26/10; [2010] VSCA 111

SUPREME COURT OF VICTORIA — COURT OF APPEAL

MASTWYK v DPP

Maxwell P, Nettle and Redlich JJA

10 June 2009; 11 May 2010 — [2010] 27 VR 92; (2010) 200 A Crim R 563

MOTOR TRAFFIC – DRINK/DRIVING – BREATH TEST AND BLOOD ALCOHOL – BLOOD ALCOHOL CONTENT EXCEEDING 0.05% – DRIVER UNDERWENT A PBT WHICH INDICATED THAT DRIVER'S BREATH CONTAINED ALCOHOL – DRIVER THEN REQUIRED TO ACCOMPANY POLICE OFFICER TO POLICE STATION FOR A FULL BREATH TEST – DRIVER AGREED TO ACCOMPANY POLICE OFFICER – WHEN DRIVER SAW THAT SHE WOULD HAVE TO TRAVEL IN THE REAR OF A DIVISIONAL VAN SHE WITHDREW CONSENT – DRIVER LATER CHARGED WITH REFUSING TO COMPLY WITH THE REQUIREMENT TO ACCOMPANY THE POLICE OFFICER – FINDING BY MAGISTRATE THAT THE REAR OF A DIVISIONAL VAN WAS A FORM OF IMPRISONMENT – FINDING THAT THE REQUIREMENT WAS NOT A VALID ONE – CHARGE DISMISSED – WHETHER MAGISTRATE IN ERROR – WHETHER MATTER SHOULD BE REMITTED TO THE MAGISTRATE FOR REHEARING: *ROAD SAFETY ACT* 1986 (VIC) SS49(1)(e), 55(1).

M. was charged with having refused to comply with the informant's requirement made under s55 of the *Road Safety Act* 1986 (Vic) ('Act') that she accompany him to a nearby police station for the purpose of providing a sample of her breath for analysis, contrary to s49(1)(e) of the Act. The mode by which she was required to do so was by travelling in the rear compartment of a divisional van. The Magistrate at first instance concluded that it was beyond the power of the informant to require the appellant to travel in the rear of the divisional van as it constituted a form of imprisonment and dismissed the charge. On appeal and allowing the Director's appeal (MC31/08; [2008] VSC 192), Kyrou J found that such a requirement would not constitute imprisonment if the person travelled to the police station by that means voluntarily. His Honour further held that the Magistrate should have determined whether, on the basis of all of the evidence before him, including the means of transport proposed, the requirement that was made under s55(1) was reasonable. His Honour ordered that the Magistrate's decision be set aside and that the charge be reheard according to law. Upon appeal—

HELD: Appeal dismissed.

1. Per the Court:

The power conferred by s55(1) of the Act to require a driver to accompany a police officer, does not authorise the arrest or detention of a driver.

2. Per Nettle and Redlich JJA, Maxwell P dissenting:

Where a driver does not comply with a requirement to accompany the police officer because the proposed manner of compliance with the request is objectively unreasonable, the prosecution will fail to establish the element of 'refusal' by the driver.

***DPP v Webb* MC40/1992; [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367; and**

***Hrysikos v Mansfield* MC 32/2002; [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408, followed.**

***Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635, considered.**

3. Per Nettle JA: Where a driver is otherwise willing to comply with a requirement that he or she accompany a police officer to a designated place to undergo a breath test, but the police officer directs the driver to accompany the police officer to that place by means of travel which are objectively unreasonable, a refusal by the driver so to travel is not without more a contravention of s55(1) of the Act. It is implicit in Ormiston JA's reasoning in *DPP v Webb* [1993] 2 VR 403 that a requirement to remain in an unreasonably confined space is beyond the power conferred on a police officer by s55(1). Put another way, the power under s55(1) to require a driver to stay at a place does not extend to requiring a driver to stay in a space which is so confined as to be unreasonable.

***DPP v Webb* MC40/1992; [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367; and**

***Hrysikos v Mansfield* MC 32/02; [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408, followed.**

4. Fundamentally, a statutory restriction on the liberty of the subject is to be strictly construed. In the absence of a clear indication to the contrary, it should be taken as going no further than necessary to achieve the object in view. Here, to adopt and adapt Ormiston JA's reasoning in *Hrysikos*,

the object in view is that the driver accompany the police officer to the designated place for testing. It is capable of being achieved by a requirement to accompany a police officer to a designated place by means of travel which is not objectively unreasonable.

5. Consequently, if an accused defends a prosecution under s49(1)(e) of the Act on the basis that the means of travel by which he or she was directed to accompany the police officer in question were unreasonable, the prosecution under s49(1)(e) will fail unless the Crown establishes that the stipulated means of travel were objectively reasonable.

6. Per Redlich JA:
In the absence of the express authority conferred by s55 of the RSA, a member of the police force would have no power to require a driver to accompany the officer to a police station for the purpose of a breath test. Section 55 provides a police officer with a limited tool of coercion, as a requirement is accompanied by the threat of penalty for non-compliance. The power differs from that of the power of arrest, however, as ultimately it leaves the driver with the choice of non-compliance, although non-compliance will then constitute the relevant offence. But neither at common law nor by statute do police officers have the power to detain people for the purpose of obtaining compliance with such a statutory requirement. This consideration makes it unlikely that Parliament intended that the power under s55 should be exercisable in unreasonable circumstances so as to deny to the driver the limitation on power which confines the statutory power of arrest.

7. The prosecution does not have to establish, as a separate element of the offence in s49(1)(e) of the RSA that the requirement made under s55 is reasonable. To do so would conflate the requirement with the means by which it is to be satisfied. But the reasonableness of the means by which the requirement is to be satisfied is relevant to proof, where it is in issue, that the driver's failure constitutes a refusal under s49(1)(e). Once the defence that there was no 'refusal' is raised, objective reasonableness of the requirement becomes relevant to the question whether the prosecution has discharged its burden of proving a refusal.

8. The section should be construed so that the requirement must be one that is objectively reasonable in the circumstances. This conclusion rests upon the premise that Parliament would not have intended that the refusal of an objectively unreasonable requirement would constitute an offence. It is an implication that is derived from the accepted presumption of statutory interpretation that Parliament will not, without clear words to the contrary, be taken to have intended a restriction on individual liberty that goes beyond what is necessary to meet the purposes of the section and the Act. The elements of the offence should, therefore, be read to reflect the intention. Accordingly, where a driver does not comply with a requirement to accompany the police officer because the proposed manner of compliance is objectively unreasonable, the prosecution will fail to establish the element of 'refusal' by the driver.

9. Unlawful restraint can occur only where the driver has not consented to travel by the means proposed. Consequently where the driver is properly informed as to their choice and is prepared to accompany the officer by the means proposed, the driver will not by entering the rear of the divisional van be imprisoned. Hence an inquiry as to whether the proposed course would constitute imprisonment misconceives the issue. The true question is whether it is, in all the circumstances, objectively unreasonable to require the driver to travel by that means. If it is, the prosecution will fail to establish that the driver refused to accompany the officer. It is to the resolution of that question that the Magistrate's attention should be directed.

***Salton v Wigg* (unrep, County Court of Victoria, Judge Kimm, 27 February 1998), not followed.**

MAXWELL P:

1. This appeal concerns a particular provision of the *Road Safety Act* 1986 (Vic) (the 'RSA'), but the point at issue is one of general importance in statutory interpretation. The question which arises is: how does the law give effect to Parliament's presumed – but unstated – intention that statutory powers will be exercised reasonably?

2. The particular provision of the RSA is s55(1), which empowers any member of the police force to require a person to provide a sample of breath for analysis. For that purpose, the officer 'may further require the person to accompany a member of the police force … to a place or vehicle where the sample of breath is to be furnished …' (The full statutory framework, as set out in the reasons of the primary judge, appears as an appendix to these reasons.)

3. The present appellant, having been required to furnish a sample of breath, was then required to accompany the relevant officer by travelling in the lockable rear section of a police divisional van. She refused and was subsequently charged with an offence under s49(1)(e) of

the RSA, in that she 'refused to comply with a requirement made under s55(1).' The Magistrate dismissed the charge on the ground that to require Ms Mastwyk to travel in the rear of the van was 'really ... an imprisonment', and the statutory power to 'require the person to accompany' did not authorise imprisonment.

4. The Director of Public Prosecutions (the 'Director') appealed under s92(1) of the *Magistrates' Court Act* 1989 (Vic) against the dismissal of the charge. Kyrou J allowed the appeal, holding that the Magistrate had misdirected himself. His Honour upheld a submission made on behalf of Ms Mastwyk, that a 'requirement to accompany ... must be objectively reasonable at the time that it is made.'[1] In other words, a refusal to comply with a requirement to accompany would only constitute an offence if the requirement were shown to have been reasonable in the circumstances. (As will appear, his Honour's conclusion was based on earlier decisions of this Court.)[2] But, because the Magistrate had not addressed the question of reasonableness, the decision had to be set aside and the matter remitted for rehearing.

5. On the appeal to this Court, counsel for Ms Mastwyk contended that Kyrou J had correctly stated the legal test as being that of reasonableness but had misapplied the test to the facts as found by the Magistrate. On those facts, so it was contended, the informant had failed to establish that the requirement imposed on Ms Mastwyk was reasonable in the circumstances. That being so, the charge against Ms Mastwyk had been correctly dismissed by the Magistrate and Kyrou J should have dismissed the appeal by the Director.

6. By notice of contention, the Director submitted that Kyrou J had erred in law in holding that the requirement to accompany must be shown to be reasonable. The correct approach, according to the Director's submission, was to investigate the reasonableness of the driver's refusal. On this argument, the driver would only commit an offence if she 'unreasonably refused' to comply with a requirement made under s55(1).

7. On the Director's argument, the offence provision in s49(1)(e) would have to be read as if it said 'refuses unreasonably to comply with a requirement made under s55(1)'. But if the approach adopted by Kyrou J (and contended for by the appellant) is correct, the relevant part of s55(1) must now be read as if it provided as follows:

> ... and for that purpose [the police officer] may further require the person to accompany a member of the police force ... to a place or vehicle where the sample of breath is to be furnished ... **provided that the requirement to do so is reasonable in all the circumstances.**

8. Whether it is sought to attach the concept of reasonableness to the making of the requirement or to the driver's refusal to comply, the point of principle is the same. The question to be investigated is whether it is correct to imply the concept of reasonableness into s55(1), so as to qualify the power which the subsection confers.

9. In my view, for reasons which follow, there is no legal basis for treating the power conferred on a police officer by s55(1) as subject to an implied requirement of reasonableness. There is nothing in the provision itself, or in the legislative scheme of which it is a part, which could justify the Court reading in – as a matter of necessary implication – a test of reasonableness which Parliament itself did not impose.

10. Both Nettle JA and Redlich JA draw attention to the potential for the power conferred by s55(1) to be exercised so as to interfere with the liberty of the individual. As their Honours point out, the common law is very jealous of any infringement of personal liberty. A statute which purports to impair a right to personal liberty will be interpreted, if possible, so as to respect that right.[3] As Ormiston J said in *Director of Public Prosecutions v Webb*,[4] this is but a particular example of the application of the common law presumption against statutory interference with fundamental rights.[5] Likewise, s32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) requires courts to construe statutory provisions, so far as possible consistently with their purpose, compatibly with human rights.[6]

11. It follows that s55(1) is not to be construed as authorising the detention or imprisonment of a driver.[7] But, in my respectful view, so to conclude does not justify, less still compel, the much

broader conclusion that the exercise of the power under s55(1) must in every case be 'objectively reasonable'.

Reasonableness as a condition of validity

12. On the interpretation of s55(1) adopted by Kyrou J, reasonableness becomes a criterion of legal validity of the relevant exercise of the power. On this view, the power conferred by s55(1) is a power to impose reasonable requirements only. An unreasonable requirement will, accordingly, be beyond power.

13. On this analysis, a person in the position of the appellant can defend a charge of refusal to comply with a requirement on the ground that the requirement was unreasonable or, more accurately, has not been affirmatively shown by the prosecution to have been reasonable in the circumstances. As noted earlier, that is the position which Ms Mastwyk asserts in this appeal. She argues that the requirement which the officer made was unreasonable; it was therefore beyond the power conferred by s55(1); and hence it was a nullity. Accordingly, there was no 'requirement' with which she was obliged to comply.

14. Her defence is properly to be understood as involving a 'collateral challenge' to the exercise of the power to make the requirement. It is a collateral challenge because, in proceedings for enforcement of the requirement, the person charged seeks to demonstrate that the requirement was beyond power, such that her refusal to comply with it could not constitute an offence.[8] Ms Mastwyk has in effect sought a declaration that the purported requirement was invalid.

15. A collateral challenge to an exercise of statutory power relies on the conventional grounds of legal invalidity.[9] These are the grounds which would be relied on if the challenge were mounted directly, in a proceeding for judicial review.[10] For example, it is a condition of the validity of an exercise of power that the decision-maker must have complied with the requirements of procedural fairness. Failure to do so is a jurisdictional error.[11] The decision-maker must also have taken into account all relevant considerations.

16. It is not, however, a condition of legal validity at common law that the decision-maker must have acted reasonably. The only way in which any question of reasonableness arises on a challenge to the legal validity of an administrative decision is by way of what is known as *Wednesbury* unreasonableness.[12] Where this ground is invoked, an exercise of statutory power will be held to be invalid if – but only if – the exercise of power was so unreasonable that no reasonable decision-maker could have exercised that power in that way in those circumstances.

17. The ground of *Wednesbury* unreasonableness is difficult to establish. This difficulty reflects the fundamental distinction between judicial review, which is concerned with legal validity, and merits review, which is concerned with arriving at the correct (or preferable) decision in the circumstances.[13] As the learned authors of *Judicial Review of Administrative Action* have said:
The courts have always called for extreme care in handling the common law's unreasonableness ground, because it has such obvious potential for allowing disguised merits review ...[14]

Within the outer limits of validity defined by *Wednesbury* unreasonableness, it is for the decision-maker alone to determine what is reasonable in the circumstances. It is not for the court engaged in judicial review (whether the challenge is direct or collateral) to decide whether what was done was reasonable.

18. The position in Canada provides an instructive contrast. As Dr Matthew Groves has recently pointed out,[15] Canadian jurisprudence until recently recognised three standards of judicial review of administrative decisions, as follows: correctness; reasonableness; and 'patent unreasonableness'. Correctness review equated to merits review; patent unreasonableness equated to *Wednesbury* unreasonableness. Where the standard of review was 'reasonableness *simpliciter*', the reviewing court would look to see whether the decision in question was 'supported by any reasons that can stand up to a somewhat probing examination'.[16] Under Australian law, by contrast, 'unreasonableness *simpliciter*' is not recognised as a ground of judicial review, as counsel for Ms Mastwyk acknowledged in argument.

19. *Wednesbury* unreasonableness is a disqualifying characteristic of an exercise of power.

Where the ground is made out, the act or decision is shown to have lacked legal validity. By contrast, to imply a positive requirement of reasonableness into a statutory provision conferring power is to make reasonableness a qualifying characteristic of a valid exercise of that power.

20. The obvious difficulty with treating reasonableness in this way – that is, as a condition of the valid exercise of a statutory power – is that when the validity of a particular exercise of power is challenged (whether directly or collaterally), the court must undertake what amounts to a review on the merits of the exercise of power. The present case illustrates the point. Instead of being confined to deciding whether the exercise of power under s55(1) fell outside the limits of validity defined by *Wednesbury* unreasonableness, the court would be required to decide for itself, on the merits of the case, whether it was reasonable for the police officer to impose the particular requirement on the particular driver in the particular circumstances of the case. That, in my view, is a task for a tribunal undertaking merits review, not for a court considering legal validity.[17]

21. Doubtless it is correct to say that Parliament in conferring a statutory power intends that the power be exercised reasonably by the person(s) on whom the power is conferred. It does not follow, however, that the provision conferring the power must therefore be read as subject to an implied requirement that the exercise of power in a particular case must be – and be capable of being shown to be – reasonable in the circumstances. Apart from anything else, the same implication would – by parity of reasoning – have to be made in respect of every statutory provision conferring power.

22. As Lord Mersey said a century ago, it is 'a strong thing' to read into an Act of Parliament words which are not there, 'and in the absence of clear necessity it is a wrong thing to do.'[18] With great respect to my colleagues, I can see nothing in the language of s55(1), or in the statutory scheme of which it forms part, which necessitates reading into s55(1) (or s49(1)(e)) a qualifying requirement of reasonableness. In my view, the corollary of Parliament's intention that statutory powers be exercised reasonably is the availability of the unreasonableness ground of review at common law.

The decisions in Webb and Hrysikos

23. Kyrou J relied on two decisions to support the reading into s55(1) of a 'reasonableness' requirement. The first was that of Ormiston J in *Webb*,[19] referred to earlier. The case concerned, relevantly, the power conferred on a member of the police force by s3(1) of the RSA, to require a person 'to undergo a preliminary breath test by a prescribed device'. Ormiston J dismissed arguments advanced on behalf of the respondent driver that the power to make such a requirement should be read subject to limitations as to the place at which, or the time by which, the breath test could be validly required to be taken. His Honour concluded that 'the only implication which needs to be read into s53 is that the requirement [to take the test] should be reasonable'.[20]

24. It is important to examine closely the analysis which underpinned Ormiston J's conclusion. The critical passages are the following:

> If a driver is willing to go elsewhere to undergo the tests, whether to a police station or some other place, the fact that the test is undergone some distance away from the place of driving or from the place where the officer made the requirement, is irrelevant. If, however, the driver is directed, expressly or by implication, to travel some distance from the place where the requirement is made in order to undergo the test, *then that direction will go beyond power because it would be unreasonable* and it is not comprehended by the power in s53 to require that a driver undergo a breath test. Cf *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 62 CLR 24 at pp40-2 and *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62; (1989) 169 CLR 379 at p392; (1989) 87 ALR 412; (1990) 21 ALD 139; (1989) 63 ALJR 561.[21]
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> ...
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> If a qualification is to be read into the requirement, it should be by reading the section as confined to an obligation to comply only with a reasonable requirement. To that limited extent an implication modifying the terms of the section is necessary. ... So long as the requirement does not import an unjustified detention of the driver or an unjustified demand that he go to some other place to the extent that he would be wrongfully deprived of his liberty, no implication is otherwise necessary restricting the time or place where the test must be conducted.[22]

25. The key proposition here is that, in particular circumstances, a direction to a driver to

'accompany' the officer by travelling to a particular place 'will go beyond power because it would be unreasonable and it is not comprehended by the power.' As appears from the extract set out above, Ormiston J referred to two specific passages from two High Court decisions as supporting this proposition. Importantly for present purposes, both passages dealt not with reasonableness as an affirmative condition of legal validity but with *Wednesbury* unreasonableness as a disqualifying condition, which renders a decision invalid.

26. The first passage cited by Ormiston J was from the judgment of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*[23] (with which Gibbs CJ and Dawson J agreed). In the passage cited, Mason J said:[24]

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned: *Wednesbury Corporation*.
>
> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power. I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable". This ground of review was considered by Lord Greene MR in *Wednesbury Corporation*, in which his Lordship said that it would only be made out if it were shown that the decision was so unreasonable that no reasonable person could have come to it. This ground is now expressed in ss5(2)(g) and 6(2)(g) of the [*Administrative Decisions (Judicial Review) Act* 1977 (Cth)] in these terms. The test has been embraced in both Australia and England.

27. The second passage referred to was from the judgment of Dawson J in *Chan v Minister for Immigration & Ethnic Affairs*,[25] where his Honour said:[26]

> The appellant contends that a decision, made by a delegate of the Minister, that he, the appellant, did not have the status of a refugee, involved an improper exercise of power within the meaning of s5(1)(e) or s6(1)(e) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). The basis for this contention is that the decision was so unreasonable that it lay outside any proper exercise of the power relied upon to support it. See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation; Minister for Aboriginal Affairs v Peko-Wallsend Ltd.*[27]

28. It seems clear, therefore, that when Ormiston J said that a direction would 'go beyond power because it would be unreasonable', his Honour meant that it would go beyond the limit on the lawful exercise of power which is marked out by *Wednesbury* unreasonableness. In other words, although his Honour expressed his conclusion in terms of reading down the section – 'as confined to an obligation to comply only with a reasonable requirement' – he was in fact invoking, and incorporating by express reference, the conventional unreasonableness ground of judicial review.

29. Subsequently, what his Honour said in *Webb* was applied by this Court in *Hrysikos v Mansfield*.[28] Like the present case, that case concerned a requirement under s55(1) that the driver accompany the informant to a mobile breath testing station in a police van. The principal judgment was given by Eames JA (with whom Ormiston and Chernov JJA agreed). Referring to the decision in *Webb*, Eames JA said:[29]

> Ormiston J held that there being no power to place the driver in custody or to detain the person indefinitely, it should be implied into the terms of [s53] that the requirement to undergo the test be reasonable, thus, if the requirement imposed an obligation that the person be delayed unduly or be obliged to travel a significant distance for the preliminary test, then it might not be a reasonable request. In the present case, consistent with *Webb*, a requirement under s55(1) to accompany an officer to a place for the purpose of testing by a breath analysing machine would also need to be reasonable. It would not be difficult to postulate circumstances where the requirement might be unreasonably imposed.

In the present case, Kyrou J set out this passage and said:[30]

> It appears from the above passage that Eames JA accepted that a requirement to accompany (as well as a requirement to remain) made under s55(1) must be reasonable.

30. Kyrou J also cited references to the concept of reasonableness in the concurring judgment of Ormiston JA in *Hrysikos*. For example, Ormiston JA said that s55(1) 'describes a practical but reasonable requirement',[31] and went on to give examples of requirements which would be 'unreasonable'.[32] Kyrou J then said:[33]

> ... [I]t is clear that [Ormiston JA] considered that there are circumstances in which a requirement to remain could be unreasonable, and that in such circumstances, no offence would be committed if the person did not comply with the requirement to the extent that it was unreasonable. It follows that his Honour's judgment does support the view that a requirement to remain made under s55(1) must be reasonable. However, the judgment is silent on whether a requirement to accompany made under s55(1) must be reasonable.

31. It was common ground before Kyrou J that he was not bound by either *Webb* or *Hrysikos* to conclude that a requirement to accompany made under s55(1) must be reasonable. This was so because only Eames JA had dealt directly with the requirement to accompany, and his comments were obiter. Nevertheless, in Kyrou J's view, what Eames JA had said about that power should be adopted and applied. His Honour continued:[34]

> Although the comments about reasonableness made by Eames JA in *Hrysikos* were made in obiter, I am persuaded that I should adopt them in this case. Accordingly, I find that a requirement made under s55(1) to accompany a police officer or other authorised person to a place for the purpose of furnishing a sample of breath must be objectively reasonable at the time that it is made. I am fortified in this conclusion by the reliance placed by Nettle J (as his Honour then was) on the comments of Eames JA in relation to reasonableness in concluding that "it cannot be supposed that Parliament intended to empower police officers arbitrarily and capriciously to impose a requirement to undergo a blood test" under s55(9A) of the RS Act in *DPP v Skinner* [2004] VSC 32; (2004) MVR 427. In my opinion, the same principle is applicable to implying that a requirement to accompany made under s55(1) must be reasonable. For the reasons given by Nettle J in *Skinner*, relating to the lack of consistency in the drafting styles and practices employed in amending the RS Act from time to time and the law's jealousy of attempts to detract from the rights of the individual, the fact that s55(9) does not apply to a requirement to accompany made under s55(1) does not dissuade me from holding that such a requirement must be reasonable. Although there are differences between ss53 and 55(1), neither section authorises the arrest of a person who refuses to comply with a requirement made under that section and therefore the underlying considerations which persuaded Ormiston J in *Webb* to imply a requirement of reasonableness in s 53 also apply to s55(1). The approach I have adopted is not inconsistent with the purposes of Part 5 of the RS Act.

Conclusion

32. For the reasons I have given, I consider that it is not correct as a matter of law to read s55(1) as subject to an implied requirement that the exercise of power must be objectively reasonable at the time it is made. In my view, no question of the reasonableness of the exercise of power will arise – either on a collateral challenge of the kind mounted by Ms Mastwyk or directly on judicial review – unless the ground of *Wednesbury* unreasonableness is invoked. The same applies to every provision of the RSA which confers power on an authorised person to require another person to do, or refrain from doing, a particular thing.

33. As I have sought to explain, the decision of Ormiston J in *Webb* has, by reason of the language which his Honour used, been misinterpreted as holding that reasonableness must be read into the statute as an affirmative condition of the validity of a particular exercise of power. The decision of this Court in *Hrysikos* proceeded on that (mis)interpretation and extended the analysis to a different power-conferring provision of the RSA. If, contrary to my view, the decision in *Webb* is correctly to be understood as holding that an affirmative requirement of reasonableness must be read into the statute, then I would respectfully decline to follow it. For the reasons I have given, I consider that a decision to that effect would be contrary to law.

34. Like Kyrou J, but for different reasons, I consider that the approach of the learned Magistrate was erroneous. His Honour did not apply the correct test in assessing the legal validity of the requirement imposed on Ms Mastwyk. Ms Mastwyk having mounted a collateral challenge to the

validity of the requirement with which it was alleged she had refused to comply, the Magistrate needed to have her identify which of the conventional grounds of judicial review she relied on. If and to the extent that Ms Mastwyk wished to challenge the exercise of power on the unreasonableness ground, his Honour needed to apply the *Wednesbury* test before he could reach any conclusion as to whether the exercise of power was invalid on that ground.

35. Since I would affirm the orders of Kyrou J, though on different grounds, the appeal must be dismissed.

NETTLE JA:

36. This is an appeal from a judgment given in the Common Law Division concerning the meaning of s55(1) of the *Road Safety Act* 1986 (Vic) (the 'Act'). The question for the judge below was whether a Magistrate had erred in holding that the appellant's refusal to be transported to a police station in the lock-up section of a police divisional van was not an offence under s49(1)(e) of the Act of failing to comply with a requirement under s55(1) to accompany a member of the police force to a place where a sample of breath was to be furnished. The judge decided that question as follows:

> A requirement made under s55(1) to accompany a police officer... to a place for the purpose of furnishing a sample of breath must be objectively reasonable at the time that it is made.[35]

37. In my view, the judge was substantially correct for the reasons which his Honour gave. But for the sake of precision, it is desirable to distinguish between a requirement as such that a driver accompany a police officer to a designated place and a requirement that a driver accompany the police officer to the designated place by a specified means of travel.

38. Accordingly, I would limit the basis for decision in this case to saying that, where a driver is otherwise willing to comply with a requirement that he or she accompany a police officer to a designated place to undergo a breath test, but the police officer directs the driver to accompany the police officer to that place by means of travel which are objectively unreasonable, a refusal by the driver so to travel is not without more a contravention of s55(1).

39. I express my decision in that way because, as Ormiston JA observed in *Hrysikos v Mansfield*:[36]

> The penalty under par (e) [of s49(1)], however, is not imposed for *failing* to ... accompany the police officer, ... it is for *refusing* to do so. ... The word 'refuses' must be taken to carry with it an element of mental intent, albeit judged objectively for the purposes of an offence such as the present.
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> Thus it will not be sufficient for the prosecution to prove merely a failure to remain [or, I interpolate, a failure to accompany] ... for that in itself may not be sufficient to allow the drawing of an inference to the criminal standard that the person was exhibiting such an unwillingness to comply with a requirement as to amount to a refusal. Each case must depend on its own particular circumstances ....
>
> ... The subsection describes a practical but reasonable requirement ...
>
> In each case one would have to look to the precise circumstances ... to see what was reasonable and so what amounted to a refusal to comply.

40. *Hrysikos* was concerned with the power in s55(1) to require a driver to remain at a designated place in order to undergo a breath test. The question was whether, by stepping a few feet outside a booze bus to smoke a cigarette, a driver refused to comply with a requirement to remain at the booze bus. She was charged on the basis that she had been explicitly directed to remain inside the bus and, therefore, that stepping even only a few feet outside the bus to have a smoke was a refusal to comply with the direction. In holding that the driver did not thereby refuse to comply with a direction to remain at the specified place within the meaning of s55(1), Ormiston JA said this:

> ... no aspect of the scheme of s55 entitles the police officer to treat the person, ... as a person under arrest and thus subject to explicit directions and control by the officer. The object sought to be achieved is that the driver attend at the designated place and undergo the appropriate breath test.... One should not infer a right in a police officer to detain a driver by use of force or to require the subject to go to or stay in some particular room or place with would involve a further deprivation

> of liberty...[37] The subsection describes a practical but reasonable requirement. At a police station [assuming that the designated place is a police station] there is clearly no power to require a driver to remain in a cell, so that there must be scope for some flexibility ... In each case one would have to look to the precise circumstances and the layout of the police station to see what was reasonable and so what amounted to a refusal to comply. A person who waited on a verandah could hardly be said to be refusing to comply with such a requirement....[38]
>
> Common sense dictates that a requirement to remain 'there' at a vehicle, with such confined space as is revealed by a description of the relevant compartments, could not be treated as requiring a driver to remain within a compartment for a period of up to three hours for the purpose of having a test.[39]

41. It is implicit in that part of Ormiston JA's reasoning that a requirement to remain in an unreasonably confined space is beyond the power conferred on a police officer by s55(1). Put another way, the power under s55(1) to require a driver to stay at a place does not extend to requiring a driver to stay in a space which is so confined as to be unreasonable.

42. Ormiston JA had earlier determined in *DPP v Webb*[40] that the power under s53 of the Act to require a driver to undergo a preliminary breath test is similarly limited to what is reasonable. His Honour reasoned that, absent a clear statutory indication to the contrary, the restrictions on the liberty of the subject imposed by s53 were to be construed as limited to the minimum necessary to enable the test to be carried out and, consequently, that a requirement to travel any significant distance in order to undertake the test would be beyond power and unreasonable.

43. Eames JA expressly made the same point, in *Hrysikos*, in relation to s55(1) as follows:[41]

> ... Ormiston J held [in *Webb*] that there being no power to place the driver in custody or to detain the person indefinitely, it should be implied into the terms of the section that the requirement to undergo the test be reasonable, thus, if the requirement imposed an obligation that the person be delayed unduly or be obliged to travel a significant distance for the preliminary test, then it might not be a reasonable request.
>
> In the present case, consistent with *Webb*, a requirement under s55(1) to accompany an officer to a place for the purpose of testing by a breath analysing machine would also need to be reasonable. It would not be difficult to postulate circumstance where the requirement might be unreasonably imposed. ... If the notion of reasonableness, as discussed in *Webb*, was sought to be applied to the present case, then it would be implied at the time of the making of the requirement to accompany to a place. Thus, a requirement to accompany and remain in a police car for up to three hours might very well be unreasonable...

44. With respect, I agree with Ormiston and Eames JJA and I consider that their reasoning applies with equal force to the power under s55(1) to require a driver to accompany a police officer to a designated place for the purposes of testing. Strictly speaking, their Honours' observations may have been *obiter*, but they were considered obiter and, in my view, they are compelling.

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

46. Consequently, I consider that, if an accused defends a prosecution under s49(1)(e) of the Act on the basis that the means of travel by which he or she was directed to accompany the police officer in question were unreasonable, the prosecution under s49(1)(e) will fail unless the Crown establishes that the stipulated means of travel were objectively reasonable.

Wednesbury unreasonableness

47. Maxwell P has concluded that the test should be one of *Wednesbury* unreasonableness, as opposed to objective unreasonableness. It will be apparent from what I have said that I disagree. It seems to me that, in the context with which we are concerned, the application of *Wednesbury* unreasonableness is relevantly limited to instances where the statute expressly or impliedly makes a police officer's state of mind the relevant criterion of requirement.[42]

48. For example, in the case of s55(9A), the statutory criterion of requirement is that it appear to a police officer or other person that a driver is unable to furnish the required sample. The statute thus conceives of the criterion of requirement in terms of a *bona fide* formation of opinion based on reasonable grounds.[43] In that context, 'reasonable grounds' means grounds on which the opinion could reasonably be based. So, in order to attack the opinion, and assuming *bona fides* and the taking into account of relevant considerations and the exclusion of irrelevant considerations, it is both necessary and sufficient to show that it was not reasonably open to form the opinion in the circumstances of the case.

49. It is different under s55(1) because, in contradistinction to s55(9A), s55(1) does not expressly or by necessary implication invoke the test of a police officer's opinion.

50. As was explained in *Hrysikos*, the power conferred by s55(1) does not entitle a police officer to treat the driver as a person under arrest, or as such subject to the explicit directions and control of the police officer. It is limited to restricting the liberty of the subject to the extent that is necessary and reasonable. There is, therefore, no justification for inferring a right in a police officer, as incidental to the power conferred by s55(1), to require a driver to travel by means of travel which are unreasonable. Nor can it matter that a police officer is of opinion that given means of travel are reasonable if in fact they are unreasonable. What is relevant is whether a requirement to adopt a particular means of travel is within the power to require that a driver accompany a police officer to a designated place. Logically, that must depend on whether the means of travel is objectively reasonable in all the circumstances of the case.[44]

Police resources

51. Finally, a fair amount was made in the course of argument of the difficulty which police would face if they had to provide reasonable means of transport in all cases of requiring a driver to accompany them to a designated place for testing. In my view that is not persuasive. Practical difficulties of the kind to which reference were made are the product of executive budgetary decisions. Absent an express or otherwise clear statutory indication that they were regarded by Parliament as informing the scope of a power, they are irrelevant to the amplitude of the power. The solution is to furnish the police with the resources required to carry out their duties in the manner that Parliament intended or to have Parliament amend the legislation to make clear that it intends to authorise requirements which are unreasonable.

Conclusion

52. I would dismiss the appeal.

REDLICH JA:

53. The appellant was charged with having refused to comply with the informant's requirement made under s55 of the *Road Safety Act* 1986 (Vic) (the 'RSA') that she accompany him to a nearby police station for the purpose of providing a sample of her breath for analysis, contrary to s49(1)(e) of the RSA. The mode by which she was required to do so was by travelling in the rear compartment of a divisional van. The Magistrate at first instance concluded that it was beyond the power of the informant to require the appellant to travel in the rear of the divisional van as it constituted a form of imprisonment and dismissed the charge. Allowing the Director's appeal, Kyrou J found that such a requirement would not constitute imprisonment if the person travelled to the police station by that means voluntarily. His Honour further held that the Magistrate should have determined whether, on the basis of all of the evidence before him, including the means of transport proposed, the requirement that was made under s55(1) was reasonable. His Honour ordered that the Magistrate's decision be set aside and that the charge be reheard according to law.

54. Like Nettle JA I have concluded that, where a driver does not comply with a requirement to accompany the police officer because the proposed manner of compliance with the request is objectively unreasonable, the prosecution will fail to establish the element of 'refusal' by the driver.

55. The facts and circumstances which give rise to this appeal are conveniently set out in the judgment of Kyrou J and need not be repeated.[45] The relevant statutory provisions are as follows:

> **49 Offences involving alcohol or other drugs**
> (1) A person is guilty of an offence if he or she— ...
> (c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; or
> ...
> (e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A); or
>
> **55 Breath analysis**
> (1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 to do so and—
> (a) the test in the opinion of the member ... in whose presence it is made indicates that the person's breath contains alcohol; ...
> any member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force ... to a place or vehicle where the sample of breath is to be furnished and to remain there until the person has furnished the sample of breath ... and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.
> Example A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath.

56. The primary question raised by the appeal is how s49(1)(e) in combination with s55(1) should be interpreted and applied in circumstances where it is alleged that the 'requirement to accompany' is unreasonable. It also calls for a determination of whether the Magistrate had been correct to find that travel by the means proposed constituted a form of imprisonment.

57. The appellant maintained that the judge below had correctly interpreted s55(1) and that a requirement to accompany made under s55(1) must be objectively reasonable. But the appellant contended that his Honour erred in overturning the decision of the Magistrate as the finding of imprisonment was one of fact that was open in the circumstances of the case and such a finding necessarily entailed the conclusion that the request was 'unreasonable'.

58. The proposition that the requirement made by the informant under s55(1) must be shown to be 'reasonable' was disputed by the Director before the judge below[46] and was maintained in this court but subject to an important qualification. Senior Counsel for the Director submitted that the prosecution do not need to establish as a separate element of proof that a requirement to accompany under s55(1) is one that is 'reasonable'. He submitted on appeal, but not it appears before the judge below, that the reasonableness of the requirement was relevant to the question whether the driver's failure to comply constituted a 'refusal'. It was thus contended by both parties on appeal that 'reasonableness' is relevant to the determination of whether a valid request has been made in accordance with s55(1), the difference between the parties being whether the request must be objectively reasonable or whether that reasonableness is relevant only to inform the question of whether there has been a 'refusal'.

59. It was common ground between both parties that the Court should adopt a purposive approach to the interpretation of the relevant provisions of the RSA.[47] The purposes include the following:

> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
> (c) provide a simple and effective means of establishing that there is present in the blood or breath of a driver more than the legal limit of alcohol; and ...

60. Part 5 of the RSA seeks to combat a recognised social evil and deal with a major social problem and, in light of this purpose, invests police officers with additional powers. As Winneke P recognised in *DPP v Foster*,[48] the investiture of police with these additional powers must, because of the overriding community interest, involve some increased incursion into civil liberties though 'not in a necessarily hostile or coercive way'.[49] Accordingly, s55(1) needs to be read within the broad context of police powers and construed in such a fashion that the right to individual liberty is not unjustifiably diminished. This calls for a balance between the statutory objectives and the imperative to avoid unnecessary curtailment of fundamental civil liberties.[50] The provision should not be construed as authorising a requirement that involved an unreasonable imposition on the liberty of the driver.

61. The right to liberty is 'the most elementary and important of all common law rights'.[51] Statutory authority to engage in conduct infringing such a right must be expressed in unmistakeable and unambiguous language. The common law insists upon the necessity for a clear and express statutory authorization of any abrogation or curtailment of such rights. In the absence of such words it is presumed that the legislature did not intend such a consequence.[52] Accordingly, inconvenience in carrying out an object authorized by the legislation does not provide a basis for the erosion of fundamental common law rights.[53]

62. Historically, the common law power of arrest for commission of a felony, enabled a police officer or citizen to arrest someone only if they were suspected upon reasonable grounds of having committed such an offence.[54] That common law limitation is reflected in the defined statutory powers of arrest. These powers, which exist in all Australian jurisdictions, contain an explicit objective requirement of reasonableness.[55]

63. In the absence of the express authority conferred by s55 of the RSA, a member of the police force would have no power to require a driver to accompany the officer to a police station for the purpose of a breath test. Section 55 provides a police officer with a limited tool of coercion, as a requirement is accompanied by the threat of penalty for non-compliance. The power differs from that of the power of arrest, however, as ultimately it leaves the driver with the choice of non-compliance, although non-compliance will then constitute the relevant offence. But neither at common law[56] nor by statute do police officers have the power to detain people for the purpose of obtaining compliance with such a statutory requirement. This consideration makes it unlikely that Parliament intended that the power under s55 should be exercisable in unreasonable circumstances so as to deny to the driver the limitation on power which confines the statutory power of arrest.

64. The mode of transport proposed or the length of time that the driver is required to remain in the company of the police officer may render the requirement indistinguishable in substance from an arrest because of the manner in which it affects the driver's liberty. The form or nature of the compliance proposed might in those circumstances then be objectively unreasonable. There is nothing in the language or context of s55 that suggests that the power should be so broadly construed as to permit the police officer to require a driver to accompany him in such circumstances. The absence of language to the contrary is a strong indicator that the restricted ambit of the statutory power of arrest informs the intended scope of the power to require the driver to accompany the officer. We should not easily conclude that Parliament intended that a driver would commit an offence by refusing to comply with an objectively unreasonable request that would result in an unjustifiable interference with the driver's liberty unless it was unmistakeably mandated by a legislative will.

65. I agree with the conclusions reached by Kyrou J as to the way in which the reasons of Ormiston J (as he then was) in *DPP v Webb*[57] and Eames JA in *Hrysikos v Mansfield*[58] should be viewed. *Webb* is authority for the proposition that a qualification should be read into s53 so as to confine the obligation to comply with a requirement to one that is reasonable. Ormiston J recognised that there may be some physical or temporal aspect of the requirement that would implicitly and unjustifiably place a restriction on the driver's liberty.[59] That reasoning is apposite to a requirement made under s55(1). The decision of Eames JA in *Hrysikos* contains carefully considered *obiter dicta* in further support of the conclusion that it was intended by the legislature that the requirement under s55 be exercised reasonably. Furthermore, as Ormiston JA observed in *Hrysikos*, the offence committed under s49(1)(e) of the RSA is for refusing, not failing, to accompany the officer. Where the request is unreasonable because it involves some unjustifiable deprivation of liberty, a failure to accompany may not constitute an 'unwillingness to comply with a requirement' so as to amount to a refusal.[60]

66. It is accepted by all parties to this appeal, albeit for different reasons, that refusal of a plainly unreasonable requirement under s55(1) would not constitute an offence under s49(1)(e). I agree with the President and Nettle JA that Parliament would not have intended that a refusal of a plainly unreasonable request should be proscribed conduct for the purposes of the section. But the President has concluded that the right to undertake a collateral attack on the exercise of the power by establishing '*Wednesbury*' unreasonableness provides a sufficient 'safeguard' to ensure that refusal of an unreasonable request will not be the subject of a successful prosecution

under the section. Because such an administrative law remedy already exists, it is therefore unnecessary, in his view, to read into the elements of the offence, any implication of objective unreasonableness.

67. The purpose of *Wednesbury* unreasonableness is to determine whether the administrative decision taken was within power. It does not cure administrative injustice or error in reasoning. The merit of the administrative decision is for the repository of the relevant power alone.[61] Conscious of the separation of powers, this ground will only be invoked by a court to invalidate a decision or other administrative action that is judged as so unreasonable that no reasonable decision maker could have made it. In *Wednesbury*, Lord Greene spoke of a decision 'so absurd that no sensible person would ever dream that it lay within the powers of the authority'.[62] Since then the test has been described in many ways. For example, a decision or other action may be *Wednesbury* unreasonable where it is 'manifestly unreasonable', 'simply defies comprehension', or where 'it is obvious that the decision-maker consciously or unconsciously acted perversely.'[63] If it could here be invoked, it would involve the assertion that the requirement that the driver travel in the rear of the divisional van 'was out of proportion in relation to the scope of the power'.[64] However it is expressed, *Wednesbury* unreasonableness is an extremely difficult ground to establish, its threshold high and its operation 'extremely confined'.[65] It constitutes an 'exceptional' basis for overturning a decision, retained by the common law to allow an element of flexibility to cover the exceptional case.

68. Neither *Webb* and *Hrysikos* were, in my respectful opinion, decisions in which *Wednesbury* principles were applied. Although in *Webb* Ormiston J cites two decisions of the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend* and *Chan v Minister for Immigration and Ethnic Affairs*, which involved legal invalidity arising from *Wednesbury* unreasonableness, I do not understand his Honour to be applying *Wednesbury* unreasonableness (as an invalidating principle) rather than an affirmative requirement of reasonableness. When speaking of directions by the officer which would be 'beyond the terms of the section' 'or 'beyond power', his Honour was not speaking of *Wednesbury* disqualifying unreasonableness but was referring to directions that were inconsistent with the qualification that he found was to be read into the requirement. Hence Ormiston J said:

> it should be by reading the section as confined to an obligation to comply only with a reasonable requirement. To that limited extent an implication modifying the terms of the section is necessary.[66]

69. In *Hrysikos* Ormiston JA considered that in order for the prosecution to prove refusal, it had to establish 'an intention to be unwilling' to comply with the requirement.[67] Whether a refusal could be inferred was informed by all of the circumstances including the reasonableness of the requirement. Ormiston JA spoke of the statute 'describing a practical but reasonable requirement'. His reasoning and that of Eames JA rested upon the implication of reasonableness that had previously been stated in *Webb*. Although Kyrou J relied also upon *DPP v Skinner*,[68] Nettle J (as he then was) was there dealing with a provision which was concerned with the state of mind of the police officer and to which *Wednesbury* principles were applicable. By contrast, if it had been *Wednesbury* unreasonableness that was being applied in either *Webb* or *Hrysikos*, no necessity would have arisen to embark upon an analysis of whether a term of reasonableness should be implied as every statutory power upon which an administrative decision rests must by implication always be exercised reasonably.[69]

70. There are sound reasons of policy why it is necessary to imply a criterion of objective reasonableness into the elements of the offence, even though *Wednesbury* principles would otherwise be applicable to the exercise of such a police power. A collateral challenge to the validity of the exercise of power is one that is ill suited to a summary proceeding in the Magistrates' Court. This is a relevant consideration in ascertaining the intention of parliament. Were collateral attack via *Wednesbury* unreasonableness review to be the lone safeguard against unreasonable or capricious requirements, the defendant would be faced with the difficulties attendant upon a collateral attack. As is recognised in Aronson and Dyer, the assertion of legal invalidity via collateral attack can 'arise in a manner not designed specifically for handling it, nor necessarily focusing on that issue…and in a court or tribunal which may not have much administrative law experience'. The summary prosecution of offences under the RSA in the Magistrates' Court is not a jurisdiction readily amenable to such an administrative review of police powers. Questions of 'policy' including

arguments about the availability of resources may arise[70]. The parties' representatives are unlikely to have any particular familiarity with such potentially complex issues, proof or disproof of which may require a significant body of evidentiary material and necessitating multiple hearings.

71. These considerations were relied upon by counsel for the Director, although not in the context of *Wednesbury* unreasonableness[71]. It was submitted that to require the prosecution to prove reasonableness as an element of the offence, 'would invite analysis and proof of issues that range far beyond what ought to be expected legitimately of any prosecuting authority' and involve questions as to 'the resources that were available' to the police in the relevant district and even questions of 'funding to police in general'. In the absence of an express statutory indication, these are not factors which bear upon the amplitude of the power or whether the manner of its exercise was objectively reasonable.

72. If the question of the reasonableness of the decision could only be raised within the narrow confines of a collateral challenge to the validity of the requirement, the burden to establish invalidity would be borne by the driver. Such a consequence sits uncomfortably with the penal nature of the relevant provision, particularly where the criterion of reasonableness is implied to ensure that the driver's liberty is not imperilled. This would be an unsatisfactory outcome, the result of relying upon concepts of administrative law in an area of law which rests upon a different jurisprudential basis.

73. The ability to impugn the police officer's request on the limited ground of *Wednesbury* unreasonableness, does not, in my respectful opinion, provide the answer to the contention that Parliament cannot have intended that the refusal of an objectively unreasonable request constitutes an offence. It therefore remains necessary to imply a further criterion of reasonableness into the relevant provision of the statute.

74. The prosecution does not have to establish, as a separate element of the offence in s49(1)(e) of the RSA that the requirement made under s55 is reasonable. The Director rightly submits that to do so would conflate the requirement with the means by which it is to be satisfied. But it is properly conceded that the reasonableness of the means by which the requirement is to be satisfied is relevant to proof, where it is in issue, that the driver's failure constitutes a refusal under s49(1)(e). The interpretation which I favour has the consequence that once the defence that there was no 'refusal' is raised, objective reasonableness of the requirement becomes relevant to the question whether the prosecution has discharged its burden of proving a refusal.

75. I consider that the section should be construed so that the requirement must be one that is objectively reasonable in the circumstances. My conclusion rests upon the premise that Parliament would not have intended that the refusal of an objectively unreasonable requirement would constitute an offence. It is an implication that is derived from the accepted presumption of statutory interpretation that Parliament will not, without clear words to the contrary, be taken to have intended a restriction on individual liberty that goes beyond what is necessary to meet the purposes of the section and the Act. The elements of the offence should, therefore, be read to reflect the intention. Accordingly, where a driver does not comply with a requirement to accompany the police officer because the proposed manner of compliance is objectively unreasonable, the prosecution will fail to establish the element of 'refusal' by the driver.

76. Kyrou J directed that the Magistrate consider a number of factors relevant to the reasonableness of the requirement including whether the driver was informed that she could not be forced to enter the divisional van against her will, whether she was informed of the consequences of not complying, the reasons given by the driver for non-compliance and whether the divisional van provided an effective means by which a person in the rear compartment could withdraw their consent to be transported in the vehicle and then leave. These were all matters which bore upon whether her conduct amounted to a refusal. It is a matter entirely for the Magistrate to determine, having regard to all of the circumstances, whether the requirement made was unreasonable and whether the driver should be found to have refused to accompany the officer.

77. With these principles in mind I return then to the Magistrate's finding that the requirement constituted 'imprisonment'. The Magistrate had drawn heavily upon the decision of Judge Kimm in *Salton v Wigg*[72] in which the circumstances, relevantly identical to the present case, involved a

request that the driver travel in the rear of a divisional van. It was there held that such a means of travel would constitute 'imprisonment' so that the requirement was invalid. Before Kyrou J the dispute was whether it was open to the Magistrate on the evidence, to find that the mode of transport proposed would in the circumstances of the case, constitute an 'imprisonment'.

78. The appellant submitted before Kyrou J and in this court that the Magistrate was correct to conclude that the requirement was akin to a form of imprisonment and that the rear compartment of a divisional van was analogous to a police cell. In response, it was submitted on behalf of the Director that a person who enters the rear compartment of a police divisional van to comply with a requirement made under s55(1) is consensually confined and so has not been imprisoned.

79. Kyrou J concluded that a driver who voluntarily enters the rear compartment of a prison van is not imprisoned provided that the driver has been fully informed of the purpose for the request, that they are under no compulsion to comply and that if they fail to comply they may be charged with an offence. Accordingly, Kyrou J, correctly in my opinion, disapproved that part of the decision in Salton that appears to stand for the proposition that to take a person to a place of testing in the rear compartment of a police divisional van will in all circumstances constitute imprisonment.

80. Consideration of "imprisonment" in the context of a requirement to accompany made under the RSA is apt to mislead. The concept of "imprisonment" requires a lack of consent. As this court stated in *v Macfazean v CFMEU*[73] (in the context of the tort of false imprisonment) imprisonment is predicated upon restraint of personal freedom so that one cannot be held liable therefore unless it affirmatively appears that detention was contrary to the will of the person alleged to be imprisoned.[74]

81. As already stated, s55(1) does not confer a power of arrest. It empowers an officer to make, but not to enforce a requirement to accompany. The legislation contemplates that the requirement will present the driver with the choice of compliance or refusal. The penalty for refusal is the offence under s49(1)(e). It is central to the operation of the provision that where the driver willingly complies with the requirement to accompany the officer, his consent to do so is not vitiated by being informed that a refusal will constitute an offence. Plainly a requirement that forces a person to comply (physically or otherwise) would be unreasonable, because it would not offer the driver even a notional choice as to whether to offer consent. The choice which must be presented to the driver, is between compliance and committing an offence under s49(1)(e). It is the choice embodied in the Act.

82. Leaving consent obtained by fraudulent means aside, unlawful restraint can occur only where the driver has not consented to travel by the means proposed. Consequently where the driver is properly informed as to their choice and is prepared to accompany the officer by the means proposed, the driver will not by entering the rear of the divisional van be imprisoned. Hence an inquiry as to whether the proposed course would constitute imprisonment misconceives the issue. The true question is whether it is, in all the circumstances, objectively unreasonable to require the driver to travel by that means. If it is, the prosecution will fail to establish that the driver refused to accompany the officer. It is to the resolution of that question that the Magistrate's attention should be directed.

83. The appeal should be dismissed.

APPENDIX

Relevant statutory provisions

84. The relevant provisions of the RSA are in Part 5, which is headed 'Offences involving alcohol or other drugs'.

85. Section 47 of the RSA provides as follows:

> **47 Purposes of this Part**
>
> The purposes of this Part are to—
>
> (a) reduce the number of motor vehicle collisions of which alcohol or other drugs are a cause; and
>
> (b) reduce the number of drivers whose driving is impaired by alcohol or other drugs; and
>
> (c) provide a simple and effective means of establishing that there is present in the blood or breath of a driver more than the legal limit of alcohol; and

(d) provide a simple and effective means of establishing the presence of a drug in the blood, urine or oral fluid of a driver.

86. Section 49 of the RSA provides as follows:

49 Offences involving alcohol or other drugs
(1) A person is guilty of an offence if he or she— ...
(c) refuses to undergo a preliminary breath test in accordance with section 53 when required under that section to do so; or ...
(e) refuses to comply with a requirement made under section 55(1), (2), (2AA), (2A) or (9A); or ...
(f) within 3 hours after driving or being in charge of a motor vehicle furnishes a sample of breath for analysis by a breath analysing instrument under section 55 and—
(i) the result of the analysis as recorded or shown by the breath analysing instrument indicates that the prescribed concentration of alcohol or more than the prescribed concentration of alcohol is present in his or her breath; and
(ii) the concentration of alcohol indicated by the analysis to be present in his or her breath was not due solely to the consumption of alcohol after driving or being in charge of the motor vehicle; ...

(3) A person who is guilty of an offence under paragraph (ba), (c), (ca), (d), (e) or (ea) of subsection (1), other than an accompanying driver offence, is liable—
(a) in the case of a first offence, to a fine of not more than 12 penalty units; and
(b) in the case of a second offence, to a fine of not more than 120 penalty units or to imprisonment for a term of not more than 12 months; and
(c) in the case of any other subsequent offence, to a fine of not more than 180 penalty units or to imprisonment for a term of not more than 18 months.

87. Section 50(1B) of the RSA provides as follows:

On convicting a person, or finding a person guilty, of an offence under section 49(1)(a), (c), (d) or (e) the court must, if the offender holds a driver licence or permit, cancel that licence or permit and, whether or not the offender holds a driver licence or permit, disqualify the offender from obtaining one for such time as the court thinks fit, not being less than—
(a) in the case of a first offence, 2 years; and
(b) in the case of a subsequent offence, 4 years.

88. Section 53 of the RSA provides as follows:

53 Preliminary breath tests
(1) A member of the police force may at any time require—
(a) any person he or she finds driving a motor vehicle or in charge of a motor vehicle; or
(b) the driver of a motor vehicle that has been required to stop, and remain stopped at a preliminary testing station under section 54(3); or
(c) any person who he or she believes on reasonable grounds has within the last 3 preceding hours driven or been in charge of a motor vehicle when it was involved in an accident; or
(d) any person who he or she believes on reasonable grounds was, within the last 3 preceding hours, an occupant of a motor vehicle when it was involved in an accident, if it has not been established to the satisfaction of the member of the police force which of the occupants was driving or in charge of the motor vehicle when it was involved in the accident—
to undergo a preliminary breath test by a prescribed device. ...

(3) A person required to undergo a preliminary breath test must do so by exhaling continuously into the device to the satisfaction of the member of the police force ...

(4) A person is not obliged to undergo a preliminary breath test if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.

89. Section 55 of the RSA provides as follows:

55 Breath analysis
(1) If a person undergoes a preliminary breath test when required by a member of the police force ... under section 53 to do so and—
(a) the test in the opinion of the member ... in whose presence it is made indicates that the person's breath contains alcohol; ...
any member of the police force ... may require the person to furnish a sample of breath for analysis by a breath analysing instrument and for that purpose may further require the person to accompany a member of the police force ... to a place or vehicle where the sample of breath is to be furnished and

to remain there until the person has furnished the sample of breath ... and been given the certificate referred to in subsection (4) or until 3 hours after the driving, being an occupant of or being in charge of the motor vehicle, whichever is sooner.

Example

A person may be required to go to a police station, a public building, a booze bus or a police car to furnish a sample of breath. ...

(6) A person is not obliged to furnish a sample of breath under this section if more than 3 hours have passed since the person last drove, was an occupant of or was in charge of a motor vehicle.

(9) A person must not be convicted or found guilty of refusing to furnish under this section a sample of breath for analysis if he or she satisfies the court that there was some reason of a substantial character for the refusal, other than a desire to avoid providing information which might be used against him or her.

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[1] *DPP v Mastwyk* [2008] VSC 192; (2008) 185 A Crim R 285, [14] ('*Mastwyk*').
[2] See [23] below.
[3] *Re Bolton*; *Ex parte Beane* [1987] HCA 12; (1987) 162 CLR 514, 523; (1987) 70 ALR 225; 61 ALJR 190; 25 A Crim R 90 (Brennan J).
[4] [1993] VicRp 82; [1993] 2 VR 403, 411; (1992) 16 MVR 367 ('*Webb*').
[5] See *R v Momcilovic* [2010] VSCA 50, [103]; (2010) 25 VR 436; (2010) 265 ALR 751 ('*Momcilovic*') and the cases there cited.
[6] *Momcilovic* [2010] VSCA 50, [102]–[103]; (2010) 25 VR 436; (2010) 265 ALR 751.
[7] *Morris v Beardmore* [1981] AC 446, 444-5; [1980] 2 All ER 753; [1980] RTR 321; (1980) 71 Cr App R 256; [1980] 3 WLR 283; (1980) 144 JP 331 (Lord Diplock).
[8] See, generally, M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [10.105].
[9] See *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 176–180; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359; M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [1.90].
[10] Cf *Gedeon v Commissioner of the New South Wales Crime Commission* [2008] HCA 43; (2008) 236 CLR 120, [22] and [47]; (2008) 249 ALR 398; (2008) 82 ALJR 1465; (2008) 187 A Crim R 398.
[11] *Minister for Immigration v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597; (2002) 187 ALR 117; 67 ALD 615; (2002) 76 ALJR 598; (2002) 23 Leg Rep 16.
[12] The reference is to the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1947] 2 All ER 680; [1948] 1 KB 223, 229–30; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635.
[13] The two are 'quite different': *Masters v McCubbery* [1995] VICSC 209; [1996] VicRp 47; [1996] 1 VR 635, 656; 9 VAR 164 (Callaway JA, with whom Ormiston JA agreed).
[14] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [6.180].
[15] M Groves, 'The Differing and Disappearing Standards of Judicial Review in Canada' (2009) 16 *Australian Journal of Administrative Law* 211 ('Groves').
[16] See *Baker v Canada (Minister of Citizenship and Immigration)* (1999) 174 DLR (4th) 193; [1999] 2 SCR 817, [53]–[65] (Iacobucci J). As to the distinction between 'patent unreasonableness' and 'unreasonableness *simpliciter*' see *Law Society of New Brunswick v Ryan* [2003] 1 SCR 247, [48]–[56]; [2003] SCC 20 (Iacobucci J). In 2008, the Canadian Supreme Court sought 'to remove confusion about the differing standards of reasonableness (by collapsing) them into a single standard': Groves, 227 discussing *Dunsmuir v New Brunswick* [2008] SCC 9; [2008] 1 SCR 190; [2008] SCJ No 9.
[17] For example, under the *Superannuation (Resolution of Complaints) Act* 1993 (Cth), the relevant tribunal (conducting a review on the merits) can examine whether the decision under review was 'unfair or unreasonable': see *Australian Reward Investment Alliance v Superannuation Complaints Tribunal* [2008] FCA 1548; (2008) 173 FCR 335, [43]–[44]; (2008) 177 IR 281.
[18] *Thompson v Goold & Co* [1910] AC 409, 420. See also *Director-General of Education v Suttling* [1987] HCA 3; (1987) 162 CLR 427, 433; (1987) 69 ALR 193; (1987) 20 IR 250; (1987) 61 ALJR 117; (1987) 12 ALD 245, and *Byrne v Marles* [2008] VSCA 78; (2008) 19 VR 612, [54] (Nettle JA).
[19] [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.
[20] *Ibid* 418. On the evidence, his Honour held, it had not been established that any unreasonable requirement had been made.
[21] *Webb* [1993] VicRp 82; [1993] 2 VR 403, 413; (1992) 16 MVR 367 (emphasis added).
[22] *Ibid* 416.
[23] [1986] HCA 40; (1986) 162 CLR 24; 66 ALR 299; (1986) 60 ALJR 560; (1986) 10 ALN N109.
[24] *Ibid* 40–41 (citations omitted).
[25] [1989] HCA 62; (1989) 169 CLR 379; (1989) 87 ALR 412; (1990) 21 ALD 139; (1989) 63 ALJR 561.
[26] *Ibid* 392.
[27] Dawson J here referred to the passage from the judgment of Mason J which appears in [26] above.
[28] [2002] VSCA 175; (2002) 5 VR 485; (2002) 135 A Crim R 179; (2002) 37 MVR 408 ('*Hrysikos*').
[29] *Ibid* [57]–[58].
[30] *Mastwyk [2008] VSC 192;* (2008) 185 A Crim R 285, [31].
[31] *Hrysikos* (2002) 5 VR 485, [13].

[32] *Ibid* [15].
[33] *Mastwyk* [2008] VSC 192; (2008) 185 A Crim R 285, [35].
[34] *Ibid* [41].
[35] And on that basis remitted the matter to the Magistrate for re-determination.
[36] [2002] VSCA 175; (2002) 5 VR 485, 487 [3], [4], [13]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[37] *Ibid* [5].
[38] *Ibid* [13].
[39] *Ibid* [15].
[40] [1993] VicRp 82; [1993] 2 VR 403, 412; (1992) 16 MVR 367.
[41] [2002] VSCA 175; (2002) 5 VR 485, 502 [57]–[58]; (2002) 135 A Crim R 179; (2002) 37 MVR 408.
[42] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] EWCA Civ 1; [1948] 1 KB 223, 229–230 [43]; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635; *DPP v Skinner* [2004] VSC 32; (2004) 40 MVR 427.
[44] According to the circumstances of the case, a reasonable means of travel may include walking to the designated place or it may be limited to particular forms of transport.
[45] [2008] VSC 192; (2008) 185 A Crim R 285.
[46] *DPP v Mastwyk* [2008] VSC 192; (2008) 185 A Crim R 285, [38] (Kyrou J).
[47] The relevant provisions are fully set out in the reasons of the President.
[48] [1999] VSCA 73; (1999) 2 VR 643, [53]; (1999) 104 A Crim R 426; (1999) 29 MVR 365 (Winneke P).
[49] *Ibid.*
[50] *Interpretation of Legislation Act* 1984 s35(a); *DPP v Foster* [1999] VSCA 73; (1999) 2 VR 643, [53]; (1999) 104 A Crim R 426; (1999) 29 MVR 365 (Winneke P); *Thompson v His Honour Judge Byrne* [1999] HCA 16; (1999) 196 CLR 141, 149–50; (1999) 161 ALR 632; (1999) 73 ALJR 642; (1999) 29 MVR 1; (1999) 7 Leg Rep 27.
[51] *Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147, 152; [1956] ALR 15 (Fullagar J).
[52] *Coco v R* (1994) [1994] HCA 15; 179 CLR 427; (1994) 120 ALR 415; (1994) 72 A Crim R 32; (1994) 68 ALJR 401; [1994] Aust Torts Reports 81-270.
[53] *Plenty v Dillon* [1991] HCA 5; (1991) 171 CLR 635; (1991) 98 ALR 353; 65 ALJR 231; [1991] Aust Torts Reports 81-084 (Gaudron, McHugh JJ).
[54] *Christie v Leachinsky* [1947] UKHL 2; [1946] 1 KB 124; [1947] AC 573; [1947] 1 All ER 567; (1947) 111 JP 224; 63 TLR 231.
[55] Sections 458 and 459 *Crimes Act 1958* (Vic); *R v De Simone* [2008] VSCA 216, [35]–[36] (Neave JA); s99 *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW); *Zaravinos v State of NSW* [2004] NSWCA 320; 214 ALR 234; (2004) 62 NSWLR 58, [37]; 151 A Crim R 24 (Bryson JA); s48 and s365 *Police Powers and Responsibility Act* 2000 (Qld); s75 *Summary Offences Act* 1953 (SA); s128 *Criminal Investigation Act* 2006 (WA); *Kelly v Dann* (1992) 8 WAR 225.
[56] *R v Lemsatef* [1977] 2 All ER 835.
[57] [1993] VicRp 82; [1993] 2 VR 403; (1992) 16 MVR 367.
[58] (2002) 5 VR 485.
[59] *DPP v Webb* [1993] VicRp 82; [1993] 2 VR 403, 416; (1992) 16 MVR 367 (Ormiston J).
[60] *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485, [3], [4], [13]; (2002) 135 A Crim R 179; (2002) 37 MVR 408 (Ormiston JA).
[61] *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1, 38; (1990) 93 ALR 1; (1990) 64 ALJR 327; (1990) 33 IR 263; (1989) 18 ALD 77 (Brennan J).
[62] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223, 229 [43]; [1947] 2 All ER 680; (1947) 63 TLR 623; (1947) 177 LT 641; (1947) 112 JP 55; [1948] LJR 190; (1947) 45 LGR 635 (Green MR).
[63] *East Melbourne Group Inc v Minister for Planning and Anor* [2008] VSCA 217; (2008) 23 VR 605; (2008) 254 ALR 112, [183]; (2008) 166 LGERA 1 (Ashley and Redlich JJA).
[64] *Fares Rural Meat and Livestock Co Pty Ltd v Australian Live-Stock Corporation and others* [1990] FCA 139; (1990) 96 ALR 153,168 (Gummow J).
[65] *East Melbourne Group Inc v Minister for Planning and Anor* [2008] VSCA 217; (2008) 23 VR 605; (2008) 254 ALR 112, [110]; (2008) 166 LGERA 1 (Warren CJ); *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1, 36; (1990) 93 ALR 1; (1990) 64 ALJR 327; (1990) 33 IR 263; (1989) 18 ALD 77 (Brennan J).
[66] *DPP v Webb* (1993) 2 VR 403, 416 (Ormiston J).
[67] *Hrysikos v Mansfield* [2002] VSCA 175; (2002) 5 VR 485, 491; (2002) 135 A Crim R 179; (2002) 37 MVR 408, (Ormiston JA).
[68] [2004] VSC 32; (2004) 40 MVR 427.
[69] *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30; (2003) 198 ALR 59, [54]; (2003) 77 ALJR 1165; (2003) 73 ALD 1; (2003) 24 Leg Rep 10 (McHugh and Gummow JJ).
[70] *Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110, 118-9; (1976) 9 ALR 481; (1976) 50 ALJR 648 (Gibbs J).
[71] Neither party adverted to *Wednesbury* unreasonableness during the hearing of the appeal.
[72] (Unreported, County Court of Victoria, Judge Kimm, 27 February 1998).
[73] [2007] VSCA 289; (2007) 20 VR 250.
[74] *Ibid* [41].

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