Antunovic

v.

Dawson

Supreme Court of Victoria

(2010) 30 VR 355; [2010] VSC 377

Bell J

9 July 2010

Bell J.

INTRODUCTION

[1] Zeljka Antunovic is suffering from a mental illness for which she is being treated under a community treatment order issued pursuant to the Mental Health Act 1986. Having resided at the Norfolk Terrace Community Care Unit for some time, she wants to go home to live with her mother.

[2] The conditions of Ms Antunovic's order, which were recently reviewed and confirmed by the Mental Health Review Board, do not require her to live at a particular place, including the unit. Dr Louise Dawson, the authorised psychiatrist there, has instructed Ms Antunovic that she cannot go home. Although Ms Antunovic can go out during the day, she must return to the unit and stay there each night.

[3] The unit and the doctor do not dispute these restraints have been imposed on Ms Antunovic, which they say are in her best medical interests and can be justified under the provisions of the Mental Health Act. Ms Antunovic, who is aged 35 years, says she is being restrained without lawful authority.

[4] Ms Antunovic applies to the court for a writ of habeas corpus or other order releasing her from these restraints. She contends her common law right to personal liberty is being infringed and also relies on her human rights to freedom of movement and liberty under the Charter of Human Rights and Responsibilities Act 2006.

[5] Protecting people, especially the vulnerable, from unlawful restraints on their personal liberty is a fundamental purpose of the common law going back to Magna Carta 1297 (which is in force in Victoria), and the Charter.

PERSONAL LIBERTY

[6] Personal liberty is a foundational value of the common law and our constitutional arrangements. As Blackstone said, protecting the liberty of individuals is "the first and primary end of human laws."1 He defined the right to liberty as consisting of "the power of loco-motion, of changing situation, or removing one's person to whatever place one's own

inclination may direct; without imprisonment or restraint, unless by due course of law."2 So, said Blackstone, under the common law:3

keeping a man against his will in a private house, putting him in stocks, arresting or forcibly detaining him in the street, is an imprisonment.

[7] While modern human rights legislation, such as the Charter, has given explicit recognition to the human right to freedom of movement and personal security and liberty,4 the theory of the common law treats these as given. Thus Halsbury says the liberties of the subject are really "implications" drawn from two related principles:5

the subject may say or do what he pleases, provided he does not transgress the substantive law, or infringe the legal rights of others, whereas public authorities may do nothing but what they are authorised to do by some rule of common law or statute.

[8] These implications have profound consequences for the organisation of the scheme of the common law and the outcome of the present case. Even vulnerable individuals like Ms Antunovic have the liberty to do anything which is not legally prohibited. Restrictions cannot be imposed on that liberty without legal authorisation. The common law presumes Ms Antunovic to be free of control by the unit and her doctor except to the extent of their lawful authority, if any.

[9] At common law, the right to personal liberty is inherent in every human being. Blackstone said the rights belonged to persons "merely in a state of nature".6 He said these "rights and liberties [were] our birthright to enjoy entire", unless constrained by law.7 The courts have long treated the right to liberty and access to habeas corpus as "inherent"8 and a human "birthright".9 Turning to the Charter, it too is founded on the philosophy that "all people are born free equal in dignity and rights."10 This is reflected in the language of the Charter, which recognises, specifies and protects the human rights of persons. That everyone "has" these rights is treated as an inherent quality of their humanity. The common law and the Charter proclaim in harmony the fundamental importance of personal liberty, reflecting common bedrock values.

[10] Ms Antunovic's personal liberty being at stake in this case, I turn now to the legal protection which she invokes and the remedy which she seeks.

PROTECTING PERSONAL LIBERTY

Three sources or protection

[11] Ms Antunovic has applied for orders under order 57.02 of the Supreme Court (General Civil Procedure) Rules 2005. Order 57.03 permits the court to issue a writ of habeas corpus ad subjiciendum (para (a)) or an order that the person restrained be released (para (a)).

[12] Order 57 regulates the jurisdiction of the court to grant that writ and like orders, but it is not the source of that jurisdiction.

[13] As relevant to civil proceedings for relief against unlawful detention, personal security and liberty are protected in Victoria by the common law, especially the ancient writ of habeas corpus, by the Magna Carta and certain other ancient Imperial statues which are here in force and by the human rights framework enacted in the Charter.

Habeas corpus ad subjiciendum at common law

[14] The Supreme Court of Victoria has the common law jurisdiction to issue the writ of habeas corpus ad subjiciendum. That jurisdiction exists independently of any statute, though it is reinforced by the Habeas Corpus Act 1679 (Imp) and Habeas Corpus Act 1816 (Imp).

[15] In their various forms, the writs of habeas corpus have pre-Magna Carta medieval common law origins.11 Habeas corpus began as a means of bringing someone to a court for procedural purposes. The form habeas corpus ad subjiciendum became over time a fundamental means of protecting personal liberty and enforcing the rule of law against the executive government and anyone else imposing restrictions on personal liberty without demonstrable legal justification.

[16] Blackstone said habeas corpus ad subjiciendum was "the great and efficacious writ in all manner of illegal confinements".12 It was.

directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his capture and detention … to do, to subject to, and receive, whatever the judge or court awarding such writ shall consider in that behalf.13

[17] The writ habeas corpus is a prerogative writ, like the other such writs, including certiorari, prohibition, mandamus etc.14 I will deal later with the conditions governing the issue of the writ.

[18] The common law jurisdiction of the courts to issue the writ of habeas corpus has been consistently recognised in authorities of long standing. In Ex parte Besset,15 the writ was being sought under the procedural statute and the applicant encountered difficulties. The court issued the writ none the less. Lord Denman CJ wanted it "understood that the application is at common law. The statute … is not necessary to the right of making it."16 As Ex parte Anderson17 demonstrates, the superior common law courts at Westminster possessed the jurisdiction to issue the writ even in respect of people in the colonies, there Canada. Halsbury says the writ of habeas was "reinforced"18 by the Habeas Corpus Acts.

[19] As we will see, the Habeas Corpus Acts were passed in England to strengthen the procedures for issuing the writ. These statutes did not qualify the common law jurisdiction of the courts, which this court retains as an indispensible element of its constitutional function to protect fundamental rights and freedoms.

[20] The common law came to the Australian colonies with English settlement,19 and habeas corpus came with it.20 As Clark and McCoy21 explain, issuing the writ in the Australian colonies "was accomplished by the creation by statute of Superior Courts with the same jurisdiction as that possessed by the Superior Courts at Westminster." So, in 1839, the Supreme Court of New South Wales could hold, in Ex parte Nichols,22 that with English settlement came English law, including "those personal rights which are fundamental, constitutional and inherent birthrights of British subject".23 Those rights included the protection of the writ of habeas corpus, both "at common law and under statute".24

[21] The independent common law jurisdiction to issue the writ is well-established. It was recognised again in 1888 by the Supreme Court of New South Wales in Ex parte Lo Pak.25 In Re Bolton; Ex parte Beane,26 Brennan J twice stressed the importance of the writs of

habeas corpus,27 referring to these as “ancient principles of the common law [and] ancient statutes which are so much part of our accepted constitutional framework”.28

[22] Turning to Victoria, in Zwillinger v Schulof,29 Gowans J issued a writ of habeas corpus to a person in another State said to be detaining a child normally domiciled in Victoria. It was the common law jurisdiction to do so which his Honour exercised.30 This common law jurisdiction of the court was likewise accepted and exercised by Osborn J in PR v Department of Human Services,31 except in that case the application was rejected.32

[23] In this case, it is the common law jurisdiction to issue a writ of habeas corpus or order for release which I will exercise.

Magna Carta and the Habeas Corpus Acts

Constitutional significance

[24] The constitutional significance of Magna Carta in the Australian context was discussed by Isaacs J in Ex parte Walsh and Johnson; In Re Yeats.33 As his Honour made clear, the principle of personal liberty is central to defining the relationship between the individual and the state. Therefore Isaacs J described Magna Carta as “the groundwork of all our Constitutions”.34 Referring to cl 39 and other justice and liberty provisions, his Honour said it recognised “three basic principles”:35

(1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will.

Isaacs J went on to say:36

These principles taken together form one united conception for the necessary adjustment of the individual and social rights and duties of the members of the state.

These general principles, flowing from Magna Carta, feed into more specific principles which apply when the court exercises its common law habeas corpus jurisdiction, as in the present case.

Application in Victoria

[25] Magna Carta 1297, the Habeas Corpus Acts and other ancient Imperial statutes protecting personal liberty are, under Victorian legislation, in force here to a specified extent. These ancient statutes form an important part of our constitutional heritage and express fundamental principles and values which continue to influence the application and development of the common law, including the law of habeas corpus. For example, the flexibility and efficacy of the common law habeas corpus jurisdiction has increased greatly in response to the important procedural reforms made by the Habeas Corpus Act. Now, with the enactment of the Charter in Victoria, it is important to identify the scope of these sources of law in the contemporary environment, for the Charter and the ancient statutes, together with the common law, constitute a composite body of law operating to protect the human rights and fundamental freedoms of the Victorian community.

[26] Under ss 3 and 8 of the Imperial Acts Application Act 1980,37 the Imperial statutes listed in s 3 and the Schedule to the Act have effect as Victorian legislation to the effect specified in s 8. As relevant to personal liberty, the Imperial statutes and provisions which are so transcribed into Victorian law are:

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Magna Carta 1297 (25 Edward I, cl 39)

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Petition of Right 1627 (3 Charles I, cl 10)

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Bill of Rights 1688 (1 William and Mary, ss 11, cl 11)

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Habeas Corpus Act 1640 (16 Charles I, c 1)

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Habeas Corpus Act 1679 (31 Charles II, cl II, ss 1–9, 11–123, 15–20)

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Habeas Corpus Act 1816 (56 George III, c C)

[27] The actual provisions of the Imperial statutes so in force are set out under s 8. I will describe the provisions shortly. Let me first deal with their local application.

[28] There are application Acts in Victoria, New South Wales, Queensland, the Australian Capital Territory and New Zealand38 and reception Acts (a different form of incorporation) in Western Australia, South Australia, Tasmania and the Northern Territory.39

[29] It was established early in Australia's colonial history that, where the Habeas Corpus Act 1816 applied to an Australian colony, it could be enforced by the courts. In Ex parte Lo Park,40 several alien sailors being unlawfully detained on a ship at port in Sydney harbour were freed by a writ issued by the Supreme Court of New South Wales. The court applied the common law and that Imperial statute.41

[30] The operation of the application Act of that State was considered by Brennan and Gaudron JJ in Jago v District Court (New South Wales).42 Brennan J pointed to certain provisions of the Habeas Corpus Acts of 1679 and 1816, which he said were "in force" in New South Wales by virtue of s 6 of the Imperial Acts Application Act 1969 (NSW). Gaudron J pointed to cl 29 of Magna Carta, which she said was "part of the law of New South Wales" by force of the application Act.43

[31] Subsequent authorities in New South Wales have confirmed this reasoning. In Attorney-General v Ray (No 3),44 Young J said the Habeas Corpus Act 1679 was in force in New South Wales to the extent specified in the application Act. In Adler v District Court of New

South Wales,45 Kirby ACJ referred to Imperial "constitutional" statutes whose operation was preserved by the application Act. In the same case, Priestly JA extensively analysed the content of several Imperial statutes, including Magna Carta 1297 and the Petition of Right 1627, because they were so in force.46

[32] Turning to Victoria, the provisions of our application Act have been interpreted in the same way.

[33] In R v Vollmer,47 the Court of Appeal considered the crime of false imprisonment. Ormiston JA (Southwell and McDonald JJA concurring) identified the elements of that offence back to Magna Carta, which his Honour said continued to have "force" in Victoria.48 Recently, in Port of Portland Pty Ltd v State of Victoria,49 the Court of Appeal considered a case about land tax. Buchanan JA (Maxwell P and Nettle JA concurring) held the "Bill of Rights applies in Victoria by virtue of s 8 of the Imperial Acts Application Act 1980 (Vic)."50

[34] In R v Templeton,51 the Full Court (Herring CJ, Smith and Hudson JJ) upheld an appeal against a conviction a prisoner for escaping from lawful custody in a prison. The prisoner had been transferred from one prison to another and escaped from the second. The court held the prohibition on unauthorised prisoner transfers in Habeas Corpus Act 1697 was in force in Victoria by virtue of s 8 of the Imperial Acts Application Act.52 Although restricted by exceptions, it was still an "important constitutional safeguard".53 As the prosecution had not established the prisoner had been lawfully taken to the gaol from which he escaped, he would be re-tried.54

[35] That too is the position in the ACT where, in Lukatela v Birch,55 Rares J held Magna Carta 1297 (to the extent specified) operated in force along with the Human Rights Act 2004 (ACT).56

[36] The operation of the ancient Imperial statutes under the Victorian application Act is subject to contrary legislation. For example, reflecting medieval English customs for the organisation of court terms, s 6 of the Habeas Corpus Act 1679 requires a person committed for trial and in custody to be arraigned within two sittings of the court. In Clarkson v Director-General of Corrections,57 the Full Court of this court held s 6 could not, by virtue of our application Act, operate within the modern legislative framework of criminal procedure in Victoria.58

[37] Now to the main ancient statutes which are in force in Victoria.

Magna Carta 1297

[38] This is cl 39 of Magna Carta 1297, which was legislation enacted in the reign of Edward I:59

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties or free customs, or be outlawed or exiled, or any other wise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

[39] The historic words of cl 39, whose importance it is impossible to exaggerate, were derived from cll 39 and 40 of Magna Carta 1215, which was issued as a Royal Grant by king John at Runnymeade.

[40] Understanding these and the provisions of the other ancient statutes requires some historical context. I will keep to the safest terrain.

[41] The forces which led to Magna Carta 1215 have been discussed by the leading legal historians.60 In brief, after the Norman conquest of 1066, the Norman and Angevin kings, especially Henry II,61 established a national administrative and judicial system, the latter based on the common law.62 By the time of the reign of John (1189–1216), these instruments of government were being used inconstantly and capriciously against the nobility and free men.63 They rebelled against the king, who was already weak due, among other things, to failed campaigns of war in France. On pain of losing the crown, John was made to acknowledge the rule of law and the liberties of his subjects,64 which Stubbs said was the "first great public act of a nation."65

[42] While it took another five hundred years to achieve parliamentary democracy, the justice and liberty provisions of Magna Carta 1215 were enacted and re-enacted in legislation time and again. The justice and liberty provisions have come to symbolise the very idea of the rule of law or, in the words of Holt, "the rights of subjects against authority and … the principle that authority was subject to law."66 In setting fundamental constitutional standards which have been implemented in numerous national laws, Magna Carta was an importance source for the Universal Declaration of Human Rights, which set normative standards that have been acted on in numerous international laws.67

[43] The justice and liberty provisions of Magna Carta 1215, "that great confirmatory instrument",68 stated principle which were derived from the judicial system, based on the custom and traditions of the common law, which Henry II (especially) had consolidated in the twelfth century.69 In the words of Pollock and Maitland, on these subjects:70

the charter contains little that is absolutely new. It is restorative. John in these last years has been breaking the law; therefore the law must be defined and set in writing … the king is and shall be below the law.

[44] The fundamental legal standard which Magna Carta 1215 set was the application of the rule of law for virtually everyone in England, including the sovereign. Holt says it has a "comprehensive quality" and "assumed legal parity among all free men to an exceptional degree".71 The justice and liberty protections were extended to every "freeman". In medieval feudal England, that did not include everyone. But, in the words of Lord Woolf, this was "as broad a category as was conceivable at the time."72 Of course, over time the principle of the rule of law did come to apply to absolutely everybody. That was a drawing out of the principle of Magna Carta.

[45] Clause 39 of Magna Carta 1297, as in force in Victoria, expresses the fundamental principle of the rule of law, formal equality before the law73 and freedom from arbitrary and unlawful interference with personal liberty. These principles are the foundation of our democratic constitutional arrangements, inherent in the framework of the common law and now reflected in Charter. The principles also form the foundation of the other ancient statutes which I will now examine.

Petition of Right 1627

[46] In Darnel's case (the Five Knights Case),74 the court refused to order the release of nobles who were being detained under executive warrant by the special command of Charles I, who asserted absolute authority over the parliament (based on the doctrine of divine right).75 The Petition of Right was parliament's response.76 It is a parliamentary declaration, approved by both houses, to which the king gave his assent.77

[47] Among other things, and as set out under s 8 of the Imperial Acts Application Act, it states that "no freeman, in any such manner as is before-mentioned, be imprisoned or detained".78 It thereby declared the abolition of executive detention. It also abolished the imposition of taxation without parliamentary approval.79

[48] As a parliamentary declaration, the Petition of Right was not an ordinary statute and had uncertain legal form.80 It contained no special mechanisms for enforcing its terms. It could be and was evaded by the king,81 who continued to subject people to executive detention by royal warrant and impose extra-legislative taxation.82 In particular, the king interfered with the proceeding of parliament and had Seldon and other members or parliament imprisoned. Their habeas corpus applications were again unsuccessful.83 That led ultimately to the Habeas Corpus Act 1640, which was improved by subsequent amendments. I will deal with that legislation as a group after dealing briefly with the Bill of Rights.

Bill of Rights 1688

[49] After the constitutional crisis precipitated by James II, the parliament enacted the Bill of Rights 1688. It was an "act for declaring the rights and liberties of the subject and settling the succession of the crown".84 It made provision for the abdication of the king and the settlement of the succession of the crown on William and Mary.85 In Re Tracey; Ex parte Ryan,86 Brennan and Toohey JJ said the Bill of Rights represented the "victory of Parliament over the Royal Forces."87

[50] The rights and liberties in the Bill of Rights restricted the powers of the sovereign, specified and confirmed the responsibilities of parliament and declared certain fundamental freedoms of the people.88 The focus of these rights and liberties is mainly on the relationship between the sovereign, the parliament and the people, rather than on the rights of the people as such. The rights are mainly civil and political in character and have a significant overlap with, but a different focus and scope, to those declared in twentieth century human rights instruments, such as the International Covenant on Civil and Political Rights and the Charter.

[51] While not dealing with habeas corpus as such, the Bill of Rights declares fundamental rights and freedoms, within a democratic constitutional framework, which it is the function of habeas corpus to protect.

Habeas Corpus Acts

[52] Magna Carta 1215 and its subsequent re-enactments set the legal standard for justice and liberty and defined what would now be called civil liberties of the people. But in the centuries which followed, its precepts were frequently breached by the sovereign and their administration. As discussed, these events exposed the inadequacy of the law to protect people from arbitrary and unlawful detention, and even torture and death. While common law habeas corpus ad subjiciendum, supported by cl 39 of Magna Carta 1297, emerged as the

most important means of such protection, it was subject to certain procedural restrictions, and the courts did not exercise the jurisdiction consistently. In the great constitutional struggles between the parliament and the sovereign in the sixteenth and seventieth century, which I have referred to, the doctrine of the supremacy of the parliament was absolutely established, with the result that the royal prerogatives of the monarchy were made subject to the law. The parliament exercised that supremacy to legislate for the Habeas Corpus Acts, thus improving the availability of the writ and enhancing the capacity of the courts to vindicate the personal liberty of the people, which was always the at the centre of the constitutional struggle.

[53] As shown by the provisions set out under s 8 of the Imperial Acts Application Act, the main purpose of the Habeas Corpus Act 1640 was to abolish the court known as the Star Chamber,89 which was an instrument of abuse of the king, especially Charles.90 It acted without formal procedure, in secret and on imperfect evidence. The parliament declared in the Act that the Star Chamber had imposed "intolerable burden on the subjects, and the means to introduce arbitrary power and government".91

[54] On the principles of Magna Carta,92 the 1640 Act gave anyone "committed, restrained of his liberty, or suffering imprisonment" the right to obtain habeas corpus from a court.93 Production of the body in open court was compulsory.94 The court was required to rule on the legality of the detention within three days,95 on pain of the judges personally paying heavy fines.96

[55] In consequence, habeas corpus became more available and accepted. But there were still several procedural difficulties. According to Sharpe:97

The writ had … evolved in an uncertain, sometimes precipitate, fashion from humble origins, and there were consequent procedural defects which could impair its operation despite the acceptance it had gained.

[56] These many "procedural defects" were described in the Habeas Corpus Act 1679, which the parliament enacted to reform the operation of the writ in most criminal cases.98 The defects included delay in complying with the writ,99 recommitment after habeas corpus for the same alleged cause,100 transfer from prison to prison after or to avoid habeas corpus,101 courts failing to give habeas corpus in the court vacation102 and illegal imprisonment beyond the seas or borders.103 The Act introduced simplified procedures for applying for and issuing the writ, dealing with all these specified abuses.104

[57] To Blackstone, this "famous" statute was "another magna carta of the kingdom"105 To Sharpe, the statute "marks the point at which the writ took its modern form".106 To both, the procedural reforms made by the Habeas Corpus Act 1679 consolidated the legitimacy of the writ, which had a powerful impact on the administration and development of the writ at common law.107 Later we will see evidence of the truth of these observations in the contemporary operation of the common law habeas corpus jurisdiction in Victoria.

[58] By 1816, the parliament could declare that habeas corpus had "been found by experience to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof".108 Further procedural improvements were made by the Habeas Corpus Act 1816. The main one was to extend the procedural reforms to civil cases (habeas corpus was available in such cases at common law).109 The writ was made available to "any person … confined or restrained of his or her liberty, otherwise than for some criminal or supposed criminal matter".110 It applied to unlawful deprivation of liberty

broadly defined. The writ could be directed to any person "in whose custody or power the party [was] so confined or restrained."111 It was made a contempt of court to fail to comply with the writ.112

[59] Further reforms enabled the courts to examine the truth of the facts asserted in the return, and "to do therein as to justice shall appertain", as well as to grant bail particularly the reduction of doubtful cases.113

Charter

[60] Ms Antunovic submitted it was all the more important for the common law habeas corpus jurisdiction to be exercised, because that would be consistent with protecting her human rights under the Charter. I accept that submission.

[61] It was not in dispute that Ms Antunovic's human rights under the Charter were engaged by the restrictions which were being imposed. I will explain briefly what those rights were and how they were engaged.

[62] The Charter specifies the human rights to freedom of movement in s 12 and liberty and security of the person in s 21.

[63] Under s 12, every person "has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live." This is important, because common law habeas corpus protects the interest which everybody has in their freedom of movement, and the human right in s 12 helps us to appreciate what at common law that interest might embrace.

[64] Under s 21(1), everybody has "the right to liberty and security". Section 21(2) prohibits "arbitrary arrest or detention." By s 21(3), no one can be deprived of their liberty "except on grounds, and in accordance with procedures, established by law." Under s 21(5), people arrested or detained on a criminal charge must be properly brought to a court, tried without unreasonable delay or released. Section 21(6) prohibits automatic detention prior to trial and authorises release subject to guarantee. By s 21(7), everyone detained by arrest or detention is entitled to apply to a court for a declaration or order regarding the unlawfulness of their detention, and the court must make a decision without delay and order release if it finds the detention to be unlawful. Under s 21(8), civil imprisonment is prohibited.

[65] Protecting and promoting these rights is central to the purposes of the Charter, which is based on the principle that "human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom".114

[66] The human rights of freedom of movement (including the right to choose where to live) and liberty and security are recognised in comparable international human rights instruments, including Arts 9 and 12(1) respectively of the ICCPR and Art 5(1) (the latter) of the European Convention on Human Rights. Quite apart from the Charter, the ICCPR is an important source for understanding the nature of the interests protected by common law habeas corpus. Because Australia is a signatory to the ICCPR, it has a certain significance under Australian domestic law, including the common law.115

[67] These rights are regarded as being of the first order of importance in terms of human rights protection. Speaking of liberty and security, in Medvedyer v France116 the European

Court of Human Rights recently said it "reiterates that Art 5 of the [ECHR] protects the right to liberty and security. The right is of the highest importance 'in a democratic society' within the meaning of the Convention".117 The court referred to its decision in Winterwerp v Netherlands,118 which established that principle in the context of protecting the human rights of someone who was mentally ill.119

[68] In Kracke v Mental Health Review Board,120 as president of the Victorian Civil and Administrative Tribunal, I analysed the scope of the right to freedom of movement in s 12121 and the right to liberty and security in s 24.122

[69] Under s 38(1) of the Charter, public authorities must act compatibly with human rights and, in making decisions, must give proper consideration to human rights. It is unlawful not to do so, unless (under s 38(2)) it is reasonably required by statute.

[70] The obligation to act compatibly with human rights depends in the first instance on whether "any of the rights are engaged".123 Human rights are engaged when a public authority makes a decision affecting or acts towards a person in a way which apparently limits their human rights.124 If a human right is engaged, the question whether the decision or conduct is compatible with human rights will depend on whether any limitation is demonstrably justified according to the general limitations provision in s 7(2).125 A critical element of justification is the legality requirement that the decision or conduct be "under law".

[71] The scope of a human right specified in the Charter is to be identified in "the broadest possible way".126 The focus is on the purpose of the right and the interest which it protects, the legislative intent being that individuals should receive the full benefit of its protection.127

[72] Applying that approach, in Kracke v Mental Health Review Board128 I set out the scope of the right in s 12 as follows:129

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.

[73] As to liberty and security of the person, in the same case I set out the nature and scope of the right in s 21(1) as follows:130

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.

[74] As the discussion in Kracke v Mental Health Review Board demonstrates, many of the major cases concerning these rights have been decided with respect to people with mental illness.131

[75] In the present case, Ms Antunovic is being required to live at the unit and prevented from going to live at home with her mother. She is being allowed to go out during the day but must return to the unit to sleep at night. Her personal belongings and medication are being kept at the unit.

[76] This form of restraint may not amount to a restriction of liberty in the classic sense protected by the human right to personal liberty and security, as I have identified its scope. That is because Ms Antunovic is allowed to go out during the day and is not under arrest. I need not decide that issue. The limitation on her right to freedom of movement is clear. She is both being compelled to live at one place and prevented from living at another place against her wishes. She is thereby being prevented from exercising her right to freedom of movement and her right to choose where to live.

[77] Now to the principles governing common law habeas corpus.

HABEAS CORPUS

Swift and efficient vindication of liberty

[78] The purpose of habeas corpus is to provide a "swift and imperative remedy in all cases of illegal restraint or imprisonment".132 The great policy of habeas corpus is that the legality of restraint on the person's freedom will "be determined summarily and finally".133 De Smith calls it "a fast and effective method for challenging cases of illegal unlawful detention".134

[79] From the earliest days of the writ, the emphasis has been on the speed of disposition. One reason for enacting the Habeas Corpus Act 1640 was to overcome delays in determining the legality of the detention.135 The 1679 Act again introduced procedural reforms to combat delay.136 In the 1918 Act, the parliament recited its approval of habeas corpus because it was an "expeditious and effectual method of restoring any person to his liberty".137

[80] The importance of swift and efficient vindication of liberty by common law habeas corpus has additional importance in Victoria. As we have seen, s 21(1) of the Charter specifies the human right to liberty and security. Section 21(7) requires a court to rule on the legality of any arrest or detention "without delay" and to "order the release of the person if it finds that the detention is unlawful". Habeas corpus is the court's most important jurisdiction for ensuring this is done. Applications alleging unlawful restraints which also limit the right to freedom of movement specified in s 12 likewise require swift determination.

[81] The provisions of Order 57 of the Supreme Court Rules facilitate the speedy resolution of applications for a writ of habeas corpus or on order for release from restraint. Applications are made on notice by summons supported by an affidavit,138 but these requirements can be dispensed with in urgent cases.139 The court can issue a writ of habeas corpus or "order that the person restrained be released".140 By the second alternative, in appropriate cases the court can determine the legality of the detention and order the release of the applicant on the first return of the summons.

[82] Because of the importance placed on the swift and efficient determination of lawfulness of the restraint, habeas corpus applications are given priority in the organisation of the business of the court.141 Of course, justice must be done to all sides and the court is obliged to give every party, including the party carrying the onus of justifying the legality of the restraint, a fair opportunity to be heard.

[83] In the present case, the summons in respect of Ms Antunovic's detention was issued on 8 July 2010 for hearing in the practice court on 9 July 2010. It was supported by affidavit dated 7 July 2010. Both the summons and affidavit were served on 8 July 2010.

[84] Having had one day's notice, counsel for the unit and Dr Dawson sought an adjournment. He submitted that he had not had the opportunity to seek sufficient instructions. That submission was supported by an affidavit from the respondents' solicitor.

[85] Although the notice was short, the legal and factual basis of Ms Antunovic's application for habeas corpus was extremely clear. In the circumstances, the only conceivable legal basis for the restraints being imposed was some authority conferred by the provisions of the Mental Health Act 1986. As a matter of law, Ms Antunovic contended there was no lawful authority under that Act for her to be restrained. For reasons I will explain later, that issue turns entirely on whether there is a residence condition in her community treatment order. The factual basis of the application was not seriously disputed by the respondents. They maintained that they were entitled, as a matter of law, to impose the restraints complained of.

[86] Because the legal and factual issues were fully canvassed on the first return of the summons, and nothing which could later have been submitted or presented in evidence would alter the position as it appeared on that day, I declined to grant the adjournment sought. While the court might normally grant an adjournment when an application is short-served, this was a habeas corpus application involving Ms Antunovic's liberty. It was not appropriate to refuse to determine her application on the first return day when that would have involved the continuation of a detention which appeared clearly to lack lawful justification. I therefore heard and determined the application. I gave short reasons then for granting it, and these are the full reasons I said I would give.

Broad, flexible and adaptable

[87] An important quality of the habeas corpus, as it has developed at common law, is that it is a broad, flexible and adaptable remedy.

[88] In Al-Kateb v Godwin,142 Gleeson CJ said habeas corpus is "a basic protection of liberty, and its scope is broad and flexible". From the earliest days of the common law, the scope of the writ has developed according to the process described by Wilmot J in Opinion on the Writ of Habeas Corpus:143 drawing a "principle out into action, and a legal application of it to attain the ends of justice." So also did Lord Donaldson say, in R v Secretary of State for the Home Department; Ex parte Muboyayi,144 that habeas corpus, "the greatest and oldest of all the prerogative writs, is quite capable of adapting itself to the circumstances of the times". Similarly Taylor LJ said the "great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changed circumstances."145

[89] This quality of common law habeas corpus has enabled the courts to respond to the policy of the Habeas Corpus Acts by developing the writ into the swift and efficient means for vindicating personal liberty which it is today.

Proper respondent

[90] The jurisdiction to issue a writ of habeas corpus is one to enquire into the restraint and, if it is not legally authorised, to issue a writ or order for the production or the release of the person being restrained. The proper respondent is therefore the person by whose alleged lawful "custody, power or control"146 the restraint is being imposed. Put another way, the "proper respondent to an application for habeas corpus is a person who can obey an order for release of the applicant."147

[91] Therefore, where a particular individual has the custody, power or control of the person, it is necessary to name that individual as the respondent. Where the person is being restrained in an institution, the superintendent or person who has management or control of the institution should be named. As here, the institution itself can also be named.

[92] It sometimes happens that the restraint is being imposed by someone whose alleged lawful custody, power or control is a step removed from those who are imposing the physical restraint. Where the restraint is being imposed at the direction of someone who asserts the contested legal authority from a physical distance, that person is also a proper respondent to an application for habeas corpus.

[93] In such a case, the proper course is to name the superintendent or manager of the institution having physical custody of the person, as well as the person having the alleged lawful authority.148 It is not uncommon for the superintendent or manager simply to abide by the order of the court, leaving those asserting legal authority to contest the application.149 I will illustrate these propositions by reference to cases like the present which involve the detention of mentally ill people.

[94] In R v Wright,150 the doctor having the care of the mentally ill person was the respondent. The "keeper" of the "private mad-house" in R v Turlington151 was the respondent. He produced the woman concerned, "who was confined there by her husband".152 In Re Shuttleworth,153 the respondent was the proprietor of a licensed private house for mentally ill people, who said the person concerned had been "delivered into my custody". So too in R v Pinder; in Re Greenwood,154 the respondent was the proprietor of private licensed premises for the mentally ill. Habeas corpus went for the discharge of the person from his "custody".155

[95] In Re Gregory,156 a Victorian case, the respondent was "the medical superintendent of the asylum". Another Victorian case is Murray v Director General, Health and Community Services Victoria and Superintendent Larundel Hospital.157 There the respondents were the person having ultimate management of the Victorian health department and the superintendent of the hospital in which the person concerned was being detained. In Ex parte Chidley,158 a New South Wales case, the respondent was the superintendent of the hospital for mentally ill people, although the court dismissed the appeal as incompetent on other grounds.159

[96] In the leading case of R v Board of Control; Ex parte Rutty160 (to which we will return), the respondents were the medical superintendent of the institution for mentally ill people in which the person was being detained and the board who authorised her detention.161

[97] In summary, the proper respondent to an application for habeas corpus is the person having the alleged lawful custody, power or control of the person being restrained.

Depending on the circumstances, it will be appropriate to name both the person who has, or who manages or superintends the institution which has, physical custody of the person being restrained and the person on whose alleged lawful authority the restraint is being carried out.

[98] In the present case, the respondents were the institution having physical custody162 and the doctor on whose alleged lawful authority the restraint was being carried out. It is now necessary to consider the restraints to which habeas corpus applies.

Power, custody or control: restraints amenable to habeas corpus

[99] Ms Antunovic's liberty is not being totally restrained by the unit and the doctor. She must live at the unit and be there at night, but she can go out during the day. In that setting, the unit and the doctor raised the issue whether she was subject to a restraint which was amenable to habeas corpus. Their counsel very fairly brought to my attention authorities which did not support his case on this point.

[100] In an influential analysis, Sharpe says the scope of habeas corpus should reflect its purpose — the protection of personal liberty:163

The idea of personal liberty, that is, the physical freedom to come and go as one pleases, is considered to possess special value in the common law tradition. The importance which is attached to habeas corpus parallels this value.

Therefore, habeas corpus should issue against restraints involving "less than complete incarceration … as long as that which is challenged palpably constitutes a restriction on personal liberty."164

[101] The content of the principle of personal liberty which habeas corpus protects may be discerned, in the first instance, from Magna Carta 1297. I have already given the terms of cl 39, which is in force in Victoria. To paraphrase, cl 39 prohibits taking someone, imprisoning them, disseising a person of their freehold, liberties or free customs, outlawing165 or exiling somebody, and otherwise destroying them, unless by the law of the land. The principle of liberty being protected here is broad; it is not confined to deprivation of liberty in the sense of imprisonment or other detention.

[102] Turning to the ancient Imperial statutes, we have seen that the Habeas Corpus Acts are in force in Victoria to a specified extent. The principle of liberty which they protect is likewise broad. The Habeas Corpus Act 1640 applies to criminal cases in which "any person is … committed, restrained of his liberty, or suffer imprisonment".166 The Habeas Corpus Act 1679 deals mainly with imprisonment, for that is the kind of deprivation to which its reforms were directed. The Habeas Corpus Act 1816 describes the great worth of habeas corpus in terms of "restoring any person to his liberty, who hath been unjustly deprived thereof".167 It improves access to the writ in civil cases where "any person shall be confined or restrained of his or her liberty".168 Under its procedures, the writ is directed to "the person or persons in whose custody or power the party so confined or restrained shall be".169 Having regard to the terms of these statutes, there is no warrant for adopting a narrow view of the principle of liberty which habeas corpus protects at common law. The principle extends beyond imprisonment to cover other confinements and restraints on personal liberty which are not sanctioned by positive law.

[103] The English authorities support this approach. In R v Jackson,170 a wife who was being subjected to confinement at the house of her estranged husband obtained habeas corpus. She had the full run of the house, short of leaving it. Lord Esher MR said "the lady is confined by the husband physically so as to take away her liberty."171 She got habeas corpus.

[104] The extent of the restraint necessary for habeas corpus was discussed in Barnardo v Ford.172 Lord Herschell said the writ issued where someone was "in unlawful custody, power or control" of another person.173 Lord Macnaghten said the issue was whether the person was "under … control or within … reach."174

[105] This approach was applied in R v Secretary of State for the Home Department; Ex parte O'Brien.175 There habeas corpus was issued against the Home Secretary in respect of someone interned in the Irish Free State. The evidence was that the internment was being controlled by the Home Secretary pursuant to undertakings given by the Free State government.176 The court held that was enough to require a return.177 Atkin LJ said "[a]ctual physical custody is obviously not essential", and he referred to the phrases "custody" or "control" in Barnardo v Ford.178 The House of Lords dismissed the appeal as incompetent.179

[106] The inherent jurisdiction to protect vulnerable adults of the Family Division of the England and Wales High Court is regarded as analogous to habeas corpus. It applies a broad concept of liberty. In Re C (Mental Patient: Contact),180 a case involving an adult mental patient who was not being allowed to see her mother and have other family access, Eastham J said:181

although in the normal habeas corpus case the applicant for relief is totally incarcerated, the cases reveal that it is not limited to such cases and if it prevents someone being at liberty freely to go at all times to all places wither he will or amounts to a significant curtailment of the freedom to do those things which in this country free men are entitled to do then the writ will run.

This statement reflects both the passage in Sharpe to which I have referred and the American authorities.

[107] Jones v Cunningham182 is the leading American case. It concerned a prisoner on parole. The principle stated is of importance here. The United States Supreme Court held that "the use of habeas corpus has not been restricted to situations in which the applicant is in actual physical custody".183 The court went on to say:184

History, usage and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus.

In the court's view, the scope of habeas corpus should reflect its fundamental purpose:185

It is not now and never has been a static narrow formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.

[108] This approach to the scope of habeas corpus was followed by the Federal Court of Australia in the litigation concerning the asylum seekers on the MV Tampa. At first instance, North J applied it in Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs186 to hold that asylum seekers detained on a ship could access habeas corpus. Referring to the American authorities and the leading texts,187 his Honour said the test was "whether the restraint imposed is one that is not shared by the public generally."188 North J held the asylum seekers were so detained, and issued habeas corpus after finding the detention to be unlawful.

[109] In the Full Court in Ruddock v Vadarlis,189 Black CJ and French J agreed with the concept of detention actually applied by North J, but disagreed as to the result. Beaumont J did not consider that issue. The judgment of North J was overturned on appeal (Beaumont and French JJ; Black CJ dissenting) on the ground that the detention was a lawful exercise of the executive power of the Commonwealth, but that does not undercut the authority of what was said about the scope of habeas corpus.

[110] On that issue, Black CJ held "it is not necessary to show actual detention and complete loss of freedom to found the issue of habeas corpus. Rather, custody and control are the required elements."190 Citing authorities including Jones v Cunningham,191 the Chief Justice said applicants must show they are "subject to restraints not shared by the public".192

[111] French J also held close custody was not required and nor should be a fetter on the development of the writ, which was "a remedy for an authorised restraint be it total or partial".193 After citing Jones v Cunningham, his Honour held:194 "In the end it is necessary to consider whether on the facts of the case there is a restraint on liberty which is not authorised by law. The relevant liberty is freedom of movement." French J held the restraint was not here amenable to habeas corpus because it was an incident of what he found to be lawful action on the part of the Commonwealth.195

[112] A case with some similarities to the present was Re Skyllas.196 An elderly woman with high medical care needs was living in a nursing home against her wishes. She had previously been placed there by her lawful guardian, but the guardianship had been revoked. The director of nursing at the home told the court the woman did want to go home, but she was too sick to do so. Byrne J issued habeas corpus because "as a matter of law the nursing home cannot detain a patient against her wishes".197

[113] On the basis of this analysis, close custody, imprisonment, detention or something analogous is not a necessary element of the right to habeas corpus, although restraints of that kind are clearly covered.198 The purpose of the writ is to give a remedy against unlawful restraints on personal liberty, which is not to be narrowly defined.199 The restraint may be imposed directly or indirectly. It may be partial or total. The question is whether the person imposing the restraint has the lawful custody, power or control of the person being restrained.200 The liberty protected by common law habeas corpus is broader than the liberty protected by the human right to personal liberty and security in s 21(1) of the Charter. For the purposes of habeas corpus, it is a restraint on personal liberty to imprison or detain somebody201 and also to impose restrictions on their liberty or freedom of movement which are not shared by the public generally.202 That freedom is a human right specified in s 12 of the Charter.

Determining legality of the restraint

Constitutional importance

[114] It is here that I return to what Isaacs J said in Ex parte Walsh and Johnson; Re Yates.203 As we saw, his Honour stated three principles, recognised by Magna Carta, which he referred to as a united conception for adjusting individual/state rights and duties under our constitutional arrangements. Isaacs J went on to say these principles gave rise to "two great working corollaries",204 which were necessary for the implementation of the principles. These two corollaries, which I here set out, are features of the operation of habeas corpus:205

The first corollary is that there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law. The second corollary is that the Court themselves see that this obligation is strictly and completely fulfilled before they hold that liberty is lawfully restrained.

[115] I will deal with the second corollary first.

Duty of court to enquire

[116] Personal liberty and security being a "first and primary end"206 of the law, it is the responsibility of the courts to protect it. In the words of Isaacs J, the courts themselves must "see" to it.207 In R v Carter; Ex parte Kisch,208 Evatt J held this was their "duty". It was because the court had that duty in Somerset v Stewart209 that the enslaved African was freed by habeas corpus, whatever the "inconveniences". The Habeas Corpus Act 1816 (UK) "hereby required"210 the justices to issue a writ of habeas corpus. The obligation applies equally in times of peace and war, because at all times "judges … stand between the subject and any encroachments on their liberty, alert to see that any coercive action is justified in law".211 I am therefore obliged positively to enquire into the legality of the restrictions being imposed on Ms Antunovic's liberty in the present case.

Onus on respondent to justify legality of restraint

[117] It is well-established that there is a presumption in favour of individual liberty and an obligation on the part of those who would restrict it demonstrably to establish the lawful justification for doing so.

[118] As we have seen, in Ex parte Walsh and Johnson; Re Yates212 Isaacs J said "there is always an initial presumption in favour of liberty". Similarly, in R v Governor of Metropolitan Gaol; Ex parte Di Nardo,213 Sholl J said "every person is presumed entitled to personal freedom of body". Thus, when a court considers the legality of a restraint on personal liberty, the starting point is that it is prima facie illegal at common law.214 Making that statement of principle, which is now well accepted,215 this is Lord Atkin in Liversidge v Anderson :216

a principle which again is one of the pillars of liberty is that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify his act.

[119] As the presumption is in favour of liberty, other presumptions cannot go in the opposite direction. In matters of liberty, held the Privy Council in Dillon v R,217 "there is … no room for presumptions in favour of the Crown." In Schlieske v Federal Republic of Germany,218

the Full Court of the Federal Court of Australia held that, as extradition involves the liberty of the subject, "we do not think the common law rule presuming the regularity of official acts has any relevance."219

[120] The legality of the detention must be demonstrably established by the respondent. In Secretary of State for the Home Department v O'Brien,220 Lord Birkenhead said it must be "made to appear".221 His Lordship went on to say: "The general onus as to the legality of the detention is upon the respondent."222 On the same subject, in R v Davey; Ex parte Freer223 Evatt J said: "Of course the onus rests upon persons detaining a person within the jurisdiction to show with precision the legal authority for such a serious invasion of the personal liberty of the subject". In Trobridge v Hardy,224 Fullagar J said curtly "[i]t was for the defendant to justify". In this court, Sholl J made the position equally clear in R v Governor of Metropolitan Gaol; Ex parte Di Nado:225

the onus is on the respondent … to justify [the] detention this being a free country, every person is presumed entitled to personal freedom unless some reason is made to appear to the satisfaction of the court why he is lawfully deprived of that freedom …

Standard of proof

[121] Where issues of fact are in question in habeas corpus proceedings, the civil standard of proof on the balance of probabilities applies but, consistently with Briginshaw v Briginshaw,226 in a manner which takes into account the importance of protecting the personal liberty of the individual.227

[122] The issue was discussed by Lord Scarman in R v Secretary of State for the Home Department; Ex parte Khawaja.228 His Lordship referred to Bater v Bater,229 where Denning LJ said the civil standard "requires a degree of probability which is commensurate with the occasion", and also to Wright v Wright,230 where Dixon J said "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue." Applying these principles to the habeas corpus proceedings before him, Lord Scarman said:231 "The flexibility of the civil standard of proof suffices to ensure that the court will require the high degree of probability which is appropriate for what is at stake."

[123] In Truong v Manager, Immigration Detention Centre, Port Hedland232 the Full Court of the Supreme Court of Western Australia applied this approach to determine that, "as the liberty of the applicant is at stake", habeas corpus applications require "strong, clear and cogent evidence".233

[124] Requiring a high degree of probability in habeas corpus proceedings is consistent with the approach adopted in Victoria to determining whether a limitation is demonstrably justified under s 7(2) of the Charter. Referring to the judgment of Denning LJ in Bater v Bater,234 in Application under the Major Crimes (Investigative Powers) Act 2004235 Warren CJ said the standard of proof required was high. The Chief Justice went on236 to apply the principle expounded by Dickson CJ in R v Oakes237 that the evidence should be "cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit."

Standard of review

[125] There are limitations on the scope of the review available under habeas corpus which I should note, although they are not in issue in the present case.

[126] Generally speaking, as Osborn J held in PR v The Department of Human Services,238 "habeas corpus does not provide a remedy by way of judicial review. It does not facilitate collateral attack upon the basis of the judicial exercise of discretion which is in issue."

[127] Nor can habeas corpus be used to challenge a conviction or sentence of a superior court of record, for these are regarded as valid until they are set aside on appeal or other valid means.239 By the same principle, the orders or warrants of an inferior court or tribunal cannot be challenged under habeas corpus.240

[128] However, it is recognised that a court hearing an application for habeas corpus can determine whether a public authority whose jurisdiction depends on objective facts has a total lack of jurisdiction to make the order or warrant because those facts do not exist.241 One example is Re S-C (Mental Patient: Habeas Corpus),242 where the Court of Appeal issued habeas corpus because the applicant was committed to a mental institution pursuant to an application which was made by somebody who lacked the statutory authority to make it.

Habeas corpus available as of right, though not of course, and is not discretionary

[129] The writ of habeas corpus, although grantable ex debito justitiae, "does not issue as of course."243 A remedy ex debito justitiae is "a remedy to which the applicant is entitled as of right", as distinct from a discretionary remedy.244 So in Wall v R; Ex parte King Won and Wah On (No 1),245 Isaacs J said habeas corpus was "not a writ of course, though a writ of right. It had to be moved for, and a proper case made out."246

[130] The nature of habeas corpus as a writ available as of right, but not of course, was explained in Opinion on the Writ of Habeas Corpus.247 Wilmot J said at common law the writ did not issue as of course "but upon probable cause being shown."248 When that cause was shown, the writ was issued as of "right", indeed as of "birthright", to the applicant.249 The procedure for showing cause was "not a check upon justice, but a wise and prudent direction of it."250

[131] Habeas corpus being available as of right once cause is shown, there is no discretion to refuse to grant the remedy.251 As Lord Mansfield said in Somerset v Stewart,252 "as is usual, for obvious reasons, on a return of habeas corpus; the only question before us is, whether the cause of the return is sufficient? If it is, the negro must be remanded; if it is not he must be discharged."

[132] North J so held at first instance in Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs.253 This was not disputed on appeal in Ruddock v Vadarlis,254 where Black CJ said "it is clear that there is no discretion to refuse relief once the grounds for the issue of the writ of habeas corpus have been made out."255 In this court, Eames J in Murray v Director General, Health and Community Services and Superintendent, Larundel Psychiatric Hospital256 accepted this principle in a case involving an application by a person who was mentally ill. His Honour held: "if the detention is unlawful then there is no discretion and the writ must issue."257

Unlawful detention of the mentally ill

[133] As the present case concerns the alleged unlawful detention of a person who is mentally ill, I will illustrate these principles by reference to cases of this kind.

[134] In doing so, I would draw attention to the fundamental principle of the common law that "[n]either public officials nor private persons can lawfully detain [someone] … except under and in accordance with some positive authority conferred by law."258 There is no such thing as executive detention, or detention under executive warrant or special command, in Australia.259 Detention of that kind was abolished by Magna Carta 1297 (and Magna Carta 1215 before that), as well as the ancient statutes which have been enacted since, which are still relevantly in force in Victoria.

[135] In consequence, a doctor or other official holding statutory power with respect to a person who is mentally ill can exercise that power only in the circumstances and to the extent permitted by law. If their lawful authority does not permit them to detain or restrict the freedom of the individual in the circumstances, they cannot impose such restraints because they believe it is in the best interests of the individual's health. If they professionally consider that the restraints are warranted, they must go through the proper legal channels. For a public authority under the Charter to impose restraints of the liberty of patients without lawful authority would ipso facto be unlawful under s 38(1) of the Charter: restraints of this nature would usually engage the human rights of the individual (especially freedom of movement in s 12), the limitation would not have statutory protection under s 38(2) and could never meet the legality requirement in s 7(2) that the restraint be "under law".

[136] The principles of habeas corpus which I have examined have been applied in many cases concerning the detention of people with mental illness. In view of the extreme vulnerability of such people,260 the courts are vigilant to ensure that any detention or other restriction on their personal liberty is properly in accordance with the legal requirements.

[137] Thus, in Re S-C (Mental Patient: Habeas Corpus),261 Sir Thomas Bingham MR began by stating the fundamental principles:262

As we are all well aware, no adult citizen of the United Kingdom is liable to be confined in any institution against his will, save by authority of law. That is a fundamental constitutional principle, traceable back to chapter 29 of Magna Carta 1297 … , and before that to chapter 39 of Magna Carta 1215.

Sir Thomas went on to acknowledge that the relevant legislation allowed people suffering from mental illness to be involuntary admitted to mental hospitals and detained. But "the circumstances in which the mentally ill may be detained are very carefully prescribed by statute".263 When considering whether the powers have been properly exercised to produce a lawful detention:264

One reminds oneself that the liberty of the subject is at stake in a case of this kind, and that liberty may be violated only to the extent permitted by law and not otherwise.

[138] In that case, the court held the proper procedures were not followed.265 Under the legislation, a social worker could not make an application for an admission if the nearest relative objected.266 Knowing that the nearest relative (the father) objected, a social worker put forward the mother as the nearest relative (she was not), saying in the admission form that she did not object.267 It was held that the social worker was not entitled to make the

application. The applicant was released when the court said it would issue a writ of habeas corpus.268

[139] Sharpe269 points to other cases in which habeas corpus has been granted because the prescribed procedures have not been followed or the legislation has been misconstrued. I will focus my attention on those cases in which mentally ill people have been detained contrary to law after someone has deemed it to be necessary in their interests.

[140] It is here that I return to R v Board of Control; Ex parte Rutty.270 A power to place someone in a mental institution if they were "found neglected" was used to transfer a "borderline high grade mental defective" from a poor law institution to a mental institution. Hilbury J examined the facts and held the girl concerned was not "neglected". He said the legislation did not empower the authorities to detain and deprive people of their liberty "in the case of all mental defectives however circumstanced."271 Lord Justice Goddard CJ said:272

While, no doubt, what was done in this case was thought and intended to be for the benefit of the girl, persons of whatever age are not to be deprived of their liberty and confined in institutions merely because doctors and officials think it would be good for them.

The court granted habeas corpus, which resulted in the discharge of three thousand other patients who had been likewise improperly committed.273

[141] Lord Justice Goddard CJ repeated these views in Re Callender.274 A girl aged 14 years was not being ill-treated or out of control but had not been to school for three weeks. She was removed from her home by school inspectors and placed in a children's home as being in need of care and protection. Habeas corpus was granted. His Lordship held the statutory procedures could not be employed on "the mere fact that officials, or doctors, or anyone else, thought that it would be good for a child or young person, or any other person, to receive treatment."275

[142] The courts have recognised a jurisdiction to delay the issue of a writ of habeas corpus, or to continue the otherwise unlawful restraint of the applicant, temporarily to allow the authorities independently to examine a mentally ill person who may be a danger to themselves and others.276 The practice appears to have been initiated in R v Turlington277 by Lord Mansfield, who "thought fit to have a previous inspection of [the applicant], by proper persons, physicians and relations; and then to proceed, as the truth should come out upon such inspection".278

[143] A similar case was Re Shuttleworth,279 where the court held it did not have to order immediate discharge of a dangerous mental patient when the authorities would shortly recommit by the proper procedure.280 Another was R v Pinder ; Re Greenwood.281 The court here held it could delay habeas corpus if the applicant was dangerous to the public and himself and "restrain him from his liberty, until the regular and ordinary means can be resorted to".282 The jurisdiction arose from "obvious necessity", but could not be extended to ordinary cases.283 As the applicant was harmless to himself and others, he had to be released,284 since the committal certificate was defective.285

[144] The jurisdiction was exercised by the Full Court of the Supreme Court of Victoria in the case of Re Gregory.286 Here the committal certificate was found to be irregular. But there was cause to think the applicant "may do a very harmful act to someone."287 The court

said the return to the habeas corpus was bad, but remanded the applicant in a mental hospital for independent psychiatric assessment, which it ordered to be conducted at a specified time in seven days.288

Summary

[145] In summary, personal liberty is a foundational principle of the common law, confirmed in Magna Carta 1297 (and Magna Carta 1215 before it) and now reflected in human rights specified in the Charter of Human Rights and Responsibilities Act. By that central principle of our democratic constitutional arrangements, neither private persons nor public authorities may impose restraints on the personal liberty of the individual unless it is sanctioned by the law of the land.

[146] The court has the jurisdiction at common law,289 reinforced by ancient Imperial statutes (Habeas Corpus Acts) which are in force in Victoria, to protect the personal liberty of the individual by issuing a writ of habeas corpus or order for release from restraint. The purpose of this jurisdiction is to provide swift and effective vindication of the personal liberty of the individual in cases where it is being unlawfully restrained. The jurisdiction is broad, flexible and adaptable. Habeas corpus applications are given priority in the business of the court. In such applications, the court has a positive duty to consider and determine the legality of the restraint.

[147] The proper respondent in a habeas corpus application is the person who asserts a lawful authority of custody, power or control over the applicant's personal liberty and the person, or the person responsible for managing the institution or place which, is carrying the physical restraint out. The court's habeas corpus jurisdiction covers but is not confined to unlawful imprisonments and other forms of detention; it extends to all unlawful restraints upon a person's freedom of movement which are not shared by the public generally.

[148] As there is a presumption in favour of the liberty of the subject, restraints on personal liberty are prima facie illegal at common law. Therefore the onus is on the respondent demonstrably to justify the legality of the restraint. On issues of fact, the civil standard of proof applies; since personal liberty is at stake, a high degree of probability is required.

[149] Habeas corpus is a remedy available as of right once good cause is established. If the restraint is unlawful, there is no discretion to refuse to grant the writ. In certain cases the jurisdiction is exercised taking into account the need for medical examination of an applicant who, due to mental illness, is a danger to themselves or others.

[150] On the analysis that follows, those principles entitle Ms Antunovic to an order for release.

ORDER FOR RELEASE OF MS ANTUNOVIC

Mental Health Act 1986

[151] The only possible source of lawful authority for the restraints being imposed on Ms Antunovic is the Mental Health Act. I will describe the legislative scheme and identify the provisions which confer the relevant powers. I examined the Act in Kracke v Mental Health Review Board.290 I have drawn on that in writing what follows.

[152] According to s 1, the purpose of the Mental Health Act "is to reform the law relating to mental health." The reforms were a fundamental break with the past. They were intended significantly to improve the position of people with mental illness, consistently with respect for their dignity and human rights. This is apparent from the objects in s 4(1), which are:

(a)

to provide for the care, treatment and protection of mentally ill people who do not or cannot consent to that care, treatment or protection; and

(ab)

to facilitate the provision of treatment and care to people with a mental disorder; and

(ac)

to protect the rights of people with a mental disorder; and

…

(e)

to ensure that people with a mental disorder are informed of and make use of the provisions of this Act.

[153] Consistently with those objects, Parliament stated the principles pursuant to which the various powers in the Act had to be exercised. This is s 4(2):

It is the intention of Parliament that the provisions of this Act are to be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that —

(a)

people with a mental disorder are given the best possible care and treatment appropriate to their needs in the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment; and

(b)

in providing for the care and treatment of people with a mental disorder and the protection of members of the public any restriction upon the liberty of patients and other people with a mental disorder and any interference with their rights, privacy, dignity and self-respect are kept to the minimum necessary in the circumstances.

[154] Under the legislation, subject to carefully specified criteria and procedures, mentally ill persons can be placed on involuntary and community treatment orders. An involuntary treatment order results in the person being treated in detention in a mental health service. A community treatment order results in a person being involuntarily treated in the community.

[155] The powers under the Mental Health Act to place people on such orders plainly interfere with their human rights and fundamental rights and freedoms in substantial ways.

Therefore, this is only authorised in certain circumstances where it is necessary in the person's medical interest. There are also many checks and balances, which I describe in Kracke.291

[156] Ms Antunovic was placed on an involuntary treatment order in 2008. Under the Mental Health Act, nobody can be made subject to involuntary treatment unless the criteria specified in s 8(1) and (1A) are satisfied. These are the criteria:

(1)

The criteria for the involuntary treatment of a person under this Act are that —

(a)

the person appears to be mentally ill; and

(b)

the person's mental illness requires immediate treatment and that treatment can be obtained by the person being subject to an involuntary treatment order; and

(c)

because the person's mental illness, involuntary treatment of the person is necessary for his or her health or safety (whether to prevent a deterioration in the person's physical or mental condition or otherwise) or for the protection of members of the public; and

(d)

the person has refused or is unable to consent to the necessary treatment for the mental illness; and

(e)

the person cannot receive adequate treatment for the mental illness in a manner less restrictive of his or her freedom of decision and action.

(1A)

Subject to subs (2), a person is mentally ill if he or she has a mental illness, being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.

[157] The criteria have to be applied with the general objects in s 4(2) in mind.

[158] A community treatment order is an order requiring the person to obtain treatment while not detained.292 Community treatment orders can be made in respect of people on involuntary treatment orders only if an authorised psychiatrist is satisfied:293

(a)

the criteria in s 8(1) apply to the person; and

(b)

the treatment required for the person can be obtained through the making of a community treatment order.

[159] The legislation gives an authorised psychiatrist discretionary to impose a condition in a community treatment order which specifies "where the person must live".294 Such a condition can only be imposed "if this is necessary for the treatment of the person's illness."295 By the very nature of a community treatment order, the specified place of residence must be in the community and the condition cannot be detention in an approved mental health service.296 This is not a general discretionary power to impose a residence condition. It is a power to impose such a condition where it is necessary for the treatment of the person's mental illness.

[160] The legislation also gives an authorised psychiatrist discretion to vary community treatment orders.297 If that is done, they must inform the person of the variation, give them a copy and explain the grounds.298 This power could be used to impose a residence condition, but only if the statutory criteria are satisfied.299

[161] A community treatment order must have a specific duration not exceeding twelve months.300 It can be extended before its expiry301 by an authorised psychiatrist who has examined the person and is satisfied the criteria in s 8(1) continue to apply and the treatment can be obtained by extending the order.302

[162] Dr Dawson is an authorised psychiatrist. She made a community treatment order in respect of Ms Antunovic in 2008, which she extended in 2009 and again in 2010. The current order expires on 2 May 2011. At no time has Dr Dawson or anyone else authorised to do so placed a residence condition on the order or varied the order to include such a condition.303

[163] Under the legislation, the authorised psychiatrist must prepare and regularly review and revise as required a treatment plan for each involuntary patient, including those on a community treatment order.304 A range of matters must be considered, including the patient's wishes and any beneficial or alternative treatments available.305 The plan must specify the treatment which the patient is to receive.306 For patients on community treatment orders, it must also specify the place and time at which the patient is to receive the treatment.307

[164] That has been done in Ms Antunovic's case. A treatment plan is not a vehicle for imposing residence requirements on a person, and there is no such "condition" in the treatment plan here. But Ms Antunovic's plan does not specify her wish to stop living at the unit and to go home to live with her mother. As we will see, that attracted adverse comment from the board.

[165] A community treatment order must be revoked if the criteria in s 8(1) no longer apply to the person or the treatment cannot be obtained in the community. It may be revoked by an authorised psychiatrist if there is non-compliance by the patient with the order or treatment plan, if reasonable steps to ensure compliance have failed and there is a significant risk of the mental or physical condition of the patient deteriorating.308 There has been no such revocation here. As noted, an involuntary treatment order ends when a community treatment order expires without extension.309

[166] The policy of the legislation is giving the least restrictive and intrusive treatment possible and doing so in the community if possible.310

[167] Involuntary311 and community treatment orders312 must be reviewed by and can be appealed313 to the board. On appeal or review of an involuntary314 or community treatment order,315 the board can discharge the patient from the order. The critical consideration is whether the criteria in s 8(1) continue to apply. If not, discharge is mandatory.316 A community treatment order may also be revoked because the treatment cannot be obtained in the community317 or for patient non-compliance as above.318 On appeals and reviews, the board must also review the patient's treatment plan319 and can order its revision.320 The board must have regard primarily to the patient's current mental condition and consider their medical and psychiatric history and social circumstances.321

[168] Ms Antunovic's involuntary treatment status was reviewed by the board on 18 June 2010. It received oral evidence from Ms Antunovic and medical evidence from a doctor (in Dr Dawson's absence). The board noted favourably how much it gained from a report produced by Dr Dawson. It determined to continue the community treatment order and review it again in six weeks. The board also determined it was not satisfied the treatment plan complied with the necessary requirements of the Mental Health Act. It specifically referred to the absence of any reference to Ms Antunovic's wish to cease residing at the unit and to go home to live with her mother. The board did not impose any residence condition on the community treatment order.

[169] Before determining whether the restraints being imposed on Ms Antunovic are lawfully justified, it is necessary to determine whether the restraints are within the scope of habeas corpus.

Are the restraints on Ms Antunovic amenable to habeas corpus?

[170] On the undisputed facts, Ms Antunovic has been instructed by Dr Dawson, the authorised psychiatrist at the unit, to live there. Under that instruction, Ms Antunovic is allowed to go out during the day but must return to the unit at night. She is not allowed to go home to live with her mother. She has asked on numerous occasions to be allowed to go home but has been refused the permission to do so. She has been told she is not ready to go home. Ms Antunovic does not agree.

[171] Even after the board reviewed Ms Antunovic's order and did not impose a residence condition, and indeed even after the board has made adverse comment about the treatment plan for not including reference to Ms Antunovic's wishes to go home, she has not been allowed to do so.

[172] On Ms Antunovic's behalf, the Mental Health Legal Service has repeatedly asked Dr Dawson and the unit to allow her to live at home. They have refused to do so. Her own personal requests to go home have been refused.

[173] Ms Antunovic is not in close-custody in the sense of being under arrest, imprisoned or detained. She has considerable freedom of movement during the day, but her freedom in that respect is limited by the requirement that she must live at the unit and be there at night. At night, her freedom of movement is limited by that requirement. This is a partial not a total restraint, but it is substantial.

[174] I infer that Ms Antunovic feels unable to go home without the permission of Dr Dawson and the unit because of the authority which the doctor holds over her as an authorised psychiatrist under the Mental Health Act and because the unit is the place where she is being treated for her mental illness. Because of the power which the doctor and the unit have over her, Ms Antunovic feels unable simply to leave the unit and go home. I think she is being subjected to "power" and "control" within the applicable legal test of restraint.

[175] In my view, Ms Antunovic's personal liberty is being restrained by the doctor and the unit. The doctor is using her position as an authorised psychiatrist to direct the imposition of the restraints by the unit.

[176] Ms Antunovic's freedom of movement is being restrained in that she is being required to live at the unit at night and is being prevented from going to live in the place of her own choosing. Being required to live at the unit, and to be there at night, limits Ms Antunovic's freedom of movement in certain respects even during the day. Such restraints engage the human right to freedom of movement under s 12 of the Charter. The restraints, even though they are partial and not total, are amenable to habeas corpus because they are not shared by the general public who, under the common law, can generally choose where to live, and go to and from their home, at will. Being able to do so is an important aspect of the private and social life and the development of the individual, including that which occurs within their own family.

[177] On one view, it would take an extension of the scope of habeas corpus to cover the present case, for I know of no case where a person able to come and go during the day has obtained habeas corpus. According to authorities I have examined, however, the remedy of habeas corpus is broad, flexible and adaptable. Drawing out the underlying principle of personal liberty which this remedy protects, it covers a case where the applicant's freedom of movement and freedom to choose where to live are being restrained, even if only partially, and the principle takes the remedy with it. Indeed, habeas corpus is not just an available remedy in such a case; it is the most efficacious remedy.

Are the restraints lawfully authorised?

[178] This is not a case in which it can be said that some medical emergency322 makes it necessary for medical treatment to be imposed on Ms Antunovic at a directed place of residence. Such a suggestion would be clearly untenable in the circumstances.

[179] This case of managing Ms Antunovic's treatment in the community of a person with mental illness is not out of the ordinary. There is no evidence of her being likely to harm herself or others. She is taking her medication. The restraints being imposed on Ms Antunovic are either lawfully authorised under the Mental Health Act as being necessary for the treatment of her mental illness or not at all.

[180] Dr Dawson and the unit submitted the residence direction was lawfully authorised because Ms Antunovic was an involuntary patient under the Mental Health Act. I must reject that submission.

[181] I have taken you to the provisions of the Mental Health Act. Under those provisions, making a community treatment order in respect of a person means they are to be treated in the community, rather than in detention in an approved mental health service.323 I have

referred to the legislative scheme and the emphasis which it places on people being treated in the least restrictive and intrusive way and in the community where possible.324

[182] As we have seen, the legislative scheme does contemplate the possible imposition of a residence condition in a community treatment order, but only if the authorised psychiatrist considers it to be necessary for the treatment of the person's mental illness.325 An authorised psychiatrist also has the power to vary a community treatment order to include such a condition,326 but subject to the same requirements. There is no other power in the Mental Health Act to impose such a condition on a community treatment order. Other than by the lawful imposition of such a condition, there is no other power to instruct a person who is subject to a community treatment order to live at a directed place, including at a community treatment unit.

[183] The legislation makes ample provision for dealing with situations in which it is necessary to address the place or circumstances in which someone suffering from mental illness is living. An authorised psychiatrist has several options. One is the power of variation of a community treatment order which I have mentioned. Another is the revocation of the order.327 These powers must be duly exercised for the purpose of the Mental Health Act. The point is that proper legal channels do exist for dealing with such issues when the occasion arises. The proper channels have not been utilised in the present case.

[184] Although Ms Antunovic is having involuntary treatment under the Mental Health Act, it is in the community under a community treatment order. There is no residence condition in her current community treatment order, and there was no such condition in the previous orders. The board has recently reviewed her case and did not impose such a condition. Nobody has lawful authority under the Mental Health Act to direct Ms Antunovic where to live or to prevent her from living where she wants to. The powers available under that Act to authorise such restraints, subject to the carefully specified checks and balances, have not been exercised. No other powers apply. The unit and the doctor are asserting a power which in law they do not have.

[185] Accordingly, I conclude the restraints being imposed on Ms Antunovic's freedom of movement are not authorised in law.

What orders should be made?

[186] The common law remedy of habeas corpus can be granted by issuing a writ requiring production of the body of the person in court or by making a direct order for release from the restraint, depending on the circumstances. This is made express in r 57.03(1), which authorised the court to issue a writ of habeas corpus or make and order that the person restrained be released.

[187] In the present case, I was able to determine the legality of the restraint on the first return day of the summons. You have seen my reasons for concluding it was not appropriate to issue a write of habeas corpus. In short, it would have unnecessarily delayed the release of Ms AntunoVic I therefore made orders for her release by Dr Dawson and the unit.

[188] Before doing so, I satisfied myself that, were Ms Antunovic to go home to live with her mother, she would have access to and take her medication. I was satisfied she could obtain her medication from a point close to her mother's inner-Melbourne home. There was no

dispute that she would take it. She has been doing so voluntarily for some years. Nor was this a case in which there was a risk of Ms Antunovic harming herself or other people.

[189] Counsel for the unit and the doctor submitted Ms Antunovic had alternative remedies available. He referred to the board and the Victorian Civil and Administrative Tribunal.

[190] I do not think Ms Antunovic has any relevant review or appeal rights before the board or the tribunal. The board has already determined not to impose a residence condition. There is nothing to appeal to the tribunal.

[191] However, even if such alternative avenues were available, I would have made orders for the release of Ms AntunoVic It is her right to make application to the court for a writ of habeas corpus or order for release. If the court determines that her personal liberty is being unlawfully restrained, it should issue the writ or make the order. Ms Antunovic is not seeking de facto merits or judicial review of the exercise of the discretion to impose a residence condition on her community treatment order. She seeks relief against the unit and the doctor, who are imposing a residence requirement on her in the absence of such a condition or other lawful authority. She is positively entitled to that relief, for habeas corpus is a remedy of right once good cause is shown, as it has been here.

CONCLUSION

[192] When a court determines a habeas corpus ("produce the body") application, both the body of the person and the body of the law are at stake, for nothing tears to shreds more completely the whole idea of the rule of law than unlawfully restraining the personal liberty of the individual.

[193] In the present case, Zeljka Antunovic has been directed by Dr Louise Dawson and the Norfolk Terrace Community Care Unit to live at the unit and not at home with her mother. She is allowed to go out during the day but must return to the unit at night. She is aged 35 years.

[194] Ms Antunovic is suffering from a mental illness for which she is being treated involuntarily under a community treatment order. She is not in detention and the order does not have a residence condition. The Mental Health Review Board has recently reviewed her case. It acknowledged her wish to go home and did not include such a condition in the order. The doctor and the unit have nonetheless refused the numerous requests made by Ms Antunovic, and the Mental Health Legal Service on her behalf, to go home. To achieve that simple objective, Ms Antunovic has made a habeas corpus application to the court.

[195] The purpose of habeas corpus is to protect personal liberty, which is the birthright of every individual under the common law. The bedrock value of personal liberty goes back to Magna Carta 1297 (which is in force in Victoria) and is now recognised in a number of human rights in the Charter of Human Rights and Responsibilities Act 2006. Under the common law of habeas corpus, personal liberty can only be restrained where this is authorised by law, and the courts have a duty to protect individuals from any infringement of that principle.

[196] It was first necessary to determine whether the restraints being imposed on Ms Antunovic come within the scope of habeas corpus. She is not under house arrest or being imprisoned. After analysing the authorities, I have determined that habeas corpus is not

confined to arrest and imprisonment. It applies where anyone having custody, power or control over another person imposes restraints on their personal liberty which are not shared by the general public. It applies to partial as well as total restraint.

[197] Applying that test to the present case, the undisputed facts were that Ms Antunovic was being required to live at the unit. That is a substantial restraint on her freedom of movement. She was being required to stay at the unit each night. That too is a substantial restraint on her freedom of movement. She could go out during the day. But the extent of her freedom of movement during the day was limited by the requirement that she return to the unit at night. She was being prevented from going home to live with her mother. That adds another dimension to the restraints.

[198] I concluded that restraints of this kind come with the scope of habeas corpus. The restraints being applied to Ms Antunovic are not shared by the general public, who can generally chose where to go and live, in accordance with their fundamental common law rights and liberties, and as now recognised in the human right to freedom of movement in the Charter.

[199] The onus was therefore on the unit and the doctor to demonstrate the lawful basis for the restraints. They relied on Ms Antunovic's status as an involuntary patient under the Mental Health Act 1986. After examining that legislation and its application in the circumstances, I rejected that justification. There was no residence condition in Ms Antunovic's community treatment order. Without such a condition, nobody — including the unit and the doctor — can tell Ms Antunovic where and where not to live. I note there was no question of her not taking her medication, which she has been doing for many years, or of her harming herself or other people.

[200] The Mental Health Act contains procedures for dealing with where people with mental illness should receive treatment and live. Under those procedures, the least restrictive and intrusive option possible is to be preferred, and treatment in the community is to be preferred to treatment in detention in a hospital. Of course, any treatment must be necessary in the medical interests of the person. There are also procedures for revoking community treatment orders where it is no longer appropriate for someone to be treated in the community, and for changing the terms of a community treatment order if this becomes necessary, including the imposition of a residence condition. The rights of mentally ill people are protected under the Act by various safeguards, especially the review and appeal functions of the board.

[201] The personal liberty which mentally ill people have to choose where to go and live in the community can only be restrained by those proper channels. The unit and the doctor do not posses the lawful authority to impose restraints on Ms Antunovic outside those channels. The restraints which they have imposed have no lawful foundation.

[202] Everybody whose personal liberty is being restrained without lawful authority has the right to seek from the court a writ of habeas corpus or an order for release from the restraint. By the proper exercise of this common law jurisdiction, the court is especially concerned to protect vulnerable people, such as the mentally ill. As the restraints being imposed on Ms Antunovic were without lawful foundation, she was entitled to the relief which she sought and I made orders against the unit and the doctor for her immediate release from the unit accordingly.

Order

Orders accordingly.

Counsel for the applicant: Mr R McClosky

Counsel for the respondents: Ms M Carroll

Solicitors for the applicant: Donaldson Trumble

Solicitors for the respondents: Mental Health Legal Centre

1 William Blackstone, Commentary on the Laws of England (1765) Vol 1, 120. He included the right to security and private property in this formulation.

2 Ibid 130.

3 Ibid 132.

4 Personal security, liberty and freedom are fundamental values of the Charter which are expressly recognised in several respects. The right to life is recognised in s 9, the right to personal integrity is recognised in ss 10 and 11(a), the right to freedom of movement is recognised in s 12 and the right to personal liberty and security is recognised in those precise terms in s 21(1). As the Preamble to the Charter declares, these are among the human rights which are "essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom."

5 Butterworths, Halsbury's Laws of England, (1954) Vol 7, 195–196 (footnotes omitted).

6 William Blackstone, Commentary on the Laws of England (1765) Vol 1, 119.

7 Ibid 140.

8 Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36 at 79 per Isaacs J.

9 See eg Opinion on the Writ of Habeas Corpus (1758) 97 ER 29 at 33 per Wilmot J; Ex parte Nichols [1839] SCC 123 at 133 per Willis J (Supreme Court of New South Wales).

10 Preamble.

11 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 1–2; David Clark, "The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law" (2000) 24 Melbourne University Law Review 866, 885; William F Duker, A Constitutional History of Habeas Corpus (1980) Ch 1.

12 William Blackstone, Commentary on the Laws of England (1768) Vol 3, 131.

13 Ibid.

14 Ibid 131–132.

15 (1844) 115 ER 180.

16 Ibid 182, Williams, Coleridge and Wightman JJ concurring.

17 (1861) 121 ER 525 at 527–528 per Cockburn CJ, Crompton, Hill and Blackburn JJ. This jurisdiction was later limited by statute.

18 Butterworths, Halsbury's Laws of England (3rd ed, 1954) Vol 7, 177; see also Vol 2, 29: "The right to the writ is a right which exists at common law independently of any statute, though the right has been conferred and regulated by statute."

19 Mabo v Queensland (No 2) (1991) 175 CLR 1 at 37–8 per Brennan J.

20 Ex parte Nichols [1839] SCC 123 at 128 per Willis J.

21 David Clark and Gerard McCoy, The Most Fundamental Legal Right (2000) 19.

22 [1839] SCC 123.

23 Ibid 123 per Willis J.

24 Ibid 128 per Willis J; see also 132 per Dowling CJ.

25 (1888) 9 NSWR 221 at 227 and 234 per Darley CJ, 247 per Windeyer J.

26 (1987) 162 CLR 514.

27 Ibid 520–521 and 522.

28 Ibid 520–521.

29 [1963] VR 407.

30 Ibid 412, referring to Ex parte Anderson (1861) 121 ER 525.

31 [2007] VSC 338, [8].

32 Ibid [12].

33 (1925) 37 CLR 36.

34 Ibid 79.

35 Ibid.

36 Ibid.

37 Before it, the Imperial Acts Application Act 1922.

38 The legislation is identified and discussed in David Clark, "The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law" (2000) 24 Melbourne University Law Review 866, 869–872; Matthew Groves, "The use of habeas corpus to challenge prison conditions" (1996) 19 University of New South Wales Law Review 281, 283–284; regarding the Bill of Rights 1688, see also Matthew Groves, "Administrative Segregation of Prisoners: Powers, Principles of Review and Remedies" (1996) 20 Melbourne University Law Review 639, 654 ff.

39 Ibid.

40 (1888) 9 NSWR 221.

41 Ibid 234 per Darley CJ.

42 (1989) 168 CLR 23.

43 Ibid 78. Toohey J assumed this was so without expressing an opinion: 67.

44 (1989) 99 FLR 265 at 277 and 278.

45 (1990) 19 NSWLR 317 at 332.

46 Ibid 345–346.

47 [1996] 1 VR 95.

48 Ibid 176 and 178.

49 [2009] VSCA 282.

50 Ibid [41], fn 25.

51 [1956] VLR 709.

52 Ibid 713.

53 Ibid.

54 Ibid.

55 [2008] ACTSC 99.

56 Ibid [3] and [6].

57 [1986] VR 425.

58 Ibid 434, Tadgell J, Young CJ and Kaye J concurring.

59 I here set out the version given under s 8 of our application Act.

60 See JC Holt, Magna Carta (2nd ed, 1992); Henry Malden (ed), Magna Carta Commemoration Essays (1917); Frederick Pollock and Frederic Maitland, The History of English Law, (1895) Vol 1, 150–152; William Stubbs, The Constitutional History of England — in its Origins and Development (1873) Vol 1, 597 and 583; see also Lord Irvine (Lord Chancellor), "The Spirit of Magna Carta Continues of Resonate in Modern Law", (2003) 119 Law Quarterly Review 227, 228–233.

61 JC Holt, Magna Carta (2nd ed, 1992) 41–43, 112, 16.

62 Ibid 27; William F Duker, A Constitutional History of Habeas Corpus (1980) 15.

63 Ibid 31; Frederick Pollock and Frederic Maitland, The History of English Law, (1895) Vol 1, 150.

64 JC Holt, Magna Carta (2nd ed, 1992) 35; Frederick Pollock and Frederic Maitland, The History of English Law (1895) Vol 1, 150.

65 William Stubbs, The Constitutional History of England — in its Origins and Development (1873) Vol 1, 597 and 583.

66 JC Holt, Magna Carta (2nd ed, 1992) 19.

67 Lord Irvine (Lord Chancellor), The Spirit of Magna Carta Continues of Resonate in Modern Law', (2003) 119 Law Quarterly Review 227, 237.

68 Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36 at 79 per Isaacs J.

69 JC Holt, Magna Carta (2nd ed, 1992) 323.

70 Frederick Pollock and Frederic Maitland, The History of English Law (1895) Vol 1, 151–152;

71 JC Holt, Magna Carta (2nd ed, 1992) 278.

72 Lord Woolf CJ, "Magna Carta: a Precedent for Recent Constitutional Change", (Royal Holloway, University of London, 15 June 2005) 2; see also FM Powicke, "Per Iudicum Parium Vel Per Legem Terrae", in Henry Malden (ed), Magna Carta Commemoration Essays (1917) 109–10 and 121, William Stubbs, The Constitutional History of England — in its Origins and Development (1873) Vol 1, 596–597.

73 On the difference between formal equality before the law and the broader concept of legal equality specified in s 8(3) of the Charter, see Lifestyle Communities Ltd (No 3) [2009] VCAT 1869, [105] ff per Bell J.

74 (1627) 3 St Tr 1 .

75 The decision in Darnel's case and the enactment of the Petition of Right is examined in detail in RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 9–14.

76 William Blackstone, Commentary on the Laws of England (1768) Vol 3, 134.

77 William Blackstone, Commentary on the Laws of England (1765) Vol 1, 124; Thomson Reuters, The Laws of Australia (2008) [21.1.180].

78 Clause 8(3).

79 Ibid, cl 8(1).

80 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 13.

81 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 14; Thomson Reuters, The Laws of Australia (2008) [21.1.180].

82 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 14–15

83 Ibid; William Blackstone, Commentary on the Laws of England (1768) Vol 3, 135.

84 Preamble to Bill of Rights 1688 (Imp) set out under s 8 of the Imperial Acts Application Act.

85 William Blackstone, Commentary on the Laws of England (1765) Vol 1, 124; Thomson Reuters ,The Laws of Australia (2008) [21.1.210]–[21.1.220].

86 (1989) 166 CLR 518.

87 Ibid 569.

88 The "ancient rights and liberties" declared were the power to suspend laws (cl 1), the power to dispense with laws (cl 2), commissioning late courts for certain causes (cl 3), imposing taxation and levies with parliamentary approval (cl 4), the right to petition the king and abolishing prosecutions for doing so (cl 5), raising or keeping standing armies without parliamentary approval (cl 6), the right for protestants to bear arms (cl 7), free elections for members of parliament (cl 9), the freedom of speech and debate in parliament not to be impeached or questioned in court or place out of parliament (cl 9), abolition of excessive bail and fines and abolition of cruel and unusual punishment (cl 10), due empanelment and return of jurors (cl 11), abolition and criminalisation of fine and forfeiture before conviction (cl 12), frequent parliamentary sittings to address grievances and strengthen and preserve the law: see the provisions set out under s 8 of the Imperial Acts Application Act.

89 The Preamble and Clause III.

90 William Blackstone, Commentary on the Laws of England (1768) Vol 3, 134–5; RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 15–16.

91 Clause II.

92 Preamble.

93 Clause VIII(3).

94 Ibid.

95 Ibid.

96 Clause VI.

97 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 15–17; William Blackstone, Commentary on the Laws of England (1768) Vol 3, 134–5.

98 It did not apply to treason, for example.

99 Clause 1. Among other things, some jailers simply ignored the writ until they were forced by a second ("alias") or third ("plures") to bring the body to court: RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 18; William Blackstone, Commentary on the Laws of England (1768) Vol 3, 135.

100 Clause 5.

101 Clause 8. This led to the acquittal in R v Templeton [1956] VLR 709, considered above.

102 Clause. This defect was notoriously demonstrated by Jenks Case (1676) 6 St Tr. 1190, where the applicant was denied habeas corpus in vacation time, though he had been committed to prison by the king in council simply for advocating that parliament be recalled. Sharpe called this that "great abuse": The Law of Habeas Corpus (2nd ed, 1989) 17. Blackstone deplored that a person could be imprisoned without access to habeas corpus for a "turbulent speech", and said the case of "this obscure individual gave birth to the habeas corpus act, 31 Car, II. c 2.": William Blackstone, Commentary on the Laws of England, (1768) Vol 3, 135.

103 Clause 11.

104 The reforms are fully described in RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 17–20; William Blackstone, Commentary on the Laws of England (1768) Vol 3, 136–137. The reforms giving access to the writ during vacation time did not extend to persons charged with treason and felonies: cl 2 (see further cl 6).

105 William Blackstone, Commentary on the Laws of England (1768) Vol 3, 135.

106 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 20.

107 William Blackstone, Commentary on the Laws of England (1768) Vol 3, 135 and 137; RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 19–20.

108 Habeas Corpus Act 1816 (Imp), as set out under s 8 of the Imperial Acts Application Act.

109 Opinion on the Writ of Habeas Corpus (1758) 97 ER 29 at 33–34 and 37 per Wilmot J. It was civil habeas corpus which went to release the enslaved African in Somerset v Stewart (1772) 98 ER 499 at 510.

110 Clause 1.

111 Ibid.

112 Clause 2.

113 Clause 3. In R v Board of Control, Ex parte Rutty [1956] 2 QB 109 at 124, Lord Goddard LJ said the reform was important because previously, under the common law and the Habeas Corpus Act 1674, "the court could do no more than look at the return and decide whether on its face it showed a lawful cause of detention".

114 Preamble.

115 See generally the authorities in Tomasevic v Travaglini (2007) 17 VR 100, [73].

116 29 March 2010.

117 Ibid [70].

118 24 October 1979.

119 Ibid [39].

120 [2009] VCAT 646.

121 Ibid [578]–[588].

122 Ibid [621]–[666].

123 Castles v Secretary, Department of Justice [2010] VSC 310, [45].

124 Kracke v Mental Health Review Board [2009] VCAT 646, [67].

125 On the application of s 7(2), see generally R v Momcilovic [2010] VSCA 50, [139] ff; Re Application under the Major Crime (Investigative Powers) Act 2004; [2009] VSC 381, [145]–[150] per Warren CJ; Kracke v Mental Health Review Board [2009] VCAT 646, [98]–[162].

126 Re Application under the Major Crime (Investigative Powers) Act 2004 [2009] VSC 381, [80] per Warren CJ [footnote omitted].

127 Castles v Secretary, Department of Justice [2010] VSC 310, [55]–[56] per Emerton J; Director of Housing v Sudi [2010] VCAT 328, [90]; Kracke v Mental Health Review Board [2009] VCAT 646, [97].

128 [2009] VCAT 646.

129 Ibid [588].

130 Ibid [664]–[665].

131 Ibid [588]–[654].

132 Secretary of State for Home Affairs v O'Brien [1923] AC 603 at 609 per Lord Birkenhead; Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36 at 77 per Isaacs J.

133 Cox v Hayes (1890) 15 App Cas 506 at 522 per Lord Halsbury LC; R v Kerr; Ex parte Groves [1973] Qd R 314 at 316 per Stable, DM Campbell and Andrews JJ.

134 Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, De Smith's Judicial Review (6th ed, 2007) [17–013].

135 See cl VIII(3) as set out under s 8 of the Imperial Acts Application Act and above.

136 See cl 1 of the Habeas Corpus Act 1679 as set out under s 8 of the Imperial Acts Application Act.

137 Preamble to the Habeas Corpus Act 1816 as set out under s 8 of the Imperial Acts Application Act.

138 Order 57.02(5) and (6).

139 Order 57.02(8).

140 Order 57.03(1).

141 R v Secretary of State for the Home Department; Ex parte Cheblak [1991] 1 WLR 890 at 894 per Lord Donaldson; David Clark and Gerard McCoy, Habeas Corpus: Australia, New Zealand and the South Pacific (2002) 202–203; Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, De Smith's Judicial Review (6th ed, 2007) [17–013].

142 (2004) 219 CLR 562, [25].

143 (1758) 97 ER 29 at 39.

144 [1992] QB 244 at 258 (cited with approval by Gleeson CJ in Al-Kateb v Godwin (2004) 219 CLR 562, [25]).

145 Ibid 269.

146 Bernardo v Ford [1892] AC 326 at 338 per Lord Herschell.

147 Mark Aronson, Bruce Dyer and Matthew Groves, Judicial Review of Administrative Action (4th ed, 2009) [14.95].

148 So in Somerset v Stewart (1772) 98 ER 499, the respondents were the "owner" of the enslaved African and Captain Knowles was the captain in whose ship that person was being kept in chains. Habeas corpus was used against the captain.

149 See eg Ingram v Attorney-General for the Commonwealth [1980] 1 NSWLR 190 at 193.

150 (1731) 93 ER 939.

151 (1761) 97 ER 741.

152 So in Somerset v Stewart (1772) 98 ER 499, the respondents were the "owner" of the enslaved African and Captain Knowles was the captain in whose ship that person was being kept in chains. Habeas corpus was used against the captain.

153 (1846) 9 QB 651.

154 (1855) 24 LJQB 148.

155 Ibid 150, 153.

156 (1899) 25 VLR 539.

157 23 June 1995, Eames J, unreported.

158 (1916) 33 WN (NSW) 63.

159 Ibid 63.

160 [1956] 2 QB 109.

161 Ibid 112. An interested relative was also named.

162 The assumption on which the matter was argued was that the unit was capable of being a respondent and would abide by the order, but the superintendent, if that was not also the doctor, should have been named.

163 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 175.

164 Ibid.

165 An outlaw is one deprived of the benefit of the law, and out of the sovereign's protection: Daniel Greenberg and Alexandra Millbrook Stroud's Judicial Dictionary of Words and Phrases (6th ed, 2000) Vol 2, 1837. That is the deprivation of legal personality which, under the Charter, is a human right: s 8(1).

166 Clause VIII(1)(3) as set out under s 8 of the Imperial Acts Interpretation Act.

167 Clause 1 as set out under s 8 of the Imperial Acts Interpretation Act.

168 Ibid.

169 Ibid.

170 [1891] 1 QB 671. There are earlier examples of courts giving habeas corpus where the restraint was less than close physical confinement: R v Clarkson (1722) 93 ER 625; R v Delaval (1673) 97 ER 913.

171 [1891] 1 QB 671 at 682.

172 [1892] AC 326. Followed by the Supreme Court of New Zealand in John v Taylor Jones v Skelton [2006] NZSC 114, [25]–[26].

173 [1892] AC 326 at 338.

174 Ibid 340.

175 [1923] 2 KB 361.

176 Ibid 392.

177 See at 391 per Scrutton LJ and 398–399 per Atkin LJ

178 [1892] AC 326 at 398. The internee was subsequently produced before the court and discharged: 399–400. In Hicks v Ruddock (2007) 156 FCR 574, [50] Tamberlin J refused to strike out an application for habeas corpus directed to an Australian government minister in respect of the applicant's detention in a foreign country because, following R v Secretary of State for the Home Department; Ex parte O'Brien, it could not be said the claim had no reasonable prospects of success.

179 Secretary of State for the Home Department v O'Brien [1923] AC 603.

180 [1993] 1 FLR 940.

181 Ibid 944; followed in A Local Authority v MA [2005] EWHC 2942 (Fam), [54] per Mr Justice Mumby.

182 (1963) 371 US 236.

183 Ibid 239.

184 Ibid 240.

185 Ibid 243.

186 (2001) 110 FCR 452.

187 Ibid [86], referring to David Clark and Gerard McCoy, Habeas Corpus: Australia, New Zealand, The South Pacific (2000) 66; and RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 175.

188 (2001) 110 FCR 452, [86].

189 (2001) 110 FCR 491.

190 Ibid [69].

191 (1963) 371 US 236.

192 (2001) 110 FCR 491, [69].

193 Ibid [2009].

194 Ibid [2001].

195 Ibid [2003].

196 [2006] VSC 409.

197 [9]. By the return of the writ, the guardian had been reappointed, which was regarded as a sufficient return: [10].

198 R v Secretary of State for the Home Department; Ex parte O'Brien [1923] 2 KB 361 at 391 per Scrutton LJ and 398 per Atkin LJ; Ruddock v Vadarlis (2001) 110 FCR 491, [69] per Black CJ and [209] per French J.

199 Jones v Cunningham (1963) 371 US 236 at 243; Re C (Mental Patient: Contact) [1993] 1 FLR 940 at 944 per Eastham J; Victorian Council for Civil Liberties v Minister for Immigration and Multicultural Affairs (2001) 110 FCR 452, [86] per North J; Ruddock v Vadarlis (2001) 110 FCR 491, [69] per Black CJ, [2010] per French J.

200 Barnardo v Ford [1892] AC 326 at 338 per Lord Herschell; R v Secretary of State for the Home Department; Ex parte O'Brien [1923] 2 KB 361 at 391 per Scrutton LJ and 398 per Atkin LJ

201 See eg R v Jackson [1891] 1 QB 671 at 680 per Lord Halsbury LC, 682 per Lord Esher.

202 Jones v Cunningham (1963) 371 US 236, [240]; Re C (Mental Patient: Contact) [1993] 1 FLR 940, [944]; Victorian Council for Civil Liberties v Minister for Immigration and

Multicultural Affairs (2001) 110 FCR 452, [86] per North J; Ruddock v Vadarlis (2001) 110 FCR 491, [69] per Black CJ, [2010] per French J.

203 (1925) 37 CLR 36.

204 Ibid 79.

205 Ibid.

206 William Blackstone, Commentary on the Laws of England (1765) Vol 1, 120.

207 Ex parte Walsh v Johnson, Re Yates (1925) 37 CLR 36 at 79.

208 (1934) 52 CLR 221 at 227.

209 (1772) 98 ER 499 at 510 per Lord Mansfield.

210 Clause 1 set out under s 8 of the Imperial Acts Application Act.

211 Liversidge v Anderson [1942] AC 206 at 244 per Lord Atkin.

212 (1925) 37 CLR 36 at 79.

213 [1963] VR 61 at 62.

214 See Mark Aronson, Bruce Dyer and Matthew Groves, Judicial Review of Administrative Action (4th ed, 2009) [14.105].

215 See eg R v Home Secretary; Ex parte Khawaja [1984] 1 AC 74 at 110 per Lord Scarman; Ruddock v Vadarlis (2001) 110 FCR 491, [73] per Black CJ; Hicks v Ruddock (2007) 156 FCR 574, [53] per Tamberlin J.

216 [1942] AC 206 at 245.

217 [1982] AC 484 at 487.

218 (1987) 71 ALR 215.

219 Ibid 223 per Fox, Wilcox and Burchett JJ.

220 [1923] AC 603.

221 Ibid 227.

222 Ibid.

223 (1936) 56 CLR 381 at 385.

224 (1955) 94 CLR 147 at 152.

225 [1963] VR 61 at 62 (footnote omitted); see also Hicks v Ruddock (2007) 156 FCR 574, [54] per Tamberlin J.

226 (1938) 60 CLR 336 at 362–363 per Dixon J.

227 See RG Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 89.

228 [1984] AC 74.

229 [1951] P 35 at 37.

230 (1948) 77 CLR 191 at 210.

231 [1984] AC 74 at 210.

232 (1993) 31 ALD 729.

233 Ibid 731 per Malcolm CJ, Seaman and Ipp JJ, referring to Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170 at 171–2.

234 [1951] P 35 at 37.

235 [2009] VSC 381, [147].

236 Ibid.

237 [1986] 1 SCR 103, [43].

238 [2007] VSC 338, [6].

239 Censori v Holland [1993] 1 VR 509 at 512 per Harper J; Young v Registrar, Court of Appeal (No 3) (1993) 32 NSWLR 262 at 285 per Kirby P; Re Officer in Charge of Cells, Australian Capital Territory Supreme Court; ; Ex parte Eastman (1994) 123 ALR 478 at 480 per Deane J; Re Stanbridge's application (1996) 70 ALJR 640 at 643 per Kirby J; Ah Shueng v Lindberg [1906] VLR 323 at 327 per Cussen J.

240 Ah Shueng v Lindberg [1906] VLR 323 at 327.

241 Ibid; R v Secretary of State for the Home Department; Ex parte Khawaja [1984] AC 74 at 101–102 110 and 122–123 and 128; R v Secretary of State for the Home Department; Ex parte Muboyayi, [1992] QB 244 at 254–255.

242 [1996] QB 599.

243 R v Langdon; Ex parte Langdon (1953) 88 CLR 158 at 161 per Taylor J.

244 John Burke (ed) Jowitts Dictionary of English Law (2nd ed, 1977) Vol 1, 731.

245 (1927) 39 CLR 245.

246 Ibid 256. See also Ex parte Walsh and Johnson; Re Yates (1925) 37 CLR 36 at 76 per Isaacs J, endorsing the proposition that habeas corpus was a writ of right which may be demanded when a person is unlawfully deprived of their liberty.

247 (1758) 97 ER 29.

248 Ibid 32.

249 Ibid 33.

250 Ibid.

251 RJ Sharp, The Law of Habeas Corpus (2nd ed, 1989) 58–59; David Clark and Gerard McCoy, Habeas Corpus: Australia, New Zealand and the South Pacific (2000) (241).

252 (1772) 98 ER 499 at 510.

253 (2001) 110 FCR 452, [105].

254 (2001) 110 FCR 491.

255 Ibid [91] (footnote omitted).

256 23 June 1995, unreported; BC9503348.

257 Ibid [26].

258 Lim v Minister for Immigration Local Government and Ethnic Affairs (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ; see also Somerset v Stewart (1772) 98 ER 499 at 510.

259 Re Bolton, Ex parte Bean (1987) 162 CLR 514 at 528–529; Lim v Minister for Immigration Local Government and Ethnic Affairs (1992) 176 CLR 1 at 19 per Brennan, Deane and Dawson JJ; Ex parte Lo Pak (1888) 9 NSWR 221 at 240 per Darley CJ.

260 In R v Rampton Institution Board of Control; Ex parte Baker [1957] Crim LR 403 the applicant had remained illegally detained in a mental institution for 18 years because neither her parents nor anybody else had challenged the wrongful committal. Habeas corpus was granted. The court did not determine whether the applicant was mentally ill and liable to valid re-committal: ibid 404.

261 [1996] QB 599.

262 Ibid 603. Lord Bingham of Cornhill repeated these views in the House of Lords in R v East London and the City Mental Health NHS Trust [2004] 2 AC 280, [6]

263 Ibid.

264 Ibid.

265 Ibid 612 per Sir Thomas Bingham MR, Neill and Hirst LJJ agreeing.

266 Ibid 604, (see the definition of “approved social worker” in s 11(4) of the Mental Health Act 1983 (UK)).

267 Ibid 612.

268 Ibid 614.

269 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 157ff.

270 [1956] 2 QB 109.

271 Ibid, 118.

272 Ibid 125.

273 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 158, fn 7.

274 [1956] Crim LR 617.

275 Ibid 618.

276 RJ Sharpe, The Law of Habeas Corpus (2nd ed, 1989) 159.

277 (1761) 97 ER 741.

278 Ibid.

279 [1846] 9 QB 651.

280 Ibid 662 per Lord Denman CJ, Coleridge, Wightman and Erle JJ concurring.

281 (1855) 24 LJQB 148.

282 Ibid 152 per Coleridge J.

283 Ibid.

284 Ibid 153.

285 Ibid 152. In Al-Kateb v Godwin, (2004) 219 CLR 562 at 580 Gleeson CJ saw this as a legitimate example of orders being made "upon terms or conditions which relate directly to the circumstances affecting an applicant's right to be released from detention, and reflect temporal or other qualifications upon that right".

286 (1899) 25 VLR 539. Appeal dismissed in Ex parte Gregory [1901] AC 128 (privy council).

287 Ibid 542 per Madden CJ, A'Beckett and Hodges JJ.

288 Ibid.

289 The jurisdiction is regulated by Order 57 of the Supreme Court Rules.

290 [2009] VCAT 646 at 674 ff.

291 Ibid [696].

292 Section 14(2).

293 Section 14(1).

294 Section 14(3)(b).

295 Ibid.

296 Section 14(2).

297 Section 14C(1).

298 Section 14C(2).

299 Section 14(3)(b).

300 Section 14(3)(a).

301 Sections 14B(4) and 14(5).

302 Section 14B(1)(a) and (b).

303 Section 19A(1) and the definition of "patient" and "involuntary patient" in s 3(1).

304 Section 19A(1) and the definition of "patient" and "involuntary" in s 3(1).

305 Section 19A(2).

306 Section 19A(3) and (4).

307 Section 19A(4)(e).

308 Section 14D(2).

309 Section 14(5).

310 Section 4(2) and 6A(b).

311 Sections 30(1)(a) and 30(3)(a).

312 Section 30(4).

313 Section 29(1)(a).

314 Section 36(2).

315 Section 36C(2).

316 Section 36(2) and 36C(2).

317 Section 36C(3).

318 Section 36C(4).

319 Section 35A(1).

320 Section 35A(2).

321 Section 22(2).

322 See R v Bournewood Community and Mental NHS Trust; Ex parte L [1999] 1 AC 458; In Re F (Mental Patient Sterilisation) [1990] 2 AC 1; Savage v South Essex Partnership NHS Foundation Trust [2009] 1 AC 681.

323 Section 14(2).

324 Sections 4(2) and 6A(b).

325 Section 14(3)(b).

326 Section 14C(1).

327 Section 14D.