DIRECTOR OF PUBLIC PROSECUTIONS (on behalf of WATSON) v KABA and Another

BELL J

11, 12 February, 7 November, 18 December 2014

[2014] VSC 52

Criminal law — Prerogative relief — Permissible fragmentation of prosecution — Evidence — Admissibility — Summary offences — Motor vehicles — Registration — Licensing of drivers — Victoria Police — Random checks — Validity — Driver complying with police requests — Passenger leaving vehicle — Police request that passenger provide name and address — Passenger repeatedly and abusively refusing to comply with police request — Passenger charged with offensive behaviour and assault — Preliminary ruling by magistrate that police request was made without lawful authority — Exercise of discretion to exclude police evidence — Collapse of prosecution — Appeal against ruling — Evidence Act 2008 (No 47) s 138(1).

Human rights — Charter of Human Rights — Applicability — Statutory interpretation — Principles — Consistency — Legality.

Human rights — Charter of Human Rights — Applicability — Road safety legislation — Enforcement — Victoria Police — Random road checks — Vehicle drivers — Stopping of motor vehicles in random checks not amounting to detention — Interference with driver's rights — Consequential interference with passenger's rights — Qualified right to drive on public roads — Right to liberty — Right to freedom of movement — Right to privacy — International Covenant on Civil and Political Rights — Interpretation of Legislation Act 1984 (No 100961) s 35(a) — Road Safety Act 1986 (No 127) s 59(1) — Charter of Human Rights and Responsibilities Act 2006 (No 43) ss 12, 13, 32(1), 38(1) — Evidence Act 2008 (No 47) s 138(1), (3).

Section 32(1) of the Charter of Human Rights and Responsibilities Act 2006 ("the Charter") provided that, so far as it was possible consistently with their purpose, all statutory provisions were to be interpreted in a way that was compatible with the human rights provided for in the Charter.

Section 59(1)(a) of the Road Safety Act 1986 ("the Road Safety Act") relevantly provided that the driver or person in charge of a motor vehicle on a highway had a duty to stop the motor vehicle, produce for inspection his or her driver licence document or learner permit document and state his or her name and address if requested or signalled to do so by a police officer.

Two uniformed police officers stopped the driver of a motor vehicle for a random check of his driver's licence and the registration of the vehicle. They also obtained his permission to search the vehicle. The defendant, K, a passenger in the vehicle, expressed anger over the delay occasioned by the random stop, left the vehicle and commenced to walk along the adjacent footpath. The police repeatedly pressed him for his name and address, which he abusively refused to provide. When K's language worsened, one of the police officers arrested him for using offensive language. Led handcuffed to the police vehicle, K allegedly assaulted that officer and committed other street offences for which he was charged.

At the hearing of the charges in the Magistrates' Court, counsel for K objected to the evidence of the police under s 138(1) of the Evidence Act 2008 ("the Evidence Act") upon the ground that the criminal charges resulted from their unlawful and improper conduct in carrying out a random licence check for which they had no power under the Road Safety Act or otherwise and which breached the driver's and K's right to freedom of movement

under s 12 of the Charter. It was also submitted that demanding K's name and address was contrary to his right to privacy under s 13 of the Charter. At a preliminary hearing, the magistrate upheld both grounds of objection and exercised his discretion to refuse to admit their evidence, causing the prosecution to collapse. The prosecution sought judicial review of the magistrate's ruling.

Held, quashing the magistrate's ruling for error of law on the face of the record in relation to the ruling on s 59(1) of the Road Safety Act and remitting the proceeding to the magistrate for reconsideration of the exercise of the discretion under s 138(1) of the Evidence Act: (1) Despite the importance of the principle against fragmentation of criminal proceedings by the grant of prerogative relief, this was one of those exceptional cases in which judicial review should be granted upon the ground that the magistrate's ruling to exclude the evidence constituted an error of law on the face of the record and the discretion of the court should be exercised in favour of granting relief. The ruling of the magistrate, if upheld, would cause the complete collapse of the prosecution case. [11]–[18].

> *Sankey v Whitlam* (1978) 142 CLR 1; *R v Iorlano* (1983) 151 CLR 678; *R v Judge Mullaly* [1984] VR 745; *Craig v South Australia* (1995) 184 CLR 163; *Rozenes v Beljajev* [1995] 1 VR 533; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *Easwaralingam v Director of Public Prosecutions* (2010) 208 A Crim R 122 followed.

(2) The common law assumed the liberty of the individual and insisted upon positive lawful authority for any governmental interference therewith. In the context of that general principle, certain particular rights and freedoms of relevance to the present case had been recognised. They were most especially relevant in relation to the application of the principle of legality. Those rights and freedoms were liberty, freedom of movement and privacy (in a particular sense). [74].

> *Entick v Carrington* (1765) 19 State Tr 1030; 95 ER 807; *Somerset v Stewart* (1772) Lofft 1; 98 ER 499; *Clough v Leahy* (1904) 2 CLR 139; *Rice v Connolly* [1966] 2 QB 414; *R v Eeet* [1983] Crim LR 806; *R v Therens* [1985] 1 SCR 613; (1985) 18 DLR (4th) 655; *Williams v R* (1986) 161 CLR 278; *Collins v Wilcock* [1984] 1 WLR 1172; *R v Grafe* (1987) 36 CCC (3d) 267; *Attorney-General v Guardian Newspapers [No 2]* [1990] 1 AC 109; *Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414; *Director of Public Prosecutions v Zierk* (2008) 184 A Crim R 582; *R v Grant* [2009] 2 SCR 353; *Antunovic v Dawson* (2010) 30 VR 355; *Director of Public Prosecutions v Hamilton* (2011) 33 VR 505; *Hamed v R* [2012] 2 NZLR 305; *R v Nguyen* (2013) 117 SASR 432 considered.

(3) There was, as an aspect of the common law right to freedom of movement, a qualified right to drive on the public roads which was to be exercised according to law, including the licensing and road safety legislation. [85].

> *Melbourne Corporation v Barry* (1922) 31 CLR 174; *Richards v Stange* (unreported, Full Court, Supreme Court of Western Australia, 2 April 1982); *Cole v Whitfield* (1988) 165 CLR 360; *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307 considered.

(4) Under the Charter, a routine check which involved stopping a motor vehicle for a brief period, examining the licence of the driver and inspecting the vehicle from the kerbside did not amount to physical detention of the driver (or passenger) such as to engage the right to liberty. As no more than this occurred in the present case, this right was not engaged for the purposes of the Charter. [112].

R v Waterfield [1964] 1 QB 164; *Hoffman v Thomas* [1974] 1 WLR 374; *Brendlin v California* 551 US 249 (2007); *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415; *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 503; *Austin v UK* (2012) 55 EHRR 14 considered.

(5) When police stopped a vehicle to check on the licence of the driver and the registration of the vehicle, they interfered with the right to freedom of movement of the driver, and necessarily any passenger, under s 12 of the Charter. [118].

Melbourne Corporation v Barry (1922) 31 CLR 174; *Richards v Stange* (unreported, Full Court, Supreme Court of Western Australia, 2 April 1982); *Gerhardy v Brown* (1985) 159 CLR 70; *Cole v Whitfield* (1988) 165 CLR 360; *Kerr v Attorney-General* [1996] DCR 951; (1996) 4 HRNZ 270; *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 considered.

(6) The driver of the vehicle stopped by police had no duty to state his name and address except as was imposed by the legislation in question. This information was personal to himself and represented an aspect of the privacy that was protected by s 13(a) of the Charter. Making a statutory demand for the driver's name and address interfered with this right. [132].

R v Secretary of State for the Home Department; Ex parte Phansopkar [1976] 1 QB 606; *Crowley v Murphy* (1981) 34 ALR 496; 52 FLR 123; *Morris v Beardmore* [1981] AC 446; *George v Rockett* (1990) 170 CLR 104; *R v Jefferies* [1994] 1 NZLR 290; *Stjerna v Finland* (1994) 24 EHRR 195; *Pretty v UK* (2002) 35 EHRR 1; *Von Hannover v Germany* (2005) 40 EHRR 1; *Unal Tekeli v Turkey* (2006) 42 EHRR 53; *Reklos v Greece* [2009] EMLR 16; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1; *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328; *PJB v Melbourne Health and State Trustees Ltd* (2011) 39 VR 373; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 considered.

(7) Section 59 of the Road Safety Act interfered with human rights, particularly the privacy and freedom of movement of drivers. In the present case, the relevant and commonly understood rules of interpretation as developed by the courts and decreed by statute were the principles of consistency and legality and s 32(1) of the Charter. It was necessary to interpret the provision in question according to the command in s 35(a) of the Interpretation of Legislation Act 1984. [135]–[139].

Jumbunna Coal Mine, NL v Victorian Coal Miners' Association (1908) 6 CLR 309; *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1; *Dietrich v R* (1992) 177 CLR 292; *Coco v R* (1994) 179 CLR 427; *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Buck v Comcare* (1996) 66 FCR 359; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; *R v Lord Chancellor; Ex parte Lightfoot* [2000] QB 597; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22; *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414; *Evans v New South Wales* (2008) 168 FCR 576; *Zheng v Cai* (2009) 239 CLR 446; *R v Momcilovic* (2010) 25 VR 436; *Mastwyk v Director of Public Prosecutions* (2010) 27 VR 92; *PJB v Melbourne Health and State Trustees Ltd* (2011) 39 VR 373; *Lacey v Attorney-General* (2011) 242 CLR 573; *Momcilovic v R* (2011) 245 CLR 1; *Director of Public Prosecutions v Piscopo* (2011) 33 VR 182; *Slaveski v Smith* (2012) 34 VR 206; *Noone v Operation Smile (Australia) Inc* (2012) 38 VR 569; *WBM v Chief Commissioner of Police* (2012) 43 VR 446; *Director of Public*

Prosecutions v Leys (2012) 44 VR 1; *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; *Australian Postal Corp v Sinnaiah* (2013) 213 FCR 449; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 considered.

(8) The history of the Road Safety Act, and its current provisions, revealed that the Victorian Parliament unmistakably intended that s 59(1)(a) was to confer, by necessary implication, both a duty on drivers and a power to stop on police (and other officers). It was not reasonably open to interpret the provision otherwise. This conclusion was reached taking full account of the individual rights and freedoms and the human rights that were engaged under the principle of legality at common law and under s 32(1) of the Charter. It would be contrary to the plain and unmistakable intention of the Parliament to interpret the provisions as conferring only a duty on drivers and that interpretation was not warranted by s 32(1) of the Charter. [239]–[244].

(9) The magistrate correctly decided that, under s 138(1)(a) of the Evidence Act, the police questioning was improper and in contravention of Australian law because it was done without authority and in contravention of K's rights and freedoms at common law. He made no error in so deciding, indeed was correct to so decide. Asking K for his name and identification particulars breached his right of privacy under Art 17(1) of the International Covenant on Civil and Political Rights ("ICCPR"), and his right to freedom of movement under Art 12(1) of the ICCPR. This was a relevant discretionary consideration under s 138(3)(f). The magistrate was correct also in deciding that the police questioning of the defendant was improper and in contravention of Australian law because it was incompatible with human rights and therefore unlawful under s 38(1) of the Charter. [457]–[469].

(10) Under s 138(1)(b) of the Evidence Act a chain of causation must be shown between the impropriety or contravention and the obtaining of the evidence. It could be direct or indirect. Evidence of offending could be excluded where the impugned police conduct gave rise to the offending in circumstances that made it appropriate to find that the evidence was "obtained … in consequence of" that conduct. Where a person committed an offence by acting in a way that, viewed objectively, was disproportionate to impugned police conduct, the court might be compelled to find that the evidence of the offending was not, as a matter of causation, obtained in consequence of it. The magistrate did not accept that the defendant's reaction was so disproportionate that, as a matter of causation, the offending was not in consequence of impugned conduct of police. The magistrate was entitled to make those findings. [470]–[478].

(11) The magistrate's exercise of the discretion in s 138(1) of the Evidence Act not to admit the evidence appeared to have been based upon two legal grounds, one of which was in error. Therefore, it was not appropriate to allow it to stand. In the circumstances, the ruling should be quashed because of the error made with respect to the interpretation of s 59(1) of the Road Safety Act. The magistrate should reconsider the exercise of his discretion to refuse to admit the evidence on the basis that the conduct of the police officer was improper and unlawful by reason of the breach of the defendant's rights under common law and the Charter (and the ICCPR) which occurred. [479]–[484].

(12) The magistrate had erred in interpretating of s 59(1) of the Road Safety Act. Contrary to the magistrate's interpretation, police do have a power of random stop and check under that provision. The magistrate correctly determined that police exceeded their common law powers and breached the defendant's human rights under the Charter (and the ICCPR) by subjecting him to coercive questioning for his name and address. The proceeding will be remitted to the magistrate for reconsideration, upon that basis, of the exercise of his discretion to exclude the evidence under s 138(1) of the Evidence Act. [485]–[487].

Comparative analysis of interpretation of road traffic legislation in Australia, the United Kingdom and Canada. [245]–[319].

Comparative analysis of the law of evidence pertaining to the exclusion of unlawfully or improperly obtained evidence in New Zealand, Canada, the United States of America and the United Kingdom. [351]–[442].

Consideration of the effect of improper and unlawful police conduct under the common law, the ICCPR and the Charter of Human Rights and Responsibilities Act 2006. [457]–[469].

Application for judicial review

This was an application for judicial review of a magistrate's ruling pursuant to s 138(1) of the Evidence Act that the police evidence as to a random road check of a motor vehicle's registration and the driver's licence was unlawfully obtained and inadmissible on the hearing of charges of assault and related street offences against a passenger who had alighted from the motor vehicle in the course of the random test. The facts are stated in the judgment.

No appearance for the second defendant.

P B Kidd SC and *J Davidson* for the plaintiff.

S P Donaghue SC and *E M Nekvapil* for the first defendant.

K L Walker SC for Victorian Equal Opportunity and Human Rights Commission (Intervening).

Cur adv vult.

Bell J.

Introduction

1 Two young black African men were minding their own business when driving in the streets of Flemington one afternoon. Two uniformed police officers on mobile patrol stopped the driver for a random check of his licence and the registration of the vehicle. They also obtained his permission to search the vehicle.

2 Magnus Kaba, the passenger, expressed indignant anger over the delay, left the vehicle and exercised the liberty, which we all take for granted, to walk along the footpath towards the nearby flats. While he was doing so and without suspicion of wrongdoing, the police repeatedly pressed him for his name and address, which he abusively refused to provide, protesting vehemently about racist harassment.

3 When Mr Kaba's abuse worsened considerably, one of the officers arrested him for using offensive language. Led handcuffed to the police vehicle, he allegedly assaulted that officer and committed other street offences for which he was charged.

4 On the hearing of the charges before Duncan Reynolds, Magistrate, counsel for Mr Kaba objected to the evidence of the police under s 138(1) of the Evidence Act 2008 upon the ground that the criminal charges were the result of their

unlawful and improper conduct in carrying out a random licence check for which they had no power under the Road Safety Act 1986 or otherwise and which breached the driver's and Mr Kaba's right to freedom of movement under the Charter of Human Rights and Responsibilities Act 2006. It was also submitted that demanding Mr Kaba's name and address was contrary to his right to privacy under the Charter.

5 His Honour heard and determined these objections at a preliminary hearing. Ruling against the police on both grounds, his Honour exercised his discretion to refuse to admit their evidence, causing the prosecution to collapse. The trial was adjourned part-heard so that the prosecution could consider its position. This application for judicial review of the magistrate's ruling, which raises important issues about police powers, exclusion of evidence and human rights, is the result.

Application for judicial review

Grounds relied upon

6 By originating motion, the Director has made an application under O 56 of the Supreme Court (General Civil Procedure) Rules 2005 seeking an order in the nature of certiorari quashing the ruling of the magistrate under s 138(1) of the Evidence Act not to admit the evidence of the police, an order in the nature of mandamus compelling his Honour to admit the excluded evidence, a declaration that s 59(1) of the Road Safety Act confers a power of stop and request upon members of the police force and certain procedural and other orders.

7 The grounds of the application are that, in making the ruling, his Honour committed jurisdictional errors and errors of law upon the face of the record.[1] On examination, these grounds raise two main legal issues.

8 The first legal issue is whether the magistrate erred in law upon the face of the record in concluding that the police had acted unlawfully and improperly because s 59(1) of the Road Safety Act did not confer any power on them to undertake random checks in respect of the licence status of drivers and motor vehicles. It was agreed between the parties that this is a question of pure law and is raised

1. In summary, the grounds were: (a) determining that the officers had no power, either at common law or under s 59 of the Road Safety Act, to stop the vehicle; (b) determining that there was no lawful power for the police officers to request the driver of the vehicle to consent to a search of the vehicle; (c) determining that there was no lawful power for the police to ask Mr Kaba for his identification when he left the vehicle and proceeded to move off; (d) determining that the actions of Senior Constable Randall and Constable Andrews in stopping the vehicle unjustifiably breached the right to freedom of movement of Mr Kaba and the driver of the vehicle and subjected them to arbitrary detention, contrary to the provisions of s 21(2) of the Charter and of the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)) ("ICCPR"); (e) determining that Constable Andrews' request of the driver of the vehicle to consent to a search of the vehicle contravened Mr Kaba's right to privacy in s 13 of the Charter; (f) determining that the requests by police for Mr Kaba's identification when he left the vehicle and proceeded to move off contravened his right to privacy in s 13 of the Charter and of the ICCPR; (g) determining that the police officers did not give proper consideration to Mr Kaba's rights under the Charter; (h) determining that the entirety of the evidence of Senior Constable Randall and Constable Andrews as Mr Kaba's conduct, including criminal conduct after his arrest, was inadmissible because that conduct was a consequence of the unlawful conduct of police prior to his arrest; and (i) exercising the discretion under s 138 of the Evidence Act when, on no reasonable view, could the impugned conduct of the police justify exclusion of all of the evidence of Senior Constable Randall and Constable Andrews.

upon the face of the record, being the written ruling of the magistrate. For reasons which I will later give, I have concluded that the magistrate did so err.

9 The second legal issue is whether the magistrate erred in law upon the face of the record, or committed a jurisdictional error, by exercising his discretion not to admit the evidence upon the basis that the police had acted unlawfully or improperly by breaching Mr Kaba's right to privacy under the Charter and the ICCPR. As I will later explain, his Honour did not so err in law or jurisdiction because his approach to the interpretation and application of the Charter (and the ICCPR) was correct.

10 Before giving reasons for these conclusions, it is necessary to consider the rules governing the making of orders by way of judicial review in relation to evidentiary rulings in part-heard criminal proceedings.

Rule against fragmentation

11 As submitted on behalf of Mr Kaba and acknowledged on behalf of the Director, it is highly unusual, and usually highly undesirable, for this court to intervene in part-heard criminal proceedings in another court. At common law there is a strong rule, subject only to limited exceptions, against the fragmentation of criminal proceedings by the grant of prerogative relief, such as prohibition or certiorari. Thus, in *Sankey v Whitlam*,[2] Gibbs ACJ criticised the practice of making declaratory orders as to matters of criminal evidence or procedure. His Honour said that "the circumstances must be most exceptional to warrant the grant of relief"[3] and that "[o]nce criminal proceedings have begun they should be allowed to follow their ordinary course" unless "for some special reason it is necessary in the interests of justice" to grant relief.[4]

12 In *R v Judge Mullaly*,[5] the prosecution (through the Attorney-General) sought judicial review in respect of an evidentiary exclusion ruling made in the exercise of the discretion of a judge of the County Court. The same rule against fragmentation of criminal proceedings was applied. Brooking J said "there is a good deal of weighty authority for the view that in general the erroneous reception or rejection of evidence is no ground for a prohibition"[6] and also referred to cases in which the same rule had been applied in relation to certiorari.[7] His Honour expressed the "strong view" that such remedies were not available with respect to evidentiary rulings[8] and would in any event be refused on discretionary grounds,[9] even where the ruling was fatal to a party's case.[10] When refusing special leave to appeal in *R v Iorlano*,[11] Gibbs CJ, Murphy, Wilson, Brennan and Dawson JJ repeated the rule that:[12]

2. (1978) 142 CLR 1 at 25–6 ("*Sankey*").
3. At 25.
4. At 26.
5. [1984] VR 745.
6. At 748.
7. At 749.
8. At 748.
9. At 750.
10. Ibid.
11. (1983) 151 CLR 678.
12. At 680.

> … it is highly undesirable to interrupt the ordinary course of criminal proceedings by applications for leave to appeal or prerogative relief for the purpose of challenging rulings on questions of admissibility of evidence.

Examples of the application of this well-established rule include *R ex rel City of Fitzroy v Casey*,[13] *Ex parte Alldritt*,[14] *Ex parte Buzzacott; Re Burns,*[15] *Ex parte Ball; Re Tanner,*[16] *Ex parte Dowsett; Re Macauly,*[17] *Ex parte Crothers; Re Anderson v Commissioner for Motor Transport*[18] and *R v Tennant; Ex parte Woods*.[19]

13 It was held in *Kirk v Industrial Court of New South Wales*[20] that, for the purposes of prerogative relief such as prohibition and certiorari, there is in Australia a distinction between jurisdictional and non-jurisdictional error. Prerogative relief is only available with respect to the former.[21] It was established in *Craig v South Australia* that an inferior court did not "ordinarily" commit a jurisdictional error by deciding questions of law and fact which fell within its jurisdiction, including the "identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence".[22]

14 On the other hand, in *Kirk* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that it was a jurisdictional error for the Industrial Court to permit the accused to be called as a voluntary witness for the prosecution.[23] Moreover, *Craig* established[24] and *Kirk* confirmed[25] that judicial review was available with respect to decisions of inferior courts vitiated by error of law on the face of the record.

15 It was decided in *Craig*[26] that:[27]

13. (1897) 23 VLR 495 at 498 per Holroyd J.
14. (1898) 15 WN (NSW) 43 at 44 per Stephen J, 45 per Cohen J.
15. (1920) 20 SR (NSW) 144 at 146–9 per Cullen CJ, Gordon and Ferguson JJ agreeing.
16. [1960] SR (NSW) 465 at 466 per Street CJ, Ferguson and Hardie JJ agreeing.
17. (1943) 60 WN (NSW) 40 at 41 per Roper J.
18. (1961) 78 WN (NSW) 316 at 321 per Kinsella J.
19. [1962] Qd R 241 at 255 per Warstall J.
20. (2010) 239 CLR 531 at 571–2, [66] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ ("*Kirk*"); see also *Craig v South Australia* (1995) 184 CLR 163 at 178–9 per Brennan, Deane, Toohey, Gaudron and McHugh JJ ("*Craig*").
21. See *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 141, [163] per Hayne J.
22. (1995) 184 CLR 163 at 179–80 per Brennan, Deane, Toohey, Gaudron and McHugh JJ; approved in *Kirk* (2010) 239 CLR 531 at 572, [67] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
23. (2010) 239 CLR 531 at 575, [75]–[76] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; see also 565, [53] ("It may be that *some* departures from the rules of evidence would not warrant the grant of relief in the nature of certiorari") (emphasis added).
24. (1995) 184 CLR 163 at 175–6 and 180 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.
25. (2010) 239 CLR 531 at 575–8, [78]–[90] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
26. (1995) 184 CLR 163 at 181 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.
27. See, in particular, *R v District Court of Queensland Northern District; Ex parte Thompson* (1968) 118 CLR 488 at 495–6 per McTiernan J, 501–2 per Menzies J; *Hockey v Yelland* (1984) 157 CLR 124 at 131 per Gibbs CJ, 142–3 per Wilson J; *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 at 667 per Gibbs CJ, Wilson, Brennan and Dawson JJ concurring (this footnote in original quotation).

> … in the absence of some statutory provision to the contrary, the record of an inferior court for the purposes of certiorari does not ordinarily include the transcript, the exhibits or the reasons for decision.

No application to reconsider this decision was made in *Kirk*.[28] In Victoria, there is a relevant statutory provision. Section 10 of the Administrative Law Act 1978 provides:

> Any statement by a tribunal or inferior court whether made orally or in writing … of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

As was held in *Easwaralingam v Director of Public Prosecutions (Victoria)*,[29] the transcript of the hearing may be considered where this is necessary for the purpose of understanding the reasons in context. In the present case, it has been necessary to look at the transcript of the hearing before the magistrate in order to give context to and understand the written reasons. I refer to and set out the relevant passages below.

16 Of course, even where ground of error of law on the face of the record is established, relief might be refused in the exercise of the court's discretion because of the importance of the principle against fragmentation (see above).

17 An example of an exceptional case in which relief was granted in respect of the wrongful evidentiary ruling of a trial judge is *Rozenes v Beljajev*.[30] The ruling had the effect of excluding virtually all of the evidence of the prosecution. The application for judicial review was made by the Commonwealth and State Directors of Public Prosecution. The analogy with the present case will be obvious. Brooking, McDonald and Hansen JJ held that the way in which the trial judge exercised the discretion constituted an error of law. While not doubting the importance of the principle that "fragmentation [of judicial proceedings] should be avoided unless there are exceptional or special circumstances",[31] their Honours held that such circumstances had been established. Those circumstances were that:[32]

> … the Crown wishes to call admissible evidence in a criminal trial and the judge has excluded it on the application of the defence, and in which no evidence has actually been heard and the impugned evidence may constitute the substantial body of evidence, if not the essence of the case, relied on by the Crown, with the effective result of denying to the Crown — and thereby the community — the trial which it requires.

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28. (2010) 239 CLR 531 at 577, [85] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
29. (2010) 208 A Crim R 122 at 127, [22] per Tate JA, Buchanan JA agreeing ("*Easwaralingam*"); followed in *Green v Magistrates' Court of Victoria* [2011] VSC 584 (16 November 2011) at [6] per Pagone J; *Director of Public Prosecutions v Batich* (2012) 226 A Crim R 118 at 129, [40] per Bell J ("*Batich*"); *O'Connor v County Court of Victoria* (2014) 67 MVR 66 at 73–4, [28]–[30] per Kaye J; *McKenzie v Magistrates' Court of Victoria* [2013] VSC 2 (25 January 2013) at [38], [46] per Sifris J. Special leave to appeal in *Easwaralingam* was refused: *Easwaralingam v Director of Public Prosecutions* [2011] HCASL 99 (7 June 2011) per Hayne and Crennan JJ.
30. [1995] 1 VR 533.
31. At 571.
32. At 570.

Distinguishing those circumstances from standard evidentiary rulings of the kind mentioned by Gibbs ACJ in *Sankey*, Brooking, McDonald and Hansen JJ said:[33]

> There is a significant difference between this situation and a ruling on a point of evidence along the way in a committal or a trial … Such a ruling would be part of a trial conducted in accordance with established principles.

Their Honours decided that relief would be granted because:[34]

> … the plaintiffs have been affected by a ruling given by a judge at a preliminary stage, without any evidence having been given and on a highly contentious basis in law and fact which could have serious future consequences, both in the instant case and in the administration of justice generally.

The submission of counsel for the Director was that the present case falls into the same category. I agree.

18 Despite the importance of the principle against fragmentation, this is one of those exceptional cases in which judicial review should be granted upon the ground that the magistrate's ruling to exclude the evidence constituted an error of law on the face of the record and the discretion of the court should be exercised in favour of granting relief. The ruling of the magistrate, if upheld, will cause the complete collapse of the prosecution case.

Relief to be granted

19 As I have explained, my conclusion in relation to the two critical legal issues is that the Director has established that the magistrate's ruling was based upon an error of law on the face of the record in relation to the interpretation of s 59(1) of the Road Safety Act. However, the Director has not established that the magistrate committed any jurisdictional error in relation to his Honour's interpretation and application of the Charter.

20 If the magistrate's ruling in relation to the exercise of the discretion in s 138(1) of the Evidence Act not to admit the evidence had clearly been based independently upon each of these two legal grounds, it may have been appropriate to allow it to stand. However, that is not clear. The court should quash the ruling by reason of the error made with respect to the interpretation of s 59(1). His Honour should then be given the opportunity to reconsider the admission or exclusion of the evidence because the conduct of Senior Constable Randall was unlawful or improper by reason of the breach of Mr Kaba's rights under the Charter (and the ICCPR) which occurred.

21 In the circumstances, the ruling should be quashed because his Honour committed an error of law upon the face of the record in relation to the interpretation of s 59(1) of the Road Safety Act and his Honour should reconsider the exercise of his discretion to exclude the evidence under s 138 of the Evidence Act upon the ground, which I have upheld, that Senior Constable Randall breached Mr Kaba's rights under the Charter (and the ICCPR). There will be orders to that effect.

33. Ibid.
34. At 571.

Findings and ruling of magistrate

Criminal charges

22 I will begin by explaining in more detail the charges brought against Mr Kaba and the course of the hearing before his Honour.

23 Arising out of events that occurred at Flemington on 19 April 2012, eight charges[35] were brought against Mr Kaba. The facts allegedly giving rise to the charges all occurred after the driver of the car in which Mr Kaba was travelling had been stopped and questioned and police had sought Mr Kaba's name. The hearing of the charges commenced in the Magistrates' Court at Melbourne on 9 April 2013. Mr Kaba pleaded not guilty to all of the charges.

24 The prosecution proposed to call witnesses of whom only Senior Constable Randall and Constable Andrews could give evidence of the alleged events. The defence objected to the admissibility of their evidence under s 138 of the Evidence Act and a voir dire (preliminary hearing) was conducted for the purpose of ruling upon this objection. It was agreed that Senior Constable Randall and Constable Andrews would give their evidence in full but that counsel for Mr Kaba would cross-examine them only in relation to the objection to the admissibility of their evidence. Only the two officers gave evidence for the prosecution. No evidence was led on behalf of the defence.

25 At the conclusion of the voir dire, his Honour reserved his decision. After an exchange of written submissions, his Honour ruled on 20 June 2013 that the evidence of the two police officers would be excluded. The hearing was adjourned pending the determination of the application for judicial review which the prosecution now makes to this court.

26 It is clear that the factual foundation of the charges brought against Mr Kaba depends entirely upon the evidence of the two police witnesses. If their evidence was properly excluded, the prosecution will have to withdraw the charges or produce no evidence of the alleged facts in which case the charges will inevitably be dismissed.

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35. The eight charges were that Mr Kaba: (1) without lawful excuse, intentionally caused injury to Senior Constable Randall (under s 18 of the Crimes Act 1958, this is an indictable offence with a maximum penalty of imprisonment for 10 years); (2) without lawful excuse, recklessly caused injury to Senior Constable Randall (under s 18 of the Crimes Act, this is an indictable offence with a maximum penalty of imprisonment for five years); (3) assaulted Senior Constable Randall, a member of the police in the execution of his duty (under s 31(1)(b) of the Crimes Act this is an indictable offence with a maximum penalty of imprisonment for five years); (4) used indecent language in a public place (under s 17(1)(c) of the Summary Offences Act 1966 this is a summary offence with a maximum penalty for a first offence of a fine of 10 penalty units or imprisonment for two months); (5) behaved in an offensive manner in a public place (under s 17(1)(d) of the Summary Offences Act this is a summary offence with a maximum penalty for a first offence of a fine of 10 penalty units or imprisonment for two months); (6) wilfully and obscenely exposed a genital area of his body in a public place (under s 19 of the Summary Offences Act this is a summary offence with a maximum penalty of imprisonment for two years); (7) after Senior Constable Randall believed on reasonable grounds that Mr Kaba had committed an offence, namely using indecent language in a public place, and that was explained to him, he refused to state his name and address (under s 456AA(3)(a) of the Crimes Act this is a summary offence with a maximum penalty of a fine of 5 penalty units); and (8) assaulted Senior Constable Randall in indecent circumstances while being aware that Senior Constable Randall was not consenting (under s 39(1) of the Crimes Act this is an indictable offence with a maximum penalty of imprisonment for 10 years).

Findings on the evidence

27 In the ruling, his Honour found that, on the evidence of the two police officers, the case against Mr Kaba was that the officers were on patrol in their police vehicle on 19 April 2012. They were engaging in the routine and random interception of motor vehicles primarily to check the driver's licence of the driver, registration of the vehicle and whether the driver was the subject of any outstanding warrants.[36] They were not equipped with a mobile data terminal which disclosed information about a vehicle upon entering its registration number. Before requiring drivers to stop, the officers had no information about the status of the registration of the vehicle, whether the driver had a valid driver's licence and whether the occupants were associated with any breach of the road traffic laws. Their focus was upon intercepting an adequate quota of vehicles during their shift.

28 The Mazda in which Mr Kaba was a passenger was intercepted at about 1.50 pm in Portal Street, Flemington. Constable Andrews was driving the police vehicle. While Senior Constable Randall remained in the passenger seat, Constable Andrews approached the Mazda and explained to the driver that he was undertaking a routine licence and vehicle check. On that constable's request, the driver produced a current Victorian licence and he voluntarily remained in the vehicle while checks were carried out.

29 Constable Andrews walked to the front of the Mazda to check the expiry date of its registration label. Speaking through the open window of the front passenger door, Mr Kaba asked:

> How long was this fucking going to take? I have somewhere to be.

30 Constable Andrews went back to the police vehicle. In doing so, he observed a laptop computer protruding from underneath the rear of the driver's seat and a pair of orange handled scissors on the back seat. A police radio inquiry revealed that at some time in the past marijuana had been found in the intercepted vehicle or in the possession of the then driver.

31 Constable Andrews returned to the Mazda. He asked the driver for consent to search the vehicle, which was given. The driver then got out of the vehicle. As it happened, the search was not undertaken.[37]

32 At this time, Senior Constable Randall was still in the passenger seat of the police vehicle. About the time when Constable Andrews asked the driver for permission to search the Mazda, Senior Constable Randall observed Mr Kaba leave the vehicle and walk towards some residential units in Portal Street. Constable Andrews asked Mr Kaba for his name or identification.[38] This is the first request. Mr Kaba's response was:

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36. The Director submitted that the evidence before his Honour was that the sole or at least primary purpose of the interception was to check the licence of the driver and the registration of the vehicle but nothing turns on this.
37. I was told in submissions that in fact the search was undertaken but after the arrest of Mr Kaba and his alleged offending. This is not relevant in any way.
38. Senior Constable Randall's evidence in chief in this respect was:

> What's happened at that time? — While Tyrone was speaking to the driver I noticed the front passenger of the vehicle, that we hadn't had any contact with at that point, exit the vehicle and start walking off towards the residential high-rise in Portal Street.
>
> Where was Constable Andrews at that point? — Constable Andrews was still speaking to the driver at the driver's side window.

Fuck off.

Constable Andrews again asked Mr Kaba for identification. This is the second request. His Honour's ruling does not refer to the response but the evidence reveals that it was abusively refused.

33 At about this point, Senior Constable Randall got out of the police vehicle and approached Mr Kaba. He said to him that he needed his name "to say I spoke to you". This is the third request. In response, Mr Kaba said to Senior Constable Randall:

Go and get fucked cunt, I've done nothing wrong.

34 Senior Constable Randall then informed Mr Kaba that he had committed the offence of using offensive language. Mr Kaba said:

That's fucking bullshit cunt, you are a racist.

Senior Constable Randall then asked Mr Kaba for his name and address. Mr Kaba said:

I don't have to tell you anything, I've done nothing wrong.

What have you done at this stage? — As I say the passenger started walking off. I've approached him and I stated to him "Mate, I need your name to say I spoke to you".

What reason did you have to speak with the passenger? — I had no real reason to speak to him, I just wanted to know his details.

Why would you want to know his details? — He's in the vehicle, there's an allegation of some scissors on the back seat and a laptop under there. I wanted to know everyone's details before we cut anyone loose.

What conversation did you have with the accused? — I said to him, "Mate, I need your details to say I spoke to you". That's when he turned around and told me to get fucked.

What's happened at that point? — I told him that he'd committed the offence of offensive language and that I required his name and address.

This was his evidence under cross-examination:

[Y]ou said that my client, Magnus … was attempting to walk off at one point? — That's correct.

Is that right? — Yes.

That was before you'd said that he'd committed an offence? — That's correct.

So you then pursued him and said you required his name. Is that right? — Yes. I didn't require his name. I asked him for his name, as I would of any person on the street. He had the right not to give me his name at that point.

All right. I might come back to that. What if he'd just ignored you and kept walking? — Then he was free to go.

So you say that, even though he was trying to walk off and you said, "Mate, I need your name …"? — To say I spoke to you.

"… to say I spoke to you"? — Yep.

"I need your name". Did you say that? — "I need your name to say I spoke to you".

Were you in uniform? — That's correct, yes.

So do you really think in those circumstances that he would understand he's free to go? He's trying to leave and you're chasing him, asking for his name? — I wasn't chasing him at all. I walked after him and asked his name, which I'd do to any person on the street, whether or not I think they've committed an offence or not. Every person I speak to, my bosses want to know whether or not we've chatted to someone at any particular time.

But this wasn't about chatting to someone, was it? Because you saw him walking off. Do you agree you could have just let him go at that stage? — Yeah, sure, he could have walked away.

No, you could have just let him go without saying, "I need your name". Do you agree with that? — I suppose so, but I'm in the business of gathering intelligence and, yeah …

Senior Constable Randall told Mr Kaba that, if he did not state his name and address, he would be placed under arrest "until I can confirm who you are". Mr Kaba replied:

> This is fucking bullshit, you're just harassing me because I am black.

Senior Constable Randall then told Mr Kaba that he was under arrest for failing to state his name and address.

35 Mr Kaba was then asked to turn out his pockets. In response, he removed his T-shirt, dropped his trousers and underpants and exposed and grabbed hold of his penis, saying:

> See I have got nothing on me.

Mr Kaba then pulled up his trousers.

36 After being cautioned, Mr Kaba was handcuffed with his hands behind his back. The two police officers walked him to the police sedan. As he was about to be placed in the back seat, from behind Mr Kaba grabbed and squeezed the testicles of Senior Constable Randall, who felt immense pain for 10–15 seconds.

37 His Honour said that it was on the basis of these alleged events that the eight charges were brought against Mr Kaba.

Ruling to exclude evidence

38 In ruling on the application for exclusion of the evidence under s 138(1) of the Evidence Act, his Honour said that he had to decide whether the evidence was obtained as a consequence of impropriety or illegality, as to which the onus lay on the defence, and whether the desirability of admission outweighed exclusion, as to which the onus was on the prosecution.

39 As to the first issue, his Honour determined that, in the circumstances, the police had no power to stop the Mazda or detain the driver or Mr Kaba to seek identification details. There was no such power at common law because neither were under suspicion of having committed an offence (until Mr Kaba allegedly used abusive language). There was no such power under s 59(1)(a) of the Road Safety Act because, properly interpreted, it imposed duties upon a driver to whom a lawful request had been made without actually authorising such a request.[39]

40 In relation to human rights, his Honour referred to s 38(1) of the Charter and the obligations of members of Victoria Police as public authorities to act consistently with human rights. He accepted Mr Kaba's submission that, in stopping the Mazda, the police officers had acted unlawfully. Without common law or statutory power, their "conduct" had:

> … unjustifiably breached the right to freedom of movement of [Mr] Kaba and the driver [contrary to s 12 of the Charter] and subjected them to arbitrary detention, contrary to the provisions of s 21(2) of the Charter.

39. In reaching that conclusion, his Honour took into account s 32(1) of the Charter (as explained by French CJ in *Momcilovic v R* (2011) 245 CLR 1 at 46) ("*Momcilovic*") and the principle of legality (as explained by Redlich JA in *Mastwyk v Director of Public Prosecutions* (2010) 27 VR 92 at 107 ("*Mastwyk*")).

41 His Honour then referred to the obligations of police officers under s 38(1), when making decisions, to give proper consideration to relevant human rights. He found that the concentration of the focus of the two officers was upon achieving their vehicle interception quota.

42 Moving to Mr Kaba, his Honour found that his arrest had occurred after he had left the Mazda and started to move off. At this point, he was "twice" (his Honour earlier identified three requests) asked by police for identification. On neither occasion were the police purporting to act under s 456AA of the Crimes Act. His Honour accepted the submission of the defence that these requests "were unlawful and improper and contravened [Mr] Kaba's right, protected by the terms of s 13(a) of the Charter, not to have his privacy interfered with".

43 His Honour found that Mr Kaba's ultimate arrest was lawful under s 456AA. By then, Senior Constable Randall reasonably believed that Mr Kaba had committed the offence of using offensive language and Mr Kaba had refused the constable's lawful request to state his name and address.

44 As to the second issue, his Honour said that it was necessary to determine whether the evidence relating to the eight charges, including those charges connected with the lawful arrest, should be excluded under s 138(1) of the Evidence Act because it was evidence of Mr Kaba's conduct obtained in consequence of an impropriety or contravention of Australian law.[40] Assessing the evidence of that conduct, his Honour found:

- Mr Kaba was "angry that the vehicle had been stopped and detained while checks were undertaken by police";
- his "demeanour and attitude did not change when he moved away from the vehicle and was requested to provide identification details and it was maintained following his arrest"; and
- his "conduct … from which the charges arise, was directly responsive to and a consequence of that police conduct prior to his arrest, which I have considered to be unlawful".

45 In considering whether to admit or exclude the evidence, his Honour referred to the factors specified in s 138(3).[41] In balancing the desirability of admission against exclusion, his Honour said:

- he was unaware whether there were other prosecution witnesses to Mr Kaba's alleged conduct (before me, it was clear that there was not) but found that the evidence of Senior Constable Randall and Constable Andrews had "significant probative value and is important evidence in the proceeding";
- while the alleged offences included indictable offences (which can be heard summarily), they were "of modest seriousness"; and

40. His Honour referred to *Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151 per Smart AJ ("*Carr*") and *Robinett v Police* (2000) 78 SASR 85 per Bleby J ("*Robinett*").
41. His Honour referred to the principles expounded by Whelan J in *R v Mokbel* (2012) 35 VR 156.

- referring to *Bunning v Cross*,[42] the conduct of the two police officers did not involve "overt defiance of the will of the legislature or calculated disregard of the common law".

46 On the side of the evidence being excluded, his Honour said:

- the police had both engaged in "stopping the vehicle without … lawful justification, detaining the occupants" and in asking "Kaba for his identification particulars [in] breach [of] rights recognised by the International Covenant on Civil and Political Rights";[43] and
- the police had done so "without giving proper consideration as to whether acting in the manner they did interfered with the relevant human rights" of Mr Kaba.

47 His Honour concluded that, in the exercise of his discretion under s 138, the evidence of Senior Constable Randall and Constable Andrews was "inadmissible" and would be excluded.

Individual rights and freedoms

Context

48 We have just seen the decision of the magistrate and his Honour's findings and reasons. It is now necessary to determine the two legal issues that arise, namely whether the magistrate erred in law in deciding that, under s 59(1) of the Road Safety Act, police had no power randomly to stop the driver and whether his Honour properly exercised the discretion in s 138(1) of the Evidence Act to refuse to admit the police evidence.

49 In order to determine the first of these issues and address the submissions that were made on behalf of the parties, it is necessary to identify and apply the relevant principles of statutory interpretation. That will be done in the next section of this judgment. For reasons that will become clear, in my view, this involves consideration of the protection afforded to individual rights and freedoms under the common law, international law and the Charter. By way of foundation for the later analysis in this judgment, it is also convenient here to identify the scope of those human rights under the ICCPR and the Charter that are engaged and relevant to the issues of statutory interpretation that arise. It is also convenient to deal with the principles governing the limitation of human rights.

50 In order to determine the second of these issues and address the submissions of the parties, it is necessary to identify the scope of the human rights under the ICCPR and the Charter that are engaged and relevant to the issue of the exercise of the magistrate's discretion not to admit the police evidence. That too is done here.

51 I will begin with the common law.

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42. (1978) 141 CLR 54 at 78 per Stephen and Aickin JJ ("*Bunning*").
43. The ICCPR is specified in s 138(3)(f) of the Evidence Act (see below).

Common law

Foundational principles

52 Deep in the philosophical underpinning of the common law[44] lies the fundamental notion that rights and freedoms inhere naturally in all individuals as an attribute of their humanity. Blackstone declared that "rights and liberties [are] our birthright to enjoy entire", unless constrained by law.[45] It is considered that these "traditional civil and political liberties, like liberty of the person and freedom of speech" are not "solely residual" but have "independent and intrinsic weight".[46] So held Black CJ, French and Weinberg JJ in *Minister for Immigration and Citizenship v Haneef*,[47] "[f]reedom is not merely left over when the law is exhausted". As I pointed out in *Antunovic v Dawson*,[48] it is because everybody's individual liberty is presumed and protected that the law of habeas corpus requires any restraint thereon to be lawfully established.

53 Certain early decisions of the English courts gave common law effect to these inherent rights and freedoms and helped to lay the foundation for human rights in the modern sense. Two may be mentioned. In *Entick v Carrington*,[49] Lord Camden held that the state could not, without positive lawful authority, invade the privacy of a person's property or papers. The principle thereby enforced finds expression in human rights charters, such as the Fourth Amendment of the Constitution of the United States of America, which provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated". In *Somerset v Stewart*,[50] Lord Mansfield decided that English law would, by habeas corpus, vindicate the right to personal freedom of an enslaved person because his detention was not supported by positive law. The principle thereby enforced finds expression, for example, in s 21(1) of the Charter, which provides that "[e]very person has the right to liberty and security". It might be thought that the underlying interest protected by the principles applied in *Entick* and *Somerset*, as in human rights, is universal human dignity.

54 The principle of inherency by which everybody naturally possesses rights and freedoms under the common law has a constitutional dimension. Dicey wrote that "freedom of person is not a special privilege but the outcome of the ordinary law of the land enforced by the courts" and that individual rights constitute "the basis,

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44. The rights and freedoms protected by the common law form part of the setting in which the Charter was enacted. The Charter does not detract from them in any way. Indeed, s 5 makes clear that rights or freedoms recognised by law but not by the Charter are not thereby abrogated or limited.
45. Blackstone, *Commentaries on the Laws of England*, The University of Chicago Press, first published 1765, (1979 ed), vol 1, 140.
46. Allan, "The Common Law of the Constitution: Fundamental Rights and First Principles" in Saunders (ed), *Courts of Final Jurisdiction — The Mason Court in Australia*, Federation Press, (1996), 146, 148.
47. (2007) 163 FCR 414 at 444, [113] ("*Haneef*").
48. (2010) 30 VR 355 at 359, [9] ("*Antunovic*"). It is the same with the tort of false imprisonment once the interference with liberty is established: *Watson v Marshall and Cade* (1971) 124 CLR 621 at 626 per Walsh J.
49. (1765) 19 State Tr 1030; 95 ER 807 at 817–18 ("*Entick*").
50. (1772) Lofft 1; 98 ER 499 at 510 ("*Somerset*").

not the result, of the law of the constitution".[51] According to Lord Goff in *Attorney-General v Guardian Newspapers [No 2]*,[52] it follows that, under the common law, "everybody is free to do anything, subject only to the provisions of the law". Because liberty is valued so highly by the common law, it will be actionably violated by unlawful interferences of *any* kind. As was held by Black CJ, Sundberg and Weinberg JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri*, "[e]ven apparently minor deprivations of liberty are viewed seriously by the common law".[53] In that connection, their Honours referred to *Watson v Marshall and Cade*.[54] In that case, Walsh J awarded damages of $200 for the minor unauthorised detention of a mentally ill person, holding: "An interference with personal liberty even for a short period is not a trivial wrong. The injury to the plaintiff's dignity and to his feelings can be taken into account".[55]

55 As individual rights and freedoms constitute the basis of the constitution, the state can interfere therewith only to the extent permitted by law. This is explained in the current edition of *Halsbury's Laws of England*:[56]

> Under the ancient traditions of the English common law, the freedom of the individual has been protected against infringements by public officials under the twin doctrines that every citizen is free to carry on any activity not expressly limited or prohibited by law, and that public officials may only interfere with a citizen's personal liberty and property where authorised by the common law or by statute.

Therefore, states *De Smith's Judicial Review*, the powers of the individual and the state cannot be exactly acquainted:[57]

> While central government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals — that they may do everything which is not specifically forbidden — with the powers of ministers, where the opposite is true. Any action they take must be justified by a law …

56 As demonstrated by the judgment of Elias CJ in *Hamed v R*,[58] the scope of police power is identified from this standpoint. The question was whether police had power to conduct video surveillance of private property. The Chief Justice commenced negatively answering that question by stating that "[p]ublic officials do not have freedom to act in any way they choose unless prohibited by law, as

51. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan & Co, first published 1885, (1959 ed), 207.
52. [1990] 1 AC 109 at 283 ("*Guardian Newspapers [No 2]*").
53. (2003) 126 FCR 54 at 77, [88] ("*Al Masri*").
54. (1971) 124 CLR 621.
55. At 632; appeal dismissed: *Marshall v Watson* (1972) 124 CLR 640 per Barwick CJ, McTiernan, Menzies and Stephen JJ.
56. LexisNexis, *Halsbury's Laws of England*, vol 20 (at 1 March 2014) Constitutional and Administrative Law, "1 Constitutional Fundamentals" [31] (citations omitted).
57. Lord Woolf et al, *De Smith's Judicial Review*, Sweet & Maxwell, 7th ed, (2013), 253 [5–025]. These principles were eloquently explained by Laws J in *Re Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513 at 524, with the later endorsement (and biblical embellishment) of Sir Thomas Bingham MR in *R v Somerset County Council; Ex parte Fewings* [1995] 1 WLR 1037 at 1042.
58. [2012] 2 NZLR 305 ("*Hamed*").

individual citizens do".[59] Rather they "must point to lawful authority for all actions undertaken".[60] Her Honour went on to explain why this was important to the protection of individual liberty:

> The lack of equivalence between the subject and public authorities is a necessary condition of the liberties of the subject: "[w]here public authorities are not authorised to interfere with the subject, he has liberties".[61] Equivalent liberty for public authorities would destroy individual liberty.[62]

57 The same approach has been adopted in Australia since the earliest days of federation. The question in *Clough v Leahy*[63] was whether a royal commission could lawfully make enquiries. We shall come to the answer presently. Griffiths CJ (Barton and O'Connor JJ concurring) said this about the starting point:[64]

> We start, then, with the principle that every man is free to do any act that does not unlawfully interfere with the liberty or reputation of his neighbour or interfere with the course of justice. That is the general principle. The liberty of another can only be interfered with according to law …

58 Similarly, in *Williams v R*[65] the court was concerned with the extent of police power to detain in custody for questioning someone who had been lawfully arrested. Mason and Brennan JJ referred to the statement of Fullagar J in *Trobridge v Hardy*[66] that personal liberty was "the most elementary and important of all common law rights". Citing Blackstone, their Honours said that "[p]ersonal liberty … [is] an absolute right vested in the individual by the immutable laws of nature".[67] They referred with approval[68] to the statement of Deane J in *Cleland v R*[69] that:[70]

> It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.

Mason and Brennan JJ concluded by emphasising that "[t]he right to personal liberty cannot be impaired or taken away without lawful authority but then only to the extent for the time which the law prescribes".[71]

59 The present case concerns the existence, scope and exercise of the power of police to stop and ask questions of motorists, passengers and pedestrians. Consistently with the principles I have discussed, the starting point is the respect and protection that the common law affords to personal liberty. As Sedley LJ (Tuckey and Brooke LJJ agreeing) said in *Hepburn v Chief Constable of Thames*

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59. At 323, [24].
60. Ibid.
61. *Halsbury's Laws of England*, 4th ed, (1974), vol 8, Constitutional Law at [828]; 3rd ed, (1954), vol 7 Constitutional Law at [416].
62. [2012] 2 NZLR 305 at 324, [28].
63. (1904) 2 CLR 139 per Griffith CJ, Barton and O'Connor JJ ("*Clough*").
64. At 157.
65. (1986) 161 CLR 278 per Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ ("*Williams*").
66. (1955) 94 CLR 147 at 152.
67. (1986) 161 CLR 278 at 292.
68. Ibid.
69. (1982) 151 CLR 1.
70. At 26.
71. (1986) 161 CLR 278 at 292.

Valley Police,[72] "[i]t is a bedrock of our liberties that a citizen's freedom of person and of movement is inviolable except where the law unequivocally gives the state power to restrict it".

60 At common law, without statutory authority police do not have power to stop a person riding a bicycle for the purpose of obtaining his or her name and address[73] nor to remain on private premises after being told to leave.[74] Police do have power to arrest on reasonable suspicion of offending.[75] Police do not have power to arrest for questioning or facilitating an investigation and such conduct is "unlawful".[76] Police are not acting in the course of their duties when executing, and a person may use reasonable force when resisting, such an arrest.[77] Statutory power to arrest a person on reasonable suspicion until taken without delay before a court must, like the equivalent common law power, be exercised strictly according to the condition and no power to engage in questioning is conferred.[78] It follows that the magistrate was right to conclude that, at common law, police had no authority to stop the vehicle or subject the driver or Mr Kaba to compulsory questioning. That authority had to be found in statute.

61 *R v Eeet*[79] is interesting because the underlying interest at stake was privacy in the context of identity. Following a traffic stop, the accused was subjected to a search solely directed at establishing his identity. He forcibly resisted and bit the thumb of a police officer. Judge Hewitt directed the jury to acquit the accused on a charge of assaulting police because there was no authority at common law to search him for the purposes of establishing identity (which could have been lawfully established by other readily available means) and he used no more than reasonable force to resist.[80]

62 On the other hand, as explained by Lord Parker CJ (Marshall and James JJ agreeing) in *Rice v Connolly*,[81] people may choose to assist police but are not obliged to answer their questions:[82]

> It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.

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72. [2002] EWCA Civ 1841 (13 December 2002) at [14].
73. *Hatton v Treeby* [1897] 2 QB 452 at 454 per Collins J.
74. *Davis v Lisle* [1936] 2 KB 434 at 438 per Lord Hewart CJ, 439 per Du Parcq J, 441 per Goddard J.
75. *R v Banner* [1970] VR 240 at 249 per Winneke CJ, Smith and Gowans JJ ("*Banner*").
76. *Williams* (1986) 161 CLR 278 at 294 per Mason and Brennan JJ; *Banner* [1970] VR 240 at 249 per Winneke CJ, Smith and Gowans JJ.
77. *Kenlin v Gardiner* [1967] 2 QB 510 at 519 per Winn LJ, Lord Parker CJ and Widgery J agreeing; *Ludlow v Burgess* (1971) 75 Cr App Rep 227 at 228 per Lord Parker CJ, Melford Stevenson and Cooke JJ agreeing; *Waaka v Police* [1987] 1 NZLR 754 at 757–8 per Cooke P, Somers and Hillyer JJ; *Brooke v Chadwick* (unreported, Court of Appeal, Lord Bingham CJ, Brooke LJ and Chadwick LJ, 3 March 1999).
78. *R v Iorlano* (1983) 151 CLR 678 at 680 per Gibbs CJ, Murphy, Wilson, Brennan and Dawson JJ.
79. [1983] Crim LR 806 (Teeside Crown Court).
80. At 807.
81. [1966] 2 QB 414 ("*Rice*").
82. At 419, approved in *R v Grafe* (1987) 36 CCC (3d) 267 at 271 (Ontario Court of Appeal) per Martin, Tarnopolsky and Krever JJA ("*Grafe*").

63 The application of these principles is illustrated by the decision of Kaye J in *Director of Public Prosecutions v Hamilton*.[83] Police attended at a restaurant which the accused was suspected of leaving without paying the bill. When they sought to speak to him, he fled and was ultimately caught and arrested. A statutory charge of resisting arrest was brought on the sole basis of his action in fleeing from police. The magistrate acquitted the accused and Kaye J dismissed the prosecution appeal. After analysing the principal authorities, his Honour said:[84]

> The authorities to which I have just referred make it clear that, at common law, and in the absence of specific legislation to the contrary, the respondent in this case was not required to stop, when he was requested to do so by the police. I have no doubt that, in requesting the respondent to speak to them, the police were acting in the course of their duties as police constables. However, they were not, at that point, acting "in the execution" of their duties as police members for the purpose of [the provision]. It follows that, in the absence of any specific legislative provision of imposing on the accused an obligation to remain and speak to the police, he would not be guilty of [the] offence …

64 The principles are also illustrated by the decision of Kourakis CJ, Blue and Stanley JJ in *R v Nguyen*.[85] Police were involved in surveillance of a private home. When the appellant drove his vehicle into the common driveway, they acted under an entrenched but mistaken view of their statutory powers to block his exit for the purpose of searching him and the vehicle. They did not act under road safety regulations. Drugs were found, leading to charges and a conviction.

65 Upholding the appeal and entering a verdict of acquittal, the court held the judge should have exercised the judicial discretion at common law to exclude the evidence.[86] The mistaken view of the police of their statutory powers was "calculated to lead to widespread and arbitrary infringements on civil liberties".[87] The evidence had to be excluded because it was of "great importance that police officers entrusted with powers which abrogate fundamental liberties pay close attention to the conditions on which their lawful exercise depends".[88] Moreover, it was "necessary to censure the excesses of power by which the evidence was procured in order to better secure compliance with the statutory limitations".[89]

66 It is not inconsistent with these principles for police to invite someone to accompany them to a police station for questioning and there is no deprivation of liberty if a person agrees to do so.[90] In *Clough*, Griffith CJ (Barton and O'Connor JJ concurring) held that a royal commission could make enquiries (without compelling an answer) because no deprivation of liberty was involved.[91] It has likewise been held that "[t]here is nothing unlawful in asking a person, even if he be in custody, to provide fingerprints and, with his agreement, taking those

83. (2011) 33 VR 505.
84. At 513, [32].
85. (2013) 117 SASR 432.
86. At 440, [35].
87. At 442, [40].
88. At 442, [41].
89. At 443, [42].
90. *R v King* (1978) 19 SASR 118 at 128–9 per King J; *Conley v R* (1982) 30 SASR 226 at 239–40 per King CJ, White and Cox JJ agreeing; *Grafe* (1987) 36 CCC (3d) 267 at 272–3 (Ontario Court of Appeal) per Martin, Tarnopolsky and Krever JJA.
91. (1904) 2 CLR 139 at 157.

fingerprints"[92] or in taking a sample of breath for an alcohol test "with the co-operation of a person willing without being required or commanded to take it".[93] But a person who volunteers answers to questions is free to choose when to cease co-operating and, unless lawfully arrested, may leave when they please and must not be impeded.[94] For the police to detain someone for questioning past the point of voluntary co-operation is "unlawful" and an actionable civil wrong, at least.[95]

67 This leads to an issue of critical importance that often arises in these situations, and does arise in relation to the questioning of Mr Kaba in the present case: whether police have sought to exercise a power of coercion not possessed. According to the principles applied by the court, there is a line beyond which police cannot go.

68 In drawing that line, the courts take into account the duties of police to protect the community and prevent crime. In *Director of Public Prosecutions (Vic) v Zierk*,[96] Warren CJ describes the duties of police in the following general terms:[97]

> The "duties" of a police officer are ancient[98] and include: the duty to preserve the peace;[99] the duty to protect life and property;[100] the duty to prevent crime;[101] the duty

92. *Carr v R* (1973) 127 CLR 662 at 663 per Menzies, Walsh, Gibbs, Stephen and Mason JJ.
93. *Bunning* (1978) 141 CLR 54 at 64 per Barwick CJ.
94. *Bentley v Brudzinski* (1982) 75 Cr App Rep 217 at 225; [1983] Crim LR 825 per McCulloch J, Donaldson LJ agreeing; *R v Leecroft* (1987) 46 SASR 250 at 253 per White J; *Grafe* (1987) 36 CCC (3d) 267 at 272 (Ontario Court of Appeal) per Martin, Tarnopolsky and Krever JJA.
95. *Banner* [1970] VR 240 at 249 per Winneke CJ, Smith and Gowans JJ.
96. (2008) 184 A Crim R 582.
97. At 586, [18].
98. See generally *Halsbury's Laws of England*, 4th ed, (2007), [477] and following; *Halsbury's Laws of Australia*, vol 20 "Police", 585,175 and following; also see *Duncan v Jones* [1936] 1 KB 218 per Lord Hewart CJ and Singleton J ("*Duncan*"); *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 per Viscount Cave LC, Viscount Finlay, Lord Shaw, Lord Carson and Lord Blanesburgh ("*Glasbrook*"); *Haynes v Harwood* [1935] 1 KB 146 per Greer, Maugham and Roche LJJ ("Haynes"); *R v Waterfield* [1964] 1 QB 164 per Lord Parker CJ, Ashworth and Hinchcliffe JJ ("*Waterfield*"); *Attorney-General (HK) v Chow Sau-sing* [1966] HKLR 220 per Hogan CJ and Huggins J ("*Chow Sau-sing*"); *R v Westlie* (1971) 2 CCC (2d) 315 (British Columbia Court of Appeal) per McFarlane, Branca and Robertson JJA ("*Westlie*"); *Donaldson v Police* [1968] NZLR 32 per Perry J ("*Donaldson*"); *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118 per Lord Denning MR, Salmon and Edmund LJJ ("*Blackburn*").
99. *Duncan* [1936] 1 KB 218 per Lord Hewart CJ and Singleton J.
100. *Glasbrook* [1925] AC 270 per Viscount Cave LC, Viscount Finlay, Lord Shaw, Lord Carson and Lord Blanesburgh; *Haynes* [1935] 1 KB 146 per Greer, Maugham and Roche LJJ.
101. *Haynes* [1935] 1 KB 146 per Greer, Maugham and Roche LJJ; *Waterfield* [1964] 1 QB 164 per Lord Parker CJ, Ashworth and Hinchcliffe JJ; *Chow Sau-sing* [1966] HKLR 220 per Hogan CJ and Huggins J; *Westlie* (1971) 2 CCC (2d) 315 (British Columbia Court of Appeal) per McFarlane, Branca and Robertson JJA.

to detect crimes when they occur;[102] the duty to apprehend offenders;[103] the duty to prevent obstructions of highways;[104] and the duty to uphold the law.[105]

69 It is recognised that, in the performance of these duties and without reasonable grounds of suspicion, police might exercise their ordinary capacity to ask questions of and seek co-operation from persons in reliance upon every citizen's "moral duty, or … social duty to assist the police", to use the words of Lord Parker CJ in *Rice*.[106] As was held in *R v Grant*[107] by McLachlin CJ and Charron J, "[e]ffective law enforcement is highly dependent on the co-operation of members of the public. The police must be able to act in a manner that fosters this co-operation, not discourage it".

70 Likewise, in *R v Grafe*,[108] which was approved in *Grant*,[109] it was held by Martin, Tarnopolsky and Krever JJA that the human rights in the Canadian Charter of Rights and Freedoms did "not seek to insulate all members of society from all contact with constituted authority, no matter how trivial the contact may be".[110] So, at common law, it is not a deprivation of liberty for police to attract a person's attention by touching him or her on the shoulder or arm.[111] But it is a deprivation of liberty for police to grab someone by the arm; that could only be legitimate for the purposes of a lawful arrest.[112]

71 It is not presumed that a person is coerced simply upon being questioned by a police officer in uniform. That is so even though, as was held by Robert Goff LJ and Mann J in *Collins v Wilcock*,[113] the "advantage of authority" enjoyed by police is deliberately enhanced by "the uniform which the state provides and requires" them to wear. But, as Le Dain J explained in *R v Therens*:[114]

> Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand.

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102. *Rice* [1966] 2 QB 414 per Lord Parker CJ, Marshall and James JJ; *Westlie* (1971) 2 CCC (2d) 315 (British Columbia Court of Appeal) per McFarlane, Branca and Robertson JJA; *Chow Sau-sing* [1966] HKLR 220 per Hogan CJ and Huggins J.
103. *Haynes* [1935] 1 KB 146 per Greer, Maugham and Roche LJJ; *Waterfield* [1964] 1 QB 164 per Lord Parker CJ, Ashworth and Hinchcliffe JJ; *Rice* [1966] 2 QB 414 per Lord Parker CJ, Marshall and James JJ; *Westlie* (1971) 2 CCC (2d) 315 (British Columbia Court of Appeal) per McFarlane, Branca and Robertson JJA; *Chow Sau-sing* [1966] HKLR 220 per Hogan CJ and Huggins J.
104. *Haynes* [1935] 1 KB 146 per Greer, Maugham and Roche LJJ; *Stunt v Bolton* [1972] Crim LR 561 per Lord Widgery CJ, Melford Stevenson and Milmo JJ; *Gelberg v Miller* [1961] 1 WLR 153 per Lord Parker CJ, Streatfield, Slade, Ashworth and Elwes JJ; *Donaldson* [1968] NZLR 32 per Perry J.
105. *Blackburn* [1968] 2 QB 118 per Lord Denning MR, Salmon and Edmund LJJ.
106. *Rice* [1966] 2 QB 414 at 419.
107. [2009] 2 SCR 353 at 382, [39] per LeBel, Fish and Abella JJ agreeing ("*Grant*").
108. (1987) 36 CCC (3d) 267.
109. [2009] 2 SCR 353 at 381–2, [39] per LeBel, Fish and Abella JJ agreeing.
110. *Grafe* (1987) 36 CCC (3d) 267 at 274.
111. *Donnelly v Jackman* [1970] 1 WLR 562 at 565 per Talbot J, Lord Parker CJ and Ashworth J agreeing; *Collins v Wilcock* [1984] 1 WLR 1172 at 1180 per Robert Goff LJ and Mann J ("*Collins*").
112. *Collins* [1984] 1 WLR 1172 at 1180 per Robert Goff LJ and Mann J.
113. At 1178.
114. [1985] 1 SCR 613 at 644 ("*Therens*").

Therefore, when drawing the line between the voluntary and the coerced, it is necessary to take into account the imbalance of power between police, especially when in uniform, and ordinary members of the community, as well as the psychological impact of apparent police authority. Barwick CJ adverted to this consideration in *Bunning* where he held that, "in deciding whether … willingness was uncoerced, it is proper to remember the apparent authority" of police and the situation of the citizen.[115]

72 According to the test stated by Le Dain J in *Therens*, which I think is consistent with the common law here, a person is regarded as having submitted to psychological compulsion where, without the application or threat of application of physical restraint, he or she "reasonably believes that the choice to do otherwise does not exist".[116] In *Grant*, McLachlin CJ and Charron J held that, in applying this test, the following factors could be taken into account:[117]

> (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.
>
> (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
>
> (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

73 I will return to these considerations when I examine the magistrate's analysis of how Mr Kaba was treated by the police. As will become apparent, I think his Honour was right to conclude that, by crossing the line of permissible conduct, they acted unlawfully and in breach of his rights and freedoms under the common law.

74 As can be seen, the common law assumes the liberty of the individual and insists upon positive lawful authority for any governmental interference therewith. In the context of that general principle, certain particular rights and freedoms of relevance to the present case have been recognised. They are most especially relevant in relation to the application of the principle of legality. These rights and freedoms are liberty, freedom of movement and privacy (in a particular sense).

Liberty

75 It is clear enough from the discussion so far that individual liberty is both a foundational principle of the common law and a recognised right and freedom in itself. After reference to the principal authorities, it was held in *Al Masri* that the right to personal liberty was one to which the principle of legality applied.[118]

115. (1978) 141 CLR 54 at 64.
116. [1985] 1 SCR 613 at 644.
117. [2009] 2 SCR 353 at 385, [44] per LeBel, Fish and Abella JJ agreeing.
118. (2003) 126 FCR 54 at 76, [86] per Black CJ, Sundberg and Weinberg JJ.

76 That being so, the question is whether the provisions of s 59(1) of the Road Safety Act would, on the Director's interpretation, interfere with the common law right of personal liberty of a driver and passenger. On that interpretation, police would have a power to stop in respect of the vehicle and request in respect of the driver.

77 As we will see, in the United Kingdom, the right to liberty has been acknowledged in several cases concerning drivers and motor vehicles. For example, in *R v Waterfield*[119] police directed a driver not to remove a parked motor vehicle suspected of being used in the course of a criminal offence. Ashworth J said the direction represented "prima facie an unlawful interference with a person's liberty or property".[120] Lord Widgery CJ followed *Waterfield* in *Hoffman v Thomas*.[121] The question was whether police had a statutory power randomly to direct traffic into a census area. His Lordship approached that question of interpretation from the starting point that "the constable's action … did amount to an interference with the defendant's personal liberty or property".[122]

78 On those authorities stopping a vehicle for a random check represents a general interference with the liberty of a driver (and potentially a passenger) at common law. But it is not in the nature of a detention and I think freedom of movement more accurately represents the precise nature of the liberty interest that is engaged. The cases under the Canadian Charter and the United States Constitution (see above) are to be distinguished in this regard.

Freedom of movement

79 The general right to liberty that is an elementary principle of the common law includes the right to personal freedom of movement. When Blackstone referred to certain rights and liberties that are "our birthright to enjoy entire" unless restrained by law,[123] he included:[124]

> … the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.

Freedom of movement is protected by habeas corpus.[125]

80 In *R (Gillan) v Commissioner of Police of the Metropolis*,[126] Lord Bingham referred to this right in the context of using the public streets. Without doubting that the right to freedom of movement was amenable to state regulation, his Lordship said:[127]

> It is an old and cherished tradition of our country that everyone should be free to go about their business in the streets of the land, confident that they will not be stopped and

119. [1964] 1 QB 164.
120. At 170 per Lord Parker CJ and Hinchcliffe J agreeing.
121. (1974) 1 WLR 374 ("*Hoffman*").
122. At 379 per Ashworth and Melford Stevenson JJ agreeing.
123. Blackstone, *Commentaries on the Laws of England*, The University of Chicago Press, first published 1765, (1975 ed), vol 1, 140.
124. Ibid 130.
125. *Antunovic* (2010) 30 VR 355 at 380, [113] per Bell J.
126. [2006] 2 AC 307 ("*Gillan*").
127. At 332, [1] per Lord Hope, Lord Scott, Lord Walker and Lord Brown agreeing.

> searched by the police unless reasonably suspected of having committed a criminal offence. So jealously has this tradition been guarded that it has almost become a constitutional principle.

81 In Australia, s 92 of the Constitution provides (among other things) that "intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free". In *Cole v Whitfield*,[128] approving *Gratwick v Johnson*,[129] it was held that the constitutional guarantee "extends to a guarantee of personal freedom 'to pass to and fro among the States without burden, hindrance or restriction'". The guarantee is not infringed by reasonable regulation[130] but leaves the means of carriage to the choice of the person.

82 Consistently with the general common law right to personal freedom of movement, there is a common law right to use of the public highway. That right was described in *Melbourne Corporation v Barry*[131] by Higgins J in the following terms:[132]

> … the common law right of the King's subjects to pass through the highways, whether singly or in Indian file, or in groups, or four abreast or in processions cannot be forbidden, although the passage without such precautions as the by-law prescribes can be forbidden.

In that case, a by-law prohibiting certain processions was held to be invalid. Higgins J applied the principle of legality to the interpretation of the enabling legislation.[133] The decision has never been doubted.

83 This right was acknowledged in *Richards v Stange*.[134] The court was required to interpret provisions very like those in issue here. I will go into the decision in more detail later. The driver was convicted of failing to stop when requested by police. On appeal against conviction, he challenged the authority of the police to make the request and supported his preferred interpretation by reference to the "common law … right to the unobstructed use of the highways for the purpose of legitimate travel".[135]

84 Wallace, Brinsden and Smith JJ dismissed the appeal. However, referring to *Melbourne Corporation*, Wallace J accepted the "common law right to free use of the highway".[136] His Honour said the right was "confined to its legitimate use and the driving of a vehicle mechanically unsound or without a licence, neither of which conditions prevailed herein, would not come within that definition".[137]

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128. (1987) 165 CLR 360 at 393 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ (footnote omitted) ("*Cole*").
129. (1945) 70 CLR 1 at 17 per Starke J.
130. *Cole* (1987) 165 CLR 363 at 393 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ.
131. (1922) 31 CLR 174 ("*Melbourne Corporation*").
132. At 206.
133. (1922) 31 CLR 174 at 206–7; see also *Potter v Minahan* (1908) 7 CLR 277 at 305 per O'Connor J ("*Potter*").
134. Unreported, Full Court of the Supreme Court of Western Australia, Wallace, Brinsden and Smith JJ, 2 April 1982 ("*Richards*").
135. Ibid 4 in the judgment of Wallace J.
136. Ibid.
137. Ibid.

Brinsden J generally accepted the reasons of Wallace J. His Honour held that the right of a person to use a highway for driving a vehicle was now subject to licence.[138]

85 Therefore I do not accept the submissions made on behalf of the Director that there is no common law right to drive on the public roads. The authorities reveal that there is such a right. But it is not an absolute right and must be exercised according to law, including the licencing and road safety legislation. As an aspect of the common law right to freedom of movement, the right to drive a motor vehicle on the public roads is akin to the right to walk in public streets and navigate on public waters. It is not conferred by, but may be (and in Victoria is) qualified by and under legislation, to the interpretation of which the principle of legality applies on this basis.[139] That is consistent with the specific nature of the general right to liberty discussed in *Waterfield* and *Hoffman.*

Privacy

86 It is uncertain whether there is a positive right to privacy that is independently enforceable at common law. As was pointed out in *WBM v Chief Commissioner of Police*[140] by Warren CJ (Hansen JA agreeing), "the question of whether such a right exists at common law, and if so, its scope, is yet to be settled by the High Court or a superior court of record".[141]

87 However, the common law clearly recognises the right to privacy for particular purposes. As we have seen, *Entick*[142] held that positive lawful authority was required for any state intrusion into the privacy of a person's property or papers. The property aspect of the interests so protected has received much attention. Over time the focus of that attention has shifted towards privacy.[143] This is evident in such cases as *George v Rockett*[144] where, in a similar context, the importance of both privacy and property was recognised. Speaking of provisions governing the issue of search warrants, the court noted that:[145]

> … the legislature has sought to balance the need for an effective criminal justice system against the need to protect the individual from arbitrary invasions of his privacy and property.

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138. Ibid 4 in the judgment of Brinsden J. His Honour expressly declined to follow *Waterfield* [1964] 1 QB 164 on this point.
139. The rights engaged are very different but the principle of legality likewise applies to the interpretation of legislation creating traffic offences: *Dover v Doyle* (2012) 34 VR 295 at 305, [44] ff per Bell J; *Director of Public Prosecutions v Dover* (2013) 39 VR 601 at 610, [40] per Tate JA, Maxwell P and Garde AJA agreeing.
140. (2012) 43 VR 446 at 465, [81] ("*WBM*").
141. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 248, [107] per Gummow and Hayne JJ, Gaudron J agreeing, at 277, [187] per Kirby J and 320–3, [313]–[320] per Callinan J; *Giller v Procopets* (2008) 24 VR 1 at 28, [129], 35–6, [167]–[168] per Ashley JA, 106–7, [447]–[452] per Neave JA commenting in relation to a potential tort of an invasion of privacy. Cf the District Court of Queensland's decision in *Grosse v Purvis* [2003] Aust Torts Reports 81-706 and *Doe v Australian Broadcasting Corporation* [2007] VCC 281.
142. (1765) 19 State Tr 1030; 95 ER 807 at 817–18.
143. Feldman, *The Law Relating to Entry, Search and Seizure*, Butterworths, (1986), 1–2.
144. (1990) 170 CLR 104 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.
145. At 110 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

It went on to refer to a particular provision in which:[146]

> … the legislature has given primacy to the public interest in the effective administration of criminal justice over the private right of the individual to enjoy his privacy and property.

In *Crowley v Murphy*,[147] Lockhart J (Northrop J agreeing) referred to the right to privacy and applied the principle of legality to the interpretation of legislation conferring warrant-issuing powers.

88 There have many other cases in which, under the principle of legality, the courts have taken into account the common law right to privacy when interpreting legislation. For example, in *R v Secretary of State for the Home Department; Ex parte Phansopkar*[148] Scarman LJ held that the principle of legality protected the right to family and private life recognised in Art 8(1) of the Convention for the Protection of Human Rights and Freedoms.[149]Accordingly, "it is the duty of the courts, so long as they do not defy or disregard clear, unequivocal provisions, to construe statutes in a manner which promotes, not endangers, those rights".[150] Among the cases I referred to in this connection in *WBM*[151] were *Marcel v Commissioner of Metropolitan Police*,[152] *R v Secretary of State for Home Department; Ex parte Leech*[153] and *Taciak v Commissioner of Australian Federal Police*[154] (in which Sackville J collected and discussed other authorities). As I noted in *PJB v Melbourne Health and State Trustees Ltd*,[155] such authorities have been cited with approval by the High Court in the context of the principle of legality. It was on the basis of this acceptance of the right to privacy at common law that I said in *WBM*:[156]

> A fundamental civil right or liberty which we all possess under the common law is the right or liberty not to report to police and other officials and not to disclose personal and private information to them.

In my view, the second element of this formulation applies to the request of the police for the driver's name and address (although the magistrate did not so find and it does not affect the result) and the demand of the police for Mr Kaba's name and address in the present case.

89 The present case concerns the interpretation of road traffic legislation and the exclusion of evidence unlawfully obtained in the administration thereof. The common law right to privacy has been recognised in both contexts. In *Morris v Beardmore*,[157] the House of Lords refused to interpret the Road Traffic Act 1972 (UK) c 20 as authorising entry into someone's home to obtain a blood test. Lord Scarman said the case before it was:[158]

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146. Ibid.
147. (1981) 52 FLR 123 at 141–2; 34 ALR 496 at 513–14.
148. [1976] 1 QB 606 ("*Phansopkar*").
149. Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).
150. [1976] 1 QB 606 at 626.
151. (2012) 43 VR 446 at 481–2, [165]–[167].
152. [1992] Ch 225 at 235 per Sir Nicolas Browne-Wilkinson VC.
153. [1994] QB 198 at 209–10 per Neill, Steyn and Rose LJJ.
154. (1995) 59 FCR 285 at 297–9.
155. (2011) 39 VR 373 at 428, [249] ff ("*Patrick's Case*").
156. (2012) 43 VR 446 at 480, [160].
157. [1981] AC 446.
158. At 465.

> … concerned exclusively with the suspect's right to the privacy of his home … The appeal turns on the respect which Parliament must be understood, even in its desire to stamp out drunken driving, to pay to the fundamental right of privacy in one's own home, which has for centuries been recognised by the common law.

We later examine *Bunning*[159] in which Stephen and Aickin JJ made a seminal statement about the discretionary rule for excluding unlawfully obtained evidence. In doing so, their Honours stated that the admission of such evidence:[160]

> … called in question … society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.

90 I would conclude that, when police exercise a power to require a driver to give his or her name and address during a random vehicle stop, they intrude upon the common law right to privacy of the driver. Under the principle of legality, the right to privacy is taken into account when interpreting legislation conferring such a power. When police assert a compulsive power to demand the name and address of a person, say someone like Mr Kaba who is walking along a public street, they intrude upon his or her common law right to privacy.

ICCPR

State obligations

91 Australia is a party to the ICCPR.[161] According to the Preamble, the ICCPR was made in accordance with the principles proclaimed in the Charter of the United Nations and recognises that "the inherent dignity and … the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". It was also made in accordance with the Universal Declaration of Human Rights[162] and recognises that:

> … the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

92 As party to the ICCPR, Australia has undertaken by Art 2(1) "to respect and to ensure" to all individuals the specified rights without discrimination. Further, Art 2(2) provides:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

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159. (1978) 141 CLR 54 per Barwick CJ, Stephen, Jacobs, Murphy and Aickin JJ.

160. At 75. In another exclusion of evidence case, the court held, consistently with the right to privacy, that there was no power to require an arrested person to submit himself or herself to photography for any purpose other than identification: *R v Ireland* (1970) 126 CLR 321 at 335 per Barwick CJ, McTiernan, Windeyer, Owen and Walsh JJ agreeing ("*Ireland*").

161. Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980: United Nations, *United Nations Treaty Series Online Collection* <https://treaties.un.org>.

162. GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ("UDHR").

By Art 2(3), Australia has undertaken to ensure that individuals have access to a "effective remedy", "competent judicial, administrative and legislative authorities" and means of enforcement.

93 Australia's obligation to give effect to the ICCPR is expressed in the principle of "pacta sunt servanda" that is enshrined in Art 26 of the Vienna Convention on the Law of Treaties[163] to which Australia is also a party. Article 26 provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". This obligation of performance in good faith is a "general principle of international law".[164] Under Art 34(1)(a) and (c) of the Statute of the International Court of Justice in the Charter of the United Nations, the jurisdiction of the court includes disputes in relations to international conventions and those general principles. As Australia is a federation, it is relevant to note that, by Art 50 of the ICCPR, the obligation extends "to all parts of federal States without any limitations or exceptions". It therefore includes Victoria. Moreover, Arts 27 and 46 of the Vienna Convention on the Law of Treaties provide that a state party may not invoke the provisions of its internal law as justification for its failure to perform a treaty, subject to qualifications that do not here apply. Article 29 provides that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

94 Those being the obligations which Australia has assumed under international law by virtue of becoming a party to the ICCPR, it is now necessary to refer to the relevant rights. These are liberty (Art 9(1)), freedom of movement (Art 12(1)) and privacy (Art 17(1)).

Liberty

95 Article 9(1) provides that "[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention".

96 I set out the scope of this right below in my discussion of the equivalent right in the Charter.

97 In my view, the stopping of the vehicle interfered with the liberty of the driver and Mr Kaba (as a passenger) in a general way. But, with respect, the magistrate was wrong to treat this as a detention. I accept the submissions of the Director in this regard. In regard to both the vehicle stop and questioning of the driver and the stopping and questioning of Mr Kaba, the human rights engaged under the ICCPR (and the Charter) are more accurately characterised, and not less importantly, as freedom of movement (Art 12(1)) and privacy (Art 17(1)).

Freedom of movement

98 Under Art 12(1), persons lawfully within the territory of a state "have the right to liberty of movement" within that territory.

99 The scope of this right is also set out below in the discussion of the equivalent right in the Charter.

163. Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

164. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, 8th ed, (2012), 377.

100 In *Gerhardy v Brown*[165] Mason J discussed the right of freedom of movement as specified in Art 5(f)[166] of the International Convention on the Elimination of All Forms of Racial Discrimination.[167] His Honour made the following observations about the content of that right:[168]

> In broad terms the concept may be said to embrace a claim to immunity from unnecessary restrictions on one's freedom of movement and a claim to protection by law from unnecessary restrictions upon one's freedom of movement by the State or by other individuals. It extends, generally speaking, to movement without impediment throughout the State, but subject to compliance with regulations legitimately made in the public interest, such as traffic laws, and subject to the private and property rights of others. And it would include a right of access to facilities necessary for the enjoyment of freedom of movement, subject to legitimate regulation of those facilities. The concept would also ordinarily include a right of access to places and services used by members of the public — a matter explicitly dealt with in Art 5(f).

These observations are equally applicable to the right to freedom of movement in the ICCPR and the Charter.

101 As I conclude below in relation to the Charter, the police traffic stop under s 59(1) of the Road Safety Act represented an interference with the right to freedom of movement of the driver and the passenger, Mr Kaba.

Privacy

102 Article 17(1) provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy".

103 Again, the scope of this rights is set out below in the discussion of the equivalent right in the Charter.

104 As I there conclude, the traffic stop and request of the driver's name and address interfered with his free enjoyment of the right to privacy. The persistent police demands for Mr Kaba's name went over the permissible line and interfered with his right to privacy.

Charter

Scope of rights

105 The premise of the Charter is that human rights and freedoms are indispensable for all persons to function in democratic society. Reflecting the bedrock principle of universal human dignity, it specifies those rights and freedoms, thereby defining the boundaries of the protected arena within which, subject to law and respect for the rights of others, a person may exercise their natural capacity to choose how to live and develop individually and with others in that society. In determining whether a law authorises interference with these

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165. (1985) 159 CLR 70 ("*Gerhardy*").

166. Article 5(f) relevantly provides:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: …
>
> (f) The right of access to any place or service intended for use by the general public such as transport hotels, restaurants, cafes, theatres and parks.

167. Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

168. (1985) 159 CLR 70 at 102.

rights and freedoms, the starting point under the Charter is that, absent such law, the individual stands in that arena dignified and free. Identifying the scope of these rights and freedoms is therefore an important exercise.

106 Under the Charter, 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".[169] In my view, it is an elementary first step in a human rights analysis to identify the scope of the right said to have been so limited or infringed.[170] The object of attention is the individual standing dignified and free in the civil arena protected by the specified rights.

107 Taking a case under s 38(1) as an example, the question is whether the act of a public authority is incompatible with those rights or that, when making a decision, such an authority has failed to give proper consideration to human rights. To determine that, it is first necessary to identify the scope of the right: what does the right protect that is allegedly restricted by the act or decision concerned? This is logically and schematically anterior to any consideration of breach, which may involve questions of justification under s 7(2). As Elias CJ held in *R v Hansen*[171] in relation to the New Zealand Bill of Rights Act 1990, when so "ascertaining the meaning [ie scope] of the right, the criteria for justification are not relevant". The importance of this step should not be overlooked. The answer to some of the competing submissions in the present case about the application of human rights is provided by properly identifying the scope of the rights which are engaged.

108 It is established that, when identifying the scope of a human right, the focus must be upon its purpose and the underlying values and interests which it is designed to protect. Speaking of the Charter, Warren CJ said in *Re Application under the Major Crimes (Investigative Powers) Act 2004*[172] that human rights should be interpreted "in the broadest possible way". Hargrave J said in *Director of Public Prosecutions v Ali (No 2)*[173] that rights were interpreted "broadly and in a non-technical sense". In *Hansen*,[174] Elias CJ emphasised that the "meaning of the right is to be ascertained from the 'cardinal values' it embodies". Of the Canadian Charter, Dickson J said in *R v Big M Drug Mart Ltd*[175] that the "meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* 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.[176]

109 Mr Kaba relied upon the human rights to liberty (Art 21(1)), freedom of movement (Art 12) and privacy (Art 13(a)). To the scope of those rights I now turn.

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169. *Patrick's Case* (2011) 39 VR 373 at 384, [36] per Bell J.
170. *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 at 27, [70] ff per Bell J ("*Kracke*").
171. [2007] 3 NZLR 1 at 15, [22] ("*Hansen*").
172. (2009) 24 VR 415 at 434, [80]; followed in *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 at 157–8, [55] per Emerton J.
173. [2010] VSC 503 at [29].
174. (2007) 3 NZLR 1 at 15, [22].
175. [1985] 1 SCR 295 at 344, [116].
176. See generally *Kracke* (2009) 29 VAR 1 at 28–9, [75]–[91] per Bell J; *Director of Housing v Sudi (Residential Tenancies)* [2010] VCAT 328 (31 March 2010) at [90] per Bell J ("*Sudi*").

Liberty

110 Under the Charter, all persons possess the right to liberty as an attribute of their humanity, as they do under the common law (see above). Section 21(1) provides that "[e]very person has the right to liberty and security", reflecting Art 9(1) of the ICCPR. In *Re Kracke and Mental Health Review Board*,[177] by reference to the authorities, especially *Guzzardi v Italy*,[178] I explained the scope of the right to liberty and security under s 21(1) of the Charter as follows:[179]

> The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed at all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom movement is one of degree or intensity, not one of nature and substance.
>
> The fundamental value which the right to liberty and security expresses is freedom, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy.

In the more recent decision of *Austin v United Kingdom*,[180] the European Court of Human Rights stressed that, when deciding whether someone had been deprived of liberty:[181]

> [T]he starting point must be [his or her] concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.

It can be seen that the difference between a restriction on freedom of movement and the deprivation of liberty in the classic sense is one of fact and degree. In the words of Lord Bingham in *Secretary of State for the Home Department v JJ*,[182] "[t]here is no bright line separating the two". The examination is necessarily fact intensive.

111 As we will see in more detail, s 9 of the Canadian Charter provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned". As there is no express right to freedom of movement as such, the concept of detention is broadly interpreted. Under that broad interpretation, random police stop-checks of motorists, even if brief in duration, have been held to amount to detention.[183] In the United States of America, the Fourth Amendment to the Constitution confers a right against "unreasonable … seizures". There too no right to freedom of movement is specified. In *Brendlin v California*,[184] the Supreme Court decided that "[w]hen a police officer makes a traffic stop, the driver [and passenger] of the car is seized within the meaning of the Fourth Amendment".[185] The approaches

177. (2009) 29 VAR 1.
178. (1980) 3 EHRR 333 at 362–3, [92]–[95].
179. (2009) 29 VAR 1 at 140, [664]–[665].
180. (2012) 55 EHRR 14.
181. At 380, [57]; see also *Gillan v United Kingdom* (2010) 50 EHRR 45 at 1141–2, [56]–[57].
182. [2008] 1 AC 385 at 411, [17].
183. *R v Hufsky* [1988] 1 SCR 621 at 631–2 per Dickson CJ, Beetz, Estey, McIntyre, Wilson, Le Dain and La Forest JJ ("*Hufsky*"); *R v Ladouceur* [1990] 1 SCR 1257 at 1263 per Dickson CJ, Wilson, La Forest and Sopinka JJ, at 1277 per Lamer, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ ("*Ladouceur*").
184. 551 US 249 (2007) ("*Brendlin*").
185. At 251 per Souter J giving the unanimous judgment of the court.

in these jurisdictions reflects the specific terms of the constitutional provisions in question. Closer to our law is the New Zealand Bill of Rights Act which separates freedom of movement (s 18(1)) from liberty of the person (s 22). Under that Act, briefly stopping a driver for a blood-alcohol test has been held to interfere with his freedom of movement, not liberty (see below).

112 In my view, under the Charter, a routine check which involves stopping a motor vehicle for a brief period, examining the licence of the driver and inspecting the vehicle from the kerbside does not amount to physical detention of the driver (or passenger) such as to engage the right to liberty. As no more than this occurred in the routine check in the present case, this right was not engaged for the purposes of the Charter. It is possible to see how, in other facts and circumstances, it would be.

Freedom of movement

113 Under the Charter, all persons likewise possess the right to freedom of movement, as they do under the common law (see above). Section 12 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", reflecting Art 12(1) of the ICCPR.

114 In *Kracke*,[186] by reference to the authorities, especially *Baumann v France*,[187] I explained the scope of this right as follows:[188]

> The purpose of the right to freedom of movement in s 12 is to protect the individual's right to liberty of movement within Victoria and their right to live where they wish. It is directed to restrictions on movements which fall short of physical detention coming within the right to liberty in s 21. The fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and society.

115 Because "mere" restrictions upon freedom of movement do not amount to detention, it is tempting to think of freedom of movement as inferior to the right to liberty. This way of thinking fails to appreciate the importance of freedom of movement as a human right. When we stop to think what we do every day, it is easy to see how critical freedom of movement is to us as individuals and our relationships with others. Like good health, the value of freedom of movement is not usually appreciated until it is compromised. As regards the analogous right to liberty of movement in Art 12(1) of the ICCPR, the ability to move freely is regarded as "an indispensable condition for the free development of a person".[189] *Antunovic*[190] demonstrates how restrictions upon freedom of movement can have drastic consequences for the individual. Without lawful authority, the applicant was being denied the freedom to go home to live with her mother.

116 *Kerr v Attorney-General*[191] illustrates the operation of the right to freedom of movement in police traffic stop and questioning cases. Without lawful authority, police stopped the plaintiff at a road block and said he could not pass for 10

186. (2009) 29 VAR 1.
187. (2002) 34 EHRR 44 at 1061, [61].
188. (2009) 29 VAR 1 at 124, [588].
189. Human Rights Committee, *General Comment No 27: Freedom of Movement (article 12)*, 67th sess, 1783rd mtg, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [1].
190. (2010) 30 VR 355 per Bell J.
191. [1996] DCR 951; (1996) 4 HRNZ 270.

minutes. The plaintiff sought damages for breach of the right to freedom of movement in s 18(1) and the right to liberty of the person in s 22 of the New Zealand Bill of Rights Act. Awarding nominal damages, Judge Ryan held that the plaintiff had not been detained under s 22 but his freedom of movement under s 18(1) had been infringed.

117 In so holding, Judge Ryan discussed various legislative provisions enabling police to stop and question motorists. His Honour said the right to freedom of movement in s 18(1) did protect the free use of the road by motorists, although it was "one of the most qualified rights" because it was subject to the licensing and transport legislation.[192] As no legislation permitted police to do what they did, the plaintiff's right to free use of the state highway had been breached.[193]

118 In my view, when police stop a vehicle to check on the licence of the driver and the registration of the vehicle, they interfere with the right to freedom of movement of the driver, and necessarily any passenger, under s 12 of the Charter.

Privacy

119 In human rights terms, we can generally understand the right to privacy as "the right to be let alone by other people"[194] and "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself".[195] This general way of understanding this right is helpful as far as it goes but does not fully capture the personal interests that are protected, the nature of the injury that is done to dignity by a breach and the interaction between the right to privacy and other human rights.

120 In a recent report, the Australian Law Reform Commission emphasised that interaction. It said:

> Privacy is important to enable individuals to live a dignified, fulfilling, safe and autonomous life. It is fundamental to our understanding and appreciation of personal identity and freedom.[196] Privacy underpins:
>
> - meaningful and satisfying interpersonal relationships, including intimate and family relationships;
> - freedom of speech, thought and self-expression;
> - freedom of movement and association;
> - engagement in the democratic process;
> - freedom to engage in secure financial transactions;
> - freedom to pursue intellectual, cultural, artistic, property and physical interests; and
> - freedom from undue interference or harm by others.[197]

192. At 274.
193. At 275.
194. *Hunter v Southam Inc* [1984] 2 SCR 145 at [24] per Dickson J, citing *Katz v United States* 389 US 347 at 350 per Stewart J for the court (1967) ("*Katz*").
195. *R v Duarte* [1990] 1 SCR 30 at 46 per La Forest J.
196. Mills, *Privacy: The Lost Right*, Oxford University Press, (2008), 13.
197. Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era,* Final Report No 123 (2014) 30 [2.6].

121 Speaking of s 21 (protection from unreasonable search and seizure) of the New Zealand Bill of Rights Act, Thomas J in *R v Jefferies*[198] also emphasised the interconnected values and interests that are protected by concept privacy, including[199]

> … the protection of one's property against uninvited trespass; the security of one's person and property, particularly against the might and power of the state; the preservation of personal liberty; freedom of conscience; the right of self-determination and control over knowledge about oneself and when, how and to what extent it will be imparted; and recognition of the dignity and intrinsic importance of the individual.

122 Reflecting Art 12 of the UDHR,[200] the right to privacy is specified in the ICCPR in terms of a freedom and a right to protection of the law. Article 17 provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.
> 2. Everyone has the right to protection of the law against such interference or attacks.

123 The ICCPR[201] and the United Nations Convention on the Rights of the Child[202] recognise the right of children to a name. As we are all children once, this in effect recognises the right of all persons to begin life with a name. That is not just for the obvious practical reasons but because there is something universal and personal about possession of a name and its connection with identity. It might be said that our name is one of our most important possessions and that, like other possessions, we have a private right to choose who to share it with or divulge it to.

124 Reflecting both the UDHR and the ICCPR, the right to privacy is specified as a human right in the Charter. Section 13 provides that [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 [emphasis added].

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198. [1994] 1 NZLR 290 (Court of Appeal).

199. At 319.

200. GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948). Article 12 provides:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such interference.

201. Article 24(2) provides that "[e]very child shall be registered immediately after birth and shall have a name". This ensures acknowledgement of the child's legal personality, maximises access to legal entitlements and minimises the opportunity for exploitation: Joseph and Castan, *The International Covenant on Civil and Political Rights*, Oxford University Press, 3rd ed, (2013), 725 [21.60].

202. Opened for signature 20 November 1989, 1577 *UNTS* 3 (entered into force 2 September 1990). Article 7(1) gives children the right to "be registered immediately after birth" and "the right from birth to a name". Making the connection between the child's name and identity, Art 8(1) requires States "to respect the right of the child to preserve his or her identity, including nationality, name and family relations".

125 I discussed the scope of right to privacy in s 13(a) of the Charter in *Kracke*[203] and *Director of Housing v Sudi (Residential Tenancies)*.[204] In those decisions, I drew attention to the protection which the right affords to "personal and social individuality"[205] and emphasised the importance of that protection for a person's capacity for "effective participation in democratic society".[206] In *Kracke*, I gave this description of the fundamental values expressed by the right:[207]

> 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.

126 Applying these concepts we might ask, as regards the right to privacy, what's in a name? As we will see, dignity, identity and autonomy. With that in mind we can understand why, in the family circumstances, Romeo expressed his love for Juliet by freely giving up his name for her (she offered to do the same), thus obtaining a "new baptised" identity.

127 The relationship in human rights law between dignity, identity and personal autonomy on the one hand and a person's name on the other is well illustrated by decisions of the European Court of Human Rights under Art 8(1) of the European Convention on Human Rights. While that right is expressed in terms of a positive "right to respect for … private and family life" and the right in s 13(a) of the Charter is expressed in terms of a freedom from "unlawful and arbitrary interference", these decisions are still helpful in relation to the core concepts involved.

128 In *Pretty v United Kingdom*,[208] the court was required to consider the scope of the right to private life in Art 8(1) of the European Convention on Human Rights. In doing so, it made the following oft-cited[209] statement about the general principles:

> As the Court has had previous occasion to remark, the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person.[210] It can sometimes embrace aspects of an individual's physical and social identity.[211] Elements such as, for example, gender identification, *name* and sexual orientation and sexual life fall within the personal sphere protected by Article 8.[212] Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world.[213] Though no previous case has established as such any right to

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203. (2009) 29 VAR 1 at 124–31, [589]–[620].
204. [2010] VCAT 328 (31 March 2010) at [27]–[82]. The appeal against this decision was upheld in *Director of Housing v Sudi* (2011) 33 VR 559 per Warren CJ, Maxwell P and Weinberg JA, but not on the scope of the human right to privacy.
205. *Kracke* (2009) 29 VAR 1 at 131, [619].
206. *Sudi* [2010] VCAT 328 (31 March 2010) at [29].
207. *Kracke* (2009) 29 VAR 1 at 131, [620].
208. (2002) 35 EHRR 1.
209. See for example *S v United Kingdom* (2009) 48 EHRR 50 at 1189, [66].
210. *X and Y v Netherlands* (1985) 8 EHRR 235 at 239, [22].
211. *Mikuli v Croatia* (European Court of Human Rights, First Section, Application No. 53176/99, 7 February 2002) [53].
212. See, for example, *B v France* (1992) 16 EHRR 1 at 18, [63]; *Burghartz v Switzerland* (1994) 18 EHRR 101 at 115, [24]; *Dudgeon v United Kingdom* (1981) 4 EHRR 149 at 161, [41]; *Laskey, Jaggard and Brown v United Kingdom* (1997) 24 EHRR 39 at 56, [36].
213. See, for example, *Burghartz v Switzerland* (1994) 18 EHRR 101 at 107, [47]; *Friedl v Austria* (1996) 21 EHRR 83 at 87, [45].

self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.[214]

It can be seen that the court specifically included protection of a person's name as coming within the sope of the right to respect for private life.

129 These general principles have been applied in cases specifically concerning a person's name. For example, in *Stjerna v Finland*,[215] the Finnish authorities refused the applicant's request to change his name to reflect that which had been used by his ancestors. He claimed interference with his private life contrary to Art 8(1). The court upheld the complaint. It held that, although Art 8(1) did not expressly refer to names, a name "constitutes a means of personal identification and a link to a family".[216] Therefore "an individual's name does concern his or her private and family life".[217] On the same basis, in *Ünal Tekeli v Turkey*[218] Art 8(1) was held to be applicable where a married woman was required by law to use her husband's name and was therefore refused permission to use her maiden name.

130 The relationship between dignity, personal identity and autonomy and a person's name is also illustrated by decisions of the court concerning the collection and use of personal information, such as photographs. For example, in *Reklos v Greece*,[219] the applicants complained of unauthorised photographing. Article 8(1) was held to be applicable. The court said:[220]

A person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image.

Similar remarks can be made about a person's name.

131 The same emphasis is to be found in *Von Hannover v Germany*[221] where the applicant (Princess Caroline of Monaco) claimed protection from the unauthorised publication of her name and photographs. The court held that Art 8(1) applied:[222]

The Court reiterates that the concept of private life extends to aspects relating to personal identity, such as a person's *name*,[223] or a person's picture.[224] Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each

214. (2002) 35 EHRR 1 at 35–6, [61] (emphasis added).
215. (1994) 24 EHRR 195.
216. At 214, [37].
217. Ibid.
218. (2006) 42 EHRR 53.
219. [2009] EMLR 16; other authorities are discussed in *R (on the application of Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2013] 1 WLR 3305 per Lord Dyson MR, Moore-Bick and McCombe LJJ.
220. [2009] EMLR 16 at 301, [40].
221. (2005) 40 EHRR 1.
222. At [50]; followed by *Köpke v Germany* (2011) 53 EHRR SE26 at 254, [36].
223. See *Burghartz v Switzerland* (1994) 18 EHRR 101 at 115, [24].
224. See *Schüssel v Austria* (European Court of Human Rights, Third Section, Application No. 42409/98, 21 February 2002).

> individual in his relations with other human beings.[225] There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life"[226] (emphasis added).

It can be seen that, in holding that private life extends to a person's name and photograph, the court laid stress upon the primary purpose of the right, which is to ensure the free development of the personality of each individual in his or her relations with others. The decision also shows that even public interactions between persons can fall within the scope of "private life" in certain circumstances.

132 Turning to the present case, the driver of the vehicle stopped by police had no duty to state his name and address except as was imposed by the legislation in question. This information was personal to himself and represented an aspect of the privacy that is protected by s 13(a) of the Charter. Making a statutory demand for the driver's name and address interfered with this right.

133 As to Mr Kaba, consider. Two uniformed police officers are on mobile patrol in an urban area during daylight hours. They pull over a vehicle being driven lawfully on a public road for a random inspection of the licence status of the driver and the registration of the vehicle. A young man suspected of no wrongdoing is a passenger. He exercises his liberty (which we all take for granted) to get out of the vehicle and walk where he wants to go along the public footpath. While doing so, he is stopped by the police who demand, just because they want to know, his name and address. What has this got to do with human rights?

134 What dignity and freedom does a person possess if he or she cannot (without fear of negative consequences) choose not to divulge his or her name to someone (including uniformed police) who has no authority to make the demand? Anyone could be in that position. Because it is a value which we cherish in democratic society, should not all of us be free to choose, subject to law, not to enter into that personal relation with another which involves (against our will) divulging who we are? After all, that is the right which enables every person to fend off, with legal impunity, an entreaty that is not only unwelcome (on whatever grounds) but, as contended in this case, may be unlawful. Is not persistent official insistence (especially despite repeated refusals) upon the revelation of one's name an interference with the personal living space of an individual and an affront to his or her dignity and autonomy? In my view, it is and the right to privacy in s 13(a) of the Charter was therefore engaged as regards Mr Kaba.

Statutory interpretation: principles

Centrality of parliamentary intention

135 The first legal issue is whether the magistrate erred in law when interpreting s 59(1) of the Road Safety Act. The question is whether that provision confers both a power on police to make a request and a duty on drivers to comply with the request or only a duty on drivers and not a power on police. On the latter

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225. See, *mutatis mutandis*, *Niemietz v Germany* (1992) 16 EHRR 97 at 111, [29]; *Botta v Italy* (1998) 26 EHRR 241 at 247, [32].

226. See, *mutatis mutandis, PG and JH v United Kingdom* (European Court of Human Rights, Third Section, Application No. 4487/98, 25 September 2001) at [56]; *Peck v United Kingdom* (2003) 36 EHRR 719 at 737, [57].

view, police can only make a request when they are otherwise authorised. In the present case they were not. That is why the magistrate held that the request was unlawful.

136 When resolving such an issue of interpretation, the function of the court is to give effect to the intention of the parliament as revealed by the language of the provision in question and as understood in the context of the legislation as a whole and its purpose. Following *Project Blue Sky Inc v Australian Broadcasting Authority*,[227] it was held in *Zheng v Cai*[228] by French CJ, Gummow, Crennan, Kiefel and Bell JJ that the relevant intention is not the supposed collective intention of the legislature but the intention which is revealed "by the application of rules of interpretation accepted by all arms of government in the system of representative democracy".[229] Ascertaining and giving effect to the intention of the legislature by reference to those rules is "an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws".[230] This is the "objective" or "textualist" approach to the ascertainment of legislative intention.[231]

137 In making those statements of principle, French CJ, Gummow, Crennan, Kiefel and Bell JJ referred[232] with approval to the judgment of French J in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[233] where his Honour discussed[234] the normative aspects of the judicial function of statutory interpretation. His Honour said that a court is legitimately "entitled to make the normative statement that it has interpreted [legislation] in accordance with the legislative intention" only where "the words expressed by Parliament are interpreted according to commonly understood rules of interpretation".[235] The commonly understood rules of interpretation are those which have been "developed by courts or decreed by statute"[236] and are "understood by Parliament, the Executive, parliamentary drafters and by the courts".[237]

138 On my analysis, the provision in question interferes with human rights, particularly the privacy and freedom of movement of drivers. The interpretation of this provision involves the application of two commonly understood rules or presumptions of the common law that are directed to ascertaining the intention of parliament in such a context. The first rule is that ambiguous provisions are interpreted according to the presumption that parliaments intend to legislate in a manner that is consistent with Australia's international obligations. This is known as the principle of consistency. The second rule is that provisions (whether ambiguous or not) are interpreted according to the presumption that parliament does not intend to abrogate or curtail fundamental common law rights and

227. (1998) 194 CLR 355 at 384, [78] per McHugh, Gummow, Kirby and Hayne JJ ("*Project Blue Sky*").
228. (2009) 239 CLR 446 ("*Zheng*").
229. At 456, [28].
230. At 455, [28].
231. Ibid; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at 591–2, [43] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ ("*Lacey*").
232. Ibid.
233. (2002) 123 FCR 298.
234. At 410–12, [430]–[434].
235. At 412, [432].
236. Ibid.
237. At 411, [432].

freedoms. This is known as the principle of legality. As the legislation in question is Victorian, it is also necessary to apply the rule in s 32(1) of the Charter that, so far as it is possible consistently with their purpose, provisions must be interpreted compatibly with the human rights in the Charter. Thus, in the present case, the relevant and commonly understood rules of interpretation as developed by the courts and decreed by statute are the principles of consistency and legality and s 32(1) of the Charter. It is also necessary to interpret the provision in question according to the command in s 35(a) of the Interpretation of Legislation Act 1984.[238]

139 Certain issues of importance arise in relation to the content and application of the principles of consistency and legality. As regards the principle of consistency, it will be necessary to consider how the principle is to be applied when the relevant international obligation involves a human right that might permissibly be limited by provisions which are reasonable and proportionate having regard to legitimate purposes. As regards the principle of legality, it will also be necessary to identify the rights and freedoms that are protected by the principle, the status of international human rights in that context and whether it is permissible to consider the extent of the interference in relation to the purpose of the provision in question.

140 I will begin with the principle of consistency.

Principle of consistency

141 Under Australia's constitutional arrangements, international conventions requiring legislative implementation do not become an enforceable part of domestic law until legislation is enacted.[239] Applying this principle in *Dietrich v R*,[240] it was held by Mason CJ and McHugh J that:[241]

> [r]atification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.

142 Since Australia is a sovereign state, the federal and state Parliaments acting within the sphere of their legislative authority may legislate consistently *or* inconsistently with Australia's international obligations.[242] But, once legislation is enacted and dispute arises as to its meaning in law, the principle of consistency operates as a canon of construction to produce conformity between the legislation and Australia's international legal responsibilities where such interpretation is legitimately open.

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238. Section 35(a) provides:

> a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.

239. *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 303 per Gummow J ("*Magno*"); *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286–7 per Mason CJ and Deane J ("*Teoh*").

240. (1992) 177 CLR 292 at 305 ("*Dietrich*").

241. *Bradley v Commonwealth* (1973) 128 CLR 557 at 582; *Simsek v MacPhee* (1982) 148 CLR 636 at 641–4; *Kioa v West* (1985) 159 CLR 550 at 570–1.

242. *Polites v Commonwealth* (1945) 70 CLR 60 at 69 per Latham CJ, 75–6 per Starke J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384, [97] per Gummow and Hayne JJ ("*Kartinyeri*").

143 The principle of the common law that legislation should be interpreted consistently with the rules of international law was stated by O'Connor J in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*[243] in these terms:[244]

> In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being *prima facie* restricted in their operation within territorial limits. Under the same general presumption every statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law: *Maxwell on Statutes*, 3rd ed, 200.

The principle is very well established and has been frequently affirmed by the High Court.[245]

144 I do not accept the Director's submission that the court should be more cautious in the application of the principle of consistency to State legislation. As submitted on behalf of Mr Kaba, there is no basis for distinguishing between Commonwealth and State legislation in the application of the principle. The High Court,[246] the Court of Appeal,[247] this court[248] and other State supreme courts[249] have recognised that the principle of consistency applies to the interpretation of State legislation. There is nothing inconsistent with Australia's constitutional arrangements in Victorian courts working on the basis of a presumption that the Victorian Parliament has not intended to legislate contrary to Australia's international obligations unless it makes that intention clear.

243. (1908) 6 CLR 309 ("*Jumbunna*").
244. At 363.
245. *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 per Barton, Isaacs and Rich JJ ("*Zachariassen*"): "It is trite law that Statutes should be construed, as far as their language permits, so as not to clash with international comity …"; *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1 at 38 per Brennan, Deane and Dawson JJ ("*Lim*"): "[T]he courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty" (citations omitted); *Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J: "It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law" (citations omitted); in *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589–91, [63]–[65] ("*Al-Kateb*") McHugh J questioned the contemporary relevance of the rule but said (at 591, [65]) it was "too well established to be repealed now by judicial decision".
246. *Tajjour v New South Wales* (2014) 88 ALJR 860 at 879, [48]; 313 ALR 221 at 241 per French CJ; *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 204 per Gibbs CJ; *Kartinyeri* (1998) 195 CLR 337 at 384, [97] per Gummow and Hayne JJ; *AMS v AIF* (1999) 199 CLR 160 at 180, [50] per Gleeson CJ, McHugh and Gummow JJ; *Coleman v Power* (2004) 220 CLR 1 at 91, [240] per Kirby J ("*Coleman*"); *Cornwell v R* (2007) 231 CLR 260 at 320–2, [174]–[178] per Kirby J.
247. *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at 39, [75] per Maxwell P ("*Royal Women's Hospital Board*").
248. *ZZ v Secretary, Department of Justice* [2013] VSC 267 (22 May 2013) at [67]–[68], [81] per Bell J; *A & B v Children's Court of Victoria* [2012] VSC 589 (5 December 2012) at [110] per Garde J; *Tomasevic v Travaglini* (2007) 17 VR 100 at 113–14, [72]–[73] per Bell J.
249. See eg *Yeo v Attorney-General* [2012] 1 Qd R 276 at 298–9, [60]–[63] per McMurdo P, Muir and White JJA agreeing; *Wilson v Francis* [2013] WASC 157 (3 May 2013) at [123]–[131] per Martin CJ.

145 Unlike the principle of legality, which operates whether or not the provision in question is ambiguous, the principle of consistency applies where, in the words of Mason CJ and Deane J in *Minister of State for Immigration and Ethnic Affairs v Teoh*, "a statute or subordinate legislation is ambiguous".[250] The requirement for ambiguity was referred to by Mason CJ and McHugh J in *Dietrich*,[251] and Gummow J in *Minister for Foreign Affairs and Trade v Magno*.[252] There are English authorities (which are frequently cited here) referring to the requirement for ambiguity.[253] Applying this requirement in *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs*,[254] Brennan, Deane and Dawson JJ would not favour an interpretation consistent with Australia's obligations under an international treaty because the relevant provisions were "quite unambiguous". However, in *Teoh*, Mason CJ and Deane J made clear that ambiguity does not play an overly obstructive role in relation to the principle. Their Honours rejected "a narrow conception of ambiguity" in favour of a consistent interpretation where the language of the provision was "susceptible" to such.[255] That statement of principle accords with a number of English[256] and Australian[257] authorities, including *Royal Women's Hospital v Medical Practitioners Board of Victoria*.[258] In that case, Maxwell P succinctly expressed the principle of consistency as follows:[259]

> … the provisions of international treaties are relevant to statutory interpretation. In the absence of a clear statement of intention to the contrary, a statute (Commonwealth or State) should be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant treaty.

I take this statement to represent the current state of the law.

146 As the principle of consistency requires legislation to be interpreted and applied, as far as its language permits, so that it conforms with Australia's obligations under a relevant international treaty, it is necessary to identify the relevant treaty and the specific obligations that are imposed. International treaties (including covenants and conventions) vary considerably in subject matter and content. No general description can be offered as to the nature of the specific obligations that might be imposed. Such can only be ascertained by reference to

250. (1995) 183 CLR 273 at 287.
251. (1992) 173 CLR 292 at 306.
252. (1992) 37 FCR 298 at 304.
253. See *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770 at 812 per Balcombe LJ; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 760 per Lord Ackner ("*Brind*"); *Phansopkar* [1976] 1 QB 606 at 626 per Scarman LJ.
254. (1992) 176 CLR 1 at 38.
255. (1995) 183 CLR 273 at 287.
256. *Bloxam v Favre* (1883) 8 PD 101 at 107 per Sir James Hannen; *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771 per Lord Diplock: if the words "are reasonably capable of bearing such a meaning"; *Brind* (1991) 1 AC 696 at 747 per Lord Bridge: "ambiguous in the sense that [the provision] is capable of a [consistent] meaning"; *Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 283 per Lord Goff: when the court is "free to do so".
257. *Jumbunna* (1908) 6 CLR 309 at 363 per O'Connor J: citing *Maxwell on Statutes*, 3rd ed, "as far as its language admits"; *Zachariassen* (1917) 24 CLR 166 at 181 per Barton, Isaacs and Rich JJ: "so far as … language permits"; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558 at 569 per Kirby P: "so far as possible"; *Kartinyeri* (1998) 195 CLR 337 at 384 per Gummow and Hayne JJ: "as far as its language permits".
258. (2006) 15 VR 22.
259. At 39, [75].

the terms of the instrument as interpreted in accordance with the applicable rules of international law.[260] In the present case the relevant instrument is the ICCPR.

147 I have already identified the provisions of the ICCPR which are relevant in the present case. In summary, Art 2 imposes obligations on Australia to respect and ensure the specified human rights to all individuals, to implement legislative and other measures to give effect to the rights and provide access to effective remedies and authoritative means of determination and enforcement. Articles 9, 12 and 17 specify the human rights to liberty and security, freedom of movement and privacy. These obligations apply under international law (see above) in relation to those rights according to the terms of those articles. For the purposes of the principle of consistency, I take these to be the relevant obligations of international law which, so far as it language permits, the legislation in question should conformably or consistently be interpreted.

148 In order properly to identify the nature of these obligations, it is necessary to appreciate that Arts 9, 12 and 17 have certain features which are foundational to human rights as such. Some of the human rights in the ICCPR cannot be abrogated or curtailed under international law. The right in Art 7 not to be subjected to torture falls into this category.[261] But, subject to the standards of legality and proportionality, most human rights are amenable to legitimate limitation by domestic law. In other words, most of the human rights in the ICCPR are not absolute. The rights in Arts 9, 12 and 17 to liberty and security, freedom of movement and privacy fall into this category.

149 Each of Arts 9, 12 and 17 incorporate a limitation standard. Under Art 9(1), persons shall not be subjected to "arbitrary" arrest or detention or deprived of their liberty "except on such grounds and in accordance with such procedures as are established by law". Under Art 12(3), freedom of movement may be subject to restrictions that are "provided by law" and "necessary to protect … public order" etc. Under Art 17(1), persons shall not be subjected to "arbitrary or unlawful" interference with privacy etc. It can be seen that there are two aspects to the limitations standard in each case: a requirement for any limitation to be supported by law and not arbitrary (or be necessary).

150 By virtue of the limitation standard in these human rights, as in others specified in the ICCPR,[262] state parties are permitted to exercise their sovereign power to enact legislation or implement other measures that limit or restrict the rights concerned provided that this is done in accordance with the standard. Necessarily, consideration of whether a particular interpretation of a legislative provision would be consistent or inconsistent with the international obligation of Australia as a state party requires attention to be paid to the content and application of the standard. Enactment of a legislative provision limiting or restricting the human right in a way that satisfies the standard is not a violation of Australia's obligations. That must be taken into account when applying the principle of consistency.

260. See for example the Vienna Convention on the Law of Treaties.

261. Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, 3rd ed, (2013), 216 [9.01].

262. See for example Arts 18(3) (limitation of the right to freedom of thought and religion) and 19(3) (restriction of the right to freedom of opinion and expression).

151 My focus here is upon the nature of the obligation of Australia as a state party, not upon the scope of the human right applicable to the individual. I am in no way suggesting that the scope of a human right that is amenable to limitation should be ascertained by reference to the extent of the limitation rather than the content of the right. The scope of a human right is ascertained by reference to its terms as to which of the fundamental interests and values it protects and the respect and protection that it affords to individuals are the central focus. The scope of the right as so ascertained is not diminished by the capacity of a state party to limit or restrict the enjoyment of the right when the conditions for so doing are satisfied. This distinction is of some importance because it influences the manner in which the limitation standard falls to be applied and the selection of the starting point for the consideration of human rights in the process of statutory interpretation. We need to appreciate how valuable and precious is the human right possessed by the individual before assessing the extent and manner of its restriction against the applicable standard.

152 As to the requirement for lawfulness, I discuss the general principles in *Kracke*.[263] To identify the content of the requirement for present purposes, I will here follow the leading text[264] and refer to the what the Human Rights Committee says about that requirement in Art 17(1):[265]

> The term "unlawful" means that no interference can take place except in cases envisaged by the law. Inference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.

The lawfulness requirements in Arts 9(1) and 12(3) are to be similarly interpreted.

153 The presently relevant limitations are contained in s 59(1) of the Road Safety Act, which satisfies the lawfulness requirement.

154 In *Patrick's Case*[266] I discuss the concept of "arbitrary" in the context of s 13(a) of the Charter (which reflects Art 17(1) of the ICCPR). I made particular reference to the interpretation adopted by the Human Rights Committee,[267] such communications of that committee as *Toonen v Australia*,[268] the commentary of

263. (2009) 29 VAR 1 at 44, [162] ff.

264. Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, 3rd ed, (2013), 535 [16.06].

265. Human Rights Committee, *General Comment No 16*, 32nd sess, UN Doc HRI/Gen/1/Rev.9 (8 April 1988) [3].

266. (2011) 39 VR 373.

267. Human Rights Committee, *General Comment No 16*, 32nd sess, UN Doc HRI/Gen/1/Rev.9 (8 April 1988) [4]:

> 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.

268. (1994) 69 ALJ 600, [8.3]:

> 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.

Professor Nowak[269] and the judgment of Black CJ, Sundberg and Weinberg JJ in *Al Masri*[270] where their Honours held that "arbitrary" in Art 9(1) meant "unproportional or unjust". My conclusion was that the human right in s 13(a) of the Charter not to have one's privacy, family, home or correspondence "arbitrarily" interfered with:[271]

> … 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.

155 Also in relation to the right to privacy in s 13(a) of the Charter, in *WBM*[272] Warren CJ (Hansen JA agreeing) supported this approach in obiter dicta[273] and I applied it.[274] Referring to the guidance offered in decisions of the United Kingdom courts concerning Art 8 of the European Convention on Human Rights, Warren CJ said that "arbitrary interference" in s 13(a) was concerned with "capriciousness, unpredictability, injustice and unreasonableness — in the sense of not being proportionate to the legitimate aim sought".[275]

156 It can be seen that the arbitrariness aspect of the limitations standard in Arts 9(1) and 17(1) incorporates a proportionality test. It follows that, when interpreting a statutory provision by reference to the principle of consistency, it is necessary to consider whether any limitation on rights imposed by the provision is proportionate in that sense. If limitations are proportionate, the provision so interpreted would not be inconsistent with Australia's international obligations under the ICCPR.

157 I have already expressed my conclusion that interpreting s 59(1) so as to confer both a duty on drivers and a power of random stop and request on police (and other authorised persons) would interfere with the enjoyment by drivers of the rights to privacy (Art 17(1)) and freedom of movement (Art 12(1)). Because passengers would necessarily be caught up in a stop and likely not feel free to leave, the stop would also interfere with their right to freedom of movement. As I have explained, these are important rights to the individual. It is true that, in

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269. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, NP Engel, 2nd rev ed, (2005), 382–3 (citations omitted):

> … 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.

270. (2003) 126 FCR 54 at 92, [152].
271. (2011) 39 VR 373 at 395, [85].
272. (2012) 43 VR 446.
273. At 470–2, [103]–[117].
274. At 490, [203] per Bell AJA.
275. At 471–2, [114].

most cases, the delay would be short. The compulsory questioning would be limited to obtaining a statement of the driver's name and address and production of his or her licence. This is still a significant interference with human rights. It would bring about a compulsory and probably unwelcome interaction with (usually uniformed) police in a public setting when the lawful expectation of the driver, and any passenger, was the continued exercise of the liberty to be let alone and travel on.

158 However, the purpose of conferring such a power on police (and other authorised persons) is the maintenance of the road safety and licensing system. Plainly this is a legitimate and important purpose. As is recognised in the leading text[276] and by Mason J in *Gerhardy*[277] and Bell J in *Momcilovic v R*,[278] this purpose would generally support road safety and licencing laws. That is not doubted in the international jurisprudence that I review below. Moreover, the power is rationally connected to that purpose. I do not understand that to be in issue. The critical question is whether the nature of a random stop and request power is such as to make it arbitrary in the sense of being a unreasonable and disproportionate response to that purpose (Art 17(1)) and not necessary to protect public order (Art 12(1)).

159 On this aspect the onus rests with the Director. In my view, he has established that a police power of random stop and request would not be arbitrary in the human rights sense and is so necessary. Essentially for the reasons given in the Supreme Court of Canada in *Dedman v R*[279] by Le Dain J for the plurality, in *R v Hufsky*[280] by Le Dain J for the whole court and in *R v Ladouceur*[281] by Cory J on behalf of the plurality (see below), I consider that such a power represents a reasonable and proportionate response to the legitimate purpose of regulating drivers in the interests of public safety on the roads.

160 Of course it is necessary that the means chosen be the least restrictive which are reasonably available. I maintain the view that this "is a very important consideration and lies at the heart of an effective proportionality analysis".[282] But the means here are the least restrictive which are reasonably available for the regulation reasonably needed could not be effective without a power of this kind. With respect, on the proportionality issue, I cannot agree with the conclusion to the contrary of the plurality in the Supreme Court of the United States in *Delaware v Prouse*,[283] although there is much of value in the analysis.

161 While I acknowledge that, when deciding this issue of proportionality, the Supreme Courts of Canada and the United States had regard to statistical and other evidence of fact, I do not accept that it was critical to the reasoning and conclusions reached. It seems to me that the evidence was used to illustrate conclusions that could have been supported without such evidence. I do not doubt that, in some cases, perhaps many cases, evidence would be necessary before a

276. Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, 3rd ed, (2013), 407 [12.32].
277. (1985) 159 CLR 70 at 102.
278. (2011) 245 CLR 1 at 248, [679].
279. [1985] 2 SCR 2 ("*Dedman*").
280. [1988] 1 SCR 621.
281. [1990] 1 SCR 1257.
282. *Patrick's Case* (2011) 39 VR 373 at 452, [352] per Bell J.
283. 440 US 648 per White J for the court; Blackmun and Powell JJ concurring; Rehnquist J dissenting (1979) ("*Prouse*").

judgment of this kind could be made. When that is so, the party making the case for proportionality carries a high factual onus as well as a high persuasive onus. I would not want to make any general statements about when such evidence might be necessary. It is sufficient to say that, in the present case, the conclusion that a random power of stop and request is reasonable and proportionate emerges convincingly from the general purpose of the traffic safety and licencing regulation system. In that connection, with respect I generally agree with the remarks of Bleby J in *Police v Prinse*[284] (see below), although of course the South Australian legislation is in express terms.

162 In reaching this conclusion, it is critical to my reasoning that the power of stop and request has been conferred upon police and other authorised persons (s 59(1)(a)(i)) who presumably have been properly trained in the exercise of such powers (and not upon members of the general public), that a defence to prosecution for non-compliance is available where the requester is not in uniform (s 59(4)), that the power must only be used for the purposes of road safety and licence regulation and that it would be unlawful for the power to be used in manner that was discriminatory in human rights terms (see below).

163 It follows that it is not inconsistent with Australia's obligations under the ICCPR to interpret the provision so as to confer both a duty on the driver and a power of stop and request on police. That removes a negative reason for thinking that parliament did not intend to confer such a power. But it does not mean that parliament actually so intended. To determine that issue we have to go further.

164 Now to the principle of legality.

Principle of legality

Content and rationale

165 As we have seen, it was held in *Zheng*[285] that, when interpreting legislation, the court must ascertain the objective intention of the legislature by reference to the applicable rules of interpretation. One of the rules of interpretation which is applied when objectively ascertaining the intention of the legislature is the principle of legality. This was made expressly clear in *Project Blue Sky*[286] and *Lacey v Attorney-General*.[287]

166 In the early Australian case of *Potter v Minahan*, O'Connor J adopted this formulation of the principle:[288]

> [i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness;[289] and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

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284. (1998) 196 LSJS 267 at 272; (1998) 27 MVR 50 at 54 ("*Prinse*").
285. *Zheng* (2009) 239 CLR 446 at 455, [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ.
286. (1998) 194 CLR 355 at 384, [78] per McHugh, Gummow, Kirby and Hayne JJ.
287. (2011) 242 CLR 573 at 591–2, [43] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ.
288. (1908) 7 CLR 277 at 304, quoting from Maxwell and Theobold, *On the Interpretation of Statutes*, Sweet and Maxwell, 4th ed, (1905), 122.
289. 2 Cranch., 390.

167 More recently, in *Lacey*[290] French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ stated that, according to the principle, it is presumed that, "in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms, or immunities".[291] The principle ensures that such rights, freedoms and immunities are not infringed by judicial supposition. In the language of French CJ in *Momcilovic*,[292] it requires that "statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law".[293]

168 Counsel for Mr Kaba and the Commission relied heavily upon this principle in support of their preferred interpretation of s 59(1) of the Road Safety Act. They submitted that, interpreted otherwise, the provision would interfere with the basic rights of drivers and that the legislature has not unmistakably and unambiguously revealed an intention to confer not only a duty on drivers to stop but also a power on police to request. As I have said, resolution of this issue involves some consideration of the rationale of the principle, the rights that it engages and the manner of its application.

169 As we just saw in *Potter*, the principle of legality applies in respect of legislation that would "overthrow fundamental principles, infringe rights, or depart from the general system of law". Of the three aspects of this formulation, the present case requires consideration only of individual rights and freedoms under the common law.

170 I have already discussed the great significance of individual rights and freedoms under the common law and their constitutional dimension. At the most elementary level, the rationale of the principle of legality is to protect such rights and freedoms from unintended legislative interference. The premise of the principle of legality is that individual rights and freedoms under the common law have an anterior value which counts in, and represents the starting point of, the process of interpreting legislation impacting thereon. The submissions made on behalf of Mr Kaba eloquently call that protection in aid.

171 The modern rationale of the principle is deeper. It is now common to see statements drawing attention to the importance of the principle of legality (and other common law principles of interpretation) to the maintenance of a proper constitutional relationship between the legislature, the executive and the judiciary.[294] For example, Gleeson CJ said in *Al-Kateb v Godwin*[295] that the principle "governs both Parliament and the courts" and "is an expression of legal value, reflected by the courts and acknowledged by the courts to be respected by Parliament". The Chief Justice went on in *Electrolux Home Products Pty Ltd v*

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290. (2011) 242 CLR 573.
291. At 591–2, [43] citing *Project Blue Sky* (1998) 194 CLR 355 at 384, [78] per McHugh, Gummow, Kirby and Hayne JJ.
292. (2011) 245 CLR 1 at 46, [43].
293. *Potter* (1908) 7 CLR 277 at 304 per O'Connor J; *Bropho v Western Australia* (1990) 171 CLR 1 at 18 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; *Coco v R* (1994) 179 CLR 427 at 436–7 per Mason CJ, Brennan, Gaudron and McHugh JJ ("*Coco*"); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329, [21] per Gleeson CJ ("*Electrolux*").
294. The evolution of the principle of legality is critically discussed by Lim, "The Normativity of the Principle of Legality" (2013) 37 *Melbourne University Law Review* 372.
295. (2004) 219 CLR 562 at 577, [19]–[20].

Australian Workers' Union[296] to state it was "a working hypothesis, the existence of which is known both to Parliament and the courts upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law". These statements have frequently been cited with approval in subsequent cases.[297]

172 More recently in *Zheng*, French CJ, Gummow, Crennan, Kiefel and Bell JJ described the principle of legality as an:

> … expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*,[298] the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.[299]

Developing the same subject, in *Momcilovic*[300] French CJ said:[301]

> The common law in its application to the interpretation of statutes helps to define the boundaries between the judicial and legislative functions. That is a reflection of its character as "the ultimate constitutional foundation in Australia".[302] It also underpins the attribution of legislative intention on the basis that legislative power in Australia, as in the United Kingdom, is exercised in the setting of a "liberal democracy founded on the principles and traditions of the common law".[303] It is in that context that this Court recognises the application to statutory interpretation of the common law principle of legality.

In *Lee v New South Wales Crime Commission*, Gageler and Keane JJ[304] explained that the principle of legality:[305]

> … respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government.

173 In this modern formulation, it is recognised that the principle can contribute to making the democratic process more effective. Accordingly, it has been held that one purpose of the principle is to ensure that, in the enactment of legislation that interferes with individual rights and freedoms, the parliament properly examines that impact. This objective was first expressed in *Coco v R*[306] by Mason CJ, Brennan, Gaudron and McHugh JJ, who stated that:[307]

296. (2004) 221 CLR 309 at 329, [21].
297. As to *Al-Kateb,* see for example *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at 191, [528] per Bell J; as to *Electrolux,* see for example *Australian Education Union v Fair Work Australia* (2012) 246 CLR 117 at 135, [30] per French CJ, Crennan and Kiefel JJ.
298. (2002) 123 FCR 298 at 410–12, [430]–[433].
299. (2009) 239 CLR 446 at 455–6, [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ; approved in *Lacey* (2011) 242 CLR 573 at 592, [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.
300. (2011) 245 CLR 1.
301. At 46, [42].
302. *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182 per Gummow J.
303. *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587 per Lord Steyn.
304. (2013) 251 CLR 196 ("*Lee*").
305. At 310, [312].
306. (1994) 179 CLR 427.
307. At 437–8.

> Curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights.

Along the same lines, in *R v Secretary of State for the Home Department; Ex parte Simms*,[308] Lord Hoffmann later made this oft-cited[309] statement:[310]

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights … The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

174 On this analysis, the related[311] purposes of the principle of legality are to protect common law rights and freedoms from unintended legislative interference and to help in making the democratic process more effective when legislation impacting thereon is being considered. The greater is the clarity about what rights are covered and the manner of its application, the more effective will be the principle in achieving these purposes. The demands made upon the principle in the contemporary setting, of which this case is perhaps an example, suggest that attention to these issues is warranted.

175 That contemporary setting includes the great increase in the quantity of legislation that has occurred and its accompanying great impact upon the daily lives of individuals.[312] This in itself has placed heavy demands upon the principle of legality.[313] But more than that, a substantial body of international human rights law has come into force, most importantly (for present purposes) the ICCPR. This has been influential in the development of the common law. It has influenced the formulation of much legislation and led to the establishment, by the Australian Human Rights Commission Act 1986 (Cth),[314] of Australia's national human rights institution. The ICCPR is a schedule to that Act.[315] Legislation based on the ICCPR has been enacted in a State and Territory.[316] As we have seen

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308. [2000] 2 AC 115 ("*Simms*").
309. See for example *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492, [30] per Gleeson CJ.
310. *Simms* [2000] 2 AC 115 at 131.
311. *Lee* (2013) 251 CLR 196 at 309, [310]–[312] per Gageler and Keane JJ.
312. Finn, "Statutes and the Common Law" (1992) 22 *University of Western Australia Law Review* 7, 11.
313. Spigelman, "Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769, 776.
314. Section 7(1).
315. Schedule 2.
316. See Charter of Human Rights and Responsibilities Act 2006 and Human Rights Act 2004 (ACT).

and will see again, the national uniform evidence legislation includes inconsistency with the ICCPR as a consideration relevant to the exclusion of unlawfully or improperly evidence.[317]

176 Furthermore, the increase in the quantity of legislation has given rise to highly developed parliamentary processes. Given the contemporary importance of human rights when enacting legislation, it is perhaps not surprising that human rights are receiving more attention in these processes. Two deserve particular mention. First, Parliaments have more sophisticated legislative scrutiny mechanisms than previously. So, drawing on the United Kingdom model,[318] the Australian Parliament has established a Parliamentary Joint Committee on Human Rights.[319] It functions include the examination of proposed legislation for compatibility with human rights, including the ICCPR.[320] A second parallel development is that legislative counsel are expected to be, and are, more conscious of human rights in the drafting of legislation and in supporting these scrutiny processes.[321] I would expect both of these trends to intensify in coming years.

177 Despite these and other increased contemporary demands and the deepening of its underlying rationale, the principle of legality is still expressed in broad terms. These reflect its ancient origins and allow considerable scope for the exercise of individual judicial preference and, potentially, unpredictability and inconsistency of application. Moreover, there has been little judicial explanation of the principle. This has led to constructive criticism of the scope and operation of the principle and its “methodological opacity”,[322] particularly with respect to the rights and freedoms covered and the manner of its application, two matters which are directly relevant to this case.

Rights and freedoms covered

178 It is important to know what rights and freedoms are covered by the principle of legality because this determines what legislation will be interpreted according to the protective approach that it specifies and therefore its scope as a normative rule. Up to now, the rights and freedoms covered have not been catalogued and I am not suggesting that they should be. They are generally “informed by the history of the common law”,[323] which should continue to be so. Important guidance has been provided in scholarly writings[324] and judgments.[325] However, some uncertainty remains, more than is necessary or desirable, particularly as

317. Evidence Act 2008 s 138(3)(f).

318. See generally Hunt, “The Joint Committee on Human Rights” in Horne, Drewry and Oliver (eds), *Parliament and the Law*, Hart Publishing, (2013), 223.

319. Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) s 4.

320. Ibid ss 3, 7.

321. See Lovric, “Human Rights: The Role of Legislative Counsel” (2011) 3 *The Loophole* 73.

322. Meagher, “The Common Law Principle of Legality in the Age of Rights” (2011) 35 *Melbourne University Law Review* 449, 464.

323. Spigelman, *Statutory Interpretation and Human Rights*, University of Queensland Press, (2008), 26.

324. See eg Spigelman, “Principle of Legality and the Clear Statement Principle” (2005) 79 *Australian Law Journal* 769, 775; Gans et al, *Criminal Process and Human Rights*, Federation Press, (2011), 32; Pearce and Geddes, *Statutory Interpretation in Australia*, LexisNexis, 8th ed, (2014), 255–9 [5.46]; Chief Justice Robert French, “Protecting Human Rights Without Bill of Rights” (Speech delivered at John Marshall School of Law, Chicago, 26 January 2010) 27.

325. See eg *Momcilovic* (2011) 245 CLR 1 at 177–8, [444] per Heydon J.

regards identifying what rights and freedoms are "fundamental"[326] or "commonly accepted",[327] how much the qualifier "fundamental" has "work to do"[328] in that process and, indeed, whether it has completely outlived its usefulness.[329] The uncertainty can be illustrated by reference to the right to privacy. By reference to received authority, I held in *WBM,*[330] as I hold here, that the common law right to privacy is covered by the principle. A senior Commonwealth legislative counsel has written that the rights to a fair trial and privacy "make up about 90% of a legislative counsel's human rights workload".[331] Yet this right does not feature in the guiding lists, which may raise legitimate but unfortunate questions in the minds of some about the status of this important right under the principle.

179 Writing extra-judicially, Chief Justice French has observed that the content of the principle of legality might be informed by international human rights norms through the evolution of the common law.[332] That could, and in my view should, happen by treating the rights and freedoms in the ICCPR as fundamental rights and freedoms for the purposes of the principle of legality, thereby bringing greater coherence, discipline and transparency to the process of engaging with human rights in the course of statutory interpretation.

180 In making this observation, Chief Justice French referred to "developmental processes of the kind mentioned"[333] in *Mabo v Queensland [No 2].*[334] These processes were identified in that case by Brennan J (Mason CJ and McHugh JJ agreeing) as follows:

> The opening up of international remedies to individuals pursuant to Australia's ascension to the Optional Protocol to the [ICCPR][335] brings to bear on the common law the powerful influence of the Covenant and the internationals standards it imports. The common law does not necessarily conform with international standards, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[336]

His Honour went on to say that such development of the common law "would be precluded if [it] … were to fracture a skeletal principle of our legal system".[337] It was subsequently held by Mason CJ and Deane J in *Teoh* that development of the common law on the basis of international law must be carried out with "due circumspection" and "not be seen as a backdoor means of importing an unincorporated convention into Australian law".[338]

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326. *Coco* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.
327. *Momcilovic* (2011) 245 CLR 1 at 47, [43] per French CJ.
328. See for example Spigelman, "Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769, 781.
329. *Momcilovic* (2011) 245 CLR 1 at 46, [43] per French CJ.
330. (2012) 43 VR 446 at 481, [163].
331. Lovric, "Human Rights: The Role of Legislative Counsel" (2011) 3 *The Loophole* 73, 81.
332. "Oil and Water? — International Law and Domestic Law in Australia" (The Brennan Lecture, Bond University, 26 June 2009) 20 [37].
333. Ibid.
334. (1992) 175 CLR 1.
335. See Communication 78/1980 in *Selected Decisions in the Human Rights Committee under the Optional Protocol*, vol 2, 23.
336. (1992) 175 CLR 1 at 42.
337. At 43.
338. *Teoh* (1995) 183 CLR 273 at 288 per Mason CJ and Deane J.

181 Applying these principles, treating the rights and freedoms in the ICCPR as fundamental rights and freedoms for the purposes of the principle of legality would, I think, be a natural and appropriate step to take. It would reflect the close relationship between common law rights and freedoms and those recognised in the ICCPR. It would be consistent with the widespread acceptance of the ICCPR in the Australian legal system. It would fit well into the constitutional relationship between parliament and the judiciary. It would not represent backdoor importation of an unincorporated convention into Australian law. It would bring a greater measure of certainty to the identification of the rights covered by the principle without limiting those already covered or inhibiting the capacity of the common law to develop in this regard. In relation to the issue of limitation of rights, it would fit with the way in which, under the existing principle, legislation is read down (where appropriate) so as to be compatible with human rights. I will develop three of these propositions in what follows.

182 The rights and freedoms covered by the principle of legality overlap with but are not the same as those recognised in the ICCPR (and other human rights instruments).[339] The degree of overlap, which is substantial, reflects the close connection between common law individual rights and freedoms and the development of international human rights law, particularly as regards the civil and political rights in the ICCPR.

183 In the United Kingdom, as here, it is accepted that damage would be done to the principle of legality if, in the words of Laws J in *R v Lord Chancellor; Ex parte Lightfoot*,[340] it were to be "pressed into service in areas to which it does not necessarily belong". However, the connection between common law rights and freedoms is so close that, consistently with that observation, the rights specified by the European Convention on Human Rights are, in that jurisdiction, covered by the principle of legality quite apart from s 3 of the Human Rights Act. Lord Browne-Wilkinson laid the foundation for that development in an influential article, where he wrote:[341]

> It is now inconceivable that any court in this country would hold that, apart from statutory provision, the individual freedoms of a private person are any less extensive than the basic rights protected by the ECHR. Whenever the provisions of the ECHR have been raised before the courts, the judges have asserted that the Convention confers no greater rights than those protected by the common law.

Subsequently the courts held that, at common law, the principle of legality covered these rights because, returning to Laws J in *Lightfoot*, they are "rights which, in truth, everyone living in a democracy under the rule of law ought to enjoy".[342]

184 Accepting that the United Kingdom and Australia have different constitutional arrangements and that the European Convention on Human Rights applies to the United Kingdom by virtue of its membership of a regional human rights system, both the United Kingdom and Australia apply a common law principle of legality

339. Spigelman, *Statutory Interpretation and Human Rights*, University of Queensland Press, (2008), 29.
340. [2000] QB 597 at 608 ("*Lightfoot*").
341. Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" (1992) *Public Law* 397, 405.
342. [2000] QB 597 at 609.

and the reasons for bringing the rights in the Convention under its application in the United Kingdom would appear to have equal force in relation to the ICCPR and Australia.

185 Bringing the rights and freedoms in the ICCPR under the principle of legality would not represent backdoor importation of an unincorporated convention into Australian law because it would inform the operation and application of an existing principle of interpretation, not create a law or rule that was independently enforceable. Ascertaining the intention of parliament would continue to be the central focus of statutory interpretation, as required by the well-established principles.

186 The issue of limitation of rights arises because, as we have seen in relation to the principle of consistency, most of the rights specified in the ICCPR are susceptible to limitation by a state provided that the standards of legality and proportionality (or necessity) are complied with. For the reasons I give below, Australian courts of high authority have, for some time, been applying a proportionality standard in the process of reading down legislation according to the principle of legality. Therefore, if the rights in the ICCPR were to be brought under the principle of legality, the current approach to the application of the principle would enable the issue of limitation of rights to be dealt with. However, the rights-protecting rationale of the principle of legality prevents it from ever being employed to read up legislation whose meaning is ambiguous.

187 For those reasons, I would hold that, generally speaking, the rights and freedoms in the ICCPR are covered by the principle of legality. I would hold that, specifically speaking, the right to liberty (Art 9(1)), freedom of movement (Art 12(1)) and privacy (Art 17(1)) are so covered. Depending on the nature of the case, this might require the court, when ascertaining the intention of parliament in relation to the provision in question, to engage more deeply with the nature of the right, the importance of the right to the individual and the impact upon the right of the provision in question, as I hope I have here.

188 Finally, as regards the operation and application of the principle of legality in Victoria, there is reason to think that the statutory human rights specified in the Charter, quite apart from s 32(1), are protected at common law under the principle of legality. Observations were made about the applicability of the principle to statutory rights by Finn J in *Buck v Comcare*.[343] His Honour was interpreting a federal provision that suspended a statutory right to worker's compensation. While acknowledging that statutory rights did not fall into the category of common law rights that had been traditionally protected by the principle, Finn J had regard to the social importance of modern legislation in holding that the principle applied to the right to compensation in question. His Honour observed that the statutory right in question was of such:[344]

> … significance to the individual in my view, that, where there may be doubt as to Parliament's intention, the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of "fundamental

343. (1996) 66 FCR 359 ("*Buck*").

344. At 364–5. These remarks were obiter dicta because the issue in the case was whether an application for judicial review could be made with respect to a "decision" made under the provision in question. Finn J held that the provision was self-executing and did not authorise or require the making of a decision: at 363–4.

common law rights" is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.

189 These observations have been referred to with approval or applied in Australian courts by judges of first instance on a number of occasions.[345]

190 At the intermediate level, the observations were applied by Cowdroy, Buchanan and Katzmann JJ in *Australian Postal Corporation v Sinnaiah*.[346] The same approach was applied (without reference to Finn J in *Buck)* by Black CJ, French and Weinberg JJ in *Haneef*.[347]

191 In *Sinnaiah*, the court was interpreting a provision, like the one at issue in *Buck*, that suspended a worker's right to claim compensation. Cowdroy, Buchanan and Katzmann JJ set out the abovementioned passage from the judgment of Finn J and held that his Honour's remarks applied with "equal force" in the case before them.[348]

192 In *Haneef*, which we will see again later, the court was interpreting the word "associate" in the character test in the migration legislation. Black CJ, French and Weinberg JJ applied the principle of legality upon the basis that the respondent's visa "gave him valuable rights", being the right (for the term of the visa) "to live here, to be at liberty here, to be with his wife here, and to work here".[349]

193 The human rights specified in the Charter may be compared with the fundamental rights and liberties traditionally protected by the principle of legality. Following Finn J in *Buck*, it might be concluded that the principle encompasses these human rights. If this is correct, I have additional fortification for my conclusion. As this was not argued, I will not express a concluded view.

Application

194 According to the submissions of counsel for Mr Kaba and the Commission, the correct method involves determining whether a constructional choice consistent with protection of a relevant right, freedom or immunity is open. If such a choice is open, that is the interpretation which must be adopted. The application of the principle of legality is essentially binary. The interpretation involving the least infringement of human rights must be preferred to any other interpretation. That

345. *Re Scholfield; Ex parte Rangott v P & B Barron Pty Ltd* (1997) 72 FCR 280 at 285–6 per Finn J (interpretation of provisions relating to restrictions upon use of transcripts); *SB v Parramatta Children's Court* (2007) 39 Fam LR 132 at 146, [68]–[69] per Price J (interpretation of provisions relating to right to be heard in proceedings); *Director of Public Prosecutions (WA) v GTR* [2007] WASC 318 (20 December 2007) at [28]–[29] per McKechnie J (interpretation of provisions relating to admissibility of evidence about prior convictions of child); *Harvey v Minister Administering Water Management Act 2000* (2008) 160 LGERA 50 at 71–2, [65] (New South Wales Land and Environment Court, Jagot J) (interpretation of provisions relating to statutory water bore rights); *Oxenbould v Solicitors' Trust* [2011] TASSC 57 (3 November 2011) at [36]–[38] per Blow J (interpretation of transitional provisions allegedly extinguishing a prior statutory right to make claim) (this decision was substantially overturned on appeal but no adverse comment was made about his Honour's use of the principle of legality: *Solicitors' Trust v Oxenbould* (2013) 22 Tas R 235 per Crawford CJ, Tennent and Wood JJ.

346. (2013) 213 FCR 449 ("*Sinnaiah*").

347. (2007) 163 FCR 414.

348. (2013) 213 FCR 449 at 458, [34].

349. (2007) 163 FCR 414 at 443, [110].

is how the principle has operated in the past.[350] Applied to the present case, counsel submitted that it was open to interpret s 59(1) of the Road Safety Act such that the duty of the driver to stop arose only where the power of the police to request was independently conferred. The principle of legality mandated that interpretation. The Commission supported these submissions. The Director opposed the interpretation for which Mr Kaba contended but was in substantial agreement about the approach to be followed. All parties submitted that proportionality was not part of the principle of legality.

195 These submissions raise important issues about how the principle of legality is to be applied. I would formulate the critical questions by asking how is the court to determine whether a particular interpretation is open and whether the parliament has, by the provision in question, clearly intended to interfere with the relevant right or freedom. While there are no simple answers to these questions, I shall explain the judicial method that I intend to follow, for I think the importance of the principle of legality, especially given its modern rationale, demands nothing less.

196 I think it is clear from the authorities that the court cannot adopt a "one size fits all" approach to the application of the principle of legality. The legislative landscape is too vast. However, I think that, broadly speaking, two useful categories can be identified. I am not suggesting that they cover the field or are hermetic. Far from it. The first category is where the court must determine the scope and extent of a plainly rights-infringing provision. The second is where the court must determine whether a rights-infringing provision applies at all. With cases in the first category, the court may be required to identify the extent of the interference by reference to the purpose of the provision in question, the nature of the infringement and the relation between the two, that is, by reference (in effect) to a proportionality analysis. With cases in the second category, the court may be required to make a binary choice between an infringing and non-infringing interpretation.

197 With cases in the first category, the need to determine the scope or extent of a plainly rights-infringing provision arises by reason of the particular demands of the principle of legality in such situations. On the authorities, such a provision is to be interpreted so as to "avoid *or minimise*"[351] the infringement. In *WBM*,[352] Warren CJ (Hansen JA agreeing) held that the preferred interpretation must be one that "does not interfere or *least interferes*" with the right.[353] In *Victoria Police Toll Enforcement v Taha*,[354] Tate JA observed:

> Where the intention to encroach upon rights is not manifest with "irresistible clearness"[355] a court must interpret the legislation, consistent with the principle of legality, as not abrogating or curtailing the rights in question. This may be seldom an

350. Meagher, "The Common Law Principle of Legality in the Age of Rights" (2011) 35 *Melbourne University Law Review* 449, 460–3.
351. *Momcilovic* (2011) 245 CLR 1 at 46, [43] per French CJ (emphasis added).
352. (2012) 43 VR 446.
353. At 468, [97] (emphasis added).
354. [2013] VSCA 37 ("*Taha*").
355. See O'Connor J in *Potter* (1908) 7 CLR 277 at 304, referring to the 4th edition of *Maxwell on Statutes*, cited by Gleeson CJ in *Al-Kateb*, above.

> all-or-nothing matter. Legislation may be enacted which unequivocally interferes with rights; the *extent to which it permits such interference* may remain a matter of constructional choice.[356]

198 *Patrick's Case*[357] fell into this category. The appellant claimed that the Victorian Civil and Administrative Tribunal had made an error of law by interpreting the provisions of s 46 of the Guardianship and Administration Act 1986 so as to permit the selling of the home of a person with a mental illness when this was not necessary for the due management of the property. In upholding the appeal, I analysed authorities in the United Kingdom which had been approved by the High Court of Australia when expounding the principle of legality.[358] On the basis of that analysis, I gave the following summary of the application of the principle in this category of case:[359]

> Applying the 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 provision 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.

I reject the submission of the Commission, supported by Mr Kaba, that this statement is contrary to the way in which the principle of legality has previously been applied. To the contrary, it is based upon authorities approved by the High Court. In addition to those authorities, I would refer here to several others that have followed the same or a similar approach.

199 In *Al Masri*,[360] the Full Court of the Federal Court of Australia was required to determine whether general provisions of migration legislation authorised the potentially indefinite detention of an unlawful non-citizen. Applying the principle of legality, Black CJ, Sundberg and Weinberg JJ emphasised the importance of liberty under the common law.[361] Holding that the legislation did not authorise indefinite detention either by express words or necessary implication, their Honours emphasised that, when interpreting the provision, it was important to take into account the nature of the right abrogated or curtailed and the nature and degree of the interference:[362]

> In considering the application of the principle of construction it is appropriate to take into account not only the fundamental nature of the right that may be abrogated or curtailed, but also the extent to which, depending upon the construction adopted, that may occur. Although all interferences with personal liberty are serious in the eyes of the common law, it may be said that the more serious the interference with liberty, the clearer the expression of intention to bring about that interference must be. Where the

356. [2013] VSCA 37 (4 March 2013) at [192] (emphasis added).
357. (2011) 39 VR 373.
358. At 426–33, [243]–[270].
359. At 434, [271].
360. (2003) 126 FCR 54.
361. At 75–8, [82]–[91].
362. At 78, [92].

right in issue is the fundamental right of personal liberty, it is appropriate to consider the nature and duration of the interference.

200 In *Mastwyk v Director of Public Prosecutions*,[363] the appellant was charged with failing to comply with a request under s 55(1) of the Road Safety Act to accompany police to a police station for a breath test.[364] The mode of transport proposed was the rear of a lockable police van. Finding that this would have constituted imprisonment, the magistrate dismissed the charge. Holding that the method of transport had to be objectively reasonable, the trial judge dismissed the appeal. Upholding that reasoning, Nettle and Redlich JJA (Maxwell P dissenting) dismissed the appeal. Applying the principle of legality, Nettle JA held:[365]

> Fundamentally, a statutory restriction on the liberty of the subject is to be strictly construed. In the absence of a clear indication to the contrary, it should be taken as going no further than necessary to achieve the object in view. Here, to adopt and adapt Ormiston JA's reasoning in *Hrysikos*, the object in view is that the driver accompany the police officer to the designated place for testing. It is capable of being achieved by a requirement to accompany a police officer to a designated place by means of travel which is not objectively unreasonable.

Also applying that principle, Redlich JA held that the provision "should not be construed as authorising a requirement that involved an unreasonable imposition on the liberty of the driver".[366] Maxwell P held that unreasonableness was an administrative law concept which should not be imported into the legislation.[367]

201 *Mastwyk* was followed by Ashley, Weinberg and Tate JJA in *Director of Public Prosecutions v Piscopo*[368] which also concerned the interpretation of s 55(1). The issue was whether, when requiring a driver to accompany police for a breath test, police had to inform the driver that he or she need remain at the place of test for only three hours. Applying *Coco* and the principle of legality, Ashley JA (Weinberg and Tate JJA agreeing) reasoned that the requirement to accompany and remain did "involve some degree of interference with liberty",[369] yet "Parliament has made it apparent that the right to liberty is to be curtailed to an

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363. (2010) 27 VR 92.
364. Section 55(1) provided:

> If a person undergoes a preliminary breath test when required by a member of the police force … under section 53 to do so and—
>
> (a) the test in the opinion of the member … in whose presence it is made indicates that the person's breath contains alcohol; …
>
> …
>
> any member of the police force … may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force … to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath … and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.
>
> Example
>
> A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath.

365. (2010) 27 VR 92 at 103, [45].
366. At 107, [60].
367. At 101, [32].
368. (2011) 33 VR 182.
369. At 201, [61].

extent".[370] His Honour held that a restrictive interpretation must be adopted, but not so restrictive as the driver contended. The interpretation adopted, which his Honour saw to be "consistent with *Coco*"[371] was that drivers had to be informed of both the purpose and temporal limit of the remaining, but this could be done on arrival at the place of test.[372]

202 Another case is *Evans v New South Wales*.[373] Among the issues considered by the court was the validity of cl 7 of the World Youth Day Regulation 2008 (NSW).[374] That Regulation was made pursuant to s 58(1) and (2) of the World Youth Day Act 2006 (NSW).[375] Applying the principle of legality, French, Branson and Stone JJ held that cl 7(1)(b) of the regulation was not authorised by s 58(1) and (2) of the Act, properly interpreted. Their Honours held that the concept of "annoyance" might "extend to expressions of opinion which neither disrupt nor interfere with the freedoms of others, nor are objectively offensive".[376] A breach of that kind of prohibition affected "freedom of speech in a way that … is not supported by the statutory power conferred by s 58 properly construed".[377]

203 Lastly we return to *Haneef*.[378] Under s 501(6)(b) of the Migration Act 1958 (Cth), a person failed the character test if he or she had an "association" with someone, or with a group or organisation, whom the Minister reasonably suspected had been involved in criminal conduct. The Minister cancelled the respondent's visa because of his association with his two cousins about whom the Minister held that suspicion.

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370. At 195, [38(13)].
371. At 202, [66].
372. At 201, [61], 202, [66].
373. (2008) 168 FCR 576.
374. Clause 7 provided:

> (1) An authorised person may direct a person within a World Youth Day declared area to cease engaging in conduct that:
> (a) is a risk to the safety of the person or others, or
> (b) causes annoyance or inconvenience to participants in a World Youth Day event, or
> (c) obstructs a world Youth Day event.
>
> (2) A person must not, without reasonable excuse, fail to comply with a direction given to the person under subclause (1).
> Maximum penalty: 50 penalty units.
>
> (3) A person is not guilty of an offence under this clause unless it is established that the authorised person warned the person that a failure to comply with the direction is an offence.
>
> (4) In this clause, "*authorised person*" means:
> (a) a police officer, or
> (b) a member of an SES unit (within the meaning of the State Emergency Act 1989) or a member of the NSW Rural Fire Service, but only if the member is authorised by the Authority in writing for the purposes of this clause.

375. Section 58(1) gave the Governor power to make regulations for or with respect to any matter that by the Act required or permitted to be prescribed or that was necessary or convenient to be prescribed for carrying out or giving effect to the Act. Section 58(2) specifically authorised the making of regulations for or with respect to "regulating the use by the public of, and the conduct of the public on, World Youth Day venues and facilities". The expression "World Youth Day venue or facility" included a World Youth Day declared area (s 3 of the Act).
376. (2008) 168 FCR 576 at 597, [83].
377. Ibid.
378. (2007) 163 FCR 414.

204 According to the Minister's interpretation, the term "association" did not require any suspicion that the respondent was involved in the criminal conduct of which his cousins were suspected. Black CJ, French and Weinberg JJ held the principle of legality to be applicable. We have seen their Honours' analysis of the statutory rights engaged. Regarding the issue of interpretation, the court held that the task of construction required was to determine the limits of the "range" of meanings of the term "association".[379] Their Honours did not simply posit and then select the least rights infringing interpretation. Holding that the principle of legality tended against an interpretation of s 501 which made innocent association with suspected persons enough,[380] they held otherwise on the basis of nature and purpose.

205 In each of these cases, as in those in the United Kingdom that I reviewed in *Patrick's Case*, the court determined the scope or extent of a rights-infringing provision by applying the principle of legality in a way that engaged with the nature and importance of the right infringed, the purpose of the interference in question and the relation between the two. Although the courts did not describe this method as proportionality, it does in my view answer that general description. I am not suggesting that the analysis was the same in each case or that all proportionality analyses are the same. Neither is the case. But the analyses of the courts was the same kind of analysis that is carried out when determining whether interference is arbitrary in the human rights sense of being unreasonable and disproportionate in cases arising under the ICCPR (see above) when applying the principle of consistency.

206 I must emphasise, however, that this method for applying the principle of legality has only been adopted in reading-down cases of the kind that I have discussed in *Patrick's Case* and here. The method allows the court, consistently with the intention of parliament, to identify the least rights-infringing interpretation where that is the matter that is in issue. It does not seem to assist the court to determine what interpretation is to be adopted where the matter in issue is whether the parliament intended to interfere with rights or freedoms at all, as where the matter in issue is whether a particular power is applicable in the given case.

207 After consideration I have concluded that the present case falls into this second category. In this regard, I accept the alternative submissions made on behalf of Mr Kaba. The present case does not concern the scope of the power to conduct a routine check under s 59(1) of the Road Safety Act. The issue is whether, under that provision and no other, police have a power of routine stop and request at all. Mr Kaba and the Commission submit that the provision only applies where police have a power to stop and request under some other source of power. The Director submits that the provision itself confers that power. Because human rights are engaged, the principle of legality (and also s 32(1) of the Charter) is relevant to the resolution of this interpretative problem. The issue cannot be determined by a scope analysis. If it emerges upon proper examination that the legislature plainly and unambiguously intended to confer that power, this court must give effect to that interpretation even though it is rights-infringing. If an interpretation that avoids that infringement is reasonably open, I must adopt it.

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379. At 442, [106].
380. At 444, [114].

208 Next, to the interpretative principle in the Charter.

Section 32(1) of Charter

209 Section 32(1) of the Charter provides:

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

It can be seen that the application of this provision in the interpretation of statutory provisions is compulsory.

210 In *R v Momcilovic*,[381] Maxwell P, Ashley and Neave JJA held[382] that s 32(1) of the Charter was not intended to operate like s 3(1) of the Human Rights Act 1998 (UK) c 42. As illustrated by *Ghaidan v Godin-Mendoza*,[383] s 3(1) requires justification considerations (such as those specified in s 7(2) of the Charter) to be taken into account when identifying what interpretation was compatible with human rights. This permits the courts in the United Kingdom to adopt a remedial interpretation that, in some circumstances, might be contrary to the intention of the Parliament when originally enacting the provision in question.[384] Maxwell P, Ashley and Neave JJA held that s 32(1) had to be applied without reference to such considerations[385] upon the basis that it was intended to do no more than give express legislative expression to the common law principle of legality.[386]

211 In *Momcilovic*,[387] the High Court (by a majority) overruled the judgment of the Court of Appeal, but not upon the ground that it had adopted a mistaken interpretation of s 32(1) of the Charter. In the course of giving judgment all members of the High Court addressed that question. In *Slaveski v Smith*,[388] Warren CJ, Nettle and Redlich JJA examined these judgments and held that no ratio decidendi was revealed as to whether, when applying s 32(1), s 7(2) of the Charter had a role to play. As explained by their Honours:

- French CJ[389] and Crennan and Kiefel JJ[390] held that s 7(2) did not come into play when interpreting a provision in accordance with s 32(1);
- Gummow J,[391] with whom Hayne J agreed[392] and Bell J[393] held that s 7(2) did come into play in that context; and
- Heydon J (dissenting) held[394] that ss 32(1) and 7(2) were invalid but, if valid, s 7(2) did come into play when interpreting a provision in accordance with s 32(1).

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381. (2010) 25 VR 436.
382. At 457, [74].
383. [2004] 2 AC 557 at 571, [29]–[30] per Lord Nicholls.
384. Ibid.
385. (2010) 25 VR 436 at 465, [105].
386. At 464–5, [103]–[104].
387. (2011) 245 CLR 1 per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ.
388. (2012) 34 VR 206 at 214, [21] ("*Slaveski*").
389. (2011) 245 CLR 1 at 44, [35].
390. At 219, [572]–[574].
391. At 92, [168].
392. At 123, [280].
393. At 247–9, [678]–[682].
394. At 163–4, [408]–[409], 175, [439].

212 Faced with this unsettled position, Warren CJ, Nettle and Redlich JJA in *Slaveski* adopted the approach of French CJ to the interpretation of s 32(1). Their Honours cited with approval[395] this passage from the judgment of French CJ:[396]

> … statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.

Warren CJ, Nettle and Redlich JJA then explained the application of these principles as follows:[397]

> Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.[398]

It can be seen that the approach of Warren CJ, Nettle and Redlich JJA was to interpret and apply s 32(1) like the common law principle of legality, but with a wider feel of application, as had Maxwell P, Ashley and Neave JJA in *R v Momcilovic*.

213 In *Noone v Operation Smile (Australia) Inc*,[399] Warren CJ and Cavanough AJA again discussed the conflicting views expressed by the members of the High Court in *Momcilovic*. Applying the applicable laws of precedent, their Honours held that the dissenting judgments of Hayne and Heydon JJ could not form part of the ratio decidendi in relation to whether s 7(2) informed the application of s 32(1) and, therefore, there was no ratio on that point.[400] Their Honours left open whether the Court of Appeal was required to follow the decision of Maxwell P and Ashley and Neave JJA in *R v Momcilovic* in the circumstance that, among others, a majority of the High Court had disagreed with this decision.[401] Nettle JA was of the view that there was no majority position in the High Court in relation to this question; therefore the Court of Appeal should follow its previous decision in *R v Momcilovic* until the High Court determined otherwise.[402]

395. (2012) 34 VR 206 at 215, [23].
396. (2011) 245 CLR 1 at 50, [51].
397. (2012) 34 VR 206 at 215, [24].
398. *Momcilovic* (2011) 245 CLR 1 at 45–50, [40]–[50] per French CJ.
399. (2012) 38 VR 569 at 575–6, [27]–[28].
400. At 576, [29].
401. At 576, [30].
402. At 475, [142].

214 In *WBM*,[403] Warren CJ (Hansen JA agreeing) again expressed the view that there was "no obvious ratio from the High Court in *Momcilovic v R* as to whether s 7(2) should be considered as part of the s 32(1) interpretative exercise".[404] On the application of s 32(1), the Chief Justice said:[405]

> [I]f a statutory provision interferes with an identified human right, then an interpretation must be preferred that does not interfere with that right or least interferes with that right, provided it is not contrary to statutory intent.

215 The issue concerning the relationship between ss 32(1) and 7(2) was acknowledged and also left open by Redlich and Tate JJA and T Forrest AJA in *Director of Public Prosecutions v Leys*,[406] and by Tate JA in *Taha*.[407]

216 Whether or not s 7(2) informs the application of s 32(1), it appears to be clear that s 32(1) does not permit the adoption of an interpretation that is contrary to the intention of the parliament when it enacted the legislation. As was pointed out by Tate JA in *Taha*,[408] six members of the High Court so held in *Momcilovic*.[409] To that extent, the judgment of Maxwell P, Ashley and Neave JJA in *R v Momcilovic*[410] that, unlike s 3(1) of the Human Rights Act in the United Kingdom, s 32(1) of the Charter did not permit an interpretation to be adopted which was contrary to parliament's intention when originally enacting the provision in question, has been confirmed. In this respect, the scope of s 32(1) of the Charter is narrower than that of s 3(1) of the Human Rights Act.

217 In *Nigro v Secretary to the Department of Justice*,[411] Redlich, Osborn and Priest JJA approached the interpretation and application of s 32(1) on that basis. Their Honours went on to state the applicable principles in the following terms:[412]

> Section 32(1) is not to be viewed as establishing a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the statute.[413] Accordingly, as was observed in *Slaveski v Smith*,[414] the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky*.[415] The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.[416]

403. (2012) 43 VR 446.
404. At 473, [122] (footnotes omitted).
405. At 468, [97].
406. (2012) 44 VR 1 at 46–7, [138].
407. [2013] VSCA 37 (4 March 2013) at [191].
408. At [190].
409. (2011) 245 CLR 1 at 50, [50]–[51] per French CJ, 92, [170] per Gummow J, 123, [280] per Hayne J, 210, [544]–[545], 217, [565]–[566] per Crennan and Kiefel JJ and 250 [684] per Bell J.
410. (2010) 25 VR 436 at 457, [74].
411. (2013) 41 VR 359 at 382, [82].
412. At 383, [85].
413. *R v Momcilovic* (2010) 25 VR 436 at 459, [82] per Maxwell P, Ashley and Neave JJA.
414. (2012) 34 VR 206 at 214, [20] per Warren CJ, Nettle and Redlich JJA.
415. (1998) 194 CLR 355 per Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ.
416. *Slaveski* (2012) 34 VR 206 at 215, [23] per Warren CJ, Nettle and Redlich JJA.

I do not take this statement to be different to what was said by Warren CJ, Nettle and Redlich JJA in *Slaveski* (see above).

218 Confronted with this body of authority, the parties did not place the relationship between s 32(1) and s 7(2) of the Charter in issue. It was submitted that the application of s 32(1) should be approached in accordance with the judgment of Warren CJ, Nettle and Redlich JJA in *Slaveski* and that s 32(1) operates like the principle of legality but with a wider field of operation, ie one that takes the human rights specified in the Charter into account at their highest and without regard to s 7(2). I accept those submissions and will interpret the provision in question on that basis, beginning with the legislative history of that provision. I note that, so interpreted, there is no doubt that the right to privacy is included in the analysis, for that is specified in s 13(a) of the Charter. That is engaged as regards the driver. The other relevant right is freedom of movement (s 12). That is engaged as regards the driver and the passenger.

Statutory interpretation: application

Legislative history

219 Legislation with respect to the production on demand of a driver's licence appears to have begun in Victoria with the Motor Car Act 1909. That Act generally regulated the use of motor cars on public highways. A short enactment having only 25 sections, its fundamental principles have endured: to be used on a public highway, motor cars had to be registered (s 4(1)); to drive on a public highway, the driver had to be licensed (s 6(1)).

220 In that context, s 6(4) made provision for the production of a driver's licence on demand[417] (not on request or signal as under s 59(1)(a) of the current Act). No express power for the member of the police force to make a demand was conferred. The obligation to produce the driver's licence or demand was closely connected to (in the same section as) the prohibition on driving without a licence. Persons driving a motor car on a public highway (which was lawful only if the driver was licenced) were required to produce their driver's licence upon demand by the police. Section 20(1) made contravention of the Act, and therefore non-compliance with that obligation, an offence. There is nothing in the legislation to suggest that s 6(4) was part of a scheme in which the authority of the police to make the demand was to be separately conferred.

221 The 1909 Act was replaced by the Motor Car Act 1928. The Motor Car Act 1930 replaced s 6(4) of the 1928 Act with subss 6(4), (5) and (6).[418] The new provisions operated upon requests by police, not demands, and required not only

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417. Section 6(4) provided as follows:

> (4) Any person driving a motor car as aforesaid shall on demand by any member of the police force produce his licence and if he fail to do so he shall be guilty of an offence against this Act unless he has a reasonable excuse and does within seven days produce his licence at some police station specified by the member of the police force demanding its production.

418. Section 12 of the 1930 Act provided that, for s 6(4) of the 1909 Act, there shall be substituted the following subsections:

> (4) Any person driving a motor car upon any public highway shall when requested so to do by any member of the police force produce his licence for inspection and state his name and address.
>
> (5) If such person fails to produce his licence or refuses to state his name and address or states a false name or address he shall be guilty of an offence against this Act:

production of the driver's licence but also the driver's name and address (s 6(4)). That appears to be the origin of the equivalent provision in the current Act (s 59(1)(a)). Non-compliance was made an offence, subject to a reasonable excuse defence (s 6(5)). The police were given a power of arrest of persons refusing to state their name and address (s 6(6)).

222 Section 22(1) of the 1930 Act conferred an express power to give reasonable directions for the purpose of carrying into execution the provisions of the Act or any regulations, being the apparent origin of s 59(5) of the current Act. The licensing provisions of s 6 were thus separate from the general power of direction in s 22(1). It is clear from the terms and context of ss 6 and 22 that they dealt with different (if potentially overlapping) subjects. I think that is still the case. It follows that s 59(5) of the current Act (which is connected to s 59(1)(b)) does not tell us much about the scope of s 59(1)(a). No express power to make a request was conferred by the provisions of the 1930 Act. The drafting design was the same as s 6(4) of the 1909 Act and the intention was clearly to strengthen the operation of the provisions in important respects.

223 The Motor Car Act 1951 made provision for the licensing of drivers (s 21) and (among other things) the production of a driver's licence and the statement of the driver's name and address (s 28), all in Pt III ("Licensing of Drivers"). Thus the connection was retained. The general power of reasonable direction (s 76(1)) was now dealt with separately in Pt VI ("General and Supplementary"). The actual terms of the provisions did not change in any material way. The drafting design was retained.

224 The Motor Car Act 1958 followed the same approach, in arrangement and content (see s 22 (licensing) and s 29 (production of a licence and statement of name and address), both in Pt III ("Licensing of Drivers"), and s 79 (power of reasonable direction) in Pt VI ("General and Supplementary")).

225 The Motor Car Act was replaced by the Road Safety Act 1986, which is much more comprehensive legislation. The Road Safety Act is currently in force and contains the provisions which are in issue in the present case. It has been amended in various ways since 1986, including as to s 59(1). None of the amendments are particularly relevant. I will here describe the Act as it is currently in force (Reprint No 15 incorporating amendments as at 20 February 2013).

226 The general purposes of the Road Safety Act are set out in s 1 as follows:

(a) to provide for safe, efficient and equitable road use; and

(ab) to set out the general obligations of road users in relation to responsible road use; and

(b) to improve and simplify procedures for the registration of motor vehicles and the licensing of drivers; and

(c) to prevent the rebirthing of stolen vehicles; and

Provided that any person failing to produce his licence as aforesaid who gives a reasonable excuse for such failure and within seven days after such failure produces his licence at the police station (if any) specified by the member of the police force who requested its production shall not in respect of such failure be guilty of an offence.

(6) Any person who is requested by a member of the police force as aforesaid to state his name and address and who refuses to state his name and address or gives a false name and address may be apprehended (with or without warrant) by any member of the police force who shall take such person before a justice of the peace to be dealt with according to law.

(d) to ensure the equitable distribution within the community of the costs of road use.

As material, it can be seen that the general emphasis is upon the "safe" use of roads and the "obligations" of road users.

227 The Act separates the licensing of drivers (in Pt 3) from offences and legal proceedings (Pt 6, which contains s 59). Section 17 specifies the purposes of licensing drivers in a way that emphasises public protection, which I consider to be an important interpretative consideration.[419] It continues to prohibit and make an offence of unlicensed driving (s 18).

228 I can now refer to s 59 in its current form, which is the form applicable in the present case. Its heading — "General duty of drivers or persons in charge of motor vehicles" — reflects the language but I think not the full meaning of the provision.

229 Section 59(1)(a) and (b) provides:

> The driver or person in charge of a motor vehicle on a highway has the following duties —
>
> (a) to stop the motor vehicle, produce for inspection his or her driver licence document or permit document and state his or her name and address if requested or signalled to do so by —
>
> (i) a member of the police force or an officer of the Corporation or of the Department of Transport (being an officer authorised in writing by the Corporation or the Secretary of the Department of Transport as the case requires, in that behalf); or
>
> (ii) an officer of or person authorised in writing in that behalf by any municipal council who has reasonable grounds for believing that any provision of the regulations relating to the mass or dimensions of a motor vehicle or trailer or to the number of hours during which a person may drive a motor vehicle or to the carrying of a log book on a motor vehicle is being contravened; and
>
> (b) to obey any lawful direction given to him or her by a member of the police force under subsection (5).

The power of lawful direction in subsection (5) is express, as follows:

> A member of the police force may give such reasonable directions to a person driving or in charge of a motor vehicle on a highway as are, in the opinion of that member, necessary —
>
> (a) for carrying into execution the provisions of this Act or the regulations; or
>
> (b) for the purposes of any traffic survey being carried out in the vicinity of the highway.

230 It can be seen that s 59(1) operates when the police make a request or give a signal to the driver (or person in charge) to stop the vehicle. The driver is obliged to comply with the request or signal. Although the driver is not expressly obliged

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419. Section 17 specifies the purposes as follows:

(a) to ensure that people who drive motor vehicles on highways are competent drivers; and
(b) to ensure that drivers are aware of safe driving practices and road law; and
(c) to ensure that people who are, or who become, unsuited to drive are not permitted to drive on highways; and
(d) to enable the identification of drivers for the purposes of law enforcement and accident investigation.

to keep the vehicle at a standstill,[420] it is a necessary inference that he or she is obliged to do so until the police have had a reasonable opportunity to exercise their powers.[421] I took this into account when deciding that the exercise of these powers (as I find them to be) interferes with the right to freedom of movement of drivers (and necessarily passengers). The driver is then obliged to produce his or her licence and state his or her name and address but is not subject to further restraint (unless, say, he or she is lawfully arrested for failing to comply or the police give a direction under s 59(5)).

231 It is clear that s 59(1) confers no powers (expressly or impliedly) on police (or other specified persons) in relation to passengers. It did not confer any power on the police in the present case to require Mr Kaba to state his name or address or to prevent him from walking away. But, as I have said, passengers are necessarily interrupted in their travel by the exercise of these powers. Most reasonable passengers would not feel free to leave and this would usually not be a practical possibility. Therefore their freedom of movement is restricted by the exercise of these powers.

232 The drafting scheme of s 59(1)(a)(i) and (ii) is to impose on drivers and person in control of motor vehicles on highways the obligation to stop the vehicle, produce the licence and state the name and address by reference to the making of a request or signal by a police officer or other officer of the specified kind. In s 59(1)(a)(i), the police and other authorised officers are specified without reference to belief. In s 59(1)(a)(ii), the authorised officers must have the specified belief and reasonable grounds for it. I think the implication is that requestors having the specified status possess the power of request. The implication is most strong in relation to s 59(1)(a)(ii). If the authorised officer does not have the power of request under the provision, why specify the need for reasonable belief? That implication feeds back into s 59(1)(a)(i), indeed the section as a whole. It tends that, by necessary implication, the nature of the scheme is that all requestors with the specified status possess the power of request or signal.

233 Section 59(2) makes it an offence for a person to "[fail] to do anything that he or she is required to do under subs (1)". Different penalties are specified (materially) for failing to produce a driver's licence (s 59(2)(a)), failing to state name and address (s 59(2)(b)) and failing to stop (s 59(2)(c)). There is no reference to the power to make the relevant request. Section 59(4)[422] creates a defence to the offence of failing to stop on request under s 59(1)(a) or (1A)(a). Significantly, it is not an offence if the requestor is not in uniform and the driver

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420. In a different situation, s 54(3) confers upon police an express power to make a request of or signal a driver to stop the vehicle and remain stopped.

421. *Lodwick v Sanders* [1985] 1 WLR 382 at 389 per Watkins LJ ("*Lodwick*").

422. Section 59(4) provides:

> A driver or person in charge of a motor vehicle who fails to stop when required to do so in accordance with subsection (1)(a) or (1A)(a) is not guilty of an offence if —
> (a) the person making the request or signal is not in uniform; and
> (b) the driver or person in charge believed that that person was not —
> (i) a member of the police force, a protective services officer or an authorised officer of the Corporation or an authorised officer of the Corporation or of the Department of Transport, as the case requires; or
> (ii) an officer of or person authorised in writing in that behalf by a municipal council.

believes that the requestor did not have the specified official status. The assumption appears to be that a person in uniform and having that status possesses the power of request.

234 Other obligations to stop and produce are imposed by s 59(1)(c) and (d)[423] and (1A), following the same general scheme. All appear to operate upon the basis that a power is necessarily implied.

235 Section 59(7)[424] is an example of a provision conferring an express power on the police and other officers. Notably, s 59(1) confers no such express power. Besides s 59(7), there are many other examples of particular powers being expressly conferred, including the power of police in s 53 to "require" drivers to undergo a preliminary breath test, the power of police in s 54(3) to "request or signal" a driver to stop and remain stopped at a preliminary testing station,[425] the various powers of police in s 55 to require persons to do specified things in connection with breath analyses and the power to give reasonable directions in s 59(5). Abundant as these and other[426] examples are, I do not detect any scheme that, when a power is intended to be conferred, it is done expressly. There are other examples of provisions which, like s 59(1)(a), specify the obligation to comply with a request without expressly authorising the making of the request (see eg s 60(1) (duty of owner of motor vehicle to give information about driver) and s 60A(1) (duty of owner of trailer to give information about driver of towing vehicle)).

236 Some insight into the intended operation of s 59(1) can be obtained from s 59(10), which provides:

> Neither the Crown nor the person making a request under subsection (1)(d) or a requirement under subsection (7) nor any other person is liable for any loss or damage occasioned by or arising out of anything done in the exercise or purported exercise in good faith of the powers conferred by this section.

As you have seen, s 59(1)(d) is based on the same drafting design as s 59(1)(a) in that it refers to requests and signals made by persons having a specified status without expressly conferring that power. Section 59(7) has a different design in

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423. Section 59(1)(d) provides that a driver has a duty:

> if requested or signalled to do so by a member of the police force or an officer of the Corporation (being an officer authorised in writing by the Corporation in that behalf) or by an officer of or person authorised in writing in that behalf by any municipal council, to stop the motor vehicle and allow it together with its load and any trailer attached to the motor vehicle and the load of the trailer (whether those loads are goods or passengers or both) to be weighed or to be taken to be weighed at a weighbridge or weighing machine that is agreed on by the driver or person in charge of the motor vehicle and the person making the request or, if there is no agreement, at the weighbridge or weighing machine that is nominated by the person making the request.

424. Section 59(7) provides:

> If a motor vehicle that is used on a highway and its load, together with any trailer attached to the motor vehicle and the load of the trailer, exceeds the prescribed maximum weight or any prescribed maximum dimension, a member of the police force or an officer of the Corporation (being an officer authorised in writing by the Corporation in that behalf) may require the driver or person in charge of the motor vehicle to unload any part of the load that is necessary to bring the motor vehicle, trailer or load within the prescribed maximum weight or dimension.

425. Section 49(1)(d) makes it an offence for a person to refuse or fail to comply with a request or signal to stop a motor vehicle, and remain stopped, under s 54(3).

426. See also ss 62(1) and 63.

that it expressly confers a power to "require" on the person having the specified status. Notably, s 59(10) refers without differentiation to requests "under" s 59(1)(d), requirements "under" s 59(7) and the "powers" conferred by s 59. This suggests that the powers are implicitly conferred where they are not expressly conferred.

237 Section 59(1)(a) was the subject of the decision of the Court of Appeal in *Tsolacis v Kelly*.[427] A police officer asked the appellant for his name and address as he was alighting from his vehicle, which he refused to provide. When convicted for failing to comply with s 59(1)(a), he appealed on the ground that he was not the "driver" of a motor vehicle. Dismissing the appeal, Winneke P (Hayne and Kenny JJA agreeing) held that the term "driver" contemplated a person who had stopped the vehicle, turned off the ignition and alighted from the vehicle.[428] In reaching that conclusion the President approached the interpretation of an application of the provision on the basis that it:[429]

> … creates in drivers three duties raised as the consequence of the conduct of a police officer; the first, to stop the vehicle when requested or signalled to do so; the second, to produce a licence for inspection when requested to do so; and the third, to state the driver's name and address when requested to do so.

238 What is presently important about this reasoning is that it emphasises the duties imposed upon drivers that arise in consequence of the conduct of the police in making a request. The reasoning is consistent with interpreting the provision such that it gives the police the authority to engage in the conduct of making a request giving rise to that duty.

239 In my opinion, this analysis of the history of the Road Safety Act, and its current provisions, reveals that the Victorian Parliament unmistakably intends that s 59(1)(a) is to confer, by necessary implication, both a duty on drivers and a power to stop on police (and other officers). It is not reasonably open to interpret the provision otherwise.

240 In reaching this conclusion, I take into account that two features have characterised the provision from the very outset. The first is that the duty on the driver to stop has been imposed in the context of the driver's licence regulatory system. The second is that the duty has been imposed by reference to a demand (or more recently a request) made by a police officer (or more recently other authorised officers). These two features strongly point in the direction of my conclusion. Police and other authorised officers will likely have the discipline and training necessary for the appropriate exercise of these powers for the purposes of the regulatory system. There would appear to be no reason for requiring independent conferment of authority upon them.

241 The road safety purposes of the legislation also strongly point in that direction. There is no foundation in the history or present content of the legislation, or any related legislation, for the proposition that demands or requests can only be made by police or other officers who are independently authorised. It would defeat the purposes of the legislation to interpret the provision as requiring that independent authority because no provisions, in this or any other legislation, confer it or allow it to be conferred.

427. (1997) 25 MVR 549.
428. At 551.
429. At 551.

242 Besides these powerful general considerations, certain particular aspects of the provisions of Pt 6 support the conclusion that s 59(1)(a) confers both a duty on drivers and a power on police. I refer to ss 59(1)(a)(ii), 59(4) and 59(10), as discussed above.

243 I reach this conclusion after taking full account of the individual rights and freedoms and the human rights that are engaged under the principle of legality at common law and under s 32(1) of the Charter. I repeat that I have approached the interpretation of s 59(1)(a) taking those rights and freedoms and human rights at their highest and unlimited by any proportionality considerations, for these are not presently relevant. Even so, for the reasons I have given, it would be contrary to the plain and unmistakable intention of the Parliament to interpret the provisions as conferring only a duty on drivers and that interpretation is not warranted by s 32(1) of the Charter.

244 In reaching that conclusion, I have considered authoritative decisions of courts on the interpretation of comparable road traffic legislation in other States of Australia and in the United Kingdom and Canada, as discussed in the written and oral submissions of the parties. They fortify me in that conclusion.

Comparative analysis

Australia

245 To begin, in *Richards*[430] the appellant was convicted of failing to stop when called upon by the police to do so and other offences. Section 53(1) of the Road Traffic Act 1974 (WA) provided that it was an offence for the driver of a vehicle to refuse to state his name and address, "when required by a patrolman" (para (a)) or to stop his vehicle when called upon to do so by a patrolman (para (b)). No express power to make such a requirement or call upon a driver was conferred.

246 In the appeal against the conviction, the driver relied upon the "common law … right to the unobstructed use of the highways for the purpose of legitimate travel".[431] He contended that only express words were sufficient to authorise interference with this right. In his submission, s 53(1) did not confer a power on police to stop vehicles for any or no reason.

247 Wallace, Brinsden and Smith JJ rejected these submissions. I have already relied upon their Honour's reasoning in relation to the common law right to free use of the highway. What is presently important is that Wallace J held that "it is clear that a statutory duty is imposed upon the citizen to obey a patrolman's signal to stop".[432] In generally accepting the reasons of Wallace J, Brinsden J held that the right of a person to use a highway driving a vehicle was now subject to licence. There was no doubt that s 53(1) impliedly "imposes as much a duty [on the driver to stop] as it confers a power [on the police to require the driver

430. Unreported, Full Court of the Supreme Court of Western Australia, Wallace, Brinsden and Smith JJ, 2 April 1982.
431. Ibid 4 in the judgement of Wallace J.
432. Ibid.

to stop]".[433] Smith J also agreed with Wallace J. His Honour held that "on its proper interpretation it is clear" that the provision imposes both a duty and a power.[434]

248 This interpretation of s 53(1) of the Road Traffic Act was followed in the Supreme Court of Western Australia in the *Krysiak* cases. At issue was whether the police were required to hold a reasonable suspicion before exercising the power conferred. In *Krysiak v McDonagh*,[435] E M Heenan J held that the provision gave police "an absolute right to call upon the applicant; to stop his vehicle; give his name and address; and to produce his driver's licence".[436] Reasonable suspicion was not required. Leave to appeal was refused by the Court of Appeal in *Krysiak v McDonagh*,[437] although the trial judge's decision in this respect was apparently not a ground of appeal.

249 In *Krysiak v Carruthers*,[438] Beech J followed E M Heenan J in relation to the interpretation of s 53(1),[439] which his Honour saw to be consistent with the decision of the Full Court in *Richards*.[440] Leave to appeal was refused by the Court of Appeal in *Krysiak v Carruthers*[441] but again the interpretation of s 53(1) was not apparently raised as a ground of appeal.

250 Having regard to *Richards* and the *Krysiak* cases, it appears to be settled in Western Australia that s 53(1) of the Road Traffic Act, by unmistakable necessary implication, confers both a power on police to request and a duty on the driver to comply with the request. In my view, s 59(1) of our Road Safety Act is to be interpreted in the same way.

251 Section 39(1) of the Road Traffic Act 1949–1985 (Qld) was an example of a provision that expressly confers power on the police to request a driver to stop a vehicle, produce his or her licence and state his or her name and address.[442] This power is widely interpreted.[443] Likewise, subss 42(1) and (2) of the Road Traffic Act 1961 (SA) conferred an express power on the police to request and an

433. Ibid 4 in the judgment of Brinsden J. His Honour expressly declined to follow *Waterfield* [1964] 1 QB 164 on this point.
434. Ibid 2 in the judgment of Smith J.
435. [2012] WASC 270 (4 July 2012).
436. At [42].
437. [2013] WASCA 100 (16 April 2013) per McLure P, Buss and Mazza JJA.
438. [2012] WASC 472 (11 December 2012).
439. At [49]–[51].
440. Unreported, Full Court of the Supreme Court of Western Australian, Wallace, Brinsden and Smith JJ, 2 April 1982.
441. [2013] WASCA 210 (10 September 2013) per McLure P, Buss JA and Hall J.
442. Section 39(1) provides:

> Any member of the Police Force who …
> …
> (b) is making inquiries or investigations with a view to establishing whether or not an offence against this Act … has been committed by any person;
> …
> may require that person—
> (i) … where that person is the driver of any vehicle … to stop that vehicle …;
> (ii) to produce any licence issued to him under this Act; and
> (iii) to state his name and address …

443. *Garrow v Platsis; Ex parte Platsis* [1989] 1 Qd R 154 per Andrews CJ, Thomas and de Jersey JJ.

express duty on the driver to comply.[444] This provision has application to all vehicles on the road (including stationary vehicles)[445] and reasonable suspicion is not required.[446] However, there is no doubt that such a power of request can be expressly conferred. The issue is whether the power is conferred by s 59(1) of the Road Safety Act by necessary implication.

252 As I have mentioned but not yet discussed, there is a helpful analysis of the South Australian provisions in the judgment of Bleby J in *Prinse*.[447] According to his Honour, this legislation expresses the policy that, as the necessary price to be paid for effective enforcement of the road safety law, all drivers must stop and state their name and address:[448]

> Because breaches of the Road Traffic Act or the Motor Vehicles Act can, in some cases, not readily be detected, it is understandable that Parliament considered that there needs to be adequate powers vested in those who have the responsibility of policing the relevant laws to detect and prevent such breaches. Without the ability to stop and question motorists, many offences, some of a quite serious nature, could well go undetected, thereby encouraging others to commit similar offences, knowing that there is little risk of detection. Apart from coincidental discovery if a driver is involved in an accident or in the commission of some other traffic offence, s 42 provides the only effective method of detecting possible breaches of s 74 (Driving without holding a licence or permit) and s 91(5) (Driving whilst disqualified) of the Motor Vehicles Act.
>
> The requirement to stop and identify oneself, even where an offence has not been committed, is a small sacrifice to make and a very minor infringement of the right — I would prefer to call it a privilege — to drive a motor vehicle on public roads.

Bleby J went on to state that capricious exercise of the power to request must be unlawful:[449]

> There may be circumstances where it can be shown that the exercise of the powers under s 42 has been carried out capriciously or for an identifiable purpose not connected at all with legitimate policing of the law. In those circumstances, the stopping and what follows may be unlawful. Examples, some of which were mentioned in argument, may include that of a male police officer stopping a vehicle and asking the female driver for her identity for the purposes of inviting her out, or stopping a vehicle and offering to purchase it, or to inquire of the driver about the result of a sporting event.
>
> Responsible policing does not necessarily require in all circumstances the disclosure of the immediate or ultimate purpose of an inquiry. Indeed, in some circumstances, such disclosure may well be contra-indicated. It cannot be presumed, because the exercise of

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444. Subsections 42(1) and (2) provide:

(1) A member of the police force or an inspector may:
(a) request the driver of a vehicle on a road to stop that vehicle;
(b) ask the driver or the person apparently in charge of a vehicle (whether on a road or elsewhere) questions for the purpose of ascertaining the name and place of residence or place of business of that driver or person, or of the owner of the vehicle, or the nature or constituents of the load on the vehicle, or for the purpose of estimating the mass of the vehicle.

(2) A person must forthwith —
(a) comply with a request made under subsection (1) to stop a vehicle;
(b) truthfully answer any questions put under subsection (1).

445. *Cavanagh v Galkowski* (1979) 20 SASR 322 per Jacobs J.
446. *Lovegrove v Spangler* (1988) 145 LSJS 411 at 412 per O'Loughlin J; *Prinse* (1998) 196 LSJS 267 at 272; 27 MVR 50 at 54 per Bleby J.
447. (1998) 196 LSJS 267; 27 MVR 50.
448. At LSJS 271–2; MVR 54.
449. Ibid.

> the power under s 42 is not justified in a particular case by reference to a suspicion or belief, that it is exercised for an unlawful purpose. However, if it is quite apparent from the nature of the inquiry made or directions given that the stopping and questioning has no connection whatever with proper policing inquiries but is merely a capricious exercise of the power or an abuse of the power for a purpose irrelevant to law enforcement, then it may well fall into the unlawful category. However, without such a finding, I cannot agree with the learned magistrate that the exercise of the powers in respect of a random selection of motorists is unlawful, or that there was anything in the evidence to suggest that [the constable of police] was, on this occasion, acting unlawfully.

As already indicated, with respect I generally agree.

253 By contrast, s 96[450] of the Motor Vehicles Act 1959 (SA) does not expressly confer a power of request. Like s 59(1) of our Road Safety Act, it confers a duty to comply. This provision (as then in force) was considered by the Supreme Court of South Australia in *Jones v Daire*.[451] Without suspicion, police stopped a driver and requested production of her licence. The driver's husband objected and was convicted of hindering police in the execution of their duty. Dismissing his appeal, Zelling J held that the officers were acting lawfully in the course of their duty. Section 96(1) was "in perfectly general terms" and it did not matter why the police asked for production of the driver's licence.[452] A predicate of this conclusion is that the provision confers both a power and a duty.

254 The Australian authorities support my reasoning that s 59(1) of our Road Safety Act confers both a duty and a power by way of unmistakable necessary implication.

255 Now to the United Kingdom, where we will find that the position is much the same.

United Kingdom

256 In *Waterfield*[453] a struggle ensued when the police prevented the appellants from removing a parked motor vehicle that had been involved in the commission of serious offences. Lord Parker CJ, Ashworth and Hinchcliffe JJ overturned the appellants' conviction for assaulting police in the course of their duty and related offences because the police had no authority to detain the vehicle.

257 Giving the judgment of the court, Ashworth J held that, as the police conduct was "prima facie an unlawful interference with a person's liberty or property",[454] the proper approach was to consider whether:[455]

> (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.

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450. Section 96(1) provides:

> (1) The driver of a motor vehicle, if requested by a member of the police force to produce his licence, shall produce such licence either —
> (a) forthwith to the member of the police force who made the request; or
> (b) within 48-hours after the making of the request, at a police station conveniently located for the driver, specified by the member of the police force at the time of making the request.
> Penalty: Two hundred dollars.

451. (1983) 32 SASR 369.
452. At 372.
453. [1964] 1 QB 164.
454. At 170.
455. At 171.

His Honour held that, although the police were acting in a general sense in the course of their duty to preserve evidence, they had no particular authority to prevent removal of the vehicle. Therefore the appellant could not be convicted of assaulting police in the execution of their duty.[456]

258 The prosecution relied on s 223 of the Road Traffic Act 1960, 8 & 9 Eliz 2, c 16 which relevantly provided that "a person driving a motor vehicle on a road … shall stop … on being so required by a police constable in uniform". It was contended that, quite apart from the position at common law, the police were acting in the execution of a duty arising under that provision.

259 Ashworth J doubted, without deciding, that the provision permitted the police to require both "a moving vehicle to stop [and] … a stationary vehicle not to move".[457] In a passage relied upon by Mr Kaba, his Honour held that s 223 merely gave "a power as opposed to laying down a duty" and did not authorise "something … which … the constable had in the circumstances no right to do".[458] I take his Honour here to mean that the provision conferred a power on police to require a driver to stop the vehicle but did not confer a duty on police to take action beyond the scope of that power, namely to detain the vehicle.

260 This decision provides something for both sides of the issue in the present case. On the interpretation issue, it has to be read with subsequent authorities (see below).

261 In *Hoffman*,[459] the defendant was randomly directed by police out of a stream of traffic to go into a traffic census area beside a motorway, which he refused to do. Overturning his conviction for failing to comply with a traffic direction, Lord Widgery CJ (Ashworth and Melford Stevenson JJ agreeing) held that the legislation relied upon by the police did not authorise the direction given for the purpose of a census.

262 Following *Waterfield*, Lord Widgery CJ held that the police direction interfered with the defendant's personal liberty and property and then turned to whether the police were acting lawfully within the course of their duty. As there was nothing to suggest that life or property was in danger, the police "neither at common law nor by any statutory provision [had] … any right to direct the defendant to leave the motorway and go into the census area".[460] On the interpretation issue, this decision is to be distinguished.

263 In *Winter v Barlow*,[461] s 159 of the Road Traffic Act 1972 (UK) c 20 (the successor to s 223 of the 1960 Act) provided: "A person driving a motor vehicle on a road … shall stop the same on being so required by a constable in uniform, and if he fails to do so he shall be guilty of an offence". Acting without suspicion, police in uniform stopped the appellant when driving a motor vehicle on a road. Then, suspecting him of drunk driving, they sought to administer a breath test, which he refused to take. He appealed against his conviction for refusing to take the test upon the ground that evidence of the offence should have been excluded because the requirement to stop was unlawful.

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456. Ibid.
457. At 172.
458. Ibid.
459. [1974] 1 WLR 374.
460. At 379.
461. [1980] RTR 209 per Eveleigh LJ and Kilner Brown J ("*Winter*").

264 After referring to *Waterfield*, Eveleigh LJ (Kilner Brown J agreeing) said that it was not necessary to go into "the precise effect of s 159".[462] However, his Lordship went on to say that it:[463]

> … may be thought and may be argued that that section does not give a direct power as such anyway, but it simply imposes a duty on a person in the circumstances therein referred to, namely, when required to stop by a constable in uniform.

On the concession of the prosecution, the court approached the scope of s 159 upon the basis that it did not give "a police constable a power willy-nilly to stop a motor vehicle".[464] It concluded that the evidence of the offence should not have been excluded because there had been "no suggestion of police malpractice".[465] Because the court did not go into s 159 and the prosecution made a key concession, I cannot derive much of benefit from this decision.

265 *Beard v Wood*[466] also concerned s 159 of the 1972 Act. Acting under that provision and without suspicion, an officer in uniform signalled the defendant to stop his lorry. The officer wanted to check whether the defendant had valid documentation and was driving a roadworthy lorry. The justices acquitted the defendant on a charge of failing to comply with the officer's signal on the ground that s 159 was not a source of power to give such a direction.

266 Upholding the prosecutor's appeal, Wien J (who gave the first judgment at the request of Lord Widgery CJ) held that s 159 conferred both a duty and a power on the police:[467]

> Applying the ordinary canons of construction … it seems to be plain that a constable has the power to stop a motorist on a road provided the constable is in uniform and requires that person to stop. There is nothing in that section which leads one to suppose that there is anything that requires the prosecutor to prove that the police constable is acting in the execution of his duty under some common law powers. It would seem on the face of it that the constable derives his duty as well as his power from the terms of section 159 itself.

It followed that, under s 159, drivers must stop when required to do so by a constable in uniform.[468]

267 Referring to *Waterfield*,[469] Wien J said that Ashworth J had been "clearly right"[470] in the observations he made about the ambit of s 223 of the 1960 Act. As we have seen, those observations were that the provision conferred a power on police to require a driver to stop but did not support a duty to detain the vehicle.

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462. At 213.
463. Ibid.
464. Ibid.
465. At 214. *Winter* was followed in *Such v Ball* [1982] RTR 140 ("*Such*") where police made a routine stop of a driver for the sole purpose of administering an alcohol breath test, which proved positive. Section 8(1)(a) of the 1972 Act permitted that course only on suspicion, which the police did not have. The justices acquitted the driver of drunk driving after excluding evidence of the positive test by reason of the unauthorised stop. Donaldson LJ and Forbes J held that evidence of the test should not have been excluded because the justices did not find that the routine stop constituted malpractice. It appears that s 159 was not relied upon by the police.
466. [1980] RTR 454 per Lord Widgery CJ and Wien J ("*Beard*").
467. At 457–8.
468. At 459.
469. [1964] 1 QB 164 at 172.
470. [1980] RTR 454 at 458.

268 However, Wien J distinguished *Waterfield* on the ground that it was a case concerning detention of a vehicle. He also distinguished *Hoffman*[471] upon the ground that the issue was whether the constable was acting in the course of his duty.[472] In the present case, there was no question of the police not acting bona fide (which might have justified a different conclusion) and it was not necessary to refer to the general powers of the police at common law.[473]

269 Lord Widgery CJ held that the officer was not exceeding his duty by requiring the driver to stop without suspicion because such a requirement was authorised by s 159.[474]

270 Section 59(1) of our Road Safety Act can be relevantly compared with s 159 of the 1972 United Kingdom Act. *Beard* unequivocally supports my conclusion as to how our provision should be interpreted.

271 In *Steel v Goacher*,[475] police in uniform saw a strange car being driven by two men after midnight through "a good class residential area".[476] Without suspicion, they stopped the driver to make a "random crime check".[477] Smelling alcohol on his breath, they required him to submit to a breath test under s 8(1)(a) of the 1972 Act,[478] which proved positive. The justices convicted the driver of drunk driving after rejecting his submission that evidence of the test should be excluded because, lacking common law authority to require him to stop, police were not acting in the course of their duty when they later required him to submit to the test.

272 In the driver's appeal, it was held that the police requirement to stop was not authorised by s 159 of the 1972 Act. Following the obiter observations of Eveleigh J in *Winter*,[479] Griffiths LJ held that s 159 was to be interpreted as follows:[480]

> That section imposes a duty on a motorist to stop when required to do so by a constable in uniform. It does not follow that a constable in uniform must be deemed to have acted lawfully when, for whatever reason, he requires a motorist to stop. For purely practical reasons, there must be a rule that motorists stop when called upon to do so by a constable in uniform. The motorist must assume for the purpose of stopping that he is being lawfully required to stop, otherwise a dangerous and chaotic state of affairs would result. But once the motorist has stopped he can, thereafter, challenge the constable's right to stop him, for nothing in the wording of the section gives any power to the constable to stop the motorist. It is a section designed to ensure safety and good order rather than to confer any specific power on a police constable.

It can be seen that his Lordship interpreted the provision as not conferring power on police to stop a motorist. Mr Kaba so relies upon the judgment.

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471. [1974] 1 WLR 374 per Lord Widgery CJ, Ashworth and Melford Stevenson JJ.
472. [1980] RTR 454 at 458.
473. At 459.
474. Ibid.
475. [1983] RTR 98 per Griffiths LJ and Forbes J ("*Steel*").
476. At 102.
477. Ibid.
478. Section 8(1)(a) provided:

> A constable … may require any person driving … a motor vehicle on a road … to provide a specimen of breath for a breath test … if the constable has reasonable cause — (a) to suspect him of having alcohol in his body …

479. [1980] RTR 209 at 213.
480. At 103.

273 However, contrary to the observations of Ashworth J in *Waterfield*,[481] as adopted by Wien J in *Beard*,[482] Griffiths LJ held that, by virtue of their powers at common law, police were acting in the execution of their duty when they carried out the "random crime check" in the present case. It was the duty of police to "detect and prevent crime",[483] for which purpose they were entitled to stop and question motorists, as they did in the present case. As the driver, the appellant was required by s 159 to stop, as the constable was in uniform and his inquiries and requirements to stop were reasonable "in all the circumstances".[484] It was hoped that motorists would "co-operate with the police in answering their questions, albeit they are under no legal duty to do so".[485] The appeal was dismissed.

274 *Steel* provides limited support for Mr Kaba's submissions. But the reasoning of the court was greatly bound up with powers and duties of police under both legislation and common law in the United Kingdom context. Here I am concerned only with police power under the legislation in question.

275 In *Lodwick v Sanders*,[486] the defendant was driving a lorry which was stopped by police in uniform on reasonable suspicion. He gave equivocal answers to police and a struggle ensued when he tried to drive off. He was acquitted of assaulting an officer in the execution of his duty upon the basis that the police had no power to detain the defendant or the lorry.

276 Upholding the prosecution appeal, Watkins LJ agreed with Ashworth J in *Waterfield*[487] that s 159 of the Road Traffic Act conferred a power on police in uniform to request a motorist to stop the vehicle.[488] The driver was then under a duty to stop. It was a necessary inference from s 159 (and other provisions) that the driver was under a duty to keep the vehicle at a standstill while police had a reasonable opportunity to exercise their power.[489] There were also circumstances in which police had power at common law to detain the vehicle.

277 Watkins LJ also agreed with Griffiths LJ in *Steel*[490] that police were entitled to use their power in s 159 to require a driver to stop for the purpose of questioning the driver in the course of exercising their common law duty to detect and prevent crime, although the driver had no legal duty to co-operate.[491] Further, on reasonable suspicion, the vehicle could be detained for a reasonable time to effect an arrest.

278 Webster J held that, when considering s 159, it was important to "distinguish between a constable's powers and the citizen's duties, and … requiring a driver to stop his vehicle and [police] stopping or physically stopping it".[492] His Honour held that Ashworth J in *Waterfield*[493] and Wien J in *Beard*[494] had correctly

481. [1964] 1 QB 164 at 171–2.
482. [1980] RTR 454 at 458.
483. [1983] RTR 98 at 103.
484. Ibid.
485. Ibid.
486. [1985] 1 WLR 382 per Watkins LJ and Webster J.
487. [1964] 1 QB 164 at 172.
488. [1985] 1 WLR 382 at 388.
489. At 389.
490. [1983] RTR 98 at 103.
491. [1985] 1 WLR 382 at 390.
492. At 391.
493. [1964] 1 QB 164 at 171–2.

decided that s 159 conferred power on police in uniform to require a driver to stop the vehicle, but not a power to detain the vehicle.[495] Police in uniform had power under s 159 to require a driver to stop the vehicle and the driver had a duty to do so. The driver also had a duty to keep the vehicle at a standstill while police exercised their powers. But, under the provision, the police had no power of physical detention of the vehicle.[496]

279 After discussing the judgments of Eveleigh LJ (Kilner Brown J agreeing) in *Winter*[497] and Griffiths LJ in *Steel*,[498] Webster J held that, under s 159, police had power only to request the driver to stop the vehicle, not power actually to stop the driver nor power physically to detain the vehicle once it had stopped.[499] However, in the present case the defendant's actions and equivocal answers to police questions gave rise to a reasonable suspicion that the lorry had been stolen. This entitled the police to detain the vehicle and arrest the defendant in the exercise of their powers.

280 This decision also provides some support for the conclusion I have reached as to the proper interpretation of our provision.

281 In *Chief Constable of Gwent v Dash*,[500] police used s 159 of the 1972 Act in a program to stop vehicles at random to see whether the driver was drunk-driving or had committed other offences. Police in uniform stopped the defendant and police smelt alcohol on his breath. Suspecting him of drunk-driving, they then used the power under s 8(1)(a) to require him to take a breath test, which proved positive. He was acquitted of charges upon the basis that the random stopping of motor vehicles amounted to malpractice and the requirement for the breath test and the subsequent procedure was unlawful.

282 Allowing the appeal, Lloyd LJ and Macpherson J held that no evidence supported a conclusion that malpractice or capricious or oppressive conduct had occurred, as mentioned in the decided cases.[501] It is at least implicit in the reasoning of the court that it was legitimate to require drivers to stop under s 159 for the purposes of determining whether there was evidence that drivers were drunk-driving and therefore might be reasonably suspected under s 8(1)(a).[502] As was held by Macpherson J:[503]

> [T]here is no restriction upon the stopping of motorists by a policeman in the execution of his duty and the subsequent requirement for a breath test should the policeman then and there genuinely suspect the ingestion of alcohol.

His Honour went on to state:[504]

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494. [1980] RTR 454 at 458.
495. [1985] 1 WLR 382 at 391.
496. Ibid.
497. [1980] RTR 209 at 213.
498. [1983] RTR 98 at 103.
499. [1985] 1 WLR 382 at 392.
500. [1986] RTR 41 per Lloyd LJ and Macpherson J ("*Dash*").
501. See *Winter* [1980] RTR 209 at 215 per Eveleigh LJ, Kilner Brown J agreeing: "malpractice"; *Such* [1982] RTR 140 at 143 per Donaldson LJ, Forbes J agreeing: "malpractice"; and *Steel* [1983] RTR 98 at 104 per Griffiths LJ: "oppressively or capriciously".
502. In *Normand v McKellar* 1995 SLT 798 at 799–800 the High Court of Judiciary of Scotland (the Lord Justice General (Hope), and Lord Allanbridge and Lord Cowie) ("*Normand*") said that this interpretation of s 159 was implicit in the reasoning of Macpherson J.
503. [1986] RTR 41 at 46.
504. At 46–7.

> In summary, therefore, the police are, in my judgment, not prohibited from the random stopping of cars within the limits already referred to; but are, of course, prohibited from requiring breath tests at random, which is a very different thing.

Likewise, Lloyd LJ held:[505]

> The word "malpractice", as it has come to be used in this field, seems to me to cover cases where the police have acted from some indirect or improper motive or where the conduct on the part of the police could be described as capricious. The random stopping of cars under s 159 of the Road Traffic Act 1972 for the purpose of detecting crime, or for inquiring whether the driver has had too much to drink, cannot be so described. Nor can it be said that the police were acting from some indirect or improper motive. However much the public may dislike the random stopping of cars, I cannot agree that random stopping by itself involves malpractice.

283 *Dash* thus treated s 159 of the 1972 Act as conferring on police in uniform both a power to require drivers to stop and a duty to exercise that power. This is consistent with *Lodwick*,[506] which was cited in argument in *Dash* but not discussed.

284 In *Normand v McKellar*,[507] police in uniform were carrying out a routine road check when they stopped the defendant's vehicle and saw that it had no excise disk displayed. He was acquitted of the excise offence when the magistrate excluded the evidence of the police upon the ground that the road stop was illegal.

285 Upholding the prosecution appeal, Lord Justice General Hope, Lord Allanbridge and Lord Cowie held that the stop was authorised by s 163 of the Road Traffic Act 1988 (UK) c 52[508] (the successor to s 159 of the 1972 Act). The court rejected the defendant's submission that s 163(1) should be interpreted narrowly "since it appeared to be an invasion of privacy and liberty".[509] It also rejected the submission that "[i]t was going too far to infer that there was an unlimited power to stop the vehicle when the section itself did not expressly confer such a power on the constable".[510] It was not impressed with a submission that a restriction preventing capricious use of the power was not a sufficient safeguard because it would be difficult to apply.[511]

286 Agreeing with Wien J (Lord Widgery CJ agreeing) in *Beard*[512] and the implicit reasoning of Macpherson J in *Dash*,[513] the court held that s 163(1) of the 1988 Act was the source of both the power and the duty of the police to require

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505. At 48.
506. [1985] 1 WLR 382 per Watkins LJ and Webster J.
507. 1995 SLT 798 (The Lord Justice General (Hope), Lord Allanbridge and Lord Cowie).
508. Section 163(1) provided:

> A person driving a mechanically propelled vehicle on a road must stop the vehicle on being required to do so by a constable in uniform.

509. 1995 SLT 798 at 799.
510. Ibid.
511. Ibid.
512. [1980] RTR 454 at 457–8.
513. [1986] RTR 41 at 46.

motorists to stop.[514] As regards to the observation of Wien J in *Beard*[515] that police derived both their duty and power from s 159 of the 1972 Act, the court said:[516]

> We understand him to mean from that observation that where you find a duty expressed in a statute, which must be performed when this is required by somebody, there is implicit in the provision a power in that somebody else to require the duty to be performed.

Accepting that the terms of the section were very general, it said that "to describe this as an invasion of privacy and liberty is pressing the point too far" and that the scope of the provision reflected the purposes of the Road Traffic Act, which were "concerned with safety and preservation of order on the roads".[517] While I have concluded that our provision does interfere with a driver's privacy and a driver's and passenger's freedom of movement, the court's analysis of the powers and duties created by the United Kingdom provision is consistent with my own.

287 Similar issues confronted the High Court of Justiciary in *Stewart v Crowe*.[518] In the lead up to Christmas, the police conducted a road safety program. To raise the awareness of motorists of the "morning-after effect", police in uniform stopped vehicles and asked drivers to take a breath test. If they agreed, the test would be administered. If they did not, they would be allowed to go unless alcohol was smelt on their breath, in which case a breath test would be administered on reasonable suspicion under s 5(1)(a) of the 1988 Act. After being stopped and agreeing to take a test, which proved positive, the appellant was convicted of drunk driving. The court rejected his submission that he had no case to answer because the police had acted oppressively.

288 Dismissing the appeal, Lord Prosser, Lord Kirkwood and Lord Weir held that "[t]he power of the police" to require drivers to stop was to be found in s 163(1) of the 1988 Act.[519] Citing *Dash*[520] with approval, the court said that there was nothing oppressive about the general campaign. In particular, the "randomness of what was done obviously distinguishes the case from situations where a particular person is stopped for reasons particular to himself".[521]

289 The court did, however, observe:[522]

> We would observe that in a situation such as this, there is plainly a very substantial need for the police to act with considerable tact and good manners and to be very scrupulous in not going beyond the intended purpose of merely requesting and doing no more than that, unless reasonable grounds for suspicion arise through the smell of alcohol. But there is no suggestion in this case that there was any impropriety or failure in tact or good manners or scrupulousness in the way in which the powers were used.

I would rely upon both the court's reasoning and this observation.

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514. 1995 SLT 798 at 799–800.
515. [1980] RTR 454 at 457–8.
516. 1995 SLT 798 at 799.
517. At 798.
518. 1999 SLT 899 per Lord Prosser, Lord Kirkwood and Lord Weir.
519. At 900.
520. [1986] RTR 41 at 46–7 per Macpherson J and *Normand* 1995 SLT 798 (The Lord Justice General (Hope), Lord Allanbridge and Lord Cowie).
521. 1999 SLT 899 at 900.
522. Ibid.

290 In *McNee v Ruxton*,[523] the appellant was convicted for possession of offensive weapons which were found by police in his vehicle in the course of a routine traffic stop under s 163 of the 1988 Act. He appealed upon the ground that evidence of the weapons was inadmissible because they had been found during that stop. Dismissing the appeal, Lords Coulsfield, Milligan and Cowie held that the power in s 163 was very wide and there was nothing to suggest that police were acting outside that power.

291 It can be seen that the strong balance of authority in the United Kingdom supports the interpretation of s 59(1) of the Road Safety Act that I have adopted.

292 Now to Canada.

Canada

293 The Canadian authorities, to which the parties made reference in their submissions, contain salient discussion of proportionality and interpretation issues in the context of traffic stop and related legislation (as well as exclusion of evidence, which I consider below). As to proportionality, the discussion is relevant only to the application of the principle of consistency. I have mentioned this earlier but it is more convenient to discuss it here. As to interpretation, it will be seen that legislation with features like our own has been examined with pertinent results. I make clear that I do not rely upon the proportionality analysis in the Canadian authorities when applying the principle of legality or s 32(1) of the Charter to the interpretation question.

294 In *Dedman*,[524] which was decided prior to the commencement of the Canadian Charter, police established a spot-check program called Reduce Impaired Driving Everywhere (RIDE) pursuant to which, in selected locations, motorists were randomly pulled over and stopped. For the purpose of detecting drunk drivers, conversation was then initiated by requiring production of licence and insurance documentation. If alcohol was smelt on the driver's breath, he or she was asked to take a breath test. Subject to reasonable suspicion, the test was compulsory under legislation.[525] The RIDE program was not supported by legislation.

295 During the program and without suspicion, police required the appellant to pull over and stop. Smelling alcohol on his breath, they demanded that he take a breath test, which he failed to do. His acquittal of charges was set aside by an appeal court. As relevant here, the Supreme Court of Canada was required to determine whether the random stop of the appellant's motor vehicle as part of the RIDE program was unlawful as having been made without statutory or common law authority.[526]

296 The relevant statutory provision[527] was similar to ours in that it expressly conferred only a duty on the driver. The question was whether it also conferred a power on police to stop a motor vehicle for the purpose of inspecting a licence.

523. [1999] GWD 28-1354 per Lord Coulsfield, Lord Milligan and Lord Cowie.
524. [1985] 2 SCR 2 per Dickson CJ, Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.
525. Criminal Code RSC 1970, c C-34, s 234.1(1).
526. [1985] 2 SCR 2 at 23 per Le Dain J (question 1).
527. Section 14 of The Highway Traffic Act, RSO 1970, c 202 provided:

> (1) Every operator of a motor vehicle shall carry his licence with him at all times while he is in charge of a motor vehicle and shall surrender the licence for reasonable inspection upon the demand of a constable or officer appointed for carrying out the provisions of this Act.

The duty was to surrender the licence for inspection on demand by police, not to stop on demand. The plurality[528] decided that it was doubtful whether the provisions conferred a police power to stop, the minority[529] held that it did and the court unanimously decided that the provisions did not authorise random stops for the purposes of the RIDE program.[530]

297 Giving the plurality judgment, Le Dain J explained that it was doubtful whether the duty on the driver carried with it by implication a police power to stop because this "would appear to involve an unusual extension of the rule of implied powers, as a matter of statutory construction".[531] His Honour went on to hold[532] that the police lacked statutory power but had validly exercised their common law power pursuant to the principles stated in *Waterfield*.[533]

298 Discussing the exercise of the common law power, Le Dain J began by accepting that there was a "right to circulate in a motor vehicle on the public highway".[534] Following *Hoffman*[535] and *Johnson v Phillips*,[536] his Honour described this right as a "liberty". In scope, it was:[537]

> … not a fundamental liberty like the ordinary right of movement of the individual, but a licensed activity that is subject to regulation and control for the protection of life and property.

Nevertheless, the random stop in the present case had to be regarded prima facie as an unlawful interference with his liberty because it was not authorised by statute.[538]

299 From that starting point, Le Dain J considered whether the interference with liberty constituted by the stop was an unjustifiable use of police resources. Drawing on the "reasonably necessary" test stated in *Johnson*,[539] his Honour said:[540]

> The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference.

300 As to the interfering purpose, Le Dain said the importance and necessity of the RIDE program as a deterrent to drunk driving was not open to doubt. As to the nature of the right, his Honour said that it too was important, although circulating on a highway was "a licensed activity subject to regulation and control in the

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> (2) Every person who is unable or refuses to surrender his licence in accordance with subsection 1 shall, when requested by a constable, give reasonable identification of himself and, for the purposes of this subsection, the correct name and address of such person shall be deemed to be reasonable identification.

528. [1985] 2 SCR 2 at 30 per McIntyre, Lamer, Wilson and Le Dain JJ.
529. At 10 per Dickson CJ, Beetz and Chouinard JJ.
530. At 30–1 per McIntyre, Lamer, Wilson and Le Dain JJ and 10 per Dickson CJ, Beetz and Chouinard JJ.
531. At 31.
532. At 32.
533. [1964] 1 QB 164 per Lord Parker CJ, Ashworth and Hinchcliffe JJ.
534. [1985] 2 SCR 2 at 35.
535. [1974] 1 WLR 374 at 379 per Lord Widgery CJ, Ashworth and Melford Stevenson JJ agreeing.
536. [1976] 1 WLR 65 at 70 per Lord Widgery CJ, Milmo and Wien JJ ("*Johnson*").
537. [1985] 2 SCR 2 at 35.
538. Ibid.
539. [1976] 1 WLR 65 at 70 per Lord Widgery CJ, Milmo and Wien JJ.
540. [1985] 2 SCR 2 at 35.

interests of safety".[541] In his view, it was the random or arbitrary nature of the stop that was the objectionable feature of the interference. However, this was a necessary feature of the deterrence and the stop "would be of relatively short duration and of slight inconvenience".[542] His Honour concluded:[543]

> Weighing these factors, I am of the opinion that having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway. It was not, therefore, an unjustifiable use of a power associated with the police duty, within the *Waterfield* test. I would accordingly hold that there was common law authority for the random vehicle stop for the purpose contemplated by the RIDE program.

It followed that the police had acted lawfully in stopping the appellant and demanding that he take a breath test. The appeal was accordingly dismissed.[544]

301 The minority judgment (Dickson CJ, Beetz and Chouinard JJ) accepted that no statutory powers supported the random stops but did not accept that the stops were supported by the common law duties and powers of police.[545] Delivering that judgment, Dickson CJ stated that police no more had power at common law without suspicion compulsorily to stop a motorist than they had power compulsorily to detain a person for that purpose.[546] Stopping a motorist on a "chance" was inescapably arbitrary.[547] There was a necessary distinction between the scope of police duties and the ambit of police powers.[548] To extend police powers at common law to the conduct of random stops:[549]

> … would run contrary to the long-standing protection accorded individual liberty by the common law and erode the individual's fundamental right to be free from arbitrary interference.

In the view of Dickson CJ, as long as the licensing and road safety laws were complied with by drivers, they had a "right to circulate on the highway [that was] limited to freedom from unreasonable interference by police … [but] exists unfettered except in so far as it is curtailed by law".[550]

302 Accepting the force of the judgment of the minority, I think the reasoning of the plurality in relation to proportionality, which held sway in the subsequent cases, is compelling.

541. At 36.
542. Ibid.
543. Ibid.
544. Dismissal of the appeal meant the order of the Ontario Court of Appeal stood. That order was that the case was to be remitted back to the trial judge for determination of whether the unsuccessful attempts of the appellant to take the test were genuine or feigned: [1985] 2 SCR 2 at 9.
545. At 10.
546. At 16.
547. At 17.
548. At 12.
549. At 17.
550. Ibid.

303 In *Hufsky*,[551] police carried out random stopping of motorists pursuant to an organised program under s 189a of the Highway Traffic Act, RSO 1980, c 198[552] as amended after *Dedman*. The provision expressly conferred both a police power to request and a duty on the driver to comply. The court (Dickson CJ, Beetz, Estey, McIntyre, Wilson, Le Dain and La Forest JJ) unanimously decided that random stopping of motorists constituted an arbitrary detention in violation of s 9 of the Canadian Charter,[553] which by that time had commenced. However, this violation was demonstrably justified within a free and democratic society pursuant to s 1 of the Charter.[554]

304 Giving the judgment of the court, Le Dain J held that police road stops fell within the broad and general concept of detention in s 9 of the Charter which had been enunciated by the court in *Therens*[555] and *Thomsen v R*.[556] This was because:[557]

> … the police officer assumed control over the movement of the appellant by a demand or direction that might have significant legal consequence, and there was penal liability for refusal to comply with the demand or direction.

In his Honour's view, roadside stops were arbitrary because:[558]

> … there were no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure. The selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise.

305 In determining that such stops were justified in a free and democratic society, Le Dain J applied the proportionality test formulated by Dickson CJ in *R v Oakes*[559] and restated in *R v Edwards Books and Arts Ltd*.[560] His Honour's conclusion was:[561]

> In view of the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the

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551. [1988] 1 SCR 621.
552. Section 189a provided:

> (1) A police officer, in the lawful execution of his duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.
> (2) Every person who contravenes subsection (1) is guilty of an offence and on conviction is liable to a fine of not less than $100 and not more than $2000 or to imprisonment for a term of not more than six months, or to both.

553. Section 9 provides:
Everyone has the right not to be arbitrarily detained or imprisoned.
554. Section 1 provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

555. [1985] 1 SCR 613 per Dickson CJ, Beetz, Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.
556. [1988] 1 SCR 640 per Dickson CJ, Beetz, Estey, McIntyrne, Wilson, Le Dain and La Forest JJ.
557. [1988] 1 SCR 621 at 632.
558. At 633.
559. [1986] 1 SCR 103 at 138–40 ("*Oakes*").
560. [1986] 2 SCR 713 at 768–9.
561. [1988] 1 SCR 621 at 636–7.

> perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving, I am of the opinion that the limit imposed by s 189a(1) of the Highway Traffic Act on the right not to be arbitrarily detained guaranteed by s 9 of the *Charter* is a reasonable one that is demonstrably justified in a free and democratic society. The nature and degree of the intrusion of a random stop for the purposes of the spot check procedure in the present case, remembering that the driving of a motor vehicle is a licensed activity subject to regulation and control in the interests of safety, is proportionate to the purpose to be served.

With respect, I agree.

306 In *Ladouceur*,[562] without suspicion police stopped the appellant for a random search under s 189a of the Highway Traffic Act. When asked for his licence and other documentation, he admitted he was driving whilst his licence was suspended. He was convicted of that offence. His appeals were dismissed. The Supreme Court of Canada had to determine whether the power of random stopping without suspicion in s 189a was inconsistent with ss 7, 8 and 9 of the Canadian Charter[563] and if so, whether it could be justified under s 1.

307 All members of the court held that random roadside stops amounted to arbitrary detention in violation of s 9 of the Charter. A bare majority (Lamer, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ) held that the stops were reasonably and demonstrably justified in democratic society under s 1 of the Charter. The minority (Dickson CJ, Wilson, La Forest and Sopinka JJ) held that s 189a of the Highway Traffic Act was only valid if limited to organised programs of stopping, such as the RIDE program or road blocks, or to stopping for articulable cause.

308 Giving the judgment of the majority, Cory J held that there was little difference between the organised program of random stopping under the common law which was found to be valid in *Hufsky* and the general random stopping under s 189a which was at issue in the present case.[564] His Honour held, following *Hufsky*, that such stops constituted arbitrary detention in violation of s 9 of the Charter.[565] His Honour held that s 8 of the Charter (protection from unreasonable search or seizure) was not violated.[566] It was not necessary to determine whether the stops violated s 7 (liberty and security of the person).[567] However, applying the justification and proportionality test expounded by Dickson CJ in *Oakes*[568] the stops were justified as being a proportionate and appropriate means of addressing pressing and substantial road safety concerns[569] and impaired the s 9 right as little as possible.[570] His Honour expressed the view that:[571]

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562. [1990] 1 SCR 1257.
563. I have already set out s 9 of the Charter. Section 7 of the Charter provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 8 of the Charter provides:

> Everyone has the right to be secure against unreasonable search or seizure.

564. [1990] 1 SCR 1257 at 1275.
565. At 1277.
566. Ibid.
567. At 1278.
568. [1986] 1 SCR 103.
569. [1990] 1 SCR 1257 at 1276–7, 1283 and 1285–6.
570. At 1285.

… the random stop is rationally connected and carefully designed to achieve safety on the highways. The stops impair as little as possible the rights of the driver. In addition, the stops do not so severely trench on individual rights that the legislative objective is outweighed by the abridgement of the individual's rights.

The following passage is of importance in explaining this view:[572]

The only method of ensuring that the brakes and seat belts are operational is by stopping and checking vehicles. Of even greater importance is to determine if a driver is licensed and insured. Once again this can only be done by stopping vehicles. The unlicensed driver is a statistically proven menace on the highways. Moreover, such a driver has demonstrated a contempt for the law and an irresponsible attitude as well as a marked propensity to being involved in serious accidents. All users of the highways have an interest in seeing that unlicensed drivers are apprehended and removed from the highway.

As to why the impairment was minimal, his Honour said:[573]

The next question is whether the routine check impairs the s 9 right as little as possible. Incompetent driving creates a serious and dangerous hazard to all who use the highways. This has been recognized throughout Canada by legislation which makes it a condition of granting a licence to drive that the applicant demonstrate a minimum standard of competence. It is only those holding a licence who may exercise the right to drive. Even that right is regulated by the provisions of provincial traffic Acts and the Criminal Code. If the right to drive can only be exercised by licence holders, then there must be a method by which society can ensure that this requirement is met by all who drive. This same requirement is embodied in many statutes which seek to regulate other activities and products which raise concerns for the safety of others. See, for example, other acts of the Province of Ontario, such as the Game and Fish Act, RSO 1980, c 182, s 14, and the Motorized Snow Vehicles Act, RSO 1980, c 301, s 15a, where random stops are allowed without articulable cause. This is also true of Acts regulating environmental protection, farm products, off-road vehicles and potential violators of tobacco and fuel taxes. Licensed activities must be carried out exclusively by licence holders who have demonstrated their competence and their willingness to comply with the fair and reasonable guidelines and requirements that govern all licence holders. There would be no point to requiring licences for those who engage in activities that are potentially dangerous and require a demonstrated degree of skill if there was no means of ensuring that a driver holds a valid licence.

With respect, I again agree.

309 In reaching these conclusions, Cory J took into account a large body of statistical evidence which was filed on behalf of the government.[574] The statistics reveal the number of road deaths in Ontario,[575] the positive relationship between the roadworthiness of vehicles, unlicensed driving and drug or alcohol impaired driving on the one hand and the probability of traffic accidents on the other.[576]

310 Giving judgment for the minority, Sopinka J held that the organised program of random stops found to be valid at common law in *Hufsky* had to be regarded as the "last straw".[577] While random stopping under a program infringed human

571. At 1283–4.
572. At 1281.
573. At 1285–6.
574. At 1279–82.
575. At 1279.
576. At 1280–2.
577. At 1264.

rights but a little, roving stops went impermissibly further.[578] In his Honour's view, the government had not persuaded the court that an unrestricted power of random stopping without cause was a "necessary addition to the impressive array of enforcement methods" that already existed.[579]

311 *R v Wilson*[580] was heard and determined at the same time as *Ladouceur* and raised the same issue. Police stopped the appellant when driving in a small rural town under s 119 of the Highway Traffic Act, RSA 1980, c H-7.[581] The officer did not suspect any wrongdoing and was conducting "floating" stops in the street concerned[582] but he stopped the vehicle because it had out-of-province registration, he did not recognise any of the three occupants (who were all seated in the front seat) and the local bar had just closed. As the appellant's breath smelt of alcohol, the officer demanded that he take a breath test, which the appellant failed. He was convicted of drunk driving and his appeals failed.

312 Dismissing the further appeal, Lamer, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ (Dickson CJ, Wilson, La Forest and Sopinka JJ dissenting) followed their judgment in *Ladouceur* in holding that, if the stop constituted an arbitrary detention, it was valid under s 1 of the Charter.[583] However, it was held that the appellant was stopped for reasonable and articulable cause. Therefore the stop was not random and the detention was not arbitrary.[584]

313 The court's unanimous interpretation of s 119 of the Highway Traffic Act is significant for us. Like s 59(1) of our Road Safety Act, s 119 was expressed in language that imposed a duty upon a driver to stop upon being signalled or requested to do so by police in uniform. Among other things, the appellant argued in *Wilson* that the provision conferred no power on police to stop vehicles.

314 The plurality and the minority judges all rejected this argument. Speaking for the plurality, Cory J said:[585]

> Though s 119 imposes duties upon motorists rather than conferring powers on the police, the language of this section is broad and enough to authorize random stops of motorists by police officers.

Speaking for the minority, Sopinka J said that "on its face", s 119 authorised "a random stop".[586] I have adopted the same interpretation of our provision.

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578. At 1267.
579. At 1266.
580. [1990] 1 SCR 1291 ("*Wilson*").
581. Section 119 provided:

> A driver shall, immediately upon being signalled or requested to stop by a peace officer in uniform, bring his vehicle to a stop and furnish any information respecting the driver or the vehicle that the peace officer requires and shall not start his vehicle until he is permitted to do so by the peace officer.

582. [1990] 1 SCR 1291 at 1294.
583. At 1296.
584. Ibid.
585. Ibid.
586. At 1293.

315 There are other cases in which the Supreme Court of Canada has considered the interpretation of traffic stop legislation. These include *R v Mellenthin*[587] and *R v Nolet*,[588] which are best discussed in the context of exclusion of evidence (see below).

316 As with the authorities concerning comparable legislation in Australia and the United Kingdom, the Canadian authorities generally support my conclusion that s 59(1)(a) of the Road Safety Act confers both a duty on drivers and a power on police.

317 The first legal issue in this proceeding is determined accordingly. It follows that the magistrate erred in law on the face of the record by interpreting the provision in the way that he did.

318 That brings me to the second legal issue.

Exclusion of unlawfully obtained evidence: principles

Victoria

319 We now examine the second issue, namely whether the magistrate erred in law upon the face of the record, or committed a jurisdictional error, by exercising the discretion in s 138(1) of the Evidence Act not to admit the evidence of Mr Kaba's alleged offending. The basis upon which his Honour so ruled was that the police actions were improper and unlawful and violated Mr Kaba's right to privacy under the ICCPR and the Charter and that the evidence of his alleged offending was caused by those violations.

320 The parties made comprehensive submissions about the validity of the magistrate's ruling. Those submissions made extensive reference to the Australian authorities on the protection of individual rights and freedoms and exclusion of evidence at common law. Having regard to the reference in s 138(3)(f) of the Evidence Act to the ICCPR and to the obligations of police under s 38(1) of the Charter, the submissions also made reference to the relevant international jurisprudence on human rights and the exclusion of evidence. The submissions in this latter regard were important because they referred to many decisions concerning random traffic stops and questioning of passengers and pedestrians. There have been few such cases in Australia.

321 Prior to the enactment of s 138 of the Evidence Act, courts had (as they still have) discretion not to admit evidence on a number of grounds. As relevant to this case, I would refer to *R v Ireland*,[589] *Bunning*[590] and *Ridgeway v R*.[591] Judgments in these decisions show that, at common law, important values and interests which are embodied in human rights are recognised and appropriately balanced in the exercise of the discretion to exclude unlawfully obtained evidence.

322 *Ireland* laid the foundation for *Bunning* which laid the foundation for s 138. A question in *Ireland* was whether evidence of persistent questioning of a suspect and photographs of his hands (and forensic analysis thereof) should have been

587. [1992] 3 SCR 615 per Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ ("*Mellenthin*").
588. [2010] 1 SCR 851 per McLachlin CJ, Binne, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ ("*Nolet*").
589. (1970) 126 CLR 321 per Barwick CJ, McTiernan, Windeyer, Owen and Walsh JJ.
590. (1978) 141 CLR 54 per Barwick CJ, Stephen, Jacobs, Murphy and Aickin JJ.
591. (1995) 184 CLR 19 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ ("*Ridgeway*").

excluded. Barwick CJ (McTiernan, Windeyer, Owen and Walsh JJ agreeing) held that "[e]vidence of relevant facts or things ascertained or procured by means of unlawful or unfair acts is not, for that reason alone, inadmissible".[592] However:[593]

> Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion.

323 Barwick CJ approved of the "rule of practice for the conduct of police officers" that it is "improper for police investigating the commission of a crime to persist in questioning a suspect after indication that he did not wish to answer any more questions".[594] This protects the presumption of innocence. His Honour also held that police had no power to compel someone to subject themselves to a photograph "for any purpose other than identification".[595] This protects the right to privacy.

324 The question in *Bunning* was whether it was correct for a magistrate to exclude evidence of drunk driving because it resulted from the unauthorised compulsory administration by police of a breath test on a driver. Stephen and Aickin JJ delivered a seminal judgment which was influential in the formulation of s 138. Building on the judgment of Barwick CJ in *Ireland*, their Honours stated that the power of the court to reject unlawfully obtained evidence was not simply concerned with:[596]

> … ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.

Noting the potential for misuse of contemporary legislative powers, Stephen and Aickin JJ drew attention to:[597]

> … society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired.

These statements implicitly give effect to important human rights, including liberty and privacy, whilst at the same time acknowledging that they are not absolute.

325 The question in *Ridgeway* was whether evidence of alleged illegal importation of drugs should have been excluded because it was induced by police activity that was itself illegal. The court affirmed the principle of discretionary exclusion stated in *Ireland* and *Bunning*. Mason CJ, Deane and Dawson JJ explained it thus:

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592. At 334.
593. At 335.
594. At 333.
595. At 334.
596. (1978) 141 CLR 54 at 74.
597. At 75.

> The basis in principle of the discretion lies in the inherent or implied powers of our courts to protect the integrity of their processes. In cases where it is exercised to exclude evidence on public policy grounds, it is because, in all the circumstances of the particular case, applicable considerations of "high public policy"[598] relating to the administration of criminal justice outweigh the legitimate public interest in the conviction of the guilty.[599]

It was also made clear that the principle was not confined to unlawful conduct so that the discretion to exclude evidence "extends to cases of either unlawful or improper conduct on the part of authorities".[600]

326 Section 138 of the Evidence Act was enacted into that setting of common law principle. It applies to both civil and criminal cases.

327 Section 138(1) provides:

> (1) Evidence that was obtained —
> (a) improperly or in contravention of an Australian law; or
> (b) in consequence of an impropriety or of a contravention of an Australian law —
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

328 This provision contains a rule of non-admission of evidence unless and until the court determines that it should, on balance, be admitted. In *R v Mokbel*,[601] Whelan J gave this description of the "two-stage process" that is required, noting the shifting onus:[602]

> First, it is necessary to decide whether the evidence in question was obtained improperly or illegally or as a consequence of impropriety or illegality. This must be established by the party seeking to have the evidence excluded.[603] Then, it is necessary to undertake a balancing exercise, comparing the desirability of admitting the evidence with the undesirability of admitting evidence obtained in such a way. The evidence must not be admitted unless the balance is in favour of desirability. Where illegality or impropriety exists, the onus is on the party seeking admission to establish that the desirability of admission outweighs any undesirability.[604]

329 This description of the process accords with the decision of the Court of Appeal in *Director of Public Prosecutions v Marijancevic*.[605] In that case Warren CJ, Buchanan and Redlich JJA held that the discretion in s 138 "did not essentially differ from that at common law"[606] and "calls for the balancing exercise to be undertaken that is discussed in cases"[607] like *Bunning* and *Ridgeway*. However, their Honours noted two important differences: the onus of establishing that evidence obtained as a result of impropriety or contravention should be admitted rested (in a criminal case) upon the prosecution and the terms

598. *Bunning* (1978) 141 CLR 54 at 74 per Stephen and Aickin JJ.
599. (1995) 184 CLR 19 at 31.
600. At 37 (footnote omitted).
601. (2012) 35 VR 156.
602. At 184, [309].
603. *Parker v Comptroller-General of Customs* (2009) 252 ALR 619 at 626, [28] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ.
604. Ibid.
605. (2011) 33 VR 440 ("*Marijancevic*").
606. At 445, [17].
607. Ibid.

of the qualified proscription indicated "the importance of according appropriate weight to the effect of any impropriety or unlawfulness".[608]

330 The words "impropriety or contravention" in s 138(1) are not defined. In the Dictionary in the Evidence Act, "Australian law" is defined to mean "a law of the Commonwealth, State or a Territory" and such a law is defined to mean "a law (whether written or unwritten) of or in force in that place".

331 As to what constitutes "impropriety", the origin of s 138(1)(a) and (b) suggests that it is permissible to examine what was considered to be improper at common law. What is improper at common law was expressly considered in *Ridgeway*.[609] Mason CJ, Dean and Dawson JJ held that the discretion to exclude evidence at common law arose with respect to "conduct which is not criminal but which is quite inconsistent with the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement".[610]

332 Building on that approach, it was decided in *Robinson v Woolworths Ltd*[611] by Basten JA (Barr J agreeing) that:

> … the identification of impropriety requires attention to the following propositions. First, it is necessary to identify what, in a particular context, may be viewed as "the minimum standards which a society such as ours should expect and require of those entrusted with powers of law enforcement". Secondly, the conduct in question must not merely blur or contravene those standards in some minor respect; it must be "quite inconsistent with" or "clearly inconsistent with" those standards. Thirdly, the concepts of "harassment" and "manipulation" suggest some level of encouragement, persuasion or importunity in relation to the commission of an offence …

Only the first two of those propositions are relevant in this case.

333 It seems to me that police conduct that is not legally authorised and in significant breach of the common law right to freedom of movement and privacy of an individual is conduct that is inconsistent with the standards expected in our society of law enforcement officers. Such conduct is therefore improper as well as unlawful. In a case like the present, it will also likely be contrary to or inconsistent with the individual's rights under the ICCPR, which will be a relevant discretionary consideration under s 138(3)(f).

334 Under s 38(1) of the Charter, it is "unlawful" for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to human rights in making a decision. Section 39(1) contemplates relief or remedy being given in respect of such unlawfulness in the specified circumstances. As police are public authorities under the Charter,[612] it is a source of the standards expected of law enforcement officers in Victorian society. This is relevant to determining whether police actions are improper under s 138(1) of the Evidence Act. Further, acting or making decisions in contravention of an obligation imposed by s 38(1) of the Charter represents a contravention for the purposes of s 138(1) of the Evidence Act. In a case like the present, this too will likely be contrary to or inconsistent with the individual's rights under the ICCPR, which will be a relevant discretionary consideration under s 138(3)(f).

608. Ibid (footnote omitted).
609. (1995) 184 CLR 19.
610. At 36.
611. (2005) 158 A Crim R 546 at 553, [23].
612. Section 4(1)(d).

335 It was submitted on behalf of the Director that, even if the police request for Mr Kaba's name was improper or unlawful, the evidence of his offending was not "obtained … in consequence" (s 138(1)(b)) thereof and that the magistrate erred in law in concluding otherwise. This raises issues of causation about which the parties made competing submissions.

336 Under s 138(1)(b), the exercise of discretion is necessary in respect of evidence that was obtained "in consequence" of an impropriety or contravention, that is, where there was a causal relationship between the obtaining of the evidence and the impropriety or contravention, and that is so even though the obtaining itself was not improper or contravening. The words "obtained … in consequence" specify an objective test of causation and do not incorporate any requirement of intention or purpose.

337 As a leading text states, the precise nature of the causal relationship between the obtaining of the evidence and the impropriety or contravention "is a matter of some difficulty".[613] However, on the authorities, it seems to be clear that it is not necessary for the causation to be direct and that a chain of causation linking the obtaining of the evidence and the impropriety or contravention is sufficient. Thus, in *Cornwell v R*,[614] evidence was obtained pursuant to a warrant obtained on the basis of a minor misstatement. It was held that the evidence was not unlawfully obtained because the misstatement did not cause the warrant to be issued.[615] Otherwise (presumably) a chain of causation might have been established. Similarly, in *Re Application by Lee,*[616] police retained a photograph obtained during a search carried out in reliance on a defective warrant. They used it a year later in a surveillance operation which produced identification evidence. Penfold J held that the evidence was obtained in consequence of the impropriety or contravention because there was a "clear chain of causation" between the two.[617]

338 In the present case, the evidence concerned is evidence of Mr Kaba's offending. It was contended for him that this evidence was obtained "in consequence" of the improper or unlawful conduct of police because the offending itself occurred in consequence of that conduct, as the magistrate held.

339 Under s 138(1)(b), obtaining evidence of offending that was itself caused by impropriety or contravention can be characterised as obtaining evidence "in consequence" of that impropriety or contravention. This is illustrated by *Robinett v Police*[618] and *Director of Public Prosecutions v Carr*.[619]

340 In *Robinett*, which was relied upon by the magistrate, an Aboriginal person was charged and convicted with threatening to cause harm and using offensive language. He was arrested in a state of great intoxication and aggression and sprayed with capsicum spray. Whilst in the cells he repeatedly sought medical attention and complained of asthma, but in language that was extremely

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613. Odgers, *Uniform Evidence Law in Victoria*, Lawbook Company, 2nd ed, (2013), 829 [1.3.14930].
614. [2010] NSWCCA 59 (8 April 2010) per McClellan CJ at CL, Simpson and Johnson JJ.
615. At [180] per McClellan CJ at CL, Simpson and Johnson JJ agreeing.
616. (2009) 212 A Crim R 442.
617. At 449, [31].
618. (2000) 78 SASR 85.
619. (2002) 127 A Crim R 151.

abusive[620] and may be compared with that of Mr Kaba in the present case. The police did not respond to these requests.

341 On appeal, Bleby J found that the conduct of the police had been improper and was "a contributing cause to the ultimate threats and abusive language".[621] Their neglect "was almost certain, in the circumstances, to give rise to the type of offending which in fact occurred".[622] Further, the conduct of the police was highly inappropriate, especially given the state of community understanding about the possible medical needs of Aboriginals in custody.[623] Although the conduct was not unlawful or deliberate, and the police were not conscious of how improper it was, it was not in the public interest to procure a conviction at the cost of condoning impropriety by admitting the evidence.[624] Applying *Bunning*, his Honour exercised the common law discretion to exclude the evidence.[625]

342 *Robinett* was followed in *Carr,* this time under s 138 of the Evidence Act 1995 (NSW). In *Carr*, a magistrate excluded evidence of the commission of the offences of resisting, assaulting and intimidating police. The magistrate found that the arrest was ill-advised and had resulted in the escalation of both the incident and the offending conduct, although the police had acted lawfully, with integrity and in good faith. As here, the exclusion of the evidence left the police with no case. On appeal, Smart AJ held that the decision of the magistrate on this point was correct.

343 The judgment of Smart AJ contains a valuable discussion of the concept of causation in s 138(1)(b). His Honour held that the approach to be followed by Bleby J in *Robinett* under the common law was correct and applicable under s 138(1).[626] He pointed out that it was necessary to distinguish between the situations that may arise:[627]

> The person arrested may in a state of anger at his ill-advised arrest commit a serious crime, for example, attempted murder or maliciously inflicted grievous bodily harm with intent to do so. In such a case, the evidence of those subsequent acts would be admitted. On the other hand he may commit a relatively minor crime such as a mild assault or resist arrest. Further, he may, if moderately intoxicated, utter threats never intended to be carried out. There is also the example of a reaction at the police omitting to summon necessary medical or other attention when they should have done so.

In his Honour's view, when characterising the circumstances in a given case, it was necessary, as in *Robinett*, to take "a robust approach which was based on the realities of the situation in which the defendant found himself".[628]

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620. Bleby J described the language as follows (at 87, [7]):

> The language included: "Get me a fucking doctor. You burnt my eyeballs you cunt. I want a fucking doctor or I'll sue the arse off you." Another expression was "You white cunts", and after some 15–20 minutes: "I will fucking kill you. I will bury the fat cow. I will get you Michelle and your husband. I will bury you, you fucking dog. I will rape the arse out of you and as for the rest of you …" While saying this the appellant was belting the cell wall or door with his fists.

621. At 98, [54].
622. At 101, [69].
623. At 100–1, [66]–[68].
624. At 100–1, [69].
625. At 102, [81].
626. (2002) 127 A Crim R 151 at 165, [61].
627. At 165, [63].
628. At 165, [64].

344 Smart AJ did not accept the submission that, in the case before him, the accused had put his own "intervening will" between the impropriety or contravention and the offending such that evidence of the latter was not in consequence of the former. His Honour held:[629]

> All the offences were closely related and interconnected and at the lower end of the criminal scale. The offences and the evidence stemmed from the ill-advised and unnecessary arrest. A narrow construction should not be given to s 138(1)(a) and (b) nor one that is unduly broad. This is not the kind of case to apply the "but for" test except in the restricted way outlined above.

However:[630]

> … if the offences were moderately serious to serious and disproportionate to an ill-advised arrest it would not be possible to contend that the evidence of such offences was obtained in consequence of an impropriety. A question of degree is involved. This is not completely satisfactory as it does give rise to debate at the margins.

345 In *Director of Public Prosecutions v Coe*,[631] Adams J disagreed with *Robinett* and *Carr*. His Honour held that, under s 138(1)(b), evidence of offending would not be regarded as being "in consequence of" improper or unlawful conduct "unless something more is shown than the mere causal link".[632] He stated that the "something more" would "almost invariably" be that "the conduct was intended or expected (to a greater or lesser extent) to achieve the commission of the offences".[633] The analysis earlier in the judgment suggests that his Honour had something like the circumstances in *Ridgeway* in mind.

346 With respect, I would not disagree with the outcome in *Coe* that the evidence was admitted. It was evidence of very serious assaults upon police that were out of all proportion to the alleged misconduct. However, because the concepts of obtaining and causation in s 138(1)(b) are objective and do not incorporate any element of intention or purpose, I would not accept the reasoning of Adams J on that subject. In that connection, I would generally accept the analysis of Hall J in *Director of Public Prosecution (NSW) v AM*[634] according to which the cases of *Robinett* and *Carr* are examples of obtaining of evidence of offending that occurred in consequence of (unintended) impropriety or contravening conduct within s 138(1)(b).

347 Under s 138(3), the court must take into account certain considerations when undertaking the balancing exercise in s 138(1). Section 138(3) provides:

> Without limiting the matters that the court may take into account under subsection (1), it is to take into account —
> (a) the probative value of the evidence; and
> (b) the importance of the evidence in the proceeding; and
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
> (d) the gravity of the impropriety or contravention; and
> (e) whether the impropriety or contravention was deliberate or reckless; and

629. At 166–7, [70].
630. At 166, [68].
631. [2003] NSWSC 363 (1 May 2003) ("*Coe*").
632. At [24].
633. Ibid.
634. (2006) 161 A Crim R 219 at 235–6, [80]–[82].

(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and

(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and

(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note

The International Covenant on Civil and Political Rights is set out in Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 of the Commonwealth.

348 In relation to the gravity of the offending (s 138(3)(d)), in *Marijancevic*[635] it was held by Warren CJ, Buchanan and Redlich JJA that impugned conduct may be characterised by reference to a spectrum of least to most serious:[636]

> At the least serious end of spectrum of improper conduct would be that which did not involve any knowledge or realisation that the conduct was illegal and where no advantage or benefit was gained as a consequence of that impropriety. In the middle of the range would be conduct which was known to be improper but which was not undertaken for the purpose of gaining any advantage or benefit that would not have been obtained had the conduct been legal. At the most serious end of the range would be conduct which was known to be illegal and which was pursued for the purpose of obtaining a benefit or advantage that could not be obtained by lawful conduct. Cases such as *Ridgeway* exemplify this category of impropriety. There are of course other factors which will bear upon how seriously the impropriety should be characterised such as the nature of the illegality and the extent to which it is widespread.

349 Without detracting from the significance of the other specified considerations, s 138(3)(f) is of importance in the present case. As we have seen, the ICCPR creates rights in relation to liberty (Art 9(1)), freedom of movement (Art 12(1)) and privacy (Art 17(1)) each of which are potentially engaged by the circumstances of the present case.

350 There is a close connection between the protection which is afforded to such rights and freedoms as liberty, freedom of movement and privacy as fundamental principles of the common law and the protection afforded to these (and other) rights and freedoms by the ICCPR. Because of the commonality of the underlying values and interests, especially universal human dignity, many cases of impropriety or contravention under the common law will involve conduct that is necessarily contrary to or inconsistent with the ICCPR. Impropriety or contravention because of the Charter is also likely to involve conduct that is necessarily contrary to or inconsistent with the ICCPR. The separate specification of that consideration in s 138(3)(f) indicates that particular importance is to be attached thereto in the balancing exercise, as with human rights violations in comparable jurisdictions. As will be seen, that is so in the present case.

Comparable jurisdictions

351 In the administration of the Australian law of evidence as it pertains to the exclusion of unlawfully or improperly obtained evidence, increasing attention is being given to human rights. The present case is a good example because, before

635. (2011) 33 VR 440.

636. At 458, [67]; cf *Grant* [2009] 2 SCR 353 at 396, [76] per McLachlin CJ, La Bel, Fish, Abella and Charron JJ.

the magistrate and on judicial review in this court, the exclusion issues were articulated in human rights terms. This reflects the provisions of the Evidence Act, which is national uniform legislation, and particularly s 138(3)(f), which refers to the ICCPR, and also reflects the provisions of the Victorian Charter, especially s 38(1) (which applies to police).

352 In several comparable jurisdictions evidence can be excluded because it was obtained in breach of human rights. The relevant principles have been applied in the context of evidence obtained by police at traffic stops and in like situations. While the Victorian provisions must be applied according to their terms, the comparative jurisprudence represents a potential source of guidance on which the parties quite properly drew in their submissions.

New Zealand

353 Before the enactment of the Bill of Rights Act in 1990, in New Zealand relevant evidence was admissible and no principle required the exclusion of illegally obtained evidence, although at common law it could be excluded in the exercise of the judge's discretion on grounds of unfairness to the accused or abuse of process.[637] Following the enactment of the Bill of Rights Act, the courts adopted a position between the preference of the common law for admission of relevant evidence and the rule of automatic exclusion applying in respect of any breach of the Fourth Amendment rights in the United States Constitution (see below). As explained by Elias CJ in *R v Shaheed*,[638] in the initial stages the rule in New Zealand was that "[e]vidence obtained in breach of the Bill of Rights Act [was] presumptively inadmissible unless good cause is shown for its admission".[639]

354 In *Temese v Police*,[640] the appellant unsuccessfully relied upon this prima facie exclusionary rule. Police saw him driving erratically and pulled him over. Approaching his stationary vehicle, they exercised their power under s 68B of the Transport Act 1962 (NZ) to ask for the driver's name, address and licence particulars. The appellant gave a false name but later admitted his real name and that he was driving whilst disqualified. When prosecuted, he argued that these and other admissions should be excluded because, as a person detained, he was denied the right in s 23 of the Bill of Rights Act to consult a lawyer.

355 Dismissing the appeal against the judge's refusal to exclude the evidence, the Court of Appeal held that the accused had not been detained. In the plurality judgment, Casey J held that "[w]e do not think the brief encounter envisaged in those situations amounts to detention"[641] and that there was no detention "where a person's movements are interrupted merely for the purpose of answering the questions relating to identity … and for no longer than is reasonably necessary for that purpose".[642] I think the same is so in the present case.

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637. *R v Coombs* [1985] 1 NZLR 318 at 321 per Woodhouse P, Somers and Eichelbaum JJ; *R v Williams* [2007] 3 NZLR 207 at 249, [150] per William Young P, Glazebrook and Hammond JJ.
638. [2002] 2 NZLR 377 ("*Shaheed*").
639. At 384, [18]; see also at 418, [140] per Richardson P, Blanchard and Tipping JJ; *R v Williams* [2007] 3 NZLR 207 at 249, [150] per William Young P, Glazebrook and Hammond JJ; *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260 at 271 per Cooke P, at 285 per Richardson J.
640. (1992) 9 CRNZ 425 per Richardson, Casey, Hardie Boys and Gault JJ ("*Temese*").
641. At 429.
642. At 430.

356 Similarly, in *Police v Smith and Herewini*[643] the appellants unsuccessfully relied upon the same rule. They had been involved in a motor vehicle accident and, when taken to hospital, were asked to give a blood sample. One did and the other refused. Finding that the accused had been "detained" at the hospital within the meaning of s 23(1) of the Bill of Rights Act, the trial court excluded the evidence of the sample and the refusal because the accused had not been given access to a lawyer.

357 The Court of Appeal upheld the prosecution appeal. Richardson, McKay and Hardie Boys JJ (Cooke P and Casey J dissenting) held that the accused had not been detained. The majority rejected the broad concept of detention adopted in Canada with respect to s 10 of the Charter. Richardson J held that "temporary restraints on the absolute liberty of the citizen"[644] did not amount to detention. Nor did "keeping a citizen waiting", for "something more than a temporary check, hindrance or intrusion on the citizen's liberty is required".[645] McKay J held that "detention" in s 23(1) of the Bill of Rights Act did "not extend to the merely temporary restraint brought about by the making of some demand or the giving of a direction".[646] His Honour gave an example of importance to the present case. He stated that statutory demands by police for a driver's name and address or licence particulars did not constitute detention.[647] Again, that is so here.

358 *Temese* was followed in *Andresen v Police*[648] and *Strangman v New Zealand Police*.[649] In *Andresen*, Randerson J held that there was no detention of a truck driver who had been stopped for questioning by police under transport regulations even though the driver was not free to go for some 10 minutes. In *Strangman*, Mander J held that there was no detention of a driver who was pulled over for a short period for questioning in relation to alleged dangerous driving and then allowed to go.

359 *R v Anderson*[650] is another case involving the prima facie rule. Police were engaged in an otherwise lawful roadside conversation with a driver. Without legal foundation, they asked him to open the car boot. When he refused, their request was repeated more emphatically. The trial judge found that the driver had opened the boot because "he believed he had no choice".[651] Cannabis was found, leading to a charge and conviction.

360 On appeal, applying the prima facie rule, Eichelbaum CJ, Blanchard and Herron JJ held that the evidence of the cannabis should have been excluded because the police search was unreasonable under s 21 of the Bill of Rights Act. There was no foundation for the request to open the boot and the search was entirely "speculative".[652] It was not made reasonable because the accused had cooperated. He was "ignorant of the right to refuse and it is clear that he would

643. [1994] 2 NZLR 306 per Cooke P, Richardson, Casey, Hardie Boys and McKay JJ.
644. At 315.
645. At 316.
646. At 329.
647. Ibid; his Honour referred to ss 66 and 68B of the Transport Act 1962 (NZ).
648. Unreported, High Court of New Zealand, Randerson J, 23 November 2006 ("*Andresen*").
649. [2014] NZHC 526 (20 March 2014) per Mander J ("*Strangman*").
650. (1997) 4 HRNZ 169 ("*Anderson*").
651. At 167.
652. At 169.

have refused if aware that he could do so".[653] In *R v Hjelmstrom*[654] Blanchard, Laurenson and Doogue JJ explained *Anderson* as a case in which the vehicle search was unlawful "because the police officer's aggressive approach led the suspect to believe, incorrectly, that he had no choice but to acquiesce".[655]

361 The prima facie exclusionary rule was revised by the judgment of the majority (Richardson P, Gault, Blanchard, Tipping, McGrath and Anderson JJ; Elias CJ dissenting) in *Shaheed*.[656] The leading judgment was delivered by Richardson P, Blanchard and Tipping JJ. After analysing the rules applying in comparable jurisdictions, their Honours held that the new rule should be a balancing test in which the judge was required to adopt "a response which is proportionate to the character of [the] breach of the right in question".[657] In doing so, "as a starting point, appropriate and significant weight is given to the fact that there has been a breach of a quasi-constitutional right".[658] In this regard, their Honours approved the judgment of the Privy Council in *Mohammed v The State*[659] which concerned a confession obtained in breach of a constitutional right to be informed of the right to access a lawyer. Giving the judgment of the Judicial Committee, Lord Steyn held:[660]

> The fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value.

While accepting the importance of this consideration, Richardson P, Blanchard and Tipping JJ held in *Shaheed* that it:[661]

> … might, in the end, be held to be outweighed by the accumulation of other factors. In such a case, the conscientious carrying out of the balancing exercise will at least demonstrate that the right has been taken seriously.

It followed that this consideration could not be given undue weight in circumstances where "the disputed evidence is strongly probative of guilt of a serious crime".[662] In the balancing exercise, a breach of human rights "is a very important but not necessarily determinative factor".[663]

362 Richardson P, Blanchard and Tipping JJ went on to discuss the relevant factors in the balancing exercise, stressing the importance of the starting point:[664]

> The starting point should always be the nature of the right and the breach. The more fundamental the value which the right protects and the more serious the intrusion on it, the greater will be the weight which must be given to the breach.

In relation to the conduct of police, their Honours said:[665]

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653. Ibid.
654. (2003) 20 CRNZ 208 ("*Hjelmstrom*").
655. At 212, [13].
656. [2002] 2 NZLR 377.
657. At 422, [156].
658. At 418, [143].
659. [1999] 2 AC 111 per Lord Steyn, Lord Hutton, Lord Hobhouse, Lord Millet and Sir Patrick Russell.
660. At 124.
661. [2002] 2 NZLR 377 at 419, [144].
662. At 419, [143].
663. At 419, [144].
664. At 419, [147].
665. At 420, [148].

> Exclusion will often be the only appropriate response where a serious breach has been committed deliberately or in reckless disregard of the accused's rights or where the police conduct in relation to that breach has been grossly careless. A system of justice which readily condones such conduct on the part of law enforcement officers will not command the respect of the community. A guilty verdict based on evidence obtained in this manner may lack moral authority. Society's longer term interests will be better served by ruling out such evidence.

363 Richardson P, Blanchard and Tipping JJ held that the "nature and quality of the evidence must be considered in the balancing exercise",[666] as was the importance of the evidence to the prosecution case:[667]

> It is also a matter which must be given weight in favour of admission if the disputed evidence is not only reliable but also central to the prosecution's case — that the admission of the evidence will not lead to an unfair trial and the case is likely to fail without it. The more probative and crucial the evidence, the stronger the case for inclusion, although this factor ought not by itself to lead to automatic admission.

364 Exclusion of improperly obtained evidence in criminal cases is now regulated by s 30 of the Evidence Act 2006 (NZ) which codifies the balancing test stated in *Shaheed*. According to s 30(2), when determining whether to exclude such evidence, the judge must:

> (a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and
> (b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice.

Section 30(3) inclusively specifies a number of relevant matters. Section 30(4) compels the judge to exclude improperly obtained evidence if he or she "determines that its exclusion is proportionate to the impropriety". By s 30(5), evidence obtained by a public authority to whom the Bill of Rights Act applies in breach of any enactment or rule of law is improperly obtained.

365 In *R v Williams*,[668] William Young P and Glazebrook J (Hammond J agreeing) extensively discussed the application of the balancing test and offered substantial guidance as to its application in relation to the nature of the right, the extent of the illegality, the nature of any privacy interest invaded, aggravating, mitigating and mutual factors, the need for a systematic analysis, public interest factors, the seriousness of offending, the nature and quality of the evidence and proportionality.[669] William Young P and Glazebrook J considered that their observations on the balancing test in *Shaheed* applied equally to the operation of s 30 of the Evidence Act.[670] Their Honours confirmed that the:[671]

> … starting point in the balancing exercise is the nature of the right and the nature of the breach. The more fundamental a right and the more serious the breach, the less likely it is that the balancing test will result in the evidence being admitted.

666. At 420, [151].
667. At 420–1, [152].
668. [2007] 3 NZLR 207.
669. At 239–49, [104]–[148].
670. [2007] 3 NZLR 207 at 249, [150].
671. At 239, [106].

These factors were regarded as "of fundamental importance".[672]

366 The operation and application of s 30 was again discussed in *Hamed*.[673] Elias CJ stressed that, when conducting an inquiry under s 30(2), a balance was not struck between the gravity of the impropriety and maintaining an effective and credible system of justice. Rather, the assessment was "contextual" — one that "necessitates a broader inquiry than ascertainment of the fact that the evidence has been improperly obtained".[674] Blanchard J held that, under s 30, "the case for exclusion is always stronger when a breach of the Bill of Rights Act has been found".[675]

367 The operation of the balancing test stated in *Shaheed* and expressed in s 30(2) of the Evidence Act is illustrated by *Hjelmstrom*.[676] Police wanted to search the property of the accused but had insufficient suspicion to obtain a warrant. They went to the property and were told they could not search it. They pressed their request, representing incorrectly that a warrant could be obtained. The accused relinquished because "he thought he had no other choice". Cannabis was found, leading to a charge and conviction.

368 Upholding the appeal against the ruling of the trial judge not to exclude the evidence, Blanchard, Laurenson and Doogue JJ held that the search was not consensual. While there was no general obligation on police to "formally advise suspects of their right to refuse a request for consent to a search",[677] the consent of the accused in the present case had been "legally ineffective".[678] Police had induced in the accused a "reasonable belief" that he would be "unable to prevent the search".[679] He was "effectively denied a choice".[680] The public interest and other matters favouring admission of the evidence did not outweigh the breach of the accused's right to be free from unreasonable searches.[681]

369 It can be seen that the Victorian and New Zealand provisions share a focus on the legitimacy of the system of justice and require consideration of any human rights violations, among other considerations, in that context. Under both, the presence of such a violation is an important but not a determinative consideration. Beyond that, I stress again the need to interpret and apply our legislation according to its terms.

Canada

370 Exclusion of evidence is governed by s 24[682] of the Canadian Charter. Here too the focus is upon systemic considerations and exclusion is discretionary and contextual. When considering the authorities reviewed below it is necessary to

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672. At 248, [148].
673. [2012] 2 NZLR 305.
674. At 331, [58].
675. At 363, [191] (citation omitted).
676. (2003) 20 CRNZ 208.
677. At 212, [14].
678. At 212, [13].
679. Ibid.
680. Ibid.
681. At 214, [20].
682. Section 24 provides:

> (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this

bear in mind that the context is constitutional and that the rights to be free from arbitrary search and seizure (s 8) and arbitrary detention (s 9) are widely interpreted in the absence of an express right to freedom of movement and privacy, which are applicable in Victoria under the common law, the ICCPR and the Charter. Despite these differences, the authorities show how human rights can be taken into account in the context of exclusion of evidence.

371 In *Collins v R*,[683] the court identified three sets of factors to be taken into account when applying s 24(2): (1) whether admission of the evidence would affect the fairness of the trial; (2) the seriousness or insignificance of the violation; (3) the effect of exclusion of the evidence on the reputation of the administration of justice.[684] These considerations were confirmed in *R v Stillman*.[685]

372 *Grafe*[686] is an early case of interest because it concerned a request by police for the name of pedestrians. Without suspicion, police pulled up beside the accused and his friends, asking for their names. The accused gave a false name for which he was charged. He was acquitted after the trial judge excluded the evidence upon the basis that the questioning deprived him of his liberty without justification (ss 1 and 7 of the Canadian Charter).

373 The Ontario Court of Appeal upheld the prosecution appeal against the acquittal. Martin, Tarnopolsky and Krever JJA held that the police had a common law right to ask questions even without reasonable suspicion. Asking questions did not amount to deprivation of liberty.[687] While police had no power to compel the person to answer, there had been no compulsion in this case. The Charter did "not seek to insulate all members of society from all contact with constitutional authority".[688] It took into account "the full range of contacts in modern society between state and citizen".[689] I have already noted the importance of these considerations. As the evidence should not have been excluded, a retrial was ordered.

374 The Supreme Court has given a lot of attention to the exclusion of evidence obtained at police traffic stops and like situations. The principles were extensively discussed in *Dedman*,[690] *Hufsky*[691] and *Ladouceur*.[692] It was held in *Dedman* that police derived their authority to stop motorists randomly under the

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Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

683. [1987] 1 SCR 265 per Dickson CJ, McIntyre, Chouinard, Lamer, Wilson, Le Dain and La Forest JJ ("*Collins*").
684. At 283–8 per Dickson CJ, Lamer, Wilson and La Forest JJ.
685. [1997] 1 SCR 607 per Dickson CJ, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Mayor JJ.
686. (1987) 36 CCC (3d) 267.
687. At 271.
688. At 274.
689. Ibid.
690. [1985] 2 SCR 2 per Dickson CJ, Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.
691. [1988] 1 SCR 621 per Dickson CJ, Beetz, Estey, McIntyre, Wilson, Le Dain and La Forest JJ.
692. [1990] 1 SCR 1257 per Dickson CJ, Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ; affirmed in *R v Wilson* [1990] 1 SCR 1291.

RIDE program from the common law.[693] It was held in *Hufsky* that random (but organised) police stops under provincial legislation constituted arbitrary, but justified, detention and not unreasonable search or seizure (ss 1, 8 and 9 of the Canadian Charter).[694] It was held in *Ladouceur* that truly random police stops under the same provincial legislation were also valid.[695]

375 Potential misuse of the police power of random stop and mistreatment of passengers and pedestrians have loomed large as concerns. So, in *Ladouceur*, Sopinka J (for the minority) complained that a decision to stop could be based "on any whim" and "racial considerations may be a factor".[696] Cory J (for the plurality) responded that mechanisms were in place to prevent such abuse. In particular, the power could be exercised only for road safety purposes; going beyond that subject had to be based on reasonable suspicion.[697]

376 The limited purpose of such powers was determinative in the influential case of *Mellenthin*.[698] Police randomly stopped a vehicle without suspicion under provincial legislation. They asked what was in the bag on the front seat and, on a search, found drugs. Upon the ground that the search was unreasonable (s 8 of the Charter), the trial judge excluded this evidence. An appeal court overturned, and the Supreme Court restored, the acquittal.

377 In a much-cited unanimous judgment, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ held that police had abused their power, which had to be directed to the aims of road safety. Their Honours stated firmly:[699]

> The police use of check stops should not be extended beyond these aims. Random stop programs must not be turned into a means of conducting either an unfounded general inquisition or an unreasonable search.

378 The court then applied the exclusion test in s 24(2) of the Charter by reference to the factors identified in *Collins*. It held: to "search a person who is stopped at a check stop, without any reasonable or probable cause, goes far beyond the purpose and aim of these stops and constitutes a very serious Charter breach".[700] It made clear that such searches were "unacceptable" and that a "check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over".[701] Accordingly, the trial judge had correctly excluded the evidence.[702]

379 Building upon that case, the Canadian courts have closely scrutinised the exercise of police traffic stop and like powers against fundamental human rights standards. An important body of authority has been developed for determining when the misuse of such powers should result in the exclusion of evidence. Many

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693. [1985] 2 SCR 2 at 36 per McIntyre, Lamer, Wilson and Le Dain JJ; Dickson CJ, Beetz and Chouinard JJ dissenting.
694. [1988] 1 SCR 621 at 631–3, 637 and 638 per Dickson CJ, Beetz, Estey, McIntyre, Wilson, Le Dain and La Forest JJ.
695. [1990] 1 SCR 1257 at 1288 per Lamer, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.
696. At 1267.
697. At 1287.
698. [1992] 3 SCR 615.
699. At 624.
700. At 628.
701. At 629.
702. At 630.

of the observations in *Mellenthin* and the subsequent cases may be equally applicable in the case of random stops under s 59(1) of our Road Safety Act.

380 A leading authority is *Brown v Regional Municipality and Durham Police Service Board*.[703] Police set up a large-scale checkpoint program for the stopping of motor cycle gang members. In an action in the Supreme Court of Ontario by the motorcyclists for a remedy for breach of the Canadian Charter, the trial judge found that their detention had not been unjustifiably arbitrary (ss 1 and 9). The Court of Appeal upheld that finding.

381 The judgment of Doherty, Weiler and Goudge JJ contains an extensive discussion of the purposive nature of legislative[704] powers of random stop. Their Honours stressed that the exercise of such powers was liable to misuse and, for the necessary protection of human rights, must be limited to cases where police had genuine "highway regulation and safety purposes"[705] and no "co-existing improper purpose".[706] In particular, highway safety concerns could not be used as a "ruse" to justify stopping motorists.[707] The selection of motorists according to rational and neutral criteria (for example "every third vehicle")[708] was valid. But the exercise of the power for improper purposes was not. For example:[709]

> Officers who stop persons intending to conduct unauthorized searches, or who select persons to be stopped based on their sex or colour, or who stop someone to vent their personal animosity toward that person, all act for an improper purpose. They cannot rely on [the statutory power] even if they also have highway safety concerns when making the stop.

Applying *Ladouceur* and *Mellenthin*, the court held that nothing of that sort had been established. So also in the present case nothing of that sought was (in the end) pressed.

382 The principles stated in *Ladouceur*, *Mellenthin* and *Brown* have been applied in a number of cases concerning passengers. *R v Pinto*[710] concerned the prosecution of a passenger in a vehicle pulled over for a traffic stop. Without suspicion, police asked him to get out of the vehicle and state his name and address. A fight ensued in which the accused punched a police officer. After arrest and search, he was found to possess a knife.

383 At trial, Hill J cited *Ladouceur* and *Mellenthin* and referred to the concern of society that traffic stops could "mask abusive or excessive use of police authority as the real motive for a motorist's detention" and held that such stops could not be used as a "ruse or gimmick for general criminal investigative work".[711] As the passenger had not been suspected of wrongdoing, he "was entitled to sit in the front passenger seat … and be left alone" while the driver was questioned[712] and

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703. (1998) 43 OR (3d) 223 ("*Brown*").
704. The provision in question was s 216(1) of the Highway Traffic Act, RSO 1980, c 198. The predecessor to this provision — s 189(1)a — was found in *Ladouceur* to be valid under the Canadian Charter (see above).
705. (1998) 43 OR (3d) 223 at 234.
706. At 238.
707. At 234.
708. At 239.
709. At 238.
710. (2003) 46 MVR (4th) 263 (Ontario Superior Court of Justice) per Hill J ("*Pinto*").
711. At [36].
712. At [55].

could not "be subjected to a non-consensual dragnet or general investigative questioning or identification production".[713] It is no different under our law.

384 Finding that police were not acting in the lawful execution of their duty, Hill J dismissed the assault charge. After excluding evidence of the knife under s 24(2) of the Charter, his Honour dismissed the weapon charge. In that connection, his Honour held that "[p]olice over-extension at traffic stops, even where police bad faith is not present, involves an unacceptable and serious violation".[714]

385 In *R v SH*,[715] the accused was one of three passengers in a vehicle lawfully stopped by police for a licence inspection. But three police vehicles attended, creating an intimidating atmosphere. The driver and passenger were asked for their names. The accused passenger gave a false name, which he later admitted, leading to probation breach and other charges.

386 At the trial, De Filippis J said courts should "carefully scrutinise traffic stops to ensure that what is otherwise a lawful exercise of police power is not used as a ruse for a general criminal investigation".[716] While incidental detention of a passenger might be a lawful consequence of stopping and questioning a driver, the police had to recognise that "passengers are free to leave — however unlikely and impractical this may be".[717] They were entitled to ask passengers for identification, but could not insist upon a reply. Following *Pinto*, his Honour held:[718]

> It must also be understood that in a case such as this, unless the prosecution can establish legally valid consent on the part of passengers in the vehicle to produce identification, there exists no lawful authority to compel answers and identification production.

387 De Filippis J held that the answers of the accused to the questions of the police were not truly voluntary because three police vehicles and several officers were in attendance, three of them directly involved in the questioning. Relying on the judgment of Le Dain J in *Therens*,[719] his Honour held that police had engaged in an unreasonable search of the accused (s 8 of the Charter). Excluding evidence of his admissions pursuant to s 24(2), he took into account "the prevalence of the practice as well as the fact that many people, like the defendant, will feel compelled to respond" in the circumstances that he confronted.[720]

388 Although the facts of the present case are different, the legal principles stated in cases like *Pinto* and *SH* are the same as those applying here. The cases demonstrate the way in which human rights can be taken into account, as appropriate, in the exercise of the exclusionary discretion in cases regarding the alleged mistreatment of passengers at police traffic stops.

389 The traffic stop in *R v Dennis*[721] concerned a driver and two passengers. Without suspicion, police asked the accused passenger for identification. He said he had none. Under further questioning, he gave a false name. Police took his

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713. Ibid.
714. At [71] (citation omitted).
715. [2005] ONCJ 131 (28 April 2005) ("*SH*").
716. At 5, [9].
717. At 4, [7].
718. Ibid.
719. [1985] 1 SCR 613 at 644.
720. [2005] ONCJ 131 (28 April 2005) at 6, [12].
721. (2005) 29 MVR (5th) 110 (Ontario Court of Justice) per Clark J.

mobile telephone and used it to discover his real name. He was then arrested and searched. A knife and drugs were found, leading to charges.

390 Excluding the evidence and dismissing the charges, Clark J referred to *Pinto* and other cases which stressed the need to scrutinise the exercise of traffic stop powers. His Honour said that it was particularly important to understand the "experience and perspective of visible minorities respecting the police".[722] Then he stated this general principle as regards passengers:[723]

> … a passenger cannot be subjected to a non-consensual, or dragnet, or general investigative questioning, or production of identification. An officer is not engaged in a lawful execution of duty in proceeding to ask for identification in those circumstances.

The answers of the accused were held not to be voluntary and the search of his mobile telephone unreasonable (ss 8 and 9 of the Canadian Charter). Therefore the evidence was excluded under s 24(2).[724] With respect, I agree with his Honour's observations and, in my view, the law is materially the same here. As will be seen, I consider that the magistrate correctly decided that police violated these principles in respect of Mr Kaba.

391 Another passenger case was *R v Harris*.[725] During a traffic stop and without suspicion, the accused passenger was asked to give identification, which he did. Being in breach of a bail curfew, he was arrested. When searched, he was found to be in possession of drugs, leading to charges. Applying s 24(2) of the Charter, the trial judge excluded the evidence and entered an acquittal. On appeal, McMurty CJO, O'Connor ACJO and Doherty JA held that the trial judge had been wrong to do so and ordered a retrial.

392 The case is of particular relevance because of the discussion of the contextual significance of a request for a person's name. Rejecting the prosecution submission that such a request is innocuous, Doherty JA (McMurty CJO concurring) observed that the police had not sought the name of the accused out of curiosity or for legitimate social reasons. Rather, police:[726]

> … intended to use that identification to access a wealth of personal information about Harris before allowing Harris to proceed on his way. That information included whether Harris had a criminal record, was subject to any outstanding court orders and, if so, the terms of those orders.

His Honour held that, in context, there was no functional difference between asking the accused for his name and asking him about his criminal past and bail status.[727] The accused had reasonably felt obliged to answer.[728] Following *Mellenthin*, Doherty JA said the inquiry into the identity of the accused was not a proper purpose of the traffic stop and constituted an unreasonable search (s 8 of the Canadian Charter).[729]

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722. At [21].
723. At [22].
724. At [36].
725. (2009) 87 OR (3d) 214.
726. At [38].
727. At [39].
728. At [42].
729. At [40] and [44]. Dissenting on this point, O'Connor ACJO held that the request for the name of the applicant did not breach s 8 of the Charter.

393 In the present case police, also on mobile patrol and in uniform, were acting in an official capacity in seeking Mr Kaba's name. It was not a social occasion or a request from someone walking by in the street. It was not an innocuous request. That police virtually insisted on him giving his name made that clear. Mr Kaba was entitled to think that police would not have been so insistent unless they wanted his personal details for a reason.

394 Applying the factors identified in *Collins*, Doherty JA engaged in a careful assessment of whether the evidence had been correctly excluded. His Honour took into account that the fairness of the trial would not suffer by admitting the evidence.[730] Characterising the conduct of the police, his Honour said:[731]

> Police misconduct resulting in a Charter violation can be placed on a continuum for the purposes of accessing the seriousness of that conduct. [The police officer's] conduct falls somewhere between the two extremes of a good faith error and a blatant disregard for constitutional rights. Having regard to the manner in which [the police officer] conducted himself, I would place his breach considerably nearer the good faith end of that continuum … The characterization of the police conduct tends against describing the breach as serious.

When viewed from the citizen's perspective, the breach was not trivial or minimally intrusive:[732]

> The use of the broad powers associated with Highway Traffic Act stops to routinely investigate passengers who have nothing to do with the concerns justifying those stops must have a significant cumulative, long-term, negative impact on the personal freedom enjoyed by those who find themselves subject to this kind of police conduct. While for persons in some segments of the community, these stops may be infrequent, this record suggests that for others the stops are an all too familiar part of their day-to-day routine. Viewed from the perspective of those who are most likely to find themselves stopped and questioned by police, I think this form of interrogation is anything but trivial. It seems to me at some point it must become provocative.

For the main reason that police had lawful power to obtain the same evidence in the circumstances, his Honour held that the evidence should not have been excluded. The nature of the breach, although not trivial, was insufficient to warrant exclusion of evidence in relation to serious charges.[733]

395 The analysis of Doherty JA is salient in the present case. But, as you will see, here the balancing exercise will result in a different outcome because the alleged offences were relatively minor and the circumstances were different.

396 On 17 July 2009 the Supreme Court of Canada delivered judgment in *Grant*,[734] *Suberu v R*[735] and *Harrison v R*.[736] In *Grant*, a pedestrian case, the Supreme Court revised the principles specified in *Collins* concerning the

730. At [59].

731. At [62].

732. At [63]. This passage was cited with approval in *R v Chronopoulos* (2009) CanLii 18288 (16 April 2009) at [32] (Ontario Supreme Court of Justice) per Harvison Young J. In comparable circumstances, Harvison Young J excluded evidence of the passenger's admissions and possession of drugs: at [34]. The judgment is notable for the emphasis placed on the need to break up the interactions between the police and the driver and passengers and into the legally and factually relevant episodes: see at [14].

733. At [74]–[78].

734. [2009] 2 SCR 353 per McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ.

735. [2009] 2 SCR 460 per McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ ("*Suberu*").

exclusion of evidence under s 24(2) of the Charter. The revised principles were applied in *Suberu* (which need not concern us) and *Harrison*, a traffic stop case. The revised principles do not weaken the relevance of the breach of human rights in the exclusionary determination.

397 In *Grant*, a young man was walking along a sidewalk (as Mr Kaba was trying to do). Whilst under questioning without suspicion, he was effectively surrounded by three police officers. Approving *Grafe*, McLachlin, LeBel, Fish, Abella and Charron JJ held that police were free to question persons in the street. The law was clear that persons questioned were "free to walk away" and reasonable people would not conclude from mere questioning that their right to choose to do so was being challenged.[737] A point was reached, however, where reasonable people would conclude that they were "not free to choose to walk away or decline to answer questions".[738] That had happened in the instant case, resulting in an unjustified arbitrary detention (s 9 of the Canadian Charter).

398 In the questioning, the accused admitted possession of a gun (among other things) for which he was arrested, charged and convicted. On appeal, McLachlin, LeBel, Fish, Abella and Charron JJ upheld the decision of the trial judge not to exclude evidence of the weapon, despite the unlawful questioning. In doing so, their Honours held that s 24(2) of the Canadian Charter was to be applied as follows:[739]

> When faced with an application for exclusion under s 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

399 In relation to the seriousness of the Charter-infringing conduct (factor (1)), McLachlin, LeBel, Fish, Abella and Charron JJ held that the focus was not upon punishment or deterrence of the police but to "preserve public confidence in the rule of law".[740] It was necessary to consider the effect of admitting evidence obtained unlawfully by those entrusted with upholding the rights guaranteed by the Charter.[741] This depended upon the nature of the breach and its place along the spectrum of severity. The more severe and deliberate was the

736. [2009] 2 SCR 494 per McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ ("*Harrison* ").
737. [2009] 2 SCR 353 at 381–2, [37].
738. At 384, [41].
739. At 394, [71].
740. At 395, [73].
741. At 395, [34].

Charter-infringing conduct, the greater was the need for the court to preserve public confidence in, and ensure state compliance with, the rule of law by excluding the evidence.[742]

400 In relation to the impact of the infringement on the Charter-protected interests of the accused (factor (2)), it was necessary to examine "the interests engaged by the infringed right and … the degree to which violation impacted on those interests".[743] The impact of the infringement upon those interests:[744]

> … may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

401 In relation to society's interest in an adjudication on the merits (factor (3)), this was a general expectation.[745] Several considerations were important in this context, including the reliability of the evidence[746] and its importance to the prosecution case.[747]

402 After discussing the application of these principles in particular contexts,[748] McLachlin, LeBel, Fish, Abella and Charron JJ turned to the present case. Their Honours held that, on balance, the trial judge had not erred in admitting the evidence, particularly because police were acting in a situation of legal uncertainty.[749]

403 The principles stated in *Grant* were applied in *Harrison*. Without suspicion and not acting under traffic legislation, police pulled over the driver of a rented motor vehicle. The officer had mistakenly thought that the vehicle needed a front registration plate, which it lacked. Despite realising that no plate was required, he continued with the pullover to preserve "the integrity of the police in the eyes of observers".[750] On questioning, the driver was found to have a suspended licence. A search of the vehicle revealed drugs, leading to charges and conviction.

404 Entering an acquittal on appeal, McLachlin CJ, Binnie, LeBel, Fish, Abella and Charron JJ (Deschamps J dissenting) overturned the failure of the trial judge to exclude the evidence. Applying the *Grant* principles, their Honours held that the police stop represented a "blatant" disregard of Charter rights.[751] The impact on the driver's privacy and liberty rights — including his "expectation of being left alone" — was "much more than trivial".[752] Emphasising that the third factor "must not take on disproportionate significance", the court stated:[753]

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742. At 394, [72].
743. At 396, [77].
744. At 396, [76]; cf *Marijancevic* (2011) 33 VR 440 at 458, [67] per Warren CJ, Buchanan and Redlich JJ.
745. At 397, [79].
746. At 397, [81].
747. At 398, [83].
748. For example, the court said that a heightened concern with police conduct and the centrality of human rights meant that unlawfully obtained confessional statements should normally be excluded: At 403, [98].
749. At 417, [140].
750. [2009] 2 SCR 494 at 500, [5].
751. At 508, [27].
752. At 509–10, [31].
753. At 510, [34].

> … while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, the public also has a vital interest in a justice system that is beyond reproach, particularly where the penal stakes for the accused are high.

It was held that the trial judge had placed undue emphasis on the public interest in the trial of the charges, effectively translating the analysis under s 24(2) "into a simple contest between the degree of police misconduct and the seriousness of the offence".[754] This approach neglected the importance of other factors, particularly "the need to disassociate the justice system from flagrant breaches" of Charter rights.[755]

405 Examples of the application of the *Grant* principles include *R v Nguyen*[756] (traffic stop, passenger questioning and vehicle search — evidence excluded), *Nolet*[757] (truck stop and search — no Charter breach), *R v Humphrey*[758] (traffic stop and passenger questioning — no Charter breach) and *R v Dale*[759] (traffic stop and passenger questioning — evidence excluded). A consistent theme in these authorities is the need, as emphasised in *Ladouceur* and *Mellenthin*, to ensure that the exercise of police traffic stop and like powers are kept to their highway safety purposes and not allowed to degenerate into unfounded general investigations and unreasonable searches.[760] As I have said, that too is a relevant concern here.

United States of America

406 As we have seen, the Fourth Amendment of the Constitution prohibits violation of "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures". It "protects people, not places"[761] and applies to "all seizures of the person, including seizures that involve only a brief detention short of traditional arrest".[762] As in Canada, these rights are broadly interpreted, reflecting the absence of an express right to freedom of movement and privacy.

407 The Fourth Amendment imposes a limit on search and seizure powers "in order to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals".[763] The Supreme Court has repeatedly emphasised that "the ultimate touchstone … is 'reasonableness'".[764] Reasonableness is assessed "by balancing [the] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental

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754. At 511, [37].
755. Ibid.
756. (2009) CarswellOnt 66556 (Ontario Superior Court of Justice) per Bryant J ("*Nguyen*").
757. [2010] 1 SCR 851 per McLachlin CJ, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.
758. [2011] ONSC 3024 (30 May 2011) (Ontario Superior Court of Justice) per Code J ("*Humphrey*").
759. [2013] ONSC 3329 (16 June 2013) (Ontario Superior Court of Justice) per Ray J ("*Dale*").
760. See for example *Nguyen* (2009) CarswellOnt 66556 at [127], *Nolet* [2010] 1 SCR 851 at 867, [23], *Humphrey* [2011] ONSC 3024 at 18, [81] and *Dale* [2013] ONSC 3329 at 5, [19].
761. *Katz* 389 US 347 at 351 per Stewart J for the court (1967).
762. *United States v Brignoni-Ponce* 422 US 873 at 878 per Powell J for the court (1975) ("*Brignoni-Ponce*").
763. *United States v Martinez-Fuerte* 428 US 543 at 554 per Powell J for the court (1976) ("*Martinez-Fuerte*").
764. *Brigham City, Utah v Stuart* 547 US 398 at 403 per Roberts CJ for the court (2006).

interests".[765] The reasonableness standard usually requires the intrusion to be measured against an objective test, such as probable cause or some lesser test.[766] In cases where individualised suspicion cannot be used as the test, other safeguards must protect the individual from discretionary invasion of privacy.[767]

408 In judicial proceedings, exclusion of evidence obtained in violation of the Fourth Amendment is virtually automatic,[768] subject to exceptions including the "independent source" doctrine[769] and the "good faith" rule.[770]

409 Many of the leading cases concerning the scope and application of the Fourth Amendment rights, and the exclusion of evidence obtained in violation thereof, have been decided in the context of police questioning of pedestrians and stopping of motorists and passengers. It has been held that such powers are constitutionally available in certain circumstances and not others. Control of misuse of such powers, even when available, has loomed large as a consideration, as it has in Canada and, in my mind, should here.

410 In relation to the questioning of pedestrians, *Terry v Ohio*,[771] confirmed that a person, "[u]nquestionably … was entitled … as he walked down the street" to the protection of the Fourth Amendment against unreasonable searches and seizures by the police.[772] The court rejected the suggestion that a "stop" and "frisk" of a person on the street did not engage the protection. It held that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person".[773] Indeed, such actions constitute "a serious intrusion upon the sanctity of the person … [and] may inflict great indignity".[774] The situation experienced by the individual is non-consensual in the sense that police "by means of physical force or show of authority, [have] in some way restrained the liberty of the citizen".[775] In *Floyd v City of New York*,[776] Judge Scheindlin referred with approval to cases in which the seizure had been constituted by a low level of coercion, as when an officer twice ordered a person to "hold on a second" and after the second order the person stopped. The similarity with the facts of the present case will be noted. While we do not need to call such interference a seizure, I think it does infringe upon freedom of movement and privacy.

411 However, it was held in *Terry* that the Fourth Amendment did not prevent police from approaching people in a public place for the purpose of asking questions. As explained in the latter case of *United States v Sokolow*,[777] it was also decided in *Terry* that "police can stop and briefly detain a person for

765. *Prouse* 440 US 648 at 654 per White J for the court (1979) (citations omitted).
766. Ibid.
767. At 655 per White J for the court.
768. *Weeks v United States* 232 US 383 at 393–4 per Day J for the court (1914).
769. *Murray v United States* 487 US 533 per Scalia J for the court (1988).
770. *United States v Leon* 468 US 897 per White J for the court (1984); *Massachusetts v Sheppard* 468 US 981 per White J for the court (1984).
771. 392 US 1 per Warren CJ for the court; Black J concurring in the judgment, Harlan and White JJ concurring; Douglas J dissenting (1968) ("*Terry*").
772. At 9 per Warren CJ for the court.
773. At 16 per Warren CJ for the court.
774. At 17 per Warren CJ for the court.
775. At 19 fn 16 per Warren CJ for the court.
776. 959 F Supp 2d 540 at 566 (SDNY, 2013) ("*Floyd*").
777. 490 US 1 at 7 per Rehnquist CJ for the court (1989).

investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot', even if the officer lacks probable cause".

412 It was further decided in *Terry* that, when there is reason to believe the person being questioned is armed, police can conduct a pat-down search, even when no offence is suspected.[778] This is not unreasonable in circumstances where a police officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion".[779]

413 I am not by this discussion implying that I am approving *Terry*. With respect, in several respects I do not accept the reasoning and it could not, consistently with our law, be accepted here.

414 Since *Terry* the court has repeatedly held that mere police questioning does not constitute a seizure. For example, in *Florida v Royer*[780] it was explained that:[781]

> … law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

By extension, it was held in *Florida v Bostick*[782] that, when asking such questions, police can also "ask to examine the individual's identification" and "request consent to search his or her luggage".[783]

415 The court in *Bostick* emphasised that such questioning did not amount to a constitutional seizure "as long as the police do not convey a message that compliance with their requests is required".[784] The co-operation has to be consensual and "'consent' that is the product of official intimidation or harassment is not consent at all".[785] The test of consent to questioning is objective and depends upon whether, in all of the circumstances:[786]

> … the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.

As we have seen, this statement fairly represents the position in Australia under the common law.

416 The potential for misuse of discretionary police powers to stop and question pedestrians has been amply demonstrated by *Floyd*.[787] The plaintiffs were African-Americans and Hispanic individuals stopped by police pursuant to the

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778. 392 US 1 at 27 per Warren CJ for the court (1968).
779. At 21 per Warren CJ for the court (citations omitted).
780. 460 US 491 per White J for the court; Powell J concurring; Brennan J concurring in the result; Burger CJ, Blackmun, Rehnquist and O'Connor JJ dissenting (1983).
781. At 497 per White J for the court.
782. 501 US 429 per O'Connor J for the court; Marshall, Blackmun and Stevens JJ dissenting (1991) ("*Bostick*").
783. At 435 per O'Connor J for the court.
784. Ibid.
785. At 438 per O'Connor J for the court.
786. At 439 per O'Connor J for the court. In *United States v Mendenhall,* 446 US 544 at 554 (1980) Stewart J said seizure occurred if "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave" (footnotes omitted) ("*Mendenhall*"). *Brendlin* 551 US 249 at 255 per Souter J for the court (2007) endorsed both the *Bostick* and *Mendenhall* tests.
787. 959 F Supp 2d 540 (SDNY, 2013).

New York City stop and frisk policy, which was based on *Terry*. They alleged breach of their Fourth and Fourteenth (equal protection of the law) Amendment rights. In the United States District Court, Judge Scheindlin found that the police powers were being used in a capricious and discriminatory manner, contrary to "bedrock principles of equality".[788] Her Honour ordered immediate changes to the policy and other relief.[789] The issues of fact addressed in that case illustrated those that might legitimately be explored under the Charter where it is alleged that police powers are being used in a discriminatory way, as with racial profiling. I have already noted that allegations of that nature were not pressed in the present case.

417 In relation to traffic stops, it is constitutionally permissible to conduct random stops for or in certain limited purposes or circumstances but not for general highway safety purposes.

418 *Almeida-Sanchez v United States*[790] concerned police on roving patrol who, without reasonable suspicion, randomly stopped a motor vehicle 25 miles from the Mexican border. The search revealed drugs for which the driver was charged and convicted. The Supreme Court (by a majority) upheld the appeal and ordered an acquittal upon the ground that the drugs were the product of an illegal search and should have been excluded as evidence.

419 In so deciding, the court held that it was constitutionally permissible to carry out "routine inspections and searches of individuals or conveyances seeking to cross our borders"[791] and also at its "functional equivalents", such as "an established station near the border" or a relevant airport.[792] But a search during a roving patrol 25 miles from the border without warrant, probable cause or consent was "conducted in the unfettered discretion" of police[793] and not justified by any legitimate purpose of border protection.[794]

420 In *United States v Ortiz*,[795] the defendant was convicted of knowingly transporting illegal aliens. His vehicle was searched at an organised checkpoint far from the border. The court followed *Almeida-Sanchez* to hold that such a checkpoint stood in no different position to a roving patrol. To search private vehicles at a checkpoint far from the border on a random basis involved an impermissible degree of discretion. In the view of the court:

> A search, even of an automobile, is a substantial invasion of privacy.[796] To protect that privacy from official arbitrariness, the court always has regarded probable cause as the minimum requirement for a lawful search.[797]

788. At 664.
789. At 667.
790. 413 US 266 per Stewart J for the court; Powell J concurring; Burger CJ, White, Blackmun and Rehnquist JJ dissenting (1973) ("*Almeida-Sanchez*").
791. At 272 per Stewart J for the court.
792. At 273 per Stewart J for the court.
793. At 270 per Stewart J for the court.
794. At 273–4 per Stewart J for the court.
795. 422 US 891 per Powell J for the court; Rehnquist J concurring; Burger CJ, Blackmun and White JJ concurring in the judgment (1975) ("*Ortiz*").
796. The degree of the invasion of privacy in an automobile search may vary with the circumstances, as there are significant differences between "an automobile and a home or office". *Chambers v Maroney* 399 US 42 (1970); *Almeida-Sanchez* 413 US 266 at 279 per Powell J concurring (1973).
797. 422 US 891 at 896–7 per Powell J for the court (1975).

Finding that the lower appeal court had correctly decided that the product of the illegal search (the concealed aliens) should have been excluded as evidence, the court upheld the reversal of the defendant's conviction. Confirming *Ortiz*, in *United States v Martinez-Fuerte*[798] the court repeated that "checkpoint searches are constitutional only if justified by consent or probable cause to search".

421 *United States v Brignoni-Ponce*[799] was decided on the same day as *Ortiz* but differed from that case in that the government did not claim authority to search vehicles, only to question occupants about their immigration and citizenship status. The police were found to be on roving patrol near the border. They stopped a vehicle and questioned the occupants because they "appeared to be of Mexican descent".[800] Illegal aliens were discovered in the vehicle. The court affirmed the decision of the lower appeal court that the stop was invalid and that the driver had not been properly convicted.

422 The court held that the stop and questioning constituted a seizure.[801] It was therefore necessary to consider whether it was reasonable. Citing *Camara v Municipal Court*,[802] it stated that, in doing so, it was necessary to strike "a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers".[803]

423 Applying that test, the court took into account the importance of protecting the border, the minimal intrusion created by a stop and the absence of practical alternatives. Drawing on *Terry*, the court held:[804]

> … when an officer's observations lead him reasonably to suspect that a particular vehicle may contain aliens who are illegally in the country, he may stop the car briefly and investigate the circumstances that provoke suspicion … The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.

However, the court held that seeing occupants of Mexican appearance, standing alone, did not justify a stop by a roving patrol. Therefore the evidence of the presence of the aliens in the vehicle had been illegally obtained and should have been excluded.[805]

424 The court took a step further in *Martinez-Fuerte*.[806] After being arrested at a permanently fixed checkpoint operated away from the border, the defendants were convicted of transporting illegal aliens. Vehicles were liable to be stopped and the occupants questioned even when there was no reason to believe illegal aliens were present. The court held that the stops were not unreasonable.

798. 428 US 543 at 567 per Powell J for the court (1976).
799. 422 US 873 per Powell J for the court; Rehnquist J concurring; Burger CJ, Blackmun, Douglas and White JJ concurring in the judgment (1975).
800. At 875 per Powell J for the court.
801. At 878 per Powell J for the court.
802. 387 US 523 at 536–7 per White J for the court (1967).
803. 422 US 873 at 878 per Powell J for the court (1975).
804. 422 US 873 at 881–2 per Powell J for the court (1975).
805. At 886–7 per Powell J for the court.
806. 428 US 543 per Powell J for the court; Brennan and Marshall JJ dissenting (1976).

425 In balancing the reasonableness of the stops, the court took into account the (carefully selected) location of the checkpoint,[807] the importance of protecting entry by illegal aliens[808] and the need to do so at points away from the border.[809] It followed[810] the holding in *Carroll v United States*[811] that stops intruded upon the rights of motorists to "free passage [along public highways] without interruption". But it was held that the intrusion was minimal and involved only visual inspection and questioning, not search of the vehicle.[812] In *Prouse*,[813] the court (by a majority) said this was a critical consideration justifying random stopping at checkpoints. In view of that minimal intrusion, it was held in *Martinez-Fuerte* that it was reasonable to allow police a wide discretion to stop; therefore the discretion could be exercised even on the sole basis of the apparent Mexican descent of the vehicle occupants.[814]

426 Counsel for Mr Kaba relied heavily upon the decision of the court in *Prouse*.[815] At issue was the constitutionality of a random stop by police on roving patrol. When so stopping a driver without suspicion, police saw drugs in the vehicle, leading to a charge. The trial judge acquitted the driver after excluding the evidence as the product of an illegal search and seizure.

427 White J (Blackmun and Powell JJ concurring; Rehnquist J dissenting) held that the trial judge had been correct. After reviewing the previous decisions of the court, his Honour held that a random stop, like a stop at a checkpoint, represented a "physical and psychological intrusion visited upon the occupants of a vehicle … by means of a possibly unsettling show of authority".[816] Both random and checkpoint stops "interfere with freedom of movement".[817] Automobile travel was "a basic, pervasive, and often necessary mode of transportation" in which many found a great sense of "security and privacy".[818] The security guaranteed by the Fourth Amendment would be "seriously circumscribed" by unfettered random stops of the kind which had occurred.[819]

428 As to whether the intrusion was reasonable, White J accepted the "vital interest" of government in ensuring road safety.[820] Registration of vehicles and similar regulatory requirements were "essential elements in a highway safety program".[821] However, the primary means of enforcing compliance with regulations must be "acting upon observed violations".[822] Random spot checks

807. At 553 per Powell J for the court.
808. At 552 per Powell J for the court.
809. At 556 per Powell J for the court.
810. At 557–8 per Powell J for the court).
811. 267 US 132 at 154 per Taft CJ for the court (1925).
812. 428 US 543 at 559 per Powell J for the court (1976).
813. 440 US 648 at 656 per White J for the court (1979).
814. 428 US 543 at 563–4 per Powell J for the court (1976).
815. 440 US 648 per White J for the court; Blackmun and Powell JJ concurring; Rehnquist J dissenting (1979).
816. At 657.
817. Ibid.
818. At 662.
819. At 663.
820. At 658.
821. Ibid.
822. At 659.

made only a "marginal contribution to roadway safety"[823] yet represented the acknowledged "evil" of "standardless and unconstrained discretion".[824]

429 Rehnquist J powerfully dissented. Citing the lack of empirical data to support the reasoning of the majority, his Honour held that the interests of the individual were merely "diaphanous".[825] Random stop checks were a reasonable intrusion upon those interests. That was especially because:[826]

> [t]he whole point of enforcing motor vehicle safety regulations is to remove from the road the unlicensed driver before he demonstrates why he is unlicensed. The Court would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.

430 In relation to proportionality, I have already expressed my respectful disagreement with the conclusion of the plurality in *Prouse*, although there is much in the underlying reasoning with which I do agree.

431 *Prouse* concerned a driver. *Brendlin*[827] applied the same reasoning to a passenger. When police on roving patrol randomly stopped a driver, drugs were found in the vehicle, leading to a charge against the passenger. Finding that the passenger had not been seized under the Fourth Amendment, the trial judge refused to exclude evidence of the drugs. The court upheld the appeal of the passenger against that ruling.

432 Endorsing the clear dicta in several previous cases, the court held that, at a random vehicle stop, a passenger was seized just as much as a driver.[828] Applying the *United States v Mendenhall* and *Bostick* tests, the question was whether a reasonable person in the position of the passenger would feel free to leave.[829]

433 In the view of the court, "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission".[830] The intrusion into privacy and personal security did not distinguish between passenger and driver.[831] As the passenger was seized, the holding in *Prouse* applied. Therefore the ruling had to be reconsidered upon the basis that the passenger had been seized.[832]

United Kingdom (and Europe)

434 I will consider the United Kingdom and the provisions of the European Convention on Human Rights together.[833]

435 In the United Kingdom, at common law the judge in a criminal trial has a discretion to refuse to admit evidence if "its prejudicial effect outweighs its probative value" but not upon the ground that the evidence "was obtained by

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823. At 661.
824. Ibid.
825. At 666.
826. Ibid.
827. 551 US 249 per Souter J for the court (2007).
828. At 255–6 per Souter J for the court.
829. At 255–6, 257 per Souter J for the court.
830. At 257 per Souter J for the court.
831. Ibid.
832. At 263 per Souter J for the court.
833. See generally Emerson et al, *Human Rights and Criminal Justice*, Sweet & Maxwell, 3rd ed, (2012), [634]–[650].

improper or unfair means".[834] Disciplining police is not a purpose of the common law of evidence and the remedy for unlawful obtaining of evidence must lie outside the criminal trial process.[835] As we have seen, our common law is much stronger.

436 The Police and Evidence Act 1984 (UK) c 60 implemented a broader approach by introducing a new ground upon which such evidence might be excluded. Section 78 relevantly provides:

> (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

437 *R v Fennelley*[836] illustrates how the provision applies in a case with similarities to the present. Evidence derived from an unlawful stop and search in a street and at a police station was excluded under s 78. Judge Watts held that this was done not to discipline the police but to safeguard the trial of the accused.[837]

438 The relevance of human rights to the exercise of the discretion in s 78 was considered in *R v Khan*.[838] Installation of an electronic listening device involved trespass, damage to property and invasion of privacy. Following *R v Sang*,[839] it was held that evidence thereby obtained was admissible and relevant even if unlawfully obtained. The court went on to hold that any breach of the right to privacy in Art 8 (privacy) of the European Convention on Human Rights was relevant to, but not determinative of, the exercise of the discretion in s 78:[840]

> … if the behaviour of the police in the particular case amounts to an apparent or probable breach of some relevant law or convention, common sense dictates that this is a consideration which may be taken into account for what it is worth. Its significance, however, will normally be determined not so much by its apparent unlawfulness or irregularity as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings.

Lord Nicholls stated that "the discretionary powers of the trial judge to exclude evidence march hand in hand with" Art 8.[841]

439 Evidence obtained through torture stands in a different category. It must be excluded under an absolute common law prohibition.[842]

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834. *R v Sang* [1980] AC 402 at 437 per Lord Diplock ("*Sang*"); see also *R v Khan* [1997] AC 558 at 576 per Lord Nolan ("*Khan*").
835. *Sang* [1980] AC 402 at 436 per Lord Diplock.
836. [1989] Crim LR 142 (Acton Crown Court).
837. At 143.
838. [1997] AC 558 per Lord Keith, Lord Browne-Wilkinson, Lord Slynn, Lord Nolan and Lord Nicholls.
839. [1980] AC 402 per Lord Diplock, Viscount Dilhorne, Lord Salmon, Lord Fraser and Lord Scarman.
840. [1997] AC 558 at 582 per Lord Nolan.
841. At 583.
842. *A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221 at 270, [52] per Lord Bingham.

440 *Khan* was decided before the enactment of the Human Rights Act which gave domestic force to the European Convention on Human Rights. In *R v P*,[843] it was held that the same approach was to be followed. Following decisions of the Strasbourg court, it was held:[844]

> … the direct operation of articles 8 and 6 does not invalidate their Lordships' conclusion or alter the vital role of section 78 as the means by which questions of the use of evidence obtained in breach of article 8 are to be resolved at a criminal trial. The criterion to be applied is the criterion of fairness in article 6 which is likewise the criterion to be applied by the judge under section 78. Similarly, the European Court of Human Rights decision that any remedy for a breach of article 8 lies outside the scope of the criminal trial and that article 13 does not require a remedy for a breach of article 8 to be given within that trial shows that their Lordships were right to say that a breach of article 8 did not require the exclusion of evidence. Such an exclusion, if any, would have to come about because of the application of article 6 and section 78.

Khan was also endorsed by the House of Lords in *Kinloch v Her Majesty's Advocate*.[845] This represents the current state of the law.[846]

441 As can be seen, the British courts take into account the obligations arising under Arts 6 (fair trial) and 8 of the European Convention on Human Rights in the context of unlawfully obtained evidence. I will look briefly at what the Strasbourg court has said about this subject.

442 In *Schenk v Switzerland*,[847] the applicant complained that unlawfully intercepted telephone conversations had been used against him in a criminal trial. He alleged a breach of Arts 6 and 8. The court (by a majority) held that Art 6 did "not lay down any rules on the admissibility of evidence as such, which is therefore principally a matter for regulation under national law".[848] The question was whether the "trial as a whole was fair".[849] The court ruled against the applicant on that issue after conducting a careful examination of the whole of the trial, including the evidence presented. This approach has been followed in many subsequent cases.[850]

443 Later cases have emphasised that, to be fair under Art 6, the trial procedure must allow evidence obtained in breach of the European Convention on Human Rights to be challenged on that ground. One such case was *Khan v United Kingdom*[851] which arose out of the pre-Human Rights Act decision of the House of Lords in *Khan*. The court held that the applicant's rights under Art 8 had been breached because, in the United Kingdom, there was not then any statutory regulation of the use of covert listening devices.[852] However, it was held that his Art 6 rights had not been breached because, under s 78 of the Police and

843. [2002] 1 AC 146 per Lord Hutton, Lord Goff, Lord Browne-Wilkinson, Lord Cooke and Lord Hobhouse.
844. At 161–2 per Lord Hobhouse.
845. [2013] 2 AC 93 at 105, [15]–[17] per Lord Hope.
846. *R v Plunkett* [2013] 1 WLR 3121 at 3131–2, [54] per Sir John Thompson P, Swift and MacDuff JJ.
847. (1991) 13 EHRR 242.
848. At 265–6.
849. At 266.
850. See *Khan v United Kingdom* (2001) 31 EHRR 45 at 1025, [34]; *PG v United Kingdom* (2008) 46 EHRR 51 at 1294, [76] ("*PG*"); *Allan v United Kingdom* (2003) 36 EHRR 12 at 155–6, [42]; *Gäfgen v Germany* (2011) 52 EHRR 1 at 41, [162]–[164].
851. (2001) 31 EHRR 45.
852. At 1023, [27]–[28].

Evidence Act, he had been given "ample opportunity to challenge both the authenticity and use of the recording" obtained in breach of Art 8.[853]According to a leading text, it follows from this decision that judges exercising the discretion in s 78 will need to take into account:[854]

> … the nature of the unlawful activity alleged, the gravity of the breach of Convention rights, any element of inducement or compulsion, the existence of other evidence implicating the accused, the probative weight of the disputed evidence and its reliability.

444 That brings me to the application of the principles in the present case.

Exclusion of unlawfully obtained evidence: application

General issues

445 It was the case for the Director that the discretion in s 138(1) of the Evidence Act was not enlivened because there was no impropriety or contravention of Australian law or, alternatively, the evidence was not obtained in consequence thereof. Alternatively, if the discretion was enlivened, no magistrate acting reasonably could have exercised the discretion to exclude the evidence.

446 I have upheld the submissions of the Director in relation to the interpretation of s 59(1) of the Road Safety Act. Contrary to the submissions of Mr Kaba and the Commission, there was no unlawfulness in relation to the stopping of the vehicle or the request that the driver produce his driver's licence and state his name and address.

447 I do not accept the submissions made for Mr Kaba, based on *Patrick's Case*,[855] that even if the police had a power of stop and request under s 59(1) of the Road Safety Act, the exercise of that power could be attacked in the present case for breach of human rights under s 38(1) of the Charter. On the view I have taken of s 59(1), the provision confers a power of routine or random stop and request in respect of drivers for the purposes of the administration of the Road Safety Act. What the police did in stopping the vehicle, requesting the driver's name and address and the production of his driver's licence was so authorised and, in the circumstances of the case, they could not reasonably have acted differently (see s 38(2) of the Charter).

448 In so concluding I emphasise that, in those circumstances, there was nothing to suggest any human rights were interfered with beyond those involved as an ordinary and natural consequence of the due exercise of the power concerned. If the power had been being used selectively to target drivers of a particular race or ethnicity, or for other improper purposes, that might be an abuse of the power in s 59(1) and a breach of human rights under the Charter. But that was not pressed. Moreover, the interference with the right to freedom of movement of Mr Kaba as a passenger was the ordinary and natural consequence of the due exercise of the power in s 59(1) and was also covered by s 38(2).

449 The magistrate was critical of the request made by Constable Andrews to search the vehicle. His Honour said that the request was made "on [a] tenuous basis". But he found that the driver had consented to the search and did not

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853. At 1027, [38]; see also *PG* (2008) 46 EHRR 51 at 1294–6, [76]–[81].

854. Emerson et al, *Human Rights and Criminal Justice*, Sweet & Maxwell, 3rd ed, (2012), [647] (footnote omitted).

855. (2011) 39 VR 373 at 441, [310] per Bell J.

determine that it was unlawful. The search of the vehicle played no part in his Honour's decision to exclude the evidence and it was not relevant to any question which arose before me. As submitted by the Director and the Commission, it is therefore not appropriate for me to determine Mr Kaba's submission that the request for consent to conduct the search was unlawful.

Sequence of events

450 The authorities and human experience reveal that random police traffic stops are apt to be dynamic and develop in unpredictable ways with significant consequences for the police powers that may be available. Police must be ready to react to circumstances as they initially present and may develop. It is not appropriate to examine their conduct without appreciating the challenging nature of police work, although police are trained to withstand insult and expected to exercise restraint.[856] When analysing whether police have properly exercised their powers in a traffic stop situation, the approach described by Binnie J for the Supreme Court of Canada in *Nolet*[857] is instructive:[858]

> It is necessary for a court to proceed step by step through the interactions of the police and the appellants from the initial stop onwards to determine whether, as the situation developed, the police stayed within their authority, having regard to the information lawfully obtained at each stage of their inquiry.

451 I have already set out the magistrate's findings and reasons for decision. On the found facts, I think the sequence of events can be broken up into three stages: the random stop, the walking away and questioning of Mr Kaba and the arrest and alleged offending.

452 The interaction between the driver and Mr Kaba and the police began with the random traffic stop without suspicion of wrongdoing. Despite seeing the scissors and computer and getting radio information about the vehicle, police at this stage formed no reasonable suspicion and made no arrest. The only power available to support the stop was in s 59(1) of the Road Safety Act. Before the magistrate, Mr Kaba argued that this power did not have this power, not that it was exercised unlawfully (for example, in a manner that was racially discriminatory).

453 On the found facts, Mr Kaba left the vehicle while the stop was underway and walked along the footpath, as he was entitled to do. He was asked for his name and details on three occasions, twice by Constable Andrews and on the third occasion by Senior Constable Randall. On that last occasion, the senior constable said to Mr Kaba: "Mate, I need your name to say I spoke to you". Mr Kaba was not then under suspicion.

454 What followed was the alleged abuse by Mr Kaba, the arrest and the alleged exposure, assault and other offending. For the purposes of the present application, I must take the facts alleged by police as established, as did the magistrate.

455 As I see it, the magistrate properly examined the facts of the case in that order.

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856. *Ferguson v Walkley* (2008) 17 VR 647 at 655–6, [35] per Harper J, citing *Coleman* (2004) 220 CLR 1 at 79, [200] per Gummow and Hayne JJ.
857. [2010] 1 SCR 851.
858. At 858, [4].

Magistrate's decision

456 After so examining the facts, the magistrate decided not to admit the evidence under s 138(1) of Evidence Act on the basis that both the police random stop of the vehicle and the persistent questioning of Mr Kaba was improper and unlawful. I have concluded that his Honour erred in concluding that s 59(1) of the Road Safety Act did not authorise the stop. The question remains whether he erred in concluding that Mr Kaba's right to privacy under the common law, the ICCPR and the Charter was contravened by the questioning.

457 The issue may be considered by reference to whether police engaged in improper and unlawful conduct and whether the evidence was obtained in consequence of that conduct. The Director submitted that neither was the case. I will later turn to the discretionary considerations.

Improper and unlawful police conduct

Common law

458 On my reading of the reasons for decision of the magistrate, his Honour concluded that the questioning of Mr Kaba was improper and unlawful because it was done both without legal authority and in actual breach of his human rights under the Charter. His Honour explicitly accepted the submissions made on behalf of Mr Kaba to that effect.

459 It is clear from the authorities that I have discussed that people are not immune from contact with police in public places. The ordinary power of police to ask questions is an important means by which they can fulfil their duty to prevent crime and protect the community. Up to a certain point, police questioning of individuals does not interfere with their rights and freedoms at common law. The line of permissible questioning is crossed when the questioning becomes coercive, that is, when the individual is made to feel that he or she cannot choose to cease co-operating or leave, judged by reference to how a reasonable person would feel in the circumstances.

460 Whether the line of permissible questioning was crossed with respect to Mr Kaba was a question of fact for the magistrate to determine. Having regard to his Honour's reasons for decision, I think he decided that the line had been crossed and that Mr Kaba had been subjected to unlawful questioning through the assertion of coercive authority by police in uniform. On the found facts, that conclusion was not only open, it was irresistible. Mr Kaba was stopped walking on his lawful way. He was asked on three occasions, increasingly persistently, for his name and details and police refused to take no for an answer. Although Mr Kaba did not provide his name and details, a reasonable person would have felt that he or she had no choice but to do so and not leave until it was done. I think the magistrate attributed at least some of Mr Kaba's abusive language and behaviour to the stress that was placed upon him by the coercive police questioning.

461 In my view, the magistrate correctly decided that, under s 138(1)(a), the police questioning was improper and in contravention of Australian law because it was done without authority and in contravention of Mr Kaba's rights and freedoms at common law. He made no error in so deciding, indeed was correct to so decide.

ICCPR

462 As you have seen, the magistrate decided that asking Mr Kaba for his name and identification particulars breached rights recognised in the ICCPR. From the context, I think his Honour was referring to the right to privacy in Art 17(1).

463 In my view, that right was clearly engaged and actually breached by the police questioning of Mr Kaba. For the reasons I have given, it interfered with the privacy of Mr Kaba's name and other personal details. Without legal authority, the police had no right to press him to divulge this information to them. No error of law was committed by the magistrate in so deciding.

464 It was also open on the found facts for the magistrate to decide that Mr Kaba's right to freedom of movement under Art 12(1) was also breached. Once the police questioning on the footpath became coercive, it interfered with his right to walk freely in the public streets. However, this does not affect the outcome of this case or add significantly to the seriousness of the violation.

465 Because the police questioning was not only unlawful and improper but also contrary to or inconsistent with Mr Kaba's rights under the ICCPR, this was a relevant discretionary consideration under s 138(3)(f).

Charter (s 38(1))

466 It was common ground that, under s 4(1)(d), a police officer is a public authority under the Charter. Therefore the obligation in s 38(1) applies to police.

467 The magistrate spoke of police not giving "proper consideration" to human rights. That is the language of s 38(1) in respect of decisions. There was no decision of police in this case. What they rather did was to "act" in a way towards Mr Kaba that was incompatible with human rights. On a fair reading of his Honour's reasons, he so decided.

468 There is a question whether, in relation to the concept of incompatibility with human rights, ss 7(2) and 38(1) must be read and applied together. I think the better view, as adopted in the submissions of the parties, is that they must be so read and applied. If that is correct, under s 7(2), Mr Kaba's human rights could only be limited "subject to law". But, when police interfered with Mr Kaba's right to privacy in s 13(a), they acted without lawful authority. There was no law to which his right to privacy (and freedom of movement) was relevantly subject. He was standing dignified and free in the arena of civil protection fully possessed of his human rights. There was simply no legal foundation for the coercive questioning in which police engaged in the face of his plainly expressed resistance. Therefore the police actions could not satisfy the legality component of the limitations test in s 7(2). It follows that they acted incompatibly with human rights and unlawfully under s 38(1). Police should have given effect to and respected Mr Kaba's human rights, not breached them. But in this case none of that necessarily matters. If, contrary to my view, the interpretation and application of s 38(1) must be disengaged from s 7(2), the police actions towards Mr Kaba were clearly unlawful under s 38(1) because, under s 38(2), there was no statutory provision or other law according to which police could not reasonably have acted differently. Being incompatible with the human rights in the Charter under s 38(1), and not being protected by s 38(2), the police actions were unlawful.

469 In my view, the magistrate correctly decided that, under s 138(1) of the Evidence Act, the police questioning of Mr Kaba was improper and in contravention of Australian law because it was in incompatible with his human

right to privacy in s 13(a) and unlawful under s 38(1) of the Charter. He could equally have so decided in respect of the right to freedom of movement in s 12, although this does not affect the outcome of the case or add significantly to the seriousness of the violation.

470 In summary, the magistrate correctly decided under s 138(1)(a) of the Evidence Act that the police questioning of Mr Kaba was improper and unlawful at common law and under the Charter and was also contrary to or inconsistent with his rights under the ICCPR (see s 138(3)(f)).

Evidence obtained in consequence

471 In the alternative, it was submitted on behalf of the Director that, even if the police request for Mr Kaba's name and details was improper, unlawful and in breach of human rights, the evidence of Mr Kaba's offending was not capable of being characterised as being "obtained … in consequence" thereof under s 138(1)(b) of the Evidence Act. I do not accept that submission.

472 As I have discussed by reference to the authorities, under s 138(1)(b) a chain of causation must be shown between the impropriety or contravention and the obtaining of the evidence. It can be direct or indirect. Evidence of offending can be excluded where the impugned police conduct gave rise to the offending in circumstances that make it appropriate to find that the evidence was "obtained … in consequence of" of that conduct. Where a person commits an offence by acting in a way that, viewed objectively, is disproportionate to impugned police conduct, the court might be compelled to find that the evidence of the offending was not, as a matter of causation, obtained in consequence of it.

473 The magistrate did not accept that Mr Kaba's reaction was so disproportionate that, as a matter of causation, the offending was not in consequence of impugned conduct of police. His Honour did not accept that Mr Kaba's reaction was induced by his unsubstantiated belief that he was being racially harassed. He found Mr Kaba's offensive language, verbal abuse, indecent exposure and assault, viewed objectively, were provoked by the impugned conduct. He did not consider that the assault upon Senior Constable Randall was so grossly disproportionate that it could not sensibly be concluded that evidence of it was obtained in consequence of that conduct.

474 In my view, the magistrate was entitled to make those findings. In doing so, his Honour did not err in law in the interpretation and application of the requirement in s 138(1)(b) that the excluded evidence be "obtained … in consequence" of the impropriety or contravention.

475 It is true that, on the found facts, this was not a case in which the evidence of offending arose out of an ill-advised or unlawful arrest or improper physical restraint. The actual arrest was a lawful response to Mr Kaba's offensive language. His indecent exposure and physical assault of Senior Constable Randall occurred after that. However, the magistrate found that the offending was causally connected to the earlier improper and unlawful police conduct. His Honour was of the view, on the found facts, that the arrest did not sever the connection between that conduct and the offending. In my view, he was clearly entitled so to find.

476 It is also true that the magistrate did not find that police had intentionally provoked Mr Kaba into committing the offences. Although, on the found facts, the police conduct was deliberate in the sense that they knew what they were

doing and nothing had happened by accident, I would accept that the facts did not support a finding that police had intentionally provoked Mr Kaba. But, in my view, the magistrate did not need to have facts supporting, or to make, such a finding. As his Honour decided, under s 138(1), evidence can be "obtained" by police "in consequence of" their improper or unlawful conduct without them intending, by that conduct, to produce offending and therefore to obtain evidence of offending. On his Honour's finding, that had happened in this case. That finding was open. This case really did have similarities with *Robinett* and *Carr*. The reasoning in those cases was applicable, as his Honour found.

477 Finally it is true that, on the part of police, there was no physical interference with Mr Kaba or the driver, or with private property, and no tortious conduct. Any interference with his human rights was of short duration. There was no breach of his right not to incriminate himself. The police conduct was not objectively threatening, physically intimidating or inflammatory.

478 I accept, as I think the magistrate did, that these matters must be taken into account when considering the causation issues arising under s 138(1)(b). But I think his Honour considered, as I consider, that these matters fail to capture the objective gravity of how police behaved towards Mr Kaba. He was not suspected of wrongdoing. He was free to go and he sought to go. He was then coercively asked for his name and details. Police could see that he was angry. They were trained to deal with such situations and made professional choices. Police could easily have let Mr Kaba go on his way and they should have done so. Whether he would give them his name and details was his private business but they pressed him well over the line of permissible questioning. I do not condone his offending. But it was objectively foreseeable that he might react in the way that he did in response to the police conduct. All that too had to be taken into account when applying s 138(1)(b), and the magistrate correctly did so. I would specifically reject the submission, as did his Honour, that the police human rights breach can be characterised as a brief and innocuous request for Mr Kaba's name and address.

479 I reject the submission of the Director that the magistrate erred in law in the interpretation and application of the causation test in s 138(1)(b) of the Evidence Act. In so concluding I make clear that, in my view, the error committed by his Honour in relation to the interpretation of s 59(1) of the Road Safety Act did not undermine his decision in that regard.

Discretion not to admit evidence

480 It is first necessary for me to determine submissions that were made in relation to the exercise of the magistrate's discretion to refuse to admit the evidence. Many of these submissions remain relevant even given my decision that his Honour erred when interpreting s 59(1) of the Road Safety Act. I will then return to the discretionary implications of that error.

481 The Director submitted that, in exercising the discretion, the magistrate was required to take into account the gravity of the impropriety and contravention (s 138(3)(d)) and whether it was deliberate or reckless (s 138(3)(e)) or contrary to a right in the ICCPR (s 138(3)(f)). Viewed across the spectrum, any improprieties of the police were minor and not found by the magistrate to be deliberate or reckless (in the relevant culpable sense of having foresight of impropriety but

proceeding with indifference (mere negligence not being enough)).[859] On the evidence, the only conclusion available was that police acted in good faith and with integrity, honestly believing that they had power to do what they did. Their conduct was not designed to secure any advantage but was merely routine police work. It was not found, and there was no evidence, that the police believed that they were acting improperly by repeatedly asking Mr Kaba for his name and address. If misconduct occurred, it was at the lowest end of the spectrum. It was not suggested that any human rights breaches were trivial.

482 Many of these submissions may be accepted and were accepted by the magistrate. His Honour did not find that the police had acted intentionally or recklessly. He did not find bad faith. On the evidence, he could not have found either. His Honour did not find that the impropriety or contravention was minor and it was not. In relation to Mr Kaba, the interference with his common law right to privacy and the breach of his human right to privacy under the ICCPR and the Charter was serious. As submitted by the Commission, any violation of a Charter right should be regarded as serious[860] as the violation itself represents damage to the administration of justice[861] and the rule of law. That had to be weighed in the balance and it deserved to receive, and was correctly given, more consideration than the Director's submissions would admit.

483 The Director also submitted that the magistrate was required to take into account the probative value of the evidence (s 138(3)(a)) and the importance of the evidence in the proceeding (s 138(3)(b)). The consequence of the exclusion of the evidence was that the police had no case. All of the evidence of all of the alleged offending was excluded. In my view, his Honour paid due regard to these considerations.

484 The Director submitted that the magistrate was required to take into account the nature of the relevant offence (s 138(3)(c)). The most serious offence was the physical assault of Senior Constable Randall. Of course I would accept the public interest in prosecuting persons for physically assaulting police officers on duty. Here too it is clear that his Honour took this consideration into account. For this very purpose, he properly characterised Mr Kaba's offence as one of "modest seriousness". He did not under-value the significant public interest in punishing and deterring crimes of the kind charged. His Honour had to balance this consideration against the other considerations, including the gravity of the impropriety and contravention (s 138(3)(d)) and the breach of the ICCPR and the Charter that had occurred (s 138(3)(f)).

485 The difficulty is that the magistrate's exercise of the discretion in s 138(1) of the Evidence Act not to admit the evidence appears to have been based upon two legal grounds, one of which was in error. Therefore it is not appropriate to allow it to stand. As I have explained, in the circumstances the ruling should be quashed because of the error made with respect to the interpretation of s 59(1) of the Road Safety Act. His Honour should reconsider the exercise of the discretion to refuse to admit the evidence upon the basis that the conduct of Senior Constable Randall

859. *R v Helmhout* (2001) 125 A Crim R 257 at 262–3, [33] per Hulme J.

860. *Shaheed* [2002] 2 NZLR 377 at 418–19, [143] per Richardson, Blanchard and Tipping JJ; *Grant* [2009] 2 SCR 353 at 393, [68]–[69] per McLachlin CJ and Charron J for the court.

861. *Hamed* [2012] 2 NZLR 305 at 362, [187] per Blanchard J; *Mellenthin* [1992] 3 SCR 615 at 629 per Cory J for the court.

was improper and unlawful by reason of the breach of Mr Kaba's rights under common law and the Charter (and the ICCPR) which occurred.

Conclusion

486 For the reasons given in this judgment, the ruling of the magistrate will be quashed because his Honour committed an error of law upon the face of the record in relation to the interpretation of s 59(1) of the Road Safety Act. Contrary to his Honour's interpretation, police do have a power of random stop and check under that provision.

487 His Honour correctly determined that police exceeded their common law powers and breached Mr Kaba's human rights under the Charter (and the ICCPR) by subjecting him to coercive questioning for his name and address. The proceeding will be remitted to his Honour for reconsideration, upon that basis, of the exercise of his discretion to exclude the evidence under s 138(1) of the Evidence Act.

488 There will be orders accordingly.

Ruling of the magistrate quashed; proceeding remitted for reconsideration.

Solicitor for the plaintiff: *Craig Hyland*, Solicitor for Public Prosecutions.

Solicitor for the first defendant: Flemington and Kensington Community Legal Centre.

Solicitor for the intervener: Victorian Equal Opportunity and Human Rights Commission.

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BARRISTER-AT-LAW