation' as such is not applied by the former.[452] But the domestic courts do apply a principle of weight and latitude. While 'not different *conceptually* or *logically*'[453] to the margin of appreciation, the principle has a different rationale. In recent authorities, the courts in the United Kingdom have clarified its nature and application.

322 In the first place, it is not a principle of 'deference', which has 'overtones of civility'. Having made that point in *R (ProLife Alliance) v British Broadcasting Corporation*, Lord Hoffmann went on:

> In a society based upon the rule of law and the separation of powers, it is necessary to

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449 *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, [51] (Lord Nicholls); *Tweed v Parades Commission* [2007] 1 AC 650, [36] (Lord Carswell) ('perhaps more aptly, latitude').

450 *Handyside v United Kingdom* (1979-80) 1 EHRR 737, [48] citing *Engel v The Netherlands* (1976) EHRR 684, [100]; *De Wild, Oons and Versyp v Belgium (No. 1)* (1971) 1 EHRR 373, [93] and *Golder v United Kingdom* (1975) 1 EHRR 524, [45]. See also *Sahin v Turkey* (2005) 41 EHRR 8, [100]:
[t]he national authorities are in principal better placed than an international court to evaluate local needs and conditions. It is for the national authorities to make the initial assessment of the 'necessity' for an interference, as regards both the legislative framework and the particular measure of implementation. Although a margin of appreciation is thereby left to the national authorities, their decision remains subject to review by the Court for conformity with the requirements of the Convention (footnotes omitted).

451 *Sahin v Turkey* (2005) 41 EHRR 8, [101].

452 *R v Director of Public Prosecutions; ex parte Kebilene* [2000] 2 AC 326, 380-381 (Lord Hope); *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185, [132] (Lord Walker).

453 Aileen Kavanagh, *Constitutional Review and the UK Human Rights Act* (2009) 208.

> decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts. [454]

Of the same view was the House of Lords in *Huang v Secretary of State for the Home Department*.[455] The task, said Lord Bingham for the committee:

> is not … aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational decision-maker is likely to proceed. [456]

323 The High Court of Australia considered the doctrine of deference in *Corporation of the City of Enfield v Development Assessment Commission*.[457] In the context of a decision about the nature of traditional judicial review, it rejected the doctrine as being inconsistent with an essential characteristic of a court which 'declares or enforces the law and determines the limits of power conferred by statute upon administrative decision-makers.'[458] In the constitutional context, in *Mulholland v Australian Electoral Commission*[459] Kirby J referred to the particular European rationale for the 'margin of appreciation', the duty of the common law courts to declare and enforce the law 'without deference' and said neither concept was 'helpful'.

324 Consistently with the recent authorities in the United Kingdom and this decision of and dicta in the High Court, I would not describe as 'deference' the principle of giving appropriate weight and latitude to primary decision-makers when judicially reviewing for proportionality. It is a flexible principle of comity and respect reflecting the different institutional functions of the judiciary, the parliament and the executive in the constitutional framework.

325 In the second place, the courts in the United Kingdom have held that the degree of

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454 [2004] 1 AC 185, [75].

455 [2007] 2 AC 167.

456 Ibid [16] (Lord Bingham, Lord Hoffmann, Baroness Hale, Lord Carswell and Lord Brown).

457 (2000) 199 CLR 135.

458 Ibid [153] (Gleeson, Gummow, Kirby and Hayne JJ, citing *Attorney-General (New South Wales) v Quin* (1990) 170 CLR 1, 35-36 (Brennan J) and *Marbury v Maddison* (1803) 5 US 87, 111 (Marshall CJ)).

459 (2004) 220 CLR 181, [237]-[238]. See also KM Hayne, 'Deference – an Australian Perspective', (2011) *Public Law* 75, 88-89 (Hayne J writing extra-judicially).

weight or latitude which is afforded, and the intensity of the review which this implies, depends on the context and circumstances. The various factors include the comparative institutional advantage of the court (if any); the experience and expertise of the primary decision-maker; the nature and importance of the right, and the purpose of the interference, in question; and how well suited the court is to considering the values and interests which are at stake.[460] By reference to similar considerations, in the United Kingdom a principle of 'appropriate caution' is applied by courts exercising a traditional jurisdiction by way of appeal or judicial review, for example in cases concerning social security,[461] immigration[462] and work and pensions[463] legislation, and the competition[464] and immigration appeal tribunals.[465]

326 Returning to *Corporation of the City of Enfield v Development Assessment Commission*,[466] the High Court also considered the factors which might persuade a court to give weight to the decision of a primary decision-maker in the traditional judicial review context. Among the relevant factors identified are the field in which the court or tribunal operates, the qualifications and criteria for the appointment of its members, the information on which it acts when exercising its functions and the extent to which its decisions are supported and objectively justified by a transparent process of reasoning.[467] So in traditional judicial review in Australia similar considerations are relevant in deciding how much weight should be given to the primary decision-maker. [468]

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460 See generally Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008) ch 6.

461 *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, [16] (Hale LJ, Clarke LJ and Butterfield J agreeing).

462 *Secretary of State for the Home Department v AH (Sudan*) [2008] 1 AC 678, [30] (Baroness Hale; see also [11] (Lord Bingham), [43] (Lord Brown)).

463 *Hinchy v Secretary of State for Work and Pensions* [2005] 2 All ER 129, [30] (Lord Hoffman, Lord Hope and Lord Walker agreeing)

464 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (No 5)* [2002] 4 All ER 376.

465 *AS and DD (Libya) v Secretary of State for the Home Department and Liberty* [2008] EWCA Civ 289, [15] (Sir Anthony Clarke MR, Buxton and Smith LJJ agreeing); *Secretary of State for Home Department v Akaeke* [2005] EWCA Civ 947, [26]-[29] (Carnworth LJ, Chadwick and Rix LJJ agreeing).

466 (2000) 199 CLR 135.

467 Ibid [45], citing *Registrar of Trademarks v Muller* (1980) 144 CLR 37, 41 (Stephen, Mason, Murphy, Aicken and Wilson JJ).

468 I discussed the authorities further and applied the principle in *Secretary, Department of Human Services v Sanding* [2011] VSC 42, [223]-[238].

327 To determine the appropriate degree of weight or latitude which should be afforded, taking a range of factors into account, such as factors of this nature, is the approach adopted in the United Kingdom when judicially reviewing for proportionality under the *Human Rights Act* and the approach adopted there and here when conducting traditional judicial review. It is the approach supported by the Australian writers on human rights.[469] I would therefore adopt this contextual approach here.

328 Turing to the present case, I have spelt out in detail the relevant jurisdiction of the tribunal, which is exercised in the guardianship list of the human rights division, and the expertise of the acting deputy president who made the administration order with respect to Patrick. The **s**pecialist nature of that jurisdiction and the particular expertise with which that jurisdiction was exercised both suggest that significant weight should be afforded to the decision of the tribunal. That the tribunal produces a reasoned decision by a transparent process is also relevant. On the other hard, at stake are fundamentally important human rights of an individual – one who is especially vulnerable – and protecting and vindicating those rights is, under the Charter, the judicial function of the court.

Impact of Charter on decision-making under *Guardianship and Administration Act*

329 As we have seen, the Attorney-General submitted that compliance with the terms of the *Guardianship and Administration Act* should ensure the tribunal acts compatibly with human rights. I can accept that submission with these qualifications.

330 The purpose of the *Guardianship and Administration Act* is 'to enable persons with a disability to have a guardian or administrator appointed' when necessary (s 1). The power to make such an appointment can only be exercised when the person, by reason of their disability, is unable to make reasonable judgments about themselves (s 22(1)(b), (2)-(5)) or their estate (s 46(1)(a)(ii), (2)-(4)). These powers must be exercised in accordance with the core principles of least restrictive means, the person's

469 See Carolyn Evans and Simon Evans, *Australian Bills of Rights* (2008) [5.56]-[5.69]; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) [1020]-[1050].

best interests and the wishes of the person (ss 4(2)(a)-(c), 22(1)-(3), 46(1)-(4)). The legislation contains those and other safeguards to protect the interests of persons with a disability, including interests now identified with their human rights.

331 By contrast, a main purpose of the Charter is to specify 'the human rights that Parliament specifically seeks to protect and promote' (s 1(2)(a)). Those are the civil and political rights in Part 2, reflecting (not exactly) the *International Covenant on Civil and Political Rights*. A fundamental value of the Charter is that 'all people are born free and equal in dignity and rights' (Preamble). From that fundamental value springs the stream of principle running through the Charter that 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom' (Preamble).

332 Under the Charter, human rights are not absolute and may be limited, but only according to the strict standard of justification in s 7(2). Public authorities are obliged to apply the Charter, unless there is a contrary provision or law (s 38(1) and(2)), subject only to demonstrable justification under s 7(2). These too are purposes of the Charter (s 1(2)(c)).

333 From this comparison, it can be seen that the Charter provides a general framework for protecting and promoting human rights, whereas the *Guardianship and Administration Act* provides a specific framework for appointing a guardian or administrator, subject to safeguards. Like the *Convention on the Rights of Persons with Disabilities*, which treats people not 'as objects of social protection [but] as subjects with rights',[470] the Charter takes the person with a disability to be someone 'born free and equal in dignity and rights' (Preamble) whose individual liberty, autonomy and development it is the function of human rights to protect and promote. The *Guardianship and Administration Act* takes the person with the disability to be someone in potential need of a guardianship or administration order and the protective services with which they are associated. That is not the same focus. If the inherent

470 *Nicholson v Knaggs* [2009] VSC 64, [13] (Vickery J).

purposes of the *Guardianship and Administration Act* can, despite the safeguards, give rise to a culture of paternalism, the express object of the Charter is to promote a culture of justification. The difference between the two may be understood in terms of the 'paradigm shift'[471] in approach towards people with a disability which was marked by the coming into operation of the *Convention on the Rights of Persons with Disabilities*. The *Guardianship and Administration Act* is capable of being, and in law must be, administered compatibly with human rights. But the enactment of the Charter means that stronger regard must be had to the human rights implications of guardianship and administration orders and decisions than was previously the case.

334 I can now consider whether the appointment of the administrator was unlawful under s 38(1) for being incompatible with Patrick's human rights.

Was appointing administrator incompatible with human rights and unlawful?

(a) Nature of the right

335 The meaning of the right is identified broadly and purposefully in terms of the fundamental interests which it protects and from the cardinal values which it embodies. Starting with this consideration is intended to anchor the analysis in the Charter.

336 Appointing the administrator engaged Patrick's human rights to equality (s 8(3)), to freedom of movement and choice of where to live (s 12) and against unlawful and arbitrary interference with privacy and home (s 13(a)). Each of these protect in various ways his fundamental right to live in a home of his choosing, including a home which he owns, and to enjoy that right on equal terms with other people despite his mental illness. I have dealt with the general significance of these rights already.

337 The particular significance of these rights for Patrick should be understood in the context that he has a mental illness, has been in psychiatric detention for some time and is therefore in special need of protection. In that regard, the provisions of the *Convention on the Rights of Persons with Disabilities* are relevant. The convention

471 Ibid.

emphasises the values of individual autonomy and freedom of choice (art 3), the equal rights of people with disabilities to choose their place of residence (art 19(a)) and own property and control their financial affairs (art 12(4)), as well as respect for their home (art 23). We have seen that personal autonomy and the person's wishes are important principles which are reflected in the scheme of the *Guardianship and Administration Act*.

338 It must be concluded that there are extremely valuable human rights interests at stake for Patrick and these must be given considerable weight in the balancing process.

339 The tribunal appreciated that Patrick had a 'very strong connection with his home' and it was 'the place where he wants to live'. However, having regard to the great importance of the human rights which were at stake, I would attach much more weight to the nature and importance of the human rights which were at issues than the tribunal apparently did.

(b) Importance of purpose of limitation

340 The purpose (the end) of the limitation (the means) must be legitimate in terms of the underlying values and interests which the limitation is aimed at achieving. It is important to attain a proper understanding of that purpose. The more pressing and substantial is the purpose, the greater is the interference which may be reasonably and demonstrably necessary, and vice versa.

341 I have some difficulty with identifying the purpose of appointing the administrator because of the generalised way in which the tribunal approached the matter and the nature of the findings which it made. As identified by the tribunal, the purpose of appointing the administrator was 'to make decisions in relation to [Patrick's] home'. There was a 'strong possibility that an administrator would decide to sell [his] home'. The administrator would make decisions 'about his home' which Patrick was unable to make by reason of his disability. These decisions would be made to protect Patrick 'from continuing the pattern of behaviour' that have been detrimental to him and also some of his healthcare professionals. The administrator would 'investigate' these issues and decide what should be done, taking the core principles into account.

342 But the purpose of the appointment could not have been for ensuring Patrick would obtain accommodation because he was already being accommodated at the hospital. Nor could the appointment have been made for ensuring he would obtain supported accommodation in the community which was more suitable to his needs, because the tribunal did not find the house would have to be sold before that could happen. It did not attempt to resolve the evidence on that subject, but the evidence was clearly not to that effect in any event.

343 Rather, the purpose of appointing the administrator was the generalised purpose of helping to improve Patrick's medical treatment and increase his long-term residential accommodation options. The idea was that, if he did not have his home to go to, he would be more medically compliant, more cooperative with the hospital, medical and social service staff, might develop more insight into his condition and would be more likely to settle into, and not abscond from, a community accommodation facility.

344 These may be important and legitimate purposes in general terms. But doing something to improve someone's medical and accommodation options is not as important as doing something which is necessary to meet their pressing medical and accommodation needs. Further, in assessing the importance of this generalised purpose, I would take into account that Patrick was being satisfactorily accommodated and treated in hospital, even if the living conditions were not ideal, and give significant weight to the freedom of choice he was exercising in remaining there rather than consenting to the sale of his home. I would also take into account that it was not known whether moving Patrick to a hostel would be successful, temporary or permanent.

(c) Nature and extent of the limitation

345 The focus here is on the limitation (the means), not the purpose (the end). It is necessary to identify objectively, and in the particular circumstances, how and to what extent the limitation interferes with the rights in question. The nature and extent of the limitation is a critical consideration because the greater the interference, the more

pressing and substantial must be the justification.

346 The limitation is the appointment of an unlimited administrator who will take complete and exclusive management and control of Patrick's property and probably sell his home. This is a severe interference with his human rights, for reasons which I have already given. It will probably lead to the permanent severance of Patrick's 'very strong connection to his house', together with the loss of the sense of identity and personal autonomy which that connection and managing his own money and property enables him to experience, even and perhaps all the more because he is in psychiatric detention.

(d) Relationship between limitation and purpose

347 The question is whether there is a proper relationship between the limitation (the means) and the purpose (the end). The means must be seen to be appropriate for achieving the end. The means must be rationally connected to and carefully designed to achieve the legitimate end.

348 The tribunal did discuss this issue, but at a high level of generality. In its view, decisions about Patrick's home needed to be made in his best medical and social interests, which he was not making by reason of his disability. The administrator could investigate what needed to be done. Taking into account Patrick's circumstances, including his present and future economic circumstances, that probably meant the home would be sold. The administrator would be given unlimited powers so that it could take this course, if appropriate. That, in the tribunal's view, supplied a rational connection between appointing the administrator and promoting Patrick's best interests.

349 Even accepting (against my earlier conclusion) that the legislation permitted an administrator to be appointed for these medical and social purposes, I cannot accept that it was reasonably necessary at the time, and in the circumstances, to interfere so drastically with Patrick's human rights in order to improve his medical and accommodation options, and the tribunal was wrong to approach the question in the

generalised manner that it did.

350 Patrick was not said or found to be in a health or accommodation crisis. He gave evidence at the hearing. He was not found to be in need of some urgent change of medical care or accommodation. There was no proposal for altering his medical treatment should his home be sold. Whether the appointment was needed in terms of Patrick's treatment plan under s 19A of the *Mental Health Act* was not dealt with in the evidence. I accept the tribunal's finding that living independently in the community was not then nor in the foreseeable future an option for him. That was because of his mental illness, his lack of insight into that illness and his serious physical disabilities. In the light of that, he had been assessed as suitable for placement in an aged care hostel, which he opposed. He preferred to remain where he was. As we have seen, there was some consideration in the evidence of the financial issues raised by moving him to that accommodation, but the evidence was not that Patrick's home had to be sold to provide funds for this to happen, and the tribunal did not so find. There was very little discussion in the evidence about the down-side treatment risks in the course which was proposed. The tribunal did not find that selling the home would actually break the cycle of behaviour which had been detrimental to him, or even assess what contribution would be made to that aim by selling the home. There was little consideration in the evidence, and no finding was made, about the consequences of selling the home if transferring Patrick to a hostel proved to be unsuccessful. All these matters were to be investigated by the administrator.

351 Thus, what the tribunal did was to appoint an unlimited administrator with authority to sell Patrick's home without making a finding that this was really necessary to meet his then pressing medical and accommodation needs. That was not to fashion a measure which was carefully designed to achieve a legitimate end. It was to give the administrator a power that significantly exceeded the generalised purpose of improving his treatment and accommodation options which I have discerned from the tribunal's findings. Contrary to the conclusion of the tribunal, appointing an administrator with that authority was not rationally connected to a legitimate aim.

There was no finding that selling the house was necessary for the purpose of achieving that aim. In truth, making a finding of that kind would have involved going into the matters at issue in much greater depth than the tribunal did. Moreover, because those matters went to whether an administrator should be appointed at all, they could not be left to the administrator.

(e) Less restrictive means

352 The principle is that the means chosen to achieve the legitimate end should be the least restrictive which are reasonably available.

353 This is a very important consideration and lies at the heart of an effective proportionality analysis. Its significance is underscored in cases under the *Guardianship and Administration Act*. As we have seen, least restrictive means is a core principle specified in s 4(2). When appointing an administrator, that principle is a mandatory relevant consideration under s 46(2)(a) and, by s 46(4), it governs the terms of the order which can be made. To repeat, the provisions require any order to be 'tailored to the circumstances, being privative only the extent actually required.' [472] Article 12(4) of the *Convention on the Rights of Persons with Disabilities* embodies the same principle.

354 The tribunal set out s 7(2) of the Charter in full. It also set out the passage in *R v Oakes*[473] in which Dickson CJ specified this principle. It made an express finding that 'less restrictive options had failed time and again and would be likely to fail again'.

355 The tribunal was here referring to the cycle of remission, decompensation and re-admission which had characterised Patrick's treatment for nearly 20 years. That cycle was powered by his irrational belief that he did not need medication, which he stopped taking when he went home, with serious consequences for his health.

356 Giving as much weight as I can to the experience and expertise of the tribunal in

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472 *McDonald v Guardianship and Administration Board* [1993] 1 VR 521, 530 (Fullagar, Tadgell and JD Phillips JJA).

473 [1986] 1 SCR 103, 139.

making these findings, I cannot see how giving an administrator complete management and control of Patrick's property was the least restrictive means reasonably available in the circumstances for advancing his best medical and social interests. Rather than that, it was virtually the most restrictive means. Making the order was designed to place unlimited power and control over Patrick in the hands of the administrator, essentially so his house could be sold, when the need to do so was neither established nor found.

357 In summary, the question is whether appointing an unlimited administrator who would probably sell Patrick's home was not reasonable and demonstrably justified under s 7(2) and therefore unlawful under s 38(1) of the Charter. Even giving significant weight to the assessment of the tribunal, I must conclude that it was not so justified.

358 The human rights which were at issue were of great importance, especially the rights which Patrick had to choose where to live, to be free of unlawful and arbitrary interference with his home and to live in the home which he owned, as well as his right to enjoy these rights equally with other persons, even though he had a mental illness and was a patient in a psychiatric hospital. The appointment of the administrator was a drastic interference with these rights, being the likely permanent loss of his home and his very strong connection with that home. The purpose of the appointment was the generalised one of improving Patrick's treatment and accommodation options. But he was not in a health or accommodation crisis (or anything like it) and some weight must be given to the personal choices which he was making about his own future and property. So great an interference was plainly not justified by the modest purposes of the appointment, which was virtually the most restrictive rather than the least restrictive means which were reasonably available.

359 Exercising the discretion in s 46(1) of the *Guardianship and Administration Act* to appoint the administrator placed limitations on and interfered with Patrick's human rights such as were not reasonable and demonstrably justified under s 7(2) of the Charter. The appointment was therefore unlawful under s 38(1) for being

incompatible with human rights. In this case, s 38(2) does not operate to make s 38(1) inapplicable because nothing in the *Guardianship and Administration Act* or any other law meant the tribunal could not have reasonably acted differently or made a different decision.

360 As the discretionary appointment of the administrator was unlawful under s 38(1) of the Charter, making it was an error of law within s 148(1) of the *Victorian Civil and Administrative Tribunal Act.* On that alternative ground, Patrick is also entitled to relief. It is unnecessary to determine the other grounds of unlawfulness on which he attacks the exercise of that discretion.

361 I have concluded the tribunal erred in law in interpreting the provisions of ss 46(1)-(4) of the *Guardianship and Administration Act* and also erred in law in exercising the discretion which those provisions confer to appoint an administrator. There will be an order under s 148(7)(a) of the *Victorian Civil and Administrative Tribunal Act* setting aside the administration order of the tribunal dated 17 May 2010. Under s 148(7)(b), the court can make any order that the tribunal could have made in the proceeding. The tribunal could have made an order dismissing the application for the appointment of the administrator. In my view, having regard to the purpose for which the appointment was sought and the evidence which was given in the proceedings in the tribunal, that was the only order which was open on the proper interpretation of the provisions and the exercise of the discretion to make the appointment compatibly with human rights.[474] Therefore there will be an order dismissing the application of Melbourne Health dated 22 May 2009 for the making of an administration order in respect of Patrick's estate.

CONCLUSION

362 Patrick has appealed on grounds of error of law against the appointment of an administrator to his estate by the Victorian Civil and Administrative Tribunal. There were two main issues in the appeal. The first is whether the tribunal erred in law in

474 Cf *XYZ v State Trustees Ltd* (2006) 25 VAR 402, [64] (Cavanough J).

its interpretation of the provisions of the *Guardianship and Administration Act*. The second is whether it erred in law in the way that it exercised its discretion to appoint the administrator.

363 Patrick is aged 58 years, mentally ill and has physical disabilities. He cannot live independently in the community. When unsupervised, he has a history of not taking his medication, which he irrationally believes he does not need. His mental health inevitably deteriorates, leading to involuntary readmission to hospital and a long, slow recovery. Also, his physical disabilities prevent him from taking proper care of himself.

364 Under an order made pursuant to the *Mental Health Act*, Patrick is an involuntary patient at a hospital which is operated by Melbourne Health. Despite his medical condition, he understands how to manage money and use banks accounts. He owns a modest home in a Melbourne suburb and has performed the few practical and financial obligations of that ownership from the hospital for many years.

365 State Trustees was appointed as the administrator on the application of the hospital and it will probably sell Patrick's home. The hospital wants to move him into supported accommodation in a hostel, which he opposes. To facilitate the move, the hospital made application to the tribunal for the appointment of an administrator with power to sell Patrick's home. The tribunal made the appointment even though, in its words, the appointment would probably sever his 'very strong connection with his home.'

366 The *Guardianship and Administration Act* allows an administrator to be appointed where the person with a disability is unable to make reasonable judgments about their estate by reason of their disability and they need an administrator to make those judgments for them. In the tribunal's view, these provisions permitted an administrator to be appointed over a person's estate if decisions had to be made about where it was in their best interests to live even if, as Patrick had been doing, the

person was making reasonable judgments about their estate in practical and financial terms.

367 That is incorrect in law. On the proper interpretation of the provisions, an administrator can only be appointed where the person is incapable (by reason of their disability) of making reasonable judgments about matters relating to their estate (in whole or in part) as real or personal property in practical, financial or management terms. The general purpose of the administration order provisions is to enable the property and financial resources of people with a disability to be preserved, conserved and not dissipated and to be maintained and applied for their welfare and benefit. An administration order must be made for that purpose.

368 In reaching this conclusion, I have taken into account that appointing an administrator, particularly with unlimited powers, is a very serious step because it transfers complete and exclusive control of a person's estate to the administrator. Such a step engages the human rights, and the fundamental common law rights and freedoms, of persons. In accordance with the applicable principles, I have interpreted the provisions of the *Guardianship and Administration Act* so as to preserve as much as possible a person's human rights to choose where to live, including in a home which they own (s 12), to be free of arbitrary and unlawful interference with their home (s 13(a)) and to enjoy these rights equally with other people (s 8(3)), as specified in the *Charter of Human Rights and Responsibilities Act*, as well as the fundamental common law right to own and quietly enjoy property, including your home.

369 Even if the interpretation adopted by the tribunal was correct in law, the power to appoint the administrator was discretionary. If the tribunal was a public authority under the Charter when making the appointment, it was required to exercise that discretion compatibly with Patrick's human rights and the appointment was unlawful if the tribunal did not. In this appeal, Patrick relies on provisions of the Charter which permit him to challenge the appointment on the ground that it was unlawful for being incompatible with human rights.

370 Patrick and the Victorian Human Rights and Equal Opportunity Commission submitted the tribunal was a public authority and therefore bound by the Charter when appointing an administrator under the *Guardianship and Administration Act*. The Attorney-General submitted it was not. I have determined the tribunal is a public authority when exercising such powers and must therefore act compatibly with human rights. I have accepted the submissions of the Attorney-General and the Victorian Human Rights and Equal Opportunity Commission that, when addressing human rights questions in an appeal of this nature, the court does not reconsider the decision appealed from on the merits and, in view of the experience and expertise of the tribunal, should afford its decisions appropriate weight when applying the standards in the Charter.

371 Under the Charter, human rights are not absolute and, compatibly with human rights, may be limited by legislation and the acts or decisions of public authorities where there is reasonable and demonstrable justification for the limitation. There is no question that the *Guardianship and Administration Act* is compatible with human rights in general terms. Its purpose is to protect the interests of vulnerable people who may need a guardian or administrator to be appointed in their best interests, it has built in safeguards and it is capable of being, and in law must be, administered compatibly with human rights. What was in issue in the appeal is the lawfulness of the appointment of the administrator in Patrick's case when assessed against the human rights standards in the Charter.

372 Applying those standards, and even allowing for the experience and expertise of the tribunal, I have concluded the appointment of the administrator was not reasonable and demonstrably justified. It was therefore incompatible with Patrick's human rights and unlawful.

373 The rights which are at stake are very important to Patrick, for they protect his interest in being able to choose where to live and to live in the home which he owns. He holds those rights, and they deserve protection and respect, on equal terms with everybody else even though he is an involuntary patient in a mental hospital. The appointment

infringes his human rights very seriously, as the administrator will take complete management and control of his money and other property, and probably sell his home. No sufficient purpose has been show to justify such a serious infringement of his human rights, as he is not in a crisis (or anything like it) in terms of his health, accommodation or otherwise. He has not been found to be mismanaging his money or his home. It is not known whether transferring him to a hostel would be successful, temporary or permanent. Lastly, appointing an unlimited administrator was virtually the most rather than the least restrictive option which was reasonably available.

374 As the discretionary appointment of the administrator over Patrick's estate was incompatible with his human rights and therefore unlawful under the Charter, it was an error of law to make the appointment, whether or not the tribunal misinterpreted the *Guardianship and Administration Act*.

375 I will make an order setting aside the order of the tribunal appointing the administrator. Having regard to the purpose for which the appointment was sought by Melbourne Health and the evidence which was given in the proceedings in the tribunal, the only order which was open on the proper interpretation of the provisions of the *Guardianship and Administration Act* and the exercise of the discretion to make the appointment compatibly with human rights was an order dismissing the application. Therefore I will make an order dismissing the application for the making of an administration order in respect of Patrick's estate.

CERTIFICATE

I certify that this and the 116 preceding pages are a true copy of the reasons for judgment of Bell J of the Supreme Court of Victoria delivered on 19 July 2010.

DATED this 19th day of July 2010.

Associate to Justice Bell