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Charter case collection.

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In 2006, with the introduction of the *Charter of Human Rights and Responsibilities*, Victoria became the first Australian State to formally promote the development of human rights principles in State law. The *Charter* provides a formal, non-exclusive, list of the rights that Parliament seeks to protect, and also sets out to establish collaborative dialogue between the Executive, Parliament and the courts regarding the operation of human rights in Victoria, and ensure that human rights are always considered in interpretation of Victorian statutes.

The Charter was inspired by and bears many similarities to Bills of Rights in New Zealand, Canada, South Africa, the United Kingdom, and the Australian Capital Territory. Despite these similarities, the Charter is also uniquely Victorian, and so we have seen a growth in Victorian human rights jurisprudence over the last fifteen years.

Since the *Charter* commenced operation, it has been cited in over 150 published decisions of the Supreme Court of Victoria. These have had significant impact on issues such as coercive powers under the *Major Crime (Investigative Powers) Act 2004*, the enforcement of unpaid fines and the operation of disciplinary bodies. In addition to its impact on individual cases, the *Charter* has shaped the process of statutory interpretation in Victoria. Almost half the published *Charter* cases discuss the section 32 interpretation obligation.

Given the growing volume of *Charter* case law, the Judicial College of Victoria and the Supreme Court of Victoria have prepared this collection of *Charter* cases. With over fifteen years of decisions from the Victorian Civil and Administrative Tribunal, the Supreme Court of Victoria and the Victorian Court of Appeal, this collection is an invaluable resource for those wishing to keep up to date with *Charter* principles. It aims to assist courts, practitioners, and the public to understand Victorian human rights law, and to continue to develop and apply this area of jurisprudence

For commentary on the *Charter*'s operative provisions and each of the human rights it encompasses, access the [Charter of Human Rights Bench Book](#)



Vallianos v Coroners Court of Victoria [2023] VSC 48

14 February 2023

Forbes J

Charter provisions: ss 8, 13, 16.

Summary

Following an investigation by the Coroners Court, both the deceased's parents, as her senior next of kin, and Vallianos, the deceased's close friend, applied under s 47 of the *Coroners Act 2008* (Vic) ('the Act') for release of the deceased's body. Vallianos claimed to be executor of the deceased's estate pursuant to a letter and accompanying instructions left by the deceased, alleged to amount to a will. The deceased called Vallianos her 'chosen next of kin'.

The Coroner considered who had the better claim in accordance with s 48(3). Relevantly, an executor named in a will has a better claim than the 'senior next of kin'. The defined hierarchy of 'senior next of kin' is spouse or domestic partner, an adult son or daughter, a parent, an adult sibling, an executor, a personal representative, and lastly, a person determined to be the senior next of kin under s 3(3) because of the closeness of their relationship with the deceased immediately before their death.

The Coroners Court determined that the documents left by the deceased did not amount to a will and therefore the Vallianos was not an executor.

Vallianos appealed the decision releasing the deceased's body to her parents. She asserted that she had the better claim, and raised the following *Charter* questions:

- (a) Is the hierarchy of senior next of kin in s 3(3) of the Act inconsistent with the human rights of the deceased to equality before the law and protection from discrimination (s 8), privacy (s 13), and freedom of association (s 16)?
- (b) In making a determination under s 48 of the Act, was the Coroners Court required to give effect to the human rights protected by ss 8, 13 and 16 of the *Charter* to avoid incompatibility with those rights as required by s 38 of the *Charter*?
- (c) Should the Coroners Court have regard to these human rights by reason of s 32 of the *Charter*?
- (d) Could s 48 of the Act be interpreted consistently with these human rights in the *Charter*?

Vallianos submitted that the Coroners Court could not simply apply the mandatory hierarchy in the definition of 'senior next of kin', and that the decision of *Smith v Coroners Court of Victoria* [2018] VSC 307 (which concluded that s 48(3)(b) permitted no discretion), was plainly wrong. She argued that the wording of s 48(3) — 'should be released' — presented a constructional choice, and that in accordance with s 32(1) of the *Charter*, the Coroners Court had to give effect to the interpretation most compatible with ss 8, 13 and 16 of the *Charter*.



The Charter was said to protect the deceased's decision to disown her biological family and consider herself part of a chosen family.

Alternatively, Vallianos asserted that if the Coroners Court was required to follow the s 48(3) hierarchy, that provision was incompatible with the rights protected by ss 8, 13 and 16 of the Charter. The hierarchy was said to limit the deceased's right to freedom of association and privacy because it failed to recognise her choice to distance herself from her birth family, and to choose not to associate with them.

The Attorney-General, who intervened, raised a threshold question of whether a person after death has rights that can be limited by legislation, given that Parliament provided in s 6 of the Charter that 'only persons have human rights'. However, it was accepted by the parties for the purposes of the case that a living person with the attributes of the deceased has the rights that are raised by the appellant and those rights are relevant to the definition of 'senior next of kin' and the statutory determination prescribed by s 48 of the Act. [74].

The Attorney-General argued that while the right to equality may be impinged by prioritising certain familial relationships over others, such limits were reasonable as a person could avoid this issue by making a will and naming an executor. Further, any interference with the right to privacy was neither unlawful nor arbitrary, as s 48 of the Act was plainly a lawful exercise of the Parliament's legislative authority.

Judgment

Forbes J did not accept that *Smith* was plainly wrong and rejected the submission that s48(3) involved a constructional choice. Rather, construed in the context of a purpose of avoiding lengthy, protracted and distressing factual investigations, the provision set out an order of priority that could be determined largely by objective factual matters. [70].

As to whether s 48(3) was incompatible with s 13 of the Charter, her Honour concluded that nominating a hierarchy of interests based upon the nature of familial relationships with the deceased was not an arbitrary infringement upon the right to privacy. Instead, it provided a rational and objective means for resolving disputes. There was no unlawful or arbitrary limitation of the right to privacy.

While the s 48(3) hierarchy of the Act may not assist those who are estranged from their families and who develop other close relationships instead, and may be based on assumptions that are less likely to hold true for groups including those who identify as LGBTQI, Forbes J observed that the language of the Act allowed for a broad definition of family including adoptive relationships, family units through successive partnering, and families with LGBTQI members, and also embraced friendship as a characteristic of kinship when considering s 3. [87]-[90]. She held that where a deceased's wishes were not recorded in a will, any limitation on human rights protected by the Charter arising because of the hierarchy or ranking to be applied were no more than necessary to identify an appropriate person for release of the body, and were reasonable limits under s 7(2). The s 48 approach provided a clear and expeditious dispute resolution process.



Secretary, Department of Families, Fairness and Housing v AM [2023]
VSC 291

2 June 2023

Ginane J

Charter provisions: ss 12, 13, 17, 19.

Summary

The Secretary to the Department of Families, Fairness and Housing brought an appeal under the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') against an interim accommodation order ('IAO') made by the Children's Court in respect of two young children. The IAO was made following reports of family violence by the father of the children against their mother at the family home. The IAO contained a condition allowing the father to reside with the mother and children. The Secretary appealed the IAO, seeking a condition that 'the mother and children must reside in a safe undisclosed address known to DFFH but unknown to the father'.

The father submitted that in proposing the condition, the Secretary did not have proper regard to Charter rights including protection of the child (s 17(2)), freedom of movement (s 12), privacy (s 13(a)), and cultural rights (s 19(1)). The father contended that the only Charter-compatible interpretation of ss 10 and 263(7) of the CYF Act would result in the condition not being imposed.

The Secretary submitted that any choice between statutory interpretations must be consistent with the provision's purpose under s 32(1) of the Charter. Additionally, s 7(2) of the Charter did not apply as the Children's Court was exercising the power to make an IAO.

Judgment

Ginnane J applied the approach in *ZD v Department of the Department of Justice* [2017] VSC 806 ('ZD') which held that s 263(7) of the CYF Act was not capable of more than one interpretation and so the Charter cannot assist in interpretation of the provision. That decision, in obiter, noted that s 10 of the CYF Act required the best interests of the child to be considered when making decisions or taking action, so that the preferred construction of s 263(7) was compatible with s 17, and any condition properly imposed under s 263(7) would not be unlawful nor arbitrary even if it interfered with privacy or family.

Ginnane J held that a condition properly imposed under s 263(7) releasing the children into the care of the mother on condition that they reside at an address not know to the father, would not unlawfully restrict their rights of freedom of movement. [72]. The power of the Children's Court to make an IAO with the impugned condition did not infringe Charter rights because it involved an exercise of discretion as to what was required in the child's best interests. That discretion was 'given under a statute which carefully balances the applicable human rights by reference to the best interests of the children'. [73].



Ned Kelly Centre Ltd v Australian Rail Track Corp [2023] VSC 421

24 July 2023

Richards J

Charter provisions: ss 19, 38.

Summary

The Ned Kelly Centre Ltd is a public company and registered charity founded to ‘represent the interests of Kelly family descendants’, including by ‘researching, protecting, and promoting the important historical and Kelly-related cultural heritage in north-east Victoria to benefit present and future generations’. The Centre sought to restrain the Wangaratta Council from continuing to build a new visitor centre in the Glenrowan Heritage Precinct and to restrain the Australian Rail Track Corporation from continuing to replace an existing bridge in the precinct with a larger bridge. The projects were well-advanced. The Centre brought the proceeding under s 216 of the *Heritage Act 2017* (Vic), which enables ‘any other person’ to bring a proceeding in the Supreme Court for an order to remedy or restrain a contravention of the Heritage Act. The Centre claimed that the decisions to grant permits for the projects were unlawful under s 38(1) because they failed to take into account the Centre’s cultural rights under s 19(1) of the Charter.

Judgment

Richards J declined to grant either of the interlocutory injunctions sought by the Centre, concluding that it had not established a serious question that it was entitled to relief on Charter grounds. First, the Centre was a corporation, and did not itself have human rights. Second, there was no evidence that the Centre represented a cultural group whose right to enjoy their culture was engaged by Heritage Victoria’s decisions to grant the permits. Specifically, any shared distinctive culture or cultural practices that they enjoyed in community with each other so as to attract the protection of s 19(1) of the Charter.

Third, her Honour addressed the ‘vexed’ question of the validity of a decision made contrary to s 38(1) of the Charter noting that, while it was settled that such a decision was unlawful and may be set aside on judicial review, it was a more controversial proposition that a decision made in breach of s 38(1) was invalid for jurisdictional error and had no legal effect. Her Honour considered that existing authority was against the proposition and recorded that the Centre’s submissions did not address the issue, which would ultimately be a significant obstacle for its Charter claims at trial.



Abdulrahim v Adult Parole Board [2023] VSC 432

31 July 2023

John Dixon J

Charter provisions: s 32.

Summary

Abdulrahim claimed damages against the Adult Parole Board, the Secretary of the Department of Justice and Community Safety, and the State of Victoria ('the defendants') for false imprisonment and psychiatric injury. The Board had cancelled Abdulrahim's parole on grounds of safety and protection of the community on becoming aware that Abdulrahim was the suspected target in three shootings. Abdulrahim was returned to prison and subsequently released on parole again after the Supreme Court of Victoria quashed the Board's decision to cancel his parole.

At issue in the claim for damages was whether Abdulrahim's imprisonment, after the Board's decision to cancel his parole, was unlawful. Abdulrahim submitted that the Board could only cancel his parole in accordance with s 77 of the *Corrections Act 1986* (Vic), which, in accordance with s 32 of the Charter, was to be read in a way compatible with human rights. That is, that the cancellation which predicated the issue of an arrest warrant had to be valid or lawful, in addition to factual. Relevantly, s 77B(2)(a)-(b) provides that if a prisoner's parole is cancelled or taken to be cancelled, the original authority for the prisoner's imprisonment is regarded as again in force, and any period during which the parole order is in force is not to be regarded as time served (unless so directed).

The defendants emphasised the statutory purpose of certainty, and the need for second level officers to be able to act on Board orders that were valid on their face. It was submitted that s 32 did not have a relevant operation because the question was whether the imprisonment was authorised. The right to liberty was not affected because a public law remedy was available to vindicate rights, while the asserted interpretation only affected the private remedy of compensation.

Judgment

Dixon J observed that the paramount purpose, safety and protection of the community, as well as the orderly administration of justice, must be balanced against the parolees' interest in liberty. An interpretation where third parties could rely on final administrative decisions, such as issued warrants, promotes certainty and the paramount purpose. As such, 'cancellation' in s 77B was interpreted as cancellation in fact for the issue of the warrant to be validly exercised. It was considered unnecessary to resolve the possibility that the effect of the Charter on s 77B(2)(b) is that 'cancellation' means 'valid cancellation', since calculation of sentence duration has a direct impact upon liberty.

Dixon J determined that the Charter did not disturb his findings, because it was still open to a parolee to protect their liberty by seeking a declaration that their parole was invalidly cancelled, from which time cancellation ceased to exist at fact and law for the purposes of s 77B(1)(a), or a writ of habeas corpus. Dixon J noted the conspicuous absence in the Charter of any authority supporting the proposition that the right to liberty extended to the right to



compensation for deprivation of liberty, particularly when compared to the *Human Rights Act 2004* (ACT).



Dickson v Yarra Ranges Council [2023] VSC 491

18 August 2023

Richards J

Charter provisions: ss 7, 13, 15, 18, 38.

Summary

The plaintiff, Mr Dickson, contended that the defendant Council failed to meet its obligations under the *Local Government Act 2020* (Vic) to engage with the community and to hold meetings that were open to the public. He sought orders to prohibit the Council from approving a draft Urban Design Framework ('UDF'), based on a lack of community engagement, and to require a further 12 month community consultation period. He also sought an order in the nature of mandamus requiring the Council to reopen the public gallery for meetings of the Council, and clarification of whether members of the public gallery may film Council meetings. Further, he contended that the Council was acting incompatibly with human rights protected by the Charter, specifically the rights to privacy, to freedom of expression, and to participate in public life.

Judgment

Richards J concluded that Mr Dickson lacked standing to seek the remedies claimed, as he was unable to show that he had a special interest in the UDF beyond that of any member of the public. For completeness, her Honour considered whether someone with standing might obtain those remedies.

The scope of the right to participate in public affairs under s 18(1) has not yet been fully explored in Victoria, although it has been found to be engaged by a ban on participating in public question time at a council meeting. See *Richardson v City of Casey Council (Human Rights)* [2014] VCAT 1294, [223].

In developing and considering the UDF, the Council was required by s 38 of the Charter to act in a way that was compatible with the right to participate in public affairs in s 18(1). It had designed and implemented a communication and engagement plan for the UDF, detailing key stakeholders, consultation periods and activities. Her Honour concluded that a community engagement plan designed and delivered in accordance with the Council's Community Engagement Policy was unlikely to limit the right to participate in public affairs simply by specifying the ways in which members of the public can engage with the Council about the UDF. Specifically, the right under s 18 of the Charter did not enable any member of the public, regardless of their interest in the UDF, to dictate the terms of the Council's engagement with the community about the UDF. It did not guarantee those who participated in community engagement the individual attention of Councillors, or a right to participate in Council meetings in a manner inconsistent with its Governance Rules (that is, in a disorderly fashion). Her Honour considered that the engagement plan adopted by the Council for the UDF, and the Council's engagement with the community about the UDF, was compatible with the s 18 right to participate in public affairs.

Her Honour then considered the conduct of Council meetings. The Council's Governance Rules placed some limits on public participation, including empowering the Chair to order



the removal of a disruptive person or adjourn a meeting in the event of disorder. Those limits, her Honour noted, were compatible with the right to participate in public affairs so long as they were reasonable and justifiable under s 7(2) of the Charter. In this case, due to alleged disruptive conduct, the Council had held some meetings online, and when in-person meetings were resumed, certain new requirements were imposed on community members wishing to attend including pre-registering attendance and providing photo identification. There was also a limit on the number of persons allowed entry to the public gallery. Her Honour considered that the Governance Rules facilitated the enjoyment of the right to participate in the conduct of public affairs, by providing procedural and behavioural rules for interactions at Council meetings between Councillors, and between members of the public and Council.

In respect of a complaint relating to the right to film Council meetings, Richards J concluded that where consent is sought to film or otherwise record a Council meeting, the Chair will have to give proper consideration to relevant human rights, including the right to freedom of expression under s 15(2) and the right to participate in public affairs in s 18(1) of the Charter. However, those rights do not require consent to be given on every occasion; the Chair's decision will depend on the facts and circumstances surrounding the particular request.

Her Honour accepted that the requirement to provide one's name and address, and to produce photo identification, engaged the right to privacy in s 13(a) of the Charter. However, Mr Dickson had not shown the requirement was either unlawful or arbitrary. Against the background of the disruption to earlier Council meetings, her Honour concluded the registration requirements were proportionate to the legitimate aim of ensuring that Council meetings were conducted in a safe environment for all participants.



***McKechnie v Secretary to the Department of Justice and Community
Safety (Weekly Payments Judgment) [2023] VSC 542***

11 September 2023

Ginnane J

Charter provisions: ss 22, 38.

Summary

Mr McKechnie, a prisoner, sought preliminary discovery of documents concerning the discontinuation of an ‘amenities allowance’ to prisoners in Victoria, which funds had enabled prisoners to exercise their human rights of accessing the courts by communicating with lawyers by phone or mail.

Mr McKechnie asserted that payments made to him ceased in January 2018 without change in his circumstances or any apparent legislative change. He sought to ascertain whether there had been any consideration of human rights in respect of the weekly payments made to prisoners.

Corrections Victoria asserted that Mr McKechnie received no weekly payment because he refused to work in a prison industry. Further, the evidence showed that he had never received an ‘amenities allowance’.

Mr McKechnie submitted that if he was forced to work to obtain a payment or allowance, that would be slavery and servitude, and thus incompatible with his right under s 22(1) to humane treatment while deprived of liberty.

Judgment

Ginnane J held that Mr McKechnie had no arguable case that a decision to discontinue weekly payments to him was unlawful. As he was unwilling to work in a prison industry, Mr McKechnie was not entitled to be remunerated under regulation 43(4) of the *Corrections Regulations*, and there was no evidence that he was entitled to any other payment or allowance. Mr McKechnie was therefore not entitled to seek relief or remedy on Charter grounds.

Further, due to regulation 43(4), Corrections Victoria could not reasonably have made a different decision regarding remunerating Mr McKechnie. Accordingly, by reason of s 38(2), Corrections Victoria was under no obligation to consider human rights in determining whether to pay remuneration to Mr McKechnie.



MB v Children's Court of Victoria [2023] VSC 666

21 November 2023

McDonald J

Charter provisions: ss 13, 17, 38.

Summary

The plaintiff, MB, applied to quash an order of the Children's Court permitting Victoria Police to retain MB's DNA profile under s 464ZFB(1) of the *Crimes Act 1958* (Vic).

MB, then aged 16, had voluntarily provided a DNA sample to Victoria Police under s 464SC(3)(b)(i) of the Act when he was charged with offences including aggravated home invasion. He was subsequently convicted, sentenced to and served a period of detention in a Youth Justice Centre.

MB contended that the Children's Court failed to properly consider his best interests as a child within 'all the circumstances' as mandatorily required by s 464ZFB(2)(b) of the Act, and that the retention order was unlawful pursuant to s 38(1) of the Charter, as the Children's Court failed to properly consider and act consistently with MB's right to privacy (s 13) and right to protection as a child (s 17(2)).

Judgment

As to s 464ZFB(2), McDonald J held that the fact that MB was a child was a matter which the Magistrate was required to consider in determining whether he was justified in making a retention order. However, there was no additional requirement arising under s 32(1) of the Charter to have regard to the best interest of the child as a mandatory relevant consideration. [24].

As to the Charter, his Honour held that s 38(2) (which excludes the operation of s 38(1) if a public authority could not have acted differently or made a different decision) did not apply because s 464ZFB(2) did not require the Children's Court to 'reach a particular decision or act inconsistently with human rights'. [38]. McDonald J distinguished *Yarran v Magistrate's Court* [2022] VSC 531 (which held that s 38(2) applied to the taking of DNA samples from suspects under s 464T(3)) as s 464ZFB(2) concerned children and the retention of a DNA profile after a finding of guilt.

McDonald J held that s 17 was engaged because every application under s 464ZFB(1) will affect the prima facie right of a child under s 464ZFC(1) to have a DNA sample destroyed. [44]–[49].

McDonald J held that the Children's Court had failed to comply with s 38(1) because it did not consider whether MB's s 17(2) right had been engaged, whether it was limited, and whether such limitation was justified. Further, the retention order was not authorised by s 464ZFB(1) and was unlawful. The Children's Court failed to consider whether the limitation on MB's privacy was justified. Accordingly, the retention order was unlawful by reason of non-compliance with s 38(1) read in conjunction with s 17(2) and with s 13(a), respectively.



DPP v Smith [2023] VSCA 293

30 November 2023

Emerton P, Priest and Macaulay JJA

Charter provisions: s 24.

Summary

Smith was charged with sexual assault and sexual penetration of C, a child aged under 16 years. An intermediary appointed for C reported that C's confidence would be assisted if she met with the judge and counsel in person prior to giving evidence at a special hearing. The day before the special hearing, the judge and both counsel met C to 'say hello'. The accused was not present, and the meeting occurred out of court and was not recorded. In light of *Alec (a pseudonym) v The King [2023] VSCA 208*, which determined that a private 'out-of-court' meeting between a witness and judge was a 'fundamental irregularity', questions concerning the meeting between C and the judge were referred to the Court of Appeal. These included whether the meeting infringed the principle of open justice.

Judgment

The Court of Appeal determined that the meeting between C and the judge did infringe the principle of open justice. In reaching this conclusion, Emerton P noted that the principle was 'reinforced' by the right to a fair hearing in s 24(1) of the *Charter*. [6]. Similarly, Priest JA determined that a central element of the State criminal justice system – that it must be open, impartial and even-handed – found recognition in s 24(1). Further, as the *Charter* made plain, so far as it was possible consistently with their purpose, the provisions of the *Criminal Procedure Act 2009* must be interpreted in a way that was compatible with s 24(1), ingrain the principle of open justice.

In the event, the only way to remedy the irregularity was for C's evidence to be taken at a further special hearing conducted before a different judge.



Zayneh v The King [2023] VSCA 311

11 December 2023

Walker, Taylor and Boyce JJA

Charter provisions: ss 21, 25.

Summary

Zayneh appealed the Supreme Court’s refusal of his application for bail. Zayneh faced multiple serious charges involving importation and trafficking of drugs, possessing a hand gun without a licence, and dealing with the proceeds of crime. He had been in custody for almost two years.

Although Zayneh established exceptional circumstances under s 4A of the *Bail Act 1977*, the judge determined that for the purposes of s 4E, there was an unacceptable risk that Zayneh would fail to answer bail. Noting that there was a real possibility that a trial may not occur for another three years due to complexities surrounding the proceeding, the judge observed that there would come a point where the delay (and any unacceptable delay) ‘may come to be of such a magnitude that risks which would in other circumstances be regarded as unacceptable, may properly be viewed as acceptable’. [6].

Zayneh contended that the judge’s finding that there was an unacceptable risk that he would fail to answer bail was unreasonable in all the circumstances including the ongoing delay in bringing him to trial and his right to trial without unreasonable delay (and failing that, a right to be released) under s 21(5) of the Charter.

Judgment

The Court of Appeal dismissed the appeal. Regarding the potential for delay, the Court endorsed the judge’s comments and observed that there would ‘come a point where the continued pre-trial detention of a person who is presumed innocent can no longer be justified, notwithstanding the seriousness of their alleged offending and the magnitude of the risk that they will not answer bail’. [7].

Citing *DPP (Cth) v Barbaro* (2009) 20 VR 717, 727 [36], the Court noted that the weight of authority suggests that the Charter applies to the question of bail for Commonwealth offences – at least in so far as s 32 is concerned – and that the Charter does not require any departure from the existing approach to the treatment of delay in bail applications.

The Court held that, in determining whether the tests in ss 4A and 4E are satisfied, courts ought to give proper consideration to the right to a trial without unreasonable delay in s 21(5) in assessing whether there were exceptional circumstances and whether a risk of flight, or other risk identified in s 4E, was unacceptable. In Zayneh’s case, the Charter did not require an outcome different to that reached by the judge.



Karam v The King [2023] VSCA 318

14 December 2023

John Dixon J

Charter provisions: s 24.

Summary

Karam made three applications to the Court of Appeal seeking leave to appeal his convictions following two trials some 10 years earlier due to the conduct of his former barrister Ms Nicola Gobbo. Karam had been found guilty of serious drug offences and sentenced to 37 years' imprisonment with a non-parole period of 22 years. Although Ms Gobbo did not represent Karam at trial, she had appeared for him in the initial stages of the proceedings and was involved in the preparation of Karam's defence in other ways. In effect, she acted as an advisor to Karam, notwithstanding that she was providing information to police during the relevant period.

Karam's proposed grounds of appeal included that his trial was unfair and resulted in a substantial miscarriage of justice because Ms Gobbo improperly influence his defence such that he was denied an equal opportunity to present his case in breach of the right to a fair hearing in s 24(1) of the Charter.

Judgment

The Court of Appeal found that in the circumstances, Ms Gobbo had a subsidiary and collateral role, and the performance of her work did not have the capacity to affect the outcome of the trials adversely to Karam. The Court of Appeal held that the Charter did not impose an obligation to conduct a fair trial that differed in substance from that which applied 'in Victorian criminal courts as a matter of course'. [375].



***Yarran v Magistrates' Court of Victoria* [2022] VSC 531**

9 September 2022

John Dixon J

Charter provisions: ss 10, 13, 25, 32, 38.

Summary

The plaintiff was a 20 year old Aboriginal man with an intellectual disability, Tourette's syndrome, autism and schizophrenia who had been charged with attempted murder. He sought judicial review of a Magistrates' Court decision directing that he undergo a compulsory cheek swab under s 464T(3) of the *Crimes Act 1958*.

At issue was whether s 464T empowered the Magistrate to direct a person to undergo a compulsory procedure in circumstances where the person could not give informed consent due to mental impairment.

The plaintiff sought to have the Magistrates' order quashed or declared invalid on the basis that it:

1. contravened s 38(1) by failing to properly consider the plaintiff's right to protection from medical treatment without consent (s 10(c)), right to privacy (s 13(a)) and the right of person charged of a criminal offence not to be compelled to testify against themselves (s 25(2)(k)).
2. contravened s 38(1) by acting incompatibly with the plaintiff's rights under those provisions; and
3. contravened s 32(1) by failing to interpret s 464T compatibly with the rights contained in those sections, so far as it is possible to do so consistent with the provision's purpose.

Judgment

John Dixon J determined that the provisions of s 464T were unambiguous and clear, unaffected by reference to the context or purpose of the section: [83]. Section 32 has work to do where the text of a statutory provision admits of "shades of meaning and nuance". Applying *Slaveski v Smith* (2012) 34 VR 206, 215 [24], where the words are clear, then the court must give them that meaning. The second defendant was entitled to apply for an order for a compulsory procedure.

In making the s 464T(3) compulsory order, the Magistrate was acting in an administrative capacity as a public authority. The Magistrate was creating new rights and obligations as part of the evidence gathering process, which was directly analogous to the issuing of warrants, rather than determining existing rights or obligations consistent with a judicial capacity. Accordingly, s 38 was enlivened.

Dixon J assumed, without deciding, that the rights identified by the plaintiff were engaged. However, s 38(1) does not apply if, as a result of a statutory provision, the public authority could not reasonably have acted differently or made a different decision: s 38(2). Dixon J held that the Magistrate could not have come to a different decision because the legislature has



‘substantially codified how a magistrate gives proper consideration’ when making a decision under s 464T. Properly construed, s 464T did not permit the Magistrate to consider whether his decision would interfere with the plaintiff’s Charter rights.

In adopting the reasoning of Niall JA in *Grooters v Chief Commissioner of Police (Vic)* (2021) 289 A Crim R 529, his Honour concluded that even if it were relevant to consider if the Magistrate’s order was incompatible with the plaintiff’s Charter rights, it was justified under s 7(2). The ‘proper’ construction of s 464T was one which was reasonable under s 7(2). In any event, consistent with *Bare v IBAC* (2015) 48 VR 129, 152 [53], 176 [139], a breach of 38(1) would not be a ground for setting the decision aside.



***Minogue v Falkingham* [2022] VSCA 111**

14 June 2022

Beach, Niall and Emerton JJA

Charter provisions: s 38

Summary

In 2019, Dr Minogue, a life prisoner, requested that the Commissioner of Corrections Victoria ('the Commissioner') fund and purchase a laptop computer. The request was refused, and Dr Minogue commenced a judicial review proceeding, seeking certain declarations. Dr Minogue made another request for a laptop in 2020, which was approved by the Commissioner subject to Dr Minogue's desktop computer being removed from his cell. Dr Minogue commenced a second judicial review proceeding concerning that decision, again seeking certain declarations.

During the hearing of both proceedings, the parties agreed that the declarations sought in the 2019 proceeding did not need to be considered. The trial judge ordered that the 2019 proceeding be dismissed without adjudication, and that the 2020 proceeding be dismissed.

Dr Minogue appealed, asserting amongst other things, that the trial judge erred in finding that his Charter rights had not been breached by the 2019 decision.

Judgment

The Court of Appeal rejected Dr Minogue's argument under the Charter, finding that he had unequivocally abandoned any claim to relief in relation to the 2019 decision. If the trial judge had determined whether the 2019 decision breached the Charter, there would have been a fundamental breach of procedural fairness to the respondent.



Bashour v Australia and New Zealand Banking Group Pty Ltd [2022]

VSC 252

20 May 2022

Daly AsJ

Charter provisions: ss 8, 24, 32, 38

Summary

This was an appeal on a question of law from the orders of VCAT, pursuant to s 148 of the *VCAT Act 1998* (Vic).

The plaintiff commenced a proceeding at VCAT, alleging unlawful discrimination on the basis of her pregnancy, caring responsibilities and disabilities, contrary to the provisions of the *Equal Opportunity Act 2010* (Vic). Ahead of the hearing, she made a number of discovery requests, covering 124 categories of documents, or in some instances, single documents. The defendant objected to the production of most of the categories of documents, primarily on the ground of relevance. The parties agreed that a ruling should be made first on the issue of relevance, before considering whether production of the documents would be oppressive.

VCAT made orders denying the bulk of the discovery requests, concluding that they were irrelevant. They were considered to relate to minor disparities of fact between affidavits of particular witnesses, and were not related to an issue that was raised in the pleadings.

The plaintiff appealed to the Supreme Court, arguing that VCAT erred in:

- failing to interpret the provisions of the *VCAT Act 1998* in a way compatible with human rights (s 32);
- denying her a fair hearing (s 24);
- failing to protect her from discrimination (s 8); and
- failing to act compatibly with her human rights (s 38).

The plaintiff also submitted that leave to appeal was not required, as s 6(2)(b) of the Charter conferred jurisdiction on the Supreme Court to review VCAT's orders to the extent that VCAT had functions under Part 2 and Division 3 of Part 3 of the Charter.

Judgment

Right to a fair hearing

Applying *Matsoukatidou v Yarra Ranges Council*, Daly AsJ observed that there is no material difference between the obligation imposed under s 97 of the *VCAT Act* to 'act fairly and according to the substantial merits of the case in all proceedings', VCAT's obligations under the common law to afford the parties procedural fairness, and the right to a fair hearing under the s 24 of the Charter. Any breach of s 24 of the Charter would also breach s 97 of the *VCAT Act* and the common law duty, amounting to an appealable error of law. Further, in civil



litigation, the ability of a party to obtain documents from another party may be a ‘critical element’ in ensuring that the party has a fair hearing.

Applicable test

Her Honour determined that the key issue was whether the denial of the discovery request resulted in a real risk that there would be a material impact upon the plaintiff’s ability to have a fair hearing. This was to be considered through the prism of ‘substantial injustice’, reflecting the test for granting leave to appeal including with respect to discretionary decisions concerning practice and procedure. Relying on obiter of Refshauge J in *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority (ACT)* (2008) 2 ACTLR 44, Daly AsJ rejected the plaintiff’s submission that a lower standard was appropriate: [60].

It is doubtful that s 24 of the Charter may be used to facilitate discovery of irrelevant documents, tangentially relevant documents, or to ‘embark upon discovery processes which were disproportionate in costs and effort to what is at stake in the underlying dispute’.

Whether the reliance on s 24 circumvented the leave requirements of s 148

Her Honour concluded that the better view was that once s 148 was engaged, then the requirements for leave must follow. The issue of whether Charter rights may be relied upon in any application for judicial review under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015* was put to one side.

Outcome

Daly AsJ granted leave to appeal on the question of law concerning s 24, and determined that VCAT was incorrect in finding that certain categories of documents were not relevant.

Given this finding, it was unnecessary to consider whether leave to appeal was required given s 6(2)(b), nor the s 32 ground. However, Daly AsJ rejected the submission that VCAT was making an administrative decision for the purposes of s 38 of the Charter when making the discovery orders. Rather, VCAT was exercising a judicial function.



JL v Mental Health Tribunal [2021] VSC 868 and JL v Mental Health Tribunal (No 2) [2022] VSC 222

23 December 2021 (1st judgment) and 6 May 2022 (2nd judgment)

Ginnane J

Charter provisions: ss 10, 21, 38

Summary

The plaintiff sought judicial review of his compulsory mental health treatment, which was imposed pursuant to decisions made under the *Mental Health Act 2014* (Vic) ('the Act') by the delegate of an authorised psychiatrist under the Act and the Mental Health Tribunal ('the Tribunal'). He was detained and treated in reliance on a Temporary Treatment Order ('TTO') under s 46 of the Act, which failed to state whether it was a 'Community' or 'Inpatient' TTO. That distinction was important, as it dictated whether the plaintiff was to be treated in the community, or taken to and detained and treated in a designated mental health service.

The plaintiff raised six grounds of review, including the following Charter-related grounds. These were dealt with in separate judgments after Ginnane J called for further submissions:

- Whether the authorised psychiatrist, by making the TTO through his delegate, acted unlawfully for the purposes of s 38(1) ('Ground 5'); and
- Whether the Tribunal, by making an Inpatient Treatment Order and Community Treatment Order pursuant to the TTO, acted outside jurisdiction and failed to properly consider the plaintiff's human rights, and therefore acted unlawfully for the purposes of s 38(1) ('Ground 6').

Decision in the first judgment

In failing to state whether it was a 'Community' or 'Inpatient' TTO, Ginnane J found that the delegate of the authorised psychiatrist had made an invalid TTO, as it failed to comply with a mandatory requirement in s 49(a) of the Act.

His Honour concluded that the authorised psychiatrist, when making a TTO, is a public authority. Ginnane J considered the guiding factors in s 4(2) of the Charter in conducting this analysis, observing that the authorised psychiatrist was medical director of North Western Mental Health; was appointed to that position under s 150 of the Act; and could exercise functions 'of a public nature' under the Act, including making a TTO and applying a Treatment Order.

Ginnane J also proceeded on the basis that the Tribunal was a public authority within the meaning of s 4 of the Charter, and this was not contested by the parties.

Accordingly, Ginnane J determined that the limitations imposed by the TTO upon the applicant's rights under s 10(c) (protection from medical treatment without full, free and informed consent) and s 21(3) (right to liberty) were not imposed lawfully. However, because the TTO was made by the *delegate* of the authorised psychiatrist – rather than the authorised psychiatrist himself – Ginnane J reserved his decision on Ground 5 pending



receipt of any further submissions from the parties as to whether a declaration can be made against the authorised psychiatrist, when his *delegate* acted in a way incompatible with the plaintiff's human rights.

Further, Ginnane J held that the invalidity of the TTO did not negative the Tribunal's jurisdiction to subsequently conduct a hearing to make a Treatment Order pursuant to the TTO under s 53 of the Act, on the basis that an invalid decision can still have legal consequences because of actions taken in reliance on it. In essence, the plaintiff remained 'subject to' a TTO *in fact* for the purposes of s 53 of the Act, even if it was *legally* defective.

Ginnane J then considered whether the Tribunal, in making the Treatment Orders, had impermissibly limited the plaintiff's ss 10(c) and 21(3) rights; and whether the Tribunal acted unlawfully, by making a decision which failed to properly consider a relevant human right.

Referring to the analogous case of *Re Kracke and the Mental Health Review Board* [2009] 29 VAR 1 as well as the reasons of Emerton J in *Castles v The Secretary, Department of Justice* (2010) 28 VR 141, his Honour was satisfied that the Tribunal's reasons established that the limitations on the plaintiff's ss 10(c) and 21(3) rights were made under law, and were reasonably and demonstrably justified under s 7(2).

Decision in the second judgment (Ground 5)

Applying s 42A of the *Intepretation of Legislation Act 1984*, Ginnane J held that the act of the delegate in signing the TTO was taken to have been an act of the authorised psychiatrist. Further, the delegate in this case acted as a 'public authority' when signing the TTO, as the delegate was an 'entity established by a statutory provision that has functions of a public nature' within the meaning of s 4(1)(b) of the Charter. Ginanne J held that Ground 5 was made out, and made a declaration that the TTO made by the delegate and authorised psychiatrist was invalid and of no force or effect and unlawful under s 38(1) of the Charter.



Azizi v DPP [2022] VSCA 71

20 April 2022

Priest, T Forrest and Walker JJA

Charter provisions: s 32

Summary

The appellant and her husband ('the accused') were joint registered proprietors of their family home. The accused had paid for the deposit on the property and the balance of the purchase price.

The accused was charged with a serious drug offence and a restraining order was made over the property under s 18(1) of the *Confiscation Act 1997* ('the Act'). The appellant applied under s 20 of the Act for her interest in the property to be excluded from the restraining order. Section 22A of the Act provides that a court can order that property be excluded, if satisfied of various matters including, where the applicant acquired the interest from the accused, directly or indirectly, that it was acquired for sufficient consideration.

The trial judge held that the property was indirectly acquired. On appeal, the appellant argued that 'indirectly acquired' meant that the property had to come from the accused, via another party, to the appellant. The accused paying another party for the property that was then transferred from that party to the accused and appellant jointly, was said to fall beyond the scope of s 22A.

Judgment

The Court of Appeal dismissed the appeal, finding that s 22A intends to, and does, 'achieve the consequence that a person cannot avoid its application by using their own funds to purchase a property for themselves and another jointly, where the other person does not provide consideration': [8].

In interpreting the relevant provisions, the Court of Appeal noted that it was necessary to have regard to s 32(1) of the Charter, which states that 'so far as it is possible to do so consistently with its purpose, a statutory provision "must be interpreted in a way that is compatible with human rights"': [52]. Further, s 20 of the Charter provided that a person must not be deprived of his or her property other than in accordance with law. As submissions had not been received on the point and the Attorney-General had not been notified, the Court of Appeal was limited to observing that its preferred construction was consistent with s 32. In particular, the appellant's proposed construction would undermine the purpose of s 22A(1)(c).



***Donohue v Westin* [2022] VSC 37**

9 February 2022

Niall JA

Charter provisions: s 38

Summary

The plaintiff, a prisoner, applied for 216 emergency management days ('EMDs') as a result of claimed COVID-19 pandemic-related disruptions to, and deprivations of, normal prison operations and entitlements. The defendant refused the plaintiff's application under s 58E of the *Corrections Act 1986* (Vic), on the basis that the overall disruption or deprivation experienced was not significant in the context of the pandemic.

The plaintiff raised one Charter-related ground: that the defendant's decision was unlawful because she failed to properly consider the plaintiff's rights to freedom of movement (s 12) and freedom of religion (s 14(1)(b)) as required by s 38(1).

Judgment

In making a decision that does not itself limit rights, s 38 does not require a decisionmaker to consider Charter rights – at least in terms of the specific rights invoked by the plaintiff in this case.

Section 38 does not require the decisionmaker to consider how they can maximise or increase the enjoyment of the rights of the person who may be affected by the decision. Rather, s 38 of the Charter is concerned with decisions that limit or affect rights, and ensures that the decisionmaker properly considers them before making a decision.

The existing limitation on the plaintiff's rights was justified by law and arose from the sentence of imprisonment imposed. It would have been an error for the defendant to start from the premise that the plaintiff had a right to, for example, liberty and freedom of religion, and then to consider how her decision might advance those rights. The defendant's role under s 58E was not to overcome the burden of imprisonment, or hasten the restoration of the plaintiff's freedoms, and nothing which the defendant was being asked to do in responding to the plaintiff's application for EMDs would further limit those rights. Accordingly, in circumstances where any decision the defendant might make would not further limit or reduce rights, the Charter had no role to play.



Keasey v Director of Housing [2022] VSCA 7

1 February 2022

Niall, Emerton and Whelan JJA

Charter provisions: s 38

Summary

This was an application for leave to appeal from a Supreme Court decision which took place in the context of temporary amendments to the *Residential Tenancies Act 1997 (Vic)* ('the Act'). These amendments – enacted in response to the COVID-19 pandemic – restricted landlords' ability to evict tenants and gave VCAT a greater decision-making role in the process. Under new s 548 of the Act, a landlord could apply to VCAT for an order terminating a tenancy agreement. Upon receipt of such application, VCAT could only make an order terminating the tenancy agreement under s 549 of the Act if satisfied of various stipulated matters.

The applicant was the tenant in a tenancy agreement with the respondent Director of Housing ('the Director'). After criminal charges were laid against the applicant, the Director sought to terminate the applicant's tenancy agreement under s 548. Pursuant to s 8 of the *Administrative Law Act 1978 (Vic)* ('the ALA'), the applicant requested written reasons for the Director's 'decision' to commence an application in VCAT.

The critical question was whether the Director's decision to apply to VCAT for an order was a 'decision' for the purposes of the ALA, and consequently whether the Director was obliged to give reasons under s 8 of the ALA. The Supreme Court held that it was not.

Judgment

The Court of Appeal agreed. The Court of Appeal held that the definition of a 'decision' in s 2 of the ALA should not be construed in a 'leaning' or generous fashion. Accordingly, it was clear that the Director's application seeking to terminate the applicant's tenancy not a 'decision' for the purposes of the ALA. The Court of Appeal noted that the Director's choice of grounds in the application to VCAT did not affect the applicant's rights, and – if anything – confined the case. Those grounds were no more than statements of allegation that could only affect rights if ultimately accepted by VCAT.

The applicant's Charter arguments could not succeed, as the Director's mere making of an application under s 548 did not have the potential to limit the applicant's rights under the Charter.



Chief Municipal Inspector – Local Government v Mohamud [2021] VSC 787

29 November 2021

Quigley J

Charter provisions: ss 18, 25

Summary

This proceeding arose out of the plaintiff’s application to VCAT under s 229 of the *Local Government Act 2020* (Vic) (‘the LGA’), seeking an order that the defendant councillor be stood down from her position until criminal charges levelled against her had been determined.

During VCAT’s hearing of the plaintiff’s application, a question of law arose as to the interpretation of s 229, which went to VCAT’s jurisdiction to hear the application, and accordingly was referred to the Court under s 96(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Judgment

The relevant question for the Court to determine was whether the statutory criteria in s 224 of the LGA (which dictates the application of s 229) needed to be satisfied before an application to VCAT under s 229 could be made. Quigley J ultimately answered that question in the negative, finding instead that as a matter of statutory construction s 229 ought to be construed as a standalone provision. In so holding, Her Honour dealt briefly with the following Charter-related arguments raised by the defendant.

Quigley J rejected the defendant’s argument that s 229 should be construed as being subject to the statutory preconditions in s 224 based on the general rule of construction in s 32 that statutory provisions be interpreted as far as possible in a way which is compatible with human rights. The defendant sought to rely on the right to take part in public life (s 18) and her rights in criminal proceedings (s 25). Her Honour held that interpreting the legislation to allow applications to be made under s 229 without meeting the prerequisites in s 224 did not unreasonably interfere with the Charter rights of the individual, or the voters of the municipality, in these circumstances.

Section 18 – taking part in public life

Quigley J declined to answer whether a ‘stand down’ provision, such as s 229, was a reasonable limitation of the right pursuant to s 7(2) of the Charter, observing that the narrow task before the Court was to determine whether the question ‘ought the Councillor be stood down?’ was within VCAT’s jurisdiction.

Quigley J rejected the defendant’s argument that the construction of s 224 as a standalone provision would remove a councillor – or at least expose a councillor to the prospect of being removed without replacement – thereby skewing the balance of the local council, and effectively impinging upon the rights of each elector to be represented by their democratically chosen representative. Her Honour considered that this submission



overstated the impact of the construction. Further, the logical extension of this submission would mean that no councillor could ever be stood down, which was clearly inconsistent with the scheme and intent of the LGA which specifically provided for the standing down of councillors in certain circumstances.

Section 25 – rights in criminal proceedings

Quigley J rejected the argument that the construction of s 224 as a standalone provision would impinge upon the presumption of innocence in every case involving serious charges. Her Honour observed that the question before the Court was one of jurisdiction only, and not one which made any assumption contrary to the presumption of innocence. Quigley J held that it would be inconsistent with peace, order and good government – being the purpose of the LGA – for a person facing a serious charge to remain insulated from any consideration of whether they should be required to stand down until the charge was resolved.



Thorpe v Head, Transport for Victoria (2021) 66 VR 56

23 November 2021

Forbes J

Charter provisions: ss 19, 38, 39

Summary

This decision took place in the context of litigation seeking orders for the protection of certain places and things said to constitute Aboriginal cultural heritage under the *Aboriginal Heritage Act 2006* (Vic) ('Heritage Act') and be threatened by construction of a particular section of road ('the road') of the Victorian state government's ('State') Western Highway Duplication Project. The judgment concerned an unsuccessful application by the plaintiff to further amend her statement of claim and expand relief; and a successful application by the State defendants for summary judgment.

The plaintiff also unsuccessfully sought declaratory relief pursuant to s 38(1) in respect of past and future works relating to the construction of the road, invoking her cultural rights (s 19) and arguing that the relevant test in s 39(1) was satisfied.

Ultimately, none of the plaintiff's Charter claims could not be maintained in light of the conclusions concerning her claims for non-Charter relief: [145]–[173].

Judgment

The threshold question (under s 39) was whether the plaintiff is a person who 'may seek' a remedy in respect of an act or decision otherwise than because of the Charter simply because she had commenced the proceeding – even though her application for a declaration or injunction directed at unlawfulness of future acts under the *Heritage Act* was summarily dismissed.

Forbes J identified two constructional choices in interpreting s 39(1) previously identified in the secondary literature: 'factual availability' and 'abstract availability'. Broadly, the distinction concerns whether a litigant relying on the Charter needs to also seek relief on a non-Charter ground, or can utilise an existing process and procedure for this purpose. Forbes J ultimately held it unnecessary to determine the correct construction, but observed that:

- The plaintiff must have standing to bring the relevant non-Charter claim in order to satisfy s 39(1); and
- A non-Charter claim cannot be advanced for the purpose of 'manufacturing' a Charter jurisdiction.

Standing

The plaintiff's Charter declarations relied on standing given by statute – i.e. s 39(1) – while her other claimed relief relied on establishing a 'special interest in the subject matter' pursuant to the test set out in *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493. The nature of the plaintiff's special interest was said to centre on her



position as a traditional owner and custodian of Aboriginal places. The plaintiff relied on the decisions in *M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 ('M68') and *Loiello v Giles (Ruling No 2)* [2020] VSC 723 ('Loiello') to claim she had that special interest as at the commencement of proceedings, and did not lose it by reason of any subsequent change in circumstances later in the litigation. Forbes J, however, distinguished *M68* and *Loiello* on the basis that those decisions involved the infringement of private rights, rather than any claimed 'special interest'.

Forbes J observed that where standing arises pursuant to a claimed 'special interest', such standing may well be changed by events affecting the public wrong at the heart of the dispute. While the plaintiff contended that the act against which she sought remedy was the construction of the road, the State defendants argued that their subsequent action (that they would no longer rely on the impugned cultural heritage management plan ('plan') to construct the road, would prepare a new plan for submission and approval, and would not recommence construction until the new plan was approved and lodged under the *Heritage Act*) meant there was no longer a present or anticipated act or decision to which s 38(1) could apply.

Forbes J agreed. The plaintiff's 'special interest' must attach to a legal controversy. As the State defendants no longer proposed to resume construction of the road until the required statutory process was recommenced and concluded, the act against which the plaintiff sought remedy had evaporated, and her standing was therefore now changed.

As to past works, Forbes J accepted the defendants' submission that the plaintiff was not able seek non-Charter relief without amending her pleadings – and that she would need to point to 'exceptional circumstances' permitting her to do so.

As to future works, Forbes J considered that a Charter claim regarding the unlawfulness of an act could only be advanced once the relevant act was identified – in this case, that the finalised route for construction of the road and the relevant harm said to be associated with the construction of that route was identified.



***Thompson v Minogue* [2021] VSCA 358**

17 December 2021

Kyrou, McLeish and Niall JJA

Charter provisions: ss 7, 13, 22, 38

Summary

Dr Minogue, a prisoner serving a life term at Barwon prison, challenged the lawfulness of the applicants' (collectively described as 'Corrections') directions that he submit, on two occasions, to random urine tests and associated strip searches prior to those tests.

On 16 February 2021, Richards J published reasons for judgment finding that Dr Minogue's rights under the *Charter* were breached by Corrections which are described in detail [here](#) and may be summarised for the purposes of this appeal as:

1. The decision to implement the scheme for urinalysis tests and associated strip searches (the Urinalysis Procedure) did not involve proper consideration of the relevant rights as required by s 38(1) (*the proper consideration finding*).
2. It was not lawful to require Dr Minogue to undertake a strip search before each test because there were no reasonable grounds, as required by *Corrections Regulations*, reg 87(1)(d), for Corrections to consider that doing so was necessary for the security and good order of the prison (*the reasonable grounds finding*).
3. The urinalysis tests and associated strip searches limited Dr Minogue's privacy and dignity rights and that limitation was not justified, contrary to s 38(1) (*the substantive breach finding*).

Corrections sought to impugn these findings, contending that Richards J:

4. Misinterpreted s 38(1) by requiring express consideration of s 7(2) factors in order to discharge Corrections' obligation to give 'proper consideration'; failed to afford 'weight and latitude' to the evidence of that consideration; and/or misconstrued Corrections' evidence of proper consideration.
5. Erroneously reversed the onus of proof by requiring Corrections to prove that they had reasonable grounds.
6. Erred in finding that Dr Minogue's privacy and dignity rights had been unjustifiably limited by the directions that he submit to the urinalysis tests and associated strip searches.

Judgment

The Court of Appeal granted leave and allowed the appeal on the proper consideration finding. As to the substantive breach finding, the Court held that Richards J had erred in finding that Dr Minogue's privacy and dignity rights had been unjustifiably limited by the directions that he submit to the random urine tests, but upheld that finding regarding the associated strip searches. Although it was then unnecessary for the Court to consider the reasonable grounds finding, the Court did find that the onus of proof had been erroneously



reversed by requiring Corrections to prove that they had reasonable grounds. The result is that relief was properly granted in respect of the strip searches, but not in respect of the random urine tests.

Was proper consideration given to relevant human rights under s 38(1)?

The Court of Appeal found that Richards J had misunderstood and misapplied limb four of the test in *HJ v Independent Broad-based Anti-corruption Commission* [2021] VSCA 200. The procedural limb of s 38(1) requires a decision maker to make “a broad and general assessment of whether the impact that its conduct will have upon a relevant human right is justified, in the sense that it is appropriate in all the circumstances.” This assessment does not require direct and express consideration of s 7(2) matters. Richards J impermissibly conflated the separate justification requirements in ss 38(1) and 7(2), and erred in requiring Corrections to establish that they had considered s 7(2) matters in order to satisfy the judge that they had properly considered Dr Minogue’s privacy and dignity rights.

The Court of Appeal rejected Corrections’ argument that Richards J misinterpreted, misunderstood or misapplied s 38(1) by affording no ‘weight and latitude’ to evidence of the balance struck by Mr Thompson (as Governor of Barwon Prison) in considering relevant rights. The Court found that Richards J had adopted the correct approach regarding the weight to be given to Mr Thompson’s views about compliance with the procedural limb of s 38(1), and that no error was established.

The Court held that Richards J erred in understanding Mr Thompson’s evidence as meaning that he didn’t consider human rights when approving the Urinalysis Procedure or that he didn’t undertake a Charter assessment. Mr Thompson’s consideration of the privacy and dignity rights in relation to the Urinalysis Procedure satisfied the requirements of the procedural limb. The procedural limb is not a sophisticated legal exercise and there is no formula for compliance with it – consideration at “a fairly high level of generality” suffices. The context surrounding the *Charter* Assessment was relevant – in particular, the earlier State-wide assessment of the policy, the serious drug-use problem at Barwon Prison, and Mr Thompson having ensured that the policy was flexible enough to reduce disproportionate impacts on prisoners with particular attributes in an “expansive and dynamic” analysis of whether it was appropriate to adopt the Urinalysis Procedure.

Were the directions incompatible with Dr Minogue’s human rights?

The right to privacy

The Court held that Richards J’s analysis was inconsistent with the principles on the meaning of ‘arbitrary’, finding that:

7. an ‘arbitrary’ interference with privacy is one which is capricious or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought;
8. the phrase ‘not being proportionate to the legitimate aim sought’ does not incorporate the proportionality analysis in s 7(2); and
9. the onus of establishing that an interference with privacy is unlawful or arbitrary is on the person alleging limitation of his or her privacy right.



The Court held that Richards J impermissibly conflated the meaning of ‘arbitrary’ in s 13(a) with the justification requirement in s 7(2), which resulted in a failure to distinguish who had which onus. As the Urinalysis Procedure was authorised under the *Corrections Act*, s 29A, Dr Minogue had the onus to show arbitrary interference with his privacy. Richards J erred in treating Corrections as if they had the onus of establishing that interference with Dr Minogue’s privacy was not arbitrary plus also justified. Additionally, Richards J erred in treating questions of arbitrariness and justification as effectively the same issue.

The Court held that the directions that Dr Minogue undergo the random urine tests and associated strip searches were not an arbitrary interference with his right to privacy. The urinalysis regime was not capricious, unpredictable or unjust.

The Court held that the interference with Dr Minogue’s privacy regarding the random urine tests did not extend beyond what was reasonably necessary to achieve prison security, safety and welfare of prisoners, and was therefore not unreasonable in the sense of the regime not being proportionate to a legitimate aim. The requirement was contained in carefully documented protocols and procedures and had a clear and rational purpose – to reduce the prevalence of drug use within Barwon Prison.

However, the Court found that the highly intrusive nature of the strip searches coupled with the requirement that they always be conducted prior to a random urine test, in circumstances where that test is conducted without warning and with at least one officer watching the sample being delivered, meant that they were excessive. The evidence left open a possibility that there were less restrictive means reasonably available to achieve that purpose. The interference with the privacy of prisoners extended beyond what was reasonably necessary to achieve that purpose. The regime of mandatory strip searches prior to each random urine test was unreasonable in the sense of not being proportionate to the legitimate aim sought to be achieved.

The right to dignity

While the Court did not agree with Richards J’s implicit finding that a requirement that a prisoner provide a random urine sample is, in and of itself, sufficient to engage the dignity right, the Court accepted that the Urinalysis Procedure does limit the dignity right because it is highly intrusive – as is the strip search – and there is thus a need to consider the s 7(2) justification.

The Court held that Richards J erred in finding that the directions to undergo random urine tests breached Dr Minogue’s dignity right. Mr Thompson’s evidence of feedback from prison officers and prisoners on the deterrent effect of random urine tests in relation to drug use at Barwon Prison was highly relevant to an assessment of the efficacy and appropriateness of the Urinalysis Procedure. For the following reasons, this was sufficient to discharge Corrections’ onus of establishing that the limitation on Dr Minogue’s dignity right was justified for the purposes of s 7(2) of the *Charter*:

10. the Urinalysis Procedure is authorised by the *Corrections Act*, s 29A, and is therefore ‘under law’ for the purpose of s 7(2) of the *Charter*.



11. The frequency of random selection (a prisoner could expect to be selected perhaps once a year) appropriately balanced the need for deterrence with the need for workability within the prison environment. The limitation was proportionate to the purpose of ensuring the security of Barwon Prison and the safe custody and welfare of prisoners. The limitation upon Dr Minogue’s dignity right was lawful, reasonable and justified within the meaning of s 7(2).

However, the Court held that Richards J did not err in finding that the directions that Dr Minogue undergo the associated strip searches were incompatible with his privacy and dignity rights, in breach of s 38(1). Corrections did not establish that the limits upon the privacy and dignity rights were demonstrably justified, having regard in particular to the possibility, left open by the evidence, that there were less restrictive means reasonably available to achieve the purpose sought. The evidence of Mr Thompson was too general and vague to discharge the burden under s 7(2) of the Charter. Having regard to the “extremely invasive and demeaning” strip searches severe limitation on prisoners’ privacy and dignity rights, Corrections failed to show that the limitation was proportionate to the purpose sought to be achieved – the security of Barwon Prison and the safe custody and welfare of prisoners.

Were the strip searches authorised by the Corrections Regulations?

It was not strictly necessary to decide whether Richards J had erred by impermissibly imposing an evidentiary onus on Corrections, given the conclusion that the two strip searches constituted an arbitrary interference with Dr Minogue’s privacy, which conclusion is sufficient to establish that his privacy right under the Charter was limited.

However, the Court considered the issue anyway, and held that Richards J had erroneously reversed the onus of proof by requiring Mr Thompson to prove that he had reasonable grounds.

High Court application

Dr Minogue applied for leave to appeal to the High Court. His application was refused with costs on 14 October 2022.



***Austin v Dwyer* [2021] VSCA 306**

12 November 2021

Beach and Sifris JJA

***Charter* provisions: s 24**

Summary

This appeal consolidated and resolved two proceedings which challenged intervention orders made in the Magistrates Court on 14 June 2019 ('2019 orders'). Those orders originated with an intervention order the Court had previously made in 2016 ('2016 order'). The 2016 order had been subject to continuing legal challenge by the applicant, Austin. Dwyer, the named respondent, a member of Victoria Police, applied for the 2019 orders so he could be substituted as the named applicant in the 2016 order. He submitted that the ongoing service of documents in the legal challenges constituted a form of harassment by Austin, who was also subject to criminal investigations in relation to alleged stalking of the original named applicant in the 2016 order. In the 2019 orders, O'Callaghan M granted an application to revoke the 2016 order, and granted an intervention order to Dwyer as a substitute applicant.

The two proceedings in this appeal were both challenges by Austin to the 2019 orders. In the first proceeding, Austin sought to appeal an unsuccessful judicial review of the order granting the 2016 order. In the second proceeding, Austin sought judicial review of a County Court order striking out her appeal against the revocation of the 2016 order. Austin submitted that the County Court decision was not conducted in a competent, independent, or fair manner, and that the order to strike out her appeal was a denial of her rights under s 24 of the *Charter*.

Judgment

The Court of Appeal examined the applications in detail. It refused leave to appeal the judicial review, and dismissed the other application. In relation to the *Charter* submission, the Court held that the County Court judge was entitled to exercise broad discretion to strike out the proceeding in the circumstances, and that there was no unfairness or prejudice to the applicant in those orders.

The Court of Appeal noted that the County Court proceeding was Austin's appeal, and the order to strike out the proceeding was made when Austin failed to appear at a directions hearing. Austin had 30 days to apply to reinstate the proceeding, and did not do so. The Court of Appeal noted that such orders are made for the benefit of both the parties and other parties waiting to be heard, and that the effective administration of justice depends on judges and other court officers keeping control over the timetabling and progress of matters.



***Harding v Sutton* [2021] VSC 741**

11 November 2021

Richards J

Charter provisions: ss 7, 10, 13, 38

Summary

Simon Harding and 128 other plaintiffs challenged the lawfulness of a number of directions made by the defendants in the exercise of their emergency powers under s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) ('the *Public Health Act*'), concerning mandatory vaccination against the COVID-19 virus ('Vaccination Directions'). The defendants were Brett Sutton, the Chief Health Officer appointed under the *Public Health Act*, and Deborah Friedman and Benjamin Cowie, both of whom gave directions as Acting Chief Health Officer at different times.

The plaintiffs sought orders quashing the Vaccination Directions, and injunctions restraining the defendants from making similar directions in future.

The plaintiffs also sought declarations that the Vaccination Directions were unlawful and invalid because they are incompatible with various human rights protected by the *Charter*.

Judgment

Richards J found that the Court did not have the power to suspend the operation of mandatory vaccine directions insofar as they affect certain plaintiffs. This was because the Court does not have the power to suspend or stay the operation of a statutory provision, and the Vaccination Directions depend for their force and effect on the *Public Health Act*, in particular s 203 which makes it an offence for a person to refuse or fail to comply with a direction given to a person under s 200. Likewise, the form of the injunction sought by the plaintiffs to restrain the defendants was so imprecise and uncertain that it could not be the subject of an order, breach of which would be punishable as a contempt of court.



However, Her Honour found that there was a serious question to be tried. That is, there was an arguable case that in making the Vaccination Directions, Professor Sutton acted in a way that was incompatible with:

- a) the right not to be subjected to medical treatment without full, free and informed consent, in s 10(c) of the *Charter*; and
- b) the right not to have privacy unlawfully or arbitrarily interfered with, in s 13(a) of the *Charter*.

Additionally, the plaintiffs had an arguable case on one further ground; that in making the Vaccination Directions, Professor Sutton purported to exercise power under s 200(1)(d) of the *Public Health Act* for a legislative purpose, which was not a purpose for which the power was conferred.

Incompatibility with human rights

The defendants accepted that they are public authorities for the purpose of the *Charter*, and as such, bear the burden of demonstrating that a limit to human rights is justified under s 7(2) of the *Charter*. There was a serious question to be tried as to whether s 38(1) applies to the giving of Vaccine Directions, which the defendants characterised as instruments of a legislative character and hence 'subordinate instruments' per *Kerrison v Melbourne City Council* (2014) 228 FCR 87.

A finding that s 38(1) applies to the giving of Vaccine Directions raises a serious question to be tried as to whether the Vaccine Directions are incompatible with the rights in ss 10(c) and 13(a) of the *Charter*.

The plaintiffs submitted that the effect of the Vaccination Directions was to coerce them to consent to being vaccinated in order to keep their jobs, in circumstances where they would not otherwise consent to the treatment. On that basis Her Honour considered there to be an arguable case that the right in s 10(c) of the *Charter* is limited by the Vaccination Directions. Justice Beech-Jones' rejection of a similar argument in *Kassam v Hazzard* [2021] NSWSC 1320 was based on the common law concerning consent to a trespass to the person. It is arguable that the concept of consent at common law is narrower than the 'full, free and informed consent' to medical treatment that is contemplated by s 10(c) of the *Charter*.



As to the right to privacy, there is a serious question to be tried whether the Vaccination Directions were made for an improper purpose. On that basis, it is arguable that any interference with privacy involved in requiring employers to gather vaccination information is unlawful. It is also arguable that the interference is arbitrary, in the sense of not being proportionate to a legitimate aim. That is, there is a question whether the intrusion into the plaintiffs' privacy of requiring them to provide their vaccination information to their employers, despite their objections, is justified by the protection of public health.

As to the procedural limb of s 38(1) of the *Charter*, the requirement that the public authority give proper consideration to relevant human rights, there was no evidence to support the contention that the defendants failed to give proper consideration to relevant rights.

Improper purpose

Richards J determined that there was a serious question to be tried on the ground that the defendants purported to exercise power under s 200(1)(d) of the *Public Health Act* for a legislative purpose, as opposed to an administrative purpose to make directions which it, arguably, could be said to be. If this were the case, then it is arguable that the defendants were making an unauthorised or improper use of the power.

It was not obvious that an emergency power to give directions for the protection of public health necessarily extends to a power to make delegated legislation. It was significant that the *Public Health Act* does not prescribe any formal requirements for directions given under s 200(1)(d) — they need not be in writing and they need not be published in any way. In addition, they are excluded from the application of the *Subordinate Legislation Act 1994* (Vic).

Balance of Convenience

The balance of convenience did not favour the giving of interlocutory relief. On one side of the balance of convenience in this case lay the individual interests of the plaintiffs as they were affected by the Vaccination Directions, and any future direction in similar terms. On the other side lay the protection of public health during a state of emergency arising out of circumstances causing a serious risk to public health.

Overall, Her Honour held that granting the interlocutory relief sought by the plaintiffs would have carried a higher risk of injustice than withholding it, especially considering the potential impact of serious illness and death for third parties.



Director of Public Prosecutions (Vic) v CS [2021] VSC 686

26 October 2021

Incerti J

Charter provisions: ss 8, 10, 12, 13, 19, 22

Summary

This was an application for a detention order under the *Serious Offenders Act 2018 (Vic)* due to an unacceptable risk of the respondent committing a serious sex offence, a serious violence offence or both.

The respondent is a 36-year-old Aboriginal man with an extensive criminal history including prior serious sex offences, and a history of violent offending but no prior serious violence offence. The respondent's historical offending, and his risk of future offending, was intertwined with his intellectual disability, personality disorders and severe childhood disadvantage.

Judgment

Incerti J considered whether the respondent posed, or after release from custody, would pose, an unacceptable risk of committing a relevant offence if a detention order or supervision order was not made and the respondent was in the community. The Court was convinced to a high degree of probability that the respondent posed an unacceptable risk. Her Honour had regard to the conceptual value of the respondent's rights, and particularly his right to liberty, and found that even considering those rights, the risk of the respondent committing a serious sex offence, or a serious violence offence, or both was unacceptable.

Her Honour nonetheless considered that a supervision order, with a condition that he reside at a residential facility with certain conditions, would be sufficient to reduce the risk of the respondent committing a serious sex offence or serious violence offence, so that the risk of such offending was not 'unacceptable'.

When considering the likely impact of a detention order, the Court took into account the fact that such an order would plainly impact on the respondent's rights, particularly his right to liberty.



In addition to the impact of the respondent's right to humane treatment and liberty under s 22 of the *Charter*, Her Honour also had regard to the conceptual value of the other *Charter* rights of the respondent which would be engaged by the making of a detention order, particularly: the equality rights in s 8, in light of his disabilities; the right to protection from torture and cruel, inhuman or degrading treatment in s 10; the right to freedom of movement in s 12; the right to privacy in s 13; and the cultural rights in s 19.

Incerti J dismissed the detention order application, and invited the parties to make submissions on a supervision order.



***Carroll v Goff* [2021] VSCA 267**

21 September 2021

Maxwell P, Kennedy and Walker JJA

Charter provisions: s 24

Summary

The applicant and the respondent were siblings and executors of their mother's will. A codicil appointed the Public Trustee of NSW as an executor in the event of disharmony or disagreement between the siblings. The applicant applied for a grant of probate, to which the respondent objected on the basis of the codicil and claimed indemnity costs. The applicant initially requested a hearing on the papers through her solicitors. However, after the solicitors ceased to act, the applicant's correspondence suggested that this consent may have been revoked. The primary judge accepted the respondent's submissions and refused to grant probate on the basis that the application was not made by someone entitled to act as executor. The applicant applied for leave to appeal the orders on the basis that she was denied a fair hearing contrary to s 24 of the *Charter*, in part due to the Court's failure to provide an opportunity for oral submissions, and in part due to the reliance on the respondent's submissions in reaching the decision.

Judgment

The Court of Appeal refused leave to appeal, and found no breach of procedural fairness or of s 24 of the *Charter*. Even if the applicant had not consented to a hearing on the papers, there were no disputes of fact which necessitated cross-examination of witnesses by way of oral hearing, and no other relevant issues of law arose due to the operation to the codicil. This was a case where the primary judge was not required to hold a public hearing for the sole purpose of satisfying the applicable principles of open justice, and no practical injustice was caused by reason that the dismissal order was made on the papers, due to the applicant's clear lack of entitlement as executor.



Dudley v Secretary to the Department of Justice and Community Safety
[2021] VSC 567

15 September 2021

Cavanough J

Charter provisions: ss 21, 22, 32

Summary

The plaintiff applied for judicial review of the defendant’s decision not to grant the plaintiff any emergency management days (‘EMDs’) to reduce the plaintiff’s sentence. The plaintiff submitted that the exercise of power was mandatory should the conditions precedent for its exercise exist. The defendant submitted that an exercise of power under s 58E(1) is immune from judicial review because if the provision imposed a duty to consider exercising the power, that would impose an intolerable burden on the secretary inconsistent with the legislative purpose.

Judgment

Cavanough J dismissed the plaintiff’s application for judicial review on the basis that the considerations involved in an exercise of power under s 58E(1) were appropriately discharged, and that it was at the lawful discretion of the decision-maker to make no award of EMDs.

As the decision was made on that basis, Cavanough J concluded it was not necessary to make a finding with respect to the defendant’s submission that an exercise of power under s 58E(1) is immune from judicial review. Nevertheless, his Honour dedicated a significant portion of the reasons to lay out his doubts about this argument. Part of these doubts rested on the importance of the power, identified in both the statutory context and the special conditions of its exercise. His Honour referred to comments in obiter that s 58E(1) must be construed in accordance with s 32(1) of the *Charter*, and that it was arguable that s 58E(1) may engage the right to liberty and security in s 21 of the *Charter*, and the right to humane treatment in detention in s 22, which could lead to the conclusion that a construction of s 58E(1) as both a power and a duty may best accord with those rights, as opposed to only a power. Aside from a brief mention, his Honour did not arrive at any concluded view about the application of the *Charter* in the absence of submissions in this case.



HJ (a pseudonym) v IBAC [2021] VSCA 200

21 July 2021

Beach, Kyrou and Kaye JJA

Charter provisions: s 13

Summary

The Independent Broad-Based Anti-Corruption Commission ('IBAC') commenced investigating matters involving the applicants, and was granted and carried out a warrant at the applicant's premises to inspect and seize property. Following the seizure of documents, IBAC provided an undertaking in the course of an injunction application, referring to both claims of privilege and relevance by the applicants, not to inspect documents until certain documents were quarantined.

The nature of the undertaking was not entirely clear and prompted a dispute between the parties. IBAC claimed it had undertaken not to examine the documents until only the claims for privilege were resolved. The applicants claimed that the undertaking also extended to documents which were claimed to be irrelevant. Subsequently, Kennedy J granted a variation of IBAC's undertaking, confining the documents subject to quarantine to privileged documents only, and releasing IBAC from any undertaking related to claims of irrelevance. The applicants appealed the decision, partly on the basis that Kennedy J had incorrectly construed the *IBAC Act* with respect to the right to privacy under the *Charter*.

Judgment

The Court of Appeal granted leave and dismissed the appeal. The Court held that Kennedy J had not erred in finding that releasing IBAC from its undertakings would not involve a breach of the *Charter*. In doing so, the Court noted a number of relevant matters about the appropriate construction of the *IBAC Act* and the effect of the *Charter*. The matter in question was IBAC's proposal to inspect the seized documents prior to the resolution of the applicants' irrelevance claims, and the extent to which this infringed on the right to privacy under the *Charter*.

As a matter of practicality, the Court commented that the owner of a document is better placed to make a claim for privilege than relevance because privilege is based on the purpose for which a document is prepared, whereas relevance is based on the precise scope of IBAC's investigation, which the owner of the document may not be aware. To uphold an undertaking to quarantine all documents at the behest of the applicant, until the resolution of matters about which the applicant is not (and likely cannot be made) fully aware would be an illogical construction when there is already a process in the *IBAC Act* for assessing an owner's claim of relevance. The process already contained in the *IBAC Act* does not preclude inspecting seized documents as a rule, and strikes an appropriate balance between the right to privacy under the *Charter* with the need for an effective investigation. Kennedy J's decision to vary IBAC's undertakings did not infringe on the applicants' rights.



Grooters v Chief Commissioner of Police [2021] VSC 329

8 June 2021

Niall J

Charter provisions: ss 8, 13, 32, 38

Summary

This application for judicial review concerned the nature and scope of the power in s 464ZFAC of the *Crimes Act 1958* (Vic), which empowers a senior police officer to authorise the taking of a DNA profile sample from adult persons who have been convicted of an indictable offence.

The plaintiff pleaded guilty to a persistent breach of an interim family violence order, which is an indictable offence. Following that conviction, a senior officer of Victoria Police authorised the taking of a DNA sample under s 464ZFAC. The plaintiff accepted that he satisfied the express criteria for the giving of an authorisation in respect of him, but contended that the senior police officer had a discretion to take into account the circumstances of the offending and that he suffers from a cognitive impairment that would make taking the sample distressing and something that he was not capable of understanding. He contended that the authorisation was unlawful and in breach of his *Charter* rights under s 8 (non-discrimination) and s 13 (privacy).

Judgment

The proceeding was dismissed.

Section 32 and construction of s 464ZFAC

As to construction of the section, without concluding whether s 464ZFAC conveyed a ‘discretion’, a ‘power’ or a ‘duty’, Niall JA determined that 464ZFAC does not permit the senior officer to take into account the seriousness of the offence or the circumstances of the offender when deciding whether to give the authorisation. Such considerations would fundamentally alter the nature of the decision, being one to authorise a senior officer to take steps to obtain a DNA sample. All of the criteria under the provision are objective, involve matters of record, and do not require any evaluative assessment. There is no express obligation to conduct investigations or make inquiries beyond the stipulated criteria, and none should be implied.



That result was unchanged by consideration of the *Charter*. Section 32 of the *Charter* requires that legislation be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. There is a constructional choice in relation to the question whether the word 'may' in s 464ZFAC provides for a discretion or imposes a duty. There is a related constructional question as to whether the section permits the decision maker to consider the individual circumstances of the person from whom it is intended that a DNA sample should be taken.

Even if it is accepted that the taking and retention of a DNA sample might involve some interference with privacy, and if it is accepted that there are competing constructions open on the text, that is not sufficient to engage s 13 of the *Charter*. The interference must be unlawful or arbitrary as per *PJB v Melbourne Health* (2011) 39 VR 373. The Court found that the authorisation and taking of a sample was not an arbitrary and unlawful interference with privacy as per s 13, as it had a rational and non-arbitrary basis for the taking of the sample, that is; to prevent and prosecute crime. This was true on either construction of s 464ZFAC, and therefore s 32 did not assist in resolving the constructional question.

The plaintiff submitted that as the taking of a sample affected him disproportionately because of his cognitive impairment, it involved discrimination in breach of s 8 of the *Charter*. The Court found that the relevant provision operates on convictions, and to that extent it is neutral. Even if, in its practical effect, the taking of a sample might be relatively more burdensome for those with an impairment, as the Court accepted that it was in this case, Niall J was not persuaded that the presence of a disproportionate effect alone could be a breach of s 8 of the *Charter*.

In short, the Court found that a construction which required the senior officer to make inquiries and to consider the impact that taking a sample may have in a particular case is simply not open and would involve a substantial and impermissible departure from the scheme marked out by the text when read in its context.

Section 38 of the Charter and the authorisation

Sections 38(1)-(2) provide that a decision-maker must consider human rights and not act incompatibly with them, save for when, acting reasonably, they could not have come to a different decision. On the proper construction of the Act, all of the statutory criteria were satisfied, there was no other relevant material available to the officer to consider. The material sought to be relied on by the plaintiff was irrelevant to the power to authorise the collection of a sample. Niall J found that section 38(2) applied, in the circumstances the decision-maker could not have come to a different decision, and that the decision was lawful under the *Charter*.



Douglas v Harness Racing Victoria [2021] VSCA 128

13 May 2021

McLeish, Niall and Kennedy JJA

Charter provisions: s 24

Summary

The applicants were licensed harness racing drivers and trainers who were subject to charges of serious offences against the *Australian Harness Racing Rules*. After the charges were laid, but before they were heard, the *Racing Act 1958* was amended by the *Racing Amendment (Integrity and Disciplinary Structures) Act 2018* ('amending legislation'). The amending legislation changed the regime for review of decisions made on serious offence charges. Under the old regime, charges were heard and determined by the Racing Appeals and Disciplinary Boards ('RAD Board'), with persons charged entitled to a right of review by VCAT on liability and penalty. Under the new regime, a specialist tribunal called the Victorian Racing Tribunal replaced both the Racing Appeals and Disciplinary Boards and VCAT, with rights of review confined to penalty only. The transitional provisions in the amending legislation were silent on whether persons charged and heard under the old regime still had a right to VCAT review on liability and penalty after the new regime commenced operation. The applicants submitted that they had an accrued right under s 14(2) of the *Interpretation of Legislation Act 1984* (Vic) ('ILA'), and that an interpretation of the amending legislation compatible with s 24(1) (fair hearing) of the *Charter* and having regard to extrinsic materials told against any identification of a contrary intention by Parliament.

Judgment

The Court of Appeal allowed the appeal on the basis that the applicants had an accrued right to seek review in VCAT of the decisions of the RAD Board, as to both liability and penalty, and the amending legislation did not operate to deprive them of that right. The Court of Appeal reached this conclusion on the basis of statutory interpretation alone and held it was not necessary to consider the arguments based on the *Charter*.



Mokbel v County Court of Victoria [2021] VSC 191

30 April 2021

Taylor J

Charter provisions: s 25

Summary

The plaintiff applied for judicial review of a County Court order striking out his appeal against an order of imprisonment for contempt of court. The plaintiff had pleaded guilty to the contempt, was convicted in the Magistrates Court on 21 February 2020, and was sentenced to 14 days imprisonment. The plaintiff had been charged with contempt under s 134 of the *Magistrates Court Act 1989* ('MCA') for failing to answer lawful questions at a compulsory examination hearing on 5 February 2020, after refusing to make a police statement about an incident which resulted in four persons being charged with murder.

The plaintiff's appeal to the County Court was purportedly made pursuant to s 254 of the *Criminal Procedure Act 2009* ('CPA'), which vests jurisdiction in the County Court for criminal proceedings conducted in accordance with Part 3.3 of the CPA. Judge Fox struck out the plaintiff's appeal on the basis that the procedure provided for s 134 in the MCA enabled the Magistrate to conduct the proceeding in a way the Court thought fit, meaning that the contempt proceeding was not a criminal proceeding conducted in accordance with Part 3.3 of the CPA, and therefore the County Court did not have jurisdiction to hear the appeal under s 254. In seeking judicial review of that decision, the plaintiff advanced an argument under the *Charter* that the right to review of a criminal conviction and sentence by a higher court under s 25(4) of the *Charter* could not be limited to judicial review by s 134 of the MCA, when all other summary offences gave rise to a right of de novo appeal in the County Court. The plaintiff also submitted that a construction of the CPA which excludes s 134 of the MCA from the operation of s 254 would be contrary to the *Charter* as it would derogate the pre-existing right to appeal which existed prior to the commencement of the CPA.

Judgment

Taylor J refused the application for judicial review, and rejected the plaintiff's submissions in relation to the construction of s 25(4) of the *Charter*. Taylor J confirmed that the correct construction of the right under s 25(4) of the *Charter* is not as a right 'of appeal' but as a right of review by a higher court 'in accordance with law', which indicates that the mode of the right of review is to be determined by the legal provisions creating that right. Taylor J also referred to Article 14.5 of the *International Covenant on Civil and Political Rights*, from which the wording of s 25(4) of the *Charter* is drawn, which does not require an appeal court to conduct a retrial of factual issues, and to the choice of the word 'review' in s 25(4) as opposed to 'appeal', which is used elsewhere in the *Charter*.

Construing the statutory regime in the MCA and CPA, Taylor J stated that the right of review available to a person convicted and sentence with respect to an offence under s 134 of the MCA is an appeal on a question of law to the Supreme Court under s 272(1) of the CPA, which is sufficient to satisfy the requirements of the *Charter*.

As to the plaintiff's argument that the right of review was not equivalent to right of appeal available for other offences, Taylor J found that the premise of the alleged 'unfairness' was unsound because it is not appropriate to compare contempt with other offences. Further, Taylor J found that it was not correct to construe the commencement of the CPA as derogating any pre-existing 'right of appeal' established by s 25(4) of the *Charter*, because the s 254 CPA appeal rights 'essentially continued and reproduced the appeal rights of a person' sentenced under the previous regime, which, by the same construction of s 134 of the MCA, already excluded s 134. Therefore, the commencement of the CPA did not make any changes to the human rights status of persons charged and convicted under s 134 of the MCA.



Minogue v Thompson (No 2) [2021] VSC 209

29 April 2021

Richards J

Charter provisions: ss 7, 38, 39

Summary

This matter concerned three judicial review proceedings brought by the plaintiff in relation to breaches of the *Charter* with respect to directions for strip searching and random urine tests carried out by the defendants. On 16 February 2021, Richards J published reasons for judgment finding that the plaintiff's rights under the *Charter* were breached by the defendants. In this judgment, Richards J considered the submissions of the parties as to what orders to make for relief of those breaches. The plaintiff requested injunctive relief and detailed declaratory relief particularising the obligations imposed by the *Charter* for the purpose of outlining the *Charter's* normative model for future decision-making.

The defendants submitted that no injunctions were warranted in light of the declarations providing a normative form for future conduct, and the isolated nature of the circumstances giving rise to the breaches of the *Charter*. The defendants submitted that the findings did not serve to show that strip searching and random urine tests can never be lawful, and that injunctive relief would have the effect of limiting potentially lawful conduct.

Judgment

Richards J granted declaratory relief and injunctions to the plaintiff, and made no orders as to costs for any of the proceedings.

Declaratory Relief

In two of the proceedings, Richards J granted declaratory relief in respect of the random urine tests and strip searches carried out on the plaintiff on 4 September 2019 and 1 February 2020 to declare that the events on those days were unlawful. Richards J declined to grant declaratory relief in the significantly more detailed form requested by the plaintiff on the basis that declaratory relief is not advisory in nature or directed toward providing a roadmap for future decision-making about human rights by public authorities.

Injunctions

Richards J identified a strong case for injunctive relief to prevent future breaches on the basis that the culpability of the failure by the defendants (the Governor of Barwon Prison and the Secretary to the Department of Justice and Community Safety) to observe human rights were serious findings and could not be lightly dismissed. In this light, her Honour found it significant that the breaches occurred during a time that there were entrenched policies and procedures in place which had been reviewed since the introduction of the *Charter* in 2008, the implementation of which gave rise to repeated breaches of the plaintiff's rights. Richards J identified that there was a possibility that the policies could continue to be implemented without change, and considered it appropriate to restrain the Governor of Barwon Prison from directing the plaintiff to submit to a random urine test and associated strip search unless and until the Deputy Commissioner had reviewed, revised and reissued the policies with proper consideration to relevant human rights, and been satisfied that any limitations on the right to privacy and dignity in detention were justified in accordance with s 7(2) of the *Charter*.

Other matters

Richards J also found that it was a matter of concern that officers of Barwon Prison had repeatedly prevented the plaintiff from dressing in private following a strip search, particularly given there was a



second instance on 1 February 2020 after the Governor of Barwon Prison had written to the plaintiff to apologise after the first instance on 4 September 2019. Notwithstanding that concern, the lawfulness of this decision was not part of the issues for determination in the judicial review proceeding, and no declaration was open to Richards J to make about the compliance of this decision with reg 86(2) of the *Corrections Regulations* or the *Charter*. The proceeding brought in relation to this conduct was dismissed.

Richards J also made comments about the justiciability of human rights breaches under the *Charter* in general, referring to s 39(1). Her Honour stated that s 39(1) of the *Charter* 'is not a simple provision to understand or apply, and it has been much criticised' about the extent to which it permits relief to be sought on the basis of human rights. Her Honour continued to remark that 'it is now uncontroversial that judicial review remedies are available in respect of a breach of s 38(1), in a judicial review proceeding brought under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*. This case demonstrates that human rights are justiciable in a judicial review proceeding.'



***Re Shea* [2021] VSC 207**

27 April 2021

Incerti J

Charter provisions: ss 21, 25, 32

Summary

The applicant was one of three co-accused charged following an investigation into controlled drug importation and the discovery of a clandestine laboratory on a rural property. He was charged with serious offences related to commercial quantities of controlled drugs and was refused bail in the Magistrates Court, and subsequently made this application before Incerti J for bail in the Supreme Court. The applicant contended that despite the strong circumstantial evidence in his arrest on the property, there were still a number of trial issues related to the charges, including his alleged involvement in the importation activities. The applicant contended that his mostly positive bail history, stable accommodation, family ties, personal hardship if remanded, and the onerous conditions of custody due to the long delay and requirements of COVID19 restrictions justify a grant of bail.

Judgment

Despite the gravity of the alleged offending and the sentence likely to be imposed if the applicant were convicted, the Court found that there were exceptional circumstances justifying bail in the applicant's case, and granted bail. One of those circumstances was the expected delay of at least two and a half years before sentence if the applicant was found guilty at trial, due in part due to the impact of the COVID-19 pandemic on the court system. In discussing the effect of the delay as one of several factors (combined with the applicant's bail history, the surety, an offer of employment, and personal hardship), the Court endorsed and quoted comments by Croucher J in *Re Raffoul* which referenced ss 21(5), 25(2) and 32(1) of the *Charter* to interpret two and a half years as an 'unreasonable delay' in the context of the circumstances, including a pandemic.



***Minogue v Thompson* [2021] VSC 56**

16 February 2021

Richards J

Charter provisions: ss 13, 22, 38

Summary

Dr Minogue is a prisoner serving a life term at Barwon Prison. In three judicial review proceedings heard together before Richards J, Dr Minogue challenged the lawfulness of directions of the various defendants (together, 'Corrections') that he submit to random drug tests and to strip searches on particular dates. On 4 September 2019, he was required to undergo a random alcohol and drug test, which involved providing a urine sample after being strip searched. On 1 February 2020, he was required to provide a urine sample after being strip searched. On 4 February 2020, Dr Minogue was directed to submit to a strip search before a visit from his lawyer. Rather than do so, Dr Minogue opted for a non-contact visit with his lawyer. On 18 February 2020, Dr Minogue submitted to a strip search before and after a visit from his lawyer. It was submitted that the drug tests and strip searches were not authorised by the *Corrections Act 1986* (Vic) and were also unlawful under the *Charter*.

In respect of each of the directions to submit to a urine test and to submit to a strip search, Richards J considered whether there was proper consideration given to relevant human rights for the purposes of s 38(1) of the *Charter* and whether the directions were compatible with Dr Minogue's human rights in ss 13(a) and 22(1) of the *Charter*, being respectively his rights to privacy and to be treated humanely and with respect for the inherent dignity of the human person.

Her Honour concluded, with respect to the directions that Dr Minogue submit to urine tests, that the directions were authorised by s 29A of the *Corrections Act*, but that proper consideration was not given to relevant human rights in breach of s 38(1) of the *Charter*, and that the directions were incompatible with Dr Minogue's rights under ss 13(a) and 22(1) of the *Charter*. With respect to the strip searches of Dr Minogue before his urine tests, her Honour concluded they were not authorised by reg 87(1)(d) of the *Corrections Regulations*, that proper consideration was not given to relevant human rights in breach of s 38(1), and that the strip searches were incompatible with Dr Minogue's human rights. The strip searches before and after the visit from his lawyer were authorised by reg 87(2) of the *Corrections Regulations* and were compatible with Dr Minogue's human rights.

Judgment

Random urine tests

Authorised by s 29A Corrections Act?

In prisons managed by Corrections there is a hierarchy of policy directions comprising the Commissioner's Requirements, the Deputy Commissioner's Requirements, and local operating procedures adopted for each prison. The direction for Dr Minogue to submit to a random urine test was not a decision made by one person in respect of Dr Minogue specifically, but a result of the policy directions. The relevant instruction was *Deputy Commissioner's Instruction No 3.10 - Programs Designed to Reduce Offending Behaviour – Detection and Testing – Drug and Alcohol Use* ('Instruction 3.10'). It required prison managers (or Governors) to develop a program of random and targeted urine analysis to detect drug and alcohol use. In turn, at Barwon Prison, the Governor implemented Instruction 3.10 in a 'Urinalysis Procedure'. It was pursuant to these policies that Dr Minogue was tested. Dr Minogue argued that the random urine tests were not authorised by s 29A of the *Corrections Act* as the language of the section refers to the Governor directing a prisoner (singular) to undertake a test if they consider it necessary in the interests of the management, good order or security of the prison. Richards J concluded that s 29A did authorise broad directions by the



Governor that groups or categories of prisoners submit to alcohol and drug tests including random testing of a fixed proportion of the population each month, irrespective of their personal circumstances (in Dr Minogue's case, he had been tested around 70 times and has never tested positive for alcohol or illicit drugs). Provided the Governor had the requisite belief under s 29A, of which her Honour was satisfied, the exercise of power was authorised. Her Honour rejected an argument that s 32(1) of the *Charter* was a basis for concluding that the intention of s 29A of the *Corrections Act* was contrary to s 37(c) of the *Interpretation Act*. Section 32 has the effect that where a provision has more than one possible meaning, the meaning that is most compatible with human rights should be adopted. Her Honour considered that interpreting s 29A so that a direction may only be given in respect of one prisoner at a time was not the interpretation most compatible with human rights.

Was proper consideration given to relevant human rights under s 38(1) Charter?

Richards J then turned to whether proper consideration was given to relevant human rights pursuant to s 38(1) of the *Charter*. Her Honour did not agree with submissions made by Corrections that latitude is to be given to a decision-maker in determining whether they gave such proper consideration. Further, her Honour did not agree that proper consideration involves no more than balancing the impact of the relevant decision on prisoners' human rights against the countervailing considerations of prison administration. She considered there was more involved in the exercise, including assessing whether the limit was justifiable in accordance with s 7(2) of the *Charter*.

In a prison context, limiting a human right on the basis it is 'justified' by s 7(2) of the *Charter* requires attention to a wider range of matters than whether decision is justifiable in the interests of the management, good order or security of the prison. Regard must also be had to the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve that purpose. Accepting that whether proper consideration has been given in a particular case is a highly context specific question of fact, her Honour identified that: (a) there was no specific decision to direct Dr Minogue to submit to a random urine test; (b) the relevant decision was the approval by the Governor of Barwon Prison of the Urinalysis Procedure; (c) the Governor gave evidence which her Honour understood to mean that he himself did not give consideration to human rights when he approved the Urinalysis Procedure, because he believed this had been done in the development of Instruction 3.10 and he was careful to ensure that the Urinalysis Procedure was consistent with Instruction 3.10.

Her Honour accepted that Corrections operates hierarchically, with policies and procedures developed centrally by the organisation's leadership and implemented in prisons by local management. Her Honour considered that it made perfect sense, in those circumstances, for the leadership to take responsibility for assessing those policies and procedures for compatibility with the *Charter*. Provided that was done properly, there was no difficulty with the Governor (or General Manager) relying on the Deputy Commissioner having already given proper consideration to relevant human rights. The issue in this case, however, was that her Honour was not satisfied that the Deputy Commissioner had done so. The relevant assessment of *Charter* compatibility in respect of Instruction 3.10 was 'cursory', and was limited to whether prisoners should be subjected to testing, and not with the human rights impacts of the instructions about how the testing was to be carried out – including by being strip searched before giving a sample in the presence of two prison officers. Her Honour concluded that the standard of proper consideration required of the Deputy Commissioner was more exacting, given the nature and extent of the degrading impact of urine testing.

The relevant assessment did not identify ss 13 and 22 of the *Charter* as relevant rights engaged by Instruction 3.10, identifying only s 10 (protection against torture and cruel, inhuman and degrading treatment). Her Honour noted that a decision-maker need not identify the 'correct' rights in order to give proper consideration, and also that there was an overlap and/or relationship between the protection given by ss 10, 13 and 22. However, this did not cure the defect of a lack of genuine consideration of how the



human rights of prisoners might be affected in practical terms by Instruction 3.10, and whether this was reasonable and justifiable pursuant to s 7(2).

A *Charter* assessment had also been conducted in respect of *Deputy Commissioner's Instruction No 1.05 - Searches and Patrols* ('Instruction 1.05'), relating to strip searches. That assessment concluded Instruction 1.05 was compatible with the *Charter*, noting the engagement of rights under ss 9, 10, 13 and 22, and providing analysis and comment. Richards J considered that while the assessment of Instruction 1.05 was more detailed than that of Instruction 1.03, and identified both the ss 13 and 22 rights, she could not be satisfied that it properly considered the instruction that male prisoners should be strip searched before a random urine test. Her Honour considered the assessment was impaired by an incorrect statement of the effect of Instruction 1.05 - in relation to the right to privacy, it stated that the level of intrusiveness of search procedures should be related to the probability of detecting drugs. This statement was inaccurate, given that Instruction 1.05 provided that strip searches were to be conducted on prisoners prior to any urinalysis test, irrespective of the likelihood of detecting drugs. Further, the assessment did not engage with the question whether mandatory strip searching before a random urine test is a justifiable limitation of human rights. The evidence in this case in fact included that less intrusive means had been adopted without sacrificing outcomes in a women's prison – no such consideration to a less intrusive means was present in respect of men in Instruction 1.05.

Her Honour concluded that in authorising the Urinalysis Procedure, proper consideration was not given to relevant human rights, contrary to s 38(1) of the *Charter*.

Were the directions incompatible with Dr Minoque's human rights?

Richards J considered that it was common ground that an allegation of incompatibility under s 38(1) of the *Charter* could be considered in the following three steps: (1) identify whether any human right is relevant to or engaged by the impugned decision or action of the public authority; (2) determine whether the decision or action has limited that right; (3) consider whether the limit is under law, reasonable, and demonstrably justified having regard to the matters set out in s 7(2) of the *Charter*. Her Honour stated that although the Court is not engaged in merits review, judicial review for compatibility with human rights is more intense than traditional grounds of judicial review. The burden of establishing that a limit on human rights is justified, or proportionate, rests with Corrections. The standard of justification is stringent.

Corrections accepted that the direction to undergo a random urine test engaged Dr Minogue's right to privacy, under s 13(a) of the *Charter*, and his right to humane treatment while detained, under s 22(1). However, it submitted that neither right had been limited, or alternatively, that any limit was justified in accordance with s 7(2) of the *Charter*.

Her Honour considered that a requirement to provide a urine sample for testing is an interference with personal privacy. Her Honour accepted that the interference was lawful, as it was authorised under s 29A of the *Corrections Act* but considered whether the arbitrariness inherent in a random testing regime was sufficient to make the direction 'arbitrary' for *Charter* purposes turned on whether it was proportionate to a legitimate end. Noting that submitting to urine tests was inherently demeaning, and was not a hardship or constraint that is inherent in deprivation of liberty, her Honour concluded that Corrections had not discharged its burden of justifying the limits on Dr Minogue's rights to privacy and dignity in detention. Particularly, her Honour was not satisfied that the evidence relied on by Corrections as to the necessity of maintaining random urine testing, particularly in respect of prisoners who have no history of drug use and who have never tested positive, was sufficient to establish the effectiveness of random testing against any objective measure of performance. Further, there was no evidence Corrections had considered alternative, less intrusive measures available where the relevant guidelines did not mandate urine testing and strip searching as necessary components of a prison drug strategy. Her Honour found the directions that required Dr Minogue to submit to the random urine tests were incompatible with his rights under ss 13(a) and 22(1) of the *Charter*.



Strip searches

Were the strip searches authorised by the Corrections Act?

Regulation 87 provides that a prisoner may be strip searched where the Governor believes on reasonable grounds that the search is necessary for the security or good order of the prison. Dr Minogue argued that there were no specific orders to strip search him under reg 87, rather it was the Urinalysis Procedure that dictated these searches be conducted. He argued the discretion in reg 87 did not authorise a standing order that prisoners routinely be strip searched in certain circumstances irrespective of individual justice. As with s 29A of the *Corrections Act*, Richards J accepted that the powers in reg 87 could be exercised through the adoption of policies, however, it was still necessary to show that when the procedures were adopted, the Governor believed on reasonable grounds it was necessary for the security or good order of the prison that all prisoners be strip searched before providing a random urine sample. Her Honour concluded that the reason provided – so that prisoners cannot adulterate or substitute the sample – did not establish reasonable grounds that every prisoner should be strip searched. Her Honour identified other features of the procedure which were effective to ensure there is no adulteration or substitution. The strip searches of Dr Minogue were not authorised. Richards J did accept that strip searches before and after his visit with his lawyer were authorised by reg 87(2), to ensure that contraband is not brought in and the visitor is not harmed.

Was proper consideration given to relevant human rights?

For the reasons already given, Richards J concluded that proper consideration was not given to relevant human rights when the Urinalysis Procedure was approved, and two strip searches of Dr Minogue were carried out in accordance with that procedure. However, in respect of the strip searches in the context of contact visits, Richards J concluded proper consideration had been personally given by the Governor to the human rights impacts. This was because a more rigorous approach had been adopted in respect of Barwon prison which houses Victoria's most violent prisoners.

Were the strip searches incompatible with Dr Minogue's human rights?

Richards J noted that strip searching is inherently demeaning, despite being a routine part of prison life. While it may be less demeaning if it is done for an identified reason and in accordance with standard procedure, it still limits the right of a prisoner, in s 22(1) of the *Charter*, to be treated with humanity and respect for the inherent dignity of the human person. The strip searches of Dr Minogue could only be compatible with that right if they were 'under law' and demonstrably justified in accordance with s 7(2). As the strip searches of Dr Minogue prior to the urine tests were not authorised, the interferences with his privacy were not lawful, and were incompatible with his rights pursuant to ss 13(a) and 22(1) of the *Charter*. Conversely, the strip searches before and after visits with his lawyers were attended by different considerations. Richards J considered there was proper consideration to relevant human rights, the searches were authorised, and there was a justified limitation of human rights, so that the searches were compatible with Dr Minogue's human rights.



Collis v Bank of Queensland Ltd [2021] VSCA 17

12 February 2021

Tate and Sifris JJA and Macaulay AJA

Charter provisions: s 6

Summary

Mr Collis was liable to the Bank of Queensland under a personal home loan and guarantees which he had executed as security for loans provided to companies in which Mr Collis had an interest. Following his default on those loans, summary judgment was granted in the County Court in favour of the Bank against Mr Collis. Mr Collis sought leave to appeal against the summary judgment, identifying some 20 proposed grounds of appeal. One such ground was 'human rights denied contrary to international law'. Mr Collis submitted that his rights under s 6(2)(b) of the *Charter* were denied on the basis that Victoria does not have a Commission of Human Rights to hear matters concerning breaches of the *Charter*. He also referred to the preamble of the Australian Constitution, submitting that the absence of such a commissioner fails to guarantee his human rights and that is a breach of federal law.

Judgment

The Court of Appeal found this argument, raised for the first time on appeal, was without merit and entirely misguided. Further, the lack of any commissioner was entirely irrelevant to a decision concerning enforcement of a mortgage and securities for the payment of a debt.



***She v RMIT University* [2021] VSC 2**

19 January 2021

Incerti J

Charter provisions: s 24

Summary

The plaintiff, a self-represented litigant, sought judicial review of the order of a Magistrate striking out her statement of claim pursuant to r 23.02 of the *Magistrates' Court General Civil Procedure Rules 2010*. The plaintiff contended that there had been a breach of natural justice or procedural unfairness, and additionally that the Magistrate had failed to protect her human right to equality under s 8(3) and to a fair hearing under s 24(1) of the *Charter*, as well as breaching a number of other rights under the *Charter* ss 10(b), 13(b), and 15(1). In summary, the plaintiff argued that she had been given inadequate time to prepare for the strike-out hearing, had not been afforded sufficient time to present her case, and that the Magistrate was prejudiced against her as a self-represented litigant.

The statement of claim filed by the plaintiff broadly alleged negligence, bullying, libel, improper hearing, unfair marking and delay in investigation of complaints by RMIT University and others. RMIT University applied to strike out the statement of claim. Prior to the hearing, the plaintiff was not provided with an affidavit in support of the application, which registry staff had advised she should receive from RMIT University. During the hearing, the following took place: the plaintiff did not receive copies of the authorities or relevant rules which were handed up by the solicitor for RMIT University to the Magistrate; the Magistrate had a number of exchanges with the solicitor to clarify RMIT University's case; the plaintiff was given an opportunity to address the Court, including by referring to further and better particulars she had filed; the Magistrate then engaged in a brief exchange with the plaintiff to the effect that the Court could not understand what the plaintiff was alleging from looking at the statement of claim and that the plaintiff should seek legal advice; the Magistrate concluded by asking if there was anything else the plaintiff wished to say, to which she responded that if the Magistrate did not wish to read her further and better particulars and the statement of claim was struck out, she would appeal. Following the hearing, orders were made by the Magistrate which were ambiguous as to whether only the statement of claim had been struck out with a right to re-plead, or whether the entire proceeding had been dismissed. The plaintiff enquired with the registry of the Magistrates Court, which indicated that the plaintiff's proceeding had been dismissed.

Judgment

Incerti J commenced her consideration of the plaintiff's *Charter* claims by looking at the right to a fair hearing under s 24(1), noting that courts and tribunals are not public authorities and do not have obligations under s 38(1) when acting in a judicial, as distinct from an administrative, capacity. However, pursuant to s 6(2)(b) of the *Charter*, a court or tribunal is required to enforce rights that relate to legal proceedings which are protected by the *Charter*. Therefore, the right to a fair hearing in s 24 applied directly to courts and tribunals when they exercised their functions. Her Honour noted that the human rights the *Charter* is intended to protect are practical and effective, not theoretical or illusory, and accordingly, the right to effectively participate in proceedings must be applied in a way that is practical and effective. Her Honour considered various measures a judge could take to fulfil their duty to ensure the human right to a fair hearing, and common law procedural fairness, is accorded to a self-represented litigant. Commenting on the relationship between the common law duty to afford a fair hearing and the human right to a fair hearing, her Honour stated the two were not interchangeable, but were so close and overlapping that where a self-represented party had not been accorded a fair hearing under the common law principles, a court in judicial review would almost always be entitled to find a breach of s 24 of the *Charter*. Turning to s 8 of the *Charter*, which provides for recognition and equality before the law, her



Honour considered that the plaintiff's submissions in this regard were 'somewhat amorphous' and her arguments regarding discrimination were misconceived. Her Honour concluded that s 8 had no application in the circumstances, as the Magistrate had not treated the plaintiff in an arbitrary or capricious manner. While the plaintiff also argued that she was discriminated against due to her status as a self-represented litigant, being a self-represented litigant is not a listed attribute that comes within the purview of the *Charter's* protection against discrimination. Further, ss 10, 13 and 15 had no application to the plaintiff's grievances in relation to the conduct of the Magistrates' Court proceeding.

The core of the plaintiff's complaint was that she was denied procedural fairness. Concluding that this complaint had merit, Incerti J considered the issue of procedural fairness together with the right under the *Charter* to a fair hearing, given their interconnectedness. Her Honour concluded that in the circumstances, the Magistrate had failed to provide the plaintiff a reasonable opportunity to oppose RMIT University's application, and failed in his duty to assist her in understanding the nature of the application being heard and in understanding the effect of the orders made. While the plaintiff had an opportunity to speak, it would have been clear to the Magistrate that the plaintiff was under a number of misapprehensions about the court procedure and legal principles at play, and required assistance to respond meaningfully to the application being heard. In respect of the ambiguity present in the orders made, her Honour noted it was the ordinary course to facilitate a party to re-plead pleadings that have been struck out. Quoting *Namberry Craft Pty Ltd v Watson* [2011] VSC 136, her Honour stated that the 'just resolution' of proceedings that is protected by s 24 of the *Charter* includes a proper opportunity being given to the parties to plead and re-plead their respective cases. It was her Honour's conclusion that it is difficult to consider a situation where a party, especially a self-represented litigant, could be denied a right to re-plead their case early in a proceeding without their right to a fair hearing under the *Charter* being violated. In conclusion, the Magistrate's failure to provide the requisite level of assistance to the plaintiff, as a self-represented litigant, the lack of time provided to the plaintiff to understand the hearing, the failure to facilitate an opportunity to advance her case and the ambiguity of the Magistrate's decision and orders was a denial of procedural fairness and natural justice, and constituted a breach of the plaintiff's right to fair trial under s 24 of the *Charter*.



Draper v Building Practitioners Board [2020] VSC 866

18 December 2020

Ginnane J

Charter provisions: ss 8, 24

Summary

The plaintiff sought an order that the the Building Practitioners Board, provide him with a further statement of reasons for a decision it had made determining allegations about building works performed for him by a builder. The plaintiff alleged that the building work was defective, and subsequently, that the Board's reasons for its decision in respect of the builder were inadequate. As well as seeking further reasons, the plaintiff alleged his *Charter* rights had been breached, namely ss 8 (recognition and equality before the law) and 24 (fair hearing).

Judgment

Ginnane J considered that the plaintiff was entitled to seek relief under the *Charter* because his claim for further reasons on the ground that the reasons provided did not comply with s 8 of the *Administrative Law Act 2678* was a non-*Charter* claim of unlawfulness within the meaning of s 39 of the *Charter*. However, the plaintiff's *Charter* arguments were relevant only insofar as they had a connection to the complaint about the adequacy of the reasons. The plaintiff submitted that the defendants had not treated him equally and had discriminated against him on the basis that he was not a registered building practitioner, referring to s 8 of the *Charter*. He also submitted that the defendants, together with VCAT, had breached his fair hearing right under s 24 by seeking to contest his proceeding, rather than acting as an unbiased and impartial contradictor assisting the Court.

Ginnane J concluded that there was no evidence that the plaintiff was discriminated against in connection with the first defendant's provision of reasons because of a protected attribute. Rather, it was the case that he was not a party to the Board's inquiry into the builder, and accordingly, the delay in providing reasons to the plaintiff and other complaints were properly attributable to that fact. Ginnane J was not satisfied that any *Charter* right had been breached in respect of the provision of reasons to the plaintiff. Further, the plaintiff was not entitled to rely on the right to a fair hearing in s 24 of the *Charter* as he was not a party to the Board's inquiry into the builder, even if the reference in s 24 to a 'civil proceeding' extended to include such an inquiry.



Goode v Common Equity Housing Ltd [2020] VSCA 317

9 December 2020

Priest and Beach JJA

Charter provisions: s 8

Summary

In this decision the Court of Appeal considered an application for an extension of time within which to seek leave to appeal. The decision of Ginnane J was to dismiss the applicant's appeal from the orders of Mukhtar AsJ who had, in turn, dismissed an appeal from an order of VCAT. The substance of the dispute was that the applicant contested an order made by VCAT giving the respondent, the applicant's landlord, possession on the basis of non-payment of rent. The application for leave to appeal (filed before her application for an extension of time within which to appeal) included grounds of appeal of 'Charter unlawfulness/Disability discrimination'.

Judgment

In dismissing the application for an extension of time on the basis that it was futile, the Court considered that the applicant's allegations of 'Charter unlawfulness' were utterly unfounded and should not have been made.



***Gebrehiwot v State of Victoria* [2020] VSCA 315**

8 December 2020

Tate, Kaye and Emerton JJA

Charter provisions: s 38

Summary

The applicant brought proceedings in the County Court against the State of Victoria claiming damages for battery and false imprisonment following an incident with officers of Victoria Police in which he was injured. The State admitted that force was used but relied on the defence that the police officers acted with lawful justification in accordance with s 462A of the *Crimes Act 1958*. The jury verdict was that the defence had been established by the police officers. The applicant sought leave to appeal against the jury verdict on grounds that the trial judge misdirected the jury by failing to give a direction in relation to the meaning of s 462A of the *Crimes Act*, and also sought leave to appeal against the trial judge's ruling that the issue of the compatibility of the police officers' conduct with the *Charter* was not to be left to the jury.

The applicant alleged 'police torts' had occurred, pursuant to s 74 of the *Victoria Police Act 2013*. Alternatively, the applicant claimed that the police officers had, in assaulting and falsely imprisoning him, acted incompatibly with his human rights in contravention of s 38(1) of the *Charter*. Specifically, the applicant alleged the police officers breached his rights under ss 8(3), 12, 21, 10(b) and 22(1) of the *Charter*. On the basis of these alleged breaches, the applicant sought aggravated and exemplary damages. This claim for exemplary damages was struck out by the judge before the trial began. Her Honour noted that the applicant had not submitted that damages were available for a breach of the *Charter* directly, but submitted that the *Charter* might be relevant in circumstances where breaches of it revealed the tortious conduct warranted condemnation. The trial judge also recorded that the applicant had made an alternate argument under the *Charter*, namely that the obligation under s 32 of the *Charter* to interpret all statutory provisions, as much as possible, compatibly with human rights, was engaged with respect to the statutory power to use reasonable and proportionate force. Accordingly, there was a relevant question as to what directions would need to be given to a jury in considering the interpretative obligation in connection with s 462A of the *Crimes Act*. In her ruling, without referring to s 462A of the *Crimes Act*, the primary judge rejected the proposition that *Charter* breaches would be relevant to the jury.



Judgment

The Court concluded that the trial judge had been correct in her conclusions as to the relevance of *Charter* breaches to the question of damages. Noting that s 39(3) of the *Charter* makes it clear that there is no entitlement to an award of damages by reason of a breach of the *Charter*, the Court stated that it followed that a breach of the *Charter* cannot be relied upon as a means of recovering damages either in respect of that breach or as a means of expanding the damages that might be awarded in respect of an independence cause of action, as such an expansion would ultimately derive from the *Charter* breach and that was prohibited. Section 38 of the *Charter* cannot be used as a basis on which to ground an entitlement to damages, including exemplary damages, or to expand an independently existing damages claim.

Their Honours concluded that the trial judge had erred in failing to direct the jury as to the elements of s 462A of the *Crimes Act*. Their Honours then turned to the applicant's alternate *Charter* submission, that any direction the judge gave to the jury about the meaning and application of s 462A in the circumstances had to be informed by an interpretation that was compatible with the human rights that were engaged. Noting that the State had conceded that the applicant's dignity right, for example, had been engaged, their Honours considered that a human-rights compatible interpretation of 'not disproportionate' in s 462A would have added a relevant consideration to the police officer's decision in the circumstances. Accordingly, the judge was incorrect to hold that s 32 of the *Charter* was irrelevant to the jury's deliberations. Section 32 was relevant as it may have affected the jury's consideration of whether s 462A applied in the circumstances. However, as the applicant's grounds of appeal did not include a ground identifying an error by the judge in the application of s 32 of the *Charter*, the determination of an interpretation of s 462A of the *Crimes Act* that is human rights-compatible, the Court concluded, must wait for another day.



***Fiore v Magistrates Court of Victoria* [2020] VSCA 314**

4 December 2020

Maxwell P, Kaye and Weinberg JJA

Charter provisions: ss 21, 32

Summary

The applicant sought leave to appeal against the dismissal of a proceeding he brought seeking judicial review of a decision of the Magistrates' Court to issue a warrant for his arrest in Western Australia.

The Magistrate had issued the warrant on the basis that they were satisfied by sworn evidence that it was 'required ... for other good cause' within the meaning of s 12(5)(c) of the *Criminal Procedure Act 2009*.

The principal question in the proceeding concerned the lawfulness of the decision to issue the warrant. The applicant contended that, on the proper construction of s 12(5), it was not open to the magistrate to be satisfied that the warrant was 'required for other good cause'.

The applicant submitted that the phrase 'other good cause' in s 12(5)(c) is confined to circumstances connected with ensuring an accused's attendance in court. The applicant submitted that the phrase 'or other good cause' constitutes a 'residual' or 'sweep up' category that is closely tied, in content, to the two preceding paragraphs. The applicant submitted that s 21(1) and s 32(1) of the *Charter*, the principle of legality, and the structure of s 12(4) and (5), compel such a construction.

Judgment

The Court of Appeal refused leave to appeal.

While considering the proper construction of s 12(5)(c) the Court acknowledged that, as statutory provisions providing a power of arrest necessarily impinge on the liberty of the subject, both the principle of legality and ss 21(1) and 32(1) of the *Charter* require that they are construed strictly. However, the Court was not persuaded that the phrase 'other good cause' in s 12(5)(c) must be confined to circumstances connected with ensuring an accused's attendance in court.

The Court identified three difficulties with the applicant's submissions. First, the applicant's construction ignored, and gave no effect to, the first part of s 12(5)(c), which contains the words 'a warrant is required or authorised by any other Act', a circumstance which is independent of, and distinct from, the circumstances identified in paragraphs (a) and (b). Secondly, the applicant's construction would deprive the phrase 'other good cause' of any content and would effectively render it otiose. Thirdly, the applicant's submission is that it was based on an incomplete conception of the purpose and function of the arrest power — the function and effect of the arrest of an accused person is to bring that person within the control of the court. While physical presence and attendance at court is central to that control, it is not the sole function, effect or purpose of an arrest.



***Loiello v Giles* [2020] VSC 722**

2 November 2020

Ginnane J

Charter provisions: ss 12, 21, 38

Summary

In this proceeding, the plaintiff sought judicial review of a curfew direction which formed part of the *Stay at Home (Restricted Areas) Directions (No 15)*, ('the Curfew') made by the defendant during the COVID-19 pandemic, as well as orders under the *Charter*. The Curfew was put in place pursuant to the *Public Health and Wellbeing Act 2008* ('*PWH Act*'). The plaintiff was a restaurant owner who said that her business income was drastically reduced following the *Stay at Home Directions* and the introduction of the Curfew. The plaintiff contended that the Curfew violated her rights under the *Charter* as discussed below. There was no doubt that the Curfew was an unprecedented and major restriction of human rights and liberties of the people of Victoria – the question before Ginnane J was whether it was a lawful and justified restriction under the *Charter*. The legality of the limitations and restrictions depended on whether the defendant established that they were reasonably proportionate to the objective of protecting public health.

There was also a question of the plaintiff's standing to bring the proceeding as, while the Curfew was in place when the plaintiff's proceeding was commenced, it was revoked hours prior to the commencement of the Court hearing.

Judgment

The defendant challenged the plaintiff's standing to bring the proceeding once the Curfew was revoked. The defendant argued the plaintiff was seeking a declaration in respect of a public right, and no longer had a special interest in the subject matter of the action giving her standing to bring the proceeding; as the plaintiff did not have standing to make the non-*Charter* claims, pursuant to s 39 of the *Charter*, she could not bring the *Charter* claims. Ginnane J concluded that the plaintiff did have standing to bring the proceeding as her private right to run her own restaurant business had been substantially and adversely affected by the Curfew. Accordingly, as she had standing to bring non-*Charter* claims, she had standing to bring *Charter* claims pursuant to s 39.

Section 38 of the *Charter* has two limbs, a substantive limb and a procedural limb: it is unlawful for a public authority to (a) act in a way that is incompatible with a human right, or (b) in making a decision, fail to give proper consideration to a relevant human right. Section 7(2) of the *Charter* provides that a human right may be subject only to such reasonable limits as can be justified, taking into account all relevant factors, including the purpose of the limitation, and any less restrictive means available to achieve that purpose.

The plaintiff contended that her human rights engaged by the Curfew were freedom of movement (s 12) and right to liberty and security of person (s 21). Ginnane J concluded that the human right of liberty recognised in s 21 of the *Charter* was not directly engaged, at least so far as the plaintiff was concerned. His Honour noted that that right was to liberty, to security, and not to be subject to arbitrary arrest or detention. His Honour considered that the right to come and go from your home as you choose, in human rights discourse, was more properly characterised as the right to freedom of movement under s 12. Therefore, he accepted that s 12 was engaged by the Curfew because it limited or restricted the right to move freely within Victoria. Ginnane J accepted that there may have been particular people whose right to liberty may have been limited by the Curfew because of their particular circumstances, but the plaintiff was not in that category.



Ginnane J concluded that both the substantive and procedural limbs of s 38(1) were engaged by the decision to enforce the Curfew, noting the decision and the subsequent act are connected, as the implementation of the decision may often involve an act or series of acts.

His Honour considered whether under the first limb of s 38(1) the defendant had established the limitations or restrictions imposed on the plaintiff's right to freedom were proportionate and therefore reasonably limited in accordance with s 7(2). His Honour referred to legal advice the defendant had received, which acknowledged the Curfew interfered with the rights to liberty and freedom of movement under the *Charter*, but concluded that the deprivation of liberty was not unlawful or arbitrary, as it addressed the needs of affected individuals through exceptions, and that the limitation was reasonably justified because the Curfew formed part of a vital suite of measures designed to limit community interaction and thereby minimise transmission of the virus. The advice also stated there were no less restrictive means reasonably available to achieve this purpose. Ginnane J concluded there were no other reasonably available means to achieve the purpose of reducing infections and that the defendant's evidence established the Curfew was reasonably necessary to protect public health. He found it relevant that the package of restrictions, including the Curfew, had reduced the spread of COVID-19, even though the defendant could not say that the Curfew itself reduced COVID-19 cases. His Honour considered other alternatives open to the defendant, such as revoking the curfew and continuing with the other *Stay at Home* restrictions, but noted there was no evidence that such a course would reduce new cases at the same rate. His Honour considered that in determining what means were 'reasonably available' it was appropriate to consider what means had been tried, what had followed, the urgency of the situation, and the risks if infection rates surged again.

The plaintiff also contended that the defendant did not properly consider her human rights before the Curfew direction was made – the procedural limb of s 38(1). This limb requires a decision maker to have seriously turned their mind to the possible impact of the decision on an affected person's human rights and the implications for that person and to identify the countervailing interests or obligations. Ginnane J noted there was a real question whether a health expert, such as the defendant, was able to properly balance the social and economic consequences of a decision primarily based on health considerations, however, the defendant was given that discretion under an Act of Parliament. His Honour considered that the evidence disclosed that the defendant gave primary consideration to health issues, which was the express subject matter that enlivened the exercise of her discretion under s 200(1)(d) of the *PWH Act*, but accepted that she also considered the human right advices which she had received. His Honour accepted that the defendant understood the rights of affected persons, turned her mind to the impact of the decision on human rights, identified countervailing interests and balanced private and public rights, but that she also considered the importance and purpose of the limitation, by giving primary attention to risks to public health from the spread of COVID-19. Her 'public health perspective using a precautionary approach' demonstrated proper consideration of relevant human rights. The plaintiff's proceeding was dismissed.



***Russell v Eaton* [2020] VSCA 249**

25 September 2020

Kyrou JA

Charter provisions: ss 8, 24

Summary

The applicant sought judicial review in the trial division of the Supreme Court of a decision of a County Court judge in a de novo appeal against his conviction for summary offences by the Magistrates' Court.

At a directions hearing on 26 April 2019, the trial division judge set the matter down for final hearing on 27 May 2019. In doing so, the judge refused the applicant's application for an adjournment. The applicant subsequently sought to have the trial judge recuse himself on the ground of apprehended bias. The applicant did not appear at the trial on 27 May 2019. The trial judge adjourned the trial, determined the proceeding on the basis of the written submissions already filed, and subsequently delivered reasons rejecting the applicant's claims and refusing to recuse himself.

The applicant sought leave to appeal on grounds which included that the trial judge's discretion to refuse to adjourn the final hearing miscarried and that the trial judge erred in failing to recuse himself after his conduct in the 26 April 2019 hearing.

The applicant contended that the judge's refusal of the application for an adjournment contravened the judge's duty to assist the applicant as a self-represented litigant and his human rights set out in ss 8(3) (discrimination) and 24(1) (fair hearing) of the *Charter*.

Judgment

Kyrou JA dismissed the application for leave to appeal determining that it was totally without merit.

Kyrou JA found that the trial division judge conducted the directions hearing in a manner that was consistent with his duty to assist the applicant as a self-represented litigant, stating that the judge was impartial, provided appropriate assistance to the applicant and afforded him a fair hearing.



Kyrou JA stated that s 24(1) of the *Charter* did not add anything of substance to the duties of the judge to be impartial, to assist the applicant as a self-represented litigant and to ensure that all hearings before the judge were conducted fairly to both parties.

Kyrou JA further observed that it was unclear why the applicant relied upon s 8(3) of the *Charter*, as he did not allege that the judge discriminated against him in any way. In any event, there was no evidence of any discrimination or non-compliance with s 8(3) on any other basis.



***WUT v Victoria Police* [2020] VSC 586**

11 September 2020

Ginnane J

Charter provisions: ss 8, 13, 15, 18, 24

Summary

In this proceeding WUT, whose name was anonymised due to a suppression order, sought leave to appeal a decision of VCAT affirming a decision of a delegate of the Chief Commissioner of Victoria Police. The delegate's decision refused WUT's application for the renewal of his Private Security Individual Operator Licence for the activity of investigator ('licence') under the *Private Security Act 2004* (Vic).

WUT raised 27 questions of law and related grounds of appeal including grounds which alleged that the Tribunal erred by failing to consider or apply ss 8, 13, 15, 18 and 24 of the *Charter*.

Judgment

Justice Ginnane was not satisfied that any of WUT's questions of law or proposed grounds established any error by the Deputy President or had any real prospect of success.

Justice Ginnane found that, as the Tribunal was making a binding and authoritative determination of legal rights and duties according to existing legal principles, the Tribunal was acting in a quasi-judicial, rather than administrative, capacity. The Tribunal was therefore not a public authority under s 38 of the *Charter* and, save as provided in s 6(2)(b), the *Charter* did not apply to it.

Section 6(2)(b) provides that the *Charter* applies to courts and tribunals, to the extent that they have functions under Part 2 ('Human Rights') and Division 3 of Part 3 ('Interpretation of law'). The Tribunal was therefore obliged to comply with ss 8 and 24 of the *Charter*, because they were functions under Part 2, and WUT had the right to be treated equally before the law and the right to a fair hearing.

Justice Ginnane found that WUT had not established that the Tribunal failed to comply with its obligation to assist him as a self-represented applicant, to know his rights and the relevant procedures. Further, that no submission was put which established that the Tribunal failed to provide WUT with equality before the law under s 8 of the *Charter*, and that the Tribunal did not breach s 24 of the *Charter* by conducting a formal trial and by not informing him of crucial evidence opportunities available to him.

As to WUT's reliance on ss 13, 15 and 18, Ginnane J noted that no detailed submissions were made as to how the Tribunal breached those rights and his Honour was not persuaded that it had.



McLean v Racing Victoria [2020] VSCA 234

10 September 2020

Tate, McLeish and Niall JJA

Charter provisions: s 32

Summary

The applicant was a racehorse trainer licensed by Racing Victoria Ltd and subject to the Rules of Racing. Victoria Police executed a search warrant of the plaintiff's property and discovered certain syringes. When those syringes were analysed, erythropoietin ('EPO') and equine DNA was detected. EPO is a Schedule 4 poison under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and also a prohibited substance under the Rules of Racing. Victoria Police wrote to Racing Victoria referring the information, as 'offences may have been committed against the Rules of Racing'.

In the letter disclosing the information to Racing Victoria, Victoria Police expressly relied upon Information Privacy Principle ('IPP') 2.1(e) of the *Privacy and Data Protection Act 2014* (Vic) as authorising the disclosure. IPP 2.1(e) provides that 'an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection', unless 'the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in ...'.

After being notified by Racing Victoria that there were reasonable grounds to suspect a breach of the Rules of Racing, the applicant sought injunctions in the trial division of the Supreme Court to restrain Racing Victoria from acting on the information provided by Victoria Police. The trial judge dismissed the proceeding, finding that the disclosure by Victoria Police to Racing Victoria was lawful and there was no basis for granting relief against either Victoria Police or Racing Victoria.

On appeal, the applicant relevantly contended that non-compliance with the Rules of Racing is not 'unlawful activity' within IPP 2.1(e). In particular, the applicant submitted that the phrase 'unlawful activity' is capable of being confined to a crime or breach of a statute and that, given that IPP 2.1(e) authorises disclosure of private information, the principle of legality and s 32 of the *Charter* required it to be read in this restricted way.

Judgment

Dismissing the appeal, the Court of Appeal held that the trial judge was correct to conclude that a contravention of the Rules of Racing was 'unlawful activity' for the purpose of IPP 2.1(e) and that, although the principle of legality and s 32 of the *Charter* would support a restricted reading of 'unlawful activity', there was no constructional choice to be made as it was clear that 'unlawful activity' extended beyond criminal conduct.



Carson (a pseudonym) v The Queen [2020] VSCA 202

7 August 2020

Priest, Kyrou and T Forrest JJA

Charter provisions: s 27

Summary

The applicant was committed to stand trial in the County Court on charges of incest and attempted incest between 1978 and 2013. An investigation into his fitness to be tried was conducted in accordance with ss 11-12 of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* ('CMI Act') and a jury found the applicant unfit to be tried. Given that finding, s 12(5) of the CMI Act required the Court to hold a special hearing within three months.

The special hearing was listed to proceed on 27 April 2020, prior to the expiration of the three month 'deadline'. The special hearing, as then contemplated by the CMI Act, was to be by judge and jury. However, prior to the date listed for the special hearing, all jury trials in the state were halted in light of the COVID-19 pandemic.

On 25 April 2020, the *COVID-19 Omnibus (Emergency Measures) Act 2020* ('OEM Act') which introduced a number of provisions to the CMI Act in response to the pandemic, came into operation. Those measures included CMI Act s 95 which applied, instead of s 12, 'to an investigation into the fitness of an accused to stand trial', and s 91(6) which provided a 6-month period in which a special hearing could be held. Section 101 also made provision for the Court to order that a special hearing be conducted by judge alone.

On 24 April 2020 the County Court invited the parties to provide written submissions in relation to the further conduct of the matter. Following the Court's invitation, the applicant sought to challenge the validity of s 95(6) of the CMI Act and objected to the special hearing being set down for determination by a jury on any date after 3 May 2020. Judge Davis found that the newly inserted s 95(6) of the CMI Act was valid, and resolved to proceed with the special hearing before a jury on 20 July 2020.

After it had become apparent that it was unlikely that it would be possible to empanel a jury for the special hearing, Judge Higham allowed an application by the prosecution that the special hearing be conducted by judge alone.

The applicant sought leave to appeal against each of those rulings. The applicant contended that Judge Davis erred in failing to consider s 27 of the *Charter* when construing s 95 of the CMI Act and when listing the special hearing for determination on 20 July 2020.

Section 27(1) of the *Charter* provides that a person 'person 'must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in'. And s 27(2) of the *Charter* provides that a penalty 'must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed'.

Judgment

The Court of Appeal refused leave to appeal against both rulings.

The Court rejected the applicant's arguments that Judge Davis erred in failing to consider s 27 of the *Charter* finding that section had no application to the applicant's case as incest and attempted incest were criminal offences at the time of the relevant alleged conduct and a finding under s 17(1)(c) of the CMI Act neither permits a person to be found guilty of an offence, nor exposes the accused who is unfit to be tried to any 'penalty'.



The Court also held that s 121(2) of the CMI Act provides in the clearest terms that s 95 of the Act — which makes s 12(5) inapplicable in a situation such as the applicant's — applies even if an accused person has already been found unfit to stand trial. As no other interpretation was open on the language of the provision, s 32 of the *Charter* could not require any different interpretation.



Dudley v A Judge of the County Court of Victoria

[2020] VSCA 179

2 July 2020

Priest and Kaye JJA

Charter provisions: s 21

In this decision the Court of Appeal considered an application for an extension of time within which to seek leave to appeal from a decision of a trial division judge. The trial judge had declined to direct the Prothonotary to seal the applicant's proposed originating motion, by which he sought to issue a writ of habeas corpus and sought a declaration or order under s 21(7) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The trial judge considered the proposed proceeding would be an abuse of process for two reasons. First, it would seek to re-litigate matters which had already been decided by the Court in an earlier proceeding. Secondly, the proposed proceeding had no reasonable prospects of success as the writ of habeas corpus, and s 21(7) of the *Charter*, had no application where the applicant was lawfully imprisoned by an order of the County Court.

The Court of Appeal determined the proposed proceeding would be an abuse of process because it sought to rely on grounds already litigated, and declined to grant an extension of time within which to appeal. The *Charter* was not discussed further.



***Knight v Sellman* [2020] VSC 320**

5 June 2020

Cavanough J

Charter provisions: s 24

Summary

The plaintiff is a prisoner at Port Phillip Prison who, in 2004, was declared a vexatious litigant pursuant to the *Vexatious Proceedings Act 2014* (Vic) ('VPA'). He is unable to commence legal proceedings in a Victorian court or tribunal without prior leave. The plaintiff sought leave from Cavanough J to commence a proceeding; the proposed claim was for an injunction mandating that the manager of the prison provide him with computer access (or greater computer access). This proposed claim was similar to many prior, unsuccessful applications by the plaintiff.

The plaintiff's principal argument was that he had a 'common law right of unimpeded access to the courts' and an equivalent right under s 24 of the *Charter*. The effect of his argument was that these rights were unlawfully denied to him if the authorities placed any limit on his computer access and there was a corresponding impact on his ability to access the courts. Notwithstanding that the plaintiff only mentioned the *Charter* once in his submissions (to the effect that his claim for relief was based neither in the *Corrections Act 1986* (Vic) nor the *Corrections Regulations 2019*, but in the common law and s 24 of the *Charter*), Cavanough J addressed the *Charter* and had regard to relevant Victorian authorities not cited by the plaintiff.

Judgment

His Honour noted that courts do not have jurisdiction or power to grant an injunction unless the plaintiff can establish a relevant cause of action which is enforceable by injunction. He considered that, having regard to relevant authorities, the Court would have no jurisdiction to entertain the plaintiff's proposed claim for an injunction insofar as it was based on an asserted free-standing 'common law right of unimpeded access to the courts'. This was because the 'right to a fair trial' and the 'right of access to the courts' are not unitary, coextensive or overlapping rights, rather they describe a range of elements understood to be inherent requirements of a common law system, which can nevertheless be qualified to a reasonable extent by statutory regulation. This is particularly so in a custodial setting where there is a need for the enforcement of security.

Turning to the *Charter*, s 24 provides that a person has the right to a fair hearing. Cavanough J assumed in favour of the plaintiff, without deciding, that s 24 of the *Charter* included 'the right of access to the courts' and that this right was potentially enforceable against a public authority in accordance with ss 38-39 of the *Charter*, even by way of injunction. However, his Honour referred to s 7(2) of the *Charter* to conclude that, as with the corresponding common law right, the right acknowledged by s 24 of the *Charter* 'will always be qualified in substantial respects in relation to a prisoner'. Therefore, any common law right or unimpeded access to the courts, or any similar right under the *Charter*, was not absolute, but was subject to relevant statutory provisions and to administrative decisions lawfully made under such statutory provisions, including relevant provisions of the VPA. Cavanough J concluded that, in any event, the necessary factual foundation for an injunction to enforce the right asserted by the plaintiff pursuant to the *Charter* had not been established.

His Honour further noted that any claim to enforce the relevant right (whether under the *Charter* or at common law) should be made to the court or judge responsible for that substantive matter (i.e. the proceeding for which the plaintiff asserted he needed access to computers / the court). It is a matter for the



trial judge to determine whether the court should intervene to obtain greater computer access - the appropriate forum for ensuring that a defendant had a reasonable opportunity to prepare for trial is the trial court.



***Zhong v Attorney-General* [2020] VSC 302**

29 May 2020

Croucher J

Charter provisions: ss 8, 21, 24, 25, 38

Summary

The matter has a long history. In 2001, Mr Zhong was sentenced to six years' imprisonment for inciting a third party to murder his de facto wife. He unsuccessfully sought leave to appeal against his conviction. Despite his release on parole in 2004 and the expiry of his head sentence in 2006, Mr Zhong has continually sought to clear his name. He applied for special leave to appeal to the High Court, but that was refused. Having exhausted his appellate rights, Mr Zhong in 2010 filed a petition for mercy with the A-G requesting that his case be referred to the Court of Appeal pursuant to s 327(1)(a) of the *Criminal Procedure Act 2009* (Vic) ('CPA'). Despite the denial of this petition in 2012, Mr Zhong continued to seek from the A-G reconsideration of his petition. In 2018, Mr Zhong sought judicial review of the A-G's decision in the Supreme Court. The proceedings settled with the A-G agreeing to 'consider, according to law, including the [*Charter*]' Mr Zhong's 2018 petition. In 2019, however, Mr Zhong was advised by the A-G that she had declined to refer his case to the Court of Appeal. The matter before Croucher J was Mr Zhong's application for judicial review of this most recent decision.

Mr Zhong relied on a collection of asserted breaches of *Charter* rights. Mr Zhong submitted that his human rights under s 8 (equality before the law), s 21 (the right to liberty), s 24 (the right to a fair hearing) and s 25 (rights in criminal proceedings) of the *Charter* were breached at trial and ignored by the A-G, despite her obligation pursuant to s 38 of the *Charter* to give proper consideration to those matters in reaching her decision. Mr Zhong submitted that the most important violation of his rights in criminal proceedings (s 25) was that his verdict was not reached according to law. Mr Zhong further submitted that he was entitled to receive reasons for the A-G's refusal to refer his case to the Court of Appeal, but never received any.

The A-G, on the assumption that her decision was reviewable, accepted s 38 of the *Charter* applied, so that in making her decision whether to refer Mr Zhong's case to the Court of Appeal, she was to give proper consideration to his relevant human rights. However, the A-G submitted there was nothing to suggest she had failed to do so.

Croucher J considered that insofar as Mr Zhong may have been taken to have made an application under s 33 of the *Charter* (which permits questions of law or interpretation with the respect of the *Charter* to be referred to the Court of Appeal), it was not necessary or appropriate for any *Charter* question at that stage to be referred to the Court of Appeal for determination.

Judgment

His Honour noted that Mr Zhong presented points already made under other grounds of review as if the complaints could be regarded as 'enhanced' or having 'greater force' by reason of being tied to a human right protected under the *Charter*. Whether or not that was the case, Croucher J concluded that, on the facts of the matter before him, there was no suggestion that the A-G had failed to consider Mr Zhong's human rights in deciding whether to refer his case under s 327(1)(a) of the CPA.

Further, his Honour accepted the A-G's submissions that the A-G was not required under the *Charter* to give reasons to Mr Zhong. While the A-G was a public authority to whom the *Charter* applied, none of the human rights conferred by the *Charter* required the A-G to give reasons for her decision. Moreover, referring to relevant authority, there was no failure to accord natural justice in failing to provide reasons for administrative decisions.



Ultimately, Croucher J was satisfied that none of Mr Zhong's grounds could succeed, and dismissed each of his applications.



Gardiner v Attorney-General (No 2) [2020] VSC 252

7 May 2020

Richards J

Charter provisions: ss 7, 19, 38

Summary

The Attorney General ('A-G') entered into a Recognition and Settlement Agreement ('RSA') with the Taungurung Land and Waters Council ('Council') under the *Traditional Owner Settlement Act 2010* (Vic) ('TOS Act'), pursuant to which the traditional owner rights of the Taungurung in relation to a certain area of land were recognised. In order to enter into the RSA, the Council had prepared and provided to the A-G documents which set out the grounds of its claim to the relevant land area. The plaintiffs were Aboriginal elders of the Ngurai Illum Wurrung and the Waywurru groups, who disputed that the Taungurung were traditional owners of the entire area covered by the RSA. Accordingly, the plaintiffs sought judicial review of the A-G's decision to enter into the RSA, and also sought declarations that the decision to enter into the RSA was unlawful and incompatible with their cultural rights protected by s 19(2) of the *Charter* (the '*Charter* claim').

The plaintiffs sought leave to file a further amended originating motion including three new grounds of review. The A-G opposed the amendment application, and further contended that the plaintiff's *Charter* claim should be struck out or summarily dismissed.

The A-G argued that:

- Section 19(2) of the *Charter* recognises that Aboriginal persons have cultural rights, but it does not confer a basis for the resolution of disputes between Aboriginal groups;
- The Court could not be satisfied that the decision to enter into the RSA engaged or limited the plaintiff's s 19(2) rights, because that would require the Court to find that they had traditional owner rights in respect of the disputed areas (which would be impermissible merits review, rather than judicial review); and
- The *Charter* claim would necessitate the A-G putting on evidence to justify the determination made, which would be extensive and would replicate aspects of a contested native title hearing, which the TOS Act is designed to avoid.

Judgment

Richards J declined to summarily dismiss or strike out the plaintiffs' *Charter* claim.

First, her Honour noted that because the A-G had not contended the decision was not justiciable, there was no suggestion that the decision was not amenable to judicial review. Because judicial review remedies were available to the plaintiffs, so too were *Charter* remedies, pursuant to s 39 of the *Charter*.

Second, her Honour considered that the cultural rights protected by s 19(2) of the *Charter* did not correspond exactly with the rights of traditional owners recognised by the TOS Act. Richards J canvassed the limited authority on the content and operation of s 19(2) of the *Charter*, and concluded that there was a real question whether a finding by the A-G that a group of Aboriginal persons was a traditional owner group for an area of land for the purposes of the TOS Act, was determinative of whether other Aboriginal persons enjoyed rights under s 19(2) of the *Charter* in relation to that area. Her Honour considered that question was not suitable for summary determination,



Third, if the plaintiffs were able to establish that they had cultural rights under s 19(2) of the *Charter*, and that the A-G's decision limited those rights, the burden would shift to the A-G to demonstrate that the limit was justified under s 7(2) of the *Charter*.

Fourth, the plaintiffs also relied on the procedural limb of s 38(1) of the *Charter*, arguing that the A-G did not give proper consideration to their rights under s 19(2). The A-G did not contend this argument had no prospect of success, but rather that it required particularisation.

Fifth, her Honour did not consider the *Charter* claim should be summarily dismissed merely because substantial evidence may need to be called to determine difficult questions of fact.

Her Honour noted that while a review for unlawfulness under ss 7(2) and 38(1) of the *Charter* may delve deeper into the facts and can appear closer to a merits review than traditional judicial review, 'the jurisdiction remains supervisory, not substitutionary'.

Richards J concluded that, while the plaintiffs' *Charter* claim presented some case management challenges and required further particularisation, it had not been established that the *Charter* claim had no real prospect of success.



Haigh v Ryan (in his capacity as Governor of Barwon Prison) [2020] VSC 102

5 March 2020

Cavanough J

Charter provisions: ss 13, 14, 15

Summary

The plaintiff was a prisoner at Barwon Prison who was serving a life sentence. The defendant was the Governor and General Manager of Barwon Prison. On 7 March 2018 a prison officer acting under the delegation of the defendant stopped a letter that was written by the plaintiff from being sent. The intended recipient of the letter was an evangelical Christian organisation known as ‘Tomorrow’s World’. The organisation produced a television program.

On 20 April 2018 the plaintiff commenced a proceeding in the Supreme Court seeking judicial review of the decision of the prison officer. The asserted basis for the review was that the decision had been made in accordance with an alleged prison policy imposing a ‘blanket ban’ on prisoners communicating with the media. The policy was said to conflict with prisoners’ rights under s 47(1)(n) of the *Corrections Act 1986* (‘the Act’) and with prisoners’ human rights under the *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’).

In affidavit evidence adduced in the proceeding, it became apparent that the plaintiff had circumvented the decision of the prison officer by getting his friend to send the relevant letter prior to the commencement of the proceeding. Despite this, the plaintiff did not discontinue the proceeding. The defendant then formally reversed the decision which had been made on 7 March 2018, and conceded in a later letter that the decision was affected by jurisdictional error. The error identified was not giving proper consideration to the plaintiff’s *Charter* rights.

The plaintiff discontinued the part of his claim seeking to have the original decision quashed, but maintained an application for certain declarations. Those declarations concerned amongst other things, the interaction between the right of a prisoner to send and receive letters to certain persons under s 47(1)(m) of the Act (subject to exceptions) and *Charter* rights. The specific *Charter* rights identified were the right to privacy (s 13), the right to freedom of expression (s15(2)(b)(c)) and the right to freedom of thought, conscience, religion and belief (s 14).

Judgment

Cavanough J noted that the some of the plaintiff’s submissions raised ‘difficult and interesting questions about the interaction between [the Act] and the *Charter*’. However, given that the principal subject matter of the proceeding – the decision by the prison officer — was no longer in existence, any declaration would be purely academic. As such it was not appropriate for the Court to consider the legal issues and make the declarations that the plaintiff sought.



Marijancevic v Page [2020] VSC 68

28 February 2020

Richards J

Charter provisions: s 24

Summary

The Magistrates' Court convicted the plaintiff of driving a motor vehicle on a highway while his licence was suspended and for failing to produce a licence when requested. The plaintiff then appealed to the County Court. There, he filed a subpoena addressed to the Director, Customer Service of the Roads Corporation of Victoria ('VicRoads'). VicRoads successfully applied to have the subpoena set aside and the plaintiff then abandoned his appeal. The County Court made orders striking out the appeal, setting aside the subpoena and for costs in favour of VicRoads.

The plaintiff commenced proceedings in the Supreme Court seeking judicial review of the orders of the County Court; he argued that he did not receive a fair hearing.

Judgment

Richards J stated that the 'fair hearing of a proceeding, whether civil or criminal, is a basic common law right that is now also protected by s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Her Honour also noted that depending upon the circumstances of the case, different measures may be necessary to give practical effect to the right, and where a party is unrepresented, 'a judge must do what is required "to give the unrepresented person a reasonable opportunity to advance his/her own case and to be informed of and respond to the opposing case"'. In the circumstances, the fair hearing ground was not made out as the plaintiff was able to formulate and articulate the legal argument he wished to put concerning the subpoena.



***Clubb v Edwards* [2020] VSC 49**

19 February 2020

Kennedy J

Charter provisions: ss 12, 15, 32

Summary

The appellant was convicted in the Magistrates' Court for engaging in conduct contrary to s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('the Act'). That section prohibited 'communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety', within safe access zones. A safe access zone was defined as an area within a 150m radius from premises at which abortions are provided. The evidence showed the appellant, with pamphlets in hand and at a distance of approximately 5m from the entrance to a clinic, approaching a young couple who were attempting to enter the clinic.

An appeal was commenced in the Supreme Court of Victoria relying upon three grounds. Two of those grounds were constitutional challenges asserting that s 185D was an impermissible burden on the implied freedom of political communication and was removed to the High Court of Australia. The High Court determined that the provision was justified by a legitimate purpose. The remaining ground, which was heard before Kennedy J in the Supreme Court, asserted that the magistrate erred in law in convicting the appellant.

The appellant argued that ss 12, 15 and 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') required s 185 of the Act to be construed strictly. Those sections provide for the freedom of movement (s 12), freedom of expression (s 15) and that so far as it is possible to do consistently with their purpose, that all statutory provisions should be interpreted in a way that is compatible with human rights (s 32).

The first respondent submitted that ss 12 and 15 of the *Charter* may be subject to reasonable limitations pursuant to s 7(2). And, further, that freedom of expression may be subject to lawful restrictions necessary to respect the rights and reputation of other persons or for the protection of public order or public health (s 15(3)). According to the first respondent, s 185D struck the appropriate balance between the rights identified by the appellant, as well as the right of a person not to have their privacy unlawfully or arbitrarily interfered with (s 13), and in any event, the provision must be interpreted according to the ordinary techniques of construction.

Judgment

Kennedy J generally accepted the submissions of the first respondent. More particularly, her Honour noted that 'although statutory provisions must be interpreted in a way that is compatible with human rights', that was so 'far as it is possible consistently with their purpose'. In the circumstances, the purpose s 185D was said to be elucidated by the consideration of the High Court. In this regard, her Honour had earlier quoted the High Court and the second reading speech for the Bill introducing the offence when discussing the protective purposes of the provision. The High Court stated:

It is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is apt to be most effective to deter those persons from making use of the facilities available within the safe access zones.

Ultimately, her Honour dismissed the appeal.



North (a Pseudonym) v The Queen [2020] VSCA 1

9 January 2020

Priest and Weinberg JJA

Charter provisions: s 25

This appeal concerned an application to review a County Court Judge’s determination they did not need to certify an interlocutory decision under s 295(3) of the *Criminal Procedure Act 2009* (Vic) and an appeal against the same judges’ interlocutory decision to not recuse himself on the ground of apprehended bias. The Court determined that both of the County Court Judge’s decisions were correct, refused the application and did not grant leave to appeal.

The *Charter* is only mentioned briefly in recounting the procedural history of the matter before the County Court Judge. At mention, the applicant’s counsel submitted that the prosecution should be precluded from including further indictments on the applicant’s charge sheet, this being contrary to s 25(2)(c) of the *Charter*. The prosecution had at the time of this judgment been granted numerous extensions of time to settle the pleadings against the defendant. The *Charter* is not discussed further.



Austin v Dwyer & Anor [2019] VSC 837

20 December 2019

Forbes J

Charter provisions: ss 8, 24, 39

Summary

From August 2016 personal safety interventions orders had been taken out against Ms Austin by a former student, based on alleged behaviour going back to 2014 ('the private intervention order'). In June 2019 Victoria Police applied to revoke the private intervention order and to substitute Detective Sergeant Dwyer as the applicant for intervention on a substantially identical intervention order. This course was adopted because the existence of the private intervention orders had led to a number of appeals and judicial review proceedings and police described the ongoing service of documents as a continuation of the harassment.

On 14 June 2019, the Magistrates' Court made orders revoking the private intervention order and granting an intervention order on the application Detective Sergeant Dwyer.

On 11 June 2019, Ms Austin had emailed the Magistrate's Court a summons and affidavit in support seeking that the private intervention order be stayed. At the 14 June 2019 hearing, the Magistrate refused to hear the stay application as it was not made on notice.

Ms Austin sought judicial review of the Magistrate's decision on a variety of grounds. Relevantly, Ms Austin contended:

- permit her the right to seek relief, being a stay of proceedings, pursuant to s 39 of the *Charter* (ground 4);
- that the Magistrate's failed to act in a non-discriminatory manner toward her was a breach of her rights under s 8 of the *Charter* (ground 7); and
- that the Magistrate's failure to conduct the proceedings in a competent, independent, impartial and fair manner, was a denial of her rights under s 24 of the *Charter* (ground 8).

Judgment

Forbes J held that none of Ms Austin's grounds of review were made out and no error of law was demonstrated.

For the purposes of ground 4, Forbes J stated that s 39 of the *Charter* did not apply to the decision of the Magistrate as in hearing and determining applications pursuant to the Personal Safety Intervention Order Act 2010 the Magistrate was acting in a judicial capacity and even though he did not deal with the merit of Ms Austin's stay application, only the question of whether or not it could be heard on that day, he was nevertheless acting judicially and not administratively.

Ground 7 was said to be based upon based upon comments that the Magistrate made about Kaniva where Ms Austin lives. Forbes J held that Ms Austin failed to demonstrate either that the comments made by the Magistrate were discriminatory at all or were discriminatory in a prohibited way.

In relation to ground 8, Forbes J stated that Ms Austin's submissions failed to point to a lack of impartiality or independence in the hearing itself.



Goode v Common Equity Housing Ltd [2019] VSC 841

19 December 2019

Ginnane J

Charter provisions: ss 24, 38

Summary

Ms Goode had lived in a property, as a tenant of a co-operative housing body, for more than 25 years. VCAT found that Common Equity Housing Ltd ('CEHL') was Ms Goode's landlord. However, Ms Goode did not consider that she could or should pay the rent to CEHL and for the last 5 years had been paying the rent into the bank account of another entity, Access Common Equity Rental Cooperative Ltd ('Access CERC'). Access CERC had requested that Ms Goode cease making the deposits and all attempts to return the deposits had been refused.

On 7 March 2016, VCAT ordered that CEHL was entitled to a possession order and that Ms Goode had to vacate the premises. On 21 March 2016, VCAT heard an application for review of this order. VCAT granted a stay of the possession order on the condition that Ms Goode pay the arrears of the rent to CEHL, and adjourned Ms Goode's application for re-hearing.

That matter was again heard by VCAT on 3 May 2016, Ms Goode had not paid the arrears of rent and was not present when the hearing commenced. During the hearing Ms Goode arrived and, on her request, was granted time to speak to a duty lawyer. A duty lawyer appeared for Ms Goode and asked for an adjournment to explore the possibility of coming to an alternative arrangement. The VCAT member refused an adjournment and affirmed and upheld the possession order.

On 25 November 2016, an Associate Justice refused Ms Goode's application for leave to appeal the VCAT decision of 3 May 2016 and ordered that her originating motion be dismissed. Ms Goode appealed against these orders. Ms Goode submitted that VCAT had failed to comply with s 38 of the *Charter* and/or had failed to afford her a fair hearing as required by s 24 of the *Charter*.

Judgment

Ginnane J dismissed Ms Goode's appeal.

Ginnane J stated that the Tribunal Member and the Associate Justice gave proper consideration to Ms Goode's right to a fair hearing. Ms Goode had not established any error by the Associate Justice in dealing with the existence of any question of law concerning her *Charter* rights, including her right to a fair hearing before VCAT, nor did VCAT fail to comply with s 38 of the *Charter* or fail to afford her a fair hearing. His Honour stated that VCAT had adjourned the proceeding on 21 March 2016 to enable Ms Goode to make arrangements for rent to be paid, and there was no real purpose in adjourning the matter further.



Fidge v Municipal Electoral Tribunal & Anor (No 2) [2019] VSC 767

28 November 2019

Ginnane J

Charter provisions: ss 33, 36

Summary

The plaintiff commenced two proceedings in the Supreme Court, the first was whether VCAT had erred in not referring a question to the Supreme Court and had otherwise breached its obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the *Charter*'). The Attorney-General was joined as a respondent to the proceedings under s 34 of the *Charter*.

The plaintiff was unsuccessful in the proceedings (see *Fidge v Municipal Electoral Tribunal* [2019] VSC 639), and the Attorney-General applied for her costs to be paid by the plaintiff.

On the issue of costs, the plaintiff argued that the *Charter* was a special piece of legislation and that Parliament contemplated that public interest litigation could occur raising issues concerning its operation. In the circumstances, he had sought a decision for the broader public interest, to enliven the dialogue of rights protection, to contribute to the ongoing review and reform of the *Local Government Act 1989* ('the Act'), and to address what he considered to be an injustice in the Act. As such, the plaintiff submitted that each party should bear their own costs.

The Attorney-General submitted that even if the litigation was in the public interest, the usual order as to costs should apply. The proceeding brought by the plaintiff was not a test case, nor did it raise any issue of wide legal importance.

Judgment

Ginnane J held that the first proceeding raised the important issue of the scope of the power in s 33 of the *Charter* and 'the pathway by which a person can seek a declaration in inconsistency under s 36'. This was in the context of the only detailed authority on the issues being *Momcilovic v R* (2011) 245 CLR 1, which is of uncertain effect. Moreover, the plaintiff sought to engage his human right to take part in public life, specifically surrounding the application of that right to municipal countback elections. Although a legislative change reflecting the plaintiff's views had been recommended by a review panel, the associated Bill had lapsed. Overall, Ginnane J concluded that it was appropriate for the parties to bear their own costs in the first proceeding.

Regarding the second proceeding, which concerned the constitutional validity of provisions of the Act, Ginnane J found in favour of the Attorney-General.



McLean v Racing Victoria Ltd [2019] VSC 690

18 October 2019

Richards J

Charter provisions: ss 13, 32

Summary

The plaintiff was a racehorse trainer licensed by Racing Victoria Ltd and subject to the Rules of Racing. Police executed a search warrant of the plaintiff's property and discovered certain syringes. When those syringes were analysed, erythropoietin ('EPO') and equine DNA was detected. EPO is a Schedule 4 poison under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and also a prohibited substance under the *Rules of Racing*. Victoria Police wrote to Racing Victoria referring the information, as 'offences may have been committed against the Rules of Racing'. The information was purportedly disclosed under Information Privacy Principle (IPP) 2.1(1) under the *Privacy and Data Protection Act 2014* (Vic) ('the Privacy Act'). After being notified by Racing Victoria that there were reasonable grounds to suspect a breach of the Rule of Racing, the plaintiff sought injunctions in the Supreme Court to restrain Racing Victoria from acting on the information provided by Victoria Police.

An issue that arose was the interpretation of Information Privacy Principle ('IPP') 2.1(e) of the Privacy Act, which provided that 'an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection', unless 'the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in ...'.

The plaintiff argued that 'unlawful activity' should be read to mean 'criminal activity', relying upon the principle of legality and the ss 13(a) and 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). Section 13(a) of the Charter provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with, while s 32(1) states that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.

Judgment

Richards J accepted that s 32 of the Charter would support a construction of 'unlawful activity' in IPP 2.1(e) that least interfered with personal privacy if there was a constructional choice to be made. However, her Honour was not persuaded that it was possible to limit the phrase to criminal activity. In reaching this conclusion Richards J reasoned, amongst other things, that the right to privacy in s 13 of the Charter was not paramount. Rather, parliament had provided that the right could be limited 'in a way that is proportionate to a legitimate aim'. In this regard, the Privacy Act represents a careful balancing of competing public interests, including the interest in the free flow of information and the interest in protecting privacy. Ultimately her Honour concluded that the disclosure of the information by Victoria Police was authorised under IPP 2.1(e).



***Hague v The Queen* [2019] VSCA 218**

3 October 2019

Ferguson CJ, Niall and Weinberg JJA

***Charter* provisions: s 24**

This case concerned applications for leave to appeal against the applicant's conviction and sentence for murder. The grounds of appeal against conviction included that the trial judge was wrong to refuse the application to stay the indictment as an abuse of process.

The Court of Appeal refused the applications for leave to appeal. While considering the abuse of process ground, the Court acknowledged that s 24 of the *Charter* provides that a person charged with a criminal offence has the right to have the charge decided after a fair and public hearing.



Fidge v Municipal Electoral Tribunal [2019] VSC 639

20 September 2019

Ginnane J

Charter provisions: ss 6, 18, 24, 33

Summary

The plaintiff stood for election in a 2016 general council election alongside nine other candidates. Four positions were available on council and in order to be elected, a candidate had to obtain 1,971 votes. After first preference votes were counted, the candidate with the fewest votes was excluded and their votes redistributed in accordance with second preferences. This process continued until five candidates had been excluded, and four candidates were elected. After preferences were counted, the plaintiff came in fifth place with 1,271 first preference votes and 1,734 votes after redistribution. On account of the four successful candidates each reaching 1,971 votes before the plaintiff was formally excluded, he was neither elected nor excluded.

In 2017, one of the successfully elected councillors died, creating a vacancy in her seat. In accordance with the *Local Government Act 1989* ('the Act') a countback election was conducted, adopting procedures as set out in Schedule 3A of the Act. Pursuant to this process, the 1,971 votes that the councillor who died received in 2016 were redistributed in order of the participating countback candidates –the unsuccessful candidates for the 2016 election who remained eligible to stand. If none of the countback candidates had an absolute majority, the candidate with the lowest vote was excluded, and their votes redistributed in order of next preferences. At the end of this process, a candidate who received less first preference (876) and less preference votes (1,296) than the plaintiff overall in the 2016 election was successful in the 2017 countback election. This occurred in part because the plaintiff had never been formally excluded in the 2016 election, so none of his first preference votes were redistributed to the councillor who died, which meant that they did not flow back to him in the 2017 countback election.

The plaintiff accepted that the countback election was conducted in accordance with the procedures under the Act. However, he challenged the procedures both in the Municipal Electoral Tribunal ('MET') and at the Victorian Civil and Administrative Appeals Tribunal ('VCAT') claiming that the relevant provisions were contrary to the *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter') and the constitution. He sought to have those issues referred to the Supreme Court under s 33 of the Charter. Section 33(1) of the Charter provides that upon an application, a court or tribunal can refer to the Supreme Court a question of law relating to the application of the Charter or relating to the interpretation of a statutory provision in accordance with the Charter, if it considers it appropriate for determination by the Supreme Court.

The MET dismissed the plaintiff's application because the relevant procedures under the Act had been followed. The plaintiff sought review of the MET's decision in VCAT, and also applied for referral to the Supreme Court in order to argue that the countback provision of the Act could not be interpreted consistently with s 18 of the Charter. Section 18(2)(a) provides that '[e]very eligible person has the right, and is to have the opportunity, without discrimination – to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors'. The question sought to be referred was [a]re sections 11 and 12 of Schedule 3A of [the Act] capable of being interpreted compatibly with the human rights contained in sections 18 of [the Charter]'. [20].

VCAT refused to refer the question to the Supreme Court under s 33 of the Charter and otherwise dismissed the proceeding. The Deputy President determined that if the question were referred it would have no bearing on the proceeding. That is, a declaration of inconsistent interpretation would not affect the validity of the countback provisions for the purposes of the proceedings before VCAT. Further, that the concerns raised by the plaintiff were known and being considered by the legislature, and that nothing more would be



served by the Supreme Court making a declaration of incompatibility. In this regard, the Deputy President relied upon *De Simone v Bevnol Constrictions and Developments* (2010) 30 VR 200 in which the Court of Appeal declined to express an opinion on a referred question because the question was not conditioned on any facts found or assessed or any conclusion of law. Instead, it asked a purely hypothetical question and would not determine the issue between the parties.

The plaintiff then appealed to the Supreme Court arguing that VCAT erred in law by not referring the question, and that VCAT breached s 6(2)(b) of the *Charter* by failing to apply the rights relevant to the exercise of its function. Regarding the former, he asserted that VCAT erred by:

- taking into account irrelevant considerations in that the question was ‘purely hypothetical’;
- failing to take into account the importance of the *Charter* dialogue; and
- implicitly finding that there was no evidence that the plaintiff’s rights or interests were affected.

Section 6(2)(b) of the *Charter* provides that the *Charter* applies to courts and tribunals to the extent that they have functions under Part 2 (which sets out the human rights parliament seeks to protect and promote) and Division 3 of Part 3 (concerning interpretation of laws). The plaintiff argued that in failing to refer the question to the Supreme Court, VCAT did not apply the right to recognition and equality before the law (s 8), the right to have a proceeding decided by a competent, independent, and impartial court or tribunal after a fair and public hearing (s 24) or the right to take part in public life (s 18).

The Attorney-General joined the proceeding as a respondent under s 34 of the *Charter*.

Judgment

Ginnane J viewed the discretion given to VCAT in s 33 as particularly important. As opposed to the conferral of a duty, the Deputy President had a choice to exercise in accordance with the purposes of the *Charter*. In reviewing the decision of the MET, VCAT was obliged to apply the provisions of the Act and affirm the MET’s decision. There was no dispute about the application of the provisions. As such, the Deputy President was correct in concluding that a referral would not change the outcome of the review proceeding.

Although the plaintiff had an interest in whether the countback provisions of the Act were inconsistent with s 18 of the *Charter*, VCAT proceedings could not be used as a vehicle to attempt to obtain a Supreme Court ruling on a question that had no bearing on the proceeding, but a bearing on public or political debate. VCAT was ‘entitled to take into account the fact that the referred question was hypothetical, in the sense that it did not attach to the judicial controversy’. [55] Ginnane J was not persuaded that VCAT had exercised its discretion incorrectly, and noted that the plaintiff could participate in debates concerning amendments to the Act, but not in the Court in circumstances where there was no dispute about the Act’s application.

As to whether VCAT exercised its discretion in accordance with s6(2)(b), Ginnane J determined that the authorities established that the ‘intermediate construction’ of that provision applied. While the right to a fair and public hearing applied s 24 was relevant to the function of a tribunal in the exercise of its power, the other two identified rights were not. Further, Ginnane J did not accept that any of the rights nominated by the plaintiff were breached by VCAT. The plaintiff received a fair hearing at VCAT and VCAT validly exercised its discretion. His Honour then went on to determine the plaintiff’s claims in a second proceeding claiming that the countback provisions were invalid and infringed his freedom of political communication implied in the Commonwealth Constitution. These were also dismissed by Ginnane J.



Naik v Monash University [2019] VSCA 72

4 April 2019

Priest AP, Beach and Niall JJA

Charter provisions: ss 8

Summary

The applicant was a student at Monash University who failed an assessment task in June 2017, and consequently a subject in his Masters in Journalism. This was the final subject he needed to complete to obtain his degree. The judicial review application was for an order in mandamus and a declaration, the former granting the applicant an exemption from having to complete the assignment he failed and therefore a declaration he had completed his master's degree.

The trial judge found that the judicial review application was filed more than 10 months out of time, and that no special circumstances existed that would justify an extension of time being granted.

The applicant appealed this decision on four grounds. The fourth ground was discrimination and unlawfulness; specifically, that the trial judge erred when concluding breaches of the *Charter* could not be assessed on a judicial review application.

Judgment

At trial, the applicant referred to the *Charter* in the context of the procedure that applied to his request for extensions to submit his assignment, rather than the final decision itself. The Court commented it was correct for Her Honour to conclude that the applicant's arguments were not applicable to the relief sought in a judicial review application.

In addition, the Court noted that the applicant had raised similar matters under relevant anti-discrimination laws. As such, it was not unjust to refuse an extension of time in an application where the same matters were being raised.



***Kheir v Robertson* [2019] VSC 422**

26 June 2019

McDonald J

Charter provisions: ss 21, 22, 39

Summary

On 27 June 2013, Mr Kheir was convicted and sentenced to an aggregate of nine years and six months' imprisonment with a non-parole period of seven years for aggravated burglary, armed robbery, recklessly causing injury and blackmail. On 30 June 2015 and 1 July 2015, a riot occurred at the Metropolitan Remand Centre where Mr Kheir was then imprisoned. On 2 July 2015, Mr Kheir was transferred to Barwon Prison where he was held in a high security unit and confined to his cell for long periods each day until his transfer to Port Phillip Prison on 11 May 2017.

On 24 August 2017, the Mr Kheir applied for emergency management days to reduce his non-parole period and sentence pursuant to s 58E of the *Corrections Act 1986*. On 15 September 2017, the Secretary's delegate declined Mr Kheir's application. Mr Kheir sought judicial review of that decision in the Supreme Court and, on 11 May 2018, T Forrest J (as his Honour then was) quashed the Commissioner's decision and ordered that it be remitted to a delegate who, if possible, had no previous involvement with the application.

By late September 2018, no delegation or decision had been made. On 10 October 2018, Mr Kheir sought judicial review of the failure to decide or appoint a delegate. On 23 October 2018, the Secretary delegated the decision and, thereafter, Mr Kheir withdrew his application. Richards J awarded costs in favour of Mr Kheir. On 20 December 2018, the delegate refused Mr Kheir's application.

On 27 February 2019, Mr Kheir sought judicial review of the delegate's decision. The primary relief sought was to set aside the delegate's decision of 20 December 2018, and not to compel a delayed decision. However, one of the grounds relied upon by Mr Kheir was that there had been an unlawful delay in considering and determining his application. Mr Kheir submitted that this ground was 'included because of s 39 of the Charter'. Mr Kheir's Charter ground was that his rights under ss 21(1), 21(3) and 22(1) of the Charter had been breached by the delay in appointing a delegate.

Judgment

McDonald J dismissed Mr Kheir's application for judicial review. His Honour stated that the ground alleging unlawful delay had no nexus with the relief sought and was pressed solely for the purposes of enlivening jurisdiction to grant relief under s 39 of the Charter. While acknowledging that an unsuccessful ground of non-Charter unlawfulness nonetheless supports relief for a ground of Charter unlawfulness, his Honour held that the reasoning in *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 (*'Burgundy Royale'*) applies to s 39 of the Charter such that jurisdiction is not attracted for colourable claims. His Honour quoted the Full Court of the Federal Court's statements in *Burgundy Royale* that claims are colourable if 'they were made for the improper purpose of "fabricating" jurisdiction', and that to be non-colourable a ground must be 'bona fide and not spurious, hypothetical, illusory or misconceived'. His Honour held that Mr Kheir's ground based on unlawful delay was colourable.

His Honour further stated that even if he was incorrect that the unlawful ground delay was colourable he was nonetheless not satisfied that Mr Kheir's Charter rights had been infringed. Mr Kheir's rights under ss 21(1) and (3) of the Charter were not infringed as he was deprived of his liberty upon being convicted and sentenced, not because of the refusal of his application or any delay in making the decision. Nor were Mr Kheir's rights under s 22(1) of the Charter infringed by the manner in which the delegate conducted the application.



***Davies v The Queen* [2019] VSCA 66**

28 March 2019

Kaye, McLeish, T Forrest JJA

Charter provisions: ss 24, 25

Summary

Mr Davies was charged on indictment with five counts of arson contrary to s 197(1) of the *Crimes Act 1958*. Following a three month trial in the County Court Mr Davies was convicted of each charge and sentenced to a total effective sentence of 14 years and 6 months' imprisonment, with a non-parole period of 12 years and 3 months. Mr Davies represented himself at the trial, despite the trial judge suggesting that representation would be a sound course and having had multiple solicitors appointed under a grant of legal aid.

In the Court of Appeal Mr Davies sought leave to appeal both the conviction and sentence on a variety of grounds. Ground 8 of the appeal against conviction included that the trial miscarried due to Mr Davies being unrepresented and there being 'no equality of arms and facilities'.

Judgment

The Court of Appeal dismissed Mr Davies' appeal against conviction but allowed his appeal against sentence.

Kaye, McLeish and T Forrest JJA refused leave to appeal in relation to Mr Davies' arguments that the trial miscarried due to Mr Davies being unrepresented and there being 'no equality of arms and facilities'. Their Honours stated that Mr Davies freely eschewed representation and was adequately capable of representing himself.

The parties did not make submissions as to whether the Charter impacted Mr Davies' 'equality of arms' argument. However, the Court identified that the term 'equality of arms' was an international human rights principle that explains some aspects of the right to a fair trial and, as such, international human rights jurisprudence employing that concept may inform the rights contained in ss 24(1) and 25 of the Charter.

Briefly considering these rights the Court stated:

While s 24(1) creates a right to legal representation it is only reflective of the position at common law and a criminal trial is not unfair if the defendant is unrepresented because he or she persistently neglects or refuses to take advantage of available legal representation.

The rights in s 25(2)(b) and (h) did not confer rights having a content extending beyond the common law right to a fair trial and were specific aspects and explications of that larger right which were not relied on by Mr Davies.

The rights under s 25(2)(d) and (f) are conditional on eligibility under the *Legal Aid Act 1978* and do not confer an entitlement to legal assistance independent of that Act.

The Court found it unnecessary to pursue this avenue further as Mr Davies' arguments on his right to a fair trial could be determined without considering the Charter or the notion of 'equality of arms'.



***LG v Melbourne Health* [2019] VSC 183**

22 March 2019

Richards J

Charter provisions: ss 8, 12, 13, 33, 38

Summary

The plaintiff was an 85 year old woman who lived with her son. She had a fall, dislocated her shoulder and was admitted to a hospital operated by the defendant. After undergoing initial treatment, the plaintiff was transferred to an aged care ward. She was bed bound and needed a high level of assistance with mobility and personal care. Hospital staff became concerned as to whether the plaintiff could be adequately cared for at home. The plaintiff wished to return home, and her son wanted to take her home. A neuropsychologist assessed the plaintiff as having a cognitive disability (likely dementia), which impaired her capacity to make informed and reasonable decisions. The plaintiff's son had previously been appointed as the plaintiff's enduring guardian and enduring power of attorney.

Conflict between the hospital staff and the plaintiff's son escalated, and on 15 January 2018 a social worker employed by the defendant applied to the Victorian Civil and Administrative Tribunal ('VCAT') for orders under the *Guardianship and Administration Act 1986* ('Guardianship Act'). After an initial bedside hearing, which was adjourned to enable the Public Advocate to complete an investigation and report to VCAT, on 16 April 2018 VCAT made orders appointing the Public Advocate as limited guardian for the plaintiff, and the State Trustees Limited as her administrator. VCAT gave brief oral reasons, but not written reasons.

The plaintiff and her son appealed to the Supreme Court, raising a number of questions of law. One of those questions surrounded whether VCAT erred in law in failing to give proper consideration to the plaintiff's human rights when exercising its discretion to appoint a limited guardian and an administrator. Another three concerned whether VCAT should have referred certain questions of law pursuant to s 33(1) of the Charter.

Judgment

Richards J noted that s 38(1) of the Charter provided that it was unlawful for a public authority to act in a way that was incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Following *PJB v Melbourne Health* (2011) 39 VR 373 ('Patrick's case'), her Honour also identified that in relation to its jurisdiction under the Guardianship Act, VCAT is a public authority. A number of rights in the Charter were found to be engaged in the circumstances, including the right to equal protection of the law without discrimination (s 8(3)), the freedom to choose where to live (s 12), and the right of LG not to have her privacy and home arbitrarily interfered with (s 13(a)).

In her Honour's view, the authorities demonstrated that VCAT was required to seriously turn its mind to the possible impact of the decision on LG's human rights and the implications for her of a guardianship and administration order, identifying and balancing the competing interests. Such consideration, while not needing to be a sophisticated exercise, needed to be genuine and not formulaic. Richards J also recognised the overlap between VCAT's obligations under s 38(1) of the Charter and the analysis required under ss 4(2), 22 and 46 of the Guardianship Act, noting that where VCAT has had regard to the latter sections, it would go a long way towards having properly considered relevant human rights.

Although the defendant submitted that VCAT was looking at LG's welfare and safety, Richards J found that that did not come close to a proper consideration of her rights. Good intentions were not enough, and the human rights implications of a guardianship or administration order had been comprehensively canvassed in Patrick's case. VCAT's reasons contained no sign at all that it had turned its mind to the human rights implications of the orders made. As such it had erred at law and the appeal on this issue was allowed.



In relation to the plaintiff's assertion that certain questions should have been referred to the Supreme Court under s 33 of the Charter, the first two questions surrounded the fairness of relying on the evidence of the neuropsychologist and a doctor employed by the defendant. Richards J did not find any error in VCAT's approach, noting that questions of evidence and procedure are first and foremost a matter for VCAT. Any question of law regarding VCAT's decision in this regard could be appealed via s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. The third question concerned whether VCAT understood its power to make the referral under s 33(1) of the Charter, and the fourth was whether the restraint of LG by the defendant was a breach of the Charter.

According to Richards J, VCAT did not make an error of law regarding the former, and in relation to the latter, her Honour could not see how the question arose in the circumstances – VCAT was not asked to determine whether LG had been detained, or the lawfulness of any detention. As such, it was not a question that could be the subject of a referral under s 33(1) of the Charter.



***Djime v Kearnes* [2019] VSC 117**

28 February 2019

Cavanough J

Charter provisions: ss 8, 12, 15, 35, 39

Summary

Mr Djime brought a proceeding in the Victorian Civil and Administrative Tribunal ('VCAT') against Victoria Police and certain Victoria Police members, claiming that he had been subject to sexual harassment, racial discrimination, racial vilification, victimisation and contraventions of his human rights. Mr Djime's claims related to interactions said to have occurred between himself and police on a number of occasions between 2008 and 2014. Mr Djime relied on the *Equal Opportunity Act 2010* ('EO Act'), the *Racial and Religious Tolerance Act 2001* and the Charter.

VCAT summarily dismissed 21 of Mr Djime's 27 claims as misconceived or as lacking in substance and, after several further hearing days, dismissed the remaining six claims as not having been proved. Mr Djime sought leave to appeal the decisions under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*.

Judgment

Cavanough J refused leave to appeal.

At VCAT, Mr Djime had claimed that his freedom of movement under s 15 of the Charter had been infringed when he was prevented from boarding a train. The Member hearing the proceeding had declined to consider that allegation on the basis that a parallel discrimination claim under the EO Act in respect of the same circumstances had been dismissed, meaning the Charter claim could not proceed.

Cavanough J stated that it had not been suggested that the discrimination claim was made merely colourably, in order to enable Mr Djime to bring a claim under s 39 of the Charter. In those circumstances it seemed to his Honour that the mere fact the discrimination claim had been dismissed did not render the corresponding Charter claim inadmissible.

However, his Honour stated that even if this was legal error on the part of VCAT it remained inappropriate to grant Mr Djime leave to appeal on this ground as the claim was found to be lacking in substance on the evidence and facts. Furthermore, by reason of s 39(3) of the Charter there is, at the least, a very real doubt as to whether VCAT would have the power to award Mr Djime monetary compensation for breaches of the Charter in the manner sought.



Re Application for Bail by Rebecca Dillon [2019] VSC 80

22 February 2019

Maxwell P

Charter provisions: ss 6, 7, 32

Summary

This matter concerned an application for bail made by Rebecca Dillon ('applicant') on 23 November 2018. The applicant was a 23 year old woman with an intellectual disability, who had experienced a troubled upbringing. The applicant had a criminal history, without conviction, dating back to 2010, which included offences of violence, threats to kill, resisting police, dishonesty, property damage and failing to answer bail.

On 26 October 2018, the applicant was charged with offences of criminal damage, causing a false fire alarm to be given (later withdrawn) and committing an indictable offence whilst on bail. At the time of the alleged offending the applicant was on bail in respect of nine outstanding matters. The applicant was also subject to a family violence intervention order ('FVIO') naming her ex-partner and her daughter as affected family members. Committing an indictable offence whilst on bail was a Schedule 2 offence under the *Bail Act 1977* ('the Act'). As the offence was allegedly committed while the applicant was on bail for another Schedule 2 offence (persistent contravention of an FVIO), the Act required bail be refused unless the court was satisfied that exceptional circumstances existed justifying the grant of bail, and that there was no unacceptable risk.

Judgment

Maxwell P was satisfied that exceptional circumstances existed justifying the grant of bail and that there was no unacceptable risk, and accordingly granted bail.

The first statutory hurdle was the existence of exceptional circumstances justifying the grant of bail. The applicant submitted that unless she were granted bail, she would have been on remand for 58 days by the time she came to be sentenced in relation to the charges. Given the applicant was highly unlikely to receive a custodial sentence, the remand period would have exceeded the sentence ultimately imposed. On this basis, the respondent conceded that exceptional circumstances existed. Maxwell P considered the concession to have been properly made.

The respondent's opposition to the applicant's bail application rested, rather, on what was said to be an unacceptable risk that the applicant would, if released on bail, commit an offence or offences. In this regard the respondent relied on the applicant's extensive criminal history, including her multiple charges of failure to answer bail.

Maxwell P held that while there was a risk of further offending, the risk was not unacceptable. The applicant's prior offences were relatively minor, and mostly from an earlier period. Further, until the alleged criminal damage offence in October 2018, there had been a period of 18 months without the applicant facing any charge whatsoever. This was a significant indicator of the applicant's prospects for rehabilitation and her ability to be in the community without offending. Finally, Maxwell P cited J Forrest J in *Re Kyle Magee* [2009] VSC 384, that a citizen should not be arbitrarily detained because there is a real risk of them committing a further offence of a relatively minor nature.

On 26 November 2018 the applicant filed notices with the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission under the Charter, submitting that the application raised questions in respect of the interpretation of ss 4A, 4E and 3AAA of the *Bail Act 1977* ('the Act').

Section 4A of the Act provided for the circumstances in which a two-step test applied to the consideration of a grant of bail, s 4E of the Act required the court to refuse bail if the prosecutor satisfied the court that



there [wa]s an unacceptable risk that the applicant would engage in certain behaviour while on bail, and s 3AAA of the Act set out the surrounding circumstances the court must take into account when determining whether exceptional circumstances exist.

The applicant submitted that the questions to be answered were:

- Whether s 32 of the Charter required the tests in ss 4A and 4E of the Act to be interpreted in a manner that only allowed bail to be refused where to do so would be a reasonably necessary limit on Charter rights, in accordance with s 7(2) of the Charter?
- Whether the applicant's Charter rights formed part of the 'surrounding circumstances' to which the court must have regard when making a decision under ss 4A and 4E of the Act, where those rights could be limited by a decision to refuse bail?
- Whether s 6(2)(b) of the Charter required the court when exercising the discretions under ss 4A and 4E of the Act to have regard to the content of the applicant's Charter rights as part of the proper exercise of those discretions?

Maxwell P was able to determine the bail application without needing to address the interpretation questions. His Honour commented that the questions must await a case where they needed to be answered.



Nguyen v Director of Public Prosecutions (Vic) [2019] VSCA 20

13 February 2019

Maxwell P, Tate and Niall JJA

Charter provisions: ss 24, 32

Summary

On 27 October 2015, Judge Carmody of the County Court made an *ex parte* unexplained wealth restraining order pursuant to s 40I of the *Confiscation Act 1997* ('the Act'). The order prohibited any person from disposing of or otherwise dealing with five properties. On 9 October 2017, Judge Carmody made a subsequent order declaring that the restrained properties had been forfeited to the Minister. Ms Nguyen was the registered owner of three of these properties.

In the Court of Appeal Ms Nguyen challenged the constitutional validity of s 40I of the Act. Among other things, Ms Nguyen argued that the Act did not preserve any right of the respondent to an *ex parte* restraining order to participate in an *inter partes* hearing, and that therefore s 40I conferred powers or functions incompatible with, or repugnant to, the exercise of federal judicial power, thus offending the *Kable* principle.

Arguing for the validity of s 40I, the Director of Public Prosecutions contended that the Act preserved the right of a respondent to an *ex parte* restraining order to participate in an *inter partes* hearing through both the inherent power of a court to discharge an *ex parte* order and the general power of the Court to make any orders it considers just, under s 40W of the Act. Ms Nguyen argued that the Act excluded this inherent power of the court and that s 40W did not permit a rehearing of an application for an unexplained wealth restraining order.

Judgment

The Court of Appeal granted leave to appeal but held that s 40I of the Act is constitutionally valid and accordingly dismissed the appeal.

Tate JA (Maxwell P and Niall JA agreeing) construed s 40W of the Act as extending to the power to make orders setting aside restraining orders made *ex parte*. Her Honour noted that such an interpretation ensures that s 40W is compatible with the right to a fair hearing under s 24(1) of the Charter. Her Honour also stated that such an interpretation was supported by the principle of legality and the consideration that at common law forfeiture regimes are construed strictly. The need for the Act as a whole to be interpreted compatibly with the Charter, under s 32(1), also supported her Honour's conclusion that the Act that does not exclude the inherent power of a court to discharge an *ex parte* order.



Victorian Legal Services Commissioner v McDonald [2019] VSCA 18

13 February 2019

Tate, Kaye and Emerton JJA

Charter provisions: ss 15, 32

Summary

Mr McDonald was a legal practitioner. While acting for an employee in a redundancy dispute, he sent correspondence to his opposing solicitors, Lander & Rogers, accusing the responsible solicitor of being 'fundamentally dishonest', having 'told lies' and having engaged in 'deliberate and calculated dishonesty'. Mr McDonald made the allegations because he believed that the solicitor had misrepresented a telephone conversation that had taken place between the two.

Lander & Rogers referred Mr McDonald to the Legal Services Commissioner ('Commissioner') on the grounds of discourtesy. The Commissioner subsequently brought proceedings against Mr McDonald in VCAT. VCAT accepted that Mr McDonald honestly believed that the solicitor had lied to him. However, without taking this into account, VCAT held that Mr McDonald was not acting in the legitimate pursuit of his client's best interests when he made the allegations. VCAT found him guilty of two charges of unsatisfactory professional conduct for breaches of r 21 of the Professional Conduct and Practice Rules.

Mr McDonald applied to the Supreme Court for leave to appeal VCAT's decision. He submitted that VCAT erred by failing to take into account his honest belief that he had been lied to. Mr McDonald submitted that this honest belief meant that he had a reasonable basis for making the allegations, and this reasonable basis informed the exercise of his duty to make the allegations in the legitimate pursuit of his client's best interests. Bell J dismissed the two charges of unsatisfactory professional conduct. In doing so, he relied especially on the right to freedom of expression under s 15(2) of the Charter. The Commissioner sought leave to appeal.

The Court of Appeal granted leave to appeal and allowed the appeal. It held that Bell J erred by failing to recognise that VCAT applied the correct legal test to arrive at the decision that the two charges against Mr McDonald were proved. It also held that Bell J, in making findings of fact that conflicted with those made by VCAT, exceeded jurisdiction under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*.

Judgment

The Court agreed with the following analysis of Bell J of r 21:

First, the duty of a practitioner to be robust in defending a client's interests, and the freedom of expression protected by the Charter, support an interpretation of r 21 that imposes a limit on freedom of expression only to the extent necessary to achieve its purpose. As such, the rule only prohibits discourteous, offensive or insulting language or conduct that represents a failure to take reasonable care of the reputation or integrity of the legal profession.

Second, as a subordinate instrument, r 21 is a 'statutory provision' that falls to be interpreted under s 32 of the Charter 'in a way that is compatible with human rights', '[s]o far as it is possible to do so consistently with [its] purpose'.

Third, r 21 was compatible with human rights when applied and interpreted in the light of its fundamental purpose. That purpose is to maintain the integrity and reputation of the legal profession and public confidence in the administration of justice.

Fourth, r 21 should be read as prohibiting only communications which undermine public confidence in the legal system. The rule only limits the exercise of so much of the right to freedom of expression as is necessary to preserve the integrity and reputation of the legal profession and public confidence in the



administration of justice. The rule only prohibits discourteous, offensive or insulting language or conduct that represents a failure to take reasonable care of the reputation or integrity of the legal profession.



Carbone v Melton City Council [2018] VSC 812

21 December 2018

Emerton JA

Charter provisions: ss 20, 32

Summary

The plaintiffs were property owners seeking to subdivide their land and sell it to a property developer. The land could only be subdivided once certain amendments were made to the Melton Planning Scheme, and once the plan of subdivision depicted that specified parts of the land were to be reserved for the defendant. The amendments to the Melton Planning Scheme included incorporation of a Precinct Structure Plan and Development Contributions Plan ('DCP'). The plan of subdivision was registered such that the specified areas of land were transferred from the plaintiffs to the defendant.

The defendant then offered to pay the plaintiffs for the land in accordance with the DCP. However, the plaintiffs disputed that it was appropriate to calculate the value of the land by reference to the DCP. Instead, they asserted that compensation for the land should be in accordance with the *Land Acquisition and Compensation Act 1986* ('LAC Act'), as the land was acquired 'by compulsory process or by agreement' for the purposes of s 4 of that Act. In this regard, the plaintiffs argued amongst other things, that s 32(1) of the Charter provided that so far it is possible to do so, all statutory provisions must be interpreted in a way that is compatible with human rights. Relevantly, s 20 of the Charter provided that a 'person must not be deprived of his or her property other than in accordance with law'. According to the plaintiffs, if s 4 of the LAC Act did not extend to cover a class of acquisitions by a public authority with the power to compulsorily acquire, then the LAC Act would operate arbitrarily and not in accordance with the law in the sense required by s 20 of the Charter.

Judgment

Emerton JA accepted that s 4 of the LAC Act, as beneficial legislation aimed at providing just compensation to person whose interest in land is divested or diminished for public purposes, should be given a broad construction. Such a construction was also supported by the extrinsic material, and the Charter. Regarding the Charter, her Honour determined that it required a broad construction that protected the position of landowners who may be overborne by government fire-power.

However, despite this, s 4 was found not to apply in the circumstances. The plaintiffs voluntarily transferred the land and it could not be said that there was 'an agreement' between the plaintiffs and defendants for the purposes of s 4. Further, even if s 4 applied, there were difficulties applying Part 2 of the LAC Act to circumstances where the transfer of land took place at the initiative of the owner by way of the registration of a plan of subdivision according with the requirements of the relevant applicable planning controls.

Her Honour concluded that the LAC Act did not apply to the vesting of the subject land in the Council through the registration of the plan of subdivision. The Charter requirement to interpret statutory provisions in a manner compatible with human rights did not affect this conclusion.



***DPP v Rayment* [2018] VSC 663**

2 November 2018

Taylor J

Charter provisions: ss 7, 12, 32

Summary

Section 60B of the *Crimes Act 1958* ('Act'), at the relevant time, made it an offence for any person convicted of a 'sexual offence' to be found 'loitering without reasonable excuse in or near...a school, a children's services centre or an education and care service premises'. The respondent, Mr Rayment, was found guilty in 2002 of indecent assault, a 'sexual offence' within the meaning of s 60B. On 14 February 2017, Mr Rayment was observed in the vicinity of a girls' school in Victoria for approximately 20 minutes at the end of the school day. When later questioned by police, Mr Rayment stated that he was there to meet a student of the college, 'Leah', who had rung him to request that he bring her a rose for Valentine's Day. However, he could not provide 'Leah's' telephone number to police.

Mr Rayment was charged in the Magistrates' Court with contravening s 60B. It was agreed that he had been convicted of a sexual offence and was knowingly in the vicinity of a school. However, Mr Rayment submitted that he had not been 'loitering', as he had been in the area for a purpose (namely, to meet 'Leah'), and the concept of loitering 'conveyed a concept of idleness, lack of purpose or indolence'. Alternatively, it was argued that if Mr Rayment had been loitering, he had a reasonable excuse (again, meeting 'Leah'). The Magistrate dismissed the charge, accepting in her reasoning the respondent's submission that the element of 'loitering' required a proof of a 'lack of purpose' or at least something more than mere attendance or presence.

The DPP appealed the Magistrate's decision to the Supreme Court of Victoria. The Attorney-General for Victoria intervened in the Supreme Court proceeding, submitting alongside the respondent that the case engaged and required consideration of s 12 of the Charter, namely the right to move freely within Victoria.

Judgment

Taylor J upheld the appeal. Her Honour held that a correct analysis of both the statute itself and historical case law considering the concept of 'loitering' demonstrated that loitering in the context of s 60B 'should not be construed as to require proof of a lack of purpose or unlawful purpose.' Her Honour held that to establish loitering, it is sufficient 'that a person in the prohibited circumstances 'hangs about' or idles'. Mr Rayment therefore satisfied s 60B merely by being present in the vicinity of the school, being a person to whom s 60B applied. Taylor J further held that Mr Rayment's reason for being in the vicinity of the school did not amount to a 'reasonable excuse' under the Act.

Having made this determination, Taylor J went on to consider the impact of the Charter on the interpretation and application of s 60B. Her Honour agreed with the submissions of the respondent and the Victorian Attorney-General that s 60B engaged s 12 of the Charter. As a result, s 32(1) of the Charter required s 60B to be interpreted compatibly with human rights, '[s]o far as it is possible to do so consistently with [its] purpose'. However, Taylor J held that there was only one available construction of the word 'loitering' in s 60B. As a result, there was no ambiguity in the provision and there was 'no constructional choice to be resolved by s 32(1) of the Charter'.

Further, Taylor J held that even if s 32(1) of the Charter were engaged, s 60B was a justified restriction on the right to freedom of movement within Victoria. This was so because of the important objective served by s 60B, namely the protection of children from the risk of sexual offending.



PBU and NJE v Mental Health Tribunal [2018] VSC 564

1 November 2018

Bell J

Charter provisions: ss 7, 8, 10, 13, 38

Summary

In this decision, two separate proceedings were heard together as they raised common issues concerning application of the *Mental Health Act 2014* ('Act'). The plaintiffs in each proceeding, PBU and NJE, were both compulsory inpatients at hospitals. The Mental Health Tribunal ('MHT'), and then the Victorian Civil and Administrative Tribunal ('VCAT') upon review, had determined that PBU and NJE were to compulsorily receive electroconvulsive therapy ('ECT'). The plaintiffs appealed VCAT's decisions, asserting a number of errors of law. The named defendants in each proceeding were the health service providers and the MHT. The MHT filed appearances and the health service providers took no part in the proceeding. However, as is common, the Secretary of the Department of Health and Human Services ('Secretary') assisted the Court as *amicus curiae*.

PBU had been diagnosed with schizophrenia, and was subject to an inpatient treatment order under s 45(3) of the Act. He showed limited insight into his psychiatric condition and had received ECT previously. On the application of hospital staff, the MHT ordered that PBU have a course of ECT. The orders were stayed when PBU applied to VCAT for review. Extensive medical evidence was given that: ECT was the only currently available treatment for PBU; that his condition was slowly deteriorating; and that he had refused to take other treatment. PBU accepted that he had mental health problems but denied that he had schizophrenia. In his view, he was suffering from depression, anxiety and post-traumatic stress disorder, and he was willing to have treatment for those conditions. He did not wish to have ECT, and wished to be discharged to a prevention and recovery centre before being discharged home.

In determining PBU's case, VCAT accepted that it was acting as a public authority for the purposes of s 38(1) of the Charter, and also that so far as possible, it had to interpret the provisions of the Act consistently with the Charter (s 32(1)). It also recognised that a number of Charter rights were engaged, including the right to freedom from medical treatment without full, free and informed consent (s 10(c)), the right to move freely within Victoria (s 12), and the right not to have one's privacy unlawfully or arbitrarily interfered with. In accordance with s 96(1)(a)(i) of the Act, VCAT had to decide whether it was satisfied that PBU did not have capacity to give informed consent under s 68(1) and, if so, whether there was no less restrictive way for him to be treated. Section 68(1) provided:

- (1) A person has the capacity to give informed consent under this Act if the person—
 - (a) understands the information he or she is given that is relevant to the decision; and
 - (b) is able to remember the information that is relevant to the decision; and
 - (c) is able to use or weigh information that is relevant to the decision; and
 - (d) is able to communicate the decision he or she makes by speech, gestures or any other means.

VCAT found that PBU understood the information that he was given about ECT, but ss 68(1)(b)-(d) were not specifically applied. Rather, it accepted that PBU did not have capacity because he did not agree with the diagnosis of schizophrenia. Further, in VCAT's view there were no less restrictive treatment options available.

NJE had also been diagnosed with treatment resistant schizophrenia. At the time of her VCAT hearing she was compliant with her oral and depot medication regime. The medical evidence was that NJE could read and understand the information given to her about ECT. However, she did not accept that she had treatment resistant schizophrenia, and was said to suffer from grandiose delusions and hallucinations. She



was frequently active and awake at night, saying that she was working as a psychic healer. Attempts to discuss ECT with NJE distressed her. She was concerned that the ECT may cause her to have memory problems and she preferred other treatment, including remaining in hospital for an extended period and trialling alternative medications.

VCAT concluded that NJE satisfied ss 68(1)(a)(b) and (d), however, she was unable to use and weigh information for the purposes of s 68(1)(c). In this regard, she could not ‘carefully consider the advantages and disadvantages of a situation or proposal before making a decision’, as she could not be persuaded that the information was relevant to her, because she believed that she did not have a mental illness. Additionally, VCAT accepted that no less restrictive treatment options were available.

A common ground of appeal brought by both PBU and NJE was that VCAT erred in law in interpreting and applying the ‘capacity to give informed consent’ test in s 96(1). This raised issues of law surrounding how the Charter applied to the operation of the Act and the interpretation of its provisions.

Judgment

Bell J commenced his reasons with an overview of the Act, noting that its central purpose was to establish a ‘legislative scheme for the assessment of persons who appear to have mental illness and for the treatment of persons with mental illness’. His Honour identified that regarding legal capacity, the relevant rights were the right to self-determination, to be free of non-consensual treatment and to personal inviolability. Where the Act authorised compulsory treatment or other interference with those rights, it was intended to be justified according to human rights standards, including the least infringement principle. That intention was expressed in s 10 of the Act, the Act’s objectives, and the mental health principles set out in s 11(1). In particular, s 10(c) stated an objective to ‘protect the rights of persons receiving assessment and treatment’ and s 11(1)(e) provided that ‘persons receiving mental health services should have their rights, dignity and autonomy respected and promoted’.

In his Honour’s view, consistently with the right to self-determination, to be free of non-consensual medical treatment and to personal inviolability, the objectives and principles of the Act emphasised enabling and supporting decision-making, and participation in decision-making, including the dignity of risk (that is, being allowed to make decisions about their care that involve a degree of risk). Further, respecting the views and preferences of the person was emphasised. Overall, the objectives and principles, together with the operative provisions of the Act, were viewed as intending to ‘alter the balance of power between medical authority and persons having mental illness in the direction of respecting their inherent dignity and human rights’.

His Honour then turned to consider the human rights of persons with mental disability. In this regard he discussed the *Convention on the Rights of Persons with Disabilities*¹ (‘CRPD’) and the Charter, noting contemporary mental health reform, including the Act, and the universal character of human rights and the equal application of those rights to people with mental disabilities. Bell J also identified the role of the right to health, as recognised in the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’)² and the CRPD. Although his Honour recognised that the right to health was not legislated as such in the Act, its provisions had the central purpose of ensuring that ‘people with mental disability have access to treatment from mental illness and attain a state of recovery and full participation in the life of the community’. They also had the purpose, supported by the Charter, of ‘ensuring that the rights to self-determination, to be free of non-consensual medical treatment and to personal inviolability’ were respected in treating mental ill-health and assessing capacity. In his Honour’s view, the two purposes were connected and in various ways, the Act promoted the right to health of the patient, broadly understood.

¹ Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

² Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 2676).



Bell J then considered which Charter rights were engaged, noting that such an inquiry warranted more than a 'mere salute' in passing and instead required ascertaining and understanding 'the meaning of the right in a purposive way by reference to the values and interests that it respects and protects'. His Honour rejected the submission that s 68(1) did not engage a right in the Charter. Rather, an assessment under s 68(1) that a person did not have capacity formed the foundation for compulsory ECT, taking away the person's fundamental right to refuse that treatment, constituting an immediate injury to their individual dignity. A determination of incapacity under s 96(1)(a)(i) of the Act was found to potentially limit numerous rights, but particularly pertinent were:

- **Equality before the law – s8(3)**

Bell J identified equality before the law as the keystone in the protective arch of the human rights framework. Following *Matsoukatidou v Yarra Ranges City Council* (2017) 51 VR 624, his Honour recognised three elements of the right: the right to equality before the law; the right to equal protection of the law without discrimination; and the right to equal and effective protection against discrimination. The last two elements were considered to be engaged in relation to ss 68(1) and 96(1)(a)(i) of the Act. In this regard, his Honour noted that the patient 'may only be subjected to the assessment and treatment by reason of having a mental illness that brings the patient within the regime of the legislation', when people without such an illness are 'free of both'. As such, in content and application, the capacity test in s 68(1) must be demonstrably justified, in accordance with s 7(2) of the Charter. In his Honour's view, equality was a powerful principle regarding the interpretation and application of the capacity assessment criteria in s 68(1), as it is similarly recognised in relation to the common law test for capacity. The provisions must be interpreted in a way to ensure that the rights of self-determination, being free of non-consensual medical treatment, and to personal inviolability of people with a mental disability were 'protected just as much as persons without a disability'.

- **Freedom from non-consensual medical treatment**

The right to be free of non-consensual medical treatment provided for in s 10(c) of the Charter was discussed in *Kracke v Mental Health Board* (2009) 29 VAR 1. Bell J considered comments from that case, including the notion that the right to refuse is of particular importance because 'it respects the personal dignity and autonomy of people with mental illness, as apposite.

- **Privacy**

Bell J noted that s 13(a) of the Charter includes a right not to have one's privacy unlawfully or arbitrarily interfered with. In his Honour's view, a purpose of the right to privacy was to protect people with mental disability from interference in their lives, and facilitate full participation in society on an equal basis with others. Following *Director of Housing v Sudi* (2010) 33 VAR 139, as well as decisions of international courts, his Honour stated that the right to privacy had two related dimensions of direct relevance to people with mental disability in the capacity context: self-determination and personal inviolability.

Bell J returned to these principles, equal respect for human rights, particularly the rights to self-determination, to be free of non-consensual medical treatment, and to personal inviolability, a number of times through-out his reasons. His Honour also considered principles of capacity at common law, emphasising that they too recognised notions of self-determination, personal inviolability, the presumption of capacity and avoiding discrimination.

His Honour went on to identify the following ten principles:

- (a) The primary purpose of the Act was to ensure people with mental illness, including those lacking the capacity to give informed consent, receive treatment for their illness. 'But the legislative intention is that this is to be done in a manner affording equal respect for their human rights,



particularly the right to self-determination, to be free of non-consensual medical treatment and to personal inviolability, as recognised by the Charter’;

- (b) There is a rebuttable presumption that people with mental illness have capacity to give informed consent;
- (c) The test in s 68(1) is ‘primarily a functional one in which the question is whether the person has the ability to remember and use or weigh relevant information and communicate a decision, not whether a person has actually done so’;
- (d) The capacity test must be applied in a non-discriminatory manner –it is not to be applied so as to produce social conformity at the expense of personal autonomy;
- (e) ‘A person with mental illness is not to be found lacking the capacity to give informed consent simply by reason of making a decision that could be considered unwise’;
- (f) Reflecting human rights principles, the Act rejects the best-interests paradigm for decision-making in health care. Rather, the assessment of capacity is to be ‘evidence-based, patient-centred, criteria-focussed and non-judgmental’, and not made to depend on a so-called reasonable outcome;
- (g) The threshold for capacity is a relatively low one, requiring only that the person ‘understands and is able to remember and use or weigh the relevant information and communicate a decision in terms of the general nature, purpose and effect of the treatment’;
- (h) Depending upon the facts of the case, a ‘person with mental illness may lack insight or otherwise not accept or believe that the person has a mental illness or needs treatment’, yet may still have the capacity to give informed consent;
- (i) The *Briginshaw v Briginshaw* (1938) 60 CLR 336 standard is applicable when establishing lack of capacity to give informed consent; and
- (j) The provisions of the Act are ‘predicated upon the central purpose of ensuring that persons with mental illness have access to an receive medical treatment, consistently with the person’s right to health’.

Turning to the facts at hand, Bell J determined that the VCAT incorrectly ‘based its finding that PBU lacked capacity upon his non-acceptance of the diagnosis of schizophrenia’. Other than the domain of understanding in s68(1)(a), VCAT did not separately consider ss 68(1)((b) – (d). In relation to NJE, VCAT did not make the same error, as it explicitly considered each of the criteria in ss 68(1)(a) – (d). Rather, VCAT erred in both reading to ‘use or weigh’ the relevant information as requiring the person to ‘carefully consider the advantages and disadvantages of a situation or proposal’, and in focussing upon whether NJE had ‘actually considered the advantages and disadvantages of the decision, not whether she had the ability to use or weigh the relevant information’. In Bell J’s view, a functional approach and relatively low threshold in relation to the issue of capacity was ‘underpinned by respect for the right to self-determination, to be free of non-consensual medical treatment and to personal inviolability, and for the dignity of the person’. Ultimately, VCAT erred in law by interpreting and applying the capacity test in the Act ‘incompatibly with the human rights of PBU and NJE under the Charter’.

Turning to the second condition of s 96(1), that there be ‘no less restrictive treatment’, Bell J viewed such a requirement as an important human rights safeguard that, alongside the requirement to take the views and preferences of the patient into account, represented a ‘paradigm shift in the design of mental health legislation’. In his Honour’s view, it corresponded to ‘one element of the proportionality requirement which human rights law applies to ensure that interference with the exercise or enjoyment of human rights only occurs where justified’. However his Honour rejected the submission of PBU and NJE that the compulsory



treatment had to be confined to the purpose of ‘immediately preventing serious deterioration in the person’s mental or physical health or serious harm to the person or another’ (s 5(b)), as such an approach was not supported by the language and structure of the legislation, and would have been incompatible with the person’s right to health. As such, VCAT did not err in the application of this aspect of the test.



***Gullquist v Victorian Legal Services Commissioner* [2018] VSCA 259**

11 October 2018

Maxwell P, Tate and Priest JJA

Charter provisions: s 15

Summary

This matter was an appeal from the decision of John Dixon J in *Gullquist v Victorian Legal Services Commissioner* [2017] VSC 763.

In January 2017 VCAT found the applicant guilty of professional misconduct within the meaning of s 4.4.3(1)(a) of the *Legal Profession Act 2004* in that he had engaged in conduct involving a substantial failure to reach or maintain a reasonable standard of competence and diligence. The finding related to five letters the applicant sent the Local Court of New South Wales while proceedings were on foot in that Court, including three addressed personally to the Magistrate, none of which he copied to his opponent.

VCAT ordered that the applicant be reprimanded and undertake an additional five CPD units in ethics and professional responsibilities over the following 12 months. VCAT also limited the applicant's ability to send correspondence to judicial or quasi-judicial officers without first obtaining the approval of a senior practitioner approved by the respondent.

The applicant sought leave to appeal to the Supreme Court against the findings and orders. John Dixon J refused the applicant leave to appeal. The applicant then sought leave to appeal the order of John Dixon J.

Among other things, the applicant submitted that s 15 of the Charter permitted him to send the letters, and that r 18.5 of the *Professional Conduct and Practice Rules 2005* ('Rules') had to be read down so as to make him not guilty of professional misconduct or unsatisfactory professional conduct. In support of his Charter argument, the applicant relied on the decision of Bell J in *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89 ('McDonald').**

Judgment

Tate, Beach and McLeish JJA concluded that the applicant's appeal had no real prospect of success and refused leave to appeal. The applicant's grounds of appeal were variously held to be irrelevant, misconceived or without merit.

Their Honours relevantly rejected the applicant's submissions concerning the Charter, holding that while the applicant's submissions had relied extensively upon Bell J's decision in *McDonald*, *McDonald* was of no assistance.

- *McDonald* concerned an allegation made against a solicitor of unsatisfactory professional conduct in writing letters to another solicitor, which letters were alleged to have breached a rule requiring solicitors to take all reasonable care to maintain the integrity and reputation of the legal profession 'by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct'. In *McDonald*, Bell J accepted that the solicitor who wrote the impugned correspondence did so in an honest belief that he had been lied to by his opponent and that an offer of compromise made by his opponent was not genuine.

The honest belief in *McDonald* was to be contrasted with the current proceeding, in which the applicant had not given evidence at VCAT. There was accordingly no basis to make a finding as to the applicant's state of mind when the letters were sent.



Their Honours concluded that the applicant's reliance on the Charter did not assist him. The breach of r 18.6 was the gravamen of the charge (sending *ex parte* communications to a judicial officer about a proceeding still on foot before that judicial officer). Nothing in the Charter, including s 15, permitted the applicant to communicate about the proceeding in which he and his opponent were involved, in the absence of his opponent, with the Magistrate who was hearing the proceeding, in clear contravention of professional rules.

***McDonald* since overturned in *Victorian Legal Services Commissioner v McDonald* [2019] VSCA 18.



United Firefighters Union of Australia v Victorian Equal Opportunity and Human Rights Commission [2018] VSCA 252

4 October 2018

Maxwell P, Tate and Priest JJA

Charter provisions: s 41

Summary

This matter was an appeal from the decision of Ginnane J in *United Firefighters' Union v VEOHRC & Anor* [2017] VSC 773.

The proceeding concerned a specific function conferred on the Commission by s 151(1) of the *Equal Opportunity Act 2010* ('Act'), which provided that 'on the request of a person, the Commission may enter into an agreement with the person to review that person's programs and practices to determine their compliance with this Act'. The proceeding also concerned a cognate function conferred on the Commission by s 41(c) of the Charter, which provides that the Commission, in relation to the Charter, had the function of 'when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights'.

In 2016 the Commission commenced a review into workplace discrimination within the Country Fire Authority ('CFA') and the Metropolitan Fire Brigade ('MFB') at the request of the Victorian Government. The Commission was asked to review the programs and practices of the CFA and the MFB and report on the nature and prevalence of discrimination, sexual harassment and victimisation among current CFA and MFB personnel (paid and voluntary) and those who left in or after 2010 ('Review').

The United Firefighters' Union ('Union') sought injunctions restraining the Commission from carrying out the Review. The Union also sought a declaration that the Review was beyond the Commission's power. The Union's applications were refused. It sought leave to appeal.

On appeal, the Union argued that the Review was not authorised by s 151(1). It submitted that a review could only be authorised under s 151(1) if the programs and practices to be reviewed were those of the person requesting the review. The Union argued that the programs and practices to be reviewed were those of the CFA and the MFB, who were separate legal persons from the person – the Victorian Government – which had requested the Review.

The Secretary to the Department of Justice and Regulation (as it then was) ('Secretary') argued that the Commission was not reviewing the program and practices of the CFA and the MFB but reviewing the CFA and the MFB themselves, as programs and practices of the Victorian Government. The Secretary submitted that while the Review was focused on the workplace practices of the CFA and the MFB, the effectiveness of fire services (for which the Victorian Government was responsible) was directly affected by the conditions of those workplaces (such as the prevalence of bullying within them). The Secretary accepted that the Act imposed duties on employers in relation to employees and the CFA and the MFB were the primary duty holders in that regard. However, the Secretary submitted that the accessorial liability provision in the Act created potential exposure for the Victorian Government, which gave it an interest in ensuring the MFB and CFA's compliance with the Act.

In the alternative, the Secretary argued that the Commission's conduct of the Review was supported by the Commission's functions and powers under ss 155, 157 and 152. The Secretary argued that the research function afforded to the Commission under s 157 and the advocacy function afforded to it under s 155(1)(b), were independent functions. Distinct from s 151, they provided authority for the carrying out of an online survey and – by implication – for the publication of the results.



Judgment

The Court of Appeal unanimously held that s 151(1) did not authorise the Review (by extension holding that the cognate function under s 41(c) of the Charter similarly did not do so). Maxwell P and Priest JA stated that what was requested was a review of the employment practices of two employers for compliance with the Act. When the employer in question is a statutory corporation with its own legal responsibilities, s 151(1) does not allow a different legal person – in this case, the Victorian Government – to request the Commission to review the employment practices of that employer. The policy underpinning s 151(1) is clearly to encourage a person who has obligations under the Act to seek the Commission’s assistance in improving its compliance with the Act. Provisions for the development of work plans under s 152(1) reinforce that legislative policy. However it is for the duty holder alone to request a review.

Maxwell P and Priest JA rejected the Secretary’s alternative argument with respect to the Commission’s powers and functions under ss 155, 157 and 152. Their Honours held that there was only one source of power to review a person’s programs and practices for compliance with the Act. This was s 151, which was only enlivened if that person requested a review.

Tate JA, writing separately, considered that a review required the exercise of the general powers of the Commission, which were capable of being enlivened in various ways and not only by the making of a request under s 151. Tate JA stated that the Commission had the power to conduct and complete the Review and publish its report in relation to the Review by reason of s 157 and associated provisions.



***Cemino v Cannan* [2018] VSC 535**

17 September 2018

Ginanne J

Charter provisions: ss 6, 8, 19, 32, 38

Summary

Mr Cemino was a 22 year old Indigenous Yorta Yorta man residing in Echuca. He sought judicial review of a decision made by the Magistrates' Court of Victoria, sitting at Echuca, to refuse his application to transfer criminal proceedings commenced against him to the Koori Court Division of the Magistrates' Court at Shepparton, pursuant to *Magistrates Court Act 1989* s 4F(2) ('Act'). There was no Koori Court Division at Echuca.

Section 4F(2) of the Act provides a discretion for a Magistrate to transfer proceedings to the Koori Court Division of the Magistrates' Court, whether sitting at the same or a different venue. The Magistrate refused the application, with a key basis of the decision his understanding of the importance of the 'proper venue' principle as discussed in *Rossi v Martland* (1994) 75 A Crim R 411 ('*Rossi*') that 'generally speaking, serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality'.

Mr Cemino challenged the Magistrate's decision on the grounds that:

- (1) by applying 'the principles of *Rossi*' in making the decision, the Magistrates' Court made an error of law on the face of the record or a jurisdictional error; and
- (2) in making the decision, the Magistrates' Court made an error of law on the face of the record, because it acted unlawfully under s 38(1) of the Charter or because it contravened s 6(2)(b) of the Charter.

Judgment

Ginnane J made orders quashing the Magistrate's decision and requiring the Magistrates' Court, differently constituted, to remake the decision according to law.

In relation to the first ground, Justice Ginnane held that the Magistrate's emphasis on the importance of the principles of *Rossi* meant he did not give appropriate consideration to the purposes of the Koori Court legislation and therefore failed to properly exercise the discretion under s 4F(2) of the Act.

In relation to the second ground, his Honour held that s 38(1) of the Charter did not apply to the Magistrates' Court as, in refusing the application under s 4F(2) of the Act, the Magistrate was acting in a judicial, rather than administrative, capacity. The Magistrates' Court was therefore not a 'public authority' under s 4(1)(j) of the Charter in this instance.

However, his Honour held that, by reason of s 6(2)(b) of the Charter, the Magistrates' Court was required to consider the functions of the Court under the third limb of s 8(3) of the Charter and under s 19(2)(a) of the Charter in making the decision to refuse the application under s 4F(2) of the Act. The Magistrate's failure to consider these functions amounted to an error of law on the face of the record.

In coming to that conclusion his Honour adopted the intermediate construction of s 6(2)(b) discussed in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, under which the Court's function is to enforce directly only those rights that relate to court proceedings. His Honour held that the rights in the third limb of s 8(3) directly apply to functions of courts and relate to court proceedings, while the cultural rights in s 19(2)(a) related to court proceedings to a certain extent as they are relevant to the obligation to take into account the purposes of the Koori Court legislation when exercising the discretion in s 4F(2) of the Act.



His Honour also considered that the interpretative principle in s 32(1) of the Charter meant that the proper exercise of the discretion contained in s 4F(2) of the Act required consideration of relevant human rights which, in this case, were those in the third limb of ss 8(3) and 19(2)(a). However, as this matter was not a ground of the plaintiff's further amended originating motion his Honour did not base his decision on it.



***Roberts v Harkness* (2018) 85 MVR 314; [2018] VSCA 215**

29 August 2018

Maxwell P, Beach and Niall JJA

Charter provisions: s 24

Summary

This matter concerned an appeal from the decision of Bell J in *Harkness v Roberts* [2017] VSC 646. The respondent, Mr Harkness, had originally been convicted of road safety offences in the Magistrates' Court of Victoria. Prior to the hearing in the Magistrates' Court, Mr Harkness filed a statement disputing the jurisdiction of the Magistrates' Court on the basis that the Magistrates' Court had not 'proven jurisdiction over the Blessing of Almighty God' and that the *Road Safety Act 1986* did not apply to him. The Magistrate hearing the charges dismissed Mr Harkness' objection to jurisdiction, and refused to hear further oral argument from him on the matter. Mr Harkness exhibited disrespectful and disruptive behaviour and was ultimately excluded from the courtroom. In his absence he was convicted on all but one charge.

Mr Harkness applied to the Supreme Court of Victoria for review of the Magistrate's decision on the basis that he had been denied natural justice. At first instance, Bell J held that the Magistrate's orders should be quashed and the matter remitted to be determined according to law. Bell J held that although the Magistrate was entitled to exclude Mr Harkness from the courtroom, she had denied him natural justice and breached his right to a fair hearing under s 24(1) of the Charter 'by rejecting his objections to jurisdiction without first hearing his oral submissions and by failing to provide him with due assistance in relation to those submissions.'

The police informant appealed Bell J's decision to the Court of Appeal. The Court of Appeal allowed the appeal, holding that there was no breach of natural justice and, consequently, Mr Harkness' rights under the Charter were not infringed.

Judgment

The Court of Appeal first considered the content of the right to a fair hearing under s 24(1) of the Charter, holding that the critical question is: 'What does the duty to act fairly require in the circumstances of the particular case?'. Circumstances that should be considered when determining the practical content of procedural fairness will include:

- 'The nature of the decision to be made;
- The nature and the complexity of the issues in dispute;
- The nature and complexity of the submissions which the party wishes to advance;
- The significance to that party of an adverse decision ('what is at stake'); and
- The competing demands on the time and resources of the court or tribunal.'

Maxwell P, Beach and Niall JJA observed that the statutory framework governing the decision-making process will be a key consideration in determining the content of fairness in a particular case. In this case, the applicable statutes were the *Magistrates' Court Act 1989* ('Act') and the *Magistrates' Court Criminal Procedure Rules 2009* ('Rules'). A 'main purpose' of the Act was expressed as allowing for the Magistrates' Court to be managed in a way that will ensure that optimum use is made of the Court's resources. The 'overriding objective' of the Rules was 'to enable the Court to secure the just and timely determination of every criminal proceeding', including 'ensuring an appropriate allocation of the Court's resources, while taking into account the needs of other cases'.

Their Honours held that this analysis framework does not change in any significant respect when one of the parties is an unrepresented litigant: 'The question to be asked – both at first instance and on judicial review



– remains the same: what is (or was) required to give the unrepresented person a reasonable opportunity to advance his/her own case and to be informed of and respond to the opposing case?'

However, their Honours noted that the 'key difference' in cases involving an unrepresented litigant is that the usual assumption as to the capability of represented litigants does not apply. In order to give content to procedural fairness, a Court will be required to 'assess the capability of the unrepresented person to formulate, and communicate, the case which he/she wishes to present'. The Court can make this assessment on the basis of documents filed by the unrepresented litigant and, in the case of an oral hearing, the quality of the unrepresented litigant's verbal communication with the Court. Critically, if the Court considers that the unrepresented litigant is seeking to make an arguable legal point but has not been able to articulate it, the duty to afford a fair hearing may require the Court to 'seek to elicit and elucidate the legal point, through exchanges with the litigant'. This burden, which can be a heavy one, can be ameliorated by pro bono assistance to the unrepresented person as well as through opposing parties and their lawyers acting fairly and in accordance with their overarching obligations.

Applying that analysis to Mr Harkness' case, the Court of Appeal held that there was no denial of procedural fairness by the Magistrate. It was appropriate that he had been asked to file submissions ahead of time, and those submissions demonstrated that he understood Court processes and could express himself and his stated position fluently and confidently. Fairness did not require, in those circumstances, that Mr Harkness be assisted in his objection to jurisdiction, and there was clearly no arguable legal point underlying his position that he had been unable to articulate. The Court of Appeal also held that even if there had been a breach of procedural fairness, the breach would not have been material.



***Haigh v Ryan* [2018] VSC 474**

24 August 2018

Ginnane J

Charter provisions: ss 7, 14, 15, 22, 32, 38

Summary

Mr Haigh was a prisoner. He practised what he described as Paganism and claimed that his religious observance involved the use of Tarot cards. Under policy documents describing prisoners' rights concerning religious practice, the prison refused him access to four Tarot cards. Mr Haigh sought judicial review of the prison's decision, relying on provisions of the *Corrections Act 1986* ('Act') and the Charter. He argued that the prison breached human rights conferred by the Charter and the Act. In particular, he said that his inability to use the Tarot cards was an unlawful limitation on his right to freedom of thought, conscience, religion and belief contained in s 14 of the Charter; his right to freedom of expression contained in s 15 of the Charter; and his right to humane treatment during imprisonment contained in s 22 of the Charter. Mr Haigh gave evidence that a pack of Tarot cards can only be used if all cards are available.

Ginnane J made a declaration that the prison's decision to withhold the four Tarot cards from Mr Haigh was unlawful for failure to comply with s 38(1) of the Charter. He set aside the prison's decision and remitted it for reconsideration of Mr Haigh's rights under the Charter.

Judgment

As a starting point, Ginnane J accepted that Paganism was a religion and that the prison was a 'public authority' within the meaning of s 38(1) of the Charter. He observed that while the Act and the *Corrections Regulations 2009* provided the legislative basis for prison governance and management in Victoria, s 38(1) makes it unlawful for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to a relevant human right.

Ginnane J first considered ss 14 and 15 of the Charter. He said that public officials should be extremely wary about determining what is required for a person to practise their religious beliefs. It is not for judges to determine such questions, and people generally have the freedom to choose the set of beliefs, practices and observances that they accept, even if they are gullible or misled. Further, a public official should be slow to determine that the removal of a religious tool or artwork that a person wishes to use does not engage or limit their human right of religious freedom. Ginnane J found that the use of Tarot cards can be a ritual associated with the practice and observance of Paganism. He held that the withholding of the four Tarot cards engaged Mr Haigh's right of religious freedom and belief and that the withholding of the cards limited the exercise of his religious right, albeit in a minor way. Having regard to the matters set out in s 7(2) of the Charter, Ginnane J held that the limitation was unreasonable. Moreover, the prison did not consider Mr Haigh's rights under s 15.

Ginnane J then turned to s 22. He concluded that Mr Haigh's dignity right was not curtailed by the withholding of the cards. He said that by being prevented from accessing four Tarot cards when hundreds of other sets were available, the prison did not interfere with Mr Haigh's right to be treated humanely.



R v Chaarani (Ruling No 1) [2018] VSC 387

16 July 2018

Beale J

Charter provisions: ss 7, 14, 18

Summary

Abdullah Chaarani was one of three accused charged with conspiring between 21 October 2016 and 22 December 2016 to do acts in preparation for, or planning, a terrorist act. Mr Chaarani's wife, Aisha Al Qattan, wished to wear a nikab (a veil completely covering the head and face except for an opening for the eyes)³ while attending court as a spectator during her husband's trial. Beale J had previously ordered that spectators in the public gallery must have their faces uncovered, chiefly for security reasons.

Mr Chaarani and Ms Al Qattan ('applicants') sought a variation of Beale J's orders. The applicants argued that Beale J's orders breached Ms Al Qattan's right of religious freedom and her right to participate in public life, as enshrined in ss 14 and 18 of the Charter.

Judgment

Beale J accepted that the rights of religious freedom and the right to participate in public life were important rights, and were engaged by the application. His Honour also accepted that the wearing of nikabs for religious reasons in court was not disrespectful, offensive or threatening, and that Ms Al Qattan naturally wished to support her husband during his trial. Beale J acknowledged that by revealing her face to security staff at the court entrance (as she was willing to do), Ms Al Qattan's identity could be ascertained at that stage.

While Ms Al Qattan had professed a willingness to abide by the court's directions in relation to the good order and management of the proceedings, Beale J noted that the applicants had not suggested any such directions in the application. Beale J commented that it would be undesirable and discriminatory to segregate spectators and/or arrange extra security staff to monitor them. His Honour said the dedicated allocation of already limited court security resources in such circumstances would be inappropriate.

Beale J acknowledged that Ms Al Qattan and others had been permitted to wear their nikabs in the public gallery at the committal proceedings before a Magistrate sitting alone. However, his Honour said that it did not necessarily follow that the wearing of a nikab should be permitted in a trial before a judge and jury, where different considerations would come into play. While the applicants had asserted that Ms Al Qattan was not a security risk, Beale J observed that Ms Al Qattan would have a larger stake in the proceedings than the casual observer, and would be subjected to considerable stress. His Honour said that while Ms Al Qattan and others might be able to handle the stress well and act with the restraint, the risk that they might not should not be ignored.

The applicants had cited four cases in support of their application, submitting that it was implicit in the case law that it was acceptable to observe or even participate in court proceedings while wearing a nikab. Beale J found that the cases stood for the propositions that witnesses may wear a nikab if not giving contested evidence, and that accused persons may wear a nikab except when testifying, provided identity was not in issue. However, Beale J distinguished the cases from the applicants' application on the basis that Ms Al Qattan was not under any legal compulsion to attend court.

Finally, Beale J said that the right of religious freedom and the right to participate in public life were not absolutes, and could be subject to limitations which could be demonstrably justified in a free and democratic

³ Nikab is sometimes spelt niqab – the spelling has been taken from the judgment of Beale J, who in turn took it from the Australian National Imams Council.



society based on human dignity, equality and freedom (as recognised by s 7 of the Charter). His Honour then canvassed the potential security issues associated with spectators in the public gallery have their faces covered, alongside the fundamental values of open justice, religious freedom and the right to participate in public life. After considering the issues, he concluded that requiring spectators in the public gallery to have their faces uncovered was a reasonable limitation on the engaged rights.

His Honour therefore declined to vary his orders. He said that if Ms Al Qattan chose not to attend court as a result, arrangements would be made to live stream the proceedings to a remote facility so she could still view the trial.



Deputy Commissioner of Taxation (Cth) v Bourke [2018] VSC 380

11 July 2018

Cameron J

Charter provisions: s 24

Summary

The Deputy Commissioner of Taxation ('DCT') was the mortgagee of a property registered to Mr George Williams, who died in May 2016. The mortgage had been registered as part of a settlement agreement between the DCT and Mr Williams in 2013, securing payment of a judgment debt owed by Mr Williams to the DCT. Mr Williams became liable to pay the judgment debt in 2015, but it remained unpaid at the time of his death. The DCT sought possession and sale of the property, and applied for summary judgment. The defendants were the executors of Mr Williams' estate. An Associate Justice granted summary judgment in favour of the DCT.

The first defendant, Ms Roberta Williams, appealed the decision on a number of grounds, including that the Associate Justice failed to give her a fair hearing pursuant to s 24(1) of the Charter. In this regard, Ms Williams adduced evidence that she was hospitalised at the time of the hearing and that her lawyer had sought an adjournment. When the adjournment was refused by the Associate Justice, Ms Williams' lawyer withdrew on account of having no instructions to oppose the application for summary judgment. An attempt by a Mr Strangio, who was at the hearing, to speak on the basis of assisting Ms Williams was also rejected by the Associate Justice.

Judgment

Cameron J noted that in accordance with Pound and Evans, the learned authors of *An Annotated Guide to the Charter of Human Rights and Responsibilities* (Lawbook Co, 2018), there were three express elements to s 24(1), that the hearing be fair, public, and decided by a 'competent, independent and impartial court or tribunal'. That the decision was by a competent, independent and impartial tribunal was not disputed by Ms Williams. Cameron J reasoned that the element of 'fairness' related to procedural fairness, synonymous with the principles of 'equality of arms', in that each party had a reasonable opportunity to put his or her case under conditions that do not place him or her at a substantial procedural disadvantage relative to the opposing party. In the circumstances, there was nothing to suggest that Ms Williams had been denied a fair hearing. She had ample opportunity to prepare for the hearing with legal assistance but failed to do so, and the refusal to hear Mr Strangio was appropriate. Similarly, there was nothing to suggest that the hearing before the Associate Justice was anything other than public.



DPP v Natale (Ruling) [2018] VSC 339

26 June 2018

Bell J

Charter provisions: ss 8, 38

Summary

This matter concerned an application by the accused to have a record of interview made on the 27 November 2013 ('Record of Interview') excluded as evidence. The accused was a 73 year old man of Italian background, who spoke limited English but had been interviewed by police without an interpreter present.

The accused and his wife were estranged. His wife had Filipino heritage. The events leading to the accused being charged allegedly occurred in July 2014. The accused allegedly offered a friend \$4,000 to kill a member of his wife's extended family, who was living in the Philippines. When the friend did not do this, the accused allegedly threatened to kill him and his family.

In the interview conducted in November 2013, on unrelated charges to the current case, the accused stated he would 'Pay money to go – somebody go to the Philippines to do something to the family, cross my heart.' The prosecution wanted to use this, and other statements, as evidence of motive.

The accused was charged with a number of offences: threatening to kill, extortion with threat to kill and incitement to murder. However, the accused had been found unfit to plead by a jury according to part 2 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ('Mental Impairment Act') and was going to be tried under part 3 of the Mental Impairment Act. The rules contained in the *Evidence Act 2008* ('Evidence Act') apply to proceedings under part 3 of the Mental Impairment Act.

The application to exclude the evidence was made on a number of grounds, which Bell J narrowed down to two main grounds. First, that under s 90 of the Evidence Act it would be unfair to use the evidence and second, the evidence was unlawfully or improperly obtained under s 138(1) of the Evidence Act. Broadly, the basis for the application was that in failing to provide the accused with an interpreter, the accused did not understand his rights. Therefore under the rules of evidence and on the basis of preserving the accused's human rights the Record of Interview should be excluded.

Judgment

Bell J rejected submissions by the accused that the Record of Interview was not relevant evidence within the meaning of s 55(1) of the Evidence Act. However, ultimately His Honour found that the admissions should be excluded under ss 90 and 138 of the Evidence Act.

Before turning to the questions of whether the admissions should be excluded, Bell J considered the circumstances surrounding the interview. First, Bell J noted that during the hearing before him the accused required an interpreter's assistance to give evidence and spoke English poorly. His Honour further noted that the accused cannot write in English and an interview conducted by an informant with the accused on 31 July 2014 was terminated by the informant because they determined an Italian interpreter needed to be present. Bell J then stated that throughout the Record of Interview the accused gave answers that were difficult to understand and explained himself poorly. These, along with other factors, led Bell J to the conclusion that the accused did not understand what was occurring during the interview, including that his answers could be used against him, and he did not understand the questions being put to him, nor could he answer questions adequately owing to his limited English proficiency.

Section 90 of the Evidence Act



Bell J then considered whether the admissions should be excluded as evidence under s 90 of the Evidence Act. His Honour noted that the applicant bore the onus of establishing this ground of exclusion and determined s 90 applies to a broad range of admissions, including those which are related to a matter which is adverse to the accused's interests in a proceeding. As such, s 90 applied to the admission in the present case.

His Honour noted that the unreliability of evidence is relevant to s 90, insofar as the unreliability relates to the circumstances where the admission came about and whether this should affect its use at trial. Bell J further noted the unfairness s 90 protects against is the use to which the evidence is put at trial, not the means by which it was gathered. As such, the discretion under s 90 should be used to protect the rights of the accused, particularly the right to a fair trial. His Honour determined this includes circumstances where the use of an admission would give the prosecution an unfair forensic advantage, such as a situation where an accused who has poor comprehension of English is interviewed without an interpreter present.

Turning to the facts, Bell J determined the Record of Interview should be excluded under s 90 of the Evidence Act, owing to a range of factors including the accused's: lack of appreciation of his rights, lack of understanding of legal and judicial processes and poor English skills. Further factors included that the interview was not voluntarily undertaken and would severely undermine the accused's credibility, likely forcing him to give evidence, which would place the defence at an unfair forensic disadvantage.

Section 138 of the Evidence Act

Finally, his Honour considered whether the admissions should be excluded as evidence under s 138 of the Evidence Act. Bell J noted that the application of s 138(1) is a two stage process, the first in which the onus is on the applicant to show the evidence was obtained 'improperly or in contravention of an Australian law' or in consequence of this. In the second stage, the other party needs to show the desirability of admitting the evidence outweighs the undesirability of doing so. His Honour stated that s 138(1)'s purpose is to allow the Court to protect the integrity of its own processes.

In considering whether there was an impropriety or contravention of an Australian law, Bell J noted the Charter and the *Crimes Act 1958* ('Crimes Act') fell within the definition of 'Australian Law' under the Evidence Act. His Honour then commented that evidence which is improperly obtained is evidence obtained in circumstances where individuals working within law enforcement do not conduct themselves in a way that meet the minimum standards of what our society would expect of them. In this case, Bell J determined that there was both impropriety and contravention, through the police failing to ensure an interpreter was present when they interviewed the accused. This resulted in a contravention of s 464D(1) of the Crimes Act and s 38(1) of the Charter. His Honour held the Record of Interview was improperly obtained because the contravened provisions represented standards of procedure society expects law enforcement officers to abide by.

Bell J then considered how human rights are protected under ss 138(1) and (3) of the Evidence Act. His Honour noted that a range of human rights must be considered when determining whether evidence should be excluded under s 138, including rights contained in the International Covenant on Civil and Political Rights and the Charter ('ICCPR'). The specific sections of the Charter that Bell J determined were relevant in this case were ss 8(3) and 38(1). Section 8(3) protects individuals' rights to equality before the law including 'the right to equal and effective protection against discrimination', and s 38(1) makes it unlawful for public authorities to behave in a manner that is incompatible with human rights. The definition of 'discrimination' in the Charter includes the definition of discrimination within the meaning of the *Equal Opportunity Act 2010* ('Equal Opportunity Act'). The Equal Opportunity Act delineates between direct and indirect discrimination. Bell J determined that the accused had suffered indirect discrimination because he had poor English skills and was therefore disadvantaged by not being provided with an interpreter. His Honour found this was contrary to s 8(3) and unlawful under s 38(1) of the Charter.



In conclusion, Bell J held that the undesirability of admitting the evidence outweighed the desirability of doing so under s 138(1) of the Evidence Act, based on the factors contained in ss 138(3)(a)-(f) that Act. This includes that the evidence was unreliable and this undermined its probative value (s 138(3)(a)), that there was other evidence which went to motive in the proceeding if the Record of Interview was excluded (s 138(3)(b)), and the alleged offences were serious but the exclusion of the Record of interview would not prevent proceedings commencing (s 138(3)(c)).

His Honour then considered the factors under ss 138(3)(d)-(f), and determined that in conducting the interview without an interpreter, the police officer had failed to comply with the following legal obligations and violated the following rights of the accused:

- 'the right of the accused to equal and effective protection against discrimination in article 26 (which deals with language discrimination) of the ICCPR;
- The obligation of the officer to arrange for an interpreter and defer the questioning until one was available in s 464D(1) of the Crimes Act;
- The right of the accused to equal and effective protection against discrimination in s 8(3) of the Charter and the obligation of the officer to act compatibly with that right in s 38(1); and
- The obligation of the officer to give or translate the caution into a language in which the accused could communicate with reasonable fluency in s 139(3) of the Evidence Act.' ([96]) (Information in brackets added).



ZD v Secretary to the Department of Health and Human Services [2017]

VSC 806

22 December 2017

Osborn JA

Charter provisions: s 17

Summary

The appellant was the mother of three children the subject of an interim accommodation order ('IAO') imposed by the Children's Court on 8 August 2017 under s 262 of the *Children Youth and Families Act 2005* (Vic) ('the CYFA'). The effect of the IAO was that the appellant's three children were placed into foster care.

In the proceedings the subject of appeal, a Children's Court Magistrate imposed a condition in each IAO that allowed each child to be immunised 'in accordance with DHHS immunisation schedule and in accordance with the approved immunisation program'. The Magistrate made his decision pursuant to s 263(7) of the CYFA, which provides:

An interim accommodation order may include any conditions that the Court or bail justice considers should be included in the best interests of the child.

The appellant appealed the decision on the basis that the Magistrate did not have the power under s 263(7) to impose conditions that have 'significant long-term consequences' for that child. The appellant's submissions were based on the contention that the CYFA, read as a whole, recognises that long-term decisions require the consent of parents; and/or that the purpose of an IAO is to make interim decisions only in relation to the welfare of a child.

Both the appellant and the respondent made submissions regarding the application of the Charter to the issues on appeal. The appellant contended that s 263(7) should be read in accordance with the right to protection of families and children under s 17(1) of the Charter to prevent the Magistrate from making decisions that 'impact on parental responsibility' or go beyond making 'arrangements for the temporary accommodation of a child'. The Secretary relied on the right relating to the protection of children under s 17(2) of the Charter to support their submission that s 263(7) should be given a wide reading to allow the Court to make orders in the best interests of the child.

Judgment

Osborn JA held that a proper statutory construction of both the CYFA as a whole and s 263(7) in particular supported a broad reading of the provision that allowed the Magistrate to make the immunisation order. The plain meaning of s 263(7) is that 'the Court is given a wide discretion governed by the overriding principle of the best interests of the child'. Various other provisions of the CYFA also supported this construction, including that merits review of any decision made under s 263(7) is available to the parents of the child under s 271 and that the Court is expressly required to consider access to appropriate health services as part of consideration of the concept of 'best interests' by s 10(3)(n) of the CYFA.

In relation to the application of the *Charter*, His Honour held that because the plain meaning of s 263(7) is apparent on the face of the text, the interpretive provision of the Charter in s 32(1) does not apply. Principles governing the application of s 32(1) derived from the authorities make it clear that the provision can only apply when the text in question is capable of more than one meaning (in which case the meaning of the text consistent with the meaning that best accords with rights under the Charter should be adopted). His Honour's statutory interpretation led to the conclusion that s 263(7) was only capable of one meaning, excluding the Charter from operation.



However, even if the Charter applied to s 263(7), his Honour would have held that the provision, properly constructed, could not be said to be inconsistent with the rights under ss 17(1) and 17(2). This is because in determining a child's best interests, the Court must take into account the principles set out in s 10 of the CYFA, which incorporate and accord with the applicable rights under the Charter. Even if the right under s 17(1) were limited by the provision, that right would be justifiably limited to give precedence to the best interests of the child according to the right under s 17(2).



United Firefighters' Union of Australia v Victorian Equal Opportunity and Human Rights Commission [2017] VSC 773

15 December 2017

Ginnane J

Charter provisions: ss 4, 41

Summary

On 9 December 2015, the Secretary to the Department of Justice and Regulation ('the Department') wrote to the Victorian Equal Opportunity and Human Rights Commission ('Commission') requesting that the Commission undertake a review regarding behavioural issues and increasing workforce diversity within the Country Fire Authority ('CFA') and the Metropolitan Fire Brigade ('MFB') ('the Review'). The plaintiff in these proceedings ('UFU'), sought orders that the Commission be prevented from continuing the Review and from ultimately publishing its findings. The plaintiff relied on three grounds to support its request, namely:

- (a) that the Review was not properly constituted under either the *Equal Opportunity Act 2010* (Vic) ('the EO Act') or the *Charter*,
- (b) that the Review investigated matters beyond the scope of the Commission's powers under the EO Act and the *Charter*, and
- (c) that the Review included an online survey that was so 'fundamentally flawed' that no authority acting reasonably could rely on it.

Section 151 of the EO Act allowed the Commission to enter into an agreement with a 'person to review that person's programs and practices to determine their compliance with this Act.' Section 41(c) of the Charter allowed the Commission '[w]hen requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights.' Section 4 of the Charter defines a 'public authority', which can include statutory corporations or a public official.

In relation to ground (a), the plaintiff submitted that both the MFB and the CFA were public authorities distinct from the Victorian government (also a public authority). As the EO Act and the *Charter* both require the Commission be requested to review 'that person's' or 'that authority's' programs and practices, the Review was improperly constituted, as neither the MFB nor the CFA had requested the Review. The defendants submitted that the 'person' and 'public authority' respectively that had made the request was the Secretary of the Department of Justice and Regulation, on behalf of the executive branch of the Victorian Government. They submitted that the both the MFB and the CFA carry out the work of government, namely the general provision of fire services. The Victorian Government had therefore properly requested a review into its *own* programs and practices.

In relation to ground (b), the plaintiff submitted that the Review went beyond the scope of the EO Act and the *Charter* because the questions asked in the course of the Review did not accord directly with protected attributes in the EO Act or rights under the *Charter* (because, for example, the Commission had stated that it would investigate 'workplace bullying', when only bullying by reason of a protected attribute was covered by the EO Act). The defendants submitted that the Terms of Reference of the Review clearly indicated that it was predicated on protected attributes under the EO Act, and although some questions were framed generally, the survey structure allowed for general questioning to be limited later in the survey by reference to particular kinds of unlawful discrimination. They also submitted that the wording of s 41 of the Charter ('to determine...compatibility with human rights') would encompass the terms of the Review.

Judgment



Ginnane J found that the plaintiff failed to establish all three grounds upon which it challenged the completion and publication of the Review.

In relation to ground (a), His Honour held that proper construction of the statutes instituting both the CFA and MFB demonstrated that

the programs and practices of the CFA and MFB, namely, the provision of fire and emergency services to the Victorian community, are synonymous with activities that fall within the province of action of the executive branch of government.

This was because the ‘programs and practices associated with the delivery of fire services to the community are an essential responsibility of government and its executive branch in protecting the community.’ Although the CFA and MFB may have devised or carried out those programs and practices, they were programs and practices for, and of, the executive branch of the government. As a result, the relevant ‘person’ and ‘public authority’ that requested the review was the Victorian Government, and the Review was properly requested under both the EO Act and the *Charter*. His Honour also held that funding for the Review was properly requested and that the Commission would have had the power under other provisions of the EO Act to carry out the Review in any case.

In relation to ground (b), His Honour held that the Commission did not act beyond its power in conducting the Review. He held that the reference to bullying in the Terms of Reference of the Review was clearly linked to prohibited actions under the EO Act, such as victimisation, discrimination or sexual harassment. Further, ‘[t]he Review and its survey can legitimately harvest a large pool of information and extract information relevant to its inquiry’. For this reason, the plaintiff failed to establish ground (b) of its challenge to the Review.

Finally, His Honour dismissed ground (c) of the plaintiff’s submissions after concluding that it would not be unreasonable for the Commission to rely on the online survey element of the Review to inform its findings, assuming that it would acknowledge any limitations in the data obtained in any resulting analyses or reporting of the data.



McDonald v Legal Services Commissioner (No 2) [2017] VSC 89

14 December 2017

Bell J

Charter provisions: ss 7, 15

Summary

The appellant, Mr McDonald, was a legal practitioner who was found guilty at VCAT of two charges of unsatisfactory professional conduct for breaches of rule 21 of the *Professional Conduct and Practice Rules* ('the Rules'). The charges related to correspondence Mr McDonald sent to opposing solicitors Lander & Rogers while acting for an employee in a redundancy dispute. In the correspondence, Mr McDonald accused the responsible solicitor at Lander & Rogers of being 'fundamentally dishonest', having 'told lies' and having engaged in 'deliberate and calculated dishonesty'. Mr McDonald made the allegations because he believed that the solicitor had represented to him in a telephone conversation that there was no scope for settlement and had subsequently misrepresented the content of that conversation.

Lander & Rogers referred Mr McDonald to the Legal Services Commissioner on the grounds of discourtesy, and the Commissioner subsequently brought proceedings against Mr McDonald in VCAT. VCAT accepted that Mr McDonald honestly believed that the solicitor had lied to him. However, without taking this into account, VCAT held that Mr McDonald was not acting in the legitimate pursuit of his client's best interests when he made the allegations and found him guilty.

Mr McDonald applied to the Supreme Court for leave to appeal, arguing that VCAT erred in law in failing to take into account the fact that Mr McDonald honestly believed that he had been lied to. Mr McDonald submitted that this honest belief meant that he had a reasonable basis for making the allegations, and this reasonable basis in turn informed the exercise of his duty to make the allegations in the legitimate pursuit of his client's best interests.

The case concerned the intersection between Mr McDonald's professional responsibility to make allegations in the legitimate pursuit of his client's best interests, which is subject to disciplinary regulation in the public interest, and his right to freedom of expression under s 15(2) of the Charter.

Judgment

Justice Bell granted Mr McDonald leave to appeal and upheld his appeal. He dismissed the charges of unsatisfactory professional conduct brought by the Commissioner against Mr McDonald.

Mr McDonald's right to freedom of expression was engaged, as the common law emphasises 'both the importance of the freedom for legal practice and the need for lawyers to exercise it properly.' Freedom of expression is an important element of the independence of lawyers and the administration of justice. It is therefore essential that lawyers are not unduly restricted when exercising their freedom of expression.

Identifying the scope of a human right is an analytical step that must be undertaken at the engagement stage of a court's reasoning in proceedings involving *Charter* rights. This is a distinct step from determining the extent to which the right is limited. Having identified the scope of the right, his Honour noted that it was accepted that Mr McDonald was exercising his right to freedom of expression when he sent the correspondence to Lander & Rogers.

The next step was to consider the extent to which the right was limited, both by the *Charter* limitations and by the Rules. Bell J expressed approval for the approach that 's 15(3) identifies the particular considerations that are relevant to the s 7 limitation inquiry', rather than each provision acting as a separate limitation on the right to freedom of expression. Further, as the Rules were a subordinate instrument, they should be read compatibly with the rights under the Charter where such a reading is available.



His Honour held that the purpose of the Rules are ‘not to ensure civility in relations between legal practitioners as an end in itself’, but rather to ‘maintain the integrity and reputation of the legal profession and hence public confidence in the administration.’ Therefore,

the rule only prohibits discourteous, offensive or insulting language or conduct that represents a failure to take reasonable care of the reputation or integrity of the legal profession. So interpreting and applying the rule is consistent with respecting the right of lawyers to freedom of expression in s 15(2) of the Charter.

Acting properly in the course of their duties, lawyers will sometimes have to make allegations about other practitioners in order to protect their client’s interests. The question is therefore whether the alleged discourteous communication ‘represents a failure to take reasonable care to maintain the integrity and reputation of the legal profession.’

His Honour held that Mr McDonald’s honest belief that he had been lied to was an arguably reasonable basis for his actions. This was connected to whether Mr McDonald was acting in legitimate pursuit of his client’s interests. In the first instance, VCAT had focused disproportionately on courtesy, rather than the professional judgment made by Mr McDonald. VCAT had erred in law by approaching the matter from the perspective of whether the communications were discourteous and not from the perspective of whether it was open to Mr McDonald, on the facts as he honestly believed them, to make the communications without endangering the integrity of the legal profession.



Minogue v Dougherty [2017] VSC 724

6 December 2017

John Dixon J

Charter provisions: ss 13, 15

Summary

The plaintiff is a prisoner serving a sentence at Barwon Prison. He commenced proceedings seeking declaratory relief in relation to a series of decisions made by prison mail officers to seize letters sent to and by him; decisions that he submitted had failed to accord proper consideration to his human rights, and which he believed had unreasonably limited his right to freedom of expression.

At the relevant time, prison mail was processed according to a policy direction (Deputy Commissioner's Instruction) (DCI), and an operating procedure (Local Operating Procedure on Prisoner Communications) (LOP). On a number of occasions, the plaintiff's mail was seized and then released after a period of time; one item was returned to the sender. The plaintiff complained about the following actions:

- *Pen pal letter*: This letter was seized because the correspondent's motives were unclear and might have been unlawful, so a 'precautionary approach' was adopted with the letter being considered a 'threat to prison security';
- *Christmas letter*: In December 2016, staff refused to action his request for 40 x A3 copies of a newspaper article which he intended to attach to 40 outgoing Christmas letters. Instead, staff provided one A4 copy of the article, and said they did not have time to make further copies. The plaintiff then sent out the Christmas letters without the articles.
- He also attempted to send a copy of the Christmas letter to one of the prison staff members; however, it was stopped by the mail officer. Sending letters to individual prison staff members was deemed inappropriate, and the relevant staff member had also asked that it not be forwarded to her.
- *Bank account and e-mail letters*: Prison officials initially stopped a bank account letter and an email letter from reaching the plaintiff. The correspondence was eventually provided, but the plaintiff complained that this was merely an attempt to stifle any complaint of unlawful conduct and to prevent him from discovering the identity of the person who had initially stopped the e-mail letter;
- *Descartes package*: Prison officials stopped a package containing a letter and a book (*Meditations on First Philosophy* by René Descartes), because they were not from a person on the plaintiff's 'approved visitor' list.

Judgment

(i) *General approach*

First, his Honour acknowledged the defendant's concession that Mr Ryan constituted a 'public authority' for the purposes of the *Charter*.

Second, his Honour addressed the plaintiff's argument that the relevant decision had been made without proper consideration of his *Charter* rights; specifically, s 13 (privacy and reputation); s 15 (freedom of



expression); and s 7 (human rights—what they are and when they may be limited). In response, his Honour referred to the road map for assessing incompatibility under s 38 of the *Charter*, which he had outlined in *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251, and which involved consideration of a number of questions targeting: relevance or engagement; limitation; proportionality or justification; proper consideration; and inevitable infringement (at [74]).

(ii) Pen pal letter

The plaintiff insisted on proceeding against a prison official, Officer Dougherty, rather than the prison governor, Mr Ryan. While Officer Dougherty was a public official, she had not taken any action relevant to the plaintiff's rights, because the relevant actions were taken by Mr Ryan. In the alternative, the judge found that the plaintiff's rights were subject to a reasonable and proportionate limitation by the statutory framework provided under the *Corrections Act 1986* (Vic).

(iii) Christmas letter

The refusal to provide the A3 photocopies did not constitute act of censorship, as there was nothing in the Act, Regulations, or policies that obliged the defendant to accede to such a request. On the *Charter* point, a refusal to make photocopies cannot, in the circumstances, constitute an unlawful or unreasonable interference with the plaintiff's freedom of expression. Further, applying *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 184 [185]–[186], the judge found that:

If the decision maker responding to the request for photocopying ... seriously turned his or her mind to what rights would be affected by the photocopying decision, it was not reasonable to conclude that the plaintiff's freedom of expression or his right to communicate were likely to be interfered with (at [81]).

Having failed to obtain the photocopies, it was open to the plaintiff to make alternative arrangements to secure the copies, such as by having someone outside the prison provide them.

(iv) Bank account and e-mail letters

This matter raised no *Charter* issues.

(v) Descartes package

The defendant conceded that the return of the package to the sender was not in accordance with the plaintiff's rights under *Corrections Act 1986* (Vic) s 47(1)(n) to send and receive letters and the judge made a declaration to this effect.

On the *Charter* issues, the judge noted that under s 39(1) of the *Charter*, the plaintiff may seek relief or a remedy in relation to the act or decision of a public authority on the ground that it was unlawful, if relief or a remedy is available on the same ground 'otherwise than because of this Charter'.

Although Officer Dougherty was acting as a functionary, by returning the book to the sender, she made a decision that was 'complete and irreversible when Mr Trotter purported to ratify it'. Therefore, 'she was a public authority as defined by the Charter, who completed the procedure, excluding the possibility of another accepting responsibility for her actions in the procedural sense'. Although the plaintiff had directed his complaint to the procedural rather than the substantive limb of s 38(1), his Honour found that the plaintiff's rights were engaged (despite the defendant's contention otherwise), with the focus being on whether the officer had failed to accord proper consideration to the relevant right.

His Honour referred to Emerton J's 4-step approach to assessing proper consideration in *Bare v IBAC* (2015) 48 VR 129, 226 [299], following which he observed that:



The obligation to accord proper consideration requires a public authority decision-maker to understand in general terms which rights may be relevant and whether and how those rights will be interfered with by the decision that is being made. Proper consideration also requires a decision maker to have seriously turned his or her mind to the possible impact of the decision on an affected person's human rights and the implications for that person; and to identify the countervailing interest or obligations (at [90]).

Applying this to the facts, his Honour found that Officer Dougherty ought to have understood that a prisoner's rights to correspondence and freedom of expression could only have been restricted on the basis outlined in the DCI and LOP. For example, the DCI states that: 'Prisoners' human rights are limited only to the extent that it is reasonably and demonstrably justifiable. All staff must act compatible [sic] with human rights and consider human rights when making decisions' (at [41]). Further, his Honour noted that there was no evidence to indicate that Officer Dougherty had considered the possible impact of her decision upon the plaintiff's human rights, 'whether seriously or at all' (at [92]).

His Honour concluded by stating that it would not be appropriate for him to consider 'whether these circumstances might constitute unlawfulness in the conduct of a public authority under the *substantive* limb of s 38(1)' (at [94], emphasis added); the reason being that the prison governor was the proper contradictor for the purpose of considering 'whether the relevant human rights have been subject to reasonable and proportionate limitation in accordance with s 7(2) of the *Charter*, having regard to the statutory provisions under the *Corrections Act*' (at [94]).

However, his Honour did address the *procedural* limb of s 38(1), which requires public authorities to give proper consideration to relevant human rights. In this instance, Officer Dougherty was the relevant public authority and, following application of Emerton J's proper consideration test in *Castles*, his Honour determined that the Officer had not considered the plaintiff's human rights when deciding to return the book to its sender. In this respect, his Honour observed that:

What occurred was the blanket application of a non-existent rule, namely that prisoners are only able to receive mail/property from people on their approved visitors list, without any consideration whatsoever of the plaintiff's right not to have his correspondence unlawfully or arbitrarily interfered with or his right to freedom of expression by receiving information and ideas of all kinds in print (at [95]).

If such a rule had existed, his Honour noted that 'other considerations might have arisen', as '[i]nterference with correspondence pursuant to a rule that forms part of an existing regulatory framework might be accepted as "lawful" within the meaning of s 13(a)' (at [95]). However, as the question did not arise, it was unnecessary to discuss it further.

Thus, his Honour made a declaration to the effect that Officer Dougherty had failed to take proper consideration of the plaintiff's right to privacy (s 13(a)), and of his 'freedom of expression' (ss 15(2)(b)–(c)), when returning the Descartes package to its sender. His Honour also declared that Mr Trotter, having retrospectively adopted and ratified Officer Dougherty's decision had unlawfully interfered with the plaintiff's right under *Corrections Act 1986* s 47(1)(n) to receive correspondence uncensored.



Harkness v Roberts; Kyriazis v County Court of Victoria (No 2) [2017]

VSC 646

26 October 2017

Bell J

Charter provisions: s 24

Summary

The two plaintiffs, Mr Harkness and Mr Kyriazis, were both unrepresented litigants that had been convicted of road safety offences in the Magistrate's Court of Victoria and the County Court of Victoria respectively. Both men applied to the Supreme Court seeking to have their convictions set aside and remitted to the original court to be remade according to law.

Prior to the hearing in the Magistrates' Court, the court ordered that Mr Harkness 'file and serve any arguments, submissions and authorities upon which he seeks to rely'. The Court did not specify that oral submissions from Mr Harkness would not be permitted at the hearing. Mr Harkness filed and served a statement prior to the hearing that disputed the jurisdiction of the Magistrate's Court to hear the matter, on the basis that the Magistrate's Court had no jurisdiction to adjudicate his God-given common law right to travel freely. Over the course of the hearing, the Magistrate dismissed Mr Harkness' written submissions without giving explicit reasons for doing so, and refused to hear his oral submissions on the subject. He was subsequently excluded from the courtroom for misbehaviour. In his absence he was convicted and fined in relation to six of the seven offences with which he was charged.

Mr Kyriazis had appealed two convictions under the *Road Safety Act 1986* (Vic) to the County Court. Before the hearing, Mr Kyriazis sent a letter to the Court 'informing' the Court that he would be audio recording and videotaping the proceedings (despite the fact that he was in fact required to seek the express written permission of the Court to do so under the *Court Security Act 1908* (Vic)). At the hearing, the Judge and Mr Kyriazis had a heated exchange regarding whether or not Mr Kyriazis could or would videotape the proceeding, although the judge gave leave for the proceeding to be audio recorded. Following further exchanges between the judge and Mr Kyriazis, the Judge ordered him to go into the dock and threatened to charge him with contempt of court. Mr Kyriazis continued to participate in the proceeding in a limited way. At one point in the proceeding, the judge publicly denigrated Mr Kyriazis. Ultimately, the judge convicted Mr Kyriazis of the two charges but, finding that his conduct amounted only to a technical breach, declined to impose a penalty.

Judgment

His Honour held that the orders made in both cases should be quashed and the matters remitted back to their respective courts to be heard and determined according to law.

His Honour commenced by considering the responsibility of the Court to ensure that self-represented litigants receive a fair trial, both under the rules of natural justice and the *Charter*. He noted that the purpose and scope of the duty under the rules of natural justice and the *Charter* are very close, and a finding that a self-represented party had not been accorded a fair hearing under the common law would almost always entitle the court to find that the same failure constitutes a breach of the right to a fair hearing under the *Charter*.

To satisfy both the common law and *Charter* rules of a fair hearing, a Court must provide assistance to self-represented litigants in order to assist them in overcoming the disadvantage they face when up against trained lawyers. However, the Court's assistance must be proportionate in the circumstances and must not ultimately afford the self-represented litigant an advantage.



Mr Harkness was entitled to make oral submissions at the hearing and the Magistrate should have allowed him to do so. The Magistrate did not assist Mr Harkness sufficiently, given his status as a self-represented litigant, because she did not attempt to determine his state of knowledge about legal procedure and principles or assist him to make his submissions in relation to jurisdiction. Although her Honour may have assumed that Mr Harkness's objection to the jurisdiction of the Magistrate's Court was based solely on religious concepts or precepts, it was not open to her to so assume without hearing from and assisting Mr Harkness further. As a result, the Magistrate breached the rules of natural justice and Mr Harkness's right to a fair hearing under s 24(1) of the Charter. However, the later decision to exclude Mr Harkness was permissible, given his behaviour.

In relation to Mr Kyriazis, the Judge should have assisted Mr Kyriazis along the following lines:

- inquiry into his capability so that a judgment could be made as to how much assistance was required;
- explaining the procedure that would be followed during the course of the hearing and his options in relation to giving and not giving evidence;
- directing his attention to the legal and factual questions that were in issue, which were not complex and related to the elements of the offences, which might need to be briefly explained;
- explaining to Mr Kyriazis his right to remain silent and not give evidence or to give evidence if he wished and the election that he would later be asked to make in this regard;
- informing Mr Kyriazis that the prosecution was required to prove the offences beyond reasonable doubt and give him some little explanation of what this meant if he required it; and
- discussion of the procedure for producing the documents under the subpoenas and how these would be inspected.

The judge's failure to do so breached the rules of natural justice. Further, the level of anger and frustration expressed by the judge and the apparent personal animosity between Mr Kyriazis and the judge would leave it open to a fair-minded observer to apprehend that the Judge had not conducted the hearing impartially.



Kyriazis v County Court of Victoria (No 1) [2017] VSC 636

26 October 2017

Bell J

Charter provisions: ss 6, 7, 15

Summary

The plaintiff sought permission to audio record a related proceeding (*Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)* [2017] VSC 646) under s 4A94(a)(i) of the *Court Security Act 1980* (Vic). The provision requires that a person be given express written permission by a judicial officer to make a recording of proceedings.

Judgment

His Honour allowed Mr Kyriazis to audio record the proceeding.

The applicable Charter right was the right to freedom of expression under s 15(2), which includes the rights to 'seek, receive and impart information and ideas of all kinds'. This right applies to the courts and tribunals in relation to legal proceedings through the operation of s 6(2)(b) of the Charter, but may be reasonably limited (per ss 7(2) and 15(3)).

In his reasoning, his Honour noted that no suppression, confidentiality or like orders had been made in the proceeding. The making of the recording was not likely to frustrate the administration of justice or infringe on third-party privacy interests (such as, for example, the interests of children or vulnerable participants in the proceeding). While the security of the court was a paramount consideration, there was no suggestion that security would be threatened by the making of the recording. Further, the informant in the proceeding had not opposed the application.

In light of these considerations, the common law principles of open justice and free communication of information and the right to freedom of expression under s 15(2) of the Charter supported the granting of permission to record the proceeding.



**PQR v Secretary, Department of Justice and Regulation (No 1) [2017]
VSC 513 and PQR v Secretary, Department of Justice and Regulation
(No 2) [2017] VSC 514**

26 September 2017

Bell J

Charter provisions: ss 15, 24

Summary

The applicant sought a suppression order to protect his identity in proceedings where he was seeking to challenge a decision by the Victorian Civil and Administrative Tribunal ('VCAT') under s 26B(1) of the *Working with Children Act 2005* (Vic), where he was assessed as not suitable child-related work. While the Supreme Court and VCAT had allowed him to commence the proceeding under a pseudonym, the Herald and Weekly Times Pty Ltd independently discovered, but had not yet published, his identity. The applicant sought the suppression order on the basis that he would be reasonably deterred from accessing justice at VCAT and in the Supreme Court if his present and former partner and her and their children were to suffer distress and embarrassment by reason of him being identified.

Judgment

The *Open Courts Act 2013* (Vic) engages both the right to freedom of expression and the right to a fair and public hearing. The open court principle, and the ability of journalists to report on court proceedings, is part of the right to freedom of expression and to seek, receive and impart information.

However, the rights to freedom of expression and a fair and public hearing are not absolute, and contain both internal limitations and general limitations under s 7(2). Even when justified, limitations must be proportionate, involve the least restrictive means of achieving the purpose and be expressed clearly and accessibly. Here, a suppression order was not necessary as an alternative means was available: to enforce the existing pseudonym order through the law of contempt.



***Minogue v Shuard* [2017] VSCA 267**

22 September 2017

Kyrou and Kaye JJA

Charter provisions: s 15

Summary

The applicant, a prisoner at Loddon Prison, applied for judicial review of a decision made by the respondent in her capacity as the Commissioner of Corrections Victoria. The application for leave to appeal was refused.

The applicant was undertaking a distance education course in counselling (**counselling course**) with the Australian Institute of Professional Counsellors (**AIPC**). By letter from Corrections Victoria, the applicant was advised that he would have to cease the course, and that he would be prevented from corresponding with AIPC (**the decision**). The relevant correspondence in this respect comprised two letters from Brendan Money, the Assistant Commissioner of the Sentence Management Unit of Corrections Victoria, to the applicant. The reason provided by Mr Money was that the applicant had not followed due process when commencing his studies, and that the nature of the course was not considered appropriate in the context of his offending history.

In response, the applicant sought an order in the nature of certiorari quashing the decision, as well as declarations that the policy (Distance Education Policy and Procedural Framework) (**DE Policy**) underlying the decision had the effect of unlawfully limiting his rights under ss 47(1)(n)–(o) of the *Corrections Act 1986*. The applicant argued that the decision limited his rights under these sections, without lawful justification, and therefore was beyond the respondent's power.

Trial judge's decision

Prior to trial, Corrections Victoria advised the applicant that it would not restrict his correspondence with AIPC, which would effectively permit him to continue with the counselling course. As a result, the proceeding was dismissed, with the trial judge holding that the question had become hypothetical, as the applicant had not been subject to restrictions, at any time, regarding participation in the course, and had continued to receive mail from AIPC. Therefore, with 'no extant controversy' between the applicant and respondent regarding participation in the course, the trial judge found that it was not necessary to determine whether s 47(1)(o) of the *Corrections Act* provided the applicant with an enforceable right to participate in the course.

On the *Charter* point, and whether there had been an infringement of the applicant's right to freedom of expression, the trial judge also declined to grant declaratory relief, stating that no question had arisen regarding whether the applicant's right in this respect had been limited by application of the DE Policy.

Judgment

In the appeal proceeding, the applicant sought leave to appeal the trial judge's decision on the basis that: (i) he erred in concluding that the question was hypothetical; (ii) he failed to address the applicant's complaints regarding conduct on the part of the respondent and her counsel, which he argued contravened the *Civil Procedure Act 2010* ('CPA'); and (iii) he erred in the way in which he framed some of the applicant's arguments.

Kyrou and Kaye JJA agreed with the position taken by the trial judge, observing that the question as to whether the impugned decision had curtailed the applicant's rights, as submitted above, was no longer before the Court, because the respondent had resiled from it (at [67])—therefore there was no evidence establishing that Corrections Victoria had acted, or intended to act, contrary to ss 47(1)(n) and (o) of the *Corrections Act*, in relation to the counselling course.



Their Honours noted that, if the complaint had not become hypothetical, it would have been necessary to consider the scope and effect of the relevant provisions and, if the decision had constituted a breach, to determine whether the applicant's right to freedom of expression (s 15(2) of the Charter) had been infringed.



***Rich v Howe* [2017] VSC 483**

14 September 2017

Kennedy J

Charter provisions: ss 24, 25

Summary

The plaintiff, sought to challenge alleged decisions made by the defendant, acting in his capacity as the General Manager of H.M Prison Barwon and for Corrections Victoria, to deny him supervised internet access.

The plaintiff claimed internet access was necessary to access various case law publications in order to bring an intended special leave application to the High Court to appeal a decision by the Court of Appeal upholding his conviction and sentence for murder and armed robbery. The plaintiff also filed a notice under s 35 of the *Charter*.

The plaintiff claimed that the non-provision of internet access constituted a breach of the Charter in terms of his right to a fair hearing pursuant to s 24.

Judgment

The plaintiff's case was dismissed.

The essence of the claim in relation to the *Charter* was whether the application of the policy infringes upon the plaintiff's right to a fair hearing, which encompasses access to the courts. Her Honour was prepared to assume that ss 24 and 25 of the *Charter* were generally engaged when the plaintiff sought access to the internet in relation to his proposed application to the High Court and, as well as the plaintiff's common law rights to a fair trial.

In the determination whether there was a breach of the *Charter*, the first question was whether an act had been done which was incompatible with a human right. Kennedy J canvassed the relevant Australian authority in relation to the interpretation of ss 24 and 25(2)(b) and found that the issue of a fair trial, both at common law and pursuant to the Charter, generally turns on the individual factual circumstances. Her Honour noted that there was no specified authority identified by counsel that stands for the proposition that the provision of internet access is necessary in order to afford a prisoner a fair hearing, pursuant to s 24, or the right to have adequate facilities, under s 25 (2)(b).

Overseas authorities also had not suggested a general obligation to provide access to the internet for a fair trial, nor that adequate facilities necessarily incorporate access to the internet. Rather, a number of questions need to be considered in this context, namely that:

- The claimant bears the onus of demonstrating that he is being denied the right to a fair hearing by reason of the alleged conduct;
- The position is the same as at common law;
- The issue as to whether a trial is fair involves a factual specific analysis;
- It is not sufficient to demonstrate interference with access that it might be easier or more convenient;
- The personal characteristics of the claimant are relevant;
- That the extent to which the claimant already has access to materials is relevant;
- Any decision to be unrepresented is taken into account;



- Evidence of security considerations are considered;
- That full or complete facilities are unnecessary.

After a consideration of the aforementioned factors, her Honour concluded that s 24 of the *Charter* was not breached and was not likely to be and that the plaintiff's common law rights to a fair trial have not been impeded.

Further, the defendant has not acted, and is not likely to act, in a way that was incompatible with the plaintiff's rights to have adequate facilities to prepare his case when the evidence clearly showed that the plaintiff had more than adequate access to extensive research and computer facilities.

Her Honour then considered whether there was any limit that was demonstrably justified, having regard to the matters outlined in s 7(2) of the Charter. To this end, the judge emphasised that the limitation was a narrow one in the context of restricting the use of a computer in a prison setting. Given the security risks involved, the limitation was imposed to ensure the defendant retained the ability to manage the prison, and the evidence did not point to an alternative safe way to prevent security breaches. On this basis, any limit imposed on the plaintiff's right to adequate facilities and unimpeded access was reasonable and justified pursuant to the Charter.

The final question was whether there was a failure to give proper consideration to a relevant human right. Her Honour found that the decision maker had given proper consideration to the relevant human rights of access to the court and adequate facilities by reason of the adoption of the policy in this case. Furthermore, the offer to Mr Rich to provide relevant research materials, together with the provision of the relevant High Court rules, also confirms that consideration was given to his rights of access and to adequate facilities.



BA v Attorney-General [2017] VSC 259

23 May 2017

Bell J

Charter provisions: ss 6, 24, 25

Summary

The plaintiff, BA, was charged with terrorism-related offences, pursuant to section 102.7 of the *Criminal Code 1995* (Cth) and section 7(1)(e) of the *Crimes (Foreign Incursions & Recruitment) Act 1978* (Cth). The investigation of the alleged offences committed by BA was carried out by the Australian Federal Police ('AFP') with the assistance of the Federal Bureau of Investigation ('FBI') in the USA. FBI officers obtained a large volume of information from GY, a resident of the USA, which was then supplied to the AFP. GY's statement was prepared by AFP officers in Australia upon the basis of this information. BA sought to obtain access to certain documents in the possession of FBI officers in the USA. As other means of obtaining these documents were not available, BA made application under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('MACMA') for a certificate that it would be in the interests of justice for the Attorney-General to make a request to the USA that the documents be provided.

Judgment

The plaintiff was successful. BA established that it would be in the interests of justice in Australia for the Attorney-General to make a request on behalf of BA that the USA provide access to BA to the documents sought for the purposes of the criminal proceeding in relation to the charges brought against BA in Australia.

Bell J held that the process under the MACMA contributes to the right to a fair trial by protecting the equality of arms principle.

The rights in ss 24 and 25 of the Charter also encompass the equality of arms principle and prosecutorial disclosure obligations. After considering section 6(2)(b) of the *Charter*, Bell J stated that disclosure of the documents sought by the defence would be consistent with disclosure obligations under the common law, the *Criminal Procedure Act 2009* and the *Charter*.



Certain Children v Minister for Families and Children (No 2) [2017] VSC

251

11 May 2017

John Dixon J

Charter provisions: ss 10, 17, 22, 23, 25, 38

Summary

The plaintiffs (represented by their litigation guardian) were all children detained the Grevillea Unit ('Grevillea'), an area of the Barwon adult maximum security prison designated by an Order in Council as a remand centre and youth justice centre for children. The children were all between 15 and 18 years old. They had been transferred to Grevillea from other youth justice centres following a riot that occurred at the Parkville youth justice centre over 12 and 13 November 2016, which destroyed up to 62 beds and exacerbated an accommodation crisis in the youth justice system.

The decision to designate Grevillea as a remand centre and youth justice centre was initially made by the Governor in Council on 17 November 2016. That decision and the decision to transfer the children to Grevillea were the subject of previous proceedings, heard before Garde J in December 2016 (*Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796). On 21 December 2016, Garde J declared that the November Orders in Council were invalid. This was based on a finding of that the Orders were unlawful under s 38(1) of the Charter, as well as two additional findings of jurisdictional error. The defendants appealed this declaration to the Victorian Court of Appeal, which upheld Garde J's decision on 28 December 2016.

However, before the Court of Appeal had published its reasons, on 29 December 2016 the Governor in Council again made Orders in Council that Grevillea be designated as a remand centre and youth justice centre (the 'Grevillea decision'). Following that order, several plaintiffs were transferred to Grevillea from the Parkville youth justice facility (the 'transfer decision'). Further, on 27 January 2017, the Governor in Council made Orders in Council exempting certain staff at Grevillea from restrictions that would otherwise apply to prevent them using capsicum spray and extendable batons within the area designated as a remand centre and youth justice centre (the 'weapons exemption decision'). All three of these decisions were challenged by the plaintiffs in this proceeding.

The plaintiffs challenged the decisions on the basis of jurisdictional error and unlawfulness under s 38(1) of the Charter. In relation to Charter unlawfulness, the plaintiffs submitted that rights under ss 10(b), 17(2), 22(1), 22(3), 23(3) and 25(3) were engaged and unjustifiably limited by the Grevillea and transfer decisions. The plaintiffs submitted that the weapons exemption decision engaged and unjustifiably limited rights under ss 10(b), 17(2) and 22(1) of the Charter.

Judgment

John Dixon J set out the principles for dealing with a Charter claim. He noted that the threshold for identifying a Charter right as engaged by a decision by a public authority is low, and once a right is identified as limited by the actions of a public authority, the standard of proof required to show that the limitation is justified is high. Further, s 38(1) of the Charter has a substantive and a procedural limb, with the substantive limb concerning whether the act of the public authority is incompatible with a human right, and the procedural limb concerning whether the decision-making process was undertaken with proper consideration of engaged human rights.

His Honour found that the Grevillea decision and the weapons exemption decision both engaged the substantive limb of s 38(1). He rejected the defendants argument that these decisions did not impact directly on the human rights of the plaintiffs, but were rather decisions that would make possible *subsequent* acts or



decisions that may affect the rights of the plaintiffs. He reached this conclusion on several bases, including that proper construction of the statutory text supports the argument that s 38(1) was intended to cover 'general' acts and decisions of public authorities, and that the establishment of a youth justice centre or remand centre is an act that, by itself, is capable of either promoting or interfering with certain Charter rights directly.

The next step was to determine which Charter rights were engaged by the decisions. The Grevillea decision engaged the rights under ss 17(2) and 22(1) of the Charter, but did not engage the rights under ss 10(b), 22(3), 23(3) or 25(3). In relation to the transfer decision, the rights under ss 17(2) and 22(1) were engaged, but the other rights submitted by the plaintiffs were not. Finally, in relation to the weapons exemption decision, the rights under ss 10(b), 17(2) and 22(1) were engaged.

In reviewing whether the rights engaged were limited by the decisions, His Honour considered evidence from both the plaintiffs and the defendants regarding conditions in Grevillea (including time spent outside of cells, time spent handcuffed, and availability of educational resources), the opportunities for visits from family members, and incidents of use of force. His Honour also visited Grevillea himself. On the basis of this evidence, His Honour found that the Grevillea decision and the transfer decision limited the rights under both ss 17(2) and 22(1). His Honour further found that the weapons exemption decision did limit the plaintiffs' ss 17(2) and 22(1) rights but did not limit the plaintiffs' s 10(b) rights.

As the plaintiffs' rights had been limited, the onus shifted to the defendants to demonstrate that the limitations were reasonable and demonstrably justified under s 7(2) of the Charter. In respect of the Grevillea decision and the transfer decision, the defendants had not shown that the limitations on the rights of the plaintiffs were proportionate or justified. Although the defendants were faced with a 'real accommodation crisis in the youth justice system', John Dixon J held that:

The evidence does not support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them...By simply identifying four alternative places that are not suitable, the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures.

His Honour suggested applying resources to rapidly renovate existing alternative accommodation or to reduce time spent by individuals on remand before trial as solutions that could have eased the pressure on the youth justice system generally without limiting the plaintiffs' rights in the same ways. Although the limitations imposed on the plaintiffs' rights by the Grevillea decision were in an abstract sense for the 'greater good', many of the limitations at the level of individual impact were imposed for managerial or punitive reasons (for example, extensive handcuffing was necessary because of the need for renovation or modification of the built environment within Grevillea). By contrast, His Honour held that the weapons exemption decision was a proportionate limitation on the plaintiffs' rights, thereby satisfying the first (substantive) limb of s 38(1).

His Honour then considered the procedural limb of s 38(1). Here, His Honour found that the defendants had failed in respect of all three decisions to give proper consideration to each engaged right. In relation to the Grevillea decision, although the Minister had seriously turned her mind to the possible limitations on the plaintiffs' human rights, she had not given the question 'proper consideration'. This was largely because when making her decision, the Minister had the benefit of both *Garde J's* reasons in the first *Certain Children* decision and an analysis of Charter compatibility carried out by the VGSO. As a result, the standard of her discharge of responsibility in balancing the competing public and private interests was higher than that which would be expected of a decision-maker in an ordinary case.

The Grevillea decision was based in part on several incorrect factual assumptions, such as that necessary renovations at Grevillea were complete and that handcuffing no longer occurred when transporting children within the facility. Further, there was no evidence that the defendants had sought out psychological or psychiatric opinion as to the effect of Grevillea's built environment on the plaintiffs, despite the fact that a



key aspect of Garde J's judgment in the first *Certain Children* was the potential 'physical, social, emotional, intellectual, cultural and spiritual impacts' of establishing a remand centre and youth justice centre within the maximum security environment of Barwon Prison.

In relation to the transfer decision, the consideration of the human rights of the plaintiffs was cursory and was directed more towards securing a pre-determined outcome:

Finally, the weapons exemption decision was not made with proper consideration, as it failed to consider whether the restrictive guidelines on the use of force were practical or realistic in the context of Grevillea. The decision-maker failed to consider the circumstances and surroundings in which the exempted weapons, particularly capsicum spray, were likely to be used. The built environment of Grevillea made it impossible to ensure that innocent bystander detainees would not be inadvertently sprayed with capsicum spray, a factor that the decision-maker should have considered when deciding upon the weapons exemption.

The outcome of this reasoning was that all three decisions were unlawful actions of the relevant defendants under s 38(1) of the Charter. The Grevillea and transfer decisions were unlawful actions by reason of being incompatible with human rights under ss 17 and 22(1) of the Charter and because the decision-makers did not give proper consideration to those human rights, while the weapons exemption decision was unlawful in that the decision-maker did not give proper consideration to human rights under ss 17(2) and 22(1) of the Charter when making the decision.

His Honour made declarations that all three decisions were unlawful. He further declared that the Secretary was prohibited from detaining children at a place of detention that has been declared to be unlawful. Finally, he restrained the defendants from detaining or continuing to detain at Grevillea any person in the Secretary's legal custody.



Knight v General Manager, HM Prison Barwon [2017] VSC 135

31 March 2017

Keogh J

Charter provisions: s 10

Summary

The applicant, a person incarcerated at Port Philip Prison serving a life sentence for murders he committed in 1987, had previously been declared a vexatious litigant and was subject to a general litigation restraint order. He sought leave pursuant to s 54 of the *Vexatious Proceedings Act 2014* (Vic) ('the VP Act'), to commence an action seeking a declaration that the strip-searching of visitors to Victorian prisons on the basis of positive ion scanning readings is in breach of s 10(b) of the *Charter*, as it amounts to degrading treatment and serves no law enforcement or other legitimate purpose.

Judgment

Keogh J held that the evidence did not establish that every strip search conducted on the basis of a positive ion scan reading amounted to degrading treatment in accordance with s 10 (b) of the Charter. His Honour considered the textual similarities between the Charter and the International Covenant on Civil and Political Rights, Universal Declaration of Human Rights and the European Convention on Human Rights and noted that no definition exists in these instruments relating to 'cruel, inhuman or degrading' treatment or punishment.

Therefore, after a consideration of the relevant case law and in light of the lack of evidence submitted by the applicant, his Honour found there was insufficient evidence to support the conclusion that 'every strip search of a visitor to a Victorian prison required on the basis of a positive ion scan reading constitutes degrading treatment of the visitor in accordance with s 10(b) of the Charter.' On this basis, Keogh J held that the applicant had not discharged the onus of establishing that the proposed proceeding was not a vexatious proceeding and that there were reasonable grounds for the proposed proceeding.



Baker v Director of Public Prosecutions [2017] VSCA 58

22 March 2017

Maxwell P, Tate and Beach JJA

Charter provisions: ss 17, 24, 25

Summary

The appellant, Earl Baker ('Baker'), sought leave to appeal pursuant to s 295 of the *Criminal Procedure Act 2009* ('CPA') against an interlocutory decision of the County Court of Victoria refusing to grant a permanent stay of charges contained in an indictment. Baker was charged with sexual penetration of a child under 16 contrary to s 45(1) of the *Crimes Act 1958*, knowingly possessing child pornography contrary to s 70(1) of the *Crimes Act* and use of online information to transmit child pornography contrary to s 57A(1) of the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995*.

Baker was 17 years at the time of the alleged offending between 1 May and 31 May 2014. Charges were laid on the 27 July 2015, by which time, Baker had turned 19.

It was argued that the delay between the time of the offending and the time at which the appellant was charged resulted in a loss of opportunity to have the charges dealt with in the Children's Court. It was submitted that this would breach his right to be tried without unreasonable delay under s 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). It was further submitted that this delay involved a contravention of the right of a child to the protection of his best interests under s 17(2) of the Charter and a breach of the right to a fair trial pursuant to s 24(1). It was also argued that common law principles support the grant of a permanent stay because the prosecution amounts to an abuse of process.

Judgment

Leave to appeal was granted but the appeal was dismissed. Tate JA wrote the primary judgment, with Maxwell P agreeing.

Her Honour held that despite the interlocutory nature of the decision at first instance, it was appropriate for the *Charter* issues to be considered on appeal given that the *Charter* is 'no longer to be regarded as legislation which is novel or complex, invariably requiring lengthy consideration of issues.'

Tate JA rejected the Attorney-General's preliminary objection that the appellant was impermissibly seeking a collateral review of the exercise of prosecutorial discretion, which in effect, is unexaminable by the courts. The question of whether the loss of the opportunity to be sentenced in the Children's Court and the subsequent prosecution of the appellant in the County Court constituted an abuse of process, when viewed in terms of the alleged breaches of the Charter, is not an collateral review of prosecutorial discretion.

In relation to whether there had been a breach of the appellant's human rights the following questions were considered:

(1) *What is the contravening conduct and who is the 'public authority'?*

Tate JA was satisfied to treat the DPP as the relevant public authority by considering the DPP's conduct of continuing with the prosecution in the County Court in light of the previous delay by the police.

As to the question of whether the appellant's human rights have been breached, her Honour adopted the approach taken by Hollingworth J in *Sabet v Medical Practitioners Board (Vic)* (2008) 20 VR 414 in conjunction with an assessment of the factors identified in s 7(2) of the Charter:



[I]n analysing whether there has been a breach of a human right under the Charter it is useful to ask the following three questions:

- (a) Has a Charter right been engaged? ('the engagement question');
- (b) If so, did the public authority impose any limitation on the right? ('the limitation question');
- (c) Was any such limitation reasonable and justified within the circumstances set out in s 7(2)? ('the justification question').

(2) The right to be tried without unreasonable delay

The critical issue here concerned the point in time that is used for the purpose of calculating whether a delay was unreasonable and therefore in breach of s 25(2)(c) of the Charter. Her Honour accepted the reasoning adopted by the ACT Court of Appeal in *Nona v The Queen* (2013) 8 ACTLR 168 to find that time begins to run, in the context of s 25(2)(c) of the Charter, when a person is 'charged' with a criminal offence 'when he or she is served with a summons to answer the charges laid or, if no summons has been issued, when he or she has been served with an arrest warrant.' On this basis, the period of 10 months from the time in which the appellant was 'charged' was not considered to be 'excessive, inordinate or unacceptable'. Therefore, the Charter was not engaged in these circumstances.

(3) The right to a fair trial

Her Honour considered that the right to a fair hearing was clearly engaged in the circumstances of this case, but found there was no evidence to suggest that the appellant would not receive a fair hearing from a 'competent, independent and impartial tribunal' in the County Court.

(4) The right of a child to the protection of his or her best interests

Tate JA held that the circumstances of the case did engage the right under s 17(2) of the Charter, but did not accept that there were any significant differences between the community-based sentencing dispositions available in the County Court and that which is available in the Children's Court. Moreover, the system of criminal punishment substantively considers the status of an offender as a young offender and these considerations are not reserved for the Children's Court alone. On this basis, her Honour held that the delay in the filing of charges had not 'limited or interfered with the right in a manner that is unreasonable.'

Finally, Tate JA found that the trial judge did not err in refusing a permanent stay at common law on the basis that the appellant had not discharged the high onus of demonstrating that the court process will be unfair so as to amount to an abuse of process.

Beach JA substantially agreed with the judgement of Tate JA but held that the right under s 17(2) of the Charter was not engaged in this case. The alleged offending ceased the day before Baker turned 18. Under the *Charter*, a child is a person under the age of 18. When public authorities (such as Victoria Police and the Office of Public Prosecutions) made decisions about the case, Baker was no longer a child for the purpose of the *Charter* and so could not rely on the rights in s 17.



Matsoukatidou v Yarra Ranges Council [2017] VSC 61

28 February 2017

Bell J

Charter provisions: ss 6, 8, 24

Summary

The applicants (Maria and her daughter Betty) had been charged with offences against the *Building Act 1993* (Vic). Both applicants were self-represented at the Magistrates' Court hearing, and received fines - Maria without, and Betty with, conviction.

The applicants' appeals to the County Court under the *Criminal Procedure Act 2009* (Vic) were struck out for non-attendance. The applicants believed they had reasonable explanations for their non-attendance and applied for orders reinstating the appeals. Their application was heard the following day, and they were again unrepresented. At the hearing, the judge did not explain the procedure that would be followed, nor the applicable legal test. Both applicants struggled to explain themselves before the judge, and did not fully understand the hearing. Their application was dismissed.

The applicants sought judicial review of the judge's orders, arguing that the judge's conduct of the hearing failed to ensure their human rights to equality under s 8(3) of the *Charter*; and to a fair hearing under s 24(1).

Judgment

Bell J found that the County Court had not ensured a fair hearing under s 24(1) of the *Charter*. He considered that where such a finding is made, the failure will almost always constitute a breach of the rules of procedural fairness and an excess of jurisdiction. He set aside the County Court orders striking out the applicants' applications, and remitted them to be heard and determined by a different judge.

The judge was required to ensure the human rights protected under *Charter* s 8(3)

In relation to proceedings and hearings, s 8(3) requires courts and tribunals to ensure that every person (1) is equal before the law, (2) is given the equal protection of the law without discrimination, and (3) has equal and effective protection of the law against discrimination. The second and third elements of s 8(3) have substantive operation in procedural respects and apply to both courts and tribunals, but only in respect of discrimination as defined.

Bell J observed that Maria's learning disability, an attribute under s 6(e) of the *Equal Opportunity Act 2010*, meant there was a clear distinction between Maria and Betty with respect to the application of s 8(3). Section 8(3) required the judge to ensure that the hearing was conducted so that both applicants were equal before the law, and so that Maria could enjoy her rights without discrimination and receive equal and effective protection from discrimination.

This conclusion was based on Bell J's consideration of how the three elements of s 8(3) operate. He held that the first element, equality before the law, did not have substantive operation. Giving it a substantive operation would introduce a 'shifting operation', where it would have a substantive operation in relation to court and tribunal proceedings but operate based on non-arbitrariness in other cases. This would be inconsistent with the exclusion of the first sentence of art 14(1) of the ICCPR ('[a]ll persons shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law') from s 8(3) of the *Charter*, and the express limitation of the second and third elements of s 8(3) to matters involving discrimination as defined. Bell J considered it more likely that Parliament had intended for the first sentence of art 14(1) to be subsumed by s 24(1) of the *Charter*.



Consequently, the first element of s 8(3) requires courts and tribunals to avoid arbitrary treatment in the application and administration of the law in relation to court and tribunal proceedings. His Honour concluded this did not equate to obligations to give positive assistance to self-represented parties under the common law (explained in *Tomasevic v Travaglini* (2007) 17 VR 100). The common law obligation falls within s 24 of the *Charter*.

Here the judge had, without justification, failed to make reasonable adjustments and accommodations in respect of Maria's disability, breaching her human right to equality. Bell J drew attention to the *Disability Access Bench Book*, and the issues it recommends courts and tribunals consider when s 8(3) is relevant. Here, the key problem was that the judge failed to recognise Maria as a person with a disability, and accordingly did not consider how to appropriately accommodate her in the conduct of the hearing. His Honour concluded that, regardless of whether the judge actually knew about Maria's disability, the conduct of the hearing effectively disadvantaged Maria and amounted to indirect discrimination. Section 8(3) of the *Charter* obliges judges to make reasonable adjustments and accommodations to compensate for disability and ensure parties' effective participation in proceedings.

The judge was required to ensure the human rights under s 24(1)

Under s 6(2)(b) of the *Charter*, a County Court judge must apply the s 24(1) right to a fair hearing when deciding a criminal charge brought against a person. Considering the procedural structure of how the original offences charged led to the County Court proceeding, Bell J concluded that as applicants for orders setting aside the orders striking out their appeals under s 267(3) of the *Criminal Procedure Act*, Maria and Betty were persons 'charged with a criminal offence' for the purposes of s 24(1) of the *Charter*. Accordingly, the judge hearing their applications was obliged to ensure their right to a fair hearing.

Bell J concluded the judge did not take appropriate measures to ensure each applicant participated in the hearing. Conducting the proceeding, the County Court judge did not:

- recognise Maria and Betty as self-represented parties or call upon them to announce their appearance before counsel for the Council announced his appearance;
- appreciate that Maria and Betty had made two separate applications arising out of two different but related procedures and orders;
- explain to Maria and Betty the procedure that would be followed;
- explain to Maria and Betty that the central issue raised by their applications was whether their failures to appear was not due to fault or neglect on their part or that this test had to be applied separately to their applications.

Bell J concluded that recognising Maria and Betty as self-represented parties would have helped to equalise their position in relation to the represented Council. The judge needed to ascertain the applicants' capabilities at the start of the hearing. This may also have revealed Maria's disability. Recognising them as self-represented would have demonstrated equal respect for them, and could have enabled them to request an adjournment, during which they could seek legal representation.

Because of the way in which the hearing was conducted, Maria and Betty's rights to a fair hearing under s 24(1) of the *Charter* were breached.



Secretary to the Department of Justice and Regulation v Fletcher (No 4) [2017] VSC 32

8 February 2017

Priest JA

Charter provisions: ss 12, 13, 14, 15, 21

Summary

The Secretary applied for renewal of a supervision order pursuant to the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('the Act'). The respondent had been subject to some form of supervision order for over a decade, having originally been sentenced and imprisoned for various sexual offences. In accordance with ss 9(1), (2), (4), (5) and (6) of the Act, the court needed to be satisfied that the respondent posed an unacceptable risk of committing a relevant offence if the supervision order was not renewed.

Expert evidence indicated that the respondent was a moderate risk of reoffending. However, the respondent submitted that there was no real risk of him spontaneously engaging in either sexual or violent offending against a stranger as he was 60 years old, legally blind and physically impaired.

Judgment

Priest JA noted that in determining whether the respondent posed an 'unacceptable risk', the court must balance the risk against the values accorded to liberty at common law and the rights in Part 2 of the *Charter*; specifically: freedom of movement (s 12); the right not to have privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 13(a)); the right to freedom of thought, conscience, religion and belief (s 14); the right to freedom of expression (s 15); and the right to liberty and security (s 21).

Given the level of risk that the respondent posed, Priest JA concluded that the supervision order should be revoked.



***DPP v SE* [2017] VSC 13**

31 January 2017

Bell J

Charter provisions: ss 6, 8, 17, 19, 25

Summary

The applicant, a 17 year old Aboriginal person with an intellectual disability, applied for bail under the *Bail Act 1977* (Vic) ('the Act'). After pleading guilty in the Children's Court to charges of theft and committing an indictable offence whilst on bail, he was being held on remand while awaiting a deferred sentencing hearing.

The applicant had a limited, though recent and significant, history of offending. He was engaged with support services and was doing well at school. He had previously complied with a bond and was planning, with support, to visit family interstate over the upcoming Christmas period. He had never committed a violent crime against a person. The prosecution opposed the application on the ground that there was an unacceptable risk that the applicant would reoffend.

Judgment

Bell J granted conditional bail. He first recognised that, as the applicant was a child, he had certain procedural rights under the *Charter*. As in *DPP v SL* [2016] VSC 714, because of the fundamental principle of the best interests of the child (s 17(2)), the right of a child to be segregated from detained adults (s 25(1)) and the right to equality before the law (s 8(3)), the court was obliged to make certain procedural directions. Such obligations arose under s 6(2)(b) because the court was exercising functional responsibilities under those rights. In Bell J's view, they were particularly salient in bail applications as these were likely to be the first point of contact between the child and the court process. Optimally, in the administration of criminal justice, children's rights are considered from the first opportunity.

Further, bail application procedures are encompassed by s 25(3) of the *Charter* (the right of a child charged with a criminal offence to a procedure that is age-appropriate and rehabilitation-focused). Bell J made certain procedural directions regarding the applicant's hearing at the Supreme Court, including that he was not to be handcuffed, nor detained with adult prisoners, he could sit either with counsel or support persons during the hearing, and counsel and the judge would not robe and would speak in language that so far as possible could be understood by him.

Bell J next went on to consider s 3A of the Act, which directed the decision-maker to consider any issues that arise due to a person's Aboriginality when making a determination. In Bell J's opinion, s 3A was to be read with the rights Aboriginal persons have under s 19 of the *Charter*. The right to distinct cultural rights under s 19, when operating with s 6(2)(b), provided a further basis upon which the court should respect Aboriginal persons' cultural rights. Also, Aboriginal cultural issues must be taken into account as a form of positive discrimination in order to achieve equality before the law.

The applicant had specific *Charter* rights as an Aboriginal person, as a child, and as a person with an intellectual disability. The court needed to recognise that different forms of disadvantage and vulnerability may be experienced because of each of these attributes, and exacerbated in someone who had more than one (in this case, three). In adopting procedures and making determinations under the Act, accommodation was even more necessary, as differing forms of discriminatory disadvantage and vulnerability were likely to cumulate and interact.

Section 3B of the Act further required the decision-maker to consider certain factors when making a determination about a child. Bell J noted that s 3B reflected the Victorian Law Reform Commission



recommendation that bail conditions should be no more onerous than necessary and should be consistent with the *Charter*.

In granting conditional bail, Bell J determined that the applicant showed cause as to why detention was not justified through various factors. These included his engagement with support services, compliance with a previous bond, age, Aboriginal culture (including the planned trip to visit family), intellectual disability and school attendance. There was not an unacceptable risk of reoffending, as the previous offending was likely due to the applicant's immaturity, intellectual disability and his coming to terms with life circumstances. The period of compliance with a previous bond and school attendance suggested a genuine commitment to building a positive future. Further, given that the applicant was Aboriginal, a child and had an intellectual disability, detention on remand posed a high risk of harm and exposure to negative influence.



Re Application for Bail by HL (No 2) [2017] VSC 1

6 January 2017

Elliott J

Charter provisions: ss 17, 22, 25

Summary

This was the second ruling regarding an application for bail, following the interim ruling *Re Application for Bail by HL* [2016] VSC 750 (13 December 2016) ([further details](#)).

The applicant, a 16-year-old who was on remand at Barwon Children’s Remand Centre (‘Barwon’), sought bail under s 4(4)(a) of the *Bail Act 1977* (Vic) (‘the Act’). Barwon had been ‘hastily established’ as a children’s remand centre and its facilities were ‘considered a work in progress’. The executive decisions associated with establishing Barwon were the subject of a separate challenge in *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister of Families and Children* [2016] VSC 796 (21 December 2016). While in that proceeding the decisions were found to be invalid and of no effect, the Governor-in-Council subsequently revoked the earlier establishment of Barwon and made a further order re-establishing it.

After the interim ruling, Elliott J adjourned proceedings for one week to allow a view of the conditions and facilities at Barwon, and to allow parties to file further evidence. While Elliott J expressed concerns about conditions at Barwon following this view, the court was not concerned with the merits of the decision to establish the centre.

Judgment

Elliott J considered the relevant rights under the *Charter* in greater detail than in the interim ruling. It was noted that s 17(2), the right of every child to such protection as is in his or her best interests, is modelled on art 24(1) of the International Covenant on Civil and Political Rights (‘the Covenant’). Although ‘best interest’ is not defined in the *Charter*, guidance could be drawn from s 10 of the *Children, Youth and Families Act 2005* (Vic), which refers to protection of the child and promotion of the child’s development as relevant to determining what is in the child’s best interests.

As to s 22(1), the right to be treated with humanity and dignity when deprived of liberty, Elliott J noted previous consideration of the right in both *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 and *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111. His Honour stated that although s 22(1) of the *Charter* had not been considered in detail by the Supreme Court against particular facts, in *Dale v Director of Public Prosecutions* [2009] VSCA 212, the Court of Appeal noted that solitary confinement, strip searches and shackling with leg irons may raise concern under the provision, without expressly deciding the issue.

Section 22(3), the right for an accused person to be treated in a way appropriate for a person who has not been convicted, must be construed within the context of s 22 more broadly. Elliott J identified that it extends beyond being segregated from convicted prisoners, as provided for by s 22(2), to requiring ‘differential treatment that emphasises a person’s status as an unconvicted person who enjoys the right to be presumed to be innocent’. His Honour cited a decision by the United Nations Human Rights Committee which suggested that ‘differential treatment may include privileges such as being able to wear one’s own clothes, make telephone calls and eat one’s own food’.

In relation to s 25(3), the right of a child charged with a criminal offence to a procedure that takes account of his or her age and the desirability of promoting rehabilitation, his Honour noted that the provision was modelled on art 14(4) of the Covenant. As reflected in s 3B of the Act, so far as possible, juveniles should not be detained before trial. Any detention of children should be done in a manner consistent with the



promotion of their dignity and worth, including through measures to ensure that they understand the process. Such principles apply from the child's first contact with law enforcement agencies.

Overall, rather than making findings of fact regarding the *Charter*, his Honour assumed the applicant's detention at Barwon breached his rights under ss 17(2), 22(1), 22(3) and 25(3). Notwithstanding those assumptions, the applicant failed to show cause as to why the court should grant bail under s 4(4)(a) of the Act. Although several of the applicant's charges had progressed to resolution since the interim hearing, the seriousness of the remaining charges and his conduct at Barwon meant that the applicant remained an unacceptable risk.



Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister of Families and Children [2016] VSC 796

21 December 2016

Garde J

Charter provisions: 7, 10, 17, 22, 38

Summary

The plaintiffs included a group of young persons who were on remand at Grevillea Youth Justice Precinct ('Grevillea'). Via their litigation guardian, they brought judicial review proceedings against the Minister for Families and Children ('the Minister'), the Secretary to the Department of Health and Human Services ('the Secretary') and the State of Victoria in relation to the establishment of Grevillea and the transfer of young people there from other youth justice centres. The proceeding included claims that in deciding to establish Grevillea, the Minister did not give proper consideration to the rights of the plaintiffs under the *Charter*, and that executive powers under s 478(a) and (c) of the *Children Youth and Families Act 2005* (Vic) ('the Act') were exercised for an improper purpose.

The Department of Health and Human Services ('the Department') supervised young people in the criminal justice system. Grevillea was established after nearly half the accommodation at Parkville Youth Justice Precinct ('Parkville') was lost.

Due to a lack of secure beds, young persons were transferred to alternative accommodation, the circumstances of which were not ideal. Corrections Victoria identified the Grevillea unit as the only unit in Victoria that could meet relocation needs. Shortly thereafter, three Orders in Council excised the Grevillea unit as an adult prison, and established it as a 'remand centre for emergency accommodation' and a 'youth justice centre for emergency accommodation'. These latter two Orders, establishing these accommodation facilities, were the subject of the proceeding.

Young people, including some of the plaintiffs, were transferred to Grevillea. Garde J described the conditions when they first arrived as 'harsh and austere'. Cells were fitted with porcelain bowls and sinks that were a considerable risk, and the visitor centre had certain fire and climbing risks. Within the first two weeks of being moved to Grevillea, one or more young persons were subject to:

- very long periods of solitary confinement in cells formerly used for high security prisoners;
- uncertainty as to the length and occurrence of 'lockdowns' (periods in which young people were locked in their cells) – some of the evidence suggested lockdowns were in place for 20 hours per day;
- fear and threats by staff against young persons;
- use of the adult prison Security and Emergency Services Group, including German Shepherd dogs;
- use of handcuffs when moving to the unit's outdoor area;
- screaming or loud banging on the doors;
- lack of, and limited opportunity to use, space and amenities;
- limited opportunity for education; and
- lack of family visits or access to religious services.



Against this background, the plaintiffs challenged several decisions associated with establishing Grevillea and transferring young people to the unit, including the recommendations of the Minister to the Governor in Council, and the decisions of the Governor in Council by the second and third Orders in Council. They submitted that rights under ss 10(b), 17(1), 17(2) and 22(1) of the *Charter* were engaged, and that the decisions contravened s 38(1).

Judgment

Garde J first considered whether the relevant rights under the *Charter* were engaged. A right was engaged when it was prima facie limited without referring to whether the limitation was reasonable.

Section 17(2): child's right to such protection as is in his or her best interests

Garde J noted that the central element of s 17(2) is the best interests of the child, and the scope of the rights could be informed by the United Nations Convention on the Rights of the Child ('CROC') and United Nations' materials. The CROC was noted to uphold various rights of the child in the youth justice system, because of children's differing psychological and physical development, and their emotional and educational needs compared to adults. Specifically, art 40(1) of the CROC provides for 'treatment in a manner consistent with the promotion of the child's sense of dignity and worth'.

Garde J also referred to the United Nations Standard Minimum Rules for the Administration of Justice ('the Beijing Rules'), which his Honour viewed as giving context to s 17(2). In particular, the Beijing Rules provide that juveniles in custody should be provided with 'care, protection and all of the necessary assistance - social, educational, vocational, psychological and physical - that they may require in view of their age, sex and personality'. His Honour determined that the decisions about the Orders in Council engaged s 17(2), as moving the young people to a youth justice centre within Barwon Prison had widespread ramifications including physical, social, cultural, intellectual and spiritual impacts.

In contrast, s 17(1), the right to protection for families, was not engaged. While it was perhaps less convenient for families to travel to Grevillea than Parkville, this was insufficient to engage the right. The evidence also indicated that taxi vouchers could be provided in certain circumstances.

Section 10(b): right to be protected from cruel, inhuman or degrading treatment

Garde J found that s 10(b) was engaged due to the harsh conditions at Grevillea. The fact that the plaintiffs were children was significant in this determination.

Section 22(1): right to humane treatment and respect for dignity when deprived of liberty

Garde J found that the conditions at Grevillea within the first two weeks of its occupation engaged s 22(1). He noted that s 22(1) recognises the vulnerability of all persons when deprived of liberty. The content of the right could be informed by art 10 of the International Covenant on Civil and Political Rights. Garde J also noted Emerton J's analysis in *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 ('Castles'), where her Honour identified the starting point as 'prisoners should not be subjected to hardship or constraint other than the hardship or constraint that results from their deprivation of liberty'.

Applying s 38(1)

Having determined that ss 17(2), 10(b) and 22(1) of the *Charter* were engaged, Garde J considered whether, in making the relevant decision, the Minister failed to give proper consideration to the engaged rights as required by s 38(1). In his Honour's view, a public authority must give proper consideration to human rights in two ways: first, in the decision-making process; and second, to then not act in a way incompatible with a human right. His Honour referred to s 38(1) as having two cumulative limbs, the 'procedural limb' and 'substantive limb'. He commented that, '[i]n making a decision, a public authority must give proper consideration to relevant rights and reach an outcome that is, in substance, compatible with human rights'.



Proper consideration imposes a higher standard than the obligation to take into account a relevant consideration at statute or common law (see *Castles*). Garde J noted there what will constitute ‘proper consideration’ will depend on the circumstances. He rejected the notion that the obligation was suspended during an emergency or in extreme circumstances. Such contexts, in which human rights could be overlooked, confirmed rather than obviated the need for proper consideration.

Courts should not over-zealously scrutinise proper consideration, but merely invoking the *Charter* like a mantra will not satisfy the obligation. A review of the substance of the decision-maker’s consideration, rather than form, is required. In the circumstances, the only evidence regarding the Minister’s decision-making process was the briefing paper, the papers submitted to the Governor in Council, the Orders in Council, and the Minister’s media statements. Based on these, Garde J determined that there was ‘simply no sign that the engaged *Charter* rights or indeed any human rights were taken into account at all’.

Garde J next considered the defendant’s submissions about whether the Minister’s decision was incompatible with human rights. According to the defendants, this involved analysing whether the relevant decision limited rights and, if so, whether the limitation was reasonable and justified under s 7(2) of the *Charter*. His Honour reiterated that the decision-making process leading to the Orders in Council did not involve any consideration or evaluation of human rights. He found that no one, including the Minister, considered the impact of establishing facilities at Barwon Prison on young persons. They were focused on coping with the circumstances at Parkville, on pursuing their view that tougher measures were needed, and their view that perpetrators of damage had to face consequences.

The impacts upon the plaintiff’s human rights were not proportionate and there was ‘no diligent or methodical analysis of the nature of human rights, nor the purpose, nature, extent importance of any limitation’. Less restrictive measures were not considered. Garde J determined that the Minister’s decision was substantively incompatible with human rights, as it exceeded the reasonable limits demonstrably justified in a free and democratic society according to *Charter* s 7(2).

His Honour declared that the Minister and the Governor in Council’s decisions contravened s 38(1). However, he did not decide whether such a contravention invalidated the decisions. Noting the limited authority on this important issue, he stated that determining whether contravention of s 38(1) gives rise to invalidity needed to be decided by the appellate courts in another case. These particular decisions were invalid on other grounds of judicial review - failure to take into account relevant considerations. Consequently, the plaintiffs were entitled to orders that the Secretary transfer them to a remand centre lawfully established under the Act.

The defendants immediately indicated that they would appeal the decision and sought a stay of the orders. Garde J granted a stay of one week. Within that time the matter was appealed and part-heard (see *Minister Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343). Given the urgency of the matter, the hearing of the *Charter* issues was initially adjourned, and later discontinued.



R (on application of Chief Examiner) v DA (a pseudonym) [2016] VSCA 325

16 December 2016

Ashley, Redlich and McLeish JJA

Charter provisions: ss 25, 32

Summary

The respondents failed to answer certain questions put to them by the Chief Examiner pursuant to s 36 of the *Major Crime (Investigative Powers) Act 2004* (Vic) ('the Act'). The Chief Examiner commenced separate proceedings in the Trial Division against the respondents for contempt, as provided in s 49(1)(b) of the Act. Questions were referred to the Court of Appeal.

Section 49(1)(b) provides that a person attending before the Chief Examiner is guilty of contempt if, without reasonable excuse, they refuse or fail to answer questions relevant to the subject matter of the examination. A common issue was raised regarding who bears the onus if an element of contempt under s 49(1)(b) is that the respondent does not have a reasonable excuse. The Chief Examiner asserted that, properly construed, s 49(1)(b) places the legal onus on examinees. They relied on *R v Debono* [2013] VSC 408, where such a finding was made in relation to s 36(3) of the Act.

While accepting that they bore an evidential onus, the respondents submitted that the prosecution held the legal onus. They argued that s 49(1)(b) should not be considered a statutory exception to that general common law principle, and it was consistent with the purposes of the Act that the burden of proof falls with the Chief Examiner. The second respondent also submitted that such a construction was consistent with s 25(1) of the *Charter*, the presumption of innocence, and so s 32(1) of the *Charter* required s 49(1)(b) of the Act to be interpreted compatibly so far as possible consistently with its purpose.

Judgment

The Court of Appeal found that the legal burden rested with the Chief Examiner. In doing so it referred to the relevant Statement of Compatibility, which implied that if s 49(1) were not construed as imposing only an evidential burden on the examinees, then the right to be presumed innocent under s 25(1) of the *Charter* may be limited. The Statement of Compatibility was considered properly used as an aid to construction under s 35(b)(ii) of the *Interpretation of Legislation Act 1983* (Vic).



Re Application for Bail by HL [2016] VSC 750

13 December 2016

Elliott J

Charter provisions: ss 17, 22, 25, 32

Summary

This was an application for bail under s 4(4)(a) of the *Bail Act 1977* (Vic) ('the Act'). The applicant was 16 years old and had been charged with armed robbery, theft of a motor vehicle, assault with a weapon and committing an indictable offence whilst on bail. He was initially placed at Parkville Youth Justice Centre ('Parkville'), a specifically designed remand centre for children. Before being placed there, the applicant had lived with his mother and had been engaged in an education program three days per week. He had a history of not returning to Australia to attend previous court dates when he was subject to a supervision order.

After a riot at Parkville, which there was no evidence the applicant took part in, the applicant was ultimately transferred to the new Barwon Children's Remand Centre ('Barwon'). Barwon had been 'established hastily' under s 478(a) of the *Children, Youth and Families Act 2005* (Vic) and the development of appropriate facilities for children placed there was considered 'a work in progress'.

After transferring to Barwon, the applicant was kept in solitary confinement and was released from his cell for only one hour each day. He had no access to educational programs, appropriate recreational programs or other facilities and amenities consistent with an environment appropriate for a child's rehabilitation. He asserted that his mental health had significantly deteriorated since being transferred.

The head of Barwon's operations gave evidence that certain restrictions, by way of a management plan, were imposed on the applicant due to 'negative behaviour' he had displayed toward Youth Justice staff, including a threat to rape a female staff member. The applicant did not challenge this evidence.

The applicant needed to 'show cause' as to why he should be granted bail. Issues included whether the applicant's detention at Barwon contravened certain *Charter* provisions, whether Part 2 of the *Charter* obliged the court to uphold the relevant rights, and whether s 32(1) required the court to interpret the Act in a manner consistent with these rights. The specific rights in question were the right to such protection as is in the best interests of the child (s 17(2)), the right to be treated with humanity and with respect to the inherent dignity of the human person (s 22(1)), the right to be treated in a way that is appropriate for a person who has not been convicted (s 22(3)) and the right to a procedure that takes account of the applicant's age and the desirability of promoting his rehabilitation (s25(3)).

Judgment

Elliott J noted the relationship between the Act and the *Charter*; specifically, s 3B of the Act provided for certain considerations to be taken into account when making a determination under the Act in relation to a child. When the provision was introduced into the Act, the Statement of Compatibility identified that the provision engaged ss 12, 21 and 25 of the *Charter*. This was consistent with case law that found that a breach of the *Charter* was a relevant consideration in determining a bail application. His Honour went on to state, however, that the rights in the *Charter* did not usurp the provisions of the Act. They were subject to reasonable limits and the scheme of the Act was designed to take the rights into account.

In relation to s 32(1), Elliott J found that, as there was no alternate construction or any contention that relevant parts of the Act were ambiguous, there was no basis to depart from the meaning of the provision in question. The legal meaning of the provisions was clear from ordinary principles of statutory construction.



Regarding Part 2 of the *Charter*, with one exception, both parties and the Attorney-General accepted that the applicant's rights under the *Charter* applied and were relevant when determining bail. The only exception was a submission by the Attorney-General in relation to s 25(3), which claimed that the provision did not apply as a bail application did not relate to rights in criminal proceedings. Elliott J rejected this on the basis of the Statement of Compatibility and the language of s 25(3).

Without making a finding, Elliott J proceeded on the assumption that the applicant's rights under ss 17(2), 22(1) and 22(3) of the *Charter* were infringed. An assumption was not made regarding s 25(3) as the applicant did not make submissions in relation to that provision. His Honour determined that, given the applicant's criminal history, the evidence as to the armed robbery and the little regard he had shown for bail conditions in the past, he posed an unacceptable risk and had not shown cause as to why bail should be granted. The infringements of the applicant's rights under the *Charter* did not make the risk acceptable. Rather than refuse bail immediately, Elliott J adjourned the application for one week to allow parties to file further evidence and for him to conduct a view of Barwon. The second ruling was made in *Re Application for Bail by HL (No 2)* [2017] VSC 1.



Tikiri Pty Ltd v Fung [2016] VSC 460

5 August 2016

Ierodiaconou AsJ

Charter provisions: ss 13, 32

Summary

The plaintiff operated a medical practice at which the defendant had worked for several years. The defendant stopped working at the plaintiff's practice and began work at another practice ('the second practice'). Among other issues, the plaintiff alleged that the defendant had unlawfully used its confidential information at the second practice. In accordance with an interlocutory decision, the defendant had filed an affidavit exhibiting a confidential list of patients who she consulted at the second clinic. The confidential list was to be filed in a sealed envelope at the court and did not have to be served on the plaintiff. The plaintiff sought inspection of the list by way of a summons.

The defendant opposed inspection of the list. She submitted that s 13 of the *Charter* (right not to have privacy arbitrarily interfered with) protected the disclosure of patients' names. Further, s 28(2) of the *Evidence (Miscellaneous Provisions) Act 1958*, which protects the disclosure during civil proceedings of information acquired by a physician in attending a patient and necessary to enable a medical practitioner to prescribe or to act for the patient, and the relevant sections of the *Health Records Act 2001*, which limits the use health and personal information for the purposes of providing a health service, should be interpreted through the lens of the *Charter*, in accordance with s 32.

Judgment

The list of patient names came within the scope of the *Health Records Act 2001* and the *Evidence (Miscellaneous Provisions) Act 1958*.

The words of a statute must be given their clear meaning. If the words of a statute are capable of more than one meaning, s 32 of the *Charter* requires that a court give the words whichever meaning best accords with the human right in question (*Slaveski v Smith* (2012) 34 VR 206). Section 32 was not engaged as the plain and natural meaning of the relevant provisions of the *Health Records Act 2001* and *Evidence (Miscellaneous Provisions) Act 1958* were clear.

Section 13 of the *Charter* was not engaged as if inspection of the confidential list of patient names was granted it would be via court order, and the *Charter* does not expressly apply to the making of a court order.



Daniels v Eastern Health [2016] VSC 148

22 March 2016

McDonald J

Charter provision: s 32

Summary

The plaintiff applied for a writ of habeas corpus which, if granted, would have entitled him to release from involuntary detention by Eastern Health. Pursuant to s 55 of the *Mental Health Act 2014*, the Mental Health Tribunal had the power to make a new inpatient treatment order ('ITO'). The plaintiff claimed that s 55 did not empower the Tribunal to make a new ITO that extended beyond the date of his current ITO because such a construction was inconsistent with human rights.

Judgment

Justice McDonald referred to the Court of Appeal's observation in *Slaveski v Smith* (2012) 34 VR 206 that s 32 of the *Charter* does not authorise departure from established understandings of statutory construction. It does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words to change a provision's true meaning.

Therefore, s 55 was to be interpreted according to established rules of statutory construction. The plaintiff's submitted construction would read into s 55 the term 'if the Tribunal makes a person subject to an ITO after conducting a hearing under s 60, the maximum period that may be specified in the order must not exceed the maximum period of an extant ITO'.

Applying principles from *Wentworth Securities v Jones* [1980] AC 74 and *Director of Public Prosecutions v Leys* (2012) 44 VR 1, such words should not be read into s 55. The application for habeas corpus was dismissed.



De Bruyn v Victorian Institute of Forensic Mental Health [2016] VSC 111

22 March 2016

Riordan J

Charter provisions: ss 10, 22, 38

Summary

The plaintiff, an involuntary patient at Thomas Embling Hospital, commenced judicial review proceedings in the Supreme Court seeking declaratory and injunctive relief against the defendant to prevent the implementation of a smoke free policy at the hospital. He argued that the smoke free policy was beyond the defendant's power because it fell outside the powers given to it by the *Mental Health Act 2014*, and it was unlawful because it was inconsistent with the *Tobacco Act 1987*.

The plaintiff also argued that the defendant breached its obligations under s 38(1) of the Charter because when deciding to approve and/or adopt the smoke free policy, the defendant failed to give proper consideration to the rights in ss 20 (not to be deprived of property), 22(1), 22(3) (humane treatment when deprived of liberty) and 10(c) (not to be subjected to medical or scientific experimentation or treatment). The s 20 claim was held to be premature, so it was left to be decided at a later stage.

Judgment

For reasons unrelated to the *Charter*, the approval and adoption of the smoke free policy was within the defendant's powers under the *Mental Health Act 2014* and was not inconsistent with the provisions of the *Tobacco Act 1987*.

Human rights under the *Charter* should be construed in the broadest possible way. For the defendant to be required to give proper consideration to human rights under s 38(1), such rights must be relevant. Human rights will be relevant if the proposed decision will apparently limit such rights. A decision that will apparently limit a right (without consideration of s 7(2) factors), is said to have 'engaged' the right.

Section 22(1)

Determining whether the smoke free policy would constitute treatment of the plaintiff that is inhumane (or without humanity) or is without respect for his inherent dignity required evaluating the relevant circumstances. Not every act that causes inconvenience, distress or even pain is inhumane. Not every act that limits a person's rights and freedoms can be said to be made without respect for the person's dignity. What may not be inhumane or an affront to the dignity of a person who is free to return home may be one or both of those things to an involuntary patient who suffers from mental illness and resides in an institution.

When deciding whether the smoke free policy engaged the right in s 22(1), Riordan J considered the benefits and the drawbacks of the smoke free policy. Because it was comprehensive (applying throughout the hospital to all staff, patients and visitors), properly considered and adopted after extensive consultation with patients, the smoke free policy did not impact on the dignity of the patients. The policy may cause some distress to the plaintiff, but it was introduced to protect present and future patients, staff and visitors from the harmful effects of smoking, and introduced with nicotine replacement therapy and other treatments. The policy was not inhumane to the patients and did not infringe the plaintiff's right under s 22(1), and so that right was not engaged.

A decision that is intended to benefit the affected person, is comprehensive and the product of careful consideration and consultation is less likely to affect a person's dignity. Decisions without those features could be seen to be arbitrary or discriminatory and are more likely to adversely impact on a person's dignity.



The test for giving proper consideration to a human right is:

- The decision-maker must seriously turn their mind to the possible impact of the decision on the person's human rights, and identify the countervailing interest/obligations;
- The decision-maker cannot simply invoke the Charter like a mantra. It is not sufficient to identify the Charter or particular sections then give a pro forma explanation;
- It is not necessary to identify the 'correct' right that might be interfered with (i.e. correct section under which the right is protected), or explain any content of any right by reference to legal principles. It is necessary to identify in general terms the nature and extent of effect of the decision on the person's rights;
- After identifying the actual rights affected the decision-maker will be required to balance competing private and public interests; and
- There can be no formula for the exercise and it should not be scrutinised over-zealously by the courts. Courts review the substance of the decision-maker's consideration not the form.

Although s 22(1) was not engaged, the defendant gave it proper consideration. It comprehensively considered, over a period of approximately four years, the matters relevant to the decision to limit the plaintiff's choice to smoke at the hospital, including any potential impact on the plaintiff's rights under the *Charter*. The impact of the decision on the plaintiff and other smokers was fully exposed. In the process of obtaining approval for and implementing the policy, countervailing interests/obligations were identified and private and public interests were balanced.

Section 22(3)

Section 22(3) applies to persons who have been accused but have not been tried, and to persons who have been detained without charge. The plaintiff had been charged and the charge was causally linked to his detention after being found not guilty by reason of insanity. The reference to 'person detained without charge' was intended to cover persons such as those detained under anti-terrorism legislation, which provides for preventative detention orders being made against persons who have not been charged.

Section 10(c)

Medical treatment is not defined in the *Charter*. Based on its Explanatory Memorandum, 'medical treatment' in s 10 means medical treatment as defined by s 3 of the *Medical Treatment Act 1988* - the carrying out of an operation, or the administration of a drug or other like substance, or any other medical procedure, not including palliative care.

The smoke free policy did not constitute medical treatment within the meaning of s 10(c). The plain meaning of 'medical treatment' does not include a smoking ban, which does not amount to treatment, much less medical treatment. Although the smoke free policy was initiated by a medical practitioner, his medical qualification was not a necessary feature of the decision to initiate the implementation of a smoke free policy. Generally, policies introduced to improve the health of a group of persons would not fall within the definition of a 'medical procedure'. Treatment, particularly medical treatment, would normally incorporate a connotation of positive intervention and the right in s 10(c) would normally be confined to direct interference with the individual's body or state of mind.

The smoke free policy may result in medical treatment being prescribed, but that does not mean the policy engages the right in s 10(c). The fact that certain action may cause the need for medical treatment does not render that action itself 'medical treatment'. The nicotine replacement therapy and other treatments available were optional for patients, not compulsory.



Clark-Ugle v Clark [2016] VSCA 44

17 March 2016

Tate, Ferguson and McLeish JJA

Charter provisions: ss 19, 32

Summary

This case considered whether the Supreme Court could declare a general meeting convened by Receivers and Managers appointed to the Framlingham Aboriginal Trust ('the Trust') valid where there was no quorum, and, if so, whether the circumstances warranted the exercise of such a power.

The Trust was established by the *Aboriginal Lands Act 1970* (Vic) ('the Act') as a body corporate to own and operate the Framlingham reserve, under the supervision of the Office of Aboriginal Affairs. The appellant was formerly a member of the committee empowered to act on behalf of the Trust, but lost this role when the Court declared vacant all positions on the committee and appointed receivers.

The appellant argued that the trial judge had not interpreted the Act compatibly with human rights, as required by s 32(1) of the *Charter*. He asserted that s 19(2)(d) was engaged: the right of Aboriginal persons to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. The appellant submitted that the trial judge failed to interpret the quorum requirement in s 24(3) of the Act compatibly with this provision, and as such did not consider whether the quorum requirement entrenched rights of resident members of the Trust, acknowledging the special relationship between such members and the Framlingham reserve, in contrast to the relationship that non-resident members had with the land.

Judgment

The interpretative obligation of s 32(1) is not enlivened unless a relevant human right is engaged. The Court found that s 19(2)(d) did not distinguish between residents and non-residents – the enjoyment of the cultural right did not depend on residency. The fact that some members of the community did not live on the land in question did not mean that they did not or could not 'bear the distinctive spiritual, material and economic relationship to the reserve that is founded on their traditional connection to it'. As s 19(2)(d) did not support the distinction that the appellant sought to make, and the Act did not require such a distinction, the right was not engaged.



Hoskin v Greater Bendigo City Council [2015] VSCA 350

16 December 2015

Warren CJ, Osborn and Santamaria JJA

Charter provisions: ss 14, 19, 38

Summary

The Bendigo Council approved an application for a permit to construct and use a mosque in an industrial zone in Bendigo. Objectors to the application sought merits review of this decision by VCAT pursuant to s 82 of the *Planning and Environment Act 1987* ('the Act').

VCAT granted the permit on amended conditions. Several of the original objectors sought leave to appeal VCAT's decision, arguing that there was an unacceptable risk of adverse effects to the Bendigo community should the permit be granted. The Council contended that the objectives of the Act are to be construed in a manner which gives effect to the *Charter*, focusing on s 14 (freedom of thought, conscience and religion) and s 19 (cultural rights). The objectors contended that the *Charter* was irrelevant to VCAT's decision because neither the Council nor the permit applicant were human beings.

Judgment

Sections 14 and 19 of the *Charter* informed the construction of planning objectives and of 'significant social effects' within s 60 of the Act. The *Charter* obliged the Council and VCAT to consider the human rights of future mosque users when deciding whether or not to grant the permit.

The Court accepted VCAT's conclusion that proper consideration of a relevant human right 'requires a decision-maker to do more than merely invoke the *Charter* like a mantra'. The Council was a public authority under s 6 of the *Charter* and was required to give proper consideration to the rights of potential mosque users and other individuals.

The *Charter* was relevant to the proper understanding of the compatibility of the proposed land use with Victorian planning objectives. The concept of a 'significant social effect' was informed by the *Charter's* protection of the exercise of religion, and 'it was not open to the group objectors to object to a form of religious worship in itself.'



Bayley v Nixon and Victoria Legal Aid [2015] VSC 744

18 December 2015

Bell J

Charter provisions: ss 8, 25, 38

Summary

The plaintiff was convicted of offences in three trials in the County Court of Victoria and sentenced to 18 years' imprisonment, to be served concurrently with the life sentence he was serving for other offences. A new non-parole period of 43 years was ordered, extending the existing non-parole period of 35 years imposed for other offences.

The plaintiff sought leave to appeal against conviction in two of the County Court trials, and against sentence in respect of all three trials. The plaintiff's application to Victoria Legal Aid ('VLA') for legal assistance was refused. An independent reviewer confirmed the decision to refuse to grant legal assistance, despite opining that the plaintiff's appeals against conviction were likely to be allowed, resulting in a lower non-parole period.

The plaintiff sought judicial review of the independent reviewer's decision. The relevant ground was that the independent reviewer made an unlawful decision by failing to comply with the duty in s 38(1) of the *Charter* to give proper consideration to human rights. The plaintiff sought relief on this ground on the basis that the decision was invalid for error of law on the face of the record.

Judgment

The independent reviewer's decision was set aside and the plaintiff's application remitted to a different reviewer for reconsideration according to law. There was nothing in the independent reviewer's reasons or in the objective facts to indicate how the reviewer's reference to the 'public confidence in stewardship by VLA of its limited funds' was applied to the plaintiff's application. As such, the result lacked an evidentiary foundation and could only be arbitrary. This conclusion meant it was unnecessary to consider the *Charter* ground, though Bell J made a number of comments about the *Charter*.

As a public authority under the *Charter*, VLA and independent reviewers are obliged to act compatibly with, and make decisions upon proper consideration of, the human rights in the *Charter*. The close relationship between legal aid and human rights is reflected in how provisions of the *Charter* connect with provisions of the *Legal Aid Act*, particularly sub-ss 25(2)(d) – (f) of the *Charter* which provide certain minimum guarantees with respect to legal aid.

Further relevant *Charter* considerations were how the right to legal aid must be enjoyed 'without discrimination' (s 25(2)), and the s 8(3) right to equality before the law, equal protection of the law without discrimination and equal and effective protection against discrimination. Accordingly, as was conceded by VLA, the plaintiff's notoriety was not a lawful basis upon which his applications for legal assistance could be rejected by the independent reviewer. His application was to be considered impartially and objectively.



Madafferi v The Age [2015] VSC 687

9 December 2015

John Dixon J

Charter provisions: ss 15, 32

Summary

The plaintiff alleged that he was defamed by imputations conveyed by several articles published by the first and sixth defendants. The articles referred to confidential sources and a journalist (also a defendant) gave evidence that the confidential sources had been promised that their identities would not be disclosed. The plaintiff sought orders that journalists' privilege did not apply to evidence that would disclose the identity of any of the informants described and that the defendants disclose the sources of information on which they relied. Additionally, the plaintiff sought preliminary discovery relating to the identity of the sources.

The defendants relied upon the statutory journalist privilege in relation to an informant's identity (*Evidence Act 2008*, s 126K), and common law qualified privilege defences.

Judgment

Sections 15 (freedom of expression) and 32 of the *Charter* mandated that s 126K be given 'a beneficial interpretation.' In Western Australia, where there is no *Charter*, comparable provisions had been given a beneficial interpretation because 'the confidentiality of information provided to journalists by informants is no longer (if it ever was) a matter of purely private interests, but is now recognised as a strong public interest, which may outweigh other public interests which apply in relation to the production of documents for the purposes of litigation.'

The application for a declaration that the defendants could be compelled to give evidence that would disclose informants' identities was refused, as was the application for preliminary discovery.



Vella v Waybecca Pty Ltd (2015) 303 FLR 315, [2015] VSC 678

30 November 2015

Lansdowne AsJ

Charter provisions: ss 7, 8, 10, 24, 32

Summary

The applicant contracted to sell property to Waybecca Pty Ltd. A magistrate granted Waybecca orders for specific performance of the contract, and when the applicant failed to comply, made enforcement orders permitting Waybecca's solicitors to draft the transfer of land and a registrar of the Magistrates' Court to execute the transfer on behalf of the applicant. The applicant appealed the magistrates' order.

Among other grounds, the applicant claimed that s 24 (fair hearing) was invoked by his being ordered to pay a hearing fee. He argued that Lansdowne's AsJ's decision preventing him to appear via his power of attorney also breached s 24, as well as s 8 (equality before the law) or s 10 (protection from torture and cruel, inhuman or degrading treatment). He alleged that s 20 (right not to be deprived of property other than accordance with law), was engaged by the proceeding. He asserted that s 100(1) of the *Magistrates' Court Act 1989*, which prescribes the extent of the Magistrates' Court's civil jurisdiction, was incompatible with the *Charter*.

Judgment

The appeal was incompetent as the orders were not 'final orders' for the purposes of s109 of the *Magistrates' Court Act 1989*. Regarding application of the Charter, the rights sought to be protected and promoted by Parliament were not absolute, but subject to reasonable limits.

As to the right to a fair hearing (and associated breaches of ss 8 and 10), Lansdowne AsJ had let the appeal continue even though the applicant had not paid the fee. Multiple provisions of the *Supreme Court (General Civil Procedure) Rules 2015* reasonably limit a party's right of appearance to the party in person or through their legal practitioner. The limitation is reasonable having regard to the Court's power 'to determine the rights and obligations of persons, to limit the right to participate to the party in person or a legal practitioner, licenced to practice law and subject to the disciplinary control of the Court'.

It was difficult to see how the alleged deprivation of property was not in accordance with law, as a contract was being enforced. The *Magistrates' Court Act* contained avenues for re-hearing and appeal, and an application could also be made for judicial review. The refusal to join the power of attorney as a party to the proceeding was not a breach of s 24 as he had not been a party to the matter on appeal.



National Builders Group IP Holdings Pty Ltd v CAN Pty Ltd (In Liq) **[2015] VSCA 260**

17 September 2015

Maxwell P and Kaye JA

Charter provisions: s 24

Summary

This was an appeal from a decision to strike out the defence of one of two defendants who claimed ownership of certain intellectual property.

The trial judge, relying on s 56(2) of the *Civil Procedure Act 2010 (Vic)* ('CPA') found that both defendants had persistently failed to comply with orders for discovery despite generous periods being allowed for compliance. The first defendant, Holdings, had provided no explanation for their failure to comply.

On appeal, Holdings submitted that the power to dismiss a claim or defence for non-compliance with discovery interfered with the fundamental common law right to a fair trial.

Judgment

The appeal was allowed on the basis that inconsistent outcomes may result if Holdings has judgment entered against it as to the intellectual property, but the second defendant Suckling, succeeds in their defence.

However, the Court dismissed the fair hearing argument, noting that the right to a civil hearing has never been unqualified. Section 56(2) of the CPA confers powers that are an extension of powers already available to the Court to address non-compliance. By enacting the CPA, Parliament intended to impose strict discipline on the conduct of civil proceedings.

Parliament's intention was determined with reference to the Statement of Compatibility for the CPA Bill, which asserted that the Bill would give courts the power to 'strongly sanction failure to comply with or misuse the discovery process'.



Bare v IBAC [2015] VSCA 197

29 July 2015

Warren CJ, Tate and Santamaria JJA

Charter provisions: ss 8, 10(b), 32, 38

Summary

The appellant, Mr Bare, made a complaint to the Office of Police Integrity ('the OPI') in February 2010. He claimed that in February 2009, the car in which he was travelling was stopped by police. When he got out of the car, a police officer allegedly pushed him up against the vehicle, handcuffed him and kicked his legs out from under him causing him to fall to the ground. Mr Bare alleged that as he lay on the ground, the officer pushed his head to the ground so that his chin struck the gutter and repeatedly pushed his head into the gutter so as to chip his teeth and cut his jaw. Mr Bare claimed that the officer sprayed him with capsicum spray several times and said words to the effect of 'you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'.

Mr Bare complained that the police officer's conduct amounted to a breach of his rights under ss 10 and 8 of the *Charter*. Section 10(b) provides that a person must not be treated or punished in a cruel, inhuman or degrading way, and s 8 states that every person is entitled to equal protection of the law without discrimination. Further, Mr Bare's complaint claimed that he had a right to an effective investigation independent of Victoria Police pursuant to an implied procedural right found in s 10(b) of the *Charter*.

Under s 40(4)(b) of the *Police Integrity Act 2008* ('the PI Act'), the Director of the OPI was authorised to investigate complaints where he or she considered it is in the public interest to do so. Two delegates of the Director each made a decision, pursuant to s 40(4)(b)(i), that it was not in the public interest for the OPI to investigate Mr Bare's complaint.

Mr Bare sought judicial review of the decision on the basis that it breached s 38(1) of the *Charter*. Section 38(1) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'. The trial judge dismissed Mr Bare's application for review.

On appeal, the Independent Broad-based Anti-corruption Commission ('IBAC'), which succeeded the OPI, and the Attorney-General contended that a decision of the Director under s 40(4)(b)(i) of the PI Act was protected by a privative clause in s 109 of the PI Act. It was argued that the privative clause prevented the Court from judicially reviewing the Director's decision unless it amounted to jurisdictional error. IBAC submitted that a breach of s 38(1) of the *Charter* did not amount to jurisdictional error. The Attorney-General further submitted that s 38(1) was not applicable as the public interest test in s 40(4)(b)(i) had already been interpreted in compliance with s 32 of the *Charter*.

The Victorian Equal Opportunity and Human Rights Commission ('the Commission') contended that even if the privative clause ousted review for non-jurisdictional error, a breach of s 38(1) amounted to jurisdictional error and therefore the decision could still be reviewed. The Commission further argued that s 10(b) contained an implied right to an effective and independent investigation based on decisions of a number of foreign and international jurisdictions. Finally, Mr Bare submitted that the delegate did not give proper consideration to his substantive rights under ss 8 and 10 of the *Charter*, or his implied right to an effective investigation under s 10(b) of the *Charter*.

Judgment

The Court set aside the orders of the trial judge, quashed the Director's decision and ordered that a fresh decision be made by IBAC in accordance with the obligations of decision makers under s 38(1) of the *Charter*.



The majority of the Court (Tate and Santamaria JJA) held that the privative clause in s 109 of the PI Act was limited to decisions of the Director made 'for the purposes of an investigation'. A decision of the Director not to investigate did not amount to a decision for the purposes of an investigation. The majority therefore held that the Court was not precluded from reviewing the decision of the Director. Warren CJ, dissenting, held that even if s 109 of the PI Act was limited to decisions made for the purposes of an investigation, the decision whether or not to investigate was a decision made for such a purpose and so the Court was precluded from reviewing the decision.

It was unnecessary for the majority to decide whether a breach of s 38(1) of the *Charter* amounted to jurisdictional error. Warren CJ did, however, conclude on this point that the decision did not necessarily amount to jurisdictional error, and so the privative clause applied. Warren CJ found it unlikely that Parliament intended that a decision in breach of s 38(1) should result in invalidity.

All members of the Court found s 38(1) of the *Charter* applicable to a decision, whether the section empowering the decision mentioned human rights or not, such as the public interest test under s 40(4)(b)(i) of the Act. The majority held that the delegate of the Director did not give proper consideration to Mr Bare's *Charter* rights. He did not identify the relevant rights of Mr Bare or balance them against competing interests. Although it was unnecessary for Warren CJ to decide, her Honour also considered that the delegate of the Director did not give proper consideration to Mr Bare's rights.

All members of the Court found that s 10(b) of the *Charter* contained no implied right to an effective and independent investigation.



***Carolan v R* [2015] VSCA 167**

26 June 2015

Ashley, Redlich and Priest JJA

Charter provisions: ss 21, 32(1), 38

Summary

The appellant, Mr Carolan, brought an appeal pursuant to s 18O of the *Sentencing Act 1991*, seeking an order discharging his indefinite sentence. The appellant was subject to an indefinite sentence of imprisonment imposed with respect to a significant and lengthy history of sexual offending. On 8 July 2014 the County Court refused an application for review of the indefinite sentence and refused to discharge the sentence pursuant to the *Sentencing Act 1991* (s 18M(1)).

The appellant argued that a miscarriage of justice had occurred because the DPP had not adduced evidence of the steps likely to be taken to manage the risk presented by the appellant if his indefinite sentence was discharged. He argued that the DPP did this in breach of its obligations as Prosecutor and under ss 21 and 38 of the Charter.

The appellant also argued that the County Court had erred by not ordering, pursuant to s 18I of the *Sentencing Act*, that the Adult Parole Board ('the Board') and the Secretary to the Department of Justice ('the Secretary') provide the Court with reports addressing the possible discharge of the appellant's indefinite sentence.

Judgment

The appeal was allowed and the appellant's indefinite sentence was discharged. The Court ordered a five year re-integration program administered by the Board, and issued a warrant to imprison the appellant with respect to that five year period, in accordance with s 18M of the *Sentencing Act*.

The Court of Appeal found that the Chief Judge erred in finding that, absent any evidence as to what the relevant public authorities might do upon the discharge of the appellant's indefinite sentence, the bare existence of the *Serious Sex Offenders (Supervision and Detention) Act 2009* ('SSODSA') regime for supervision and detention was insufficient to conclude that the appellant would not be a serious danger to the community. The Court found that the Board's statutory functions and the SSODSA regime were sufficient to require a discharge of the indefinite sentence under s 18M, with the court emphasising the 'extraordinary' nature of an indefinite sentence and their reservation as a solution for only 'exceptional cases'.

The Court considered the construction and purpose of s 5(2BD) of SSODSA, which prevents a court from having regard to an order or the possibility of an application for an order under SSODSA when sentencing an offender. The Court adopted the interpretation that its review function in s 18M was not subject to the prohibition in s 5(2BD), and therefore it could consider the SSODSA regime.

The appellant also submitted that, to the extent that there was ambiguity, s 5(2BD) should be construed in a way that least impinged upon the appellant's liberty in accordance with the principle of legality and the Charter. The Court of Appeal discussed s 21 of the Charter (the right to liberty and security of the person), noting that it was engaged by the indefinite sentence regime. The Court also referred to s 32(1) of the Charter, that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights' and the effect of *Momcilovic v The Queen* (2011) 245 CLR 1 in construing statutes.



The Court gave s 5(2BD) the meaning that best accorded with the appellant's liberty and therefore, the section should be construed so as not to apply to the review, but only to the imposition, of an indefinite sentence.



Kuyken v Chief Commissioner of Police [2015] VSC 204

14 May 2015

Garde J

Charter provisions: ss 7(2), 8(3), 15, 32(1)

Summary

This case concerned an application to the Victorian Civil and Administrative Tribunal ('the Tribunal') by plaintiff Leading Senior Constable Kuyken of the Victoria Police, relating to a change in grooming standards under which he was no longer permitted to have a goatee beard. Members of Victoria police were advised by email of new guidelines under which goatees and beards would not be permitted from 1 January 2012. A second email advised members that the new policy would not apply to those who exercised their right to challenge the changes until their matters were determined. A third email explained that the standard would be ratified in law due to an amendment to the *Police Regulation Act 1958* ('PR Act'), to come into effect on 1 July 2012. On 31 August 2012, the plaintiff and others received an email explaining that they had to comply with the standard or make an application to the Tribunal by 28 September 2012. The plaintiff and fifteen others made individual applications to the Tribunal.

Before the Tribunal, the plaintiff alleged direct discrimination in his employment, contrary to s 18(d) of the *Equal Opportunity Act 2010* ('EO Act'), and further victimisation under s 104 of the *EO Act*. The plaintiff also argued that there had been a breach of s 38 of the *Charter* in respect of his right to freedom of expression under s 15. The Tribunal dismissed the application, and rejected the plaintiff's argument with respect to s 15 of the *Charter*. The Tribunal was not satisfied that a reasonable member of the public would consider that the plaintiff's goatee imparted any information or ideas, or conveyed any meaning.

On appeal to the Supreme Court, the plaintiff sought to rely on an amended draft notice of appeal, contending that he had a right to equal and effective protection against discrimination under s 8(3) of the *Charter*.

Judgment

The Court proceeded on the basis that the s 8(3) right of the *Charter* was engaged. Garde J discussed the origins of s 8(3), which is derived from art 26 of the *International Covenant on Civil and Political Rights* ('ICCPR'), and found that s 8(3) is autonomous and creates rights substantively and independently of other *Charter* provisions. The Court referred to *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 in which Bell P identified two qualifications to s 8(3). Firstly, the subsection is limited by the closed definition of discrimination within the meaning of the *EO Act*, whereas under art 26 of the *ICCPR*, any discrimination is prohibited. Secondly, the rights under s 8(3) are subject to limitation pursuant to s 7(2) of the *Charter* and thus, 'limitations which are under law and demonstrably justified in terms of s 7(2) are compatible with human rights and permissible, even though amounting to statutory discrimination'. The *ICCPR* contains no general limitations provision.

The Court considered how s 5(2) of the *PR Act* was to be construed having regard to the plaintiff's human right to protection against discrimination under s 8(3) of the *Charter*. The Court found the meaning of s 5(2) to be clear; s 5(2)(c) expressly permits standards of grooming to differ based on sex and physical features. There was no ambiguity or reasonably available alternative construction of the section that would be compatible with the human right set out in s 8(3) of the *Charter*. Section 5(2)(c)(1) made it clear that the standards may differ based on the attributes listed in s 6 of the *EO Act* (sex, gender identity, physical features, religious belief or activity).

Section 32(1) does not permit an interpretation contrary to parliamentary intention. While the court should, if words are capable of more than one meaning, interpret them so as to best accord with the



human rights in question, it cannot attribute a meaning inconsistent with the grammatical meaning and apparent purpose of the enactment. The relevant parliamentary intention was to 'authorise the imposition of grooming standards even if they were discriminatory as to an attribute under s 6 of the *EO Act*, or infringed upon the human right to have equal and effective protection against discrimination under s 8(3) of the *Charter*'.

The appeal was dismissed.



C v Children’s Court of Victoria [2015] VSC 40

19 February 2015

Beale J

Charter provisions: ss 23, 25

Summary

A magistrate ordered that exceptional circumstances made a case involving rape charges unsuitable for summary determination in the Children’s Court, and so it should proceed as a committal hearing. The defendant, C, sought judicial review of this decision.

At the time of the alleged offending, C was aged 17 years and 3 months, and the complainant was aged 15 years and 7 months. The 14 charges brought against C included charges for intentionally causing injury, recklessly causing injury, unlawful assault, theft, false imprisonment, rape, and attempting to procure sexual penetration by threats.

The magistrate considered all charges together to assess the gravity of the offending and relied on the following matters to decide that the gravity justified uplifting the charges:

- C was 17 at the time of the offending.
- C was living with his grandfather and was on a youth supervision order.
- The offending was violent, controlling, predatory and prolonged.
- The complainant was placed in fear for her life, suffered injury and tried to escape several times.
- The offending involved preplanning, stealing a motor car, and taking the complainant to a remote location.
- The offending ‘reflected family violence’, C and complainant having been in a relationship for about one month.
- There were threats, including threats of C self-harming.

Judgment

Considering all the circumstances, individually and in combination, it was not reasonably open for the magistrate to find exceptional circumstances. The magistrate’s order was quashed and the matter returned to the Children’s Court for summary determination by a different member of that Court.

The magistrate appeared not to have considered where the rape charges were situated on the spectrum of rape charges. Without the rape charges, the matter would have been summarily determined. The rape charges were mid-range instances of rape, and C had limited priors. His three prior appearances in the Children’s Court resulted in two bonds and one youth supervision order, all without conviction. He had never received a sentence of detention or a youth attendance order.

C argued that the magistrate failed to have regard to s 25(3) of the *Charter*, which provides that ‘[a] child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation’, and s 23(2) of the *Charter*, which provides that ‘[a] child must be brought to trial as quickly as possible’. The parties had not referred to the *Charter* in their submissions, and the magistrate did not refer to it in her decision.

Express reference to the *Charter* in a decision-maker’s reasons is not obligatory. Requiring express reference would elevate form over substance. Sections 25(3) and 23(2) do not negate the Children’s Court’s power to



uplift charges in appropriate cases. Nor is a decision that a matter be uplifted inconsistent with ss 25(3) and 23(2), because those sections are to be given effect whether the trial takes place in the Children's, County or Supreme Court. The magistrate was aware of the different procedures in the Children's Court and the adult jurisdiction, as well as the different sentences available, and was alive to the issue of delay.



***DPP v Kaba* [2014] VSC 52**

18 December 2014

Bell J

Charter provisions: ss 7, 12, 13(a), 17(1), 21(1), 32

Summary

Charges were brought against the defendant, Mr Kaba, a passenger in a vehicle stopped by police for a random licence and registration check. The defendant, upon leaving the vehicle and walking away, was asked his name. The defendant allegedly refused the request using offensive language and, as the situation escalated, exposed himself to the officers and assaulted an officer during his arrest.

Counsel for the defendant objected to the admission of the police officers' evidence under s 138 of the *Evidence Act 2008*, arguing that the criminal charges were the result of carrying out an unauthorised random licence check. It was argued that the police officers' actions breached the driver and defendant's rights to freedom of movement under s 12 of the *Charter* and that demanding the defendant's name was contrary to his right to privacy under s 13(a) of the *Charter*. Arguments were also made in relation to the right to liberty under s 21(1) of the *Charter* and obligations under the *International Covenant on Civil and Political Rights* ('the ICCPR').

At a preliminary hearing, the magistrate refused to admit the police officers' evidence, causing the case for the prosecution to collapse. The trial was adjourned and the Director of Public Prosecutions made an application for judicial review of the magistrate's decision.

Judgment

Where breaches of rights under the *Charter* may have occurred, it is necessary first to identify the scope of the right before considering any breach, which may involve questions of justification under s 7(2) of the *Charter*. The *Charter* should be interpreted broadly and limitation of a right is not taken into account in identifying its scope.

The defendant's right to liberty under s 21(1) of the *Charter* was not breached, because a routine check involving stopping a vehicle for a brief period, inspecting it and examining the licence of the driver did not amount to physical detention of the driver or passenger. However, it did interfere with their right to freedom of movement under s 12 of the *Charter*. Further, the driver and defendant's names were personal information protected by s 13(a) of the *Charter*. The traffic stop and request for the driver's name and address interfered with the driver's right to privacy. The persistent demands for the defendant's name interfered with his right to privacy.

In interpreting the relevant provisions of the *Road Safety Act 1986*, the Court applied s 32(1) of the *Charter*, as well as the principles of consistency and legality. As in Maxwell P's statement in *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, the principle of consistency demands that in the absence of a clear statement of contrary intention, a statute should be interpreted and applied, as far as language permits, in conformity with Australia's obligations under relevant treaties.

The critical question was whether the nature of a random stop and request power made it 'arbitrary' in the sense of being an unreasonable and disproportionate response to the purpose of the power per art 17(1), and not necessary to protect public order per art 12(1) of the ICCPR. The power was necessary and not arbitrary and it represented a reasonable and proportionate response to the legitimate purpose of regulating drivers in the interests of public safety. The means used were the least restrictive in order to give effect to the purpose.



When applying the principle of legality in legislative interpretation, the rights protected by the *Charter* and the rights and freedoms in the ICCPR are protected at common law. If the legislature plainly and unambiguously intended to convey a police power to conduct a routine check under s 59(1), the court must give effect to that interpretation even if it infringes rights; if an interpretation that avoids the infringement is reasonably open, it must be adopted. Parliament unmistakably intended to confer, through s 59(1) of the *Road Safety Act*, a power of stop on police and other officers and no other interpretation was open. The interference with the defendant's right to freedom of movement as a passenger was the natural and ordinary consequence of exercise of the power.

The Court accepted the submission that s 32(1) of the *Charter* operates similarly to the principle of legality but with a wider field of operation, taking the *Charter* rights into account at their highest and without regard to s 7(2).

The Court considered the exclusion the evidence under s 138 of the *Evidence Act*, including in relation to the violation of the defendant's rights as a contributing factor leading to his offending conduct. Drawing analogies with *Robinett v Police* (2000) 78 SASR 85 and *DPP v Carr* [2002] NSWSC 194, the Court found that the evidence against the defendant was obtained in consequence of breaches of his *Charter* rights.

The Magistrate erred in finding the police had no power to undertake the random licence check, but agreed that the police had breached the defendant's rights under the *Charter* (and the ICCPR).

The ruling was quashed and the proceeding remitted to the Magistrate.



XX v WW and Middle South Area Mental Health Service [2014] VSC 564

17 December 2014

McDonald J

Charter provisions: ss 4(1), 7(2), 10(1), 12, 13, 21, 32, 38, 39

Summary

The plaintiff, XX, sought a declaration that the recommendation of the defendant, WW (a registered medical practitioner), that she be subject to an Involuntary Treatment Order ('ITO') was unlawful.

XX had previously been detained and treated under an ITO, which was discharged by the Mental Health Review Board ('the Board'). On the same day the order was discharged, WW recommended making the new ITO under s 9 of the *Mental Health Act 1986* (since replaced by the *Mental Health Act 2014*). The new ITO was made following a review by two psychiatrists. Three days later, the Board discharged the new ITO, as it was not satisfied that the relevant criteria were met.

XX submitted that s 9 of the Act should be construed so that a registered medical practitioner cannot make a recommendation in respect of a patient whose ITO has been discharged by the Board, unless they have a reasonable and good faith opinion that they have information, unknown to the Board, that makes a significant difference to the case. Accordingly, the plaintiff argued that the defendant's recommendation was ultra vires. XX argued that this interpretation was required by s 32 of the *Charter*, which requires statutory provisions to be interpreted compatibly with human rights (in this case, rights concerning medical treatment, privacy, liberty and security, and arbitrary detention). XX submitted that without a limitation on s 9, the Board's powers of appeal and review would be ineffective. This would render the limitations imposed by an ITO on the *Charter* rights unjustifiable or arbitrary.

XX also argued that WW's recommendation was unlawful under s 38 of the *Charter*, WW being a public authority by reason of his employment by the second defendant. First, she argued that WW had acted incompatibly with her human rights. XX submitted that the ITO engaged rights concerning privacy, family and home (s 13 of the *Charter*) and liberty (s 21 of the *Charter*), and that in this case these rights had not been reasonably limited 'under law' per s 7(2) of the *Charter* because WW's recommendation was ultra vires. XX submitted that WW's actions did not amount to a reasonable limitation of her *Charter* rights, as they involved an abrogation of the independent 'judicial' oversight of the Board. Second, XX argued that WW had not given proper consideration to her relevant human rights.

Judgment

Applying *Slaveski v Smith* (2012) 34 VR 206, the Court rejected XX's submissions that s 32 of the *Charter* required an implied limit to be read into s 9 of the Act.

After considering general principles of statutory interpretation and concluding that the contended limitation did not otherwise need to be read into s 9, the Court stated (at [96]):

Section 32(1) does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down words so far as to change the true meaning of a provision. Nor does it authorise a process of interpretation which departs from established understandings of the process of construction.

Accordingly, WW's decision to make the recommendation was not ultra vires.



The Court also rejected the submission that the decision was unlawful under s 38 of the *Charter* on account of the defendant acting incompatibly with XX's rights, as this contention relied on WW having had acted *ultra vires*.

The Court also rejected XX's argument in relation to unreasonableness, noting that WW had regard to the Board's earlier decision to discharge the previous ITO, and was justified in his belief that XX's circumstances had since changed. Additionally, the Board was an administrative, rather than judicial, body.

With respect to whether WW had given proper consideration to XX's human rights under s 38 of the *Charter*, the Court concluded that on the evidence, WW had turned his mind to the impact of the recommendation on XX's human rights, and had identified countervailing interests and obligations.



Burgess v Director of Housing [2014] VSC 648

17 December 2014

Macaulay J

Charter provisions: ss 13, 17, 38

Summary

Ms Burgess and her son, who lived with her on occasion, sought relief in the nature of certiorari to quash the decisions of the Director of Housing ('the Director') to issue Ms Burgess a notice to vacate her rented public housing premises and to apply for a warrant of possession of the premises.

The Director had issued the notice to vacate under the *Residential Tenancies Act 1997* following Ms Burgess's release from prison, where she had served time for trafficking heroin, on the grounds that she had used the rented premises for an illegal purpose.

Ms Burgess argued that the Director, a public authority, had failed to act compatibly with or properly consider her and her son's rights under the *Charter*. Ms Burgess submitted that their rights under s 13 (protection from unlawful or arbitrary interference with the family or home) and s 17 (protection of family and children) of the *Charter* were engaged.

Judgment

The notice of possession was ineffective (for unrelated reasons) and the remedy of certiorari therefore unavailable. The Court nonetheless considered the Director's decision to issue it. The Court held that s 17 of the *Charter* was engaged in relation to both Ms Burgess and her son, and the Court was not satisfied that the Director had properly considered their rights therein. The Director's decision was thus unlawful under s 38 of the *Charter*. The Court did not decide whether s 13 of the *Charter* was engaged, but noted that where unlawful interference with the home is alleged, the unlawfulness must be independent of the *Charter*.

The Court held that, in issuing the notice of possession, the Director was required to consider the guidelines in the 'Tenancy Management Manual', which recommended considering the *Charter*. The Court was not satisfied that the *Charter* had been considered, or that Ms Burgess was informed of her *Charter* rights and given the opportunity to be heard in relation to them.

The Court held that the application for the warrant was also unlawful under s 38 of the *Charter*. The Director, who was aware of Ms Burgess' son's residence in the house, was bound to consider the child's best interests, and had failed to do so.

The Court made no orders in respect of the warrant, but did so later in *Burgess v Director of Housing (No 2)* [2015] VSC 70 (4 March 2015) after receiving additional written submissions. In that later case, the Court held that the warrant had ongoing legal effect preserved by earlier stay orders. The Court quashed the warrant of possession, and declared the warrant application decision invalid and of no legal force or effect, and unlawful, by reason of s 38(1) of the *Charter*.



Goode v Common Equity Housing Ltd [2014] VSC 585

Bell J

21 November 2014

Charter provisions: ss 38, 39

Summary

Ms Goode applied for an extension of time to apply for leave to appeal an order made by the Victorian Civil and Administrative Tribunal ('the Tribunal') dismissing her application against Common Equity Housing Ltd under the *Equal Opportunity Act 1995* and the *Equal Opportunity Act 2010*. The application before the Tribunal concerned alleged prohibited discrimination on the grounds of her disability (Post Traumatic Stress Disorder). At the Tribunal, Ms Goode alleged that Common Equity Housing Ltd, as a public authority, had acted in a way that was incompatible with her human rights, invoking ss 38(1) and 39(1) of the *Charter*.

The Tribunal found that Common Law Equity Ltd had not committed any acts of prohibited discrimination and, rejecting Ms Goode's discrimination complaints, dismissed her application. Ms Goode's alleged human rights violations were not considered, on the basis that the Tribunal did not have jurisdiction to consider such breaches where Ms Goode's discrimination complaints had not been established.

Judgment

The Court held that the Tribunal had committed an error of law. The relevant condition with respect to the operation of s 39(1) is that a person is entitled to seek relief or remedy on grounds of non-Charter unlawfulness, not that that person is or will be awarded that relief or remedy. Ms Goode was entitled under statute to seek relief or remedy in the Tribunal from Common Equity Housing Ltd in relation to the alleged acts of unlawful discrimination. Thus the Tribunal has jurisdiction under s 39(1) of the *Charter* to grant such relief or remedy on a *Charter* ground of unlawfulness. The tribunal does not lose that jurisdiction because, when application is actually made seeking relief or remedy on a non-Charter ground of unlawfulness, that ground fails.

The Court allowed Ms Goode's appeal, and set aside the portion of the Tribunal's order that dismissed Ms Goode's application for relief or remedy under s 39(1) of the *Charter* and, in respect of that aspect of Ms Goode's application, remitted the proceeding for reconsideration by the Tribunal.



***Rich v R* [2014] VSCA 126, (2014) 312 ALR 429**

Nettle, Neave and Osborn JJA

20 June 2014

Charter provisions: ss 24, 36(2)

Summary

Mr Rich sought leave to appeal his conviction and sentence for murder in the course of an armed robbery. He had been sentenced as a serious violent offender to life imprisonment with a non-parole period of 30 years.

Mr Rich argued that s 5 of the *Evidence (Miscellaneous Provisions) Amendment (Affidavits) Act 2012* ('the *Amendment Act*') was inconsistent with his right to a fair trial under s 24 of the *Charter*. Section 5 of the *Amendment Act* incorporated s 165 into the *Evidence (Miscellaneous Provisions) Act 1958*. Section 165 deems it unnecessary to comply with statutory requirements for swearing and affirming certain affidavits.

Mr Rich contended that s 5 'deprived [him] of the ability to argue that evidence obtained as a result of improperly sworn affidavits ... should not have been admitted at trial'. He argued that an affidavit used in support of a search warrant, under which the evidence was obtained, had not been sworn or affirmed in accordance with sections 100 or 103 of the *Evidence Act 1958*. Mr Rich argued that section 5 of the *Amendment Act* deprived him of a fair trial because:

- he could and would have objected to the admission of the evidence had the defect been known at the trial;
- but for s 5, it would now be open to him to contend that his trial was unfair because the evidence was admitted in ignorance of the unlawful means by which it was obtained; therefore
- s 5 is inconsistent with his right to a fair trial inasmuch as it purports to preclude him from demonstrating that his trial was unfair.

Counsel for Mr Rich acknowledged that inconsistency with the *Charter* would not invalidate s 5 of the *Amendment Act*, but submitted that, in the circumstances of this case, it was appropriate for the Court to make a declaration of inconsistent interpretation under s 36(2) of the *Charter*.

Judgment

In a joint judgment, the Court rejected Mr Rich's arguments on the basis that his inability to contest the admissibility of the relevant evidence did not deprive him of a fair trial. Admission of the evidence did not render the trial unfair and the evidence should not have been excluded on the basis of public policy or fairness.

The Court found that the 'evidence was real, objective evidence and there was nothing said or done by the police in obtaining it which may have detracted from its reliability or cogency', and that nothing had been said 'against the truth or honesty of the contents of the affidavits by which the police obtained [the evidence]'.

Given the 'awful and outrageous' nature of the offence, the Court found that 'in the absence of gross police impropriety, the importance of bringing the wrongdoer to conviction was and is bound to prevail over any risk of the court being seen to approve or encourage an erstwhile practice of police failing to swear affidavits in accordance with statutory formalities'. The Court also held that even if it had been known at the time of trial that the affidavit had been improperly sworn, policy and fairness would have demanded reception of the evidence.



Section 5 of the *Amendment Act* was consistent with Mr Rich's right to a fair trial. The Court indicated that even if it were not, it would not make a declaration of inconsistent interpretation following the observations of Crennan and Kiefel JJ in *Momcilovic v R* (2011) 245 CLR 1 that s 36 of the *Charter* does not oblige the Court of Appeal to make such a declaration.

The application for leave to appeal against sentence and conviction was dismissed.



***DPP v Bryar* [2014] VSC 224**

Rush J

15 May 2014

Charter provisions: ss 26, 32

Summary

At a contested hearing before a judicial registrar, Mr Bryar was found guilty of travelling 94kph in an 80kph zone. He was fined \$244 and no conviction was recorded. The Chief Commissioner of Police was ordered to pay costs.

The police prosecutor lodged a request for review of the hearing and determination pursuant to s 16K of the *Magistrates' Court Act 1958*. The application was granted and the Magistrate accepted a plea of *autrefois convict*. The Director of Public Prosecutions appealed the acceptance of the special plea of *autrefois convict*.

On appeal, the Court was required to determine whether s 16K of the Act could be construed as a conferring a right upon an unsuccessful police informant or prosecutor to seek review of a decision by a judicial registrar by way of a hearing *de novo*. Mr Bryar contended that such construction would offend against the common law rule against double jeopardy, which has been given legislative expression under s 26 of the *Charter*.

Judgment

The appeal was allowed.

Rush J held that 'the words of s 16K of the Act and the statutory intention demonstrated by the Second Reading Speech enable a police informant to seek review by way of a hearing *de novo* to a magistrate from the decision of a judicial registrar'. The Court held that although 'the *Charter* embraces the common law principle against double jeopardy, that does not permit a construction of s 16K of the Act that is inconsistent with the "grammatical meaning and apparent purpose" of that section'.

Rush J referred to comments made by the Court of Appeal (Warren CJ, Nettle and Redlich JJA) in *Slaveski v Smith* (2012) 34 VR 206, regarding the approach to construction of statutes in the context of provisions of rights under the *Charter*.



Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] VSCA 75, (2014) 308 ALR 615

Maxwell P, Neave and Redlich JJA

16 April 2014

Charter Provisions: ss 1, 2, 7, 8, 14, 15, 32, 49

Summary

Christian Youth Camps Ltd ('CYC') appealed a decision of the Victorian Civil and Administrative Tribunal ('the Tribunal'), which had made a finding of unlawful discrimination on the basis of sexual orientation under the *Equal Opportunity Act 1995* ('the *EO Act*'). The conduct in question was a refusal by CYC to allow Cobaw Community Health Services Ltd ('Cobaw') to hire a resort for a weekend camp to be attended by same sex attracted young people.

CYC appealed against the Tribunal's decision, arguing 'a fundamental distinction between an objection to "the syllabus" to be taught at the proposed camp ... and discrimination on the basis of the sexual orientation of those attending'. CYC had argued before the Tribunal that even if the refusal amounted to unlawful discrimination, the religious freedom exemptions contained in s 75(2) and s 77 of the *EO Act* applied. The Tribunal found that the exemptions were not applicable.

A central issue before the Court was whether interpretation of the *EO Act* was governed by s 32(1) of the *Charter*. The Tribunal referred to ss 1(2)(b) and 49(1) of the *Charter* and found that, as a later enactment than the *EO Act*, s 32(1) was applicable. The Tribunal rejected an argument by CYC based on s 49(2) of the *Charter* that since the discrimination complaint occurred before 1 January 2008, the date in which s 32(1) came into operation, s 32(1) did not apply.

The Attorney-General submitted that the Tribunal had erred because, in the absence of contrary legislative intention, the common law statutory presumptions against retrospective legislation applied to the *Charter*. The application of s 32 to the interpretation of the *EO Act* where the events giving rise to the discrimination complaint pre-dated the *Charter* would 'alter the rights, obligations and interests of the parties to the proceeding with retrospective effect'.

The Victorian Equal Opportunity and Human Rights Commission ('the Commission') agreed with the Tribunal. The Commission argued that the cases relied on by the Attorney-General concerned events occurring before any provisions of the *Charter* had come into force, whereas at the time of the alleged discriminatory conduct at hand, the rights in Part 2 of the *Charter* were already in effect.



Judgment

Maxwell P (with whom Neave JA agreed) found that the applicable provisions were those in force at the date of the conduct in question. At the time of the relevant conduct, s 32(1) was not yet in force so the *EO Act* was to be interpreted in accordance with ordinary principles. This is consistent with s 49(1) because, although s 32(1) applies to the interpretation of pre-*Charter* statutes, it does not apply to the interpretation of statutes in respect of conduct that occurred before it came into force.

Despite this conclusion, Maxwell P upheld the Tribunal's decision because all the parties, except the Commission, accepted that the interpretation of the relevant provisions of the *EO Act* would be the same whether or not s 32(1) of the *Charter* applied. Maxwell P also concluded that the Tribunal took the correct approach to the interpretation of the religious exemptions by recognising the coexistence of the rights to freedom of thought, conscious, religion and belief (s 14), to freedom of expression (s 15), and to equality and freedom from discrimination (s 8), rather than favouring one of these rights over the others.

Redlich JA agreed with Maxwell P that s 32(1) of the *Charter* did not apply to the conduct in question. However, Redlich JA concluded that the Tribunal's recourse to the *Charter*, particularly the right to be free from discrimination contained in s 8, contributed to its view that the exemption contained in s 77 of the *EO Act* was to be construed narrowly so as not to include corporations.

Redlich JA stated that the Tribunal's interpretation of the exemption contained in s 77 was 'unworkably narrow', 'calculated to frustrate the very purpose of the exemption' and 'contributed to the Tribunal's ultimate conclusion that [CYC's] religious beliefs or principles could not necessitate their discriminatory acts'.

Redlich JA observed that while 'proportionality' under s 7(2) of the *Charter* involved making a judgment regarding competing interests, the legislature had expressed how these interests should be balanced by enacting s 77 of the *EO Act*. The Tribunal was therefore bound to apply the provision in accordance with Parliament's intent. Redlich JA concluded that the Tribunal's decision was based on a narrow construction of the exemption contrary to the clear legislative intent.

The majority (Maxwell P and Neave JA) dismissed CYC's appeal against the Tribunal's decision.



DPP v JPH (No 2) [2014] VSC 177

Forrest J

16 April 2014

Charter provisions: ss 7(2), 13(a), 21(2), 22(1), 22(2), 22(3), 32(2), 34(1), 36, 38

Summary

This case involved an application for a detention order brought by the DPP under s 73(3) of the *Serious Sex Offenders (Detention and Supervision) Act 2009* ('the 2009 Act') in respect of JPH, who was, at the time, subject to an Extended Supervision Order ('ESO') under the *Serious Sex Offenders (Monitoring) Act 2005*. The application involved a two-stage process. First, the Court was required to consider whether JPH posed an unacceptable risk of committing a relevant offence if neither a detention order nor a supervision order were made (s 35). Second, if there was such a risk, whether JPH posed an unacceptable risk of committing a relevant offence unless a *detention order*, as opposed to a supervision order, was made (s 36).

JPH conceded that he posed an unacceptable risk in terms of s 35 of the 2009 Act, but submitted that a supervision order would adequately manage this risk. Forrest J observed that JPH had a history of sexual offending from the age of 14 and that three witness reports were tendered as evidence; each expressing the view that he 'presented a really significant risk to the public'.

JPH submitted that the combined effect of the 2009 Act, the *Corrections Act 1986* and the *Corrections Regulations* infringed on one or more of his *Charter* rights. He submitted that the management of detention order prisoners under these instruments was inconsistent with rights under ss 22(1), (2) and (3) of the *Charter*, concerning the humane treatment of persons deprived of liberty, as well as s 21(2) concerning freedom from arbitrary arrest and detention.

JPH sought a declaration of inconsistent interpretation pursuant to s 36 of the *Charter* with respect to these rights. The Attorney-General intervened under s 34(1) of the *Charter*.

Judgment

With respect to s 35 of the 2009 Act, Forrest J was satisfied that JPH posed an unacceptable risk of committing a relevant offence if a supervision or detention order were not made.

In balancing the nature and degree of JPH's risk against a range of competing considerations, Forrest J acknowledged that if a detention order were made, JPH's rights under the *Charter* and at common law would be subject to significant limitations that would impact upon his rehabilitation and quality and enjoyment of life.

Forrest J was satisfied to a high degree of probability that the risk of JPH committing a relevant offence would be unacceptable unless a detention order was made. The Court concluded that the adverse impact of the detention order on JPH, alone or when combined with the consequence that his rights under the *Charter* and the common law would be subject to significant limitations, was not sufficient to render the risk acceptable.

Forrest J observed that JPH's submissions with respect to the *Charter* went to the conditions of his detention and involved speculation about the exercise of powers by corrections authorities that may interfere with his rights. The fact the 'regime' does not expressly prohibit the exercise of such powers does not mean that it is inconsistent with the *Charter*. Forrest J also observed under s 38 of the *Charter*, Corrections Authorities are to exercise their powers in a way that is compatible with human rights and that s 115 of the 2009 Act acted as an additional safeguard by recognising a detention order prisoner's status as an unconvicted prisoner. In the absence of evidence to the contrary, the Court must assume public authorities will act lawfully.



The Court imposed a detention order under s 36(3) of the 2009 Act.



Woods v DPP [2014] VSC 1

Bell J

17 January 2014

Charter provisions: ss 7(2), 12, 21

Summary

This case involved four bail applications, following amendments to the *Bail Act 1977* by the *Bail Amendment Act 2013*, which came into force on 20 December 2013 and provided the court with extensive and explicit powers to impose bail conditions.

The four applications before the court concerned whether the proposed conditions of bail assisted in satisfying the court that each accused did not represent an unacceptable risk and, if bail were to be granted, what conditions should be imposed. Section 5(2A) of the *Bail Act* sets out 'conduct conditions' the court may impose upon an accused when required.

Judgment

The human rights of freedom of movement (s 12) and of liberty and security of the person (s 21) under the *Charter* are potentially engaged by the provisions of the *Bail Act* when deciding whether a person should be granted bail and any conditions that should be imposed. Bell J gave examples of circumstances where other human rights under the *Charter* may also be engaged the *Bail Act*. Provisions of the *Bail Act* concerning a person's entitlement to bail and any associated conditions will be compatible with human rights provided they accord with s 7(2) of the *Charter*.

It was not the legislature's intention that the conditions be imposed as a matter of course and they are only meaningful in terms of mitigating risk and assisting the accused if they are consensual.

Bell J observed that the court's extensive powers to impose conditions and that contravention of most conditions of bail is now a criminal offence under s 30A(1) of the *Bail Act* raises questions about how the human rights of an accused are to be protected. The court's exercise of the power to impose conditions of bail under s 5(2A) is regulated by a suite of provisions including s 5(3), the purpose for which the conditions may be imposed, and s 5(4), the content and number of conditions imposed. These provisions are intended to ensure that conditions imposed are compatible with the human rights of the accused and are proportionate to the circumstances of the case. Similar provisions govern the imposition of conditions requiring a deposit of money or surety under s 5(5) and (6) of the *Bail Act*. In addition, Bell J observed that a note to s 5 of the *Bail Act*, which forms part of the Act, discusses the relationship between human rights in the *Charter* and provisions of that section concerning conditions of bail.

The Court acknowledged that in three of the cases before it the imposition of conduct conditions had contributed to its satisfaction that the accused was not an unacceptable risk.

Woods: The applicant was granted bail and conduct conditions were imposed. Bell J declined to impose a condition that the accused use no public transport at all, as this would hinder his freedom of movement to an extent not warranted for any legitimate purpose of bail.

Sakievski: The applicant was refused bail. The accused had not shown cause as to why his detention was not justified, and the bail conditions proposed did not satisfy the court that the applicant was not an unacceptable risk.

Klourellis: The applicant was granted bail. With support and the appropriate bail conditions, the risk of the applicant reoffending to support his drug addiction could be acceptably managed.



Mawn: The applicant was granted bail. The applicant's offending related to his refugee background, social circumstances and alcohol dependence and bail was granted on the basis that the risk of the applicant committing further offences while on bail could be mitigated to an acceptable degree by conditions relating to treatment for alcohol abuse. The Court imposed a condition that the applicant not attend the library where one instance of his violent offending had occurred. The Court declined to impose a condition excluding the applicant from his local shopping centre as it would impose greater constraints upon his freedom of movement than the circumstances of the case required.



Angeleska v State of Victoria [2013] VSC 598

Landsdowne AsJ

1 November 2013

Charter provisions: ss 5, 7, 8, 9, 10, 12, 13, 17, 24

Summary

Mrs Angeleska brought proceedings against the State of Victoria, Victoria Police and a number of police officers, principally in tort. The present matter involved two applications.

The first was by the defendants seeking to have Mrs Angeleska's proceeding struck out or dismissed pursuant to r 23 of the *Supreme Court (General Civil Procedure) Rules* and for summary judgment in their favour. The second was by Mrs Angeleska seeking an extension of time to bring her claims, pursuant to the *Limitations of Actions Act 1958*.

In support of the first application, the defendants argued, among other things, that Mrs Angeleska was estopped from bringing her claims as they should have been litigated in a proceeding involving her husband — *Slaveski v State of Victoria* [2010] VSC 441. Mrs Angeleska was involved in that proceeding as her husband's litigation guardian. In response to that application, and in support of her own, Mrs Angeleska invoked a number of *Charter* rights, namely ss 5, 8, 9, 10, 12, 13, 17, and 24.

Judgment

Landsdowne AsJ considered s 24(1) and its interaction with s 7 of the *Charter* in the context of Mrs Angeleska's application for an extension of time. Section 24 did not assist Mrs Angeleska because, consistent with s 7, limitation periods were reasonably justified limitations on s 24. The rationale for imposing limitation periods was to avoid a diminution in 'the quality of justice' and to ensure a fair trial where 'witnesses are available, memories remain sufficiently fresh and documentation has not been destroyed'.

Landsdowne AsJ also considered ss 5, 8, 9, 10, 12, 13 and 17 of the *Charter*, finding that Part 3 governs when *Charter* rights may be invoked in legal proceedings. Of that Part, Div 3 (interpreting legislation compatibly with human rights) and Div 4 (obligation on public bodies) were potentially relevant.

Regarding Div 3, the Court found that Mrs Angeleska had 'not identified any statutory provision [to] be interpreted having regard to the rights on which she relies'. In relation to Div 4, and noting that the Court was not a public authority for the purposes of the *Charter* when undertaking its judicial functions, Landsdowne AsJ considered the *Charter* rights 'as being possibly relevant to the exercise of my discretion' in relation to the applications. However, the Court expressed concern over whether considering the rights would be appropriate for that purpose. Section 8 (equality before the law) was found not to add anything to Mrs Angeleska's argument that she may bring an action in her own name, which the Court accepted. The remaining sections 5, 9, 10, 12, 13 and 17 of the *Charter* were not relevant to the application.

Two of Mrs Angeleska's complaints were struck out (with the option to re-plead), one survived the defendant's application, and the remaining 14 were denied the necessary extension of time. As a result, judgment in relation to those matters was entered for the defendants.



Strangio v Magistrates' Court of Victoria [2013] VSC 496

Ginnane J

23 September 2013

Charter provisions: ss 24, 25

Summary

Mr Strangio was committed to stand trial in the Supreme Court on 25 charges, including obtaining property by deception and obtaining financial advantage by deception. He sought an adjournment of that committal as he was without legal representation (his lawyer had ceased to act that day). Mr Strangio also sought summary determination of the charges by the Magistrates' Court. The Magistrate denied the application for an adjournment as a previous committal had been adjourned; the charges dated back years and Mr Strangio had had the opportunity to obtain appropriate representation. Ginnane J refused the application for summary determination as the offences were of a 'serious' nature.

Mr Strangio applied for judicial review of the Magistrate's orders, seeking relief in the nature of certiorari or mandamus. He claimed that refusal to adjourn the hearing infringed his right to natural justice; and breached both his right to a fair hearing under s 24 of the *Charter* and to the protections attaching to criminal proceedings under s 25 of the *Charter* (ground 1). The Magistrate's refusal was also in error as Mr Strangio's solicitor had withdrawn on the day and without prior notice (ground 2) and it denied Mr Strangio an opportunity to secure new representation (ground 3). It was argued that the Magistrate did not comply with the requirements of s 141 of the *Criminal Procedure Act 2009* ('CPA') regarding the conduct of committal hearings (ground 4) and failed to ensure that the informant 'procured witnesses to attend Court for the purpose of cross-examination in accordance with s 129 of the CPA' (ground 5). Moreover, the Magistrate's ruling was not reasonably open because it was against the weight of evidence contained in the prosecution's hand-up brief (ground 6) and, finally, the Magistrate did not give adequate reasons for refusing summary determination of the charges (ground 7).

Judgment

Ginnane J found that ground 4 was made out, although the other grounds were without merit. Consequently the Court made an order in the nature of mandamus quashing the Magistrate's orders. In relation to the *Charter*, the Magistrate did not err in exercising discretion to refuse an adjournment: Mr Strangio knew before the committal hearing that his solicitor would cease to act and he adduced no evidence of attempts to collect his files or engage further representation. Mr Strangio previously acted on his own behalf in numerous courts and he was 'determined to press his application' and 'to seek to review any decision that refused that application'. Mr Strangio was not denied natural justice and nor was there any breach of the protections in ss 24 and 25 of the *Charter*.

Ginnane J considered grounds 5 to 7 together with ground 1 and the grounds relating to ss 24 and 25 of the *Charter*. Ground 5 was dismissed because Mr Strangio had previously been granted leave to cross-examine witnesses and eight witnesses were available. No material was advanced to support ground 6. Ground 7 was dismissed because the Magistrate had given 'extensive reasons' for why summary hearing was inappropriate.



Nigro v Secretary, Department of Justice [2013] VSCA 213, (2013) 304 ALR 535

Redlich, Osborn and Priest JJA

16 August 2013

Charter provisions: ss 7(2), 12, 13, 21, 32

Summary

The Court heard three appeals by Nigro, Ghebrat and Lowe together under s 96 of the Serious Sex Offenders (Detention and Supervision) Act 2009. The appellants sought to overturn supervision orders made by the County Court under s 9 of the Act, which imposed conditions restricting, inter alia, their freedom of movement and association. As the appeal concerned the impact of the Charter on the Act, the Victorian Equal Opportunity & Human Rights Commission ('the Commission') intervened. The Commission's main submission was that s 32 of the Charter, read together with s 7(2), means that the discretion to impose a supervision order under s 9(7) of the Act is 'subject to the implied limitation that the discretion would be exercised in a manner compatible with the offender's human rights'.

The Commission's argument concerning the interaction of s 32(1) and s 7(2) was based on the judgments of Justices Gummow, Hayne, Heydon and Bell in *Momcilovic v R* (2011) 245 CLR 1 which supported such a reading of the Charter.

Judgment

In a unanimous judgment, the Court held that judicial discretion in s 9(7) of the Act is not limited by the Charter. Such an implied limitation would be inconsistent with the text and purpose of the Act, which stipulates that, upon a finding of 'unacceptable risk', the core conditions in s 16 should be imposed. Section 15(6) of the Act provides that any additional conditions to the core conditions should represent a minimum interference with human rights. Accordingly, the Court found it unnecessary to form a view on whether the 'interpretative obligations under the Charter could affect the construction of such a broad judicial discretion'. The Court also declined, given that the Commission was the only party arguing the point, to decide whether s 32(1) of the Charter was affected by s 7(2).

The Court considered the impact of the Charter on the remainder of s 9 of the Act. Section 32(1) does not displace the need, using ordinary principles of statutory construction, to ascertain the purpose of a legislative provision. The Court, applying the decision in *Slaveski v Smith* (2012) 34 VR 206, ruled that when construing legislation, s 32(1) of the Charter has the same effect as 'the principle of legality but with a wider field of application'.

Lowe's appeal was allowed on the basis that the judge erred in finding that he posed an 'unacceptable risk'. The appeals of Nigro and Ghebrat were allowed in part; in each case the orders themselves were upheld but certain additional conditions were overturned.



***Bare v Small* [2013] VSCA 204**

Hansen and Tate JJA

2 August 2013

Charter provisions: ss 1(1), 10(b), 38

Summary

Bare applied for a protective costs order relating to his appeal from the trial division. The trial division had dismissed his application for judicial review of a decision of the Director of the Office of Police Integrity (now the Independent Broad-based Anti-corruption Commission) not to investigate alleged abuse against Bare by members of Victoria Police. Bare appealed the findings that s 10(b) of the *Charter* does not create a right to an independent investigation relating to allegations of cruel, inhuman or degrading treatment, and that a breach of s 38 of the *Charter* does not constitute 'jurisdictional error'. In the present matter, Bare sought a total cap on costs of \$5,000. Both the Victorian Equal Opportunity & Commission ('the Commission') and the Attorney-General intervened, respectively supporting and opposing a protective costs order.

Judgment

The Court of Appeal had discretionary power under the *Civil Procedure Act 2010* and *Supreme Court Act 1986* to make a protective costs order, and the Court considered whether the merits of the appeal justified the making of such an order.

The Court relied on the factors identified by Bennett J in *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864. An important consideration was that Bare's appeal raised questions of law with potentially wide public interest, namely, whether s 10(b) imposes an independent duty to investigate alleged breaches of that provision and whether a breach of s 38 constitutes 'jurisdictional error'. The submission concerning the application of s 38 was especially important as a matter of public interest, given the obligation on all public bodies under s 38 to act consistently with human rights and to consider human rights when making decisions. Bare's submissions concerning both ss 10(b) and 38 supported a further factor relevant to the discretion to award a protective costs order, namely that 'the claims are arguable and not frivolous or vexatious'.

The Court made a protective costs order in Bare's favour but made the order reciprocal. All parties' were therefore limited in their recovery of costs to a maximum of \$5,000.



***Pham v Nguyen* [2013] VSC 295**

Emerton J

7 June 2013

Charter provisions: ss 8, 24, 39

Summary

The Victorian Civil and Administrative Tribunal ('the Tribunal') made orders pursuant to the *Residential Tenancies Act 1997* that part of Mr Pham's bond be paid to his landlord Ms Nguyen for outstanding rent. It also dismissed a claim by Mr Pham for compensation from Ms Nguyen. Mr Pham, who was self-represented, applied for review of the orders under s 3 of the *Administrative Law Act 1978*, and s 39 of the *Charter*. He also sought leave to appeal the orders under s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998*.

Mr Pham sought a range of other orders relating to breaches by the Tribunal of his human rights pursuant to the *Charter*. These breaches were not particularised and his complaints concerned, inter alia, the Tribunal hearings scheduled when he could not attend. He alleged a breach of natural justice because, inter alia, the Tribunal did not allow him to present his case. Mr Pham raised his right to a fair trial under s 24 of the *Charter* and his right to equality before the law under s 8 and submitted that the Tribunal infringed those rights, contrary to s 38 of the *Charter*.

Ms Nguyen made no appearance but counsel for the Attorney-General was given leave to intervene to assist the Court in its determination of the matter. The Attorney-General also appeared as *amicus curiae*.

Judgment

Emerton J found that the review and appeal proceedings 'attack the same orders' and ruled that the review should be dismissed as an abuse of process.

The appeal proceeding was dismissed because the Tribunal did not deny Mr Pham natural justice (thus no question of law arose to satisfy a grant of leave to appeal).

Emerton J found no evidence that the Tribunal had breached Mr Pham's rights either under s 8 or s 24 of the *Charter*. Indeed, in relation to the s 8 claim, the Tribunal had gone out of its way to accommodate him. His submissions relating to the *Charter* had 'no prospects of success' and the Tribunal Member's decision 'was not attended by sufficient doubt', so leave to appeal was refused.



ZZ v Secretary, Dept of Justice [2013] VSC 267

Bell J

22 May 2013

Charter provisions: ss 13(1), 17(2), 32, 35

Summary

The applicant was denied an assessment notice under the *Working With Children Act 2005*, and an accreditation to drive a commercial passenger vehicle under the *Transport (Compliance and Miscellaneous) Act 1983*, both of which he required to obtain employment as a bus driver.

The applicant argued, inter alia, that his rights under the *Charter* had been breached. The respondent argued that the children's right to be protected from harm under s 17(2) of the *Charter* was also relevant.

Judgment

Bell J found in the applicant's favour, noting that s 13(2) of the *Working With Children Act* required a determination of whether the driver posed an 'unjustifiable risk' to children as opposed to a 'risk' or 'any risk'.

Bell J cited case law in support of the right to work. Although neither the *Charter* nor the International Covenant on Civil and Political Rights ('the ICCPR') make specific mention of such a right, the 'intrinsic connection between employment, dignity and the private life of individuals' made it arguable that s 13(a) of the *Charter* supported a right to work. Bell J assumed without deciding that the right to privacy in Art 17(1) of the ICCPR and s 13(a) of the *Charter* were engaged 'where employment restrictions impact sufficiently upon the personal relationships of the individual and otherwise upon his or her capacity to experience a private life'.

Bell J noted that the human right to protection, specific to children, embodied in s 17(2) was engaged in the interpretation of the provisions of s 13(2) of the *Working With Children Act*. The interpretation compatible with that right, and consistent with the relevant provisions, was one which positively ensured protection of children from harm. However, it was not necessary to interpret them as denying a person access to their chosen field of employment where there was no real risk of harm to children.



***Re Beth* [2013] VSC 189**

Osborn J

23 April 2013

Charter provisions: ss 7, 10, 12, 13, 21, 32, 38, 40

Summary

'Beth' is a sixteen year old girl who was removed from her parents' care when she was an infant, and has been under the guardianship of the Secretary to the Department of Human Services (the applicant) since she was four. She suffers from intellectual disabilities and has been the victim of significant sexual abuse and violence during her life. Beth has in turn exhibited significant self-destructive behaviours, and engaged in violence towards others. The Secretary has guardianship and custody of Beth pursuant to a protection order made under the *Children, Youth and Families Act 2005*, which gives the Secretary all the rights, powers, duties and obligations of a natural parent.

The accommodation options available to Beth pursuant to the *Children, Youth and Families Act* and the *Disability Act 2006* proved materially inadequate or inappropriate for a variety of reasons. In November 2012, Cavanough J made interim orders that Beth be placed in a purpose-built, secure and lockable facility. The Secretary sought an order that Beth be placed in such a facility until further orders were made, with a period for review being set 12 months from the date of judgment.

The Victorian Equal Opportunity and Human Rights Commission intervened in the proceeding pursuant to s 40 of the *Charter*, stating that the serious restrictions on Beth's human rights entailed by the proposed orders (specifically in relation to sections 10, 12, 13, 21, and 32) meant that serious consideration had to be given to the orders' compatibility with the *Charter*.

Judgment

Osborn J substantially granted the orders sought, on the grounds that they were in Beth's best interests. The *Charter* did not, in strictness, fetter the Court's power to make orders in the parents' patriae jurisdiction. However, the Court held that consideration of Beth's human rights illuminated the concept of her best interests, and although the Court was not bound by s 38 of the *Charter* it should nevertheless satisfy itself that the orders sought by the Secretary were compatible with Beth's human rights.

Osborn J held that the limitations on human rights to liberty, privacy, freedom of movement, and freedom from medical treatment without consent authorised by the proposed order were reasonable, necessary and proportionate and satisfied the requirements of s 7(2) of the *Charter*.



***Bare v Small* [2013] VSC 129**

Williams J

25 March 2013

Charter provisions: ss 1, 4, 7, 8, 10, 32, 38, 39

Summary

The applicant, Nassir Bare, is of Ethiopian descent. He was allegedly assaulted in the course of an arrest by a police officer. The applicant was handcuffed and capsicum sprayed, and alleged that the police officer said to him, 'You black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'. The applicant also alleged that he was kicked, and had his head shoved multiple times into a concrete kerb. The applicant complained to the Office of Police Integrity (OPI), claiming that he was subjected to discrimination on grounds of race. The OPI decided not to accept the complaint for investigation and referred it to the Victoria Police Ethical Standards Division for action.

The applicant claimed that the OPI's decision was unlawful, of no force and effect, and was contrary to s 38 of the *Charter of Human Rights and Responsibilities 2006* (Vic) (regarding the conduct of public authorities). In the alternative, he claimed that he had the right to have the assault effectively investigated, that he had been treated in a cruel, inhuman or degrading way in violation of his human rights, contrary to s 10(b) of the *Charter*, and that he had suffered racial discrimination contrary to s 8. The respondents claimed that s 109 of the *Police Integrity Act 2008* allowed the OPI to carry out its functions without legal proceedings challenging decisions, with the exception of those alleging jurisdictional error.

Judgment

Williams J dismissed the application, on the grounds that s 109 of the *Police Integrity Act* did indeed prevent the court from hearing and determining the applicant's claims for declaration that the decision was contrary to the *Charter*. Section 109 applied to proceedings for judicial review and contained no express exemption of proceedings alleging breach of s 38 of the *Charter*. The decision made by the OPI was a preliminary determination upon which the discretionary power to investigate a complaint was contingent. Furthermore, there was no basis to conclude that the OPI's decision was affected by jurisdictional error.

Williams J also noted that, even if the Court had not been prevented from hearing and determining the applicant's claim, there was no implied procedural right in s 10(b) of the *Charter* to an effective investigation.

Appeal information

Overtaken on appeal. See above.



***Austin v Dwyer* [2021] VSCA 306**

12 November 2021

Beach and Sifris JJA

***Charter* provisions: s 24**

Summary

This appeal consolidated and resolved two proceedings which challenged intervention orders made in the Magistrates Court on 14 June 2019 ('2019 orders'). Those orders originated with an intervention order the Court had previously made in 2016 ('2016 order'). The 2016 order had been subject to continuing legal challenge by the applicant, Austin. Dwyer, the named respondent, a member of Victoria Police, applied for the 2019 orders so he could be substituted as the named applicant in the 2016 order. He submitted that the ongoing service of documents in the legal challenges constituted a form of harassment by Austin, who was also subject to criminal investigations in relation to alleged stalking of the original named applicant in the 2016 order. In the 2019 orders, O'Callaghan M granted an application to revoke the 2016 order, and granted an intervention order to Dwyer as a substitute applicant.

The two proceedings in this appeal were both challenges by Austin to the 2019 orders. In the first proceeding, Austin sought to appeal an unsuccessful judicial review of the order granting the 2016 order. In the second proceeding, Austin sought judicial review of a County Court order striking out her appeal against the revocation of the 2016 order. Austin submitted that the County Court decision was not conducted in a competent, independent, or fair manner, and that the order to strike out her appeal was a denial of her rights under s 24 of the *Charter*.

Judgment

The Court of Appeal examined the applications in detail. It refused leave to appeal the judicial review, and dismissed the other application. In relation to the *Charter* submission, the Court held that the County Court judge was entitled to exercise broad discretion to strike out the proceeding in the circumstances, and that there was no unfairness or prejudice to the applicant in those orders.

The Court of Appeal noted that the County Court proceeding was Austin's appeal, and the order to strike out the proceeding was made when Austin failed to appear at a directions hearing. Austin had 30 days to apply to reinstate the proceeding, and did not do so. The Court of Appeal noted that such orders are made for the benefit of both the parties and other parties waiting to be heard, and that the effective administration of justice depends on judges and other court officers keeping control over the timetabling and progress of matters.



***Harding v Sutton* [2021] VSC 741**

11 November 2021

Richards J

Charter provisions: ss 7, 10, 13, 38

Summary

Simon Harding and 128 other plaintiffs challenged the lawfulness of a number of directions made by the defendants in the exercise of their emergency powers under s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic) ('the *Public Health Act*'), concerning mandatory vaccination against the COVID-19 virus ('Vaccination Directions'). The defendants were Brett Sutton, the Chief Health Officer appointed under the *Public Health Act*, and Deborah Friedman and Benjamin Cowie, both of whom gave directions as Acting Chief Health Officer at different times.

The plaintiffs sought orders quashing the Vaccination Directions, and injunctions restraining the defendants from making similar directions in future.

The plaintiffs also sought declarations that the Vaccination Directions were unlawful and invalid because they are incompatible with various human rights protected by the *Charter*.

Judgment

Richards J found that the Court did not have the power to suspend the operation of mandatory vaccine directions insofar as they affect certain plaintiffs. This was because the Court does not have the power to suspend or stay the operation of a statutory provision, and the Vaccination Directions depend for their force and effect on the *Public Health Act*, in particular s 203 which makes it an offence for a person to refuse or fail to comply with a direction given to a person under s 200. Likewise, the form of the injunction sought by the plaintiffs to restrain the defendants was so imprecise and uncertain that it could not be the subject of an order, breach of which would be punishable as a contempt of court.

However, Her Honour found that there was a serious question to be tried. That is, there was an arguable case that in making the Vaccination Directions, Professor Sutton acted in a way that was incompatible with:

- c) the right not to be subjected to medical treatment without full, free and informed consent, in s 10(c) of the *Charter*; and
- d) the right not to have privacy unlawfully or arbitrarily interfered with, in s 13(a) of the *Charter*.

Additionally, the plaintiffs had an arguable case on one further ground; that in making the Vaccination Directions, Professor Sutton purported to exercise power under s 200(1)(d) of the *Public Health Act* for a legislative purpose, which was not a purpose for which the power was conferred.

Incompatibility with human rights

The defendants accepted that they are public authorities for the purpose of the *Charter*, and as such, bear the burden of demonstrating that a limit to human rights is justified under s 7(2) of the *Charter*. There was a serious question to be tried as to whether s 38(1) applies to the giving of Vaccine Directions, which the defendants characterised as instruments of a legislative character and hence 'subordinate instruments' per *Kerrison v Melbourne City Council* (2014) 228 FCR 87.

A finding that s 38(1) applies to the giving of Vaccine Directions raises a serious question to be tried as to whether the Vaccine Directions are incompatible with the rights in ss 10(c) and 13(a) of the *Charter*.



The plaintiffs submitted that the effect of the Vaccination Directions was to coerce them to consent to being vaccinated in order to keep their jobs, in circumstances where they would not otherwise consent to the treatment. On that basis Her Honour considered there to be an arguable case that the right in s 10(c) of the *Charter* is limited by the Vaccination Directions. Justice Beech-Jones' rejection of a similar argument in *Kassam v Hazzard* [2021] NSWSC 1320 was based on the common law concerning consent to a trespass to the person. It is arguable that the concept of consent at common law is narrower than the 'full, free and informed consent' to medical treatment that is contemplated by s 10(c) of the *Charter*.

As to the right to privacy, there is a serious question to be tried whether the Vaccination Directions were made for an improper purpose. On that basis, it is arguable that any interference with privacy involved in requiring employers to gather vaccination information is unlawful. It is also arguable that the interference is arbitrary, in the sense of not being proportionate to a legitimate aim. That is, there is a question whether the intrusion into the plaintiffs' privacy of requiring them to provide their vaccination information to their employers, despite their objections, is justified by the protection of public health.

As to the procedural limb of s 38(1) of the *Charter*, the requirement that the public authority give proper consideration to relevant human rights, there was no evidence to support the contention that the defendants failed to give proper consideration to relevant rights.

Improper purpose

Richards J determined that there was a serious question to be tried on the ground that the defendants purported to exercise power under s 200(1)(d) of the *Public Health Act* for a legislative purpose, as opposed to an administrative purpose to make directions which it, arguably, could be said to be. If this were the case, then it is arguable that the defendants were making an unauthorised or improper use of the power.

It was not obvious that an emergency power to give directions for the protection of public health necessarily extends to a power to make delegated legislation. It was significant that the *Public Health Act* does not prescribe any formal requirements for directions given under s 200(1)(d) — they need not be in writing and they need not be published in any way. In addition, they are excluded from the application of the *Subordinate Legislation Act 1994* (Vic).

Balance of Convenience

The balance of convenience did not favour the giving of interlocutory relief. On one side of the balance of convenience in this case lay the individual interests of the plaintiffs as they were affected by the Vaccination Directions, and any future direction in similar terms. On the other side lay the protection of public health during a state of emergency arising out of circumstances causing a serious risk to public health.

Overall, Her Honour held that granting the interlocutory relief sought by the plaintiffs would have carried a higher risk of injustice than withholding it, especially considering the potential impact of serious illness and death for third parties.



Director of Public Prosecutions (Vic) v CS [2021] VSC 686

26 October 2021

Incerti J

Charter provisions: ss 8, 10, 12, 13, 19, 22

Summary

This was an application for a detention order under the *Serious Offenders Act 2018 (Vic)* due to an unacceptable risk of the respondent committing a serious sex offence, a serious violence offence or both.

The respondent is a 36-year-old Aboriginal man with an extensive criminal history including prior serious sex offences, and a history of violent offending but no prior serious violence offence. The respondent's historical offending, and his risk of future offending, was intertwined with his intellectual disability, personality disorders and severe childhood disadvantage.

Judgment

Incerti J considered whether the respondent posed, or after release from custody, would pose, an unacceptable risk of committing a relevant offence if a detention order or supervision order was not made and the respondent was in the community. The Court was convinced to a high degree of probability that the respondent posed an unacceptable risk. Her Honour had regard to the conceptual value of the respondent's rights, and particularly his right to liberty, and found that even considering those rights, the risk of the respondent committing a serious sex offence, or a serious violence offence, or both was unacceptable.

Her Honour nonetheless considered that a supervision order, with a condition that he reside at a residential facility with certain conditions, would be sufficient to reduce the risk of the respondent committing a serious sex offence or serious violence offence, so that the risk of such offending was not 'unacceptable'.

When considering the likely impact of a detention order, the Court took into account the fact that such an order would plainly impact on the respondent's rights, particularly his right to liberty.

In addition to the impact of the respondent's right to humane treatment and liberty under s 22 of the *Charter*, Her Honour also had regard to the conceptual value of the other *Charter* rights of the respondent which would be engaged by the making of a detention order, particularly: the equality rights in s 8, in light of his disabilities; the right to protection from torture and cruel, inhuman or degrading treatment in s 10; the right to freedom of movement in s 12; the right to privacy in s 13; and the cultural rights in s 19.

Incerti J dismissed the detention order application, and invited the parties to make submissions on a supervision order.



***Carroll v Goff* [2021] VSCA 267**

21 September 2021

Maxwell P, Kennedy and Walker JJA

Charter provisions: s 24

Summary

The applicant and the respondent were siblings and executors of their mother's will. A codicil appointed the Public Trustee of NSW as an executor in the event of disharmony or disagreement between the siblings. The applicant applied for a grant of probate, to which the respondent objected on the basis of the codicil and claimed indemnity costs. The applicant initially requested a hearing on the papers through her solicitors. However, after the solicitors ceased to act, the applicant's correspondence suggested that this consent may have been revoked. The primary judge accepted the respondent's submissions and refused to grant probate on the basis that the application was not made by someone entitled to act as executor. The applicant applied for leave to appeal the orders on the basis that she was denied a fair hearing contrary to s 24 of the *Charter*, in part due to the Court's failure to provide an opportunity for oral submissions, and in part due to the reliance on the respondent's submissions in reaching the decision.

Judgment

The Court of Appeal refused leave to appeal, and found no breach of procedural fairness or of s 24 of the *Charter*. Even if the applicant had not consented to a hearing on the papers, there were no disputes of fact which necessitated cross-examination of witnesses by way of oral hearing, and no other relevant issues of law arose due to the operation to the codicil. This was a case where the primary judge was not required to hold a public hearing for the sole purpose of satisfying the applicable principles of open justice, and no practical injustice was caused by reason that the dismissal order was made on the papers, due to the applicant's clear lack of entitlement as executor.



Dudley v Secretary to the Department of Justice and Community Safety
[2021] VSC 567

15 September 2021

Cavanough J

Charter provisions: ss 21, 22, 32

Summary

The plaintiff applied for judicial review of the defendant’s decision not to grant the plaintiff any emergency management days (‘EMDs’) to reduce the plaintiff’s sentence. The plaintiff submitted that the exercise of power was mandatory should the conditions precedent for its exercise exist. The defendant submitted that an exercise of power under s 58E(1) is immune from judicial review because if the provision imposed a duty to consider exercising the power, that would impose an intolerable burden on the secretary inconsistent with the legislative purpose.

Judgment

Cavanough J dismissed the plaintiff’s application for judicial review on the basis that the considerations involved in an exercise of power under s 58E(1) were appropriately discharged, and that it was at the lawful discretion of the decision-maker to make no award of EMDs.

As the decision was made on that basis, Cavanough J concluded it was not necessary to make a finding with respect to the defendant’s submission that an exercise of power under s 58E(1) is immune from judicial review. Nevertheless, his Honour dedicated a significant portion of the reasons to lay out his doubts about this argument. Part of these doubts rested on the importance of the power, identified in both the statutory context and the special conditions of its exercise. His Honour referred to comments in obiter that s 58E(1) must be construed in accordance with s 32(1) of the *Charter*, and that it was arguable that s 58E(1) may engage the right to liberty and security in s 21 of the *Charter*, and the right to humane treatment in detention in s 22, which could lead to the conclusion that a construction of s 58E(1) as both a power and a duty may best accord with those rights, as opposed to only a power. Aside from a brief mention, his Honour did not arrive at any concluded view about the application of the *Charter* in the absence of submissions in this case.



HJ (a pseudonym) v IBAC [2021] VSCA 192

21 July 2021

Beach, Kyrou and Kaye JJA

Charter provisions: s 13

Summary

The Independent Broad-Based Anti-Corruption Commission ('IBAC') commenced investigating matters involving the applicants, and was granted and carried out a warrant at the applicant's premises to inspect and seize property. Following the seizure of documents, IBAC provided an undertaking in the course of an injunction application, referring to both claims of privilege and relevance by the applicants, not to inspect documents until certain documents were quarantined.

The nature of the undertaking was not entirely clear and prompted a dispute between the parties. IBAC claimed it had undertaken not to examine the documents until only the claims for privilege were resolved. The applicants claimed that the undertaking also extended to documents which were claimed to be irrelevant. Subsequently, Kennedy J granted a variation of IBAC's undertaking, confining the documents subject to quarantine to privileged documents only, and releasing IBAC from any undertaking related to claims of irrelevance. The applicants appealed the decision, partly on the basis that Kennedy J had incorrectly construed the *IBAC Act* with respect to the right to privacy under the *Charter*.

Judgment

The Court of Appeal granted leave and dismissed the appeal. The Court held that Kennedy J had not erred in finding that releasing IBAC from its undertakings would not involve a breach of the *Charter*. In doing so, the Court noted a number of relevant matters about the appropriate construction of the *IBAC Act* and the effect of the *Charter*. The matter in question was IBAC's proposal to inspect the seized documents prior to the resolution of the applicants' irrelevance claims, and the extent to which this infringed on the right to privacy under the *Charter*.

As a matter of practicality, the Court commented that the owner of a document is better placed to make a claim for privilege than relevance because privilege is based on the purpose for which a document is prepared, whereas relevance is based on the precise scope of IBAC's investigation, which the owner of the document may not be aware. To uphold an undertaking to quarantine all documents at the behest of the applicant, until the resolution of matters about which the applicant is not (and likely cannot be made) fully aware would be an illogical construction when there is already a process in the *IBAC Act* for assessing an owner's claim of relevance. The process already contained in the *IBAC Act* does not preclude inspecting seized documents as a rule, and strikes an appropriate balance between the right to privacy under the *Charter* with the need for an effective investigation. Kennedy J's decision to vary IBAC's undertakings did not infringe on the applicants' rights.



Grooters v Chief Commissioner of Police [2021] VSC 329

8 June 2021

Niall J

Charter provisions: ss 8, 13, 32, 38

Summary

This application for judicial review concerned the nature and scope of the power in s 464ZFAC of the *Crimes Act 1958* (Vic), which empowers a senior police officer to authorise the taking of a DNA profile sample from adult persons who have been convicted of an indictable offence.

The plaintiff pleaded guilty to a persistent breach of an interim family violence order, which is an indictable offence. Following that conviction, a senior officer of Victoria Police authorised the taking of a DNA sample under s 464ZFAC. The plaintiff accepted that he satisfied the express criteria for the giving of an authorisation in respect of him, but contended that the senior police officer had a discretion to take into account the circumstances of the offending and that he suffers from a cognitive impairment that would make taking the sample distressing and something that he was not capable of understanding. He contended that the authorisation was unlawful and in breach of his *Charter* rights under s 8 (non-discrimination) and s 13 (privacy).

Judgment

The proceeding was dismissed.

Section 32 and construction of s 464ZFAC

As to construction of the section, without concluding whether s 464ZFAC conveyed a ‘discretion’, a ‘power’ or a ‘duty’, Niall JA determined that s 464ZFAC does not permit the senior officer to take into account the seriousness of the offence or the circumstances of the offender when deciding whether to give the authorisation. Such considerations would fundamentally alter the nature of the decision, being one to authorise a senior officer to take steps to obtain a DNA sample. All of the criteria under the provision are objective, involve matters of record, and do not require any evaluative assessment. There is no express obligation to conduct investigations or make inquiries beyond the stipulated criteria, and none should be implied.

That result was unchanged by consideration of the *Charter*. Section 32 of the *Charter* requires that legislation be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose. There is a constructional choice in relation to the question whether the word ‘may’ in s 464ZFAC provides for a discretion or imposes a duty. There is a related constructional question as to whether the section permits the decision maker to consider the individual circumstances of the person from whom it is intended that a DNA sample should be taken.

Even if it is accepted that the taking and retention of a DNA sample might involve some interference with privacy, and if it is accepted that there are competing constructions open on the text, that is not sufficient to engage s 13 of the *Charter*. The interference must be unlawful or arbitrary as per *PJB v Melbourne Health* (2011) 39 VR 373. The Court found that the authorisation and taking of a sample was not an arbitrary and unlawful interference with privacy as per s 13, as it had a rational and non-arbitrary basis for the taking of the sample, that is; to prevent and prosecute crime. This was true on either construction of s 464ZFAC, and therefore s 32 did not assist in resolving the constructional question.

The plaintiff submitted that as the taking of a sample affected him disproportionately because of his cognitive impairment, it involved discrimination in breach of s 8 of the *Charter*. The Court found that the relevant provision operates on convictions, and to that extent it is neutral. Even if, in its practical effect, the



taking of a sample might be relatively more burdensome for those with an impairment, as the Court accepted that it was in this case, Niall J was not persuaded that the presence of a disproportionate effect alone could be a breach of s 8 of the *Charter*.

In short, the Court found that a construction which required the senior officer to make inquiries and to consider the impact that taking a sample may have in a particular case is simply not open and would involve a substantial and impermissible departure from the scheme marked out by the text when read in its context.

Section 38 of the Charter and the authorisation

Sections 38(1)-(2) provide that a decision-maker must consider human rights and not act incompatibly with them, save for when , acting reasonably, they could not have come to a different decision. On the proper construction of the Act, all of the statutory criteria were satisfied, there was no other relevant material available to the officer to consider. The material sought to be relied on by the plaintiff was irrelevant to the power to authorise the collection of a sample. Niall J found that section 38(2) applied, in the circumstances the decision-maker could not have come to a different decision, and that the decision was lawful under the *Charter*.



Douglas v Harness Racing Victoria [2021] VSCA 128

13 May 2021

McLeish, Niall and Kennedy JJA

Charter provisions: s 24

Summary

The applicants were licensed harness racing drivers and trainers who were subject to charges of serious offences against the *Australian Harness Racing Rules*. After the charges were laid, but before they were heard, the *Racing Act 1958* was amended by the *Racing Amendment (Integrity and Disciplinary Structures) Act 2018* ('amending legislation'). The amending legislation changed the regime for review of decisions made on serious offence charges. Under the old regime, charges were heard and determined by the Racing Appeals and Disciplinary Boards ('RAD Board'), with persons charged entitled to a right of review by VCAT on liability and penalty. Under the new regime, a specialist tribunal called the Victorian Racing Tribunal replaced both the Racing Appeals and Disciplinary Boards and VCAT, with rights of review confined to penalty only. The transitional provisions in the amending legislation were silent on whether persons charged and heard under the old regime still had a right to VCAT review on liability and penalty after the new regime commenced operation. The applicants submitted that they had an accrued right under s 14(2) of the *Interpretation of Legislation Act 1984* (Vic) ('ILA'), and that an interpretation of the amending legislation compatible with s 24(1) (fair hearing) of the *Charter* and having regard to extrinsic materials told against any identification of a contrary intention by Parliament.

Judgment

The Court of Appeal allowed the appeal on the basis that the applicants had an accrued right to seek review in VCAT of the decisions of the RAD Board, as to both liability and penalty, and the amending legislation did not operate to deprive them of that right. The Court of Appeal reached this conclusion on the basis of statutory interpretation alone and held it was not necessary to consider the arguments based on the *Charter*.



Mokbel v County Court of Victoria [2021] VSC 191

30 April 2021

Taylor J

Charter provisions: s 25

Summary

The plaintiff applied for judicial review of a County Court order striking out his appeal against an order of imprisonment for contempt of court. The plaintiff had pleaded guilty to the contempt, was convicted in the Magistrates Court on 21 February 2020, and was sentenced to 14 days imprisonment. The plaintiff had been charged with contempt under s 134 of the *Magistrates Court Act 1989* ('MCA') for failing to answer lawful questions at a compulsory examination hearing on 5 February 2020, after refusing to make a police statement about an incident which resulted in four persons being charged with murder.

The plaintiff's appeal to the County Court was purportedly made pursuant to s 254 of the *Criminal Procedure Act 2009* ('CPA'), which vests jurisdiction in the County Court for criminal proceedings conducted in accordance with Part 3.3 of the CPA. Judge Fox struck out the plaintiff's appeal on the basis that the procedure provided for s 134 in the MCA enabled the Magistrate to conduct the proceeding in a way the Court thought fit, meaning that the contempt proceeding was not a criminal proceeding conducted in accordance with Part 3.3 of the CPA, and therefore the County Court did not have jurisdiction to hear the appeal under s 254. In seeking judicial review of that decision, the plaintiff advanced an argument under the *Charter* that the right to review of a criminal conviction and sentence by a higher court under s 25(4) of the *Charter* could not be limited to judicial review by s 134 of the MCA, when all other summary offences gave rise to a right of de novo appeal in the County Court. The plaintiff also submitted that a construction of the CPA which excludes s 134 of the MCA from the operation of s 254 would be contrary to the *Charter* as it would derogate the pre-existing right to appeal which existed prior to the commencement of the CPA.

Judgment

Taylor J refused the application for judicial review, and rejected the plaintiff's submissions in relation to the construction of s 25(4) of the *Charter*. Taylor J confirmed that the correct construction of the right under s 25(4) of the *Charter* is not as a right 'of appeal' but as a right of review by a higher court 'in accordance with law', which indicates that the mode of the right of review is to be determined by the legal provisions creating that right. Taylor J also referred to Article 14.5 of the *International Covenant on Civil and Political Rights*, from which the wording of s 25(4) of the *Charter* is drawn, which does not require an appeal court to conduct a retrial of factual issues, and to the choice of the word 'review' in s 25(4) as opposed to 'appeal', which is used elsewhere in the *Charter*.

Construing the statutory regime in the MCA and CPA, Taylor J stated that the right of review available to a person convicted and sentence with respect to an offence under s 134 of the MCA is an appeal on a question of law to the Supreme Court under s 272(1) of the CPA, which is sufficient to satisfy the requirements of the *Charter*.

As to the plaintiff's argument that the right of review was not equivalent to right of appeal available for other offences, Taylor J found that the premise of the alleged 'unfairness' was unsound because it is not appropriate to compare contempt with other offences. Further, Taylor J found that it was not correct to construe the commencement of the CPA as derogating any pre-existing 'right of appeal' established by s 25(4) of the *Charter*, because the s 254 CPA appeal rights 'essentially continued and reproduced the appeal rights of a person' sentenced under the previous regime, which, by the same construction of s 134 of the MCA, already excluded s 134. Therefore, the commencement of the CPA did not make any changes to the human rights status of persons charged and convicted under s 134 of the MCA.



Minogue v Thompson (No 2) [2021] VSC 209

29 April 2021

Richards J

Charter provisions: ss 7, 38, 39

Summary

This matter concerned three judicial review proceedings brought by the plaintiff in relation to breaches of the *Charter* with respect to directions for strip searching and random urine tests carried out by the defendants. On 16 February 2021, Richards J published reasons for judgment finding that the plaintiff's rights under the *Charter* were breached by the defendants. In this judgment, Richards J considered the submissions of the parties as to what orders to make for relief of those breaches. The plaintiff requested injunctive relief and detailed declaratory relief particularising the obligations imposed by the *Charter* for the purpose of outlining the *Charter's* normative model for future decision-making.

The defendants submitted that no injunctions were warranted in light of the declarations providing a normative form for future conduct, and the isolated nature of the circumstances giving rise to the breaches of the *Charter*. The defendants submitted that the findings did not serve to show that strip searching and random urine tests can never be lawful, and that injunctive relief would have the effect of limiting potentially lawful conduct.

Judgment

Richards J granted declaratory relief and injunctions to the plaintiff, and made no orders as to costs for any of the proceedings.

Declaratory Relief

In two of the proceedings, Richards J granted declaratory relief in respect of the random urine tests and strip searches carried out on the plaintiff on 4 September 2019 and 1 February 2020 to declare that the events on those days were unlawful. Richards J declined to grant declaratory relief in the significantly more detailed form requested by the plaintiff on the basis that declaratory relief is not advisory in nature or directed toward providing a roadmap for future decision-making about human rights by public authorities.

Injunctions

Richards J identified a strong case for injunctive relief to prevent future breaches on the basis that the culpability of the failure by the defendants (the Governor of Barwon Prison and the Secretary to the Department of Justice and Community Safety) to observe human rights were serious findings and could not be lightly dismissed. In this light, her Honour found it significant that the breaches occurred during a time that there were entrenched policies and procedures in place which had been reviewed since the introduction of the *Charter* in 2008, the implementation of which gave rise to repeated breaches of the plaintiff's rights. Richards J identified that there was a possibility that the policies could continue to be implemented without change, and considered it appropriate to restrain the Governor of Barwon Prison from directing the plaintiff to submit to a random urine test and associated strip search unless and until the Deputy Commissioner had reviewed, revised and reissued the policies with proper consideration to relevant human rights, and been satisfied that any limitations on the right to privacy and dignity in detention were justified in accordance with s 7(2) of the *Charter*.

Other matters

Richards J also found that it was a matter of concern that officers of Barwon Prison had repeatedly prevented the plaintiff from dressing in private following a strip search, particularly given there was a



second instance on 1 February 2020 after the Governor of Barwon Prison had written to the plaintiff to apologise after the first instance on 4 September 2019. Notwithstanding that concern, the lawfulness of this decision was not part of the issues for determination in the judicial review proceeding, and no declaration was open to Richards J to make about the compliance of this decision with reg 86(2) of the *Corrections Regulations* or the *Charter*. The proceeding brought in relation to this conduct was dismissed.

Richards J also made comments about the justiciability of human rights breaches under the *Charter* in general, referring to s 39(1). Her Honour stated that s 39(1) of the *Charter* 'is not a simple provision to understand or apply, and it has been much criticised' about the extent to which it permits relief to be sought on the basis of human rights. Her Honour continued to remark that 'it is now uncontroversial that judicial review remedies are available in respect of a breach of s 38(1), in a judicial review proceeding brought under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*. This case demonstrates that human rights are justiciable in a judicial review proceeding.'



***Re Shea* [2021] VSC 207**

27 April 2021

Incerti J

Charter provisions: ss 21, 25, 32

Summary

The applicant was one of three co-accused charged following an investigation into controlled drug importation and the discovery of a clandestine laboratory on a rural property. He was charged with serious offences related to commercial quantities of controlled drugs and was refused bail in the Magistrates Court, and subsequently made this application before Incerti J for bail in the Supreme Court. The applicant contended that despite the strong circumstantial evidence in his arrest on the property, there were still a number of trial issues related to the charges, including his alleged involvement in the importation activities. The applicant contended that his mostly positive bail history, stable accommodation, family ties, personal hardship if remanded, and the onerous conditions of custody due to the long delay and requirements of COVID19 restrictions justify a grant of bail.

Judgment

Despite the gravity of the alleged offending and the sentence likely to be imposed if the applicant were convicted, the Court found that there were exceptional circumstances justifying bail in the applicant's case, and granted bail. One of those circumstances was the expected delay of at least two and a half years before sentence if the applicant was found guilty at trial, due in part due to the impact of the COVID-19 pandemic on the court system. In discussing the effect of the delay as one of several factors (combined with the applicant's bail history, the surety, an offer of employment, and personal hardship), the Court endorsed and quoted comments by Croucher J in *Re Raffoul* which referenced ss 21(5), 25(2) and 32(1) of the *Charter* to interpret two and a half years as an 'unreasonable delay' in the context of the circumstances, including a pandemic.



***Minogue v Thompson* [2021] VSC 56**

16 February 2021

Richards J

Charter provisions: ss 13, 22, 38

Summary

Dr Minogue is a prisoner serving a life term at Barwon Prison. In three judicial review proceedings heard together before Richards J, Dr Minogue challenged the lawfulness of directions of the various defendants (together, 'Corrections') that he submit to random drug tests and to strip searches on particular dates. On 4 September 2019, he was required to undergo a random alcohol and drug test, which involved providing a urine sample after being strip searched. On 1 February 2020, he was required to provide a urine sample after being strip searched. On 4 February 2020, Dr Minogue was directed to submit to a strip search before a visit from his lawyer. Rather than do so, Dr Minogue opted for a non-contact visit with his lawyer. On 18 February 2020, Dr Minogue submitted to a strip search before and after a visit from his lawyer. It was submitted that the drug tests and strip searches were not authorised by the *Corrections Act 1986* (Vic) and were also unlawful under the *Charter*.

In respect of each of the directions to submit to a urine test and to submit to a strip search, Richards J considered whether there was proper consideration given to relevant human rights for the purposes of s 38(1) of the *Charter* and whether the directions were compatible with Dr Minogue's human rights in ss 13(a) and 22(1) of the *Charter*, being respectively his rights to privacy and to be treated humanely and with respect for the inherent dignity of the human person.

Her Honour concluded, with respect to the directions that Dr Minogue submit to urine tests, that the directions were authorised by s 29A of the *Corrections Act*, but that proper consideration was not given to relevant human rights in breach of s 38(1) of the *Charter*, and that the directions were incompatible with Dr Minogue's rights under ss 13(a) and 22(1) of the *Charter*. With respect to the strip searches of Dr Minogue before his urine tests, her Honour concluded they were not authorised by reg 87(1)(d) of the *Corrections Regulations*, that proper consideration was not given to relevant human rights in breach of s 38(1), and that the strip searches were incompatible with Dr Minogue's human rights. The strip searches before and after the visit from his lawyer were authorised by reg 87(2) of the *Corrections Regulations* and were compatible with Dr Minogue's human rights.

Judgment

Random urine tests

Authorised by s 29A Corrections Act?

In prisons managed by Corrections there is a hierarchy of policy directions comprising the Commissioner's Requirements, the Deputy Commissioner's Requirements, and local operating procedures adopted for each prison. The direction for Dr Minogue to submit to a random urine test was not a decision made by one person in respect of Dr Minogue specifically, but a result of the policy directions. The relevant instruction was *Deputy Commissioner's Instruction No 3.10 - Programs Designed to Reduce Offending Behaviour – Detection and Testing – Drug and Alcohol Use* ('Instruction 3.10'). It required prison managers (or Governors) to develop a program of random and targeted urine analysis to detect drug and alcohol use. In turn, at Barwon Prison, the Governor implemented Instruction 3.10 in a 'Urinalysis Procedure'. It was pursuant to these policies that Dr Minogue was tested. Dr Minogue argued that the random urine tests were not authorised by s 29A of the *Corrections Act* as the language of the section refers to the Governor directing a prisoner (singular) to undertake a test if they consider it necessary in the interests of the management, good order or security of the prison. Richards J concluded that s 29A did authorise broad directions by the



Governor that groups or categories of prisoners submit to alcohol and drug tests including random testing of a fixed proportion of the population each month, irrespective of their personal circumstances (in Dr Minogue's case, he had been tested around 70 times and has never tested positive for alcohol or illicit drugs). Provided the Governor had the requisite belief under s 29A, of which her Honour was satisfied, the exercise of power was authorised. Her Honour rejected an argument that s 32(1) of the *Charter* was a basis for concluding that the intention of s 29A of the *Corrections Act* was contrary to s 37(c) of the *Interpretation Act*. Section 32 has the effect that where a provision has more than one possible meaning, the meaning that is most compatible with human rights should be adopted. Her Honour considered that interpreting s 29A so that a direction may only be given in respect of one prisoner at a time was not the interpretation most compatible with human rights.

Was proper consideration given to relevant human rights under s 38(1) Charter?

Richards J then turned to whether proper consideration was given to relevant human rights pursuant to s 38(1) of the *Charter*. Her Honour did not agree with submissions made by Corrections that latitude is to be given to a decision-maker in determining whether they gave such proper consideration. Further, her Honour did not agree that proper consideration involves no more than balancing the impact of the relevant decision on prisoners' human rights against the countervailing considerations of prison administration. She considered there was more involved in the exercise, including assessing whether the limit was justifiable in accordance with s 7(2) of the *Charter*.

In a prison context, limiting a human right on the basis it is 'justified' by s 7(2) of the *Charter* requires attention to a wider range of matters than whether decision is justifiable in the interests of the management, good order or security of the prison. Regard must also be had to the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve that purpose. Accepting that whether proper consideration has been given in a particular case is a highly context specific question of fact, her Honour identified that: (a) there was no specific decision to direct Dr Minogue to submit to a random urine test; (b) the relevant decision was the approval by the Governor of Barwon Prison of the Urinalysis Procedure; (c) the Governor gave evidence which her Honour understood to mean that he himself did not give consideration to human rights when he approved the Urinalysis Procedure, because he believed this had been done in the development of Instruction 3.10 and he was careful to ensure that the Urinalysis Procedure was consistent with Instruction 3.10.

Her Honour accepted that Corrections operates hierarchically, with policies and procedures developed centrally by the organisation's leadership and implemented in prisons by local management. Her Honour considered that it made perfect sense, in those circumstances, for the leadership to take responsibility for assessing those policies and procedures for compatibility with the *Charter*. Provided that was done properly, there was no difficulty with the Governor (or General Manager) relying on the Deputy Commissioner having already given proper consideration to relevant human rights. The issue in this case, however, was that her Honour was not satisfied that the Deputy Commissioner had done so. The relevant assessment of *Charter* compatibility in respect of Instruction 3.10 was 'cursory', and was limited to whether prisoners should be subjected to testing, and not with the human rights impacts of the instructions about how the testing was to be carried out – including by being strip searched before giving a sample in the presence of two prison officers. Her Honour concluded that the standard of proper consideration required of the Deputy Commissioner was more exacting, given the nature and extent of the degrading impact of urine testing.

The relevant assessment did not identify ss 13 and 22 of the *Charter* as relevant rights engaged by Instruction 3.10, identifying only s 10 (protection against torture and cruel, inhuman and degrading treatment). Her Honour noted that a decision-maker need not identify the 'correct' rights in order to give proper consideration, and also that there was an overlap and/or relationship between the protection given by ss 10, 13 and 22. However, this did not cure the defect of a lack of genuine consideration of how the



human rights of prisoners might be affected in practical terms by Instruction 3.10, and whether this was reasonable and justifiable pursuant to s 7(2).

A *Charter* assessment had also been conducted in respect of *Deputy Commissioner's Instruction No 1.05 - Searches and Patrols* ('Instruction 1.05'), relating to strip searches. That assessment concluded Instruction 1.05 was compatible with the *Charter*, noting the engagement of rights under ss 9, 10, 13 and 22, and providing analysis and comment. Richards J considered that while the assessment of Instruction 1.05 was more detailed than that of Instruction 1.03, and identified both the ss 13 and 22 rights, she could not be satisfied that it properly considered the instruction that male prisoners should be strip searched before a random urine test. Her Honour considered the assessment was impaired by an incorrect statement of the effect of Instruction 1.05 - in relation to the right to privacy, it stated that the level of intrusiveness of search procedures should be related to the probability of detecting drugs. This statement was inaccurate, given that Instruction 1.05 provided that strip searches were to be conducted on prisoners prior to any urinalysis test, irrespective of the likelihood of detecting drugs. Further, the assessment did not engage with the question whether mandatory strip searching before a random urine test is a justifiable limitation of human rights. The evidence in this case in fact included that less intrusive means had been adopted without sacrificing outcomes in a women's prison – no such consideration to a less intrusive means was present in respect of men in Instruction 1.05.

Her Honour concluded that in authorising the Urinalysis Procedure, proper consideration was not given to relevant human rights, contrary to s 38(1) of the *Charter*.

Were the directions incompatible with Dr Minoque's human rights?

Richards J considered that it was common ground that an allegation of incompatibility under s 38(1) of the *Charter* could be considered in the following three steps: (1) identify whether any human right is relevant to or engaged by the impugned decision or action of the public authority; (2) determine whether the decision or action has limited that right; (3) consider whether the limit is under law, reasonable, and demonstrably justified having regard to the matters set out in s 7(2) of the *Charter*. Her Honour stated that although the Court is not engaged in merits review, judicial review for compatibility with human rights is more intense than traditional grounds of judicial review. The burden of establishing that a limit on human rights is justified, or proportionate, rests with Corrections. The standard of justification is stringent.

Corrections accepted that the direction to undergo a random urine test engaged Dr Minogue's right to privacy, under s 13(a) of the *Charter*, and his right to humane treatment while detained, under s 22(1). However, it submitted that neither right had been limited, or alternatively, that any limit was justified in accordance with s 7(2) of the *Charter*.

Her Honour considered that a requirement to provide a urine sample for testing is an interference with personal privacy. Her Honour accepted that the interference was lawful, as it was authorised under s 29A of the *Corrections Act* but considered whether the arbitrariness inherent in a random testing regime was sufficient to make the direction 'arbitrary' for *Charter* purposes turned on whether it was proportionate to a legitimate end. Noting that submitting to urine tests was inherently demeaning, and was not a hardship or constraint that is inherent in deprivation of liberty, her Honour concluded that Corrections had not discharged its burden of justifying the limits on Dr Minogue's rights to privacy and dignity in detention. Particularly, her Honour was not satisfied that the evidence relied on by Corrections as to the necessity of maintaining random urine testing, particularly in respect of prisoners who have no history of drug use and who have never tested positive, was sufficient to establish the effectiveness of random testing against any objective measure of performance. Further, there was no evidence Corrections had considered alternative, less intrusive measures available where the relevant guidelines did not mandate urine testing and strip searching as necessary components of a prison drug strategy. Her Honour found the directions that required Dr Minogue to submit to the random urine tests were incompatible with his rights under ss 13(a) and 22(1) of the *Charter*.



Strip searches

Were the strip searches authorised by the Corrections Act?

Regulation 87 provides that a prisoner may be strip searched where the Governor believes on reasonable grounds that the search is necessary for the security or good order of the prison. Dr Minogue argued that there were no specific orders to strip search him under reg 87, rather it was the Urinalysis Procedure that dictated these searches be conducted. He argued the discretion in reg 87 did not authorise a standing order that prisoners routinely be strip searched in certain circumstances irrespective of individual justice. As with s 29A of the *Corrections Act*, Richards J accepted that the powers in reg 87 could be exercised through the adoption of policies, however, it was still necessary to show that when the procedures were adopted, the Governor believed on reasonable grounds it was necessary for the security or good order of the prison that all prisoners be strip searched before providing a random urine sample. Her Honour concluded that the reason provided – so that prisoners cannot adulterate or substitute the sample – did not establish reasonable grounds that every prisoner should be strip searched. Her Honour identified other features of the procedure which were effective to ensure there is no adulteration or substitution. The strip searches of Dr Minogue were not authorised. Richards J did accept that strip searches before and after his visit with his lawyer were authorised by reg 87(2), to ensure that contraband is not brought in and the visitor is not harmed.

Was proper consideration given to relevant human rights?

For the reasons already given, Richards J concluded that proper consideration was not given to relevant human rights when the Urinalysis Procedure was approved, and two strip searches of Dr Minogue were carried out in accordance with that procedure. However, in respect of the strip searches in the context of contact visits, Richards J concluded proper consideration had been personally given by the Governor to the human rights impacts. This was because a more rigorous approach had been adopted in respect of Barwon prison which houses Victoria's most violent prisoners.

Were the strip searches incompatible with Dr Minogue's human rights?

Richards J noted that strip searching is inherently demeaning, despite being a routine part of prison life. While it may be less demeaning if it is done for an identified reason and in accordance with standard procedure, it still limits the right of a prisoner, in s 22(1) of the *Charter*, to be treated with humanity and respect for the inherent dignity of the human person. The strip searches of Dr Minogue could only be compatible with that right if they were 'under law' and demonstrably justified in accordance with s 7(2). As the strip searches of Dr Minogue prior to the urine tests were not authorised, the interferences with his privacy were not lawful, and were incompatible with his rights pursuant to ss 13(a) and 22(1) of the *Charter*. Conversely, the strip searches before and after visits with his lawyers were attended by different considerations. Richards J considered there was proper consideration to relevant human rights, the searches were authorised, and there was a justified limitation of human rights, so that the searches were compatible with Dr Minogue's human rights.



Collis v Bank of Queensland Ltd [2021] VSCA 17

12 February 2021

Tate and Sifris JJA and Macaulay AJA

Charter provisions: s 6

Summary

Mr Collis was liable to the Bank of Queensland under a personal home loan and guarantees which he had executed as security for loans provided to companies in which Mr Collis had an interest. Following his default on those loans, summary judgment was granted in the County Court in favour of the Bank against Mr Collis. Mr Collis sought leave to appeal against the summary judgment, identifying some 20 proposed grounds of appeal. One such ground was 'human rights denied contrary to international law'. Mr Collis submitted that his rights under s 6(2)(b) of the *Charter* were denied on the basis that Victoria does not have a Commission of Human Rights to hear matters concerning breaches of the *Charter*. He also referred to the preamble of the Australian Constitution, submitting that the absence of such a commissioner fails to guarantee his human rights and that is a breach of federal law.

Judgment

The Court of Appeal found this argument, raised for the first time on appeal, was without merit and entirely misguided. Further, the lack of any commissioner was entirely irrelevant to a decision concerning enforcement of a mortgage and securities for the payment of a debt.



***She v RMIT University* [2021] VSC 2**

19 January 2021

Incerti J

Charter provisions: s 24

Summary

The plaintiff, a self-represented litigant, sought judicial review of the order of a Magistrate striking out her statement of claim pursuant to r 23.02 of the *Magistrates' Court General Civil Procedure Rules 2010*. The plaintiff contended that there had been a breach of natural justice or procedural unfairness, and additionally that the Magistrate had failed to protect her human right to equality under s 8(3) and to a fair hearing under s 24(1) of the *Charter*, as well as breaching a number of other rights under the *Charter* ss 10(b), 13(b), and 15(1). In summary, the plaintiff argued that she had been given inadequate time to prepare for the strike-out hearing, had not been afforded sufficient time to present her case, and that the Magistrate was prejudiced against her as a self-represented litigant.

The statement of claim filed by the plaintiff broadly alleged negligence, bullying, libel, improper hearing, unfair marking and delay in investigation of complaints by RMIT University and others. RMIT University applied to strike out the statement of claim. Prior to the hearing, the plaintiff was not provided with an affidavit in support of the application, which registry staff had advised she should receive from RMIT University. During the hearing, the following took place: the plaintiff did not receive copies of the authorities or relevant rules which were handed up by the solicitor for RMIT University to the Magistrate; the Magistrate had a number of exchanges with the solicitor to clarify RMIT University's case; the plaintiff was given an opportunity to address the Court, including by referring to further and better particulars she had filed; the Magistrate then engaged in a brief exchange with the plaintiff to the effect that the Court could not understand what the plaintiff was alleging from looking at the statement of claim and that the plaintiff should seek legal advice; the Magistrate concluded by asking if there was anything else the plaintiff wished to say, to which she responded that if the Magistrate did not wish to read her further and better particulars and the statement of claim was struck out, she would appeal. Following the hearing, orders were made by the Magistrate which were ambiguous as to whether only the statement of claim had been struck out with a right to re-plead, or whether the entire proceeding had been dismissed. The plaintiff enquired with the registry of the Magistrates Court, which indicated that the plaintiff's proceeding had been dismissed.

Judgment

Incerti J commenced her consideration of the plaintiff's *Charter* claims by looking at the right to a fair hearing under s 24(1), noting that courts and tribunals are not public authorities and do not have obligations under s 38(1) when acting in a judicial, as distinct from an administrative, capacity. However, pursuant to s 6(2)(b) of the *Charter*, a court or tribunal is required to enforce rights that relate to legal proceedings which are protected by the *Charter*. Therefore, the right to a fair hearing in s 24 applied directly to courts and tribunals when they exercised their functions. Her Honour noted that the human rights the *Charter* is intended to protect are practical and effective, not theoretical or illusory, and accordingly, the right to effectively participate in proceedings must be applied in a way that is practical and effective. Her Honour considered various measures a judge could take to fulfil their duty to ensure the human right to a fair hearing, and common law procedural fairness, is accorded to a self-represented litigant. Commenting on the relationship between the common law duty to afford a fair hearing and the human right to a fair hearing, her Honour stated the two were not interchangeable, but were so close and overlapping that where a self-represented party had not been accorded a fair hearing under the common law principles, a court in judicial review would almost always be entitled to find a breach of s 24 of the *Charter*. Turning to s 8 of the *Charter*, which provides for recognition and equality before the law, her



Honour considered that the plaintiff's submissions in this regard were 'somewhat amorphous' and her arguments regarding discrimination were misconceived. Her Honour concluded that s 8 had no application in the circumstances, as the Magistrate had not treated the plaintiff in an arbitrary or capricious manner. While the plaintiff also argued that she was discriminated against due to her status as a self-represented litigant, being a self-represented litigant is not a listed attribute that comes within the purview of the *Charter's* protection against discrimination. Further, ss 10, 13 and 15 had no application to the plaintiff's grievances in relation to the conduct of the Magistrates' Court proceeding.

The core of the plaintiff's complaint was that she was denied procedural fairness. Concluding that this complaint had merit, Incerti J considered the issue of procedural fairness together with the right under the *Charter* to a fair hearing, given their interconnectedness. Her Honour concluded that in the circumstances, the Magistrate had failed to provide the plaintiff a reasonable opportunity to oppose RMIT University's application, and failed in his duty to assist her in understanding the nature of the application being heard and in understanding the effect of the orders made. While the plaintiff had an opportunity to speak, it would have been clear to the Magistrate that the plaintiff was under a number of misapprehensions about the court procedure and legal principles at play, and required assistance to respond meaningfully to the application being heard. In respect of the ambiguity present in the orders made, her Honour noted it was the ordinary course to facilitate a party to re-plead pleadings that have been struck out. Quoting *Namberry Craft Pty Ltd v Watson* [2011] VSC 136, her Honour stated that the 'just resolution' of proceedings that is protected by s 24 of the *Charter* includes a proper opportunity being given to the parties to plead and re-plead their respective cases. It was her Honour's conclusion that it is difficult to consider a situation where a party, especially a self-represented litigant, could be denied a right to re-plead their case early in a proceeding without their right to a fair hearing under the *Charter* being violated. In conclusion, the Magistrate's failure to provide the requisite level of assistance to the plaintiff, as a self-represented litigant, the lack of time provided to the plaintiff to understand the hearing, the failure to facilitate an opportunity to advance her case and the ambiguity of the Magistrate's decision and orders was a denial of procedural fairness and natural justice, and constituted a breach of the plaintiff's right to fair trial under s 24 of the *Charter*.



Draper v Building Practitioners Board [2020] VSC 866

18 December 2020

Ginnane J

Charter provisions: ss 8, 24

Summary

The plaintiff sought an order that the the Building Practitioners Board, provide him with a further statement of reasons for a decision it had made determining allegations about building works performed for him by a builder. The plaintiff alleged that the building work was defective, and subsequently, that the Board's reasons for its decision in respect of the builder were inadequate. As well as seeking further reasons, the plaintiff alleged his *Charter* rights had been breached, namely ss 8 (recognition and equality before the law) and 24 (fair hearing).

Judgment

Ginnane J considered that the plaintiff was entitled to seek relief under the *Charter* because his claim for further reasons on the ground that the reasons provided did not comply with s 8 of the *Administrative Law Act 2678* was a non-*Charter* claim of unlawfulness within the meaning of s 39 of the *Charter*. However, the plaintiff's *Charter* arguments were relevant only insofar as they had a connection to the complaint about the adequacy of the reasons. The plaintiff submitted that the defendants had not treated him equally and had discriminated against him on the basis that he was not a registered building practitioner, referring to s 8 of the *Charter*. He also submitted that the defendants, together with VCAT, had breached his fair hearing right under s 24 by seeking to contest his proceeding, rather than acting as an unbiased and impartial contradictor assisting the Court.

Ginnane J concluded that there was no evidence that the plaintiff was discriminated against in connection with the first defendant's provision of reasons because of a protected attribute. Rather, it was the case that he was not a party to the Board's inquiry into the builder, and accordingly, the delay in providing reasons to the plaintiff and other complaints were properly attributable to that fact. Ginnane J was not satisfied that any *Charter* right had been breached in respect of the provision of reasons to the plaintiff. Further, the plaintiff was not entitled to rely on the right to a fair hearing in s 24 of the *Charter* as he was not a party to the Board's inquiry into the builder, even if the reference in s 24 to a 'civil proceeding' extended to include such an inquiry.



Goode v Common Equity Housing Ltd [2020] VSCA 317

9 December 2020

Priest and Beach JJA

Charter provisions: s 8

Summary

In this decision the Court of Appeal considered an application for an extension of time within which to seek leave to appeal. The decision of Ginnane J was to dismiss the applicant's appeal from the orders of Mukhtar AsJ who had, in turn, dismissed an appeal from an order of VCAT. The substance of the dispute was that the applicant contested an order made by VCAT giving the respondent, the applicant's landlord, possession on the basis of non-payment of rent. The application for leave to appeal (filed before her application for an extension of time within which to appeal) included grounds of appeal of 'Charter unlawfulness/Disability discrimination'.

Judgment

In dismissing the application for an extension of time on the basis that it was futile, the Court considered that the applicant's allegations of 'Charter unlawfulness' were utterly unfounded and should not have been made.



***Gebrehiwot v State of Victoria* [2020] VSCA 315**

8 December 2020

Tate, Kaye and Emerton JJA

Charter provisions: s 38

Summary

The applicant brought proceedings in the County Court against the State of Victoria claiming damages for battery and false imprisonment following an incident with officers of Victoria Police in which he was injured. The State admitted that force was used but relied on the defence that the police officers acted with lawful justification in accordance with s 462A of the *Crimes Act 1958*. The jury verdict was that the defence had been established by the police officers. The applicant sought leave to appeal against the jury verdict on grounds that the trial judge misdirected the jury by failing to give a direction in relation to the meaning of s 462A of the *Crimes Act*, and also sought leave to appeal against the trial judge's ruling that the issue of the compatibility of the police officers' conduct with the *Charter* was not to be left to the jury.

The applicant alleged 'police torts' had occurred, pursuant to s 74 of the *Victoria Police Act 2013*. Alternatively, the applicant claimed that the police officers had, in assaulting and falsely imprisoning him, acted incompatibly with his human rights in contravention of s 38(1) of the *Charter*. Specifically, the applicant alleged the police officers breached his rights under ss 8(3), 12, 21, 10(b) and 22(1) of the *Charter*. On the basis of these alleged breaches, the applicant sought aggravated and exemplary damages. This claim for exemplary damages was struck out by the judge before the trial began. Her Honour noted that the applicant had not submitted that damages were available for a breach of the *Charter* directly, but submitted that the *Charter* might be relevant in circumstances where breaches of it revealed the tortious conduct warranted condemnation. The trial judge also recorded that the applicant had made an alternate argument under the *Charter*, namely that the obligation under s 32 of the *Charter* to interpret all statutory provisions, as much as possible, compatibly with human rights, was engaged with respect to the statutory power to use reasonable and proportionate force. Accordingly, there was a relevant question as to what directions would need to be given to a jury in considering the interpretative obligation in connection with s 462A of the *Crimes Act*. In her ruling, without referring to s 462A of the *Crimes Act*, the primary judge rejected the proposition that *Charter* breaches would be relevant to the jury.

Judgment

The Court concluded that the trial judge had been correct in her conclusions as to the relevance of *Charter* breaches to the question of damages. Noting that s 39(3) of the *Charter* makes it clear that there is no entitlement to an award of damages by reason of a breach of the *Charter*, the Court stated that it followed that a breach of the *Charter* cannot be relied upon as a means of recovering damages either in respect of that breach or as a means of expanding the damages that might be awarded in respect of an independence cause of action, as such an expansion would ultimately derive from the *Charter* breach and that was prohibited. Section 38 of the *Charter* cannot be used as a basis on which to ground an entitlement to damages, including exemplary damages, or to expand an independently existing damages claim.

Their Honours concluded that the trial judge had erred in failing to direct the jury as to the elements of s 462A of the *Crimes Act*. Their Honours then turned to the applicant's alternate *Charter* submission, that any direction the judge gave to the jury about the meaning and application of s 462A in the circumstances had to be informed by an interpretation that was compatible with the human rights that were engaged. Noting that the State had conceded that the applicant's dignity right, for example, had been engaged, their Honours considered that a human-rights compatible interpretation of 'not disproportionate' in s 462A would have added a relevant consideration to the police officer's decision in the circumstances. Accordingly, the judge was incorrect to hold that s 32 of the *Charter* was irrelevant to the jury's deliberations. Section 32



was relevant as it may have affected the jury's consideration of whether s 462A applied in the circumstances. However, as the applicant's grounds of appeal did not include a ground identifying an error by the judge in the application of s 32 of the *Charter*, the determination of an interpretation of s 462A of the *Crimes Act* that is human rights-compatible, the Court concluded, must wait for another day.



***Fiore v Magistrates Court of Victoria* [2020] VSCA 314**

4 December 2020

Maxwell P, Kaye and Weinberg JJA

Charter provisions: ss 21, 32

Summary

The applicant sought leave to appeal against the dismissal of a proceeding he brought seeking judicial review of a decision of the Magistrates' Court to issue a warrant for his arrest in Western Australia.

The Magistrate had issued the warrant on the basis that they were satisfied by sworn evidence that it was 'required ... for other good cause' within the meaning of s 12(5)(c) of the *Criminal Procedure Act 2009*.

The principal question in the proceeding concerned the lawfulness of the decision to issue the warrant. The applicant contended that, on the proper construction of s 12(5), it was not open to the magistrate to be satisfied that the warrant was 'required for other good cause'.

The applicant submitted that the phrase 'other good cause' in s 12(5)(c) is confined to circumstances connected with ensuring an accused's attendance in court. The applicant submitted that the phrase 'or other good cause' constitutes a 'residual' or 'sweep up' category that is closely tied, in content, to the two preceding paragraphs. The applicant submitted that s 21(1) and s 32(1) of the *Charter*, the principle of legality, and the structure of s 12(4) and (5), compel such a construction.

Judgment

The Court of Appeal refused leave to appeal.

While considering the proper construction of s 12(5)(c) the Court acknowledged that, as statutory provisions providing a power of arrest necessarily impinge on the liberty of the subject, both the principle of legality and ss 21(1) and 32(1) of the *Charter* require that they are construed strictly. However, the Court was not persuaded that the phrase 'other good cause' in s 12(5)(c) must be confined to circumstances connected with ensuring an accused's attendance in court.

The Court identified three difficulties with the applicant's submissions. First, the applicant's construction ignored, and gave no effect to, the first part of s 12(5)(c), which contains the words 'a warrant is required or authorised by any other Act', a circumstance which is independent of, and distinct from, the circumstances identified in paragraphs (a) and (b). Secondly, the applicant's construction would deprive the phrase 'other good cause' of any content and would effectively render it otiose. Thirdly, the applicant's submission is that it was based on an incomplete conception of the purpose and function of the arrest power — the function and effect of the arrest of an accused person is to bring that person within the control of the court. While physical presence and attendance at court is central to that control, it is not the sole function, effect or purpose of an arrest.



***Loiello v Giles* [2020] VSC 722**

2 November 2020

Ginnane J

Charter provisions: ss 12, 21, 38

Summary

In this proceeding, the plaintiff sought judicial review of a curfew direction which formed part of the *Stay at Home (Restricted Areas) Directions (No 15)*, ('the Curfew') made by the defendant during the COVID-19 pandemic, as well as orders under the *Charter*. The Curfew was put in place pursuant to the *Public Health and Wellbeing Act 2008* ('*PWH Act*'). The plaintiff was a restaurant owner who said that her business income was drastically reduced following the *Stay at Home Directions* and the introduction of the Curfew. The plaintiff contended that the Curfew violated her rights under the *Charter* as discussed below. There was no doubt that the Curfew was an unprecedented and major restriction of human rights and liberties of the people of Victoria – the question before Ginnane J was whether it was a lawful and justified restriction under the *Charter*. The legality of the limitations and restrictions depended on whether the defendant established that they were reasonably proportionate to the objective of protecting public health.

There was also a question of the plaintiff's standing to bring the proceeding as, while the Curfew was in place when the plaintiff's proceeding was commenced, it was revoked hours prior to the commencement of the Court hearing.

Judgment

The defendant challenged the plaintiff's standing to bring the proceeding once the Curfew was revoked. The defendant argued the plaintiff was seeking a declaration in respect of a public right, and no longer had a special interest in the subject matter of the action giving her standing to bring the proceeding; as the plaintiff did not have standing to make the non-*Charter* claims, pursuant to s 39 of the *Charter*, she could not bring the *Charter* claims. Ginnane J concluded that the plaintiff did have standing to bring the proceeding as her private right to run her own restaurant business had been substantially and adversely affected by the Curfew. Accordingly, as she had standing to bring non-*Charter* claims, she had standing to bring *Charter* claims pursuant to s 39.

Section 38 of the *Charter* has two limbs, a substantive limb and a procedural limb: it is unlawful for a public authority to (a) act in a way that is incompatible with a human right, or (b) in making a decision, fail to give proper consideration to a relevant human right. Section 7(2) of the *Charter* provides that a human right may be subject only to such reasonable limits as can be justified, taking into account all relevant factors, including the purpose of the limitation, and any less restrictive means available to achieve that purpose.

The plaintiff contended that her human rights engaged by the Curfew were freedom of movement (s 12) and right to liberty and security of person (s 21). Ginnane J concluded that the human right of liberty recognised in s 21 of the *Charter* was not directly engaged, at least so far as the plaintiff was concerned. His Honour noted that that right was to liberty, to security, and not to be subject to arbitrary arrest or detention. His Honour considered that the right to come and go from your home as you choose, in human rights discourse, was more properly characterised as the right to freedom of movement under s 12. Therefore, he accepted that s 12 was engaged by the Curfew because it limited or restricted the right to move freely within Victoria. Ginnane J accepted that there may have been particular people whose right to liberty may have been limited by the Curfew because of their particular circumstances, but the plaintiff was not in that category.



Ginnane J concluded that both the substantive and procedural limbs of s 38(1) were engaged by the decision to enforce the Curfew, noting the decision and the subsequent act are connected, as the implementation of the decision may often involve an act or series of acts.

His Honour considered whether under the first limb of s 38(1) the defendant had established the limitations or restrictions imposed on the plaintiff's right to freedom were proportionate and therefore reasonably limited in accordance with s 7(2). His Honour referred to legal advice the defendant had received, which acknowledged the Curfew interfered with the rights to liberty and freedom of movement under the *Charter*, but concluded that the deprivation of liberty was not unlawful or arbitrary, as it addressed the needs of affected individuals through exceptions, and that the limitation was reasonably justified because the Curfew formed part of a vital suite of measures designed to limit community interaction and thereby minimise transmission of the virus. The advice also stated there were no less restrictive means reasonably available to achieve this purpose. Ginnane J concluded there were no other reasonably available means to achieve the purpose of reducing infections and that the defendant's evidence established the Curfew was reasonably necessary to protect public health. He found it relevant that the package of restrictions, including the Curfew, had reduced the spread of COVID-19, even though the defendant could not say that the Curfew itself reduced COVID-19 cases. His Honour considered other alternatives open to the defendant, such as revoking the curfew and continuing with the other *Stay at Home* restrictions, but noted there was no evidence that such a course would reduce new cases at the same rate. His Honour considered that in determining what means were 'reasonably available' it was appropriate to consider what means had been tried, what had followed, the urgency of the situation, and the risks if infection rates surged again.

The plaintiff also contended that the defendant did not properly consider her human rights before the Curfew direction was made – the procedural limb of s 38(1). This limb requires a decision maker to have seriously turned their mind to the possible impact of the decision on an affected person's human rights and the implications for that person and to identify the countervailing interests or obligations. Ginnane J noted there was a real question whether a health expert, such as the defendant, was able to properly balance the social and economic consequences of a decision primarily based on health considerations, however, the defendant was given that discretion under an Act of Parliament. His Honour considered that the evidence disclosed that the defendant gave primary consideration to health issues, which was the express subject matter that enlivened the exercise of her discretion under s 200(1)(d) of the *PWH Act*, but accepted that she also considered the human right advices which she had received. His Honour accepted that the defendant understood the rights of affected persons, turned her mind to the impact of the decision on human rights, identified countervailing interests and balanced private and public rights, but that she also considered the importance and purpose of the limitation, by giving primary attention to risks to public health from the spread of COVID-19. Her 'public health perspective using a precautionary approach' demonstrated proper consideration of relevant human rights. The plaintiff's proceeding was dismissed.



***Russell v Eaton* [2020] VSCA 249**

25 September 2020

Kyrou JA

Charter provisions: ss 8, 24

Summary

The applicant sought judicial review in the trial division of the Supreme Court of a decision of a County Court judge in a de novo appeal against his conviction for summary offences by the Magistrates' Court.

At a directions hearing on 26 April 2019, the trial division judge set the matter down for final hearing on 27 May 2019. In doing so, the judge refused the applicant's application for an adjournment. The applicant subsequently sought to have the trial judge recuse himself on the ground of apprehended bias. The applicant did not appear at the trial on 27 May 2019. The trial judge adjourned the trial, determined the proceeding on the basis of the written submissions already filed, and subsequently delivered reasons rejecting the applicant's claims and refusing to recuse himself.

The applicant sought leave to appeal on grounds which included that the trial judge's discretion to refuse to adjourn the final hearing miscarried and that the trial judge erred in failing to recuse himself after his conduct in the 26 April 2019 hearing.

The applicant contended that the judge's refusal of the application for an adjournment contravened the judge's duty to assist the applicant as a self-represented litigant and his human rights set out in ss 8(3) (discrimination) and 24(1) (fair hearing) of the *Charter*.

Judgment

Kyrou JA dismissed the application for leave to appeal determining that it was totally without merit.

Kyrou JA found that the trial division judge conducted the directions hearing in a manner that was consistent with his duty to assist the applicant as a self-represented litigant, stating that the judge was impartial, provided appropriate assistance to the applicant and afforded him a fair hearing.

Kyrou JA stated that s 24(1) of the *Charter* did not add anything of substance to the duties of the judge to be impartial, to assist the applicant as a self-represented litigant and to ensure that all hearings before the judge were conducted fairly to both parties.

Kyrou JA further observed that it was unclear why the applicant relied upon s 8(3) of the *Charter*, as he did not allege that the judge discriminated against him in any way. In any event, there was no evidence of any discrimination or non-compliance with s 8(3) on any other basis.



***WUT v Victoria Police* [2020] VSC 586**

11 September 2020

Ginnane J

Charter provisions: ss 8, 13, 15, 18, 24

Summary

In this proceeding WUT, whose name was anonymised due to a suppression order, sought leave to appeal a decision of VCAT affirming a decision of a delegate of the Chief Commissioner of Victoria Police. The delegate's decision refused WUT's application for the renewal of his Private Security Individual Operator Licence for the activity of investigator ('licence') under the *Private Security Act 2004* (Vic).

WUT raised 27 questions of law and related grounds of appeal including grounds which alleged that the Tribunal erred by failing to consider or apply ss 8, 13, 15, 18 and 24 of the *Charter*.

Judgment

Justice Ginnane was not satisfied that any of WUT's questions of law or proposed grounds established any error by the Deputy President or had any real prospect of success.

Justice Ginnane found that, as the Tribunal was making a binding and authoritative determination of legal rights and duties according to existing legal principles, the Tribunal was acting in a quasi-judicial, rather than administrative, capacity. The Tribunal was therefore not a public authority under s 38 of the *Charter* and, save as provided in s 6(2)(b), the *Charter* did not apply to it.

Section 6(2)(b) provides that the *Charter* applies to courts and tribunals, to the extent that they have functions under Part 2 ('Human Rights') and Division 3 of Part 3 ('Interpretation of law'). The Tribunal was therefore obliged to comply with ss 8 and 24 of the *Charter*, because they were functions under Part 2, and WUT had the right to be treated equally before the law and the right to a fair hearing.

Justice Ginnane found that WUT had not established that the Tribunal failed to comply with its obligation to assist him as a self-represented applicant, to know his rights and the relevant procedures. Further, that no submission was put which established that the Tribunal failed to provide WUT with equality before the law under s 8 of the *Charter*, and that the Tribunal did not breach s 24 of the *Charter* by conducting a formal trial and by not informing him of crucial evidence opportunities available to him.

As to WUT's reliance on ss 13, 15 and 18, Ginnane J noted that no detailed submissions were made as to how the Tribunal breached those rights and his Honour was not persuaded that it had.



McLean v Racing Victoria [2020] VSCA 234

10 September 2020

Tate, McLeish and Niall JJA

Charter provisions: s 32

Summary

The applicant was a racehorse trainer licensed by Racing Victoria Ltd and subject to the Rules of Racing. Victoria Police executed a search warrant of the plaintiff's property and discovered certain syringes. When those syringes were analysed, erythropoietin ('EPO') and equine DNA was detected. EPO is a Schedule 4 poison under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and also a prohibited substance under the Rules of Racing. Victoria Police wrote to Racing Victoria referring the information, as 'offences may have been committed against the Rules of Racing'.

In the letter disclosing the information to Racing Victoria, Victoria Police expressly relied upon Information Privacy Principle ('IPP') 2.1(e) of the *Privacy and Data Protection Act 2014* (Vic) as authorising the disclosure. IPP 2.1(e) provides that 'an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection', unless 'the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in ...'.

After being notified by Racing Victoria that there were reasonable grounds to suspect a breach of the Rules of Racing, the applicant sought injunctions in the trial division of the Supreme Court to restrain Racing Victoria from acting on the information provided by Victoria Police. The trial judge dismissed the proceeding, finding that the disclosure by Victoria Police to Racing Victoria was lawful and there was no basis for granting relief against either Victoria Police or Racing Victoria.

On appeal, the applicant relevantly contended that non-compliance with the Rules of Racing is not 'unlawful activity' within IPP 2.1(e). In particular, the applicant submitted that the phrase 'unlawful activity' is capable of being confined to a crime or breach of a statute and that, given that IPP 2.1(e) authorises disclosure of private information, the principle of legality and s 32 of the *Charter* required it to be read in this restricted way.

Judgment

Dismissing the appeal, the Court of Appeal held that the trial judge was correct to conclude that a contravention of the Rules of Racing was 'unlawful activity' for the purpose of IPP 2.1(e) and that, although the principle of legality and s 32 of the *Charter* would support a restricted reading of 'unlawful activity', there was no constructional choice to be made as it was clear that 'unlawful activity' extended beyond criminal conduct.



Carson (a pseudonym) v The Queen [2020] VSCA 202

7 August 2020

Priest, Kyrou and T Forrest JJA

Charter provisions: s 27

Summary

The applicant was committed to stand trial in the County Court on charges of incest and attempted incest between 1978 and 2013. An investigation into his fitness to be tried was conducted in accordance with ss 11-12 of the *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* ('CMI Act') and a jury found the applicant unfit to be tried. Given that finding, s 12(5) of the CMI Act required the Court to hold a special hearing within three months.

The special hearing was listed to proceed on 27 April 2020, prior to the expiration of the three month 'deadline'. The special hearing, as then contemplated by the CMI Act, was to be by judge and jury. However, prior to the date listed for the special hearing, all jury trials in the state were halted in light of the COVID-19 pandemic.

On 25 April 2020, the *COVID-19 Omnibus (Emergency Measures) Act 2020* ('OEM Act') which introduced a number of provisions to the CMI Act in response to the pandemic, came into operation. Those measures included CMI Act s 95 which applied, instead of s 12, 'to an investigation into the fitness of an accused to stand trial', and s 91(6) which provided a 6-month period in which a special hearing could be held. Section 101 also made provision for the Court to order that a special hearing be conducted by judge alone.

On 24 April 2020 the County Court invited the parties to provide written submissions in relation to the further conduct of the matter. Following the Court's invitation, the applicant sought to challenge the validity of s 95(6) of the CMI Act and objected to the special hearing being set down for determination by a jury on any date after 3 May 2020. Judge Davis found that the newly inserted s 95(6) of the CMI Act was valid, and resolved to proceed with the special hearing before a jury on 20 July 2020.

After it had become apparent that it was unlikely that it would be possible to empanel a jury for the special hearing, Judge Higham allowed an application by the prosecution that the special hearing be conducted by judge alone.

The applicant sought leave to appeal against each of those rulings. The applicant contended that Judge Davis erred in failing to consider s 27 of the *Charter* when construing s 95 of the CMI Act and when listing the special hearing for determination on 20 July 2020.

Section 27(1) of the *Charter* provides that a person 'person 'must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in'. And s 27(2) of the *Charter* provides that a penalty 'must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed'.

Judgment

The Court of Appeal refused leave to appeal against both rulings.

The Court rejected the applicant's arguments that Judge Davis erred in failing to consider s 27 of the *Charter* finding that section had no application to the applicant's case as incest and attempted incest were criminal offences at the time of the relevant alleged conduct and a finding under s 17(1)(c) of the CMI Act neither permits a person to be found guilty of an offence, nor exposes the accused who is unfit to be tried to any 'penalty'.



The Court also held that s 121(2) of the CMI Act provides in the clearest terms that s 95 of the Act — which makes s 12(5) inapplicable in a situation such as the applicant's — applies even if an accused person has already been found unfit to stand trial. As no other interpretation was open on the language of the provision, s 32 of the *Charter* could not require any different interpretation.



***Dudley v A Judge of the County Court of Victoria* [2020] VSCA 179**

2 July 2020

Priest and Kaye JJA

Charter provisions: s 21

In this decision the Court of Appeal considered an application for an extension of time within which to seek leave to appeal from a decision of a trial division judge. The trial judge had declined to direct the Prothonotary to seal the applicant's proposed originating motion, by which he sought to issue a writ of habeas corpus and sought a declaration or order under s 21(7) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The trial judge considered the proposed proceeding would be an abuse of process for two reasons. First, it would seek to re-litigate matters which had already been decided by the Court in an earlier proceeding. Secondly, the proposed proceeding had no reasonable prospects of success as the writ of habeas corpus, and s 21(7) of the *Charter*, had no application where the applicant was lawfully imprisoned by an order of the County Court.

The Court of Appeal determined the proposed proceeding would be an abuse of process because it sought to rely on grounds already litigated, and declined to grant an extension of time within which to appeal. The *Charter* was not discussed further.



***Knight v Sellman* [2020] VSC 320**

5 June 2020

Cavanough J

Charter provisions: s 24

Summary

The plaintiff is a prisoner at Port Phillip Prison who, in 2004, was declared a vexatious litigant pursuant to the *Vexatious Proceedings Act 2014* (Vic) ('VPA'). He is unable to commence legal proceedings in a Victorian court or tribunal without prior leave. The plaintiff sought leave from Cavanough J to commence a proceeding; the proposed claim was for an injunction mandating that the manager of the prison provide him with computer access (or greater computer access). This proposed claim was similar to many prior, unsuccessful applications by the plaintiff.

The plaintiff's principal argument was that he had a 'common law right of unimpeded access to the courts' and an equivalent right under s 24 of the *Charter*. The effect of his argument was that these rights were unlawfully denied to him if the authorities placed any limit on his computer access and there was a corresponding impact on his ability to access the courts. Notwithstanding that the plaintiff only mentioned the *Charter* once in his submissions (to the effect that his claim for relief was based neither in the *Corrections Act 1986* (Vic) nor the *Corrections Regulations 2019*, but in the common law and s 24 of the *Charter*), Cavanough J addressed the *Charter* and had regard to relevant Victorian authorities not cited by the plaintiff.

Judgment

His Honour noted that courts do not have jurisdiction or power to grant an injunction unless the plaintiff can establish a relevant cause of action which is enforceable by injunction. He considered that, having regard to relevant authorities, the Court would have no jurisdiction to entertain the plaintiff's proposed claim for an injunction insofar as it was based on an asserted free-standing 'common law right of unimpeded access to the courts'. This was because the 'right to a fair trial' and the 'right of access to the courts' are not unitary, coextensive or overlapping rights, rather they describe a range of elements understood to be inherent requirements of a common law system, which can nevertheless be qualified to a reasonable extent by statutory regulation. This is particularly so in a custodial setting where there is a need for the enforcement of security.

Turning to the *Charter*, s 24 provides that a person has the right to a fair hearing. Cavanough J assumed in favour of the plaintiff, without deciding, that s 24 of the *Charter* included 'the right of access to the courts' and that this right was potentially enforceable against a public authority in accordance with ss 38-39 of the *Charter*, even by way of injunction. However, his Honour referred to s 7(2) of the *Charter* to conclude that, as with the corresponding common law right, the right acknowledged by s 24 of the *Charter* 'will always be qualified in substantial respects in relation to a prisoner'. Therefore, any common law right or unimpeded access to the courts, or any similar right under the *Charter*, was not absolute, but was subject to relevant statutory provisions and to administrative decisions lawfully made under such statutory provisions, including relevant provisions of the VPA. Cavanough J concluded that, in any event, the necessary factual foundation for an injunction to enforce the right asserted by the plaintiff pursuant to the *Charter* had not been established.

His Honour further noted that any claim to enforce the relevant right (whether under the *Charter* or at common law) should be made to the court or judge responsible for that substantive matter (i.e. the proceeding for which the plaintiff asserted he needed access to computers / the court). It is a matter for the trial judge to determine whether the court should intervene to obtain greater computer access - the



appropriate forum for ensuring that a defendant had a reasonable opportunity to prepare for trial is the trial court.



***Zhong v Attorney-General* [2020] VSC 302**

29 May 2020

Croucher J

Charter provisions: ss 8, 21, 24, 25, 38

Summary

The matter has a long history. In 2001, Mr Zhong was sentenced to six years' imprisonment for inciting a third party to murder his de facto wife. He unsuccessfully sought leave to appeal against his conviction. Despite his release on parole in 2004 and the expiry of his head sentence in 2006, Mr Zhong has continually sought to clear his name. He applied for special leave to appeal to the High Court, but that was refused. Having exhausted his appellate rights, Mr Zhong in 2010 filed a petition for mercy with the A-G requesting that his case be referred to the Court of Appeal pursuant to s 327(1)(a) of the *Criminal Procedure Act 2009* (Vic) ('CPA'). Despite the denial of this petition in 2012, Mr Zhong continued to seek from the A-G reconsideration of his petition. In 2018, Mr Zhong sought judicial review of the A-G's decision in the Supreme Court. The proceedings settled with the A-G agreeing to 'consider, according to law, including the [Charter]' Mr Zhong's 2018 petition. In 2019, however, Mr Zhong was advised by the A-G that she had declined to refer his case to the Court of Appeal. The matter before Croucher J was Mr Zhong's application for judicial review of this most recent decision.

Mr Zhong relied on a collection of asserted breaches of *Charter* rights. Mr Zhong submitted that his human rights under s 8 (equality before the law), s 21 (the right to liberty), s 24 (the right to a fair hearing) and s 25 (rights in criminal proceedings) of the *Charter* were breached at trial and ignored by the A-G, despite her obligation pursuant to s 38 of the *Charter* to give proper consideration to those matters in reaching her decision. Mr Zhong submitted that the most important violation of his rights in criminal proceedings (s 25) was that his verdict was not reached according to law. Mr Zhong further submitted that he was entitled to receive reasons for the A-G's refusal to refer his case to the Court of Appeal, but never received any.

The A-G, on the assumption that her decision was reviewable, accepted s 38 of the *Charter* applied, so that in making her decision whether to refer Mr Zhong's case to the Court of Appeal, she was to give proper consideration to his relevant human rights. However, the A-G submitted there was nothing to suggest she had failed to do so.

Croucher J considered that insofar as Mr Zhong may have been taken to have made an application under s 33 of the *Charter* (which permits questions of law or interpretation with the respect of the *Charter* to be referred to the Court of Appeal), it was not necessary or appropriate for any *Charter* question at that stage to be referred to the Court of Appeal for determination.

Judgment

His Honour noted that Mr Zhong presented points already made under other grounds of review as if the complaints could be regarded as 'enhanced' or having 'greater force' by reason of being tied to a human right protected under the *Charter*. Whether or not that was the case, Croucher J concluded that, on the facts of the matter before him, there was no suggestion that the A-G had failed to consider Mr Zhong's human rights in deciding whether to refer his case under s 327(1)(a) of the CPA.

Further, his Honour accepted the A-G's submissions that the A-G was not required under the *Charter* to give reasons to Mr Zhong. While the A-G was a public authority to whom the *Charter* applied, none of the human rights conferred by the *Charter* required the A-G to give reasons for her decision. Moreover, referring to relevant authority, there was no failure to accord natural justice in failing to provide reasons for administrative decisions.



Ultimately, Croucher J was satisfied that none of Mr Zhong's grounds could succeed, and dismissed each of his applications.



Gardiner v Attorney-General (No 2) [2020] VSC 252

7 May 2020

Richards J

Charter provisions: ss 7, 19, 38

Summary

The Attorney General ('A-G') entered into a Recognition and Settlement Agreement ('RSA') with the Taungurung Land and Waters Council ('Council') under the *Traditional Owner Settlement Act 2010* (Vic) ('TOS Act'), pursuant to which the traditional owner rights of the Taungurung in relation to a certain area of land were recognised. In order to enter into the RSA, the Council had prepared and provided to the A-G documents which set out the grounds of its claim to the relevant land area. The plaintiffs were Aboriginal elders of the Ngurai Illum Wurrung and the Waywurru groups, who disputed that the Taungurung were traditional owners of the entire area covered by the RSA. Accordingly, the plaintiffs sought judicial review of the A-G's decision to enter into the RSA, and also sought declarations that the decision to enter into the RSA was unlawful and incompatible with their cultural rights protected by s 19(2) of the *Charter* (the '*Charter* claim').

The plaintiffs sought leave to file a further amended originating motion including three new grounds of review. The A-G opposed the amendment application, and further contended that the plaintiff's *Charter* claim should be struck out or summarily dismissed.

The A-G argued that:

- Section 19(2) of the *Charter* recognises that Aboriginal persons have cultural rights, but it does not confer a basis for the resolution of disputes between Aboriginal groups;
- The Court could not be satisfied that the decision to enter into the RSA engaged or limited the plaintiff's s 19(2) rights, because that would require the Court to find that they had traditional owner rights in respect of the disputed areas (which would be impermissible merits review, rather than judicial review); and
- The *Charter* claim would necessitate the A-G putting on evidence to justify the determination made, which would be extensive and would replicate aspects of a contested native title hearing, which the TOS Act is designed to avoid.

Judgment

Richards J declined to summarily dismiss or strike out the plaintiffs' *Charter* claim.

First, her Honour noted that because the A-G had not contended the decision was not justiciable, there was no suggestion that the decision was not amenable to judicial review. Because judicial review remedies were available to the plaintiffs, so too were *Charter* remedies, pursuant to s 39 of the *Charter*.

Second, her Honour considered that the cultural rights protected by s 19(2) of the *Charter* did not correspond exactly with the rights of traditional owners recognised by the TOS Act. Richards J canvassed the limited authority on the content and operation of s 19(2) of the *Charter*, and concluded that there was a real question whether a finding by the A-G that a group of Aboriginal persons was a traditional owner group for an area of land for the purposes of the TOS Act, was determinative of whether other Aboriginal persons enjoyed rights under s 19(2) of the *Charter* in relation to that area. Her Honour considered that question was not suitable for summary determination,



Third, if the plaintiffs were able to establish that they had cultural rights under s 19(2) of the *Charter*, and that the A-G's decision limited those rights, the burden would shift to the A-G to demonstrate that the limit was justified under s 7(2) of the *Charter*.

Fourth, the plaintiffs also relied on the procedural limb of s 38(1) of the *Charter*, arguing that the A-G did not give proper consideration to their rights under s 19(2). The A-G did not contend this argument had no prospect of success, but rather that it required particularisation.

Fifth, her Honour did not consider the *Charter* claim should be summarily dismissed merely because substantial evidence may need to be called to determine difficult questions of fact.

Her Honour noted that while a review for unlawfulness under ss 7(2) and 38(1) of the *Charter* may delve deeper into the facts and can appear closer to a merits review than traditional judicial review, 'the jurisdiction remains supervisory, not substitutionary'.

Richards J concluded that, while the plaintiffs' *Charter* claim presented some case management challenges and required further particularisation, it had not been established that the *Charter* claim had no real prospect of success.



Haigh v Ryan (in his capacity as Governor of Barwon Prison) [2020] VSC 102

5 March 2020

Cavanough J

Charter provisions: ss 13, 14, 15

Summary

The plaintiff was a prisoner at Barwon Prison who was serving a life sentence. The defendant was the Governor and General Manager of Barwon Prison. On 7 March 2018 a prison officer acting under the delegation of the defendant stopped a letter that was written by the plaintiff from being sent. The intended recipient of the letter was an evangelical Christian organisation known as ‘Tomorrow’s World’. The organisation produced a television program.

On 20 April 2018 the plaintiff commenced a proceeding in the Supreme Court seeking judicial review of the decision of the prison officer. The asserted basis for the review was that the decision had been made in accordance with an alleged prison policy imposing a ‘blanket ban’ on prisoners communicating with the media. The policy was said to conflict with prisoners’ rights under s 47(1)(n) of the *Corrections Act 1986* (‘the Act’) and with prisoners’ human rights under the *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’).

In affidavit evidence adduced in the proceeding, it became apparent that the plaintiff had circumvented the decision of the prison officer by getting his friend to send the relevant letter prior to the commencement of the proceeding. Despite this, the plaintiff did not discontinue the proceeding. The defendant then formally reversed the decision which had been made on 7 March 2018, and conceded in a later letter that the decision was affected by jurisdictional error. The error identified was not giving proper consideration to the plaintiff’s *Charter* rights.

The plaintiff discontinued the part of his claim seeking to have the original decision quashed, but maintained an application for certain declarations. Those declarations concerned amongst other things, the interaction between the right of a prisoner to send and receive letters to certain persons under s 47(1)(m) of the Act (subject to exceptions) and *Charter* rights. The specific *Charter* rights identified were the right to privacy (s 13), the right to freedom of expression (s15(2)(b)(c)) and the right to freedom of thought, conscience, religion and belief (s 14).

Judgment

Cavanough J noted that the some of the plaintiff’s submissions raised ‘difficult and interesting questions about the interaction between [the Act] and the *Charter*’. However, given that the principal subject matter of the proceeding – the decision by the prison officer — was no longer in existence, any declaration would be purely academic. As such it was not appropriate for the Court to consider the legal issues and make the declarations that the plaintiff sought.



Marijancevic v Page [2020] VSC 68

28 February 2020

Richards J

Charter provisions: s 24

Summary

The Magistrates' Court convicted the plaintiff of driving a motor vehicle on a highway while his licence was suspended and for failing to produce a licence when requested. The plaintiff then appealed to the County Court. There, he filed a subpoena addressed to the Director, Customer Service of the Roads Corporation of Victoria ('VicRoads'). VicRoads successfully applied to have the subpoena set aside and the plaintiff then abandoned his appeal. The County Court made orders striking out the appeal, setting aside the subpoena and for costs in favour of VicRoads.

The plaintiff commenced proceedings in the Supreme Court seeking judicial review of the orders of the County Court; he argued that he did not receive a fair hearing.

Judgment

Richards J stated that the 'fair hearing of a proceeding, whether civil or criminal, is a basic common law right that is now also protected by s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Her Honour also noted that depending upon the circumstances of the case, different measures may be necessary to give practical effect to the right, and where a party is unrepresented, 'a judge must do what is required "to give the unrepresented person a reasonable opportunity to advance his/her own case and to be informed of and respond to the opposing case"'. In the circumstances, the fair hearing ground was not made out as the plaintiff was able to formulate and articulate the legal argument he wished to put concerning the subpoena.



***Clubb v Edwards* [2020] VSC 49**

19 February 2020

Kennedy J

Charter provisions: ss 12, 15, 32

Summary

The appellant was convicted in the Magistrates' Court for engaging in conduct contrary to s 185D of the *Public Health and Wellbeing Act 2008* (Vic) ('the Act'). That section prohibited 'communicating by any means in relation to abortions in a manner that is able to be seen or heard by a person accessing, attempting to access, or leaving premises at which abortions are provided and is reasonably likely to cause distress or anxiety', within safe access zones. A safe access zone was defined as an area within a 150m radius from premises at which abortions are provided. The evidence showed the appellant, with pamphlets in hand and at a distance of approximately 5m from the entrance to a clinic, approaching a young couple who were attempting to enter the clinic.

An appeal was commenced in the Supreme Court of Victoria relying upon three grounds. Two of those grounds were constitutional challenges asserting that s 185D was an impermissible burden on the implied freedom of political communication and was removed to the High Court of Australia. The High Court determined that the provision was justified by a legitimate purpose. The remaining ground, which was heard before Kennedy J in the Supreme Court, asserted that the magistrate erred in law in convicting the appellant.

The appellant argued that ss 12, 15 and 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') required s 185 of the Act to be construed strictly. Those sections provide for the freedom of movement (s 12), freedom of expression (s 15) and that so far as it is possible to do consistently with their purpose, that all statutory provisions should be interpreted in a way that is compatible with human rights (s 32).

The first respondent submitted that ss 12 and 15 of the *Charter* may be subject to reasonable limitations pursuant to s 7(2). And, further, that freedom of expression may be subject to lawful restrictions necessary to respect the rights and reputation of other persons or for the protection of public order or public health (s 15(3)). According to the first respondent, s 185D struck the appropriate balance between the rights identified by the appellant, as well as the right of a person not to have their privacy unlawfully or arbitrarily interfered with (s 13), and in any event, the provision must be interpreted according to the ordinary techniques of construction.

Judgment

Kennedy J generally accepted the submissions of the first respondent. More particularly, her Honour noted that 'although statutory provisions must be interpreted in a way that is compatible with human rights', that was so 'far as it is possible consistently with their purpose'. In the circumstances, the purpose s 185D was said to be elucidated by the consideration of the High Court. In this regard, her Honour had earlier quoted the High Court and the second reading speech for the Bill introducing the offence when discussing the protective purposes of the provision. The High Court stated:

It is within those zones that intrusion upon the privacy, dignity and equanimity of persons already in a fraught emotional situation is apt to be most effective to deter those persons from making use of the facilities available within the safe access zones.

Ultimately, her Honour dismissed the appeal.



North (a Pseudonym) v The Queen [2020] VSCA 1

9 January 2020

Priest and Weinberg JJA

Charter provisions: s 25

This appeal concerned an application to review a County Court Judge's determination they did not need to certify an interlocutory decision under s 295(3) of the *Criminal Procedure Act 2009* (Vic) and an appeal against the same judges' interlocutory decision to not recuse himself on the ground of apprehended bias. The Court determined that both of the County Court Judge's decisions were correct, refused the application and did not grant leave to appeal.

The *Charter* is only mentioned briefly in recounting the procedural history of the matter before the County Court Judge. At mention, the applicant's counsel submitted that the prosecution should be precluded from including further indictments on the applicant's charge sheet, this being contrary to s 25(2)(c) of the *Charter*. The prosecution had at the time of this judgment been granted numerous extensions of time to settle the pleadings against the defendant. The *Charter* is not discussed further.



Austin v Dwyer & Anor [2019] VSC 837

20 December 2019

Forbes J

Charter provisions: ss 8, 24, 39

Summary

From August 2016 personal safety interventions orders had been taken out against Ms Austin by a former student, based on alleged behaviour going back to 2014 ('the private intervention order'). In June 2019 Victoria Police applied to revoke the private intervention order and to substitute Detective Sergeant Dwyer as the applicant for intervention on a substantially identical intervention order. This course was adopted because the existence of the private intervention orders had led to a number of appeals and judicial review proceedings and police described the ongoing service of documents as a continuation of the harassment.

On 14 June 2019, the Magistrates' Court made orders revoking the private intervention order and granting an intervention order on the application Detective Sergeant Dwyer.

On 11 June 2019, Ms Austin had emailed the Magistrate's Court a summons and affidavit in support seeking that the private intervention order be stayed. At the 14 June 2019 hearing, the Magistrate refused to hear the stay application as it was not made on notice.

Ms Austin sought judicial review of the Magistrate's decision on a variety of grounds. Relevantly, Ms Austin contended:

- permit her the right to seek relief, being a stay of proceedings, pursuant to s 39 of the *Charter* (ground 4);
- that the Magistrate's failed to act in a non-discriminatory manner toward her was a breach of her rights under s 8 of the *Charter* (ground 7); and
- that the Magistrate's failure to conduct the proceedings in a competent, independent, impartial and fair manner, was a denial of her rights under s 24 of the *Charter* (ground 8).

Judgment

Forbes J held that none of Ms Austin's grounds of review were made out and no error of law was demonstrated.

For the purposes of ground 4, Forbes J stated that s 39 of the *Charter* did not apply to the decision of the Magistrate as in hearing and determining applications pursuant to the Personal Safety Intervention Order Act 2010 the Magistrate was acting in a judicial capacity and even though he did not deal with the merit of Ms Austin's stay application, only the question of whether or not it could be heard on that day, he was nevertheless acting judicially and not administratively.

Ground 7 was said to be based upon based upon comments that the Magistrate made about Kaniva where Ms Austin lives. Forbes J held that Ms Austin failed to demonstrate either that the comments made by the Magistrate were discriminatory at all or were discriminatory in a prohibited way.

In relation to ground 8, Forbes J stated that Ms Austin's submissions failed to point to a lack of impartiality or independence in the hearing itself.



Goode v Common Equity Housing Ltd [2019] VSC 841

19 December 2019

Ginnane J

Charter provisions: ss 24, 38

Summary

Ms Goode had lived in a property, as a tenant of a co-operative housing body, for more than 25 years. VCAT found that Common Equity Housing Ltd ('CEHL') was Ms Goode's landlord. However, Ms Goode did not consider that she could or should pay the rent to CEHL and for the last 5 years had been paying the rent into the bank account of another entity, Access Common Equity Rental Cooperative Ltd ('Access CERC'). Access CERC had requested that Ms Goode cease making the deposits and all attempts to return the deposits had been refused.

On 7 March 2016, VCAT ordered that CEHL was entitled to a possession order and that Ms Goode had to vacate the premises. On 21 March 2016, VCAT heard an application for review of this order. VCAT granted a stay of the possession order on the condition that Ms Goode pay the arrears of the rent to CEHL, and adjourned Ms Goode's application for re-hearing.

That matter was again heard by VCAT on 3 May 2016, Ms Goode had not paid the arrears of rent and was not present when the hearing commenced. During the hearing Ms Goode arrived and, on her request, was granted time to speak to a duty lawyer. A duty lawyer appeared for Ms Goode and asked for an adjournment to explore the possibility of coming to an alternative arrangement. The VCAT member refused an adjournment and affirmed and upheld the possession order.

On 25 November 2016, an Associate Justice refused Ms Goode's application for leave to appeal the VCAT decision of 3 May 2016 and ordered that her originating motion be dismissed. Ms Goode appealed against these orders. Ms Goode submitted that VCAT had failed to comply with s 38 of the *Charter* and/or had failed to afford her a fair hearing as required by s 24 of the *Charter*.

Judgment

Ginnane J dismissed Ms Goode's appeal.

Ginnane J stated that the Tribunal Member and the Associate Justice gave proper consideration to Ms Goode's right to a fair hearing. Ms Goode had not established any error by the Associate Justice in dealing with the existence of any question of law concerning her *Charter* rights, including her right to a fair hearing before VCAT, nor did VCAT fail to comply with s 38 of the *Charter* or fail to afford her a fair hearing. His Honour stated that VCAT had adjourned the proceeding on 21 March 2016 to enable Ms Goode to make arrangements for rent to be paid, and there was no real purpose in adjourning the matter further.



Fidge v Municipal Electoral Tribunal & Anor (No 2) [2019] VSC 767

28 November 2019

Ginnane J

Charter provisions: ss 33, 36

Summary

The plaintiff commenced two proceedings in the Supreme Court, the first was whether VCAT had erred in not referring a question to the Supreme Court and had otherwise breached its obligations under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the *Charter*'). The Attorney-General was joined as a respondent to the proceedings under s 34 of the *Charter*.

The plaintiff was unsuccessful in the proceedings (see *Fidge v Municipal Electoral Tribunal* [2019] VSC 639), and the Attorney-General applied for her costs to be paid by the plaintiff.

On the issue of costs, the plaintiff argued that the *Charter* was a special piece of legislation and that Parliament contemplated that public interest litigation could occur raising issues concerning its operation. In the circumstances, he had sought a decision for the broader public interest, to enliven the dialogue of rights protection, to contribute to the ongoing review and reform of the *Local Government Act 1989* ('the Act'), and to address what he considered to be an injustice in the Act. As such, the plaintiff submitted that each party should bear their own costs.

The Attorney-General submitted that even if the litigation was in the public interest, the usual order as to costs should apply. The proceeding brought by the plaintiff was not a test case, nor did it raise any issue of wide legal importance.

Judgment

Ginnane J held that the first proceeding raised the important issue of the scope of the power in s 33 of the *Charter* and 'the pathway by which a person can seek a declaration in inconsistency under s 36'. This was in the context of the only detailed authority on the issues being *Momcilovic v R* (2011) 245 CLR 1, which is of uncertain effect. Moreover, the plaintiff sought to engage his human right to take part in public life, specifically surrounding the application of that right to municipal countback elections. Although a legislative change reflecting the plaintiff's views had been recommended by a review panel, the associated Bill had lapsed. Overall, Ginnane J concluded that it was appropriate for the parties to bear their own costs in the first proceeding.

Regarding the second proceeding, which concerned the constitutional validity of provisions of the Act, Ginnane J found in favour of the Attorney-General.



McLean v Racing Victoria Ltd [2019] VSC 690

18 October 2019

Richards J

Charter provisions: ss 13, 32

Summary

The plaintiff was a racehorse trainer licensed by Racing Victoria Ltd and subject to the Rules of Racing. Police executed a search warrant of the plaintiff's property and discovered certain syringes. When those syringes were analysed, erythropoietin ('EPO') and equine DNA was detected. EPO is a Schedule 4 poison under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and also a prohibited substance under the *Rules of Racing*. Victoria Police wrote to Racing Victoria referring the information, as 'offences may have been committed against the Rules of Racing'. The information was purportedly disclosed under Information Privacy Principle (IPP) 2.1(1) under the *Privacy and Data Protection Act 2014* (Vic) ('the Privacy Act'). After being notified by Racing Victoria that there were reasonable grounds to suspect a breach of the Rule of Racing, the plaintiff sought injunctions in the Supreme Court to restrain Racing Victoria from acting on the information provided by Victoria Police.

An issue that arose was the interpretation of Information Privacy Principle ('IPP') 2.1(e) of the Privacy Act, which provided that 'an organisation must not use or disclose personal information about an individual for a purpose (the secondary purpose) other than the primary purpose of collection', unless 'the organisation has reason to suspect that unlawful activity has been, is being or may be engaged in ...'.

The plaintiff argued that 'unlawful activity' should be read to mean 'criminal activity', relying upon the principle of legality and the ss 13(a) and 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). Section 13(a) of the Charter provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with, while s 32(1) states that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.

Judgment

Richards J accepted that s 32 of the Charter would support a construction of 'unlawful activity' in IPP 2.1(e) that least interfered with personal privacy if there was a constructional choice to be made. However, her Honour was not persuaded that it was possible to limit the phrase to criminal activity. In reaching this conclusion Richards J reasoned, amongst other things, that the right to privacy in s 13 of the Charter was not paramount. Rather, parliament had provided that the right could be limited 'in a way that is proportionate to a legitimate aim'. In this regard, the Privacy Act represents a careful balancing of competing public interests, including the interest in the free flow of information and the interest in protecting privacy. Ultimately her Honour concluded that the disclosure of the information by Victoria Police was authorised under IPP 2.1(e).



***Hague v The Queen* [2019] VSCA 218**

3 October 2019

Ferguson CJ, Niall and Weinberg JJA

***Charter* provisions: s 24**

This case concerned applications for leave to appeal against the applicant's conviction and sentence for murder. The grounds of appeal against conviction included that the trial judge was wrong to refuse the application to stay the indictment as an abuse of process.

The Court of Appeal refused the applications for leave to appeal. While considering the abuse of process ground, the Court acknowledged that s 24 of the *Charter* provides that a person charged with a criminal offence has the right to have the charge decided after a fair and public hearing.



Fidge v Municipal Electoral Tribunal [2019] VSC 639

20 September 2019

Ginnane J

Charter provisions: ss 6, 18, 24, 33

Summary

The plaintiff stood for election in a 2016 general council election alongside nine other candidates. Four positions were available on council and in order to be elected, a candidate had to obtain 1,971 votes. After first preference votes were counted, the candidate with the fewest votes was excluded and their votes redistributed in accordance with second preferences. This process continued until five candidates had been excluded, and four candidates were elected. After preferences were counted, the plaintiff came in fifth place with 1,271 first preference votes and 1,734 votes after redistribution. On account of the four successful candidates each reaching 1,971 votes before the plaintiff was formally excluded, he was neither elected nor excluded.

In 2017, one of the successfully elected councillors died, creating a vacancy in her seat. In accordance with the *Local Government Act 1989* ('the Act') a countback election was conducted, adopting procedures as set out in Schedule 3A of the Act. Pursuant to this process, the 1,971 votes that the councillor who died received in 2016 were redistributed in order of the participating countback candidates –the unsuccessful candidates for the 2016 election who remained eligible to stand. If none of the countback candidates had an absolute majority, the candidate with the lowest vote was excluded, and their votes redistributed in order of next preferences. At the end of this process, a candidate who received less first preference (876) and less preference votes (1,296) than the plaintiff overall in the 2016 election was successful in the 2017 countback election. This occurred in part because the plaintiff had never been formally excluded in the 2016 election, so none of his first preference votes were redistributed to the councillor who died, which meant that they did not flow back to him in the 2017 countback election.

The plaintiff accepted that the countback election was conducted in accordance with the procedures under the Act. However, he challenged the procedures both in the Municipal Electoral Tribunal ('MET') and at the Victorian Civil and Administrative Appeals Tribunal ('VCAT') claiming that the relevant provisions were contrary to the *Charter of Human Rights and Responsibilities 2006 (Vic)* ('the Charter') and the constitution. He sought to have those issues referred to the Supreme Court under s 33 of the Charter. Section 33(1) of the Charter provides that upon an application, a court or tribunal can refer to the Supreme Court a question of law relating to the application of the Charter or relating to the interpretation of a statutory provision in accordance with the Charter, if it considers it appropriate for determination by the Supreme Court.

The MET dismissed the plaintiff's application because the relevant procedures under the Act had been followed. The plaintiff sought review of the MET's decision in VCAT, and also applied for referral to the Supreme Court in order to argue that the countback provision of the Act could not be interpreted consistently with s 18 of the Charter. Section 18(2)(a) provides that '[e]very eligible person has the right, and is to have the opportunity, without discrimination – to vote and be elected at periodic State and municipal elections that guarantee the free expression of the will of the electors'. The question sought to be referred was [a]re sections 11 and 12 of Schedule 3A of [the Act] capable of being interpreted compatibly with the human rights contained in sections 18 of [the Charter]'. [20].

VCAT refused to refer the question to the Supreme Court under s 33 of the Charter and otherwise dismissed the proceeding. The Deputy President determined that if the question were referred it would have no bearing on the proceeding. That is, a declaration of inconsistent interpretation would not affect the validity of the countback provisions for the purposes of the proceedings before VCAT. Further, that the concerns raised by the plaintiff were known and being considered by the legislature, and that nothing more would be



served by the Supreme Court making a declaration of incompatibility. In this regard, the Deputy President relied upon *De Simone v Bevnol Constrictions and Developments* (2010) 30 VR 200 in which the Court of Appeal declined to express an opinion on a referred question because the question was not conditioned on any facts found or assessed or any conclusion of law. Instead, it asked a purely hypothetical question and would not determine the issue between the parties.

The plaintiff then appealed to the Supreme Court arguing that VCAT erred in law by not referring the question, and that VCAT breached s 6(2)(b) of the *Charter* by failing to apply the rights relevant to the exercise of its function. Regarding the former, he asserted that VCAT erred by:

- taking into account irrelevant considerations in that the question was ‘purely hypothetical’;
- failing to take into account the importance of the *Charter* dialogue; and
- implicitly finding that there was no evidence that the plaintiff’s rights or interests were affected.

Section 6(2)(b) of the *Charter* provides that the *Charter* applies to courts and tribunals to the extent that they have functions under Part 2 (which sets out the human rights parliament seeks to protect and promote) and Division 3 of Part 3 (concerning interpretation of laws). The plaintiff argued that in failing to refer the question to the Supreme Court, VCAT did not apply the right to recognition and equality before the law (s 8), the right to have a proceeding decided by a competent, independent, and impartial court or tribunal after a fair and public hearing (s 24) or the right to take part in public life (s 18).

The Attorney-General joined the proceeding as a respondent under s 34 of the *Charter*.

Judgment

Ginnane J viewed the discretion given to VCAT in s 33 as particularly important. As opposed to the conferral of a duty, the Deputy President had a choice to exercise in accordance with the purposes of the *Charter*. In reviewing the decision of the MET, VCAT was obliged to apply the provisions of the Act and affirm the MET’s decision. There was no dispute about the application of the provisions. As such, the Deputy President was correct in concluding that a referral would not change the outcome of the review proceeding.

Although the plaintiff had an interest in whether the countback provisions of the Act were inconsistent with s 18 of the *Charter*, VCAT proceedings could not be used as a vehicle to attempt to obtain a Supreme Court ruling on a question that had no bearing on the proceeding, but a bearing on public or political debate. VCAT was ‘entitled to take into account the fact that the referred question was hypothetical, in the sense that it did not attach to the judicial controversy’. [55] Ginnane J was not persuaded that VCAT had exercised its discretion incorrectly, and noted that the plaintiff could participate in debates concerning amendments to the Act, but not in the Court in circumstances where there was no dispute about the Act’s application.

As to whether VCAT exercised its discretion in accordance with s6(2)(b), Ginnane J determined that the authorities established that the ‘intermediate construction’ of that provision applied. While the right to a fair and public hearing applied s 24 was relevant to the function of a tribunal in the exercise of its power, the other two identified rights were not. Further, Ginnane J did not accept that any of the rights nominated by the plaintiff were breached by VCAT. The plaintiff received a fair hearing at VCAT and VCAT validly exercised its discretion. His Honour then went on to determine the plaintiff’s claims in a second proceeding claiming that the countback provisions were invalid and infringed his freedom of political communication implied in the Commonwealth Constitution. These were also dismissed by Ginnane J.



***Naik v Monash University* [2019] VSCA 72**

4 April 2019

Priest AP, Beach and Niall JJA

Charter provisions: ss 8

Summary

The applicant was a student at Monash University who failed an assessment task in June 2017, and consequently a subject in his Masters in Journalism. This was the final subject he needed to complete to obtain his degree. The judicial review application was for an order in mandamus and a declaration, the former granting the applicant an exemption from having to complete the assignment he failed and therefore a declaration he had completed his master's degree.

The trial judge found that the judicial review application was filed more than 10 months out of time, and that no special circumstances existed that would justify an extension of time being granted.

The applicant appealed this decision on four grounds. The fourth ground was discrimination and unlawfulness; specifically, that the trial judge erred when concluding breaches of the *Charter* could not be assessed on a judicial review application.

Judgment

At trial, the applicant referred to the *Charter* in the context of the procedure that applied to his request for extensions to submit his assignment, rather than the final decision itself. The Court commented it was correct for Her Honour to conclude that the applicant's arguments were not applicable to the relief sought in a judicial review application.

In addition, the Court noted that the applicant had raised similar matters under relevant anti-discrimination laws. As such, it was not unjust to refuse an extension of time in an application where the same matters were being raised.



***Kheir v Robertson* [2019] VSC 422**

26 June 2019

McDonald J

Charter provisions: ss 21, 22, 39

Summary

On 27 June 2013, Mr Kheir was convicted and sentenced to an aggregate of nine years and six months' imprisonment with a non-parole period of seven years for aggravated burglary, armed robbery, recklessly causing injury and blackmail. On 30 June 2015 and 1 July 2015, a riot occurred at the Metropolitan Remand Centre where Mr Kheir was then imprisoned. On 2 July 2015, Mr Kheir was transferred to Barwon Prison where he was held in a high security unit and confined to his cell for long periods each day until his transfer to Port Phillip Prison on 11 May 2017.

On 24 August 2017, the Mr Kheir applied for emergency management days to reduce his non-parole period and sentence pursuant to s 58E of the *Corrections Act 1986*. On 15 September 2017, the Secretary's delegate declined Mr Kheir's application. Mr Kheir sought judicial review of that decision in the Supreme Court and, on 11 May 2018, T Forrest J (as his Honour then was) quashed the Commissioner's decision and ordered that it be remitted to a delegate who, if possible, had no previous involvement with the application.

By late September 2018, no delegation or decision had been made. On 10 October 2018, Mr Kheir sought judicial review of the failure to decide or appoint a delegate. On 23 October 2018, the Secretary delegated the decision and, thereafter, Mr Kheir withdrew his application. Richards J awarded costs in favour of Mr Kheir. On 20 December 2018, the delegate refused Mr Kheir's application.

On 27 February 2019, Mr Kheir sought judicial review of the delegate's decision. The primary relief sought was to set aside the delegate's decision of 20 December 2018, and not to compel a delayed decision. However, one of the grounds relied upon by Mr Kheir was that there had been an unlawful delay in considering and determining his application. Mr Kheir submitted that this ground was 'included because of s 39 of the Charter'. Mr Kheir's Charter ground was that his rights under ss 21(1), 21(3) and 22(1) of the Charter had been breached by the delay in appointing a delegate.

Judgment

McDonald J dismissed Mr Kheir's application for judicial review. His Honour stated that the ground alleging unlawful delay had no nexus with the relief sought and was pressed solely for the purposes of enlivening jurisdiction to grant relief under s 39 of the Charter. While acknowledging that an unsuccessful ground of non-Charter unlawfulness nonetheless supports relief for a ground of Charter unlawfulness, his Honour held that the reasoning in *Burgundy Royale Investments Pty Ltd v Westpac Banking Corporation* (1987) 18 FCR 212 (*'Burgundy Royale'*) applies to s 39 of the Charter such that jurisdiction is not attracted for colourable claims. His Honour quoted the Full Court of the Federal Court's statements in *Burgundy Royale* that claims are colourable if 'they were made for the improper purpose of "fabricating" jurisdiction', and that to be non-colourable a ground must be 'bona fide and not spurious, hypothetical, illusory or misconceived'. His Honour held that Mr Kheir's ground based on unlawful delay was colourable.

His Honour further stated that even if he was incorrect that the unlawful ground delay was colourable he was nonetheless not satisfied that Mr Kheir's Charter rights had been infringed. Mr Kheir's rights under ss 21(1) and (3) of the Charter were not infringed as he was deprived of his liberty upon being convicted and sentenced, not because of the refusal of his application or any delay in making the decision. Nor were Mr Kheir's rights under s 22(1) of the Charter infringed by the manner in which the delegate conducted the application.



***Davies v The Queen* [2019] VSCA 66**

28 March 2019

Kaye, McLeish, T Forrest JJA

Charter provisions: ss 24, 25

Summary

Mr Davies was charged on indictment with five counts of arson contrary to s 197(1) of the *Crimes Act 1958*. Following a three month trial in the County Court Mr Davies was convicted of each charge and sentenced to a total effective sentence of 14 years and 6 months' imprisonment, with a non-parole period of 12 years and 3 months. Mr Davies represented himself at the trial, despite the trial judge suggesting that representation would be a sound course and having had multiple solicitors appointed under a grant of legal aid.

In the Court of Appeal Mr Davies sought leave to appeal both the conviction and sentence on a variety of grounds. Ground 8 of the appeal against conviction included that the trial miscarried due to Mr Davies being unrepresented and there being 'no equality of arms and facilities'.

Judgment

The Court of Appeal dismissed Mr Davies' appeal against conviction but allowed his appeal against sentence.

Kaye, McLeish and T Forrest JJA refused leave to appeal in relation to Mr Davies' arguments that the trial miscarried due to Mr Davies being unrepresented and there being 'no equality of arms and facilities'. Their Honours stated that Mr Davies freely eschewed representation and was adequately capable of representing himself.

The parties did not make submissions as to whether the Charter impacted Mr Davies' 'equality of arms' argument. However, the Court identified that the term 'equality of arms' was an international human rights principle that explains some aspects of the right to a fair trial and, as such, international human rights jurisprudence employing that concept may inform the rights contained in ss 24(1) and 25 of the Charter.

Briefly considering these rights the Court stated:

While s 24(1) creates a right to legal representation it is only reflective of the position at common law and a criminal trial is not unfair if the defendant is unrepresented because he or she persistently neglects or refuses to take advantage of available legal representation.

The rights in s 25(2)(b) and (h) did not confer rights having a content extending beyond the common law right to a fair trial and were specific aspects and explications of that larger right which were not relied on by Mr Davies.

The rights under s 25(2)(d) and (f) are conditional on eligibility under the *Legal Aid Act 1978* and do not confer an entitlement to legal assistance independent of that Act.

The Court found it unnecessary to pursue this avenue further as Mr Davies' arguments on his right to a fair trial could be determined without considering the Charter or the notion of 'equality of arms'.



LG v Melbourne Health [2019] VSC 183

22 March 2019

Richards J

Charter provisions: ss 8, 12, 13, 33, 38

Summary

The plaintiff was an 85 year old woman who lived with her son. She had a fall, dislocated her shoulder and was admitted to a hospital operated by the defendant. After undergoing initial treatment, the plaintiff was transferred to an aged care ward. She was bed bound and needed a high level of assistance with mobility and personal care. Hospital staff became concerned as to whether the plaintiff could be adequately cared for at home. The plaintiff wished to return home, and her son wanted to take her home. A neuropsychologist assessed the plaintiff as having a cognitive disability (likely dementia), which impaired her capacity to make informed and reasonable decisions. The plaintiff's son had previously been appointed as the plaintiff's enduring guardian and enduring power of attorney.

Conflict between the hospital staff and the plaintiff's son escalated, and on 15 January 2018 a social worker employed by the defendant applied to the Victorian Civil and Administrative Tribunal ('VCAT') for orders under the *Guardianship and Administration Act 1986* ('Guardianship Act'). After an initial bedside hearing, which was adjourned to enable the Public Advocate to complete an investigation and report to VCAT, on 16 April 2018 VCAT made orders appointing the Public Advocate as limited guardian for the plaintiff, and the State Trustees Limited as her administrator. VCAT gave brief oral reasons, but not written reasons.

The plaintiff and her son appealed to the Supreme Court, raising a number of questions of law. One of those questions surrounded whether VCAT erred in law in failing to give proper consideration to the plaintiff's human rights when exercising its discretion to appoint a limited guardian and an administrator. Another three concerned whether VCAT should have referred certain questions of law pursuant to s 33(1) of the Charter.

Judgment

Richards J noted that s 38(1) of the Charter provided that it was unlawful for a public authority to act in a way that was incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Following *PJB v Melbourne Health (2011) 39 VR 373* ('Patrick's case'), her Honour also identified that in relation to its jurisdiction under the Guardianship Act, VCAT is a public authority. A number of rights in the Charter were found to be engaged in the circumstances, including the right to equal protection of the law without discrimination (s 8(3)), the freedom to choose where to live (s 12), and the right of LG not to have her privacy and home arbitrarily interfered with (s 13(a)).

In her Honour's view, the authorities demonstrated that VCAT was required to seriously turn its mind to the possible impact of the decision on LG's human rights and the implications for her of a guardianship and administration order, identifying and balancing the competing interests. Such consideration, while not needing to be a sophisticated exercise, needed to be genuine and not formulaic. Richards J also recognised the overlap between VCAT's obligations under s 38(1) of the Charter and the analysis required under ss 4(2), 22 and 46 of the Guardianship Act, noting that where VCAT has had regard to the latter sections, it would go a long way towards having properly considered relevant human rights.

Although the defendant submitted that VCAT was looking at LG's welfare and safety, Richards J found that that did not come close to a proper consideration of her rights. Good intentions were not enough, and the human rights implications of a guardianship or administration order had been comprehensively canvassed in Patrick's case. VCAT's reasons contained no sign at all that it had turned its mind to the human rights implications of the orders made. As such it had erred at law and the appeal on this issue was allowed.



In relation to the plaintiff's assertion that certain questions should have been referred to the Supreme Court under s 33 of the Charter, the first two questions surrounded the fairness of relying on the evidence of the neuropsychologist and a doctor employed by the defendant. Richards J did not find any error in VCAT's approach, noting that questions of evidence and procedure are first and foremost a matter for VCAT. Any question of law regarding VCAT's decision in this regard could be appealed via s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998*. The third question concerned whether VCAT understood its power to make the referral under s 33(1) of the Charter, and the fourth was whether the restraint of LG by the defendant was a breach of the Charter.

According to Richards J, VCAT did not make an error of law regarding the former, and in relation to the latter, her Honour could not see how the question arose in the circumstances – VCAT was not asked to determine whether LG had been detained, or the lawfulness of any detention. As such, it was not a question that could be the subject of a referral under s 33(1) of the Charter.



***Djime v Kearnes* [2019] VSC 117**

28 February 2019

Cavanough J

Charter provisions: ss 8, 12, 15, 35, 39

Summary

Mr Djime brought a proceeding in the Victorian Civil and Administrative Tribunal ('VCAT') against Victoria Police and certain Victoria Police members, claiming that he had been subject to sexual harassment, racial discrimination, racial vilification, victimisation and contraventions of his human rights. Mr Djime's claims related to interactions said to have occurred between himself and police on a number of occasions between 2008 and 2014. Mr Djime relied on the *Equal Opportunity Act 2010* ('EO Act'), the *Racial and Religious Tolerance Act 2001* and the Charter.

VCAT summarily dismissed 21 of Mr Djime's 27 claims as misconceived or as lacking in substance and, after several further hearing days, dismissed the remaining six claims as not having been proved. Mr Djime sought leave to appeal the decisions under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*.

Judgment

Cavanough J refused leave to appeal.

At VCAT, Mr Djime had claimed that his freedom of movement under s 15 of the Charter had been infringed when he was prevented from boarding a train. The Member hearing the proceeding had declined to consider that allegation on the basis that a parallel discrimination claim under the EO Act in respect of the same circumstances had been dismissed, meaning the Charter claim could not proceed.

Cavanough J stated that it had not been suggested that the discrimination claim was made merely colourably, in order to enable Mr Djime to bring a claim under s 39 of the Charter. In those circumstances it seemed to his Honour that the mere fact the discrimination claim had been dismissed did not render the corresponding Charter claim inadmissible.

However, his Honour stated that even if this was legal error on the part of VCAT it remained inappropriate to grant Mr Djime leave to appeal on this ground as the claim was found to be lacking in substance on the evidence and facts. Furthermore, by reason of s 39(3) of the Charter there is, at the least, a very real doubt as to whether VCAT would have the power to award Mr Djime monetary compensation for breaches of the Charter in the manner sought.



Re Application for Bail by Rebecca Dillon [2019] VSC 80

22 February 2019

Maxwell P

Charter provisions: ss 6, 7, 32

Summary

This matter concerned an application for bail made by Rebecca Dillon ('applicant') on 23 November 2018. The applicant was a 23 year old woman with an intellectual disability, who had experienced a troubled upbringing. The applicant had a criminal history, without conviction, dating back to 2010, which included offences of violence, threats to kill, resisting police, dishonesty, property damage and failing to answer bail.

On 26 October 2018, the applicant was charged with offences of criminal damage, causing a false fire alarm to be given (later withdrawn) and committing an indictable offence whilst on bail. At the time of the alleged offending the applicant was on bail in respect of nine outstanding matters. The applicant was also subject to a family violence intervention order ('FVIO') naming her ex-partner and her daughter as affected family members. Committing an indictable offence whilst on bail was a Schedule 2 offence under the *Bail Act 1977* ('the Act'). As the offence was allegedly committed while the applicant was on bail for another Schedule 2 offence (persistent contravention of an FVIO), the Act required bail be refused unless the court was satisfied that exceptional circumstances existed justifying the grant of bail, and that there was no unacceptable risk.

Judgment

Maxwell P was satisfied that exceptional circumstances existed justifying the grant of bail and that there was no unacceptable risk, and accordingly granted bail.

The first statutory hurdle was the existence of exceptional circumstances justifying the grant of bail. The applicant submitted that unless she were granted bail, she would have been on remand for 58 days by the time she came to be sentenced in relation to the charges. Given the applicant was highly unlikely to receive a custodial sentence, the remand period would have exceeded the sentence ultimately imposed. On this basis, the respondent conceded that exceptional circumstances existed. Maxwell P considered the concession to have been properly made.

The respondent's opposition to the applicant's bail application rested, rather, on what was said to be an unacceptable risk that the applicant would, if released on bail, commit an offence or offences. In this regard the respondent relied on the applicant's extensive criminal history, including her multiple charges of failure to answer bail.

Maxwell P held that while there was a risk of further offending, the risk was not unacceptable. The applicant's prior offences were relatively minor, and mostly from an earlier period. Further, until the alleged criminal damage offence in October 2018, there had been a period of 18 months without the applicant facing any charge whatsoever. This was a significant indicator of the applicant's prospects for rehabilitation and her ability to be in the community without offending. Finally, Maxwell P cited J Forrest J in *Re Kyle Magee* [2009] VSC 384, that a citizen should not be arbitrarily detained because there is a real risk of them committing a further offence of a relatively minor nature.

On 26 November 2018 the applicant filed notices with the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission under the Charter, submitting that the application raised questions in respect of the interpretation of ss 4A, 4E and 3AAA of the *Bail Act 1977* ('the Act').

Section 4A of the Act provided for the circumstances in which a two-step test applied to the consideration of a grant of bail, s 4E of the Act required the court to refuse bail if the prosecutor satisfied the court that



there [wa]s an unacceptable risk that the applicant would engage in certain behaviour while on bail, and s 3AAA of the Act set out the surrounding circumstances the court must take into account when determining whether exceptional circumstances exist.

The applicant submitted that the questions to be answered were:

- Whether s 32 of the Charter required the tests in ss 4A and 4E of the Act to be interpreted in a manner that only allowed bail to be refused where to do so would be a reasonably necessary limit on Charter rights, in accordance with s 7(2) of the Charter?
- Whether the applicant's Charter rights formed part of the 'surrounding circumstances' to which the court must have regard when making a decision under ss 4A and 4E of the Act, where those rights could be limited by a decision to refuse bail?
- Whether s 6(2)(b) of the Charter required the court when exercising the discretions under ss 4A and 4E of the Act to have regard to the content of the applicant's Charter rights as part of the proper exercise of those discretions?

Maxwell P was able to determine the bail application without needing to address the interpretation questions. His Honour commented that the questions must await a case where they needed to be answered.



Nguyen v Director of Public Prosecutions (Vic) [2019] VSCA 20

13 February 2019

Maxwell P, Tate and Niall JJA

Charter provisions: ss 24, 32

Summary

On 27 October 2015, Judge Carmody of the County Court made an *ex parte* unexplained wealth restraining order pursuant to s 40I of the *Confiscation Act 1997* ('the Act'). The order prohibited any person from disposing of or otherwise dealing with five properties. On 9 October 2017, Judge Carmody made a subsequent order declaring that the restrained properties had been forfeited to the Minister. Ms Nguyen was the registered owner of three of these properties.

In the Court of Appeal Ms Nguyen challenged the constitutional validity of s 40I of the Act. Among other things, Ms Nguyen argued that the Act did not preserve any right of the respondent to an *ex parte* restraining order to participate in an *inter partes* hearing, and that therefore s 40I conferred powers or functions incompatible with, or repugnant to, the exercise of federal judicial power, thus offending the *Kable* principle.

Arguing for the validity of s 40I, the Director of Public Prosecutions contended that the Act preserved the right of a respondent to an *ex parte* restraining order to participate in an *inter partes* hearing through both the inherent power of a court to discharge an *ex parte* order and the general power of the Court to make any orders it considers just, under s 40W of the Act. Ms Nguyen argued that the Act excluded this inherent power of the court and that s 40W did not permit a rehearing of an application for an unexplained wealth restraining order.

Judgment

The Court of Appeal granted leave to appeal but held that s 40I of the Act is constitutionally valid and accordingly dismissed the appeal.

Tate JA (Maxwell P and Niall JA agreeing) construed s 40W of the Act as extending to the power to make orders setting aside restraining orders made *ex parte*. Her Honour noted that such an interpretation ensures that s 40W is compatible with the right to a fair hearing under s 24(1) of the Charter. Her Honour also stated that such an interpretation was supported by the principle of legality and the consideration that at common law forfeiture regimes are construed strictly. The need for the Act as a whole to be interpreted compatibly with the Charter, under s 32(1), also supported her Honour's conclusion that the Act that does not exclude the inherent power of a court to discharge an *ex parte* order.



Victorian Legal Services Commissioner v McDonald [2019] VSCA 18

13 February 2019

Tate, Kaye and Emerton JJA

Charter provisions: ss 15, 32

Summary

Mr McDonald was a legal practitioner. While acting for an employee in a redundancy dispute, he sent correspondence to his opposing solicitors, Lander & Rogers, accusing the responsible solicitor of being ‘fundamentally dishonest’, having ‘told lies’ and having engaged in ‘deliberate and calculated dishonesty’. Mr McDonald made the allegations because he believed that the solicitor had misrepresented a telephone conversation that had taken place between the two.

Lander & Rogers referred Mr McDonald to the Legal Services Commissioner (‘Commissioner’) on the grounds of discourtesy. The Commissioner subsequently brought proceedings against Mr McDonald in VCAT. VCAT accepted that Mr McDonald honestly believed that the solicitor had lied to him. However, without taking this into account, VCAT held that Mr McDonald was not acting in the legitimate pursuit of his client’s best interests when he made the allegations. VCAT found him guilty of two charges of unsatisfactory professional conduct for breaches of r 21 of the Professional Conduct and Practice Rules.

Mr McDonald applied to the Supreme Court for leave to appeal VCAT’s decision. He submitted that VCAT erred by failing to take into account his honest belief that he had been lied to. Mr McDonald submitted that this honest belief meant that he had a reasonable basis for making the allegations, and this reasonable basis informed the exercise of his duty to make the allegations in the legitimate pursuit of his client’s best interests. Bell J dismissed the two charges of unsatisfactory professional conduct. In doing so, he relied especially on the right to freedom of expression under s 15(2) of the Charter. The Commissioner sought leave to appeal.

The Court of Appeal granted leave to appeal and allowed the appeal. It held that Bell J erred by failing to recognise that VCAT applied the correct legal test to arrive at the decision that the two charges against Mr McDonald were proved. It also held that Bell J, in making findings of fact that conflicted with those made by VCAT, exceeded jurisdiction under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998*.

Judgment

The Court agreed with the following analysis of Bell J of r 21:

First, the duty of a practitioner to be robust in defending a client’s interests, and the freedom of expression protected by the Charter, support an interpretation of r 21 that imposes a limit on freedom of expression only to the extent necessary to achieve its purpose. As such, the rule only prohibits discourteous, offensive or insulting language or conduct that represents a failure to take reasonable care of the reputation or integrity of the legal profession.

Second, as a subordinate instrument, r 21 is a ‘statutory provision’ that falls to be interpreted under s 32 of the Charter ‘in a way that is compatible with human rights’, ‘[s]o far as it is possible to do so consistently with [its] purpose’.

Third, r 21 was compatible with human rights when applied and interpreted in the light of its fundamental purpose. That purpose is to maintain the integrity and reputation of the legal profession and public confidence in the administration of justice.

Fourth, r 21 should be read as prohibiting only communications which undermine public confidence in the legal system. The rule only limits the exercise of so much of the right to freedom of expression as is necessary to preserve the integrity and reputation of the legal profession and public confidence in the



administration of justice. The rule only prohibits discourteous, offensive or insulting language or conduct that represents a failure to take reasonable care of the reputation or integrity of the legal profession.



***Carbone v Melton City Council* [2018] VSC 812**

21 December 2018

Emerton JA

Charter provisions: ss 20, 32

Summary

The plaintiffs were property owners seeking to subdivide their land and sell it to a property developer. The land could only be subdivided once certain amendments were made to the Melton Planning Scheme, and once the plan of subdivision depicted that specified parts of the land were to be reserved for the defendant. The amendments to the Melton Planning Scheme included incorporation of a Precinct Structure Plan and Development Contributions Plan ('DCP'). The plan of subdivision was registered such that the specified areas of land were transferred from the plaintiffs to the defendant.

The defendant then offered to pay the plaintiffs for the land in accordance with the DCP. However, the plaintiffs disputed that it was appropriate to calculate the value of the land by reference to the DCP. Instead, they asserted that compensation for the land should be in accordance with the *Land Acquisition and Compensation Act 1986* ('LAC Act'), as the land was acquired 'by compulsory process or by agreement' for the purposes of s 4 of that Act. In this regard, the plaintiffs argued amongst other things, that s 32(1) of the Charter provided that so far it is possible to do so, all statutory provisions must be interpreted in a way that is compatible with human rights. Relevantly, s 20 of the Charter provided that a 'person must not be deprived of his or her property other than in accordance with law'. According to the plaintiffs, if s 4 of the LAC Act did not extend to cover a class of acquisitions by a public authority with the power to compulsorily acquire, then the LAC Act would operate arbitrarily and not in accordance with the law in the sense required by s 20 of the Charter.

Judgment

Emerton JA accepted that s 4 of the LAC Act, as beneficial legislation aimed at providing just compensation to person whose interest in land is divested or diminished for public purposes, should be given a broad construction. Such a construction was also supported by the extrinsic material, and the Charter. Regarding the Charter, her Honour determined that it required a broad construction that protected the position of landowners who may be overborne by government fire-power.

However, despite this, s 4 was found not to apply in the circumstances. The plaintiffs voluntarily transferred the land and it could not be said that there was 'an agreement' between the plaintiffs and defendants for the purposes of s 4. Further, even if s 4 applied, there were difficulties applying Part 2 of the LAC Act to circumstances where the transfer of land took place at the initiative of the owner by way of the registration of a plan of subdivision according with the requirements of the relevant applicable planning controls.

Her Honour concluded that the LAC Act did not apply to the vesting of the subject land in the Council through the registration of the plan of subdivision. The Charter requirement to interpret statutory provisions in a manner compatible with human rights did not affect this conclusion.



***DPP v Rayment* [2018] VSC 663**

2 November 2018

Taylor J

Charter provisions: ss 7, 12, 32

Summary

Section 60B of the *Crimes Act 1958* ('Act'), at the relevant time, made it an offence for any person convicted of a 'sexual offence' to be found 'loitering without reasonable excuse in or near...a school, a children's services centre or an education and care service premises'. The respondent, Mr Rayment, was found guilty in 2002 of indecent assault, a 'sexual offence' within the meaning of s 60B. On 14 February 2017, Mr Rayment was observed in the vicinity of a girls' school in Victoria for approximately 20 minutes at the end of the school day. When later questioned by police, Mr Rayment stated that he was there to meet a student of the college, 'Leah', who had rung him to request that he bring her a rose for Valentine's Day. However, he could not provide 'Leah's' telephone number to police.

Mr Rayment was charged in the Magistrates' Court with contravening s 60B. It was agreed that he had been convicted of a sexual offence and was knowingly in the vicinity of a school. However, Mr Rayment submitted that he had not been 'loitering', as he had been in the area for a purpose (namely, to meet 'Leah'), and the concept of loitering 'conveyed a concept of idleness, lack of purpose or indolence'. Alternatively, it was argued that if Mr Rayment had been loitering, he had a reasonable excuse (again, meeting 'Leah'). The Magistrate dismissed the charge, accepting in her reasoning the respondent's submission that the element of 'loitering' required a proof of a 'lack of purpose' or at least something more than mere attendance or presence.

The DPP appealed the Magistrate's decision to the Supreme Court of Victoria. The Attorney-General for Victoria intervened in the Supreme Court proceeding, submitting alongside the respondent that the case engaged and required consideration of s 12 of the Charter, namely the right to move freely within Victoria.

Judgment

Taylor J upheld the appeal. Her Honour held that a correct analysis of both the statute itself and historical case law considering the concept of 'loitering' demonstrated that loitering in the context of s 60B 'should not be construed as to require proof of a lack of purpose or unlawful purpose.' Her Honour held that to establish loitering, it is sufficient 'that a person in the prohibited circumstances 'hangs about' or idles'. Mr Rayment therefore satisfied s 60B merely by being present in the vicinity of the school, being a person to whom s 60B applied. Taylor J further held that Mr Rayment's reason for being in the vicinity of the school did not amount to a 'reasonable excuse' under the Act.

Having made this determination, Taylor J went on to consider the impact of the Charter on the interpretation and application of s 60B. Her Honour agreed with the submissions of the respondent and the Victorian Attorney-General that s 60B engaged s 12 of the Charter. As a result, s 32(1) of the Charter required s 60B to be interpreted compatibly with human rights, '[s]o far as it is possible to do so consistently with [its] purpose'. However, Taylor J held that there was only one available construction of the word 'loitering' in s 60B. As a result, there was no ambiguity in the provision and there was 'no constructional choice to be resolved by s 32(1) of the Charter'.

Further, Taylor J held that even if s 32(1) of the Charter were engaged, s 60B was a justified restriction on the right to freedom of movement within Victoria. This was so because of the important objective served by s 60B, namely the protection of children from the risk of sexual offending.



PBU and NJE v Mental Health Tribunal [2018] VSC 564

1 November 2018

Bell J

Charter provisions: ss 7, 8, 10, 13, 38

Summary

In this decision, two separate proceedings were heard together as they raised common issues concerning application of the *Mental Health Act 2014* ('Act'). The plaintiffs in each proceeding, PBU and NJE, were both compulsory inpatients at hospitals. The Mental Health Tribunal ('MHT'), and then the Victorian Civil and Administrative Tribunal ('VCAT') upon review, had determined that PBU and NJE were to compulsorily receive electroconvulsive therapy ('ECT'). The plaintiffs appealed VCAT's decisions, asserting a number of errors of law. The named defendants in each proceeding were the health service providers and the MHT. The MHT filed appearances and the health service providers took no part in the proceeding. However, as is common, the Secretary of the Department of Health and Human Services ('Secretary') assisted the Court as *amicus curiae*.

PBU had been diagnosed with schizophrenia, and was subject to an inpatient treatment order under s 45(3) of the Act. He showed limited insight into his psychiatric condition and had received ECT previously. On the application of hospital staff, the MHT ordered that PBU have a course of ECT. The orders were stayed when PBU applied to VCAT for review. Extensive medical evidence was given that: ECT was the only currently available treatment for PBU; that his condition was slowly deteriorating; and that he had refused to take other treatment. PBU accepted that he had mental health problems but denied that he had schizophrenia. In his view, he was suffering from depression, anxiety and post-traumatic stress disorder, and he was willing to have treatment for those conditions. He did not wish to have ECT, and wished to be discharged to a prevention and recovery centre before being discharged home.

In determining PBU's case, VCAT accepted that it was acting as a public authority for the purposes of s 38(1) of the Charter, and also that so far as possible, it had to interpret the provisions of the Act consistently with the Charter (s 32(1)). It also recognised that a number of Charter rights were engaged, including the right to freedom from medical treatment without full, free and informed consent (s 10(c)), the right to move freely within Victoria (s 12), and the right not to have one's privacy unlawfully or arbitrarily interfered with. In accordance with s 96(1)(a)(i) of the Act, VCAT had to decide whether it was satisfied that PBU did not have capacity to give informed consent under s 68(1) and, if so, whether there was no less restrictive way for him to be treated. Section 68(1) provided:

- (2) A person has the capacity to give informed consent under this Act if the person—
 - (a) understands the information he or she is given that is relevant to the decision; and
 - (b) is able to remember the information that is relevant to the decision; and
 - (c) is able to use or weigh information that is relevant to the decision; and
 - (d) is able to communicate the decision he or she makes by speech, gestures or any other means.

VCAT found that PBU understood the information that he was given about ECT, but ss 68(1)(b)-(d) were not specifically applied. Rather, it accepted that PBU did not have capacity because he did not agree with the diagnosis of schizophrenia. Further, in VCAT's view there were no less restrictive treatment options available.

NJE had also been diagnosed with treatment resistant schizophrenia. At the time of her VCAT hearing she was compliant with her oral and depot medication regime. The medical evidence was that NJE could read and understand the information given to her about ECT. However, she did not accept that she had treatment resistant schizophrenia, and was said to suffer from grandiose delusions and hallucinations. She



was frequently active and awake at night, saying that she was working as a psychic healer. Attempts to discuss ECT with NJE distressed her. She was concerned that the ECT may cause her to have memory problems and she preferred other treatment, including remaining in hospital for an extended period and trialling alternative medications.

VCAT concluded that NJE satisfied ss 68(1)(a)(b) and (d), however, she was unable to use and weigh information for the purposes of s 68(1)(c). In this regard, she could not ‘carefully consider the advantages and disadvantages of a situation or proposal before making a decision’, as she could not be persuaded that the information was relevant to her, because she believed that she did not have a mental illness. Additionally, VCAT accepted that no less restrictive treatment options were available.

A common ground of appeal brought by both PBU and NJE was that VCAT erred in law in interpreting and applying the ‘capacity to give informed consent’ test in s 96(1). This raised issues of law surrounding how the Charter applied to the operation of the Act and the interpretation of its provisions.

Judgment

Bell J commenced his reasons with an overview of the Act, noting that its central purpose was to establish a ‘legislative scheme for the assessment of persons who appear to have mental illness and for the treatment of persons with mental illness’. His Honour identified that regarding legal capacity, the relevant rights were the right to self-determination, to be free of non-consensual treatment and to personal inviolability. Where the Act authorised compulsory treatment or other interference with those rights, it was intended to be justified according to human rights standards, including the least infringement principle. That intention was expressed in s 10 of the Act, the Act’s objectives, and the mental health principles set out in s 11(1). In particular, s 10(c) stated an objective to ‘protect the rights of persons receiving assessment and treatment’ and s 11(1)(e) provided that ‘persons receiving mental health services should have their rights, dignity and autonomy respected and promoted’.

In his Honour’s view, consistently with the right to self-determination, to be free of non-consensual medical treatment and to personal inviolability, the objectives and principles of the Act emphasised enabling and supporting decision-making, and participation in decision-making, including the dignity of risk (that is, being allowed to make decisions about their care that involve a degree of risk). Further, respecting the views and preferences of the person was emphasised. Overall, the objectives and principles, together with the operative provisions of the Act, were viewed as intending to ‘alter the balance of power between medical authority and persons having mental illness in the direction of respecting their inherent dignity and human rights’.

His Honour then turned to consider the human rights of persons with mental disability. In this regard he discussed the *Convention on the Rights of Persons with Disabilities* (‘CRPD’) and the Charter, noting contemporary mental health reform, including the Act, and the universal character of human rights and the equal application of those rights to people with mental disabilities. Bell J also identified the role of the right to health, as recognised in the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’) and the CRPD. Although his Honour recognised that the right to health was not legislated as such in the Act, its provisions had the central purpose of ensuring that ‘people with mental disability have access to treatment from mental illness and attain a state of recovery and full participation in the life of the community’. They also had the purpose, supported by the Charter, of ‘ensuring that the rights to self-determination, to be free of non-consensual medical treatment and to personal inviolability’ were respected in treating mental ill-health and assessing capacity. In his Honour’s view, the two purposes were connected and in various ways, the Act promoted the right to health of the patient, broadly understood.

Bell J then considered which Charter rights were engaged, noting that such an inquiry warranted more than a ‘mere salute’ in passing and instead required ascertaining and understanding ‘the meaning of the right in a purposive way by reference to the values and interests that it respects and protects’. His Honour rejected the submission that s 68(1) did not engage a right in the Charter. Rather, an assessment under s 68(1) that



a person did not have capacity formed the foundation for compulsory ECT, taking away the person's fundamental right to refuse that treatment, constituting an immediate injury to their individual dignity. A determination of incapacity under s 96(1)(a)(i) of the Act was found to potentially limit numerous rights, but particularly pertinent were:

- **Equality before the law – s8(3)**

Bell J identified equality before the law as the keystone in the protective arch of the human rights framework. Following *Matsoukatidou v Yarra Ranges City Council* (2017) 51 VR 624, his Honour recognised three elements of the right: the right to equality before the law; the right to equal protection of the law without discrimination; and the right to equal and effective protection against discrimination. The last two elements were considered to be engaged in relation to ss 68(1) and 96(1)(a)(i) of the Act. In this regard, his Honour noted that the patient 'may only be subjected to the assessment and treatment by reason of having a mental illness that brings the patient within the regime of the legislation', when people without such an illness are 'free of both'. As such, in content and application, the capacity test in s 68(1) must be demonstrably justified, in accordance with s 7(2) of the Charter. In his Honour's view, equality was a powerful principle regarding the interpretation and application of the capacity assessment criteria in s 68(1), as it is similarly recognised in relation to the common law test for capacity. The provisions must be interpreted in a way to ensure that the rights of self-determination, being free of non-consensual medical treatment, and to personal inviolability of people with a mental disability were 'protected just as much as persons without a disability'.

- **Freedom from non-consensual medical treatment**

The right to be free of non-consensual medical treatment provided for in s 10(c) of the Charter was discussed in *Kracke v Mental Health Board* (2009) 29 VAR 1. Bell J considered comments from that case, including the notion that the right to refuse is of particular importance because 'it respects the personal dignity and autonomy of people with mental illness, as apposite.

- **Privacy**

Bell J noted that s 13(a) of the Charter includes a right not to have one's privacy unlawfully or arbitrarily interfered with. In his Honour's view, a purpose of the right to privacy was to protect people with mental disability from interference in their lives, and facilitate full participation in society on an equal basis with others. Following *Director of Housing v Sudi* (2010) 33 VAR 139, as well as decisions of international courts, his Honour stated that the right to privacy had two related dimensions of direct relevance to people with mental disability in the capacity context: self-determination and personal inviolability.

Bell J returned to these principles, equal respect for human rights, particularly the rights to self-determination, to be free of non-consensual medical treatment, and to personal inviolability, a number of times through-out his reasons. His Honour also considered principles of capacity at common law, emphasising that they too recognised notions of self-determination, personal inviolability, the presumption of capacity and avoiding discrimination.

His Honour went on to identify the following ten principles:

- (k) The primary purpose of the Act was to ensure people with mental illness, including those lacking the capacity to give informed consent, receive treatment for their illness. 'But the legislative intention is that this is to be done in a manner affording equal respect for their human rights, particularly the right to self-determination, to be free of non-consensual medical treatment and to personal inviolability, as recognised by the Charter';
- (l) There is a rebuttable presumption that people with mental illness have capacity to give informed consent;



- (m) The test in s 68(1) is ‘primarily a functional one in which the question is whether the person has the ability to remember and use or weigh relevant information and communicate a decision, not whether a person has actually done so’;
- (n) The capacity test must be applied in a non-discriminatory manner –it is not to be applied so as to produce social conformity at the expense of personal autonomy;
- (o) ‘A person with mental illness is not to be found lacking the capacity to give informed consent simply by reason of making a decision that could be considered unwise’;
- (p) Reflecting human rights principles, the Act rejects the best-interests paradigm for decision-making in health care. Rather, the assessment of capacity is to be ‘evidence-based, patient-centred, criteria-focussed and non-judgmental’, and not made to depend on a so-called reasonable outcome;
- (q) The threshold for capacity is a relatively low one, requiring only that the person ‘understands and is able to remember and use or weigh the relevant information and communicate a decision in terms of the general nature, purpose and effect of the treatment’;
- (r) Depending upon the facts of the case, a ‘person with mental illness may lack insight or otherwise not accept or believe that the person has a mental illness or needs treatment’, yet may still have the capacity to give informed consent;
- (s) The *Briginshaw v Briginshaw* (1938) 60 CLR 336 standard is applicable when establishing lack of capacity to give informed consent; and
- (t) The provisions of the Act are ‘predicated upon the central purpose of ensuring that persons with mental illness have access to an receive medical treatment, consistently with the person’s right to health’.

Turning to the facts at hand, Bell J determined that the VCAT incorrectly ‘based its finding that PBU lacked capacity upon his non-acceptance of the diagnosis of schizophrenia’. Other than the domain of understanding in s68(1)(a), VCAT did not separately consider ss 68(1)((b) – (d). In relation to NJE, VCAT did not make the same error, as it explicitly considered each of the criteria in ss 68(1)(a) – (d). Rather, VCAT erred in both reading to ‘use or weigh’ the relevant information as requiring the person to ‘carefully consider the advantages and disadvantages of a situation or proposal’, and in focussing upon whether NJE had ‘actually considered the advantages and disadvantages of the decision, not whether she had the ability to use or weigh the relevant information’. In Bell J’s view, a functional approach and relatively low threshold in relation to the issue of capacity was ‘underpinned by respect for the right to self-determination, to be free of non-consensual medical treatment and to personal inviolability, and for the dignity of the person’. Ultimately, VCAT erred in law by interpreting and applying the capacity test in the Act ‘incompatibly with the human rights of PBU and NJE under the Charter’.

Turning to the second condition of s 96(1), that there be ‘no less restrictive treatment’, Bell J viewed such a requirement as an important human rights safeguard that, alongside the requirement to take the views and preferences of the patient into account, represented a ‘paradigm shift in the design of mental health legislation’. In his Honour’s view, it corresponded to ‘one element of the proportionality requirement which human rights law applies to ensure that interference with the exercise or enjoyment of human rights only occurs where justified’. However his Honour rejected the submission of PBU and NJE that the compulsory treatment had to be confined to the purpose of ‘immediately preventing serious deterioration in the person’s mental or physical health or serious harm to the person or another’ (s 5(b)), as such an approach was not supported by the language and structure of the legislation, and would have been incompatible with the person’s right to health. As such, VCAT did not err in the application of this aspect of the test.



***Gullquist v Victorian Legal Services Commissioner* [2018] VSCA 259**

11 October 2018

Maxwell P, Tate and Priest JJA

Charter provisions: s 15

Summary

This matter was an appeal from the decision of John Dixon J in *Gullquist v Victorian Legal Services Commissioner* [2017] VSC 763.

In January 2017 VCAT found the applicant guilty of professional misconduct within the meaning of s 4.4.3(1)(a) of the *Legal Profession Act 2004* in that he had engaged in conduct involving a substantial failure to reach or maintain a reasonable standard of competence and diligence. The finding related to five letters the applicant sent the Local Court of New South Wales while proceedings were on foot in that Court, including three addressed personally to the Magistrate, none of which he copied to his opponent.

VCAT ordered that the applicant be reprimanded and undertake an additional five CPD units in ethics and professional responsibilities over the following 12 months. VCAT also limited the applicant's ability to send correspondence to judicial or quasi-judicial officers without first obtaining the approval of a senior practitioner approved by the respondent.

The applicant sought leave to appeal to the Supreme Court against the findings and orders. John Dixon J refused the applicant leave to appeal. The applicant then sought leave to appeal the order of John Dixon J.

Among other things, the applicant submitted that s 15 of the Charter permitted him to send the letters, and that r 18.5 of the *Professional Conduct and Practice Rules 2005* ('Rules') had to be read down so as to make him not guilty of professional misconduct or unsatisfactory professional conduct. In support of his Charter argument, the applicant relied on the decision of Bell J in *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89 ('McDonald').**

Judgment

Tate, Beach and McLeish JJA concluded that the applicant's appeal had no real prospect of success and refused leave to appeal. The applicant's grounds of appeal were variously held to be irrelevant, misconceived or without merit.

Their Honours relevantly rejected the applicant's submissions concerning the Charter, holding that while the applicant's submissions had relied extensively upon Bell J's decision in *McDonald*, *McDonald* was of no assistance.

- *McDonald* concerned an allegation made against a solicitor of unsatisfactory professional conduct in writing letters to another solicitor, which letters were alleged to have breached a rule requiring solicitors to take all reasonable care to maintain the integrity and reputation of the legal profession 'by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct'. In *McDonald*, Bell J accepted that the solicitor who wrote the impugned correspondence did so in an honest belief that he had been lied to by his opponent and that an offer of compromise made by his opponent was not genuine.

The honest belief in *McDonald* was to be contrasted with the current proceeding, in which the applicant had not given evidence at VCAT. There was accordingly no basis to make a finding as to the applicant's state of mind when the letters were sent.



Their Honours concluded that the applicant's reliance on the Charter did not assist him. The breach of r 18.6 was the gravamen of the charge (sending *ex parte* communications to a judicial officer about a proceeding still on foot before that judicial officer). Nothing in the Charter, including s 15, permitted the applicant to communicate about the proceeding in which he and his opponent were involved, in the absence of his opponent, with the Magistrate who was hearing the proceeding, in clear contravention of professional rules.

***McDonald* since overturned in *Victorian Legal Services Commissioner v McDonald* [2019] VSCA 18.



United Firefighters Union of Australia v Victorian Equal Opportunity and Human Rights Commission [2018] VSCA 252

4 October 2018

Maxwell P, Tate and Priest JJA

Charter provisions: s 41

Summary

This matter was an appeal from the decision of Ginnane J in *United Firefighters' Union v VEOHRC & Anor* [2017] VSC 773.

The proceeding concerned a specific function conferred on the Commission by s 151(1) of the *Equal Opportunity Act 2010* ('Act'), which provided that 'on the request of a person, the Commission may enter into an agreement with the person to review that person's programs and practices to determine their compliance with this Act'. The proceeding also concerned a cognate function conferred on the Commission by s 41(c) of the Charter, which provides that the Commission, in relation to the Charter, had the function of 'when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights'.

In 2016 the Commission commenced a review into workplace discrimination within the Country Fire Authority ('CFA') and the Metropolitan Fire Brigade ('MFB') at the request of the Victorian Government. The Commission was asked to review the programs and practices of the CFA and the MFB and report on the nature and prevalence of discrimination, sexual harassment and victimisation among current CFA and MFB personnel (paid and voluntary) and those who left in or after 2010 ('Review').

The United Firefighters' Union ('Union') sought injunctions restraining the Commission from carrying out the Review. The Union also sought a declaration that the Review was beyond the Commission's power. The Union's applications were refused. It sought leave to appeal.

On appeal, the Union argued that the Review was not authorised by s 151(1). It submitted that a review could only be authorised under s 151(1) if the programs and practices to be reviewed were those of the person requesting the review. The Union argued that the programs and practices to be reviewed were those of the CFA and the MFB, who were separate legal persons from the person – the Victorian Government – which had requested the Review.

The Secretary to the Department of Justice and Regulation (as it then was) ('Secretary') argued that the Commission was not reviewing the program and practices of the CFA and the MFB but reviewing the CFA and the MFB themselves, as programs and practices of the Victorian Government. The Secretary submitted that while the Review was focused on the workplace practices of the CFA and the MFB, the effectiveness of fire services (for which the Victorian Government was responsible) was directly affected by the conditions of those workplaces (such as the prevalence of bullying within them). The Secretary accepted that the Act imposed duties on employers in relation to employees and the CFA and the MFB were the primary duty holders in that regard. However, the Secretary submitted that the accessorial liability provision in the Act created potential exposure for the Victorian Government, which gave it an interest in ensuring the MFB and CFA's compliance with the Act.

In the alternative, the Secretary argued that the Commission's conduct of the Review was supported by the Commission's functions and powers under ss 155, 157 and 152. The Secretary argued that the research function afforded to the Commission under s 157 and the advocacy function afforded to it under s 155(1)(b), were independent functions. Distinct from s 151, they provided authority for the carrying out of an online survey and – by implication – for the publication of the results.



Judgment

The Court of Appeal unanimously held that s 151(1) did not authorise the Review (by extension holding that the cognate function under s 41(c) of the Charter similarly did not do so). Maxwell P and Priest JA stated that what was requested was a review of the employment practices of two employers for compliance with the Act. When the employer in question is a statutory corporation with its own legal responsibilities, s 151(1) does not allow a different legal person – in this case, the Victorian Government – to request the Commission to review the employment practices of that employer. The policy underpinning s 151(1) is clearly to encourage a person who has obligations under the Act to seek the Commission’s assistance in improving its compliance with the Act. Provisions for the development of work plans under s 152(1) reinforce that legislative policy. However it is for the duty holder alone to request a review.

Maxwell P and Priest JA rejected the Secretary’s alternative argument with respect to the Commission’s powers and functions under ss 155, 157 and 152. Their Honours held that there was only one source of power to review a person’s programs and practices for compliance with the Act. This was s 151, which was only enlivened if that person requested a review.

Tate JA, writing separately, considered that a review required the exercise of the general powers of the Commission, which were capable of being enlivened in various ways and not only by the making of a request under s 151. Tate JA stated that the Commission had the power to conduct and complete the Review and publish its report in relation to the Review by reason of s 157 and associated provisions.



***Cemino v Cannan* [2018] VSC 535**

17 September 2018

Ginanne J

Charter provisions: ss 6, 8, 19, 32, 38

Summary

Mr Cemino was a 22 year old Indigenous Yorta Yorta man residing in Echuca. He sought judicial review of a decision made by the Magistrates' Court of Victoria, sitting at Echuca, to refuse his application to transfer criminal proceedings commenced against him to the Koori Court Division of the Magistrates' Court at Shepparton, pursuant to *Magistrates Court Act 1989* s 4F(2) ('Act'). There was no Koori Court Division at Echuca.

Section 4F(2) of the Act provides a discretion for a Magistrate to transfer proceedings to the Koori Court Division of the Magistrates' Court, whether sitting at the same or a different venue. The Magistrate refused the application, with a key basis of the decision his understanding of the importance of the 'proper venue' principle as discussed in *Rossi v Martland* (1994) 75 A Crim R 411 ('*Rossi*') that 'generally speaking, serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality'.

Mr Cemino challenged the Magistrate's decision on the grounds that:

- (3) by applying 'the principles of *Rossi*' in making the decision, the Magistrates' Court made an error of law on the face of the record or a jurisdictional error; and
- (4) in making the decision, the Magistrates' Court made an error of law on the face of the record, because it acted unlawfully under s 38(1) of the Charter or because it contravened s 6(2)(b) of the Charter.

Judgment

Ginnane J made orders quashing the Magistrate's decision and requiring the Magistrates' Court, differently constituted, to remake the decision according to law.

In relation to the first ground, Justice Ginnane held that the Magistrate's emphasis on the importance of the principles of *Rossi* meant he did not give appropriate consideration to the purposes of the Koori Court legislation and therefore failed to properly exercise the discretion under s 4F(2) of the Act.

In relation to the second ground, his Honour held that s 38(1) of the Charter did not apply to the Magistrates' Court as, in refusing the application under s 4F(2) of the Act, the Magistrate was acting in a judicial, rather than administrative, capacity. The Magistrates' Court was therefore not a 'public authority' under s 4(1)(j) of the Charter in this instance.

However, his Honour held that, by reason of s 6(2)(b) of the Charter, the Magistrates' Court was required to consider the functions of the Court under the third limb of s 8(3) of the Charter and under s 19(2)(a) of the Charter in making the decision to refuse the application under s 4F(2) of the Act. The Magistrate's failure to consider these functions amounted to an error of law on the face of the record.

In coming to that conclusion his Honour adopted the intermediate construction of s 6(2)(b) discussed in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, under which the Court's function is to enforce directly only those rights that relate to court proceedings. His Honour held that the rights in the third limb of s 8(3) directly apply to functions of courts and relate to court proceedings, while the cultural rights in s 19(2)(a) related to court proceedings to a certain extent as they are relevant to the obligation to take into account the purposes of the Koori Court legislation when exercising the discretion in s 4F(2) of the Act.



His Honour also considered that the interpretative principle in s 32(1) of the Charter meant that the proper exercise of the discretion contained in s 4F(2) of the Act required consideration of relevant human rights which, in this case, were those in the third limb of ss 8(3) and 19(2)(a). However, as this matter was not a ground of the plaintiff's further amended originating motion his Honour did not base his decision on it.



***Roberts v Harkness* (2018) 85 MVR 314; [2018] VSCA 215**

29 August 2018

Maxwell P, Beach and Niall JJA

Charter provisions: s 24

Summary

This matter concerned an appeal from the decision of Bell J in *Harkness v Roberts* [2017] VSC 646. The respondent, Mr Harkness, had originally been convicted of road safety offences in the Magistrates' Court of Victoria. Prior to the hearing in the Magistrates' Court, Mr Harkness filed a statement disputing the jurisdiction of the Magistrates' Court on the basis that the Magistrates' Court had not 'proven jurisdiction over the Blessing of Almighty God' and that the *Road Safety Act 1986* did not apply to him. The Magistrate hearing the charges dismissed Mr Harkness' objection to jurisdiction, and refused to hear further oral argument from him on the matter. Mr Harkness exhibited disrespectful and disruptive behaviour and was ultimately excluded from the courtroom. In his absence he was convicted on all but one charge.

Mr Harkness applied to the Supreme Court of Victoria for review of the Magistrate's decision on the basis that he had been denied natural justice. At first instance, Bell J held that the Magistrate's orders should be quashed and the matter remitted to be determined according to law. Bell J held that although the Magistrate was entitled to exclude Mr Harkness from the courtroom, she had denied him natural justice and breached his right to a fair hearing under s 24(1) of the Charter 'by rejecting his objections to jurisdiction without first hearing his oral submissions and by failing to provide him with due assistance in relation to those submissions.'

The police informant appealed Bell J's decision to the Court of Appeal. The Court of Appeal allowed the appeal, holding that there was no breach of natural justice and, consequently, Mr Harkness' rights under the Charter were not infringed.

Judgment

The Court of Appeal first considered the content of the right to a fair hearing under s 24(1) of the Charter, holding that the critical question is: 'What does the duty to act fairly require in the circumstances of the particular case?'. Circumstances that should be considered when determining the practical content of procedural fairness will include:

- 'The nature of the decision to be made;
- The nature and the complexity of the issues in dispute;
- The nature and complexity of the submissions which the party wishes to advance;
- The significance to that party of an adverse decision ('what is at stake'); and
- The competing demands on the time and resources of the court or tribunal.'

Maxwell P, Beach and Niall JJA observed that the statutory framework governing the decision-making process will be a key consideration in determining the content of fairness in a particular case. In this case, the applicable statutes were the *Magistrates' Court Act 1989* ('Act') and the *Magistrates' Court Criminal Procedure Rules 2009* ('Rules'). A 'main purpose' of the Act was expressed as allowing for the Magistrates' Court to be managed in a way that will ensure that optimum use is made of the Court's resources. The 'overriding objective' of the Rules was 'to enable the Court to secure the just and timely determination of every criminal proceeding', including 'ensuring an appropriate allocation of the Court's resources, while taking into account the needs of other cases'.

Their Honours held that this analysis framework does not change in any significant respect when one of the parties is an unrepresented litigant: 'The question to be asked – both at first instance and on judicial review



– remains the same: what is (or was) required to give the unrepresented person a reasonable opportunity to advance his/her own case and to be informed of and respond to the opposing case?'

However, their Honours noted that the 'key difference' in cases involving an unrepresented litigant is that the usual assumption as to the capability of represented litigants does not apply. In order to give content to procedural fairness, a Court will be required to 'assess the capability of the unrepresented person to formulate, and communicate, the case which he/she wishes to present'. The Court can make this assessment on the basis of documents filed by the unrepresented litigant and, in the case of an oral hearing, the quality of the unrepresented litigant's verbal communication with the Court. Critically, if the Court considers that the unrepresented litigant is seeking to make an arguable legal point but has not been able to articulate it, the duty to afford a fair hearing may require the Court to 'seek to elicit and elucidate the legal point, through exchanges with the litigant'. This burden, which can be a heavy one, can be ameliorated by pro bono assistance to the unrepresented person as well as through opposing parties and their lawyers acting fairly and in accordance with their overarching obligations.

Applying that analysis to Mr Harkness' case, the Court of Appeal held that there was no denial of procedural fairness by the Magistrate. It was appropriate that he had been asked to file submissions ahead of time, and those submissions demonstrated that he understood Court processes and could express himself and his stated position fluently and confidently. Fairness did not require, in those circumstances, that Mr Harkness be assisted in his objection to jurisdiction, and there was clearly no arguable legal point underlying his position that he had been unable to articulate. The Court of Appeal also held that even if there had been a breach of procedural fairness, the breach would not have been material.



***Haigh v Ryan* [2018] VSC 474**

24 August 2018

Ginnane J

Charter provisions: ss 7, 14, 15, 22, 32, 38

Summary

Mr Haigh was a prisoner. He practised what he described as Paganism and claimed that his religious observance involved the use of Tarot cards. Under policy documents describing prisoners' rights concerning religious practice, the prison refused him access to four Tarot cards. Mr Haigh sought judicial review of the prison's decision, relying on provisions of the *Corrections Act 1986* ('Act') and the Charter. He argued that the prison breached human rights conferred by the Charter and the Act. In particular, he said that his inability to use the Tarot cards was an unlawful limitation on his right to freedom of thought, conscience, religion and belief contained in s 14 of the Charter; his right to freedom of expression contained in s 15 of the Charter; and his right to humane treatment during imprisonment contained in s 22 of the Charter. Mr Haigh gave evidence that a pack of Tarot cards can only be used if all cards are available.

Ginnane J made a declaration that the prison's decision to withhold the four Tarot cards from Mr Haigh was unlawful for failure to comply with s 38(1) of the Charter. He set aside the prison's decision and remitted it for reconsideration of Mr Haigh's rights under the Charter.

Judgment

As a starting point, Ginnane J accepted that Paganism was a religion and that the prison was a 'public authority' within the meaning of s 38(1) of the Charter. He observed that while the Act and the *Corrections Regulations 2009* provided the legislative basis for prison governance and management in Victoria, s 38(1) makes it unlawful for a public authority to act in a way that is incompatible with human rights or to fail to give proper consideration to a relevant human right.

Ginnane J first considered ss 14 and 15 of the Charter. He said that public officials should be extremely wary about determining what is required for a person to practise their religious beliefs. It is not for judges to determine such questions, and people generally have the freedom to choose the set of beliefs, practices and observances that they accept, even if they are gullible or misled. Further, a public official should be slow to determine that the removal of a religious tool or artwork that a person wishes to use does not engage or limit their human right of religious freedom. Ginnane J found that the use of Tarot cards can be a ritual associated with the practice and observance of Paganism. He held that the withholding of the four Tarot cards engaged Mr Haigh's right of religious freedom and belief and that the withholding of the cards limited the exercise of his religious right, albeit in a minor way. Having regard to the matters set out in s 7(2) of the Charter, Ginnane J held that the limitation was unreasonable. Moreover, the prison did not consider Mr Haigh's rights under s 15.

Ginnane J then turned to s 22. He concluded that Mr Haigh's dignity right was not curtailed by the withholding of the cards. He said that by being prevented from accessing four Tarot cards when hundreds of other sets were available, the prison did not interfere with Mr Haigh's right to be treated humanely.



R v Chaarani (Ruling No 1) [2018] VSC 387

16 July 2018

Beale J

Charter provisions: ss 7, 14, 18

Summary

Abdullah Chaarani was one of three accused charged with conspiring between 21 October 2016 and 22 December 2016 to do acts in preparation for, or planning, a terrorist act. Mr Chaarani's wife, Aisha Al Qattan, wished to wear a nikab (a veil completely covering the head and face except for an opening for the eyes) while attending court as a spectator during her husband's trial. Beale J had previously ordered that spectators in the public gallery must have their faces uncovered, chiefly for security reasons.

Mr Chaarani and Ms Al Qattan ('applicants') sought a variation of Beale J's orders. The applicants argued that Beale J's orders breached Ms Al Qattan's right of religious freedom and her right to participate in public life, as enshrined in ss 14 and 18 of the Charter.

Judgment

Beale J accepted that the rights of religious freedom and the right to participate in public life were important rights, and were engaged by the application. His Honour also accepted that the wearing of nikabs for religious reasons in court was not disrespectful, offensive or threatening, and that Ms Al Qattan naturally wished to support her husband during his trial. Beale J acknowledged that by revealing her face to security staff at the court entrance (as she was willing to do), Ms Al Qattan's identity could be ascertained at that stage.

While Ms Al Qattan had professed a willingness to abide by the court's directions in relation to the good order and management of the proceedings, Beale J noted that the applicants had not suggested any such directions in the application. Beale J commented that it would be undesirable and discriminatory to segregate spectators and/or arrange extra security staff to monitor them. His Honour said the dedicated allocation of already limited court security resources in such circumstances would be inappropriate.

Beale J acknowledged that Ms Al Qattan and others had been permitted to wear their nikabs in the public gallery at the committal proceedings before a Magistrate sitting alone. However, his Honour said that it did not necessarily follow that the wearing of a nikab should be permitted in a trial before a judge and jury, where different considerations would come into play. While the applicants had asserted that Ms Al Qattan was not a security risk, Beale J observed that Ms Al Qattan would have a larger stake in the proceedings than the casual observer, and would be subjected to considerable stress. His Honour said that while Ms Al Qattan and others might be able to handle the stress well and act with the restraint, the risk that they might not should not be ignored.

The applicants had cited four cases in support of their application, submitting that it was implicit in the case law that it was acceptable to observe or even participate in court proceedings while wearing a nikab. Beale J found that the cases stood for the propositions that witnesses may wear a nikab if not giving contested evidence, and that accused persons may wear a nikab except when testifying, provided identity was not in issue. However, Beale J distinguished the cases from the applicants' application on the basis that Ms Al Qattan was not under any legal compulsion to attend court.

Finally, Beale J said that the right of religious freedom and the right to participate in public life were not absolutes, and could be subject to limitations which could be demonstrably justified in a free and democratic society based on human dignity, equality and freedom (as recognised by s 7 of the Charter). His Honour then canvassed the potential security issues associated with spectators in the public gallery have their faces covered, alongside the fundamental values of open justice, religious freedom and the right to participate in



public life. After considering the issues, he concluded that requiring spectators in the public gallery to have their faces uncovered was a reasonable limitation on the engaged rights.

His Honour therefore declined to vary his orders. He said that if Ms Al Qattan chose not to attend court as a result, arrangements would be made to live stream the proceedings to a remote facility so she could still view the trial.



Deputy Commissioner of Taxation (Cth) v Bourke [2018] VSC 380

11 July 2018

Cameron J

Charter provisions: s 24

Summary

The Deputy Commissioner of Taxation ('DCT') was the mortgagee of a property registered to Mr George Williams, who died in May 2016. The mortgage had been registered as part of a settlement agreement between the DCT and Mr Williams in 2013, securing payment of a judgment debt owed by Mr Williams to the DCT. Mr Williams became liable to pay the judgment debt in 2015, but it remained unpaid at the time of his death. The DCT sought possession and sale of the property, and applied for summary judgment. The defendants were the executors of Mr Williams' estate. An Associate Justice granted summary judgment in favour of the DCT.

The first defendant, Ms Roberta Williams, appealed the decision on a number of grounds, including that the Associate Justice failed to give her a fair hearing pursuant to s 24(1) of the Charter. In this regard, Ms Williams adduced evidence that she was hospitalised at the time of the hearing and that her lawyer had sought an adjournment. When the adjournment was refused by the Associate Justice, Ms Williams' lawyer withdrew on account of having no instructions to oppose the application for summary judgment. An attempt by a Mr Strangio, who was at the hearing, to speak on the basis of assisting Ms Williams was also rejected by the Associate Justice.

Judgment

Cameron J noted that in accordance with Pound and Evans, the learned authors of *An Annotated Guide to the Charter of Human Rights and Responsibilities* (Lawbook Co, 2018), there were three express elements to s 24(1), that the hearing be fair, public, and decided by a 'competent, independent and impartial court or tribunal'. That the decision was by a competent, independent and impartial tribunal was not disputed by Ms Williams. Cameron J reasoned that the element of 'fairness' related to procedural fairness, synonymous with the principles of 'equality of arms', in that each party had a reasonable opportunity to put his or her case under conditions that do not place him or her at a substantial procedural disadvantage relative to the opposing party. In the circumstances, there was nothing to suggest that Ms Williams had been denied a fair hearing. She had ample opportunity to prepare for the hearing with legal assistance but failed to do so, and the refusal to hear Mr Strangio was appropriate. Similarly, there was nothing to suggest that the hearing before the Associate Justice was anything other than public.



DPP v Natale (Ruling) [2018] VSC 339

26 June 2018

Bell J

Charter provisions: ss 8, 38

Summary

This matter concerned an application by the accused to have a record of interview made on the 27 November 2013 ('Record of Interview') excluded as evidence. The accused was a 73 year old man of Italian background, who spoke limited English but had been interviewed by police without an interpreter present.

The accused and his wife were estranged. His wife had Filipino heritage. The events leading to the accused being charged allegedly occurred in July 2014. The accused allegedly offered a friend \$4,000 to kill a member of his wife's extended family, who was living in the Philippines. When the friend did not do this, the accused allegedly threatened to kill him and his family.

In the interview conducted in November 2013, on unrelated charges to the current case, the accused stated he would 'Pay money to go – somebody go to the Philippines to do something to the family, cross my heart.' The prosecution wanted to use this, and other statements, as evidence of motive.

The accused was charged with a number of offences: threatening to kill, extortion with threat to kill and incitement to murder. However, the accused had been found unfit to plead by a jury according to part 2 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* ('Mental Impairment Act') and was going to be tried under part 3 of the Mental Impairment Act. The rules contained in the *Evidence Act 2008* ('Evidence Act') apply to proceedings under part 3 of the Mental Impairment Act.

The application to exclude the evidence was made on a number of grounds, which Bell J narrowed down to two main grounds. First, that under s 90 of the Evidence Act it would be unfair to use the evidence and second, the evidence was unlawfully or improperly obtained under s 138(1) of the Evidence Act. Broadly, the basis for the application was that in failing to provide the accused with an interpreter, the accused did not understand his rights. Therefore under the rules of evidence and on the basis of preserving the accused's human rights the Record of Interview should be excluded.

Judgment

Bell J rejected submissions by the accused that the Record of Interview was not relevant evidence within the meaning of s 55(1) of the Evidence Act. However, ultimately His Honour found that the admissions should be excluded under ss 90 and 138 of the Evidence Act.

Before turning to the questions of whether the admissions should be excluded, Bell J considered the circumstances surrounding the interview. First, Bell J noted that during the hearing before him the accused required an interpreter's assistance to give evidence and spoke English poorly. His Honour further noted that the accused cannot write in English and an interview conducted by an informant with the accused on 31 July 2014 was terminated by the informant because they determined an Italian interpreter needed to be present. Bell J then stated that throughout the Record of Interview the accused gave answers that were difficult to understand and explained himself poorly. These, along with other factors, led Bell J to the conclusion that the accused did not understand what was occurring during the interview, including that his answers could be used against him, and he did not understand the questions being put to him, nor could he answer questions adequately owing to his limited English proficiency.

Section 90 of the Evidence Act



Bell J then considered whether the admissions should be excluded as evidence under s 90 of the Evidence Act. His Honour noted that the applicant bore the onus of establishing this ground of exclusion and determined s 90 applies to a broad range of admissions, including those which are related to a matter which is adverse to the accused's interests in a proceeding. As such, s 90 applied to the admission in the present case.

His Honour noted that the unreliability of evidence is relevant to s 90, insofar as the unreliability relates to the circumstances where the admission came about and whether this should affect its use at trial. Bell J further noted the unfairness s 90 protects against is the use to which the evidence is put at trial, not the means by which it was gathered. As such, the discretion under s 90 should be used to protect the rights of the accused, particularly the right to a fair trial. His Honour determined this includes circumstances where the use of an admission would give the prosecution an unfair forensic advantage, such as a situation where an accused who has poor comprehension of English is interviewed without an interpreter present.

Turning to the facts, Bell J determined the Record of Interview should be excluded under s 90 of the Evidence Act, owing to a range of factors including the accused's: lack of appreciation of his rights, lack of understanding of legal and judicial processes and poor English skills. Further factors included that the interview was not voluntarily undertaken and would severely undermine the accused's credibility, likely forcing him to give evidence, which would place the defence at an unfair forensic disadvantage.

Section 138 of the Evidence Act

Finally, his Honour considered whether the admissions should be excluded as evidence under s 138 of the Evidence Act. Bell J noted that the application of s 138(1) is a two stage process, the first in which the onus is on the applicant to show the evidence was obtained 'improperly or in contravention of an Australian law' or in consequence of this. In the second stage, the other party needs to show the desirability of admitting the evidence outweighs the undesirability of doing so. His Honour stated that s 138(1)'s purpose is to allow the Court to protect the integrity of its own processes.

In considering whether there was an impropriety or contravention of an Australian law, Bell J noted the Charter and the *Crimes Act 1958* ('Crimes Act') fell within the definition of 'Australian Law' under the Evidence Act. His Honour then commented that evidence which is improperly obtained is evidence obtained in circumstances where individuals working within law enforcement do not conduct themselves in a way that meet the minimum standards of what our society would expect of them. In this case, Bell J determined that there was both impropriety and contravention, through the police failing to ensure an interpreter was present when they interviewed the accused. This resulted in a contravention of s 464D(1) of the Crimes Act and s 38(1) of the Charter. His Honour held the Record of Interview was improperly obtained because the contravened provisions represented standards of procedure society expects law enforcement officers to abide by.

Bell J then considered how human rights are protected under ss 138(1) and (3) of the Evidence Act. His Honour noted that a range of human rights must be considered when determining whether evidence should be excluded under s 138, including rights contained in the International Covenant on Civil and Political Rights and the Charter ('ICCPR'). The specific sections of the Charter that Bell J determined were relevant in this case were ss 8(3) and 38(1). Section 8(3) protects individuals' rights to equality before the law including 'the right to equal and effective protection against discrimination', and s 38(1) makes it unlawful for public authorities to behave in a manner that is incompatible with human rights. The definition of 'discrimination' in the Charter includes the definition of discrimination within the meaning of the *Equal Opportunity Act 2010* ('Equal Opportunity Act'). The Equal Opportunity Act delineates between direct and indirect discrimination. Bell J determined that the accused had suffered indirect discrimination because he had poor English skills and was therefore disadvantaged by not being provided with an interpreter. His Honour found this was contrary to s 8(3) and unlawful under s 38(1) of the Charter.



In conclusion, Bell J held that the undesirability of admitting the evidence outweighed the desirability of doing so under s 138(1) of the Evidence Act, based on the factors contained in ss 138(3)(a)-(f) that Act. This includes that the evidence was unreliable and this undermined its probative value (s 138(3)(a)), that there was other evidence which went to motive in the proceeding if the Record of Interview was excluded (s 138(3)(b)), and the alleged offences were serious but the exclusion of the Record of interview would not prevent proceedings commencing (s 138(3)(c)).

His Honour then considered the factors under ss 138(3)(d)-(f), and determined that in conducting the interview without an interpreter, the police officer had failed to comply with the following legal obligations and violated the following rights of the accused:

- 'the right of the accused to equal and effective protection against discrimination in article 26 (which deals with language discrimination) of the ICCPR;
- The obligation of the officer to arrange for an interpreter and defer the questioning until one was available in s 464D(1) of the Crimes Act;
- The right of the accused to equal and effective protection against discrimination in s 8(3) of the Charter and the obligation of the officer to act compatibly with that right in s 38(1); and
- The obligation of the officer to give or translate the caution into a language in which the accused could communicate with reasonable fluency in s 139(3) of the Evidence Act.' ([96]) (Information in brackets added).



ZD v Secretary to the Department of Health and Human Services [2017]

VSC 806

22 December 2017

Osborn JA

Charter provisions: s 17

Summary

The appellant was the mother of three children the subject of an interim accommodation order ('IAO') imposed by the Children's Court on 8 August 2017 under s 262 of the *Children Youth and Families Act 2005* (Vic) ('the CYFA'). The effect of the IAO was that the appellant's three children were placed into foster care.

In the proceedings the subject of appeal, a Children's Court Magistrate imposed a condition in each IAO that allowed each child to be immunised 'in accordance with DHHS immunisation schedule and in accordance with the approved immunisation program'. The Magistrate made his decision pursuant to s 263(7) of the CYFA, which provides:

An interim accommodation order may include any conditions that the Court or bail justice considers should be included in the best interests of the child.

The appellant appealed the decision on the basis that the Magistrate did not have the power under s 263(7) to impose conditions that have 'significant long-term consequences' for that child. The appellant's submissions were based on the contention that the CYFA, read as a whole, recognises that long-term decisions require the consent of parents; and/or that the purpose of an IAO is to make interim decisions only in relation to the welfare of a child.

Both the appellant and the respondent made submissions regarding the application of the Charter to the issues on appeal. The appellant contended that s 263(7) should be read in accordance with the right to protection of families and children under s 17(1) of the Charter to prevent the Magistrate from making decisions that 'impact on parental responsibility' or go beyond making 'arrangements for the temporary accommodation of a child'. The Secretary relied on the right relating to the protection of children under s 17(2) of the Charter to support their submission that s 263(7) should be given a wide reading to allow the Court to make orders in the best interests of the child.

Judgment

Osborn JA held that a proper statutory construction of both the CYFA as a whole and s 263(7) in particular supported a broad reading of the provision that allowed the Magistrate to make the immunisation order. The plain meaning of s 263(7) is that 'the Court is given a wide discretion governed by the overriding principle of the best interests of the child'. Various other provisions of the CYFA also supported this construction, including that merits review of any decision made under s 263(7) is available to the parents of the child under s 271 and that the Court is expressly required to consider access to appropriate health services as part of consideration of the concept of 'best interests' by s 10(3)(n) of the CYFA.

In relation to the application of the *Charter*, His Honour held that because the plain meaning of s 263(7) is apparent on the face of the text, the interpretive provision of the Charter in s 32(1) does not apply. Principles governing the application of s 32(1) derived from the authorities make it clear that the provision can only apply when the text in question is capable of more than one meaning (in which case the meaning of the text consistent with the meaning that best accords with rights under the Charter should be adopted). His Honour's statutory interpretation led to the conclusion that s 263(7) was only capable of one meaning, excluding the Charter from operation.



However, even if the Charter applied to s 263(7), his Honour would have held that the provision, properly constructed, could not be said to be inconsistent with the rights under ss 17(1) and 17(2). This is because in determining a child's best interests, the Court must take into account the principles set out in s 10 of the CYFA, which incorporate and accord with the applicable rights under the Charter. Even if the right under s 17(1) were limited by the provision, that right would be justifiably limited to give precedence to the best interests of the child according to the right under s 17(2).



United Firefighters' Union of Australia v Victorian Equal Opportunity and Human Rights Commission [2017] VSC 773

15 December 2017

Ginnane J

Charter provisions: ss 4, 41

Summary

On 9 December 2015, the Secretary to the Department of Justice and Regulation ('the Department') wrote to the Victorian Equal Opportunity and Human Rights Commission ('Commission') requesting that the Commission undertake a review regarding behavioural issues and increasing workforce diversity within the Country Fire Authority ('CFA') and the Metropolitan Fire Brigade ('MFB') ('the Review'). The plaintiff in these proceedings ('UFU'), sought orders that the Commission be prevented from continuing the Review and from ultimately publishing its findings. The plaintiff relied on three grounds to support its request, namely:

- (d) that the Review was not properly constituted under either the *Equal Opportunity Act 2010* (Vic) ('the EO Act') or the *Charter*,
- (e) that the Review investigated matters beyond the scope of the Commission's powers under the EO Act and the *Charter*, and
- (f) that the Review included an online survey that was so 'fundamentally flawed' that no authority acting reasonably could rely on it.

Section 151 of the EO Act allowed the Commission to enter into an agreement with a 'person to review that person's programs and practices to determine their compliance with this Act.' Section 41(c) of the Charter allowed the Commission '[w]hen requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights.' Section 4 of the Charter defines a 'public authority', which can include statutory corporations or a public official.

In relation to ground (a), the plaintiff submitted that both the MFB and the CFA were public authorities distinct from the Victorian government (also a public authority). As the EO Act and the *Charter* both require the Commission be requested to review 'that person's' or 'that authority's' programs and practices, the Review was improperly constituted, as neither the MFB nor the CFA had requested the Review. The defendants submitted that the 'person' and 'public authority' respectively that had made the request was the Secretary of the Department of Justice and Regulation, on behalf of the executive branch of the Victorian Government. They submitted that the both the MFB and the CFA carry out the work of government, namely the general provision of fire services. The Victorian Government had therefore properly requested a review into its *own* programs and practices.

In relation to ground (b), the plaintiff submitted that the Review went beyond the scope of the EO Act and the *Charter* because the questions asked in the course of the Review did not accord directly with protected attributes in the EO Act or rights under the *Charter* (because, for example, the Commission had stated that it would investigate 'workplace bullying', when only bullying by reason of a protected attribute was covered by the EO Act). The defendants submitted that the Terms of Reference of the Review clearly indicated that it was predicated on protected attributes under the EO Act, and although some questions were framed generally, the survey structure allowed for general questioning to be limited later in the survey by reference to particular kinds of unlawful discrimination. They also submitted that the wording of s 41 of the Charter ('to determine...compatibility with human rights') would encompass the terms of the Review.

Judgment



Ginnane J found that the plaintiff failed to establish all three grounds upon which it challenged the completion and publication of the Review.

In relation to ground (a), His Honour held that proper construction of the statutes instituting both the CFA and MFB demonstrated that

the programs and practices of the CFA and MFB, namely, the provision of fire and emergency services to the Victorian community, are synonymous with activities that fall within the province of action of the executive branch of government.

This was because the ‘programs and practices associated with the delivery of fire services to the community are an essential responsibility of government and its executive branch in protecting the community.’ Although the CFA and MFB may have devised or carried out those programs and practices, they were programs and practices for, and of, the executive branch of the government. As a result, the relevant ‘person’ and ‘public authority’ that requested the review was the Victorian Government, and the Review was properly requested under both the EO Act and the *Charter*. His Honour also held that funding for the Review was properly requested and that the Commission would have had the power under other provisions of the EO Act to carry out the Review in any case.

In relation to ground (b), His Honour held that the Commission did not act beyond its power in conducting the Review. He held that the reference to bullying in the Terms of Reference of the Review was clearly linked to prohibited actions under the EO Act, such as victimisation, discrimination or sexual harassment. Further, ‘[t]he Review and its survey can legitimately harvest a large pool of information and extract information relevant to its inquiry’. For this reason, the plaintiff failed to establish ground (b) of its challenge to the Review.

Finally, His Honour dismissed ground (c) of the plaintiff’s submissions after concluding that it would not be unreasonable for the Commission to rely on the online survey element of the Review to inform its findings, assuming that it would acknowledge any limitations in the data obtained in any resulting analyses or reporting of the data.



McDonald v Legal Services Commissioner (No 2) [2017] VSC 89

14 December 2017

Bell J

Charter provisions: ss 7, 15

Summary

The appellant, Mr McDonald, was a legal practitioner who was found guilty at VCAT of two charges of unsatisfactory professional conduct for breaches of rule 21 of the *Professional Conduct and Practice Rules* ('the Rules'). The charges related to correspondence Mr McDonald sent to opposing solicitors Lander & Rogers while acting for an employee in a redundancy dispute. In the correspondence, Mr McDonald accused the responsible solicitor at Lander & Rogers of being 'fundamentally dishonest', having 'told lies' and having engaged in 'deliberate and calculated dishonesty'. Mr McDonald made the allegations because he believed that the solicitor had represented to him in a telephone conversation that there was no scope for settlement and had subsequently misrepresented the content of that conversation.

Lander & Rogers referred Mr McDonald to the Legal Services Commissioner on the grounds of discourtesy, and the Commissioner subsequently brought proceedings against Mr McDonald in VCAT. VCAT accepted that Mr McDonald honestly believed that the solicitor had lied to him. However, without taking this into account, VCAT held that Mr McDonald was not acting in the legitimate pursuit of his client's best interests when he made the allegations and found him guilty.

Mr McDonald applied to the Supreme Court for leave to appeal, arguing that VCAT erred in law in failing to take into account the fact that Mr McDonald honestly believed that he had been lied to. Mr McDonald submitted that this honest belief meant that he had a reasonable basis for making the allegations, and this reasonable basis in turn informed the exercise of his duty to make the allegations in the legitimate pursuit of his client's best interests.

The case concerned the intersection between Mr McDonald's professional responsibility to make allegations in the legitimate pursuit of his client's best interests, which is subject to disciplinary regulation in the public interest, and his right to freedom of expression under s 15(2) of the Charter.

Judgment

Justice Bell granted Mr McDonald leave to appeal and upheld his appeal. He dismissed the charges of unsatisfactory professional conduct brought by the Commissioner against Mr McDonald.

Mr McDonald's right to freedom of expression was engaged, as the common law emphasises 'both the importance of the freedom for legal practice and the need for lawyers to exercise it properly.' Freedom of expression is an important element of the independence of lawyers and the administration of justice. It is therefore essential that lawyers are not unduly restricted when exercising their freedom of expression.

Identifying the scope of a human right is an analytical step that must be undertaken at the engagement stage of a court's reasoning in proceedings involving *Charter* rights. This is a distinct step from determining the extent to which the right is limited. Having identified the scope of the right, his Honour noted that it was accepted that Mr McDonald was exercising his right to freedom of expression when he sent the correspondence to Lander & Rogers.

The next step was to consider the extent to which the right was limited, both by the *Charter* limitations and by the Rules. Bell J expressed approval for the approach that 's 15(3) identifies the particular considerations that are relevant to the s 7 limitation inquiry', rather than each provision acting as a separate limitation on the right to freedom of expression. Further, as the Rules were a subordinate instrument, they should be read compatibly with the rights under the Charter where such a reading is available.



His Honour held that the purpose of the Rules are ‘not to ensure civility in relations between legal practitioners as an end in itself’, but rather to ‘maintain the integrity and reputation of the legal profession and hence public confidence in the administration.’ Therefore,

the rule only prohibits discourteous, offensive or insulting language or conduct that represents a failure to take reasonable care of the reputation or integrity of the legal profession. So interpreting and applying the rule is consistent with respecting the right of lawyers to freedom of expression in s 15(2) of the Charter.

Acting properly in the course of their duties, lawyers will sometimes have to make allegations about other practitioners in order to protect their client’s interests. The question is therefore whether the alleged discourteous communication ‘represents a failure to take reasonable care to maintain the integrity and reputation of the legal profession.’

His Honour held that Mr McDonald’s honest belief that he had been lied to was an arguably reasonable basis for his actions. This was connected to whether Mr McDonald was acting in legitimate pursuit of his client’s interests. In the first instance, VCAT had focused disproportionately on courtesy, rather than the professional judgment made by Mr McDonald. VCAT had erred in law by approaching the matter from the perspective of whether the communications were discourteous and not from the perspective of whether it was open to Mr McDonald, on the facts as he honestly believed them, to make the communications without endangering the integrity of the legal profession.



Minogue v Dougherty [2017] VSC 724

6 December 2017

John Dixon J

Charter provisions: ss 13, 15

Summary

The plaintiff is a prisoner serving a sentence at Barwon Prison. He commenced proceedings seeking declaratory relief in relation to a series of decisions made by prison mail officers to seize letters sent to and by him; decisions that he submitted had failed to accord proper consideration to his human rights, and which he believed had unreasonably limited his right to freedom of expression.

At the relevant time, prison mail was processed according to a policy direction (Deputy Commissioner's Instruction) (DCI), and an operating procedure (Local Operating Procedure on Prisoner Communications) (LOP). On a number of occasions, the plaintiff's mail was seized and then released after a period of time; one item was returned to the sender. The plaintiff complained about the following actions:

- *Pen pal letter*: This letter was seized because the correspondent's motives were unclear and might have been unlawful, so a 'precautionary approach' was adopted with the letter being considered a 'threat to prison security';
- *Christmas letter*: In December 2016, staff refused to action his request for 40 x A3 copies of a newspaper article which he intended to attach to 40 outgoing Christmas letters. Instead, staff provided one A4 copy of the article, and said they did not have time to make further copies. The plaintiff then sent out the Christmas letters without the articles.
- He also attempted to send a copy of the Christmas letter to one of the prison staff members; however, it was stopped by the mail officer. Sending letters to individual prison staff members was deemed inappropriate, and the relevant staff member had also asked that it not be forwarded to her.
- *Bank account and e-mail letters*: Prison officials initially stopped a bank account letter and an email letter from reaching the plaintiff. The correspondence was eventually provided, but the plaintiff complained that this was merely an attempt to stifle any complaint of unlawful conduct and to prevent him from discovering the identity of the person who had initially stopped the e-mail letter;
- *Descartes package*: Prison officials stopped a package containing a letter and a book (*Meditations on First Philosophy* by René Descartes), because they were not from a person on the plaintiff's 'approved visitor' list.

Judgment

(vi) *General approach*

First, his Honour acknowledged the defendant's concession that Mr Ryan constituted a 'public authority' for the purposes of the *Charter*.

Second, his Honour addressed the plaintiff's argument that the relevant decision had been made without proper consideration of his *Charter* rights; specifically, s 13 (privacy and reputation); s 15 (freedom of



expression); and s 7 (human rights—what they are and when they may be limited). In response, his Honour referred to the road map for assessing incompatibility under s 38 of the *Charter*, which he had outlined in *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251, and which involved consideration of a number of questions targeting: relevance or engagement; limitation; proportionality or justification; proper consideration; and inevitable infringement (at [74]).

(vii) Pen pal letter

The plaintiff insisted on proceeding against a prison official, Officer Dougherty, rather than the prison governor, Mr Ryan. While Officer Dougherty was a public official, she had not taken any action relevant to the plaintiff's rights, because the relevant actions were taken by Mr Ryan. In the alternative, the judge found that the plaintiff's rights were subject to a reasonable and proportionate limitation by the statutory framework provided under the *Corrections Act 1986* (Vic).

(viii) Christmas letter

The refusal to provide the A3 photocopies did not constitute act of censorship, as there was nothing in the Act, Regulations, or policies that obliged the defendant to accede to such a request. On the *Charter* point, a refusal to make photocopies cannot, in the circumstances, constitute an unlawful or unreasonable interference with the plaintiff's freedom of expression. Further, applying *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 184 [185]–[186], the judge found that:

If the decision maker responding to the request for photocopying ... seriously turned his or her mind to what rights would be affected by the photocopying decision, it was not reasonable to conclude that the plaintiff's freedom of expression or his right to communicate were likely to be interfered with (at [81]).

Having failed to obtain the photocopies, it was open to the plaintiff to make alternative arrangements to secure the copies, such as by having someone outside the prison provide them.

(ix) Bank account and e-mail letters

This matter raised no *Charter* issues.

(x) Descartes package

The defendant conceded that the return of the package to the sender was not in accordance with the plaintiff's rights under *Corrections Act 1986* (Vic) s 47(1)(n) to send and receive letters and the judge made a declaration to this effect.

On the *Charter* issues, the judge noted that under s 39(1) of the *Charter*, the plaintiff may seek relief or a remedy in relation to the act or decision of a public authority on the ground that it was unlawful, if relief or a remedy is available on the same ground 'otherwise than because of this Charter'.

Although Officer Dougherty was acting as a functionary, by returning the book to the sender, she made a decision that was 'complete and irreversible when Mr Trotter purported to ratify it'. Therefore, 'she was a public authority as defined by the Charter, who completed the procedure, excluding the possibility of another accepting responsibility for her actions in the procedural sense'. Although the plaintiff had directed his complaint to the procedural rather than the substantive limb of s 38(1), his Honour found that the plaintiff's rights were engaged (despite the defendant's contention otherwise), with the focus being on whether the officer had failed to accord proper consideration to the relevant right.

His Honour referred to Emerton J's 4-step approach to assessing proper consideration in *Bare v IBAC* (2015) 48 VR 129, 226 [299], following which he observed that:



The obligation to accord proper consideration requires a public authority decision-maker to understand in general terms which rights may be relevant and whether and how those rights will be interfered with by the decision that is being made. Proper consideration also requires a decision maker to have seriously turned his or her mind to the possible impact of the decision on an affected person's human rights and the implications for that person; and to identify the countervailing interest or obligations (at [90]).

Applying this to the facts, his Honour found that Officer Dougherty ought to have understood that a prisoner's rights to correspondence and freedom of expression could only have been restricted on the basis outlined in the DCI and LOP. For example, the DCI states that: 'Prisoners' human rights are limited only to the extent that it is reasonably and demonstrably justifiable. All staff must act compatible [sic] with human rights and consider human rights when making decisions' (at [41]). Further, his Honour noted that there was no evidence to indicate that Officer Dougherty had considered the possible impact of her decision upon the plaintiff's human rights, 'whether seriously or at all' (at [92]).

His Honour concluded by stating that it would not be appropriate for him to consider 'whether these circumstances might constitute unlawfulness in the conduct of a public authority under the *substantive* limb of s 38(1)' (at [94], emphasis added); the reason being that the prison governor was the proper contradictor for the purpose of considering 'whether the relevant human rights have been subject to reasonable and proportionate limitation in accordance with s 7(2) of the *Charter*, having regard to the statutory provisions under the *Corrections Act*' (at [94]).

However, his Honour did address the *procedural* limb of s 38(1), which requires public authorities to give proper consideration to relevant human rights. In this instance, Officer Dougherty was the relevant public authority and, following application of Emerton J's proper consideration test in *Castles*, his Honour determined that the Officer had not considered the plaintiff's human rights when deciding to return the book to its sender. In this respect, his Honour observed that:

What occurred was the blanket application of a non-existent rule, namely that prisoners are only able to receive mail/property from people on their approved visitors list, without any consideration whatsoever of the plaintiff's right not to have his correspondence unlawfully or arbitrarily interfered with or his right to freedom of expression by receiving information and ideas of all kinds in print (at [95]).

If such a rule had existed, his Honour noted that 'other considerations might have arisen', as '[i]nterference with correspondence pursuant to a rule that forms part of an existing regulatory framework might be accepted as "lawful" within the meaning of s 13(a)' (at [95]). However, as the question did not arise, it was unnecessary to discuss it further.

Thus, his Honour made a declaration to the effect that Officer Dougherty had failed to take proper consideration of the plaintiff's right to privacy (s 13(a)), and of his 'freedom of expression' (ss 15(2)(b)–(c)), when returning the Descartes package to its sender. His Honour also declared that Mr Trotter, having retrospectively adopted and ratified Officer Dougherty's decision had unlawfully interfered with the plaintiff's right under *Corrections Act 1986* s 47(1)(n) to receive correspondence uncensored.



Harkness v Roberts; Kyriazis v County Court of Victoria (No 2) [2017]

VSC 646

26 October 2017

Bell J

Charter provisions: s 24

Summary

The two plaintiffs, Mr Harkness and Mr Kyriazis, were both unrepresented litigants that had been convicted of road safety offences in the Magistrate's Court of Victoria and the County Court of Victoria respectively. Both men applied to the Supreme Court seeking to have their convictions set aside and remitted to the original court to be remade according to law.

Prior to the hearing in the Magistrates' Court, the court ordered that Mr Harkness 'file and serve any arguments, submissions and authorities upon which he seeks to rely'. The Court did not specify that oral submissions from Mr Harkness would not be permitted at the hearing. Mr Harkness filed and served a statement prior to the hearing that disputed the jurisdiction of the Magistrate's Court to hear the matter, on the basis that the Magistrate's Court had no jurisdiction to adjudicate his God-given common law right to travel freely. Over the course of the hearing, the Magistrate dismissed Mr Harkness' written submissions without giving explicit reasons for doing so, and refused to hear his oral submissions on the subject. He was subsequently excluded from the courtroom for misbehaviour. In his absence he was convicted and fined in relation to six of the seven offences with which he was charged.

Mr Kyriazis had appealed two convictions under the *Road Safety Act 1986* (Vic) to the County Court. Before the hearing, Mr Kyriazis sent a letter to the Court 'informing' the Court that he would be audio recording and videotaping the proceedings (despite the fact that he was in fact required to seek the express written permission of the Court to do so under the *Court Security Act 1908* (Vic)). At the hearing, the Judge and Mr Kyriazis had a heated exchange regarding whether or not Mr Kyriazis could or would videotape the proceeding, although the judge gave leave for the proceeding to be audio recorded. Following further exchanges between the judge and Mr Kyriazis, the Judge ordered him to go into the dock and threatened to charge him with contempt of court. Mr Kyriazis continued to participate in the proceeding in a limited way. At one point in the proceeding, the judge publicly denigrated Mr Kyriazis. Ultimately, the judge convicted Mr Kyriazis of the two charges but, finding that his conduct amounted only to a technical breach, declined to impose a penalty.

Judgment

His Honour held that the orders made in both cases should be quashed and the matters remitted back to their respective courts to be heard and determined according to law.

His Honour commenced by considering the responsibility of the Court to ensure that self-represented litigants receive a fair trial, both under the rules of natural justice and the *Charter*. He noted that the purpose and scope of the duty under the rules of natural justice and the *Charter* are very close, and a finding that a self-represented party had not been accorded a fair hearing under the common law would almost always entitle the court to find that the same failure constitutes a breach of the right to a fair hearing under the *Charter*.

To satisfy both the common law and *Charter* rules of a fair hearing, a Court must provide assistance to self-represented litigants in order to assist them in overcoming the disadvantage they face when up against trained lawyers. However, the Court's assistance must be proportionate in the circumstances and must not ultimately afford the self-represented litigant an advantage.



Mr Harkness was entitled to make oral submissions at the hearing and the Magistrate should have allowed him to do so. The Magistrate did not assist Mr Harkness sufficiently, given his status as a self-represented litigant, because she did not attempt to determine his state of knowledge about legal procedure and principles or assist him to make his submissions in relation to jurisdiction. Although her Honour may have assumed that Mr Harkness's objection to the jurisdiction of the Magistrate's Court was based solely on religious concepts or precepts, it was not open to her to so assume without hearing from and assisting Mr Harkness further. As a result, the Magistrate breached the rules of natural justice and Mr Harkness's right to a fair hearing under s 24(1) of the Charter. However, the later decision to exclude Mr Harkness was permissible, given his behaviour.

In relation to Mr Kyriazis, the Judge should have assisted Mr Kyriazis along the following lines:

- inquiry into his capability so that a judgment could be made as to how much assistance was required;
- explaining the procedure that would be followed during the course of the hearing and his options in relation to giving and not giving evidence;
- directing his attention to the legal and factual questions that were in issue, which were not complex and related to the elements of the offences, which might need to be briefly explained;
- explaining to Mr Kyriazis his right to remain silent and not give evidence or to give evidence if he wished and the election that he would later be asked to make in this regard;
- informing Mr Kyriazis that the prosecution was required to prove the offences beyond reasonable doubt and give him some little explanation of what this meant if he required it; and
- discussion of the procedure for producing the documents under the subpoenas and how these would be inspected.

The judge's failure to do so breached the rules of natural justice. Further, the level of anger and frustration expressed by the judge and the apparent personal animosity between Mr Kyriazis and the judge would leave it open to a fair-minded observer to apprehend that the Judge had not conducted the hearing impartially.



Kyriazis v County Court of Victoria (No 1) [2017] VSC 636

26 October 2017

Bell J

Charter provisions: ss 6, 7, 15

Summary

The plaintiff sought permission to audio record a related proceeding (*Harkness v Roberts; Kyriazis v County Court of Victoria (No 2)* [2017] VSC 646) under s 4A94(a)(i) of the *Court Security Act 1980* (Vic). The provision requires that a person be given express written permission by a judicial officer to make a recording of proceedings.

Judgment

His Honour allowed Mr Kyriazis to audio record the proceeding.

The applicable Charter right was the right to freedom of expression under s 15(2), which includes the rights to 'seek, receive and impart information and ideas of all kinds'. This right applies to the courts and tribunals in relation to legal proceedings through the operation of s 6(2)(b) of the Charter, but may be reasonably limited (per ss 7(2) and 15(3)).

In his reasoning, his Honour noted that no suppression, confidentiality or like orders had been made in the proceeding. The making of the recording was not likely to frustrate the administration of justice or infringe on third-party privacy interests (such as, for example, the interests of children or vulnerable participants in the proceeding). While the security of the court was a paramount consideration, there was no suggestion that security would be threatened by the making of the recording. Further, the informant in the proceeding had not opposed the application.

In light of these considerations, the common law principles of open justice and free communication of information and the right to freedom of expression under s 15(2) of the Charter supported the granting of permission to record the proceeding.



**PQR v Secretary, Department of Justice and Regulation (No 1) [2017]
VSC 513 and PQR v Secretary, Department of Justice and Regulation
(No 2) [2017] VSC 514**

26 September 2017

Bell J

Charter provisions: ss 15, 24

Summary

The applicant sought a suppression order to protect his identity in proceedings where he was seeking to challenge a decision by the Victorian Civil and Administrative Tribunal ('VCAT') under s 26B(1) of the *Working with Children Act 2005* (Vic), where he was assessed as not suitable child-related work. While the Supreme Court and VCAT had allowed him to commence the proceeding under a pseudonym, the Herald and Weekly Times Pty Ltd independently discovered, but had not yet published, his identity. The applicant sought the suppression order on the basis that he would be reasonably deterred from accessing justice at VCAT and in the Supreme Court if his present and former partner and her and their children were to suffer distress and embarrassment by reason of him being identified.

Judgment

The *Open Courts Act 2013* (Vic) engages both the right to freedom of expression and the right to a fair and public hearing. The open court principle, and the ability of journalists to report on court proceedings, is part of the right to freedom of expression and to seek, receive and impart information.

However, the rights to freedom of expression and a fair and public hearing are not absolute, and contain both internal limitations and general limitations under s 7(2). Even when justified, limitations must be proportionate, involve the least restrictive means of achieving the purpose and be expressed clearly and accessibly. Here, a suppression order was not necessary as an alternative means was available: to enforce the existing pseudonym order through the law of contempt.



***Minogue v Shuard* [2017] VSCA 267**

22 September 2017

Kyrou and Kaye JJA

Charter provisions: s 15

Summary

The applicant, a prisoner at Loddon Prison, applied for judicial review of a decision made by the respondent in her capacity as the Commissioner of Corrections Victoria. The application for leave to appeal was refused.

The applicant was undertaking a distance education course in counselling (**counselling course**) with the Australian Institute of Professional Counsellors (**AIPC**). By letter from Corrections Victoria, the applicant was advised that he would have to cease the course, and that he would be prevented from corresponding with AIPC (**the decision**). The relevant correspondence in this respect comprised two letters from Brendan Money, the Assistant Commissioner of the Sentence Management Unit of Corrections Victoria, to the applicant. The reason provided by Mr Money was that the applicant had not followed due process when commencing his studies, and that the nature of the course was not considered appropriate in the context of his offending history.

In response, the applicant sought an order in the nature of certiorari quashing the decision, as well as declarations that the policy (Distance Education Policy and Procedural Framework) (**DE Policy**) underlying the decision had the effect of unlawfully limiting his rights under ss 47(1)(n)–(o) of the *Corrections Act 1986*. The applicant argued that the decision limited his rights under these sections, without lawful justification, and therefore was beyond the respondent's power.

Trial judge's decision

Prior to trial, Corrections Victoria advised the applicant that it would not restrict his correspondence with AIPC, which would effectively permit him to continue with the counselling course. As a result, the proceeding was dismissed, with the trial judge holding that the question had become hypothetical, as the applicant had not been subject to restrictions, at any time, regarding participation in the course, and had continued to receive mail from AIPC. Therefore, with 'no extant controversy' between the applicant and respondent regarding participation in the course, the trial judge found that it was not necessary to determine whether s 47(1)(o) of the *Corrections Act* provided the applicant with an enforceable right to participate in the course.

On the *Charter* point, and whether there had been an infringement of the applicant's right to freedom of expression, the trial judge also declined to grant declaratory relief, stating that no question had arisen regarding whether the applicant's right in this respect had been limited by application of the DE Policy.

Judgment

In the appeal proceeding, the applicant sought leave to appeal the trial judge's decision on the basis that: (i) he erred in concluding that the question was hypothetical; (ii) he failed to address the applicant's complaints regarding conduct on the part of the respondent and her counsel, which he argued contravened the *Civil Procedure Act 2010* ('CPA'); and (iii) he erred in the way in which he framed some of the applicant's arguments.

Kyrou and Kaye JJA agreed with the position taken by the trial judge, observing that the question as to whether the impugned decision had curtailed the applicant's rights, as submitted above, was no longer before the Court, because the respondent had resiled from it (at [67])—therefore there was no evidence establishing that Corrections Victoria had acted, or intended to act, contrary to ss 47(1)(n) and (o) of the *Corrections Act*, in relation to the counselling course.



Their Honours noted that, if the complaint had not become hypothetical, it would have been necessary to consider the scope and effect of the relevant provisions and, if the decision had constituted a breach, to determine whether the applicant's right to freedom of expression (s 15(2) of the Charter) had been infringed.



***Rich v Howe* [2017] VSC 483**

14 September 2017

Kennedy J

Charter provisions: ss 24, 25

Summary

The plaintiff, sought to challenge alleged decisions made by the defendant, acting in his capacity as the General Manager of H.M Prison Barwon and for Corrections Victoria, to deny him supervised internet access.

The plaintiff claimed internet access was necessary to access various case law publications in order to bring an intended special leave application to the High Court to appeal a decision by the Court of Appeal upholding his conviction and sentence for murder and armed robbery. The plaintiff also filed a notice under s 35 of the *Charter*.

The plaintiff claimed that the non-provision of internet access constituted a breach of the Charter in terms of his right to a fair hearing pursuant to s 24.

Judgment

The plaintiff's case was dismissed.

The essence of the claim in relation to the *Charter* was whether the application of the policy infringes upon the plaintiff's right to a fair hearing, which encompasses access to the courts. Her Honour was prepared to assume that ss 24 and 25 of the *Charter* were generally engaged when the plaintiff sought access to the internet in relation to his proposed application to the High Court and, as well as the plaintiff's common law rights to a fair trial.

In the determination whether there was a breach of the *Charter*, the first question was whether an act had been done which was incompatible with a human right. Kennedy J canvassed the relevant Australian authority in relation to the interpretation of ss 24 and 25(2)(b) and found that the issue of a fair trial, both at common law and pursuant to the Charter, generally turns on the individual factual circumstances. Her Honour noted that there was no specified authority identified by counsel that stands for the proposition that the provision of internet access is necessary in order to afford a prisoner a fair hearing, pursuant to s 24, or the right to have adequate facilities, under s 25 (2)(b).

Overseas authorities also had not suggested a general obligation to provide access to the internet for a fair trial, nor that adequate facilities necessarily incorporate access to the internet. Rather, a number of questions need to be considered in this context, namely that:

- The claimant bears the onus of demonstrating that he is being denied the right to a fair hearing by reason of the alleged conduct;
- The position is the same as at common law;
- The issue as to whether a trial is fair involves a factual specific analysis;
- It is not sufficient to demonstrate interference with access that it might be easier or more convenient;
- The personal characteristics of the claimant are relevant;
- That the extent to which the claimant already has access to materials is relevant;
- Any decision to be unrepresented is taken into account;



- Evidence of security considerations are considered;
- That full or complete facilities are unnecessary.

After a consideration of the aforementioned factors, her Honour concluded that s 24 of the *Charter* was not breached and was not likely to be and that the plaintiff's common law rights to a fair trial have not been impeded.

Further, the defendant has not acted, and is not likely to act, in a way that was incompatible with the plaintiff's rights to have adequate facilities to prepare his case when the evidence clearly showed that the plaintiff had more than adequate access to extensive research and computer facilities.

Her Honour then considered whether there was any limit that was demonstrably justified, having regard to the matters outlined in s 7(2) of the Charter. To this end, the judge emphasised that the limitation was a narrow one in the context of restricting the use of a computer in a prison setting. Given the security risks involved, the limitation was imposed to ensure the defendant retained the ability to manage the prison, and the evidence did not point to an alternative safe way to prevent security breaches. On this basis, any limit imposed on the plaintiff's right to adequate facilities and unimpeded access was reasonable and justified pursuant to the Charter.

The final question was whether there was a failure to give proper consideration to a relevant human right. Her Honour found that the decision maker had given proper consideration to the relevant human rights of access to the court and adequate facilities by reason of the adoption of the policy in this case. Furthermore, the offer to Mr Rich to provide relevant research materials, together with the provision of the relevant High Court rules, also confirms that consideration was given to his rights of access and to adequate facilities.



BA v Attorney-General [2017] VSC 259

23 May 2017

Bell J

Charter provisions: ss 6, 24, 25

Summary

The plaintiff, BA, was charged with terrorism-related offences, pursuant to section 102.7 of the *Criminal Code 1995* (Cth) and section 7(1)(e) of the *Crimes (Foreign Incursions & Recruitment) Act 1978* (Cth). The investigation of the alleged offences committed by BA was carried out by the Australian Federal Police ('AFP') with the assistance of the Federal Bureau of Investigation ('FBI') in the USA. FBI officers obtained a large volume of information from GY, a resident of the USA, which was then supplied to the AFP. GY's statement was prepared by AFP officers in Australia upon the basis of this information. BA sought to obtain access to certain documents in the possession of FBI officers in the USA. As other means of obtaining these documents were not available, BA made application under the *Mutual Assistance in Criminal Matters Act 1987* (Cth) ('MACMA') for a certificate that it would be in the interests of justice for the Attorney-General to make a request to the USA that the documents be provided.

Judgment

The plaintiff was successful. BA established that it would be in the interests of justice in Australia for the Attorney-General to make a request on behalf of BA that the USA provide access to BA to the documents sought for the purposes of the criminal proceeding in relation to the charges brought against BA in Australia.

Bell J held that the process under the MACMA contributes to the right to a fair trial by protecting the equality of arms principle.

The rights in ss 24 and 25 of the Charter also encompass the equality of arms principle and prosecutorial disclosure obligations. After considering section 6(2)(b) of the *Charter*, Bell J stated that disclosure of the documents sought by the defence would be consistent with disclosure obligations under the common law, the *Criminal Procedure Act 2009* and the *Charter*.



Certain Children v Minister for Families and Children (No 2) [2017] VSC

251

11 May 2017

John Dixon J

Charter provisions: ss 10, 17, 22, 23, 25, 38

Summary

The plaintiffs (represented by their litigation guardian) were all children detained the Grevillea Unit ('Grevillea'), an area of the Barwon adult maximum security prison designated by an Order in Council as a remand centre and youth justice centre for children. The children were all between 15 and 18 years old. They had been transferred to Grevillea from other youth justice centres following a riot that occurred at the Parkville youth justice centre over 12 and 13 November 2016, which destroyed up to 62 beds and exacerbated an accommodation crisis in the youth justice system.

The decision to designate Grevillea as a remand centre and youth justice centre was initially made by the Governor in Council on 17 November 2016. That decision and the decision to transfer the children to Grevillea were the subject of previous proceedings, heard before Garde J in December 2016 (*Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796). On 21 December 2016, Garde J declared that the November Orders in Council were invalid. This was based on a finding of that the Orders were unlawful under s 38(1) of the Charter, as well as two additional findings of jurisdictional error. The defendants appealed this declaration to the Victorian Court of Appeal, which upheld Garde J's decision on 28 December 2016.

However, before the Court of Appeal had published its reasons, on 29 December 2016 the Governor in Council again made Orders in Council that Grevillea be designated as a remand centre and youth justice centre (the 'Grevillea decision'). Following that order, several plaintiffs were transferred to Grevillea from the Parkville youth justice facility (the 'transfer decision'). Further, on 27 January 2017, the Governor in Council made Orders in Council exempting certain staff at Grevillea from restrictions that would otherwise apply to prevent them using capsicum spray and extendable batons within the area designated as a remand centre and youth justice centre (the 'weapons exemption decision'). All three of these decisions were challenged by the plaintiffs in this proceeding.

The plaintiffs challenged the decisions on the basis of jurisdictional error and unlawfulness under s 38(1) of the Charter. In relation to Charter unlawfulness, the plaintiffs submitted that rights under ss 10(b), 17(2), 22(1), 22(3), 23(3) and 25(3) were engaged and unjustifiably limited by the Grevillea and transfer decisions. The plaintiffs submitted that the weapons exemption decision engaged and unjustifiably limited rights under ss 10(b), 17(2) and 22(1) of the Charter.

Judgment

John Dixon J set out the principles for dealing with a Charter claim. He noted that the threshold for identifying a Charter right as engaged by a decision by a public authority is low, and once a right is identified as limited by the actions of a public authority, the standard of proof required to show that the limitation is justified is high. Further, s 38(1) of the Charter has a substantive and a procedural limb, with the substantive limb concerning whether the act of the public authority is incompatible with a human right, and the procedural limb concerning whether the decision-making process was undertaken with proper consideration of engaged human rights.

His Honour found that the Grevillea decision and the weapons exemption decision both engaged the substantive limb of s 38(1). He rejected the defendants argument that these decisions did not impact directly on the human rights of the plaintiffs, but were rather decisions that would make possible *subsequent* acts or



decisions that may affect the rights of the plaintiffs. He reached this conclusion on several bases, including that proper construction of the statutory text supports the argument that s 38(1) was intended to cover 'general' acts and decisions of public authorities, and that the establishment of a youth justice centre or remand centre is an act that, by itself, is capable of either promoting or interfering with certain Charter rights directly.

The next step was to determine which Charter rights were engaged by the decisions. The Grevillea decision engaged the rights under ss 17(2) and 22(1) of the Charter, but did not engage the rights under ss 10(b), 22(3), 23(3) or 25(3). In relation to the transfer decision, the rights under ss 17(2) and 22(1) were engaged, but the other rights submitted by the plaintiffs were not. Finally, in relation to the weapons exemption decision, the rights under ss 10(b), 17(2) and 22(1) were engaged.

In reviewing whether the rights engaged were limited by the decisions, His Honour considered evidence from both the plaintiffs and the defendants regarding conditions in Grevillea (including time spent outside of cells, time spent handcuffed, and availability of educational resources), the opportunities for visits from family members, and incidents of use of force. His Honour also visited Grevillea himself. On the basis of this evidence, His Honour found that the Grevillea decision and the transfer decision limited the rights under both ss 17(2) and 22(1). His Honour further found that the weapons exemption decision did limit the plaintiffs' ss 17(2) and 22(1) rights but did not limit the plaintiffs' s 10(b) rights.

As the plaintiffs' rights had been limited, the onus shifted to the defendants to demonstrate that the limitations were reasonable and demonstrably justified under s 7(2) of the Charter. In respect of the Grevillea decision and the transfer decision, the defendants had not shown that the limitations on the rights of the plaintiffs were proportionate or justified. Although the defendants were faced with a 'real accommodation crisis in the youth justice system', John Dixon J held that:

The evidence does not support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them...By simply identifying four alternative places that are not suitable, the defendants fell well short in demonstrating that resources were inadequate for the provision of less restrictive measures.

His Honour suggested applying resources to rapidly renovate existing alternative accommodation or to reduce time spent by individuals on remand before trial as solutions that could have eased the pressure on the youth justice system generally without limiting the plaintiffs' rights in the same ways. Although the limitations imposed on the plaintiffs' rights by the Grevillea decision were in an abstract sense for the 'greater good', many of the limitations at the level of individual impact were imposed for managerial or punitive reasons (for example, extensive handcuffing was necessary because of the need for renovation or modification of the built environment within Grevillea). By contrast, His Honour held that the weapons exemption decision was a proportionate limitation on the plaintiffs' rights, thereby satisfying the first (substantive) limb of s 38(1).

His Honour then considered the procedural limb of s 38(1). Here, His Honour found that the defendants had failed in respect of all three decisions to give proper consideration to each engaged right. In relation to the Grevillea decision, although the Minister had seriously turned her mind to the possible limitations on the plaintiffs' human rights, she had not given the question 'proper consideration'. This was largely because when making her decision, the Minister had the benefit of both *Garde J's* reasons in the first *Certain Children* decision and an analysis of Charter compatibility carried out by the VGSO. As a result, the standard of her discharge of responsibility in balancing the competing public and private interests was higher than that which would be expected of a decision-maker in an ordinary case.

The Grevillea decision was based in part on several incorrect factual assumptions, such as that necessary renovations at Grevillea were complete and that handcuffing no longer occurred when transporting children within the facility. Further, there was no evidence that the defendants had sought out psychological or psychiatric opinion as to the effect of Grevillea's built environment on the plaintiffs, despite the fact that a



key aspect of Garde J's judgment in the first *Certain Children* was the potential 'physical, social, emotional, intellectual, cultural and spiritual impacts' of establishing a remand centre and youth justice centre within the maximum security environment of Barwon Prison.

In relation to the transfer decision, the consideration of the human rights of the plaintiffs was cursory and was directed more towards securing a pre-determined outcome:

Finally, the weapons exemption decision was not made with proper consideration, as it failed to consider whether the restrictive guidelines on the use of force were practical or realistic in the context of Grevillea. The decision-maker failed to consider the circumstances and surroundings in which the exempted weapons, particularly capsicum spray, were likely to be used. The built environment of Grevillea made it impossible to ensure that innocent bystander detainees would not be inadvertently sprayed with capsicum spray, a factor that the decision-maker should have considered when deciding upon the weapons exemption.

The outcome of this reasoning was that all three decisions were unlawful actions of the relevant defendants under s 38(1) of the Charter. The Grevillea and transfer decisions were unlawful actions by reason of being incompatible with human rights under ss 17 and 22(1) of the Charter and because the decision-makers did not give proper consideration to those human rights, while the weapons exemption decision was unlawful in that the decision-maker did not give proper consideration to human rights under ss 17(2) and 22(1) of the Charter when making the decision.

His Honour made declarations that all three decisions were unlawful. He further declared that the Secretary was prohibited from detaining children at a place of detention that has been declared to be unlawful. Finally, he restrained the defendants from detaining or continuing to detain at Grevillea any person in the Secretary's legal custody.



Knight v General Manager, HM Prison Barwon [2017] VSC 135

31 March 2017

Keogh J

Charter provisions: s 10

Summary

The applicant, a person incarcerated at Port Philip Prison serving a life sentence for murders he committed in 1987, had previously been declared a vexatious litigant and was subject to a general litigation restraint order. He sought leave pursuant to s 54 of the *Vexatious Proceedings Act 2014* (Vic) ('the VP Act'), to commence an action seeking a declaration that the strip-searching of visitors to Victorian prisons on the basis of positive ion scanning readings is in breach of s 10(b) of the *Charter*, as it amounts to degrading treatment and serves no law enforcement or other legitimate purpose.

Judgment

Keogh J held that the evidence did not establish that every strip search conducted on the basis of a positive ion scan reading amounted to degrading treatment in accordance with s 10 (b) of the Charter. His Honour considered the textual similarities between the Charter and the International Covenant on Civil and Political Rights, Universal Declaration of Human Rights and the European Convention on Human Rights and noted that no definition exists in these instruments relating to 'cruel, inhuman or degrading' treatment or punishment.

Therefore, after a consideration of the relevant case law and in light of the lack of evidence submitted by the applicant, his Honour found there was insufficient evidence to support the conclusion that 'every strip search of a visitor to a Victorian prison required on the basis of a positive ion scan reading constitutes degrading treatment of the visitor in accordance with s 10(b) of the Charter.' On this basis, Keogh J held that the applicant had not discharged the onus of establishing that the proposed proceeding was not a vexatious proceeding and that there were reasonable grounds for the proposed proceeding.



Baker v Director of Public Prosecutions [2017] VSCA 58

22 March 2017

Maxwell P, Tate and Beach JJA

Charter provisions: ss 17, 24, 25

Summary

The appellant, Earl Baker ('Baker'), sought leave to appeal pursuant to s 295 of the *Criminal Procedure Act 2009* ('CPA') against an interlocutory decision of the County Court of Victoria refusing to grant a permanent stay of charges contained in an indictment. Baker was charged with sexual penetration of a child under 16 contrary to s 45(1) of the *Crimes Act 1958*, knowingly possessing child pornography contrary to s 70(1) of the *Crimes Act* and use of online information to transmit child pornography contrary to s 57A(1) of the *Classification (Publications, Films and Computer Games)(Enforcement) Act 1995*.

Baker was 17 years at the time of the alleged offending between 1 May and 31 May 2014. Charges were laid on the 27 July 2015, by which time, Baker had turned 19.

It was argued that the delay between the time of the offending and the time at which the appellant was charged resulted in a loss of opportunity to have the charges dealt with in the Children's Court. It was submitted that this would breach his right to be tried without unreasonable delay under s 25(2)(c) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter'). It was further submitted that this delay involved a contravention of the right of a child to the protection of his best interests under s 17(2) of the Charter and a breach of the right to a fair trial pursuant to s 24(1). It was also argued that common law principles support the grant of a permanent stay because the prosecution amounts to an abuse of process.

Judgment

Leave to appeal was granted but the appeal was dismissed. Tate JA wrote the primary judgment, with Maxwell P agreeing.

Her Honour held that despite the interlocutory nature of the decision at first instance, it was appropriate for the *Charter* issues to be considered on appeal given that the *Charter* is 'no longer to be regarded as legislation which is novel or complex, invariably requiring lengthy consideration of issues.'

Tate JA rejected the Attorney-General's preliminary objection that the appellant was impermissibly seeking a collateral review of the exercise of prosecutorial discretion, which in effect, is unexaminable by the courts. The question of whether the loss of the opportunity to be sentenced in the Children's Court and the subsequent prosecution of the appellant in the County Court constituted an abuse of process, when viewed in terms of the alleged breaches of the Charter, is not an collateral review of prosecutorial discretion.

In relation to whether there had been a breach of the appellant's human rights the following questions were considered:

(5) *What is the contravening conduct and who is the 'public authority'?*

Tate JA was satisfied to treat the DPP as the relevant public authority by considering the DPP's conduct of continuing with the prosecution in the County Court in light of the previous delay by the police.

As to the question of whether the appellant's human rights have been breached, her Honour adopted the approach taken by Hollingworth J in *Sabet v Medical Practitioners Board (Vic)* (2008) 20 VR 414 in conjunction with an assessment of the factors identified in s 7(2) of the Charter:



[I]n analysing whether there has been a breach of a human right under the Charter it is useful to ask the following three questions:

- (a) Has a Charter right been engaged? ('the engagement question');
- (b) If so, did the public authority impose any limitation on the right? ('the limitation question');
- (c) Was any such limitation reasonable and justified within the circumstances set out in s 7(2)? ('the justification question').

(6) The right to be tried without unreasonable delay

The critical issue here concerned the point in time that is used for the purpose of calculating whether a delay was unreasonable and therefore in breach of s 25(2)(c) of the Charter. Her Honour accepted the reasoning adopted by the ACT Court of Appeal in *Nona v The Queen* (2013) 8 ACTLR 168 to find that time begins to run, in the context of s 25(2)(c) of the Charter, when a person is 'charged' with a criminal offence 'when he or she is served with a summons to answer the charges laid or, if no summons has been issued, when he or she has been served with an arrest warrant.' On this basis, the period of 10 months from the time in which the appellant was 'charged' was not considered to be 'excessive, inordinate or unacceptable'. Therefore, the Charter was not engaged in these circumstances.

(7) The right to a fair trial

Her Honour considered that the right to a fair hearing was clearly engaged in the circumstances of this case, but found there was no evidence to suggest that the appellant would not receive a fair hearing from a 'competent, independent and impartial tribunal' in the County Court.

(8) The right of a child to the protection of his or her best interests

Tate JA held that the circumstances of the case did engage the right under s 17(2) of the Charter, but did not accept that there were any significant differences between the community-based sentencing dispositions available in the County Court and that which is available in the Children's Court. Moreover, the system of criminal punishment substantively considers the status of an offender as a young offender and these considerations are not reserved for the Children's Court alone. On this basis, her Honour held that the delay in the filing of charges had not 'limited or interfered with the right in a manner that is unreasonable.'

Finally, Tate JA found that the trial judge did not err in refusing a permanent stay at common law on the basis that the appellant had not discharged the high onus of demonstrating that the court process will be unfair so as to amount to an abuse of process.

Beach JA substantially agreed with the judgement of Tate JA but held that the right under s 17(2) of the Charter was not engaged in this case. The alleged offending ceased the day before Baker turned 18. Under the *Charter*, a child is a person under the age of 18. When public authorities (such as Victoria Police and the Office of Public Prosecutions) made decisions about the case, Baker was no longer a child for the purpose of the *Charter* and so could not rely on the rights in s 17.



Matsoukatidou v Yarra Ranges Council [2017] VSC 61

28 February 2017

Bell J

Charter provisions: ss 6, 8, 24

Summary

The applicants (Maria and her daughter Betty) had been charged with offences against the *Building Act 1993* (Vic). Both applicants were self-represented at the Magistrates' Court hearing, and received fines - Maria without, and Betty with, conviction.

The applicants' appeals to the County Court under the *Criminal Procedure Act 2009* (Vic) were struck out for non-attendance. The applicants believed they had reasonable explanations for their non-attendance and applied for orders reinstating the appeals. Their application was heard the following day, and they were again unrepresented. At the hearing, the judge did not explain the procedure that would be followed, nor the applicable legal test. Both applicants struggled to explain themselves before the judge, and did not fully understand the hearing. Their application was dismissed.

The applicants sought judicial review of the judge's orders, arguing that the judge's conduct of the hearing failed to ensure their human rights to equality under s 8(3) of the *Charter*; and to a fair hearing under s 24(1).

Judgment

Bell J found that the County Court had not ensured a fair hearing under s 24(1) of the *Charter*. He considered that where such a finding is made, the failure will almost always constitute a breach of the rules of procedural fairness and an excess of jurisdiction. He set aside the County Court orders striking out the applicants' applications, and remitted them to be heard and determined by a different judge.

The judge was required to ensure the human rights protected under *Charter* s 8(3)

In relation to proceedings and hearings, s 8(3) requires courts and tribunals to ensure that every person (1) is equal before the law, (2) is given the equal protection of the law without discrimination, and (3) has equal and effective protection of the law against discrimination. The second and third elements of s 8(3) have substantive operation in procedural respects and apply to both courts and tribunals, but only in respect of discrimination as defined.

Bell J observed that Maria's learning disability, an attribute under s 6(e) of the *Equal Opportunity Act 2010*, meant there was a clear distinction between Maria and Betty with respect to the application of s 8(3). Section 8(3) required the judge to ensure that the hearing was conducted so that both applicants were equal before the law, and so that Maria could enjoy her rights without discrimination and receive equal and effective protection from discrimination.

This conclusion was based on Bell J's consideration of how the three elements of s 8(3) operate. He held that the first element, equality before the law, did not have substantive operation. Giving it a substantive operation would introduce a 'shifting operation', where it would have a substantive operation in relation to court and tribunal proceedings but operate based on non-arbitrariness in other cases. This would be inconsistent with the exclusion of the first sentence of art 14(1) of the ICCPR ('[a]ll persons shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law') from s 8(3) of the *Charter*, and the express limitation of the second and third elements of s 8(3) to matters involving discrimination as defined. Bell J considered it more likely that Parliament had intended for the first sentence of art 14(1) to be subsumed by s 24(1) of the *Charter*.



Consequently, the first element of s 8(3) requires courts and tribunals to avoid arbitrary treatment in the application and administration of the law in relation to court and tribunal proceedings. His Honour concluded this did not equate to obligations to give positive assistance to self-represented parties under the common law (explained in *Tomasevic v Travaglini* (2007) 17 VR 100). The common law obligation falls within s 24 of the *Charter*.

Here the judge had, without justification, failed to make reasonable adjustments and accommodations in respect of Maria's disability, breaching her human right to equality. Bell J drew attention to the *Disability Access Bench Book*, and the issues it recommends courts and tribunals consider when s 8(3) is relevant. Here, the key problem was that the judge failed to recognise Maria as a person with a disability, and accordingly did not consider how to appropriately accommodate her in the conduct of the hearing. His Honour concluded that, regardless of whether the judge actually knew about Maria's disability, the conduct of the hearing effectively disadvantaged Maria and amounted to indirect discrimination. Section 8(3) of the *Charter* obliges judges to make reasonable adjustments and accommodations to compensate for disability and ensure parties' effective participation in proceedings.

The judge was required to ensure the human rights under s 24(1)

Under s 6(2)(b) of the *Charter*, a County Court judge must apply the s 24(1) right to a fair hearing when deciding a criminal charge brought against a person. Considering the procedural structure of how the original offences charged led to the County Court proceeding, Bell J concluded that as applicants for orders setting aside the orders striking out their appeals under s 267(3) of the *Criminal Procedure Act*, Maria and Betty were persons 'charged with a criminal offence' for the purposes of s 24(1) of the *Charter*. Accordingly, the judge hearing their applications was obliged to ensure their right to a fair hearing.

Bell J concluded the judge did not take appropriate measures to ensure each applicant participated in the hearing. Conducting the proceeding, the County Court judge did not:

- recognise Maria and Betty as self-represented parties or call upon them to announce their appearance before counsel for the Council announced his appearance;
- appreciate that Maria and Betty had made two separate applications arising out of two different but related procedures and orders;
- explain to Maria and Betty the procedure that would be followed;
- explain to Maria and Betty that the central issue raised by their applications was whether their failures to appear was not due to fault or neglect on their part or that this test had to be applied separately to their applications.

Bell J concluded that recognising Maria and Betty as self-represented parties would have helped to equalise their position in relation to the represented Council. The judge needed to ascertain the applicants' capabilities at the start of the hearing. This may also have revealed Maria's disability. Recognising them as self-represented would have demonstrated equal respect for them, and could have enabled them to request an adjournment, during which they could seek legal representation.

Because of the way in which the hearing was conducted, Maria and Betty's rights to a fair hearing under s 24(1) of the *Charter* were breached.



Secretary to the Department of Justice and Regulation v Fletcher (No 4)

[2017] VSC 32

8 February 2017

Priest JA

Charter provisions: ss 12, 13, 14, 15, 21

Summary

The Secretary applied for renewal of a supervision order pursuant to the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) ('the Act'). The respondent had been subject to some form of supervision order for over a decade, having originally been sentenced and imprisoned for various sexual offences. In accordance with ss 9(1), (2), (4), (5) and (6) of the Act, the court needed to be satisfied that the respondent posed an unacceptable risk of committing a relevant offence if the supervision order was not renewed.

Expert evidence indicated that the respondent was a moderate risk of reoffending. However, the respondent submitted that there was no real risk of him spontaneously engaging in either sexual or violent offending against a stranger as he was 60 years old, legally blind and physically impaired.

Judgment

Priest JA noted that in determining whether the respondent posed an 'unacceptable risk', the court must balance the risk against the values accorded to liberty at common law and the rights in Part 2 of the *Charter*; specifically: freedom of movement (s 12); the right not to have privacy, family, home or correspondence unlawfully or arbitrarily interfered with (s 13(a)); the right to freedom of thought, conscience, religion and belief (s 14); the right to freedom of expression (s 15); and the right to liberty and security (s 21).

Given the level of risk that the respondent posed, Priest JA concluded that the supervision order should be revoked.



***DPP v SE* [2017] VSC 13**

31 January 2017

Bell J

Charter provisions: ss 6, 8, 17, 19, 25

Summary

The applicant, a 17 year old Aboriginal person with an intellectual disability, applied for bail under the *Bail Act 1977* (Vic) ('the Act'). After pleading guilty in the Children's Court to charges of theft and committing an indictable offence whilst on bail, he was being held on remand while awaiting a deferred sentencing hearing.

The applicant had a limited, though recent and significant, history of offending. He was engaged with support services and was doing well at school. He had previously complied with a bond and was planning, with support, to visit family interstate over the upcoming Christmas period. He had never committed a violent crime against a person. The prosecution opposed the application on the ground that there was an unacceptable risk that the applicant would reoffend.

Judgment

Bell J granted conditional bail. He first recognised that, as the applicant was a child, he had certain procedural rights under the *Charter*. As in *DPP v SL* [2016] VSC 714, because of the fundamental principle of the best interests of the child (s 17(2)), the right of a child to be segregated from detained adults (s 25(1)) and the right to equality before the law (s 8(3)), the court was obliged to make certain procedural directions. Such obligations arose under s 6(2)(b) because the court was exercising functional responsibilities under those rights. In Bell J's view, they were particularly salient in bail applications as these were likely to be the first point of contact between the child and the court process. Optimally, in the administration of criminal justice, children's rights are considered from the first opportunity.

Further, bail application procedures are encompassed by s 25(3) of the *Charter* (the right of a child charged with a criminal offence to a procedure that is age-appropriate and rehabilitation-focused). Bell J made certain procedural directions regarding the applicant's hearing at the Supreme Court, including that he was not to be handcuffed, nor detained with adult prisoners, he could sit either with counsel or support persons during the hearing, and counsel and the judge would not robe and would speak in language that so far as possible could be understood by him.

Bell J next went on to consider s 3A of the Act, which directed the decision-maker to consider any issues that arise due to a person's Aboriginality when making a determination. In Bell J's opinion, s 3A was to be read with the rights Aboriginal persons have under s 19 of the *Charter*. The right to distinct cultural rights under s 19, when operating with s 6(2)(b), provided a further basis upon which the court should respect Aboriginal persons' cultural rights. Also, Aboriginal cultural issues must be taken into account as a form of positive discrimination in order to achieve equality before the law.

The applicant had specific *Charter* rights as an Aboriginal person, as a child, and as a person with an intellectual disability. The court needed to recognise that different forms of disadvantage and vulnerability may be experienced because of each of these attributes, and exacerbated in someone who had more than one (in this case, three). In adopting procedures and making determinations under the Act, accommodation was even more necessary, as differing forms of discriminatory disadvantage and vulnerability were likely to cumulate and interact.

Section 3B of the Act further required the decision-maker to consider certain factors when making a determination about a child. Bell J noted that s 3B reflected the Victorian Law Reform Commission



recommendation that bail conditions should be no more onerous than necessary and should be consistent with the *Charter*.

In granting conditional bail, Bell J determined that the applicant showed cause as to why detention was not justified through various factors. These included his engagement with support services, compliance with a previous bond, age, Aboriginal culture (including the planned trip to visit family), intellectual disability and school attendance. There was not an unacceptable risk of reoffending, as the previous offending was likely due to the applicant's immaturity, intellectual disability and his coming to terms with life circumstances. The period of compliance with a previous bond and school attendance suggested a genuine commitment to building a positive future. Further, given that the applicant was Aboriginal, a child and had an intellectual disability, detention on remand posed a high risk of harm and exposure to negative influence.



Re Application for Bail by HL (No 2) [2017] VSC 1

6 January 2017

Elliott J

Charter provisions: ss 17, 22, 25

Summary

This was the second ruling regarding an application for bail, following the interim ruling *Re Application for Bail by HL* [2016] VSC 750 (13 December 2016) (further details).

The applicant, a 16-year-old who was on remand at Barwon Children’s Remand Centre (‘Barwon’), sought bail under s 4(4)(a) of the *Bail Act 1977* (Vic) (‘the Act’). Barwon had been ‘hastily established’ as a children’s remand centre and its facilities were ‘considered a work in progress’. The executive decisions associated with establishing Barwon were the subject of a separate challenge in *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister of Families and Children* [2016] VSC 796 (21 December 2016). While in that proceeding the decisions were found to be invalid and of no effect, the Governor-in-Council subsequently revoked the earlier establishment of Barwon and made a further order re-establishing it.

After the interim ruling, Elliott J adjourned proceedings for one week to allow a view of the conditions and facilities at Barwon, and to allow parties to file further evidence. While Elliott J expressed concerns about conditions at Barwon following this view, the court was not concerned with the merits of the decision to establish the centre.

Judgment

Elliott J considered the relevant rights under the *Charter* in greater detail than in the interim ruling. It was noted that s 17(2), the right of every child to such protection as is in his or her best interests, is modelled on art 24(1) of the International Covenant on Civil and Political Rights (‘the Covenant’). Although ‘best interest’ is not defined in the *Charter*, guidance could be drawn from s 10 of the *Children, Youth and Families Act 2005* (Vic), which refers to protection of the child and promotion of the child’s development as relevant to determining what is in the child’s best interests.

As to s 22(1), the right to be treated with humanity and dignity when deprived of liberty, Elliott J noted previous consideration of the right in both *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 and *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111. His Honour stated that although s 22(1) of the *Charter* had not been considered in detail by the Supreme Court against particular facts, in *Dale v Director of Public Prosecutions* [2009] VSCA 212, the Court of Appeal noted that solitary confinement, strip searches and shackling with leg irons may raise concern under the provision, without expressly deciding the issue.

Section 22(3), the right for an accused person to be treated in a way appropriate for a person who has not been convicted, must be construed within the context of s 22 more broadly. Elliott J identified that it extends beyond being segregated from convicted prisoners, as provided for by s 22(2), to requiring ‘differential treatment that emphasises a person’s status as an unconvicted person who enjoys the right to be presumed to be innocent’. His Honour cited a decision by the United Nations Human Rights Committee which suggested that ‘differential treatment may include privileges such as being able to wear one’s own clothes, make telephone calls and eat one’s own food’.

In relation to s 25(3), the right of a child charged with a criminal offence to a procedure that takes account of his or her age and the desirability of promoting rehabilitation, his Honour noted that the provision was modelled on art 14(4) of the Covenant. As reflected in s 3B of the Act, so far as possible, juveniles should



not be detained before trial. Any detention of children should be done in a manner consistent with the promotion of their dignity and worth, including through measures to ensure that they understand the process. Such principles apply from the child's first contact with law enforcement agencies.

Overall, rather than making findings of fact regarding the *Charter*, his Honour assumed the applicant's detention at Barwon breached his rights under ss 17(2), 22(1), 22(3) and 25(3). Notwithstanding those assumptions, the applicant failed to show cause as to why the court should grant bail under s 4(4)(a) of the Act. Although several of the applicant's charges had progressed to resolution since the interim hearing, the seriousness of the remaining charges and his conduct at Barwon meant that the applicant remained an unacceptable risk.



Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister of Families and Children [2016] VSC 796

21 December 2016

Garde J

Charter provisions: 7, 10, 17, 22, 38

Summary

The plaintiffs included a group of young persons who were on remand at Grevillea Youth Justice Precinct ('Grevillea'). Via their litigation guardian, they brought judicial review proceedings against the Minister for Families and Children ('the Minister'), the Secretary to the Department of Health and Human Services ('the Secretary') and the State of Victoria in relation to the establishment of Grevillea and the transfer of young people there from other youth justice centres. The proceeding included claims that in deciding to establish Grevillea, the Minister did not give proper consideration to the rights of the plaintiffs under the *Charter*, and that executive powers under s 478(a) and (c) of the *Children Youth and Families Act 2005* (Vic) ('the Act') were exercised for an improper purpose.

The Department of Health and Human Services ('the Department') supervised young people in the criminal justice system. Grevillea was established after nearly half the accommodation at Parkville Youth Justice Precinct ('Parkville') was lost.

Due to a lack of secure beds, young persons were transferred to alternative accommodation, the circumstances of which were not ideal. Corrections Victoria identified the Grevillea unit as the only unit in Victoria that could meet relocation needs. Shortly thereafter, three Orders in Council excised the Grevillea unit as an adult prison, and established it as a 'remand centre for emergency accommodation' and a 'youth justice centre for emergency accommodation'. These latter two Orders, establishing these accommodation facilities, were the subject of the proceeding.

Young people, including some of the plaintiffs, were transferred to Grevillea. Garde J described the conditions when they first arrived as 'harsh and austere'. Cells were fitted with porcelain bowls and sinks that were a considerable risk, and the visitor centre had certain fire and climbing risks. Within the first two weeks of being moved to Grevillea, one or more young persons were subject to:

- very long periods of solitary confinement in cells formerly used for high security prisoners;
- uncertainty as to the length and occurrence of 'lockdowns' (periods in which young people were locked in their cells) – some of the evidence suggested lockdowns were in place for 20 hours per day;
- fear and threats by staff against young persons;
- use of the adult prison Security and Emergency Services Group, including German Shepherd dogs;
- use of handcuffs when moving to the unit's outdoor area;
- screaming or loud banging on the doors;
- lack of, and limited opportunity to use, space and amenities;
- limited opportunity for education; and
- lack of family visits or access to religious services.



Against this background, the plaintiffs challenged several decisions associated with establishing Grevillea and transferring young people to the unit, including the recommendations of the Minister to the Governor in Council, and the decisions of the Governor in Council by the second and third Orders in Council. They submitted that rights under ss 10(b), 17(1), 17(2) and 22(1) of the *Charter* were engaged, and that the decisions contravened s 38(1).

Judgment

Garde J first considered whether the relevant rights under the *Charter* were engaged. A right was engaged when it was prima facie limited without referring to whether the limitation was reasonable.

Section 17(2): child's right to such protection as is in his or her best interests

Garde J noted that the central element of s 17(2) is the best interests of the child, and the scope of the rights could be informed by the United Nations Convention on the Rights of the Child ('CROC') and United Nations' materials. The CROC was noted to uphold various rights of the child in the youth justice system, because of children's differing psychological and physical development, and their emotional and educational needs compared to adults. Specifically, art 40(1) of the CROC provides for 'treatment in a manner consistent with the promotion of the child's sense of dignity and worth'.

Garde J also referred to the United Nations Standard Minimum Rules for the Administration of Justice ('the Beijing Rules'), which his Honour viewed as giving context to s 17(2). In particular, the Beijing Rules provide that juveniles in custody should be provided with 'care, protection and all of the necessary assistance - social, educational, vocational, psychological and physical - that they may require in view of their age, sex and personality'. His Honour determined that the decisions about the Orders in Council engaged s 17(2), as moving the young people to a youth justice centre within Barwon Prison had widespread ramifications including physical, social, cultural, intellectual and spiritual impacts.

In contrast, s 17(1), the right to protection for families, was not engaged. While it was perhaps less convenient for families to travel to Grevillea than Parkville, this was insufficient to engage the right. The evidence also indicated that taxi vouchers could be provided in certain circumstances.

Section 10(b): right to be protected from cruel, inhuman or degrading treatment

Garde J found that s 10(b) was engaged due to the harsh conditions at Grevillea. The fact that the plaintiffs were children was significant in this determination.

Section 22(1): right to humane treatment and respect for dignity when deprived of liberty

Garde J found that the conditions at Grevillea within the first two weeks of its occupation engaged s 22(1). He noted that s 22(1) recognises the vulnerability of all persons when deprived of liberty. The content of the right could be informed by art 10 of the International Covenant on Civil and Political Rights. Garde J also noted Emerton J's analysis in *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 ('Castles'), where her Honour identified the starting point as 'prisoners should not be subjected to hardship or constraint other than the hardship or constraint that results from their deprivation of liberty'.

Applying s 38(1)

Having determined that ss 17(2), 10(b) and 22(1) of the *Charter* were engaged, Garde J considered whether, in making the relevant decision, the Minister failed to give proper consideration to the engaged rights as required by s 38(1). In his Honour's view, a public authority must give proper consideration to human rights in two ways: first, in the decision-making process; and second, to then not act in a way incompatible with a human right. His Honour referred to s 38(1) as having two cumulative limbs, the 'procedural limb' and 'substantive limb'. He commented that, '[i]n making a decision, a public authority must give proper consideration to relevant rights and reach an outcome that is, in substance, compatible with human rights'.



Proper consideration imposes a higher standard than the obligation to take into account a relevant consideration at statute or common law (see *Castles*). Garde J noted there what will constitute ‘proper consideration’ will depend on the circumstances. He rejected the notion that the obligation was suspended during an emergency or in extreme circumstances. Such contexts, in which human rights could be overlooked, confirmed rather than obviated the need for proper consideration.

Courts should not over-zealously scrutinise proper consideration, but merely invoking the *Charter* like a mantra will not satisfy the obligation. A review of the substance of the decision-maker’s consideration, rather than form, is required. In the circumstances, the only evidence regarding the Minister’s decision-making process was the briefing paper, the papers submitted to the Governor in Council, the Orders in Council, and the Minister’s media statements. Based on these, Garde J determined that there was ‘simply no sign that the engaged *Charter* rights or indeed any human rights were taken into account at all’.

Garde J next considered the defendant’s submissions about whether the Minister’s decision was incompatible with human rights. According to the defendants, this involved analysing whether the relevant decision limited rights and, if so, whether the limitation was reasonable and justified under s 7(2) of the *Charter*. His Honour reiterated that the decision-making process leading to the Orders in Council did not involve any consideration or evaluation of human rights. He found that no one, including the Minister, considered the impact of establishing facilities at Barwon Prison on young persons. They were focused on coping with the circumstances at Parkville, on pursuing their view that tougher measures were needed, and their view that perpetrators of damage had to face consequences.

The impacts upon the plaintiff’s human rights were not proportionate and there was ‘no diligent or methodical analysis of the nature of human rights, nor the purpose, nature, extent importance of any limitation’. Less restrictive measures were not considered. Garde J determined that the Minister’s decision was substantively incompatible with human rights, as it exceeded the reasonable limits demonstrably justified in a free and democratic society according to *Charter* s 7(2).

His Honour declared that the Minister and the Governor in Council’s decisions contravened s 38(1). However, he did not decide whether such a contravention invalidated the decisions. Noting the limited authority on this important issue, he stated that determining whether contravention of s 38(1) gives rise to invalidity needed to be decided by the appellate courts in another case. These particular decisions were invalid on other grounds of judicial review - failure to take into account relevant considerations. Consequently, the plaintiffs were entitled to orders that the Secretary transfer them to a remand centre lawfully established under the Act.

The defendants immediately indicated that they would appeal the decision and sought a stay of the orders. Garde J granted a stay of one week. Within that time the matter was appealed and part-heard (see *Minister Families and Children v Certain Children by their Litigation Guardian Sister Marie Brigid Arthur* [2016] VSCA 343). Given the urgency of the matter, the hearing of the *Charter* issues was initially adjourned, and later discontinued.



R (on application of Chief Examiner) v DA (a pseudonym) [2016] VSCA 325

16 December 2016

Ashley, Redlich and McLeish JJA

Charter provisions: ss 25, 32

Summary

The respondents failed to answer certain questions put to them by the Chief Examiner pursuant to s 36 of the *Major Crime (Investigative Powers) Act 2004* (Vic) ('the Act'). The Chief Examiner commenced separate proceedings in the Trial Division against the respondents for contempt, as provided in s 49(1)(b) of the Act. Questions were referred to the Court of Appeal.

Section 49(1)(b) provides that a person attending before the Chief Examiner is guilty of contempt if, without reasonable excuse, they refuse or fail to answer questions relevant to the subject matter of the examination. A common issue was raised regarding who bears the onus if an element of contempt under s 49(1)(b) is that the respondent does not have a reasonable excuse. The Chief Examiner asserted that, properly construed, s 49(1)(b) places the legal onus on examinees. They relied on *R v Debono* [2013] VSC 408, where such a finding was made in relation to s 36(3) of the Act.

While accepting that they bore an evidential onus, the respondents submitted that the prosecution held the legal onus. They argued that s 49(1)(b) should not be considered a statutory exception to that general common law principle, and it was consistent with the purposes of the Act that the burden of proof falls with the Chief Examiner. The second respondent also submitted that such a construction was consistent with s 25(1) of the *Charter*, the presumption of innocence, and so s 32(1) of the *Charter* required s 49(1)(b) of the Act to be interpreted compatibly so far as possible consistently with its purpose.

Judgment

The Court of Appeal found that the legal burden rested with the Chief Examiner. In doing so it referred to the relevant Statement of Compatibility, which implied that if s 49(1) were not construed as imposing only an evidential burden on the examinees, then the right to be presumed innocent under s 25(1) of the *Charter* may be limited. The Statement of Compatibility was considered properly used as an aid to construction under s 35(b)(ii) of the *Interpretation of Legislation Act 1983* (Vic).



Re Application for Bail by HL [2016] VSC 750

13 December 2016

Elliott J

Charter provisions: ss 17, 22, 25, 32

Summary

This was an application for bail under s 4(4)(a) of the *Bail Act 1977* (Vic) ('the Act'). The applicant was 16 years old and had been charged with armed robbery, theft of a motor vehicle, assault with a weapon and committing an indictable offence whilst on bail. He was initially placed at Parkville Youth Justice Centre ('Parkville'), a specifically designed remand centre for children. Before being placed there, the applicant had lived with his mother and had been engaged in an education program three days per week. He had a history of not returning to Australia to attend previous court dates when he was subject to a supervision order.

After a riot at Parkville, which there was no evidence the applicant took part in, the applicant was ultimately transferred to the new Barwon Children's Remand Centre ('Barwon'). Barwon had been 'established hastily' under s 478(a) of the *Children, Youth and Families Act 2005* (Vic) and the development of appropriate facilities for children placed there was considered 'a work in progress'.

After transferring to Barwon, the applicant was kept in solitary confinement and was released from his cell for only one hour each day. He had no access to educational programs, appropriate recreational programs or other facilities and amenities consistent with an environment appropriate for a child's rehabilitation. He asserted that his mental health had significantly deteriorated since being transferred.

The head of Barwon's operations gave evidence that certain restrictions, by way of a management plan, were imposed on the applicant due to 'negative behaviour' he had displayed toward Youth Justice staff, including a threat to rape a female staff member. The applicant did not challenge this evidence.

The applicant needed to 'show cause' as to why he should be granted bail. Issues included whether the applicant's detention at Barwon contravened certain *Charter* provisions, whether Part 2 of the *Charter* obliged the court to uphold the relevant rights, and whether s 32(1) required the court to interpret the Act in a manner consistent with these rights. The specific rights in question were the right to such protection as is in the best interests of the child (s 17(2)), the right to be treated with humanity and with respect to the inherent dignity of the human person (s 22(1)), the right to be treated in a way that is appropriate for a person who has not been convicted (s 22(3)) and the right to a procedure that takes account of the applicant's age and the desirability of promoting his rehabilitation (s25(3)).

Judgment

Elliott J noted the relationship between the Act and the *Charter*; specifically, s 3B of the Act provided for certain considerations to be taken into account when making a determination under the Act in relation to a child. When the provision was introduced into the Act, the Statement of Compatibility identified that the provision engaged ss 12, 21 and 25 of the *Charter*. This was consistent with case law that found that a breach of the *Charter* was a relevant consideration in determining a bail application. His Honour went on to state, however, that the rights in the *Charter* did not usurp the provisions of the Act. They were subject to reasonable limits and the scheme of the Act was designed to take the rights into account.

In relation to s 32(1), Elliott J found that, as there was no alternate construction or any contention that relevant parts of the Act were ambiguous, there was no basis to depart from the meaning of the provision in question. The legal meaning of the provisions was clear from ordinary principles of statutory construction.



Regarding Part 2 of the *Charter*, with one exception, both parties and the Attorney-General accepted that the applicant's rights under the *Charter* applied and were relevant when determining bail. The only exception was a submission by the Attorney-General in relation to s 25(3), which claimed that the provision did not apply as a bail application did not relate to rights in criminal proceedings. Elliott J rejected this on the basis of the Statement of Compatibility and the language of s 25(3).

Without making a finding, Elliott J proceeded on the assumption that the applicant's rights under ss 17(2), 22(1) and 22(3) of the *Charter* were infringed. An assumption was not made regarding s 25(3) as the applicant did not make submissions in relation to that provision. His Honour determined that, given the applicant's criminal history, the evidence as to the armed robbery and the little regard he had shown for bail conditions in the past, he posed an unacceptable risk and had not shown cause as to why bail should be granted. The infringements of the applicant's rights under the *Charter* did not make the risk acceptable. Rather than refuse bail immediately, Elliott J adjourned the application for one week to allow parties to file further evidence and for him to conduct a view of Barwon. The second ruling was made in *Re Application for Bail by HL (No 2)* [2017] VSC 1.



Tikiri Pty Ltd v Fung [2016] VSC 460

5 August 2016

Ierodiaconou AsJ

Charter provisions: ss 13, 32

Summary

The plaintiff operated a medical practice at which the defendant had worked for several years. The defendant stopped working at the plaintiff's practice and began work at another practice ('the second practice'). Among other issues, the plaintiff alleged that the defendant had unlawfully used its confidential information at the second practice. In accordance with an interlocutory decision, the defendant had filed an affidavit exhibiting a confidential list of patients who she consulted at the second clinic. The confidential list was to be filed in a sealed envelope at the court and did not have to be served on the plaintiff. The plaintiff sought inspection of the list by way of a summons.

The defendant opposed inspection of the list. She submitted that s 13 of the *Charter* (right not to have privacy arbitrarily interfered with) protected the disclosure of patients' names. Further, s 28(2) of the *Evidence (Miscellaneous Provisions) Act 1958*, which protects the disclosure during civil proceedings of information acquired by a physician in attending a patient and necessary to enable a medical practitioner to prescribe or to act for the patient, and the relevant sections of the *Health Records Act 2001*, which limits the use health and personal information for the purposes of providing a health service, should be interpreted through the lens of the *Charter*, in accordance with s 32.

Judgment

The list of patient names came within the scope of the *Health Records Act 2001* and the *Evidence (Miscellaneous Provisions) Act 1958*.

The words of a statute must be given their clear meaning. If the words of a statute are capable of more than one meaning, s 32 of the *Charter* requires that a court give the words whichever meaning best accords with the human right in question (*Slaveski v Smith* (2012) 34 VR 206). Section 32 was not engaged as the plain and natural meaning of the relevant provisions of the *Health Records Act 2001* and *Evidence (Miscellaneous Provisions) Act 1958* were clear.

Section 13 of the *Charter* was not engaged as if inspection of the confidential list of patient names was granted it would be via court order, and the *Charter* does not expressly apply to the making of a court order.



Daniels v Eastern Health [2016] VSC 148

22 March 2016

McDonald J

Charter provision: s 32

Summary

The plaintiff applied for a writ of habeas corpus which, if granted, would have entitled him to release from involuntary detention by Eastern Health. Pursuant to s 55 of the *Mental Health Act 2014*, the Mental Health Tribunal had the power to make a new inpatient treatment order ('ITO'). The plaintiff claimed that s 55 did not empower the Tribunal to make a new ITO that extended beyond the date of his current ITO because such a construction was inconsistent with human rights.

Judgment

Justice McDonald referred to the Court of Appeal's observation in *Slaveski v Smith* (2012) 34 VR 206 that s 32 of the *Charter* does not authorise departure from established understandings of statutory construction. It does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words to change a provision's true meaning.

Therefore, s 55 was to be interpreted according to established rules of statutory construction. The plaintiff's submitted construction would read into s 55 the term 'if the Tribunal makes a person subject to an ITO after conducting a hearing under s 60, the maximum period that may be specified in the order must not exceed the maximum period of an extant ITO'.

Applying principles from *Wentworth Securities v Jones* [1980] AC 74 and *Director of Public Prosecutions v Leys* (2012) 44 VR 1, such words should not be read into s 55. The application for habeas corpus was dismissed.



De Bruyn v Victorian Institute of Forensic Mental Health [2016] VSC 111

22 March 2016

Riordan J

Charter provisions: ss 10, 22, 38

Summary

The plaintiff, an involuntary patient at Thomas Embling Hospital, commenced judicial review proceedings in the Supreme Court seeking declaratory and injunctive relief against the defendant to prevent the implementation of a smoke free policy at the hospital. He argued that the smoke free policy was beyond the defendant's power because it fell outside the powers given to it by the *Mental Health Act 2014*, and it was unlawful because it was inconsistent with the *Tobacco Act 1987*.

The plaintiff also argued that the defendant breached its obligations under s 38(1) of the Charter because when deciding to approve and/or adopt the smoke free policy, the defendant failed to give proper consideration to the rights in ss 20 (not to be deprived of property), 22(1), 22(3) (humane treatment when deprived of liberty) and 10(c) (not to be subjected to medical or scientific experimentation or treatment). The s 20 claim was held to be premature, so it was left to be decided at a later stage.

Judgment

For reasons unrelated to the *Charter*, the approval and adoption of the smoke free policy was within the defendant's powers under the *Mental Health Act 2014* and was not inconsistent with the provisions of the *Tobacco Act 1987*.

Human rights under the *Charter* should be construed in the broadest possible way. For the defendant to be required to give proper consideration to human rights under s 38(1), such rights must be relevant. Human rights will be relevant if the proposed decision will apparently limit such rights. A decision that will apparently limit a right (without consideration of s 7(2) factors), is said to have 'engaged' the right.

Section 22(1)

Determining whether the smoke free policy would constitute treatment of the plaintiff that is inhumane (or without humanity) or is without respect for his inherent dignity required evaluating the relevant circumstances. Not every act that causes inconvenience, distress or even pain is inhumane. Not every act that limits a person's rights and freedoms can be said to be made without respect for the person's dignity. What may not be inhumane or an affront to the dignity of a person who is free to return home may be one or both of those things to an involuntary patient who suffers from mental illness and resides in an institution.

When deciding whether the smoke free policy engaged the right in s 22(1), Riordan J considered the benefits and the drawbacks of the smoke free policy. Because it was comprehensive (applying throughout the hospital to all staff, patients and visitors), properly considered and adopted after extensive consultation with patients, the smoke free policy did not impact on the dignity of the patients. The policy may cause some distress to the plaintiff, but it was introduced to protect present and future patients, staff and visitors from the harmful effects of smoking, and introduced with nicotine replacement therapy and other treatments. The policy was not inhumane to the patients and did not infringe the plaintiff's right under s 22(1), and so that right was not engaged.

A decision that is intended to benefit the affected person, is comprehensive and the product of careful consideration and consultation is less likely to affect a person's dignity. Decisions without those features could be seen to be arbitrary or discriminatory and are more likely to adversely impact on a person's dignity.



The test for giving proper consideration to a human right is:

- The decision-maker must seriously turn their mind to the possible impact of the decision on the person's human rights, and identify the countervailing interest/obligations;
- The decision-maker cannot simply invoke the Charter like a mantra. It is not sufficient to identify the Charter or particular sections then give a pro forma explanation;
- It is not necessary to identify the 'correct' right that might be interfered with (i.e. correct section under which the right is protected), or explain any content of any right by reference to legal principles. It is necessary to identify in general terms the nature and extent of effect of the decision on the person's rights;
- After identifying the actual rights affected the decision-maker will be required to balance competing private and public interests; and
- There can be no formula for the exercise and it should not be scrutinised over-zealously by the courts. Courts review the substance of the decision-maker's consideration not the form.

Although s 22(1) was not engaged, the defendant gave it proper consideration. It comprehensively considered, over a period of approximately four years, the matters relevant to the decision to limit the plaintiff's choice to smoke at the hospital, including any potential impact on the plaintiff's rights under the *Charter*. The impact of the decision on the plaintiff and other smokers was fully exposed. In the process of obtaining approval for and implementing the policy, countervailing interests/obligations were identified and private and public interests were balanced.

Section 22(3)

Section 22(3) applies to persons who have been accused but have not been tried, and to persons who have been detained without charge. The plaintiff had been charged and the charge was causally linked to his detention after being found not guilty by reason of insanity. The reference to 'person detained without charge' was intended to cover persons such as those detained under anti-terrorism legislation, which provides for preventative detention orders being made against persons who have not been charged.

Section 10(c)

Medical treatment is not defined in the *Charter*. Based on its Explanatory Memorandum, 'medical treatment' in s 10 means medical treatment as defined by s 3 of the *Medical Treatment Act 1988* - the carrying out of an operation, or the administration of a drug or other like substance, or any other medical procedure, not including palliative care.

The smoke free policy did not constitute medical treatment within the meaning of s 10(c). The plain meaning of 'medical treatment' does not include a smoking ban, which does not amount to treatment, much less medical treatment. Although the smoke free policy was initiated by a medical practitioner, his medical qualification was not a necessary feature of the decision to initiate the implementation of a smoke free policy. Generally, policies introduced to improve the health of a group of persons would not fall within the definition of a 'medical procedure'. Treatment, particularly medical treatment, would normally incorporate a connotation of positive intervention and the right in s 10(c) would normally be confined to direct interference with the individual's body or state of mind.

The smoke free policy may result in medical treatment being prescribed, but that does not mean the policy engages the right in s 10(c). The fact that certain action may cause the need for medical treatment does not render that action itself 'medical treatment'. The nicotine replacement therapy and other treatments available were optional for patients, not compulsory.



Clark-Ugle v Clark [2016] VSCA 44

17 March 2016

Tate, Ferguson and McLeish JJA

Charter provisions: ss 19, 32

Summary

This case considered whether the Supreme Court could declare a general meeting convened by Receivers and Managers appointed to the Framlingham Aboriginal Trust ('the Trust') valid where there was no quorum, and, if so, whether the circumstances warranted the exercise of such a power.

The Trust was established by the *Aboriginal Lands Act 1970* (Vic) ('the Act') as a body corporate to own and operate the Framlingham reserve, under the supervision of the Office of Aboriginal Affairs. The appellant was formerly a member of the committee empowered to act on behalf of the Trust, but lost this role when the Court declared vacant all positions on the committee and appointed receivers.

The appellant argued that the trial judge had not interpreted the Act compatibly with human rights, as required by s 32(1) of the *Charter*. He asserted that s 19(2)(d) was engaged: the right of Aboriginal persons to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs. The appellant submitted that the trial judge failed to interpret the quorum requirement in s 24(3) of the Act compatibly with this provision, and as such did not consider whether the quorum requirement entrenched rights of resident members of the Trust, acknowledging the special relationship between such members and the Framlingham reserve, in contrast to the relationship that non-resident members had with the land.

Judgment

The interpretative obligation of s 32(1) is not enlivened unless a relevant human right is engaged. The Court found that s 19(2)(d) did not distinguish between residents and non-residents – the enjoyment of the cultural right did not depend on residency. The fact that some members of the community did not live on the land in question did not mean that they did not or could not 'bear the distinctive spiritual, material and economic relationship to the reserve that is founded on their traditional connection to it'. As s 19(2)(d) did not support the distinction that the appellant sought to make, and the Act did not require such a distinction, the right was not engaged.



Hoskin v Greater Bendigo City Council [2015] VSCA 350

16 December 2015

Warren CJ, Osborn and Santamaria JJA

Charter provisions: ss 14, 19, 38

Summary

The Bendigo Council approved an application for a permit to construct and use a mosque in an industrial zone in Bendigo. Objectors to the application sought merits review of this decision by VCAT pursuant to s 82 of the *Planning and Environment Act 1987* ('the Act').

VCAT granted the permit on amended conditions. Several of the original objectors sought leave to appeal VCAT's decision, arguing that there was an unacceptable risk of adverse effects to the Bendigo community should the permit be granted. The Council contended that the objectives of the Act are to be construed in a manner which gives effect to the *Charter*, focusing on s 14 (freedom of thought, conscience and religion) and s 19 (cultural rights). The objectors contended that the *Charter* was irrelevant to VCAT's decision because neither the Council nor the permit applicant were human beings.

Judgment

Sections 14 and 19 of the *Charter* informed the construction of planning objectives and of 'significant social effects' within s 60 of the Act. The *Charter* obliged the Council and VCAT to consider the human rights of future mosque users when deciding whether or not to grant the permit.

The Court accepted VCAT's conclusion that proper consideration of a relevant human right 'requires a decision-maker to do more than merely invoke the *Charter* like a mantra'. The Council was a public authority under s 6 of the *Charter* and was required to give proper consideration to the rights of potential mosque users and other individuals.

The *Charter* was relevant to the proper understanding of the compatibility of the proposed land use with Victorian planning objectives. The concept of a 'significant social effect' was informed by the *Charter's* protection of the exercise of religion, and 'it was not open to the group objectors to object to a form of religious worship in itself.'



Bayley v Nixon and Victoria Legal Aid [2015] VSC 744

18 December 2015

Bell J

Charter provisions: ss 8, 25, 38

Summary

The plaintiff was convicted of offences in three trials in the County Court of Victoria and sentenced to 18 years' imprisonment, to be served concurrently with the life sentence he was serving for other offences. A new non-parole period of 43 years was ordered, extending the existing non-parole period of 35 years imposed for other offences.

The plaintiff sought leave to appeal against conviction in two of the County Court trials, and against sentence in respect of all three trials. The plaintiff's application to Victoria Legal Aid ('VLA') for legal assistance was refused. An independent reviewer confirmed the decision to refuse to grant legal assistance, despite opining that the plaintiff's appeals against conviction were likely to be allowed, resulting in a lower non-parole period.

The plaintiff sought judicial review of the independent reviewer's decision. The relevant ground was that the independent reviewer made an unlawful decision by failing to comply with the duty in s 38(1) of the *Charter* to give proper consideration to human rights. The plaintiff sought relief on this ground on the basis that the decision was invalid for error of law on the face of the record.

Judgment

The independent reviewer's decision was set aside and the plaintiff's application remitted to a different reviewer for reconsideration according to law. There was nothing in the independent reviewer's reasons or in the objective facts to indicate how the reviewer's reference to the 'public confidence in stewardship by VLA of its limited funds' was applied to the plaintiff's application. As such, the result lacked an evidentiary foundation and could only be arbitrary. This conclusion meant it was unnecessary to consider the *Charter* ground, though Bell J made a number of comments about the *Charter*.

As a public authority under the *Charter*, VLA and independent reviewers are obliged to act compatibly with, and make decisions upon proper consideration of, the human rights in the *Charter*. The close relationship between legal aid and human rights is reflected in how provisions of the *Charter* connect with provisions of the *Legal Aid Act*, particularly sub-ss 25(2)(d) – (f) of the *Charter* which provide certain minimum guarantees with respect to legal aid.

Further relevant *Charter* considerations were how the right to legal aid must be enjoyed 'without discrimination' (s 25(2)), and the s 8(3) right to equality before the law, equal protection of the law without discrimination and equal and effective protection against discrimination. Accordingly, as was conceded by VLA, the plaintiff's notoriety was not a lawful basis upon which his applications for legal assistance could be rejected by the independent reviewer. His application was to be considered impartially and objectively.



Madafferi v The Age [2015] VSC 687

9 December 2015

John Dixon J

Charter provisions: ss 15, 32

Summary

The plaintiff alleged that he was defamed by imputations conveyed by several articles published by the first and sixth defendants. The articles referred to confidential sources and a journalist (also a defendant) gave evidence that the confidential sources had been promised that their identities would not be disclosed. The plaintiff sought orders that journalists' privilege did not apply to evidence that would disclose the identity of any of the informants described and that the defendants disclose the sources of information on which they relied. Additionally, the plaintiff sought preliminary discovery relating to the identity of the sources.

The defendants relied upon the statutory journalist privilege in relation to an informant's identity (*Evidence Act 2008*, s 126K), and common law qualified privilege defences.

Judgment

Sections 15 (freedom of expression) and 32 of the *Charter* mandated that s 126K be given 'a beneficial interpretation.' In Western Australia, where there is no *Charter*, comparable provisions had been given a beneficial interpretation because 'the confidentiality of information provided to journalists by informants is no longer (if it ever was) a matter of purely private interests, but is now recognised as a strong public interest, which may outweigh other public interests which apply in relation to the production of documents for the purposes of litigation.'

The application for a declaration that the defendants could be compelled to give evidence that would disclose informants' identities was refused, as was the application for preliminary discovery.



Vella v Waybecca Pty Ltd (2015) 303 FLR 315, [2015] VSC 678

30 November 2015

Lansdowne AsJ

Charter provisions: ss 7, 8, 10, 24, 32

Summary

The applicant contracted to sell property to Waybecca Pty Ltd. A magistrate granted Waybecca orders for specific performance of the contract, and when the applicant failed to comply, made enforcement orders permitting Waybecca's solicitors to draft the transfer of land and a registrar of the Magistrates' Court to execute the transfer on behalf of the applicant. The applicant appealed the magistrates' order.

Among other grounds, the applicant claimed that s 24 (fair hearing) was invoked by his being ordered to pay a hearing fee. He argued that Lansdowne's AsJ's decision preventing him to appear via his power of attorney also breached s 24, as well as s 8 (equality before the law) or s 10 (protection from torture and cruel, inhuman or degrading treatment). He alleged that s 20 (right not to be deprived of property other than accordance with law), was engaged by the proceeding. He asserted that s 100(1) of the *Magistrates' Court Act 1989*, which prescribes the extent of the Magistrates' Court's civil jurisdiction, was incompatible with the *Charter*.

Judgment

The appeal was incompetent as the orders were not 'final orders' for the purposes of s109 of the *Magistrates' Court Act 1989*. Regarding application of the Charter, the rights sought to be protected and promoted by Parliament were not absolute, but subject to reasonable limits.

As to the right to a fair hearing (and associated breaches of ss 8 and 10), Lansdowne AsJ had let the appeal continue even though the applicant had not paid the fee. Multiple provisions of the *Supreme Court (General Civil Procedure) Rules 2015* reasonably limit a party's right of appearance to the party in person or through their legal practitioner. The limitation is reasonable having regard to the Court's power 'to determine the rights and obligations of persons, to limit the right to participate to the party in person or a legal practitioner, licenced to practice law and subject to the disciplinary control of the Court'.

It was difficult to see how the alleged deprivation of property was not in accordance with law, as a contract was being enforced. The *Magistrates' Court Act* contained avenues for re-hearing and appeal, and an application could also be made for judicial review. The refusal to join the power of attorney as a party to the proceeding was not a breach of s 24 as he had not been a party to the matter on appeal.



National Builders Group IP Holdings Pty Ltd v CAN Pty Ltd (In Liq) **[2015] VSCA 260**

17 September 2015

Maxwell P and Kaye JA

Charter provisions: s 24

Summary

This was an appeal from a decision to strike out the defence of one of two defendants who claimed ownership of certain intellectual property.

The trial judge, relying on s 56(2) of the *Civil Procedure Act 2010 (Vic)* ('CPA') found that both defendants had persistently failed to comply with orders for discovery despite generous periods being allowed for compliance. The first defendant, Holdings, had provided no explanation for their failure to comply.

On appeal, Holdings submitted that the power to dismiss a claim or defence for non-compliance with discovery interfered with the fundamental common law right to a fair trial.

Judgment

The appeal was allowed on the basis that inconsistent outcomes may result if Holdings has judgment entered against it as to the intellectual property, but the second defendant Suckling, succeeds in their defence.

However, the Court dismissed the fair hearing argument, noting that the right to a civil hearing has never been unqualified. Section 56(2) of the CPA confers powers that are an extension of powers already available to the Court to address non-compliance. By enacting the CPA, Parliament intended to impose strict discipline on the conduct of civil proceedings.

Parliament's intention was determined with reference to the Statement of Compatibility for the CPA Bill, which asserted that the Bill would give courts the power to 'strongly sanction failure to comply with or misuse the discovery process'.



***Bare v IBAC [2015] VSCA 197* Victorian Police Toll Enforcement v Taha;
*State of Victoria v Brookes [2013] VSCA 37***

Nettle, Tate and Osborn JJA

4 March 2013

Charter provisions: ss 1, 7, 8, 21, 24, 32, 160

Summary

These matters were both appeals from the Common Law Division. In each case, the judge had made an order in the nature of certiorari to quash a Broadmeadows Magistrates' Court order that the respondent be imprisoned pursuant to s 160(1) of the *Infringements Act 2006*, for failure to make instalment order payments in respect of outstanding fines. The judge held that the Magistrate made a jurisdictional error in failing to make enquiries about the respondents' circumstances, and thus in failing to consider whether to make an alternative order under s 160(2) or (3) on the basis of the respondents' intellectual disabilities. The judge remitted the matter to the Magistrate for further consideration according to law.

The appellants contended that the judge had made an error in construing s 160 in a way that required the court to consider the availability of 'less draconian orders' under subsections (2) and (3), and to take into account the individual circumstances of the offender before making an order of imprisonment under subsection (1).

Judgment

The unified construction of s 160 adopted in the court below was correct, and was supported both by the principle of legality and by the *Charter of Human Rights and Responsibilities*. The Court confirmed that the unified construction was the one most compatible with the interpretive obligation to favour a construction compatible with human rights – in particular, the right to liberty under s 21, the right to a fair hearing under s 24(1), and the right to equal protection of the law under s 8(3).

The Magistrate had therefore been subject to a positive obligation to make enquiries regarding the existence of special circumstances which might justify an order of less severity, before making an order of imprisonment.

The appeal was dismissed.



***DPP v Leys* [2012] VSCA 304, (2012) 296 ALR 96**

Redlich and Tate JJA and T Forrest AJA

12 December 2012

Charter provisions: ss 21(2), 27(2), 32(1)

Summary

The respondents pleaded guilty to recklessly causing serious injury, intentionally causing injury and affray. The first respondent was sentenced to two years' imprisonment wholly suspended and a community corrections order ('CCO') for a period of two years. The second respondent was sentenced to 18 months' imprisonment wholly suspended and a CCO for a period of two years.

On appeal, a question arose as to whether s 37 of the *Sentencing Act 1991* – which sets out the pre-requisites to the making of a CCO – applied to conduct that occurred in February 2010. The time at which the conduct occurred was significant because the Court identified an ambiguity in relation to the commencement of s 37. That ambiguity was attributable to the conflict between the commencement provision s 2(3) of the *Sentencing Amendment (Community Correction Reform) Act 2011* and the transitional provision under cl 5 of Sch 3 of the *Sentencing Act 1991* ('cl 5').

The Director alerted the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission ('the Commission') of the proceedings, given the possible relevance of the *Charter*.

The Solicitor-General submitted that the Court should adopt a construction of cl 5 compatible with the right not to have a greater penalty imposed than that which applied at the time the offence was committed, under s 27(2) of the *Charter*. The Commission submitted that the court was required by s 32(1) of the *Charter* to depart from a literal interpretation of cl 5 as such an interpretation would be incompatible with the right not to be subjected to arbitrary detention under s 21(2) of the *Charter*.

Judgment

The appeal was allowed on the ground that the combination of a CCO and suspended sentences of imprisonment exceeding three months was unlawful. The Court resentedenced the first respondent to two years and three months' imprisonment wholly suspended and the second respondent to one year and 18 months' imprisonment, also wholly suspended.

The Court adopted a purposive construction of cl 5, reading the words 'of s 21' into the provision.

In respect of the Solicitor-General's submission in relation to the *Charter*, the Court held that s 27(2) was not engaged, as the maximum sentence applicable to the offence was unchanged between the commission of the offence and the time of sentence. Regarding the Commission's submission, the Court found that it was unnecessary to consider whether the right under s 32(1) of the *Charter* was engaged, because the construction proffered by the Commission was the one the Court had adopted on ordinary principles of statutory interpretation.



A & B v Children’s Court of Victoria [2012] VSC 589

Garde J

7 December 2012

Charter provisions: ss 8(3), 17(2), 24(1), 32

Summary

The applicants, aged 11 and nine years old, were the subjects of protection applications under the *Children, Youth and Families Act 2005* by the Secretary of the Department of Human Services. The applications were made on the basis that the children had suffered, or were likely to suffer, harm as a result of physical injury or emotional or psychological harm. In an interim hearing, the Magistrate determined that the applicants were not mature enough to give instructions and adjourned the hearing to enable legal representation to be obtained pursuant to s 524(4) of the Act. The Magistrate refused to grant leave under s 524(5) for the applicants to be represented by the same legal practitioner.

The applicants applied to quash the decision. They, and the Equal Opportunities and Human Rights Commission intervening, argued that s 32 of the *Charter* required s 524 of the Act to be interpreted compatibly with human rights, including the right to equality before the law, the right of a child to protection in his or her best interests and the right to a fair hearing.

Judgment

The appeal was allowed and the orders were quashed.

Garde J did not engage with the applicants’ contention in relation to the *Charter*, as the phrase ‘mature enough to give instructions’ was clear and was capable of construction on its ordinary and grammatical meaning. On this point, the Court adopted the statement of principles in relation to ss 32(1) and 7(2) of the *Charter* in *Slaveski v Smith* (2012) 34 VR 206 (following *Momcilovic v R* (2011) 245 CLR 1).

Had the words of s 524 been capable of more than one meaning, it would have been appropriate to consider which of the meanings accorded best with the human rights identified by the applicants. Further, the construction adopted by the Court was consistent with the best interests principle generally and the principle that the best interests of the child must always be paramount.



***Biddle v Allan* [2012] VSC 538**

Randall AsJ

7 November 2012

Charter provisions: ss 24, 32

Summary

The defendants filed an application in the Victorian Civil and Administrative Tribunal ('the Tribunal') seeking orders against the plaintiff for the issue of certificates and compensation. The plaintiff failed to attend a directions hearing, a compulsory conference and a further directions hearing. The plaintiff sought leave to appeal against the Tribunal's orders, which were determined adversely to him in his absence and included a consequential order that there would be hearing as to quantum only.

The plaintiff contended that the Tribunal's failure to assist self-represented parties and failure to afford him procedural fairness were contrary to s 24 of the *Charter* and ss 97 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998* ('*VCAT Act*'). The plaintiff argued that the compulsory conference (wherein the orders sought to be appealed were made) should have been adjourned in his absence, as the Tribunal was aware that the plaintiff was unrepresented. The plaintiff referred to the Tribunal's practice notes to substantiate his arguments.

Judgment

Leave to appeal was refused.

The orders did not offend any provision of the *VCAT Act* or s 24 of the *Charter* in a strict sense. Section 24 of the *Charter* provides that 'a party to a civil proceeding has the right to have the...proceeding decided by a competent, independent and impartial court after a fair and public hearing'.

Randall AsJ stated that even if s 24 was construed by reference to s 32(3) of the *Charter* to mandate that a hearing cannot proceed in the absence of a party, s 87 of the *VCAT Act* – which prescribes what the Tribunal may do in the event that a party fails to attend – would prevail.



***Magee v Delaney* [2012] VSC 407**

Kyrou J

11 September 2012

Charter provisions: ss 1, 3, 5, 6, 7, 15, 20, 32, 38

Summary

The appellant was charged with the offence of damaging property under s 197(1) of the *Crimes Act 1958* and the offence of possessing materials for the purpose of damaging property under s 199(a)(i) of that Act. He had committed the physical elements of the offences by painting over an advertisement in a bus shelter and possessing a bucket of paint and a paintbrush for the purpose of painting over more advertisements.

Before the Magistrates' Court, the appellant argued that his acts engaged the right to freedom of expression in s 15(2) of the *Charter*, and that the exercise of that right in furtherance of his philosophical opposition to advertising constituted a 'lawful excuse' for the purposes of ss 197(1) and 199(a)(i) of the *Crimes Act*. The Magistrate rejected this argument and convicted him on both charges.

This was an appeal from the Magistrate's decision. After receiving notice under s 35 of the *Charter*, the Attorney-General of Victoria intervened in the appeal.

Judgment

The appeal was dismissed. The applicant had acted without any lawful excuse and had been correctly convicted.

With regard to the appellant's arguments under the *Charter*, painting over an advertisement was an act capable of imparting information or ideas for the purposes of s 15(2) of the *Charter*. However, the imparting of information or ideas by means of damage to a third party's property did not engage the right to freedom of expression in s 15(2).

For the purposes of s 15(3)(a) of the *Charter*, the right to freedom of expression was subject to lawful restrictions reasonably necessary to respect the property rights of other persons, irrespective of whether those persons were human beings, companies, government bodies or other types of legal entities. The expression 'lawful restrictions reasonably necessary ... for the protection of ... public order' included laws enabling citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property. Such lawful restrictions included ss 197(1) and 199(a)(i) of the *Crimes Act*.

Kyrou J considered the relationship between ss 32 and 7(2) of the *Charter*, noting some uncertainty as to the state of the law in this area. The Court adopted the approach of Nettle JA in *Noone v Operation Smile* [2012] VSCA 91 to conclude that s 7(2) should be considered only after ss 197(1) and 199(a)(i) of the *Crimes Act* have been interpreted in accordance with s 32(1) of the *Charter*. Sections 197(1) and 199(a)(i) of the *Crimes Act*, when interpreted according to their natural meaning in terms of s 32, were compatible with s 15(2) of the *Charter*.



Davies v State of Victoria [2012] VSC 343

Williams J

15 August 2012

Charter provisions: s 10(b)

Summary

The plaintiff applied for damages for wrongful dismissal. The plaintiff was a former disability development and support officer, whose employment with the Department of Human Services had been terminated for 'serious misconduct' under the *Public Administration Act 2004*. The officer had dragged a resident of a community residential unit in Victoria 1.5m across a carpeted hallway, thereby causing injury.

Judgment

The application was dismissed. The former officer's termination was justified under s 31(1)(d) of the *Public Administration Act 2004*, because his treatment of the resident was disrespectful, cruel, degrading, and contravened the Code of Conduct for Victorian Public Sector Employees.

Williams J took account of paragraph 8 of the Code of Conduct, which states that public officials should respect and promote the human rights set out in the *Charter* by:

- making decisions and providing advice consistent with human rights; and
- actively implementing, promoting and supporting human rights.

In light of these provisions, the Court found that the plaintiff had contravened the resident's human rights under s 10(b) of the *Charter*, which provides that a person must not be treated or punished in a cruel, inhuman or degrading way



WBM v Chief Commissioner of Police [2012] VSCA 159

Warren CJ, Hansen JA and Bell AJA

30 July 2012

Charter provisions: ss 7(2), 13, 31(1), 32(2)

Summary

The appellant pleaded guilty in the Magistrates' Court to five offences including knowingly possessing child pornography and making/producing child pornography, which are classified as 'registrable offences' under the *Sex Offenders Registration Act 2004* ('Registration Act'). He received a sentence of 12 months' imprisonment which was wholly suspended for 24 months. In August 2007, he was informed that he was a registrable sex offender, and his name was placed on the register of sex offenders.

By writ filed in the Supreme Court on 1 October 2009, the appellant sought a declaration from the Trial Division of the Supreme Court that he was not a registrable offender and an order that his name be removed from the register. He argued that he did not meet the definition of a registrable offender in s 3 of the *Registration Act*. The trial judge found, however, that he did meet this definition.

On appeal, the appellant argued that the trial judge failed to apply three principles of statutory construction in construing the definition in s 3, including the principle in s 32 of the *Charter*. The appellant favoured a construction of the definition that required a causal link between the registrable offences and the sentence imposed. He submitted that on any construction of the definition, the *Registration Act* was incompatible with s 13 of the *Charter*, which states that 'a person has the right not to have his or her privacy ... unlawfully or arbitrarily interfered with'. Accordingly, he submitted that his construction of the definition, being the least incompatible with the *Charter* right, must be preferred.

The respondent submitted that the *Charter* did not apply retrospectively to this case. Section 32(1) of the *Charter* came into operation on 1 January 2008, and did not apply to any act or decision of a public authority before this date. The appellant was sentenced in 2003 and placed on the Register in 2007.

Judgment

The appeal was dismissed.

With regard to the parties' arguments under the *Charter*, Warren CJ (with Hansen JA agreeing) accepted the respondent's arguments. Interpretation in light of the *Charter* was not available, as it was not intended to have a retrospective effect.

Should the *Charter* have applied, it would not have assisted the appellant, as none of the proposed constructions of the definition in s 3 were incompatible with the right in s 13 of the *Charter*.

Bell J rejected the respondent's arguments with regard to the application of the *Charter*, but was nonetheless in favour of dismissing the appeal. Bell J found that the application of the definition in s 3 to the appellant would curtail his fundamental civil rights and freedoms, including his right to personal privacy in s 13 of the *Charter*, and his right to work, which '[a]ccording to the principle of legality ... can only be abrogated or curtailed by legislation which exhibits the intention to do so with unmistakable clarity.'

In the present case, Bell J agreed with the trial judge that the definition did apply to the appellant and the impact of the legislation upon him and his civil rights and liberties was clearly intended. So interpreted, the definition did not contravene the appellant's human rights under s 13 of the *Charter*, because it did not operate arbitrarily.



Noone v Operation Smile (Aust) Inc [2012] VSCA 91

Warren CJ, Nettle JA and Cavanough AJA

11 May 2012

Charter provisions: ss 7, 9, 15, 32, 35

Summary

The appellant brought proceedings against the respondents, operators of a ‘complementary medicine centre’ named Hope Clinic, in the Supreme Court. The appellant claimed that statements on the Hope Clinic website falsely represented their treatments as being effective in treating cancer, and as having scientific support. The appellant claimed these statements constituted misleading or deceptive conduct in trade and commerce contrary to s 9(1) of the *Fair Trading Act 1999* (‘the FTA’).

The respondents denied that the statements were misleading or deceptive, and argued that construing s 9(1) as prohibiting their publication would contravene s 15 (freedom of expression) of the *Charter*.

The trial judge found that, with one exception, the impugned statements were not misleading or deceptive. The judge thus found it unnecessary to deal with the *Charter* issue, and a submission made by the Public Interest Law Clearing House (‘PILCH’) as amicus curiae, that in light of s 32 of the *Charter*, s 9(1) should be construed as including a mens rea element rather than being, as it was previously considered, a strict liability provision.

The appellant sought to challenge the finding that the impugned statements were not misleading or deceptive. The appellant also submitted that the trial judge had erred in declining to decide the issue brought up by PILCH — raising the following questions of law by way of a notice under s 35 of the *Charter*:

- a) Is s 9 of the FTA incompatible with the right to freedom of expression contained in s 15 of the *Charter*?
- b) How, if at all, is the proper interpretation of s 9 affected by the right to freedom of expression, as set out in s 15 of the *Charter*, and as promoted by the *Charter*?

Judgment

The Court allowed the appeal, with Nettle JA (and Warren CJ and Cavanough AJA) finding that each of the impugned statements by the respondent was misleading or deceptive or likely to mislead within the meaning of s 9(1) of the FTA.

The Court rejected the construction of s 9(1) proposed by PILCH, concluding that s 32 of the *Charter* did not require a departure from the traditional strict liability construction of this provision. Section 32 requires the Court to select a human rights compatible interpretation of a provision *only* if that interpretation is consistent with the purpose of that provision. The purpose of s 9(1) is to substantially reproduce the consumer protection regime existing under federal law and extend its application to non-corporate traders. The Court concluded that to incorporate a mens rea requirement into this provision would defeat its purpose by making it radically different from its federal counterpart.

After rejecting the construction of s 9(1) advanced by PILCH, Warren CJ and Cavanough AJA concluded it would be inappropriate to answer the questions raised in the appellant’s notice under s 35. It would be too difficult for the Court to consider ‘every imaginable way in which s 9 could be re-interpreted so as to take into account the right to freedom of expression’, and the question of whether the settled interpretation of s 9(1) was incompatible with human rights did need not be answered in the present case.



Nettle J did address this question, concluding that the settled meaning of s 9(1) was compatible with the right to freedom of expression under s 15 of the *Charter* because it represented a measure necessary to protect the rights of others under s 15(3).

The Court also considered the submission that, in light of the High Court's decision in *Momcilovic v R* 280 ALR 221, s 7(2) of the *Charter* had to be considered as part of the interpretative exercise under s 32. In the absence of a majority High Court ratio on this question, the Court looked to the earlier Court of Appeal decision in the same case (*R v Momcilovic* (2010) 25 VR 436) that held s 7(2) was to be considered only after the statutory provision in question had been interpreted in accordance with s 32(1).

Warren CJ and Cavanough AJA expressed some doubt as to whether the Court was bound to follow its own decision in *Momcilovic*, Nettle JA elected to adhere to the approach taken by the Court of Appeal until and unless it was later determined by the High Court to be incorrect.



Goddard Elliott (A Firm) v Fritsch [2012] VSC 87

Bell J

14 March 2012

Charter provisions: ss 8(1), 24

Summary

Goddard Elliot, the plaintiff, had acted for the defendant, a mentally ill client, in a property settlement, which was to be heard in the Family Court of Australia. The matter had taken two years to prepare, but was not ready to be heard at the trial's commencement. A last-minute settlement had been agreed, favourable to the client's ex-wife.

The plaintiff brought an action against the defendant seeking the payment of outstanding legal fees. The defendant counter-sued on the grounds that, inter alia, the plaintiff had acted negligently in settling on the agreed terms. In issue was whether the plaintiff was mentally capable of issuing orders to his firm to settle on the terms agreed.

Judgment

Bell J dismissed the plaintiff's claim and granted the defendant's counter-claim.

The Court found that the presumption of legal personality and autonomy operated to enshrine the defendant's right to have his mental illness taken into account when determining whether he assented to the settlement. Referring to a broad range of Australian and British authorities, Bell J determined that the defendant was insufficiently mentally capable to instruct on the settlement.

In particular, ss 8 and 24 of the *Charter* were relevant to the decision, as they consolidated the common law presumption of legal personality and autonomy.



***Slaveski v Smith* (2012) 34 VR 206, [2012] VSCA 25**

Warren CJ, Nettle and Redlich JJA

29 February 2012

Charter provisions: ss 7, 24, 25, 32

Summary

The applicant argued that the *Charter* entitled him to counsel through the legal aid program. He had appealed to the County Court from a conviction obtained summarily in the Magistrates' Court. Although the applicant was eligible for legal aid, Victoria Legal Aid had declined to provide free advice per its discretion in s 24(1) of the *Legal Aid Act 1978*, as the applicant had repeatedly ignored previous advice.

Two questions that from the applicant's argument. The first was whether the appeal to the County Court was a 'trial' within the meaning of s 197 of the *Criminal Procedure Act 2009*. If so, the County Court could order Victoria Legal Aid to provide assistance to the applicant.

The second question was whether (per s 32(1)) ss 24(1) and 25(2)(f) of the *Charter* applied to the *Legal Aid Act* to guarantee the applicant access to counsel. Section 25(2)(f) provides that legal aid should be provided if it is in the interests of justice and the eligibility criteria in the *Legal Aid Act* are met. The applicant argued alternatively that the counsel was required per s 24(1) of the *Charter*, which provides for the right to a fair hearing. In effect, the applicant argued that the interpretation provision in s 32 of the *Charter* required s 24(1) of the *Legal Aid Act* to be read as excluding Victoria Legal Aid's discretion not to grant legal aid when the eligibility criteria had been met.

Judgment

In a unanimous joint judgment, the Court answered both questions in the negative and rejected the appeal.

The Court applied the High Court's approach in *Momcilovic v R* (2011) 280 ALR 221 to the operation of the *Charter* upon the *Legal Aid Act*. The majority of the High Court had adopted a view of s 32(1) that precluded the reading of statutory provisions in a manner incompatible with the ordinary principles of statutory interpretation, as articulated in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

The Court applied the rule that 'may' cannot be read as 'must' unless it is apparent that Parliament intended that the rule be obligatory upon the public authority. There was no such indication in this instance and accordingly it was not open to the court to disregard the discretion set out in s 24(1) of the *Legal Aid Act*.

With respect to the interpretation of the *Criminal Procedure Act*, the location of s 197 within Chapter 5 of the Act (entitled 'Trial on Indictment') restricted its operation to a trial on indictment. This view was reinforced by the absence of an equivalent provision in Chapter 6 (dealing with appeals from the Magistrates' Court).



***Bare v Small* [2011] VSC 639**

Mukhtar AsJ

19 December 2011

Charter provisions: s 10(b)

Summary

The plaintiff sought to require the Director of the Office of Police Integrity ('OPI') to disclose certain communications between the OPI and its lawyers, on the basis that they were in furtherance of an abuse of power. This would place the communications outside lawyer-client privilege under s 125(1)(b) of the *Evidence Act 2008*.

The broader proceeding was the plaintiff's application for judicial review and orders of mandamus and certiorari with respect to decisions made by the OPI. The Office had determined that the plaintiff's complaint about police misconduct was to be internally investigated. The plaintiff argued that the lack of an independent determination was contrary to s 10(b) of the *Charter*, which protects against 'cruel, inhuman or degrading' punishment. Further, he argued that the decision to internally investigate the complaint was intended to avoid compliance with the *Charter*, and was consequently an abuse of process.

At issue was whether the term 'deliberate abuse of power' in s 125(1)(b) of the *Evidence Act* required the plaintiff to demonstrate that the decision-maker had actual intent to abuse their power, or whether it was sufficient to demonstrate that they deliberately acted in a way which, objectively analysed, fell outside the limits of their power.

Judgment

The application was dismissed. No evidence was submitted to demonstrate that the decision-makers at the Office had intended to avoid their responsibilities under the *Charter*. The Court held that the term 'deliberate' required that actual intent must be demonstrated, and made several *obiter* comments with respect to the operation of the *Charter*.

With respect to s 38, the Court assumed that 'a breach... does not give rise to a cause of action.' The Court adopted the view that, when read in light of s 39, it is apparent that the rights in the *Charter* are designed to inform the reasoning used to determine pre-existing causes of action.



Taha v Broadmeadows Magistrates' Court; Brookes v Magistrates' Court of Victoria [2011] VSC 642

Emerton J

16 December 2011

Charter provisions: ss 6, 8, 21, 24, 32 38

Summary

The plaintiffs applied to quash a Broadmeadows Magistrates' Court order that they be imprisoned pursuant to s 160(1) of the *Infringements Act 2006*, for failure to make instalment order payments in respect of outstanding fines. Section 160(1) provides that an infringement offender 'may be imprisoned for one day in respect of each penalty unit' equivalent to the total fine. The plaintiffs suffered from various mental impairments or disabilities. Accordingly, their situation enlivened the exceptions provided for in s 160(2), which allows a magistrate discretion to discharge the fine or vary the mode of imprisonment where the infringing party is mentally ill. The magistrate had declined to exercise the discretion.

In their application, the plaintiffs argued that s 160(2) should be understood in the context of ss 8, 21, 24 and 32 of the *Charter* to require the magistrate to consider their situation in detail before exercising the discretion. Further, the plaintiffs contended that a magistrate was a public authority per ss 6(2)(b) and 38 of the *Charter*. This was said to impose a duty upon the Magistrates' Court to provide a fair hearing, which in this instance required them to expressly consider the plaintiffs' impairments when applying s 160(1).

Judgment

Emerton J allowed the applications and remitted the matter to the Magistrates' Court for reconsideration. The judge accepted the plaintiffs' submission that the *Charter* required the magistrate to adopt that interpretation of s 160 which least infringed human rights. The principle of legality operated independently to necessitate an interpretation of s 160 that preserved the right to liberty.

The Court found it unnecessary to determine whether the Magistrates' Court owed a duty to provide a fair hearing as a public authority within the meaning of ss 6(2)(b) and 38 of the *Charter*. Instead, the Court resolved the duties of the Magistrates' Court by reference to procedural fairness, which Emerton J described as 'co-extensive' with the *Charter* right to a fair hearing.

It was a jurisdictional error to apply the discretion in s 160 without regard to the matters set out in s 160(2). This in effect narrowed the discretionary language provided for in s 160(2).

Appeal information

Affirmed on appeal. See above *Victorian Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37.



***WK v R* (2011) 33 VR 516, [2011] VSCA 345**

Maxwell P, Nettle and Harper JJA

30 November 2011

***Charter* provisions: ss 7(2), 13(a), 32(1)**

Summary

The applicant accused argued that a tape-recorded telephone conversation between himself and the complainant had been improperly admitted into evidence. He had been accused of attempting to coerce the complainant to take part in an act of sexual penetration via threats and intimidation. The tape was evidence of that coercion. It had been recorded by the complainant at the instigation of the police. The accused argued that this was contrary to s 6(1) of the *Surveillance Devices Act 1999*, which directs a person not to knowingly ‘install, use or maintain’ a listening device to record a conversation to which the recorder is not a party.

The question was whether s 32(1) of the *Charter* operated to construe the terms ‘install, use or maintain’ in light of the guarantee of privacy provided for in s 13(a) of the *Charter*. It was agreed that the consequence of such a reading would assign causal responsibility for the recording to the police officer, not the complainant.

Judgment

In three separate judgments, the Court rejected the appeal on the basis that the judge had correctly exercised his discretion to admit the evidence. The judges disagreed on the approach to be taken with respect to the relationship between s 7(2) and s 32(1) of the *Charter*.

Maxwell P held that the High Court’s decision in *Momcilovic v R* (2011) 245 CLR 1 directed Victorian Courts to apply the ordinary principles of statutory interpretation when interpreting a provision under s 32(1).

Nettle J held that no clear *ratio* on the operation of s 7(2) upon s 32 emerged from the High Court’s decision in *Momcilovic*. Nettle J noted that the majority had split 3-3 on the question of whether s 7 had a role to play in determining the meaning of a statutory provision, as opposed to its consistency with the *Charter*. However, Nettle JA concludes that either approach supports the decision of the trial judge.

Harper J came to a separate conclusion: namely, that s 32(1) was not engaged because the right to privacy in s 13(a) did not include protection for acts that were themselves illegal.



***Bahonko v Casey City Council* [2011] VSCA 357**

Mandie JA and Judd AJA

14 November 2011

Charter provisions: s 35

Summary

The applicant sought leave to appeal from a decision of the trial division of the Supreme Court (*Bahonko v City of Casey* [2009] VSC 443). The applicant sought to have the respondent's summons for the taxation of costs, previously awarded against the applicant, struck out. Other relief was sought, including the convening of a grand jury to investigate the conduct of the respondents.

A variety of ill-formed grounds were proposed for this order. The applicant identified one of the grounds as s 35 of the *Charter*, which provides for a notice to be provided to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission where a question of law arises with respect to the application of the *Charter*. It was unclear what the reference to the *Charter* related to, but the Court summarised this ground as essentially alleging that the judge had acted recklessly or negligently and without independence and was biased.

Judgment

The Court determined that the grounds of appeal were baseless and much of the relief sought was not available under law. Nothing more was said about the operation of s 35.



***DPP v Piscopo* (2011) 33 VR 182, [2011] VSCA 275**

Ashley, Weinberg and Tate JJA

9 September 2011

Charter provisions: ss 21, 32

Summary

The Crown appealed against a decision of the trial division of the Supreme Court (*DPP v Piscopo* [2010] VSC 498) alleging that the judge had adopted an erroneous interpretation of ss 49(1)(e) and 55(1) of the *Road Safety Act 1986*. These provisions dealt with the powers of police to detain a person they suspected of driving under the influence. Section 55(1) allowed a police officer to make an instruction to a suspected person to accompany them to another location for breath testing. Kyrrou J had held that to legally exercise s 55(1), a police officer had to inform the suspect that they would also have to remain in custody until a breath test was administered, or until 3 hours had expired. Kyrrou J also held that ‘refusal to comply’ with such an order only constituted an offence under s 49(1)(e) of the Act where the instruction to remain in custody was given at same time as the instruction to accompany.

Among Kyrrou J’s reasons for adopting this view of the Act was the provision for the right to liberty in s 21(3) of the *Charter*. The Crown argued that this view essentially hindered the accomplishment of the policy objectives contemplated by the Act. They argued that the Act permitted an instruction to remain at the breath test location for the allotted period to be given at a later time.

Judgment

The Court accepted the Crown’s arguments and upheld the appeal. Ashley JA wrote the lead judgment, with which Weinberg and Tate JJA agreed.

The Court accepted that there were rival eligible interpretations of ss 49(1)(e) and 55(1) of the Act. Ashley JA also emphasised that Australian courts have a general disinclination to abrogate rights unless the statute explicitly provides otherwise.

Applying a purposive analysis, the Court regarded Parliament’s intention as being to abrogate the applicable rights in the manner proposed by the Crown. With respect to the *Charter*, Ashley JA determined that the Crown’s interpretation of the Act was ‘no less compatible’ with the right to liberty provided by s 21(3). The Court’s view was that giving the instruction to remain in itself satisfied the requirements of the *Charter*, rather than the sequential proximity of this instruction with the initial instruction.



***Director of Housing v Sudi* (2011) 33 VR 559, [2011] VSCA 266**

Warren CJ, Maxwell P and Weinberg JA

6 September 2011

Charter provisions: ss 7, 13, 36, 38, 39

Summary

The applicant ('the Director') appealed against a Victorian Civil and Administrative Tribunal ('Tribunal') decision holding that it had jurisdiction to declare unlawful a decision made by the Director to possess the respondent's premises. The Director's decision had been made under s 344 of the *Residential Tenancies Act 1997*. The respondent had argued that the decision was contrary to s 13(a) of the *Charter*, which guarantees the right to privacy. On this basis, the Tribunal had determined that the Director had acted unlawfully per s 38(1) of the *Charter*. The Tribunal did so against the Director's objection that lawful compliance with the *Charter* was not a necessary ground upon which the power in s 344 could be exercised.

At issue was whether the Tribunal had original jurisdiction to determine a question of law under either judicial or collateral review. Complicating matters was the finding of Bell J (acting as President of the Tribunal) that the *Charter* implied that the Tribunal had the jurisdiction to determine questions of law involving its provisions. There was an ancillary question as to whether s 344 of the Act should be subject to a declaration of inconsistent interpretation per s 36(2) of the *Charter*.

Judgment

In three separate judgements, the Court allowed the appeal and determined that the Tribunal had no original jurisdiction with respect to determining whether a public authority had acted lawfully per the *Charter*.

The Tribunal does not have original jurisdiction to determine a question of law, a power reserved to the Supreme Court. Accordingly, the principal question was whether, in exercising jurisdiction in this matter, the Tribunal was validly undertaking collateral review of a legal question contingent upon the determination of an administrative decision. And further, whether this satisfied the requirement in s 39(1) that an independent ground of unlawfulness exist before non-compliance with the *Charter* could be argued.

The Court found that no such collateral jurisdiction existed. The relevant statutory materials (the Act and the *Victorian Civil and Administrative Tribunal Act 1998*) evinced an intention to exclude collateral review over the Director's decisions made under s 344. The general view was that s 39(1) was not intended to grant the Tribunal a basis for review outside of its ordinary jurisdiction. That approach was consistent with the approach of the Supreme Court of the UK and other foreign courts.

Some judges ventured more of an opinion, however, on the relationship between s 39 and the law pertaining to collateral review. Specifically, there was disagreement about whether, as Weinberg JA proposed, it was correct to understand the Tribunal's collateral review jurisdiction in light of *Ousley v The Queen* (1997) 192 CLR 69. This went more to the nature of the power exercised by the Tribunal than to any issue under the *Charter*.

The judges also disagreed as to whether a declaration of inconsistent interpretation should be made. Warren CJ and Weinberg JA concluded that a declaration should not be made.



***Collier v Austin Health* (2011) 36 VR 1, [2011] VSC 344**

Bell J

27 July 2011

Charter provisions: ss 32, 49

Summary

The plaintiff appealed an order by the Victorian Civil and Administrative Tribunal ('the Tribunal'), dismissing her claim against her employer, a hospital, for discrimination. The plaintiff argued that s 32(1) of the *Charter* was applicable to s 8 of the *Equal Opportunity Act 1995*.

On appeal, the plaintiff suggested that s 8 of the *Equal Opportunity Act* should be read in light of the *Charter* (without mentioning a specific provision). Militating against this submission was the fact that the material events had occurred prior to the *Charter's* commencement. Section 49 of the *Charter* allowed for its application to proceedings that were initiated *after* — but *not before* — its commencement. The question of applicability therefore turned on whether the relevant date for the purposes of s 49 was to be fixed at the date the appeal commenced, or the date when the events in question occurred.

Judgment

The Court concluded that the Tribunal had misapplied s 8(1) of the *Equal Opportunity Act*. However, the Court also concluded that although the appeal was initiated after the date of the *Charter's* commencement, the material facts had occurred prior to that date, and as such, the *Charter* did not apply. In coming to this conclusion, the Court referred to the previous decision of *Kracke and Mental Health Review Board* [2009] VCAT 646, in which it was held that the presumption against retrospectivity required that s 49 be read in such a way.



PJB v Melbourne Health; Patrick's Case [2011] VSC 327

Bell J

19 July 2011

Charter provisions: ss 4, 7(2), 12, 13, 20, 32(1), 38

Summary

The plaintiff sought to challenge the validity of a decision to have an administrator appointed over his estate. He had been detained for the previous 10 years because of mental illness. The hospital sought to have him placed in 'supported accommodation' at a hostel. The plaintiff wished to return to his residence, which he owned. To discourage this, the hospital applied to Victorian Civil and Administrative Tribunal ('the Tribunal') to exercise its discretion under s 46(1) of the *Guardianship and Administration Act 1986* to have an administrator appointed over the plaintiff's estate. The decision was made in light of s 4(2) of that Act, which effectively required the Tribunal to arrive at a solution which constituted the least restrictive means of acting in the plaintiff's best interests, and which took account of his wishes. Despite these requirements, the hospital's application was successful and an administrator was appointed. The plaintiff argued that this decision by the Tribunal was made on an erroneous interpretation of s 46(1), and with regard to an erroneous set of considerations.

Judgment

The Court held that the Tribunal had erred in law by depriving the plaintiff of his property and appointing an administrator. The Tribunal was a public authority for which non-compliance with the *Charter* was unlawful, and it had failed to interpret s 46(1) of the *Guardianship and Administration Act* compatibly with human rights under s 32(1) of the *Charter*.

The Tribunal's decision gave rise to questions about whether it had properly taken into consideration the plaintiff's rights to freedom of movement, privacy and property under ss 12(1), 13 and 20 of the *Charter*. Bell J determined that it was necessary to examine two preliminary questions of law:

- Whether the Tribunal was a 'public authority' for the purposes of s 38; and
- How the Court of Appeal's decision in *Momcilovic v R* (2010) 25 VR 436 required him to apply ss 7(2) and 32(1) of the *Charter* to the *Guardianship and Administration Act*.

On the first question, Bell J held that the Tribunal was a public authority under s 4(1)(b) of the *Charter*, and accordingly was bound by the obligation in s 38(1) of the *Charter* to act compatibly with human rights.

On the second question, adopting the approach to s 32(1) required by *Momcilovic*, Bell J stated that the Court should explore all possible interpretations of s 46(1) and adopt the one which least infringed *Charter* rights.

As for s 7(2), the Tribunal was required to exercise the power to appoint an administrator compatibly with this provision. Applying the 'classic test' of proportionality in this case, the Court held that it could not be argued that the limitations on the applicant's human rights by the Tribunal's decision were justified by the requirements of s 46(1). Accordingly, the Court concluded that the Tribunal's appointment of an unlimited administrator who would likely sell the appellant's home was not reasonable and not justified under s 7(2) of the *Charter*.



Noone, Director of Consumer Affairs (Vic) v Operation Smile (Australia) Inc (No 2) [2011] VSC 153

Pagone J

19 April 2011

Charter provisions: ss 15, 32, 36(2)

Summary

The respondents were the operators of Hope Clinic, which they described as a ‘complementary medicine centre’ specialising in the treatment of cancer. The applicant brought proceedings against the respondents in the Supreme Court, claiming that statements published on their website falsely represented treatments offered by Hope Clinic as being effective in treating cancer, and as having scientific support. The appellant claimed that these statements constituted misleading or deceptive conduct in trade and commerce contrary to s 9(1) of the *Fair Trading Act 1999* (‘the *FTA*’). The respondents denied that these statements were misleading or deceptive, and argued that construing s 9(1) as prohibiting their publication would contravene s 15 of the *Charter*.

During the proceeding, a submission was made by the Public Interest Law Clearing House (‘PILCH’) as amicus curiae, to the effect that in light of s 32 of the *Charter*, s 9(1) should be construed as including a mens rea element rather than being, as it was previously considered, a strict liability provision.

Judgment

The application was dismissed, the applicant having failed to establish that the impugned statements were false and misleading within the meaning of s 9(1). The Court found that while the treatments offered by Hope Clinic did not have support of conventional science and were of no benefit to cancer sufferers, the representations made by the respondents were not misleading or deceptive, because their readers would understand them as mere expressions of opinion that claimed no support from conventional medicine or science.

These findings made it unnecessary for the Court to address any of the questions raised with respect to the *Charter* and, in particular, its application and its constitutional validity.

Appeal information

Reversed on appeal. See *Noone v Operation Smile (Aust) Inc* [2012] VSCA 91 (See above 344).



De Simone v Bevnol Constructions & Developments Pty Ltd [2011]

VSCA 54

Redlich and Mandie JJA

3 March 2011

Charter provisions: ss 13, 33(2)

Summary

The applicant sought leave to appeal orders of the Victorian Civil and Administrative Tribunal ('the Tribunal'). The applicant was subject to simultaneous civil and criminal proceedings, emerging from the use of a letter provided to him by his accountant to allegedly mislead the respondents into undertaking construction work on a development project. The object of this particular proceeding was to determine whether several summonses regarding the production of documents had been validly issued. The applicant argued that the summonses were in lieu of the initiation of discovery proceedings and were consequently abuses of process. The applicant also argued that the Tribunal had made an error of law by failing to take into account s 13(a) of the *Charter* when determining whether the summonses were valid. He suggested that s 13(a), which protects the right to privacy, operated to prevent the release of documents that he had personally authored.

Judgment

In a joint judgment, Redlich and Mandie JJA refused leave to appeal.

The Court did not accept that a failure to complete discovery prevented the obtaining of documents through summons. The applicant had consequently not demonstrated a relevant question of law as required by the *Victorian Civil and Administrative Act 1998*.

With respect to the *Charter* question, the Court determined that there was no error in the Tribunal member's approach. At first instance, the Tribunal member had determined that any right of privacy enlivened by the issuing of a summons over documents was legitimately attenuated by the 'reasonable limits' test in s 7(2) in this instance.



Secretary, Department of Human Services v Sanding (2011) 36 VR 221, [2011] VSC 42

Bell J

22 February 2011

Charter provisions: ss 12, 13(a), 17, 19, 24

Summary

This was an appeal against a decision by the Victorian Children's Court (VCC) to revoke custody to secretary orders obtained by the appellant in relation to four Aboriginal siblings who had been placed in a non-Aboriginal home and separated from one another. Following an application by the children's mother, and after exercising its procedural discretion to conduct a submissions contest, the VCC made revocation orders returning the children to the care of their maternal grandmother.

On appeal to the Supreme Court, the appellant argued that the VCC had erred in revoking the custody to secretary orders without hearing written and other evidence to justify the preservation of such orders, and in particular, without considering the disposition report. The appellant sought that the revocation orders be set aside, that interim accommodation orders be made, and that the matter be remitted to the VCC.

Judgment

The appeal was dismissed. The Court found that there was no qualification upon the VCC's procedural discretion that would preclude it from conducting a submissions contest in determining a revocation application under s 215 of the *Children, Youth and Families Act 2005* (Cth). The Court noted that qualifications to the VCC's procedural discretion might accrue from the Court's obligation to respect the procedural rights of the parties — and in particular, from the right to a fair hearing in s 24(1) of the *Charter*.

In considering the applicability of the human rights in the *Charter* to the conduct of protection proceedings by the VCC, Bell J reiterated that as required by s 32(1) of the *Charter*, the *Children, Youth and Families Act* must be interpreted compatibly with human rights in so far as it is possible to do so consistently with its purpose. The principal human rights of children which will be engaged in protection proceedings are:

- The right to the protection of family in s 17(1);
- The right of every child to such protection as is in his or her best interests ('the paramountcy principle') in s 17(2); and
- The right of a child to be afforded a fair hearing as a party to a civil proceeding in s 24(1).

The Court acknowledged that the human right of a child to freedom of movement in s 12; to have their privacy, family and home not unlawfully and arbitrarily interfered with in s 13(a); and to enjoy their culture in s 19 may also be engaged in the hearing, depending on the circumstances of the particular case. The rights of family members who are party to such proceedings might also be engaged.



Giotopoulos v Director of Housing [2011] VSC 20

Emerton J

2 February 2011

Charter provisions: ss 32, 38(1)

Summary

The applicant lived in a public housing flat without having entered a tenancy agreement with the respondent. The respondent applied to the Victorian Civil and Administrative Tribunal ('the Tribunal') for an order of possession of the flat pursuant to s 344 of the *Residential Tenancies Act 1997*. The order was stayed pending the determination of an application by the applicant for a tenancy order under s 232 of the same Act. The Tribunal declined to make a tenancy order on the basis that the hardship suffered by the applicant if the order were not made would not be greater than the hardship on the respondent if the order was made. The Tribunal found that the applicant had remained in occupation of the flat without the respondent's licence or consent, and ordered the applicant to vacate the flat.

The applicant sought leave to appeal from the Tribunal's decision in the Supreme Court. His application was based on the following arguments:

- The Tribunal had erred in evaluating his likely hardship, and in evaluating and comparing the hardship that would be suffered by the respondent, for the purposes of s 233; and
- The Tribunal had also erred by failing to have regard to its obligations under s 38 of the *Charter* as a 'public authority'. In this regard, the applicant argued that the Tribunal had asked itself the wrong question in relation to the operation and effect of s 32 of the *Charter*, which requires it to interpret legislative provisions, so far as possible consistently with their purpose, compatibly with human rights.

Judgment

The application for leave was dismissed. With regard to the applicant's arguments under the *Charter*, Emerton J found that the Tribunal did err in the exercise of its discretion, but that such error was not material.

First, the Court found that the Tribunal had asked itself the wrong question with regard to the operation of the interpretative obligation in s 32 of the *Charter*.

- The Tribunal had applied to s 32 the methodology described in *Kracke v Mental Health Review Board* [2009] VCAT 646, which required a statutory provision to be first interpreted using the 'ordinary' tools of statutory interpretation before applying the 'special' interpretative tool in the *Charter*.
- That methodology was rejected by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, where it was held that the interpretative obligation under the *Charter* arose from the outset and involved exploring all 'possible' interpretations of the provisions in question, and adopting that interpretation which least infringed *Charter* rights.

Second, the Court found that as a 'public authority' for the purposes of the *Charter*, the Tribunal also erred in failing to consider its obligation under s 38 of the *Charter* in exercising its discretion under s 233.



- Under s 38(1) of the *Charter*, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
- The Tribunal had concluded that because s 233 operated to enhance a person's rights rather than to limit them, the applicant's *Charter* rights were not engaged at all. The Court disagreed, stating that s 233 was not a 'purely ameliorative' provision, and that the decision to grant or refuse a tenancy order under this provision must therefore be seen to engage the person's right to non-interference with his or her home and family and his or her family's entitlement to be protected by society and the State.
- The applicant's rights therefore *would* have been engaged had the Tribunal been required to consider exercising its discretion to make a tenancy order under s 233.



De Simone v Bevnol Constructions & Developments Pty Ltd (2010) 30 VR 211, [2010] VSCA 348

Redlich and Hansen JJA

17 December 2010

Charter provisions: s 33

Summary

The applicant sought to refer a question of law (discussed below, see 366) from the Victorian Civil and Administrative Tribunal ('the Tribunal') to the Supreme Court per s 33(1) of the *Charter*.

The appellant argued that a referral to the court of a question of law under s 33 of the *Charter* was a 'case stated' as defined within ss 3(1) and 19(1) of the *Appeal Costs Act 1998*. The consequence of that finding would be to allow the applicant to apply for indemnity against the costs incurred for the referral. At issue was whether a discretion of the kind provided for in s 33(1) was within the traditional definition of the term 'case stated'.

Judgment

In a joint judgment, Redlich and Hansen JJA refused the application and held that the s 33(1) referral discretion was not within the ambit of the term 'case stated'. The *Appeal Costs Act* was designed to indemnify costs incurred only under specific applications; namely, appeals from the judgment of a lower court. What differentiated such appeals was their restrictive scope and emphasis only upon the facts stated and the relevant question of law identified. A s 33 reference could potentially be of a broader scope, taking into account matters of general policy. The Court noted that this was why the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008* made provision for different referral procedures under s 33, cases stated, and questions of law. It was also why s 33 referrals were excluded from the equivalent referral clauses in Order 5 (dealing with cases stated) and Order 6 (dealing with questions of law).



***DPP v Piscopo* [2010] VSC 498**

Kyrou J

12 November 2010

Charter provisions: ss 21, 32

Summary

The defendant was charged with refusing to accompany police for a breath test under ss 49(1)(e) and 55(1) of the *Road Safety Act 1986*. The magistrate dismissed the charge. On appeal, the issues were:

- Whether it was an element of the offence that the motorist must be told that the accompaniment to and remaining at the place where the breath test is to occur is until the sample is furnished and the certificate is given or until three hours after driving, whichever is sooner;
- Whether compliance with a requirement under s 55(1) involves detention or deprivation of liberty, and the interaction between s 55(1) and ss 21(1), (2), (3), (4) and 32 of the *Charter*.

Judgment

The appeal was dismissed. Citing, among other cases, *R v Momcilovic* (2010) 25 VR 436 and his own earlier decision in *DPP (Vic) v Rukandin* [2010] VSC 499, Kyrou J found that s 32 of the *Charter* was engaged in the interpretation of s 55(1) by virtue of the right to liberty set out in s 21(3) of the *Charter*.

The Court stated that s 55(1) was compatible with s 21(3) of the *Charter*, when interpreted in a way that required a motorist to be informed of the temporal limitation in that provision. As in *DPP (Vic) v Rukandin*, such an interpretation would ensure that any deprivation of liberty involved in complying with a requirement under the *Road Safety Act* would be in accordance with the procedures set out in that section.

Appeal information

Subsequent appeal upheld, see above 352.



***DPP v Rukandin* [2010] VSC 499**

Kyrou J

12 November 2010

Charter provisions: ss 21, 32

Summary

The respondent in this case was charged with refusing to remain for a blood test under s 49(1)(e) of the *Road Safety Act 1986*. The magistrate dismissed the charge and the Director of Public Prosecutions appealed the dismissal. The appeal largely concerned s 55(9A) of the *Road Safety Act*, which allows a medical practitioner or professional to take a blood sample from a motorist; and requires a motorist to accompany a police officer to a place where the sample may be taken, and to remain there until the sample is taken or until three hours have elapsed since the driving, whichever is sooner.

Two of the issues before the Court were:

- Whether compliance with s 55(9A) involved detention or deprivation of liberty; and
- Whether s 55(9A) was compatible with the right to liberty and security of the person in s 21(3) of the *Charter*.

Judgment

The appeal was dismissed. With regard to the *Charter* issue, Kyrou J found that s 32 of the *Charter* was engaged in the interpretation of s 55(9A) by virtue of the right to liberty in s 21(3). The Court noted that the Court of Appeal had accepted that compliance with a requirement under s 55(1) of the *Road Safety Act* necessarily involved a restriction of liberty, to the extent that was reasonable and necessary, and that this was also true of s 55(9A).

In light of this, the Court held that s 55(9A) was compatible with s 21(3), when interpreted in a way that required that a motorist be informed of the temporal limitation in that provision. By being aware of the temporal limitation, the motorist would then be able to take steps to ensure that the deprivation of liberty did not exceed the maximum three hour period permitted in s 55(9A). This interpretation, in keeping with the approach in *R v Momcilovic* (2010) 25 VR 436 to the application of s 32 of the *Charter*, would ensure that any deprivation of liberty involved in complying with a requirement under s 55(9A) was in accordance with the procedures set out in that section.

Appeal information: Reversed, *DPP v Rukandin* [2011] VSCA 276.



DPP v Ali (No 2) [2010] VSC 503

Hargrave J

10 November 2010

Charter provisions: ss 7(2), 13(a), 17, 32(1)

Summary

This was an application for a civil forfeiture order where the respondent's husband was the registered proprietor of property that had been used for manufacturing illegal drugs. The husband had been convicted of conspiracy to traffic drugs of dependence. The applicant sought the forfeiture order on the basis that the property had been used in connection with the commission of an offence under the *Confiscation Act 1997*.

The respondent sought to resist the forfeiture, claiming, among other things, that the relevant provisions of the *Confiscation Act* limited certain provisions in the *Charter*, and that these limits could not be justified. The relevant rights which were deemed to have been limited or breached were:

- The right to protection from arbitrary interference with a person's home in s 13(a) of the *Charter*;
- The entitlement of families to be protected by society and the State in s 17(1); and
- The right of a child to such protection as is necessary in his or her best interests by reason of being a child in s 17(2).

Judgment

The application was granted in part, with Hargrave J noting that s 38(1) of the *Confiscation Act* mandated the making of a forfeiture order where the Court was satisfied of specific matters. The Court made it clear, however, that in assessing these matters, the Court did *not* need to be satisfied of the additional condition that forfeiture would be demonstrably justified under s 7(2) of the *Charter*.

The Court rejected the principal submission of the respondent, which was that the Court's discretion under s 38(1) was circumscribed by human rights. This would have the effect of re-writing the express terms of s 38(1). It would also impose an obligation on the Court to act compatibly with human rights, when the *Charter* did not impose such an obligation on courts, but only on public authorities (which include courts acting in an administrative capacity).

This did not mean, however, that *Charter* rights were irrelevant to the exercise of the Court's discretion under the *Confiscation Act*. The Court stated that '[w]ithout binding the court as to how it should exercise its discretion, the *Charter* rights which are engaged in any particular case must form part of the relevant circumstances to be taken into account in the exercise of the discretion... Where a civil forfeiture order relates to a family home and the family includes children, the court must necessarily consider the effect of the order on the home, family and children in exercising its discretion.'

With regard to the relationship between the civil forfeiture regime in the *Confiscation Act* and human rights, the Court referred to the decision of the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436. The following principles emerged from this decision in relation to s 32(1) of the *Charter* and its relationship to the justification requirement in s 7(2):

- Section 32(1) does not create a 'special' rule of interpretation permitting the Court to depart from the purpose of the provision in question, but instead 'forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision'.



- ‘Compliance’ with s 32(1) involves exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation which least infringes *Charter* rights.
- In determining what interpretations are possible, the Court should apply ‘the existing framework of interpretative rules, including of course the presumption against interference with rights’ in the absence of express language or necessary implication. Where *Charter* rights are engaged, s 32(1) elevates this common law presumption to a statutory requirement in interpreting Victorian statutes.
- When the meaning of the relevant provision has been ascertained in accordance with the body of interpretative rules, including s 32(1), the Court must then consider whether the relevant provision, so interpreted, breaches or limits a human right protected by the *Charter*. It is only if such a breach or limit is identified that the Court has occasion to apply s 7(2) and consider whether the limit on the relevant human right is justified.

The Court also considered two conflicting interpretations of the term ‘arbitrary interference’ in s 13(a) of the *Charter*. However, because the Court was not required to decide whether a civil forfeiture order would limit the respondent’s right under s 13(a), it was unnecessary to resolve the conflict between these interpretations, which were:

- That advanced for the respondent, who relied upon *Kracke v Mental Health Review Board* [2009] VCAT 646 to submit that arbitrary interference will be established if, although lawful, the interference is not reasonable and proportionate to the end sought in the particular circumstances of the case.
- The alternative view taken by Kaye J in *WBM v Chief Commissioner of Police* (2010) 27 VR 469. In this case, Kaye J expressly stated that the dictionary definition of the word ‘arbitrary’ was to be preferred, and that the concept of ‘arbitrary interference’ denoted an interference ‘which is capricious and not based on any identifiable criterion or criteria.’



De Simone v Bevnol Constructions & Developments Pty Ltd (2010) 30 VR 200, [2010] VSCA 231

Redlich, Mandie and Hansen JJA

10 September 2010

Charter provisions: ss 8, 22, 24, 25, 33(1)

Summary

The applicant had made an application for referral under s 33(1) of the *Charter* from a decision of the Victorian Civil and Administrative Tribunal ('the Tribunal'). This was granted by the sitting Tribunal member (with reference to the Court of Appeal's previous decision, *De Simone v Bevnol Constructions Developments Pty Ltd* (2009) 25 VR 237, see 386).

The question of law involved whether the rule in *McMahon v Gould* (1982) 7 ACLR 202 should be revised in light of ss 8, 24(1) and 25(1) of the *Charter*. (see 386 below). This had been refused on the basis that there was no question of law to answer. These proceedings were designed to allow the Court to state its reasons for refusing to hear the application under s 33(1).

Judgment

In a unanimous joint judgment, the Court determined that the application did not satisfy the requirements of s 33(1).

The Court considered s 33(1) of the *Charter* as operating in a similar fashion to s 17B(2) of the *Supreme Court Act 1986*. It followed that those considerations taken into account when exercising s 17B(2) were similar to the exercise of discretion under s 33(1). One of those considerations examined whether the primary decision-maker had made a final determination. The Tribunal had not in this instance. The Court noted that this deprived them of a comprehensive statement of reasons. On this basis, the Court declined to exercise the s 33(1) discretion.



***Antunovic v Dawson* (2010) 30 VR 255, [2010] VSC 377**

Bell J

25 August 2010

Charter provisions: ss 12, 21

Summary

This case involved an application by a mentally ill woman who had been forced to live at a community care unit under a community treatment order, despite the fact that the order did not contain a condition requiring her to live at any particular place. The applicant applied to the Supreme Court for a writ of habeas corpus, arguing that the respondent's refusal to allow her to return home constituted an infringement of her common law right to personal liberty, as well as her human rights to freedom of movement and liberty and security of the person under ss 12 and 21 of the *Charter*.

Judgment

The application was granted.

The Court held that habeas corpus was not confined to arrest and imprisonment, and applied where anyone having custody, power or control over another person imposed restraints on that person's personal liberties which were not shared by general public. In this case, the applicant was subject to significant restraints on her freedom of movement, which were not shared by the general public, and that her community treatment order did not contain any residence condition which might have provided a lawful justification for these restraints. These restraints were prima facie illegal at common law and therefore the onus was on the respondent to justify their legality; in the absence of such a justification, the restraints were amenable to habeas corpus. Accordingly, the Court concluded that it was appropriate to make an order for the applicant's immediate release from the community care unit.

Bell J noted that the rights under ss 12 and 21 of the *Charter* were regarded as being of the first order of importance in terms of human rights protection.

The Court commented on s 38(1) of the *Charter*, which obliges public authorities to act compatibly with human rights, stating that the application of this obligation depends on whether human rights are engaged — which will be the case when a public authority makes a decision affecting or apparently limiting a person's human rights. If a human right is engaged, the question of 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) of the *Charter*.

The effect of the rights in ss 12 and 21 of the *Charter*, together with the common law right to personal liberty, was that neither private persons nor public authorities may impose restraints on the personal liberty of the individual unless they are sanctioned by the law. For a public authority to impose restraints on the liberty of patients without lawful authority would be unlawful under s 38(1) of the *Charter*, as restraints of this nature would engage the human rights of the individual (especially freedom of movement in s 12). In a case such as this one, the limitation would also 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'.



***DPP v Mokbel* [2010] VSC 331**

Whelan J

5 August 2010

***Charter* provisions: s 24**

Summary

This was an application by Tony Mokbel for a permanent stay of proceedings for drug offences. The applicant submitted that he had been unlawfully extradited from Greece and deprived of the legal right to obtain relief from the European Court of Human Rights against Greece. He also submitted that he had been prejudiced by pre-trial publicity. In this regard, the applicant made submissions under the *Charter*, and in particular, under the right to a fair hearing in s 24.

Judgment

The application was dismissed. The applicant failed to establish the relevant unlawfulness by Australian or Greek authorities in the extradition. A stay on the basis of prejudicial pre-trial publicity was refused, as the safeguards of a jury trial were deemed to be sufficient to enable a fair trial to the applicant, particularly given the significant lapse of time between the publicity and the trial.

With regard to the applicant's submissions under the *Charter*, Whelan J held the *Charter* did apply to the Court pursuant to s 6(2)(b), to the extent that the Court had functions under Part 2, which includes the right to a fair hearing in s 24 and certain rights in criminal proceedings in s 25. The Court concluded that the application of the *Charter* would have no effect upon the outcome of this case.

The Court did, however, consider what the conclusions would have been if the impact of the *Charter* had been significant. The application of the *Charter* meant that the right to a fair hearing by an impartial court in s 24 was a positive right and not a negative one, as was the position at common law. In cases where the *Charter* applied, the Court rejected the common law view that the content of this right was no more than a right to a trial which was as fair as the courts could make it by reference to matters under their control.

The Court also considered a submission by the applicant that where the *Charter* applied, there was no warrant for any consideration of the public interest in the trial proceeding. The Court disagreed with this submission, stating that a consideration of the public interest was a component of the analysis of what constituted a fair hearing under s 24 in the same way that it was part of the analysis of what was a fair trial at common law.



Director of Public Transport v XFI [2010] VSC 319

Ross J

29 July 2010

Charter provisions: ss 8(3), 32(1), 38

Summary

The Director of Public Transport appealed a decision by the Victorian Civil and Administrative Tribunal ('the Tribunal') to grant to the respondent an accreditation to drive taxis pursuant to s 166 of the *Transport Act 1983*. The appellant had previously refused to grant such accreditation finding the respondent was unsuitable due to a criminal charge brought 20 years earlier for the murder of his wife and notwithstanding that he had been acquitted on the ground of mental illness. The Tribunal found, however, that the respondent was a suitable person, and granted the accreditation.

The appellant appealed to the Supreme Court, claiming that a combined reading of s 169(2)(b) and s 163(1)(b) of the *Transport Act* revealed a clear legislative intent that a person such as respondent would not meet the statutory criteria to provide the service in question. It claimed that the legislature had determined a person who committed the physical elements of murder to be prima facie unsuitable to be a driver, making it appropriate for the Tribunal to assess the respondent's application with a 'heightened degree of scrutiny'. The appellant claimed that the Tribunal was bound to take into account community expectations and maintenance of community confidence in taxi services when deciding whether appellant was 'suitable in other respects'. Finally, the appellant claimed that the Tribunal erred by conflating considerations relevant to public care objectives with considerations relevant to whether the person was 'suitable in other respects'.

The Victorian Equal Opportunity and Human Rights Commission ('Commission') intervened in the proceeding, making submissions with regard to the obligations imposed by the following provisions of the *Charter*:

- Section 38, which required the Tribunal, as a public authority, to give proper consideration to human rights; and
- Section 32, which required the Tribunal to interpret the *Transport Act* in a way that was compatible with human rights, so far as it was possible to do so consistently with the purpose of the Act.

The Commission claimed that the right to equality and non-discrimination in s 8(3) of the *Charter* was relevant to the proceedings. The Commission contended that acceptance of the appellant's interpretation of s 169(1)(b)(ii) of the *Transport Act* would require the Tribunal to take into account the respondent's disability in a way that contravened s 8(3).

Judgment

The appeal was dismissed. Ross J found that the Tribunal had assessed the respondent's application with a 'heightened degree of scrutiny' and had generally paid sufficient regard to considerations relevant to the question of whether the respondent was 'suitable'.

With regard to the Commission's submissions, the Court was satisfied that the Tribunal had given proper consideration to any relevant human right and did not contravene s 38 of the *Charter*.

In relation to s 32, the Commission had submitted that the *Charter* required that between competing constructions of a legislative provision (in this case, s 169(1)(b)(ii) of the *Transport Act*), the court must adopt the construction that will least limit human rights. In this instance, the Commission claimed that the



construction that least limited rights was the construction advanced by the respondent — namely, that s 169(1)(b)(ii) did not require the considerations that the appellant considered relevant to be taken into account.

In considering these submissions, Ross J considered the decision of the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, where it was found that s 32(1) obliged courts and tribunals to explore all ‘possible’ interpretations of a statutory provision, and adopt that interpretation which least infringed *Charter* rights. The Court found:

- The contention that the appellant’s interpretation of s 169(1)(b)(ii) infringed the equality right was complex, particularly in light of the approach taken by a High Court majority in *Purvis v South Wales (Dept of Education and Training)* (2003) 202 ALR 133 towards the identification of an appropriate comparator in relation to disability discrimination.
- The Commission’s argument against the adoption of the approach in *Purvis* in the determination of the scope of the equality right in s 8(3) had ‘considerable force’, as the equality right, like other *Charter* rights, should be construed broadly.
- It was not necessary to reach a final conclusion on this point, as the Court had already declined to accept the interpretation of s 169(1)(b)(ii) put forward by the appellant.

Appeal information

Affirmed on appeal. See *Director of Public Transport v XFJ* [2011] VSCA 302.



Castles v Secretary, Department of Justice (2010) 28 VR 141, [2010] VSC 310

Emerton J

9 July 2010

Charter provisions: ss 5, 7(1), 8, 13(a), 17, 22(1), 32(1), 38(1)

Summary

A 45-year-old prisoner had been refused permission under the *Corrections Act 1986* to continue undergoing IVF treatment that required her to have daily injections at prison and to visit an IVF clinic three or four times per month. The prisoner was soon to turn 46, at which point she would be ineligible for further treatment. She applied for the following relief in the Supreme Court:

- A declaration that she had the right pursuant to s 47(1)(f) of the *Corrections Act* to continue IVF treatment with a clinic of her choice;
- Orders enabling her to receive such treatment; and
- A declaration that it was unlawful pursuant to the *Charter* for the respondents to refuse to permit her to access IVF treatment.

The applicant argued that the respondents had breached her human rights by not allowing her to obtain IVF treatment, and that refusal to allow her access to IVF constituted discrimination on the basis of fertility impairment. Her claim to a right to IVF treatment under the *Charter* was based on the following provisions:

- Section 13(a) (right to privacy);
- Section 8 (equality and freedom from discrimination);
- Section 22(1) (dignity and humane treatment); and
- Section 17 (protection of family and children).

Judgment

The Court granted the application, ordering the parties to make submissions as to the appropriate form of relief.

The obligation to act compatibly with human rights depends in the first instance on whether ‘any of the rights are engaged’. In identifying the scope of a right for this purpose, the focus must be on the purpose of the right and the interest it protects, the legislative intent being that individuals should receive the full benefit of its protection.

In light of this, the Court agreed with the respondents’ submission that no right to become a parent was contained in the *Charter*, because Parliament had expressed a clear intention not to include such a right.

The right to privacy in s 13(a) of the *Charter* was one of considerable amplitude, but it did not encompass a right to become a genetic parent and thereby found a family. To construe this right (or any other *Charter* right) as incorporating a right to become a parent (by whatever means) would be inconsistent with Parliament’s stated intention in the explanatory memorandum accompanying the Bill for the *Charter*.

Section 8, the right to equality and freedom from discrimination, did not amount to a right to access IVF treatment. With regard to the applicant’s allegation of discrimination on the basis of infertility, the Court



accepted the respondents' submission that there was no evidence that the applicant had been treated any less favourably than fertile prisoners.

Section 47(1)(f) of the *Corrections Act*, which gave prisoners the right to medical treatment that was reasonable and necessary for the preservation of health, must be construed consistently with the right to dignity in s 22(1) of the *Charter*, which required prisoners to be provided with the same level of health services as enjoyed by other members of community.

Insofar as the right to dignity encompassed the right set out in s 47(1)(f) of the *Corrections Act*, a refusal to grant the applicant a permit to leave the prison for IVF treatment would be unreasonable and would constitute a limitation on s 22(1) in circumstances where no justification for the limitation was given.

A limitation on this right could, however, be justified on the basis that there was a security issue at the prison on a given day or that no vehicle was available to transport the plaintiff to her treatment. Any such justification could not be put forward in the abstract; rather, it would depend upon the circumstances at the time the permit was required.

In this case, the evidence established that IVF treatment was necessary for the preservation of the applicant's reproductive health, and hence the applicant had the right to receive treatment pursuant to s 47(1)(f). However, this right did not necessarily entitle the applicant to receive treatment at her preferred clinic.



WBM v Chief Commissioner of Police (2010) 27 VR 469, [2010] VSC 219

Kaye J

28 May 2010

Charter provisions: ss 7, 13, 27, 32(2), 36(2)

Summary

The applicant was convicted of knowingly possessing child pornography, producing child pornography and three non-sexual offences. During the period of operation of his suspended sentence for these offences, the *Sex Offenders Registration Act 2004* ('SORA') came into effect, causing the applicant's name to be included in the Victorian Sex Offenders Registry. He sought a declaration in the Supreme Court that he was not a registrable offender within the meaning of the Act, and an order that the respondent remove his name from the Registry.

The applicant also sought a declaration that the *SORA* was inconsistent with the *Charter*, submitting, among other things, that insofar as it retrospectively applied to him, the *SORA* constituted arbitrary interference with his right to privacy and his right not to be retrospectively punished under ss 13 and 27 of the *Charter*.

Judgment

The application was dismissed, and the Court rejected the applicant's arguments under the *Charter*.

With regard to the freedom from arbitrary interference with a person's privacy in s 13 of the *Charter*, the word 'arbitrary' should be construed in keeping with its dictionary meaning, as denoting interference with right of privacy which was capricious and not based on any identifiable criterion. In light of this definition, the application of the *SORA* to persons such as the applicant, who was still subject to a suspended sentence of imprisonment, was based on a readily identifiable criterion and could not be characterised as arbitrary.

Furthermore, the *SORA*'s application to persons such as applicant did not constitute an imposition of a penalty for the purposes of s 27 of the *Charter*. This was because the *SORA* was concerned with the prevention of re-offending by offenders, and the facilitation of the investigation of further crimes committed by offenders; it was not intended to punish offenders.

Appeal information: Affirmed on appeal: *WBM v Chief Commissioner of Police* [2012] VSCA 159, see above 343

Mastwyk v DPP (2010) 27 VR 92, [2010] VSCA 111

Maxwell P, Nettle and Redlich JJA

11 May 2010

Charter provisions: s 32

Summary

The appellant sought to challenge the interpretation of s 55(1) of the *Road Safety Act 1986*. That provision allows a police officer to require a person to accompany them in order to obtain breath test results. The applicant had been detained by a police officer, and she argued that this was beyond the scope of s 55(1) for a number of reasons.

In the Supreme Court, Kyrou J found that an exercise of s 55(1) was subject to an implied condition of reasonableness, but dismissed the applicant's claim nonetheless. Both parties challenged this finding. The applicant argued that the Court had misapplied the test. The DPP argued that the Court had made an error of law in reading in the requirement of reasonableness.



Judgment

In three separate judgments, the Court dismissed the appeal.

Nettle and Redlich JJ upheld the Supreme Court's reading of s 55(1) and held that the Court had correctly applied the objective unreasonableness test as formulated in *DPP (Vic) v Webb* [1993] 2 VR 403.

Maxwell P disagreed because he regarded Kyrou J's formulation as a type of inverse *Wednesbury* reasonableness test requiring the court to undertake an undue review of the decision's merits. Maxwell P nonetheless agreed with Kyrou J's orders, as the applicant had failed to sufficiently make out a ground upon which judicial review could be sought.

Maxwell P noted as *obiter* that the court's interpretive obligations, as provided by the principle of legality and s 32(1) of the *Charter*, required that s 55(1) not be read to allow detention or imprisonment in any circumstance.



Castles v Department of Justice [2010] VSC 181

Osborn J

4 May 2010

Charter provisions: ss 8, 13(a), 17, 22, 38

Summary

A 45-year-old prisoner applied for an interlocutory injunction restraining the respondent from refusing to grant her the permits and approvals necessary to allow her to continue to undergo IVF treatment at a clinic, pending a proceeding under the *Corrections Act 1986*. The prisoner was soon to turn 46, at which point she would be ineligible for further treatment. In seeking the injunction, she claimed to have an enforceable right to IVF treatment based, among other things, upon the following provisions of the *Charter*:

- Section 13(a) (privacy and family);
- Section 8 (equality and freedom from discrimination);
- Section 22 (humane treatment); and
- Section 17 (protection of family and children).

Judgment

The Court refused to grant the injunction, but determined that the matter was deserving of expedition and should be heard within one month (*Castles v Secretary, Department of Justice* (2010) 28 VR 141, see 371). The refusal of the injunction was based largely on the fact that the plaintiff was not presently entitled to receive IVF treatment because she did not have the necessary documentation required under the *Assisted Reproductive Treatment Act 2008*.

While the plaintiff's case did not plainly fall within the scope of s 47(1)(f) of the *Corrections Act* (which gives prisoners the right to access reasonable medical care and treatment), the decision of the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436 required this provision to be interpreted in conjunction with the provisions of the *Charter*.

The Court did not, however, need to reach a final conclusion on the question of whether there was a right to IVF treatment under the *Charter*, as the Secretary for the Department of Justice was willing in principle to grant a permit for such treatment to the plaintiff in accordance with s 47(1)(f). Rather, the refusal to grant a permit was based on operational considerations that affected the Department's capacity to allow the plaintiff access to such treatment; as well as the fact that the plaintiff was not at the time legally entitled to access IVF treatment.

See also *Castles v Secretary, Department of Justice* (2010) 28 VR 141, above 371.



***R v Momcilovic* (2010) 25 VR 436, [2010] VSCA 50**

Maxwell P, Ashley and Neave JJA

17 March 2010

Charter provisions: ss 7(2), 25, 36

Summary

In an appeal against her conviction and sentence for drug trafficking, the applicant argued that s 32 of the *Charter* required the Court to adopt a rights compatible interpretation of the *Drugs, Poisons and Controlled Substances Act 1981* (*Drugs Act*). Specifically, the applicant argued the reverse onus of proof of possession should be read out of s 5 of the *Drugs Act*.

The reverse onus operated to deem defendants to be in possession of drugs found on their premises, unless the defendant could prove otherwise. The applicant argued that this was contrary to s 25(1) of the *Charter*, which guaranteed the presumption of innocence. Accordingly, she argued that s 32(1) operated to reduce the legal onus imposed by s 5 to an evidentiary onus. This gave rise to questions about the operation of s 32(1) upon ordinary legislation. The applicant submitted that s 32(1) had a similar effect to s 3(1) of the *Human Rights Act 1998* (UK).

Judgment

In a unanimous joint judgment, the Court dismissed the appeal against the applicant's conviction but upheld the appeal against her sentence.

Regarding the operation of s 32(1) on ordinary legislation, the Court concluded that s 32(1) did not displace the ordinary rules of statutory interpretation, but rather operated as one factor amongst the many identified in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

On the phrasing of s 5 of the *Drugs Act*, it was not open to the Court to reduce the legal onus to an evidentiary onus. However, the Court issued a declaration of inconsistent interpretation per s 36 of the *Charter*.

Appeal information

Reversed on appeal: *Momcilovic v R* (2011) 245 CLR 1.



***R v AMP* [2010] VSCA 48**

Neave and Redlich JJA

16 March 2010

***Charter* provisions: s 27(2)**

Summary

The applicant sought leave to appeal against his sentence of 14 years imprisonment on the basis that it was manifestly excessive. He had been convicted of a wide range of child sexual abuse crimes spanning many decades. The applicant was of ill health and advanced age at the time of his conviction.

He argued that s 27(2) of the *Charter* and s 114(2) of the *Sentencing Act 1991* required the Court to read the phrase 'current sentencing practices' in s 5(2)(b) of the latter Act, as referring to practices at the time the crime was committed as opposed to the present day.

The applicant also argued that his condition should have been taken into account further when determining a proper sentence. Other arguments were submitted to the effect that the cumulation of the sentences was excessive and that no appropriate direction had been given by the prosecutor with respect to the range of sentences available.

Judgment

In a joint judgment, Neave and Redlich JJA refused leave to appeal.

They accepted the applicant's contention that the phrase 'current sentencing practices' should generally be understood as referring to practices at the time the offence was committed. However, the Court observed that it was difficult to identify sentencing practices that were contemporary to the offence. It could be assumed only that average sentences were slightly lower at the time of the offence than they are today. The Court refused to overturn the imposed sentences on the grounds that the crimes committed were extremely serious and had been prosecuted after significant delay from their initial commission.

The Court dismissed the other possible grounds of appeal.



Russell v Yarra Ranges Shire Council [2009] VSC 486

Kaye J

29 October 2009

Charter provisions: s 24

Summary

The applicant sought leave to appeal against a decision of the Victorian Civil and Administrative Tribunal ('the Tribunal'). The Tribunal had dismissed the applicant's application to cancel a planning permit issued by the respondent under s 87 of the *Planning and Environment Act 1987*. The applicant advanced three grounds of appeal against the decision, the third ground being that the Tribunal denied him the right to fair hearing under s 24 of the *Charter*.

Judgment

The application for leave to appeal was dismissed.

Kaye J noted that s 24 of the *Charter* did not materially add to the applicant's common law right to a fair hearing before an impartial Tribunal in accordance with the principles of natural justice.

Accordingly, the applicant's submissions amounted to an argument that s 24 should incline a court to give full measure to the common law right contained in the principles of natural justice. In light of this, the applicant failed to advance any substantive argument that the Tribunal had failed to comply with s 24, or that it had failed to accord him natural justice.



DAS v Victorian Equal Opportunity & Human Rights Commission (2009) 24 VR 415, [2009] VSC 381

Warren CJ

7 September 2009

Charter provisions: ss 7(2), 24(1), 25(2)(k), 32

Summary

This case concerned the following provisions of the *Major Crime (Investigative Powers) Act 2004*:

- Section 39(1), which abrogated the privilege against self-incrimination in answering a question or giving information at an examination, or from producing a document or other thing at an examination or in accordance with a witness summons; and
- Section 39(3), which provided that evidence obtained in the course of an examination or from the production of documents in accordance with a witness summons was not admissible against the person in criminal proceedings or proceedings for the imposition of a penalty. The section did not confer derivative use immunity in respect of evidence obtained through compelled incriminating testimony.

On the application by a Victoria Police member, a judge made a coercive powers order under s 10(1) of the Act. The order was subject to the condition that if any person was charged with any offence linked to the organised crime offence, they would not be summoned to give evidence at an examination until the nature of the relationship between the powers of investigation of organised crime offences in the Act, and the rights guaranteed by ss 24(1) and 25(2)(k) of the *Charter* had been determined.

Section 24(1) guarantee a person's right to a fair trial, and section 25(2)(k) guarantees the right of a person not to be compelled to testify against him or herself or to confess guilt. The applicant applied to vary the order to remove the abovementioned condition.

The Victorian Human Rights and Equal Opportunity Commission intervened pursuant to s 40 of the *Charter*.

Judgment

The Court removed the condition, and imposed another condition in its stead.

The privilege against self-incrimination was a freestanding substantive human right existing as part of the common law of human rights. There was no scope for an exception to this privilege, other than by statute.

Under the ordinary meaning of the Act, the common law privilege against self-incrimination was removed entirely, and was replaced only by the limited immunity in s 39(3). Neither the Court's inherent jurisdiction to make orders to prevent interference with the course of justice, nor a trial judge's residual discretion to exclude evidence to prevent unfairness was a sufficient mechanism for upholding the rights contemplated by ss 24(1) and 25(2)(k) of the *Charter*.

The *Charter* should be construed in a way that was consistent with, and gave effect to, the right against self-incrimination. Its protection of that right was at least as broad as the traditional common law right to a fair trial and the right not to incriminate oneself. The *Charter* supported the approach that rights should be construed in the broadest possible way before consideration was given to whether they should be limited in accordance with s 7(2) of the *Charter*.



The Act's application breached ss 24(1) and 25(2)(k), because no distinction could meaningfully be drawn between the harm that might flow from incriminating information provided directly, and incriminating evidence derived from such information:

- The limitation in s 39 of the Act on the right against self-incrimination, as guaranteed by ss 24(1) and 25(2)(k) of the *Charter*, did not meet the justification test in s 7 of the *Charter*. It was not 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'. The purpose of the limitation was important, but could be achieved while retaining a form of derivative use immunity.
- Absolute derivative use immunity would be unrealistic. However, people should not be compelled to incriminate themselves with evidence that could only have been discovered through their own testimony.



***R v Kent* [2009] VSC 375**

Bonjorno JA

2 September 2009

***Charter* provisions: s 22**

Summary

The respondent was convicted of being an active member of the terrorist organisation Jemaah and making a document connected with preparation for a terrorist attack, and faced a maximum sentence of 10 years' imprisonment for each count.

The respondent was suffering from a mental illness, which had already been exacerbated by the conditions of his period of incarceration prior to sentencing.

Judgment

The respondent was sentenced to 5 years' imprisonment.

The Court took into account s 22(1) of the *Charter*, which provides that persons deprived of their liberty by law must be treated with humanity, and with respect for their inherent dignity as human beings.

Placing a prisoner in a custodial environment, when it was foreseeable that doing so was likely to result in their suffering a major psychiatric illness, would contravene the requirement to be treated with humanity. The law required that, if the conditions of incarceration of a prisoner were so harsh as to be likely to result in their suffering a psychiatric illness, that must be taken into account in determining the length of an appropriate sentence.



Attorney-General (Vic) v Kay [2009] VSC 337

Cavanough J

14 August 2009

Charter provisions: ss 8, 24

Summary

The applicant (Kay) filed two summonses, one for the revocation of an order declaring him to be a vexatious litigant. As part of his submissions under this summons, the applicant sought to argue that his rights under the *Charter* amounted to 'new facts or circumstances' that made it appropriate for the order to be set aside.

In particular, the applicant referred to his right to a fair hearing and right of access to the courts in s 24 of the *Charter*, and also to his right to equality of treatment before the law in s 8.

Judgment

The summons was dismissed.

The matters relied upon by the applicant did not differ in substance from arguments he had relied upon unsuccessfully in the past, and in particular, before the Court of Appeal.

With respect to the applicant's arguments under the *Charter*, the Court followed the approach taken by Nettle JA in the Court of Appeal. Nettle JA had noted that it was questionable whether any of the *Charter* rights relied upon by the applicant amounted to a change in relevant circumstances since the declaration was made, and that the applicant's arguments were premised 'upon a misconception that the right of access to the courts is absolute.' The applicant had identified no relevant change in circumstances.

Appeal information

Leave to appeal refused, see: *Kay v Attorney-General for State of Victoria (No 2)* [2010] VSCA 27



Nolan v MBF Investments Pty Ltd [2009] VSC 244

Vickery J

18 June 2009

Charter provisions: ss 13(a), 32, 49

Summary

The applicant Nolan was owner of three adjoining parcels of land, all of which were mortgaged to the respondent. He applied for damages and equitable relief after the respondent sold all three lots in the exercise of a statutory power of sale arising under the mortgage, despite the fact that one of the lots was occupied by the home of the applicant.

The applicant argued, among other things, that the respondent had breached statutory duties arising under s 77(1) of the *Transfer of Land Act 1958* by failing to act in good faith and failing to have regard to the applicant's interests in the conduct of sale. One of the issues that arose before the Court was whether the protection of the home from arbitrary interference was a fundamental human right.

Judgment

The application was granted.

Vickery J held that in selling a property pursuant to the exercise of a statutory power, the mortgagee was required under s 77(1) to have regard to the 'interests' of the mortgagor. There was no need for the respondent to sell the lot containing the applicant's dwelling house for the purpose of obtaining the payment of mortgage debt; the decision to sell the lot was not made in good faith, or with regard to the 'interests' of the mortgagor pursuant to s 77(1).

Because the *Charter* was not in operation at the time of the sale, s 77(1) could not be interpreted, or given any different meaning, in light of s 32 of the *Charter*. The *Charter* was not intended to have a retrospective operation.

However, the construction of s 77(1) must take place in a context of values and jurisprudence in which the right to the protection of the home from arbitrary interference (which was established in international human rights instruments and reinforced by s 13(a) of the *Charter*) was a fundamental human right.

In this context, the principle of legality necessitated construing the word 'interests' in s 77(1) in a manner that did not curtail this human right. To do otherwise would curtail that right in a manner unintended by the legislation. Accordingly, the respondent's conduct was manifestly unreasonable and amounted to an arbitrary interference of most serious kind with the applicant's right to continue in occupation of his home.

Appeal information

Reversed on appeal, see *MBF Investments Pty Ltd v Nolan* [2011] VSCA 114.



Kracke v Mental Health Review Board [2009] VCAT 646

Bell J (As President of the Victorian Civil and Administrative Tribunal)

23 April 2009

Charter provisions: ss 7, 24, 32, 36, 40

Summary

Kracke, a mentally ill man who was being subjected to medical treatment without his consent, applied for review of a decision by the respondent. The treatment in question was being administered under treatment orders issued pursuant to the *Mental Health Act 1986*. Such orders are subject to safeguards, one being that the respondent must review any orders within specified times. In this case, the respondent did not conduct the reviews on time. When the respondent eventually sought to hear the reviews, the applicant submitted that exceeding the time limit meant that the safeguards in the system had failed and that his human rights under the *Charter* had been breached.

The respondent nonetheless decided that treating the applicant involuntarily was justified on medical grounds, which remained valid even when the review periods were exceeded. The applicant sought review of this decision at the Victorian Civil and Administrative Tribunal ('the Tribunal').

Because the application became a test case on the application and operation of the *Charter*, the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission intervened in the proceeding.

Judgment

Bell J found that the respondent had breached the applicant's human right to a fair hearing under s 24(1) of the *Charter* by failing to conduct the reviews of his involuntary and community treatment orders under the *Mental Health Act* within a reasonable time.

What is reasonable depends on such factors as the complexity of the case, the importance of the case to the applicant, any delay caused by the applicant and the explanation for the delay.

Bell J set out a detailed outline of the key principles and provisions which govern the interpretation of the *Charter* and outlined the following four steps for the application of human rights under the *Charter*:

- *Determining whether the relevant statutory provision engages a human right:*

This step requires a court to interpret the statutory provision in question, to determine whether the provision *prima facie* imposes a limit on a *Charter* right, and to identify the scope and meaning of the relevant *Charter* right. 'The provision is interpreted according to the standard principles of interpretation, including those calling up Australia's international obligations and the principle of legality. The scope of the human right is identified broadly and not legalistically, focusing on its purpose and the interests it protects. The scope of the right is identified in a way that fulfils its purpose and secures for individuals the full benefit of its protection'.

- *Assessing justification and proportionality under s 7(2) of the Charter:*

The limitation provision allows human rights to be limited 'under law' (the legality requirement) only if demonstrably justified in the circumstances specified (the proportionality requirement). With regard to the proportionality requirement, it is not necessary for the limitation in the provision to be the least possible to achieve the intended purpose. With regard to the legality component, '[t]o be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither *ad hoc* nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty'.



- *Reinterpretation of the statutory provision in keeping with s 32 of the Charter:*

A statutory provision must be first interpreted using the 'ordinary' tools of statutory interpretation before applying the 'special' interpretative obligation in s 32.

- *Declaration of inconsistent interpretation:*

This stage refers to the Supreme Court's power under s 36(2) of the *Charter* to make a declaration if a statutory provision cannot be interpreted consistently with human rights.



De Simone v Bevnol Constructions & Developments Pty Ltd (2009) 25 VR 237, [2009] VSCA 199

Neave JA and Williams AJA

3 April 2009

Charter provisions: ss 4, 6, 24, 25, 32, 38

Summary

The applicant sought leave for an interlocutory appeal against a decision of the Victorian Civil and Administrative Tribunal ('the Tribunal') refusing to stay a counterclaim made against him. The application was purportedly made on a point of law from the Tribunal, although no final determination of the question of law had been made. The applicant contended that the rules against self-incrimination should be revised in light of ss 24 and 25 of the *Charter*.

Specifically, the applicant argued that the Supreme Court should understand those sections as requiring a stay to be granted over civil proceedings until potential criminal charges were determined, where there was a risk that the civil proceedings could force the applicant to reveal incriminating documents. To this end, the applicant argued that the rule in *McMahon v Gould* (1982) 7 ACLR 202 as amended by *Reid v Howard* (1995) 184 CLR 1 was altered by the *Charter*. That rule provided that such stay may only be granted where there was a 'real risk of injustice' to the defendant which justified the denial of a hearing to the plaintiff, or alternatively where it was specifically abrogated by statute or waiver.

The applicant also argued that the Tribunal was constrained by ss 6(2)(b) and 38 of the *Charter*. The Tribunal had understood s 4(1)(j) to indicate that it was not bound as a public authority when it acted in a judicial (as opposed to administrative) capacity.

Judgment

In a joint judgment, Neave JA and Williams AJA refused the applicant leave to appeal.

It was arguable that the rule in *McMahon v Gould* may alter when subjected to the interpretive obligation found in s 32 of the *Charter*. The Court drew attention to previous judicial criticism of the *McMahon* rule on the basis that it failed to give sufficient attention to the interests of the defendant.

With respect to the Tribunal's obligations under s 38 of the *Charter*, there was some merit to the application. However, the Court did not find any error made by the vice-president in this regard to result in substantial injustice. This was compounded by the fact that the applicant's circumstances had changed (he had now been charged with criminal offences as anticipated) and it was open to him to make a new stay application.

See also *De Simone v Bevnol Constructions Developments Pty Ltd* (2010) 30 VR 200, 366 above.



***State of Victoria v Turner* (2009) 23 VR 110, [2009] VSC 66**

Kyrou J

4 March 2009

Charter provisions: ss 8, 32, 49

Summary

The respondent was suffering from a number of mental and cognitive impairments, and alleged before the Victorian Civil and Administrative Tribunal ('the Tribunal') that the State of Victoria indirectly discriminated against her under s 37(2)(a) of the *Equal Opportunity Act 1995* by imposing a condition that required the respondent to access education without a teacher's aid. The Tribunal found that the appellant had indirectly discriminated against the respondent, and ordered that the appellant provide the respondent with a full-time teacher's aid for the duration of her senior secondary schooling for all subjects.

The appellant sought to challenge the decision of the Tribunal in the Supreme Court. As part of her submissions on appeal, the respondent sought to rely on the *Charter* in relation to the interpretation of s 136 of the *Equal Opportunity Act*. The relevant provisions of the *Charter* were s 8 (recognition and equality before the law); s 32 (requiring statutory provisions to be interpreted consistently with human rights); and s 49 (transitional provisions).

Judgment

The appeal was allowed in part.

Kyrou J found that the *Charter* was not relevant to the issues to be determined in the appeal because it did not apply to the proceeding before the Tribunal, nor to the orders made by the Tribunal — and could not, therefore, be applied by the Court in determining whether the Tribunal made an error of law.

The Court noted that ss 32 and 8 of the *Charter* commenced on 1 January 2008 and 1 January 2007 respectively, while this appeal commenced on 8 July 2008. There was nothing in the *Charter* which gave it retrospective operation to change the nature of an appeal to the Court on a question of law from the Tribunal.



***DPP v Barbaro* (2009) 20 VR 717, [2009] VSCA 26**

Maxwell P, Vincent and Kellam JJA

3 March 2009

Charter provisions: ss 21(5), 25(2), 32

Summary

The applicant argued that an appellate Supreme Court judge had misapplied s 4(2)(aa) of the *Bail Act 1977*, which sets out the circumstances in which a person charged with specific serious offences may be granted bail. The applicant had been charged with a series of serious drug offences. He was in a situation in which flight would have been simple (he had resources and international contacts) and was refused bail.

The applicant argued that bail should have been granted because of some delay in the period between his detention and the bringing of case to trial. He also argued that he had mitigated some of the concerns upon which bail was refused. On this basis, he was granted bail by a magistrate on second application, which was then overruled by the Supreme Court.

The applicant argued that, ss 21(5)(c) and 25(2)(c) of the *Charter* informed the operation of s 4(2)(aa). It was not suggested however that s 32 altered the meaning of the *Bail Act*. Rather, the relevant *Charter* provisions operated as factors in the determination under s 4(2)(aa).

Judgment

In a joint judgment, the Court dismissed the appeal.

An extensive period of detention was sometimes sufficient to justify a redetermination of bail. In this instance, however, the circumstances were such that the burden of demonstrating that bail was unjustly refused was significant. Nor did the *Charter* assist the applicant.

Sections 21(5)(c) and 25(2)(c) did not require the application of s 4(2)(aa) of the *Bail Act* to be altered, as the section adequately balanced the competing public policy imperatives at play in the determination.



RJE v Secretary to the Department of Justice (2008) 21 VR 526, [2008] VSCA 265

Maxwell P, Nettle and Weinberg JJA

18 December 2008

Charter provisions: ss 12, 13, 21, 32

Summary

This was an appeal against an order made by a judge of the County Court pursuant to s 11(1) of the *Serious Sex Offenders Monitoring Act 2005*, requiring that the appellant be subject to an extended supervision order ('ESO') for a period of 10 years. In the course of submissions, the parties made a number of arguments under the *Charter*, raising the following issues:

- Whether a judge exercising the power under s 11(1) is acting judicially or administratively.
- Whether the effect of s 32(1) of the *Charter* was to limit the scope of the power conferred by s 11(1) such that a judge considering making an ESO must be satisfied that the conditions to be imposed by the Parole Board would not limit the offender's rights further than s 7(2) of the *Charter* would permit.
- Whether the Parole Board, though at present exempted from compliance with the *Charter*, must nevertheless in practice refrain from imposing conditions which would be incompatible with the *Charter*; and
- Whether, on appeal from the making of an ESO, the Court could examine whether the conditions imposed by the Parole Board under s 16(2) were compatible with the *Charter*.

Judgment

The Court allowed the application. However, they split on the question of whether the application was allowed on the basis of the common law or the *Charter*. Maxwell P and Weinberg JA held that the earlier decision of *TSL v Secretary to the Dept of Justice* (2006) 14 VR 109 ('*TSL*') was wrongly decided. They found that the common law presumption of liberty should require the term 'likely' to be understood as denoting 'more probable than not' (essentially applying the principle of legality). Accordingly, Maxwell P and Weinberg JA determined that it was not necessary to resort to s 32(1) of the *Charter*.

Justice Nettle disagreed. The judge did not regard it as appropriate to overrule the court's judgment in *TSL*. Rather, Nettle JA determined that the *Charter* displaced the interpretation of 'likely' expressed in *TSL*. In the judge's view, s 32(1) read in tandem with the reasonable limitation clause in s 7(1) required the court to interpret the term 'likely' as denoting 'more probable than not'.

The appeal was allowed and the supervision order set aside.

Maxwell P and Weinberg JA found that the trial judge erred in concluding, on the evidence presented, that the accused was likely to commit a relevant offence if released unsupervised into the community. Because the appeal succeeded on the merits, Maxwell P and Weinberg JA found it unnecessary to decide any of the questions that arose with regard to the *Charter*.

Nettle JA was also in favour of allowing the appeal, but considered it necessary to take the *Charter* into account in making his decision. In particular, the right to freedom of movement in s 12, the right to privacy in s 13 and the right to liberty in s 21. By reference to s 7 of the *Charter*, the Court was required by s 32 to construe s 11(1), as far as possible, consistently with the purpose of that section, in a way that subjected these rights only to such reasonable limits as could demonstrably be justified in a free and democratic society.



Even giving full weight to the purpose of s 11, Nettle JA could not conceive of the potentially-far reaching restrictions on rights provided for in this provision as being capable of demonstrable justification unless the risk of an offender committing a relevant offence was at least more likely than not.

Nettle JA stated that presumably the Parole Board had been exempted from compliance with the *Charter* in order to enable it to act lawfully in ways that were not demonstrably justified in a free and democratic society having regard to the criteria delineated in s 7 of the *Charter*.

Nettle JA stated that the division of responsibility under s 11 between the Court and the Parole Board may warrant the Secretary and the Board further restricting the rights of an offender than if they were required to make their own assessment of the risk of a relevant offence being committed and to justify their proposed restrictions based on such assessment. If so, Nettle JA stated that the Court might need to consider a wider range of possible directions and orders for the purposes of interpreting s 11.



Re Application for Bail by Dickson [2008] VSC 516

Lasry J

26 November 2008

Charter provisions: ss 1(2), 21(5)

Summary

The bail applicant was charged with 29 counts of armed robbery offences. A delay in trial meant that the applicant would remain in custody from the date of his arrest to trial for a period of nearly two years and three months. However, the applicant was in custody serving revoked parole and an unrelated sentence and was unlikely to be released even if bail were granted.

The applicant argued, among other things, that if a person has been held in custody for an unreasonable period of time, that person should be released on bail regardless of any other circumstances. In making this argument, the applicant relied upon s 21(5) of the *Charter*, submitting that it clearly created a legal right to be brought to trial without unreasonable delay and required the relevant provisions of the *Bail Act 1977* to be interpreted in such a way as to give full effect to this right.

Judgment

The application was refused. Lasry J found that the applicant had failed to discharge the onus to show that his detention in custody was not justified, and that he did not constitute an unacceptable risk.

With regard to the applicant's arguments under the *Charter*, Lasry J first considered the question of whether the delay in this case was 'unreasonable' within the meaning of s 21(5). This provision implied that to be 'unreasonable', a delay would have to have occurred for reasons not attributable to the fault of the applicant. While the length of the delay tended towards unreasonableness, it could not be considered in isolation. Also relevant was the fact that part of the applicant's period in custody would be spent serving pre-existing sentences or parole breaches. In all these circumstances, that the delay was considerably less prejudicial to the applicant than might normally be expected.

Lasry J also rejected the applicant's contention that s 21(5) made release on bail mandatory where there was a finding of unreasonable delay. The *Charter* did not require the *Bail Act* to be interpreted to allow a release on bail regardless of an established unacceptable risk. In this case, a number of matters pointed to a refusal of bail. In these circumstances, the terms of the *Charter* should be taken into account and the right in s 21(5) given effect against the scheme of the *Bail Act* and its relevant provisions.



***Devine v VCAT* [2008] VSC 410**

Beach J

10 October 2008

Charter provisions: ss 2, 21

Summary

The applicants sought judicial review of a decision by the Victorian Civil and Administrative Tribunal ('the Tribunal'). The applicants had failed to take certain documents off their website, as ordered by the Tribunal, and failed to appear at the ensuing proceeding. The Tribunal convicted the applicants of contempt and sentenced them to imprisonment.

The applicants claimed, among other things, that the conduct of the Tribunal proceeding in their absence constituted a breach of natural justice and of their right to a fair hearing under the *Charter*. As a result of this allegation, the Attorney-General intervened, as of right, in the proceeding.

The Tribunal proceeding was commenced and concluded prior to the operative commencement date of Division 3, Part 3 of the *Charter*. So, the applicants sought to rely on the decisions of *Tomasevic v Travaglini* (2007) 17 VR 100 and *DPP v TY (No 3)* [2007] VSC 489 as authority for the proposition that the *Charter* rights 'apply in substance' prior to the commencement date by 'operation of international law on Victorian law directly'.

Judgment

The application was dismissed. Beach J found, among other things, that there was no breach of natural justice in this case as the applicants had known of the hearing date and had voluntarily decided not to attend. No legislative provision prevented the Tribunal from imposing a custodial sentence in the absence of the applicants.

With respect to the applicants' arguments under the *Charter*, Beach J confirmed that the *Charter* had no direct application in this case, and that this raised questions over the Attorney-General's continued right to intervene. The Court agreed with the decision of Bell J in the case of *Kortel v Mirik* [2008] VSC 103, but ultimately found it unnecessary to decide the matter, as the Attorney-General had in this case sought leave to intervene, and this was an appropriate case for such leave to be granted.

With regard to the continued substantial application of *Charter* rights prior to the *Charter's* commencement date, the body of international covenants from which the rights in the *Charter* were drawn could be used as an interpretive aid or a relevant consideration in the exercise of judicial powers and discretions, regardless of the applicability of the *Charter* itself. The right to a fair trial had long been recognised at common law.



Sabet v Medical Practitioners Board of Victoria (2008) 20 VR 414, [2008] VSC 346

Hollingworth J

12 September 2008

Charter provisions: ss 4, 7, 25, 38, 39

Summary

Mr Sabet appealed against a decision by the respondent to suspend his registration as a medical practitioner in light of complaints and charges of misconduct against him. The appellant sought review of this decision under the *Administrative Law Act 1978* on a number of grounds.

In particular, the appellant argued that the respondent was a public authority for the purposes of s 38 of the *Charter*, which provides that it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. The appellant argued that the respondent breached s 38 in making its decision by failing to give proper consideration to the presumption of innocence in s 25(1) of the *Charter*.

Judgment

The appeal was dismissed.

In relation to the appellant's arguments under the *Charter*, Hollingworth J found that the respondent was a 'public authority' under s 4(1)(b) of the *Charter*, having been established by statute and having functions that were regulatory in nature for which it received public funding. The Court found that, in suspending the appellant's registration, the respondent had been acting in an administrative capacity, and was consequently a public authority to which s 38 applied.

The Court, in analysing whether there had been a breach of s 38, found it useful to ask three questions:

- Has a *Charter* right been engaged?
- Has the public authority imposed any limitation on that right?
- Was any such limitation reasonable and justified within the circumstances set out in s 7(2) of the *Charter*?

This three-stage approach was to be preferred over a two-stage approach that first asked the engagement question, and then combined the limitation and justification questions into a single question.

On the engagement question, if s 25(1) were construed only by reference to its heading and to the remainder of s 25, it would apply only in criminal proceedings. Even if the concept of criminal proceedings were given a broad construction to include procedural matters before or after the criminal trial, that would not be enough to include disciplinary proceedings in which no finding of guilt was to be made.

Even if the presumption in s 25(1) was engaged, directly or indirectly, it did not prevent the respondent from evaluating the material before it and forming an opinion that was incompatible with innocence in respect of the criminal charges against the appellant. Accordingly, the appellant had not made out a case that the respondent had imposed any unreasonable or unjustifiable limitation on the presumption in s 25(1).



X v General Television Corp Pty Ltd [2008] VSC 344

Vickery J

8 September 2008

Charter provisions: ss 7, 15, 24

Summary

The applicant sought orders prohibiting the publication, broadcast or exhibition by the respondent of a certain television program 'Underbelly' until after the completion of his criminal trial. The applicant had been charged with offences for which committal hearings had not yet commenced.

The judge made an order at the beginning of the trial prohibiting any publication in the public domain of any report in respect of the whole of this proceeding. A key issue was whether the broadcast of the program, or any part thereof, before the completion of the trial would constitute contempt of court. The need to draw a balance between the right to a fair trial and the right to freedom of expression in ss 24 and 15 of the *Charter* was also an issue in the proceeding.

Judgment

The application was granted in part, on the basis of the Court's inherent jurisdiction to make orders necessary to prohibit threatened contempt of court. The broadcast of episode six of the program in Victoria prior to the applicant's trial would constitute contempt of court and was prohibited, but broadcast of episodes one to five was permitted.

The prohibition was necessary to ensure a fair trial for the applicant, with reference to ss 24 and 15 of the *Charter*, as there was a real and definite tendency for episode six to prejudice his trial.



Allen v Secretary to the Department of Justice [2008] VSC 288

Hansen J

1 August 2008

Charter provisions: s 4(1)(k)

Summary

The applicant sought judicial review of the Parole Board's decision, alleging that he had been dealt with in an unlawful manner and seeking, among other orders, his release from custody. The applicant had been released on parole previously, subject to the condition that he undergo treatment for his drug use. As he later returned positive tests for drug use, his parole was revoked by the Parole Board.

The applicant argued that his arrest and return to custody without charge denied him his right to due process of law under the *Charter*. He also argued that the Attorney-General of Victoria had breached his duty of care to the applicant under the *Charter* by failing to correct the abuse of due process when it was drawn to his attention.

Judgment

The application was dismissed.

The applicant had breached parole, and that the Parole Board had acted lawfully in these circumstances in revoking parole and returning the applicant to custody.

Pursuant to s 4(1)(k) of the *Charter*, the Parole Board had been declared *not* to be a 'public authority' for the purpose of the rights contained therein. Furthermore, the *Charter* did not impose upon the Attorney-General any duty of care to the applicant.



***Kortel v Mirik* [2008] VSC 103**

Bell J

4 April 2008

***Charter* provisions: ss 6(2)(b), 8, 24(1), 34(1), 35(1)(a)**

Summary

This applicant, a victim of crimes committed by the respondents, claimed compensation under s 85B of the *Sentencing Act 1991*. At the directions hearing, the question arose as to whether the *Charter* applied to the proceedings through s 6(2)(b). That provision requires a court to give effect to the rights in Part 2 of the *Charter* insofar as they are relevant to a proceeding before it. The rights to a fair hearing and equality before the law in ss 24(1) and 8(3) were deemed relevant to this proceeding, because the respondents were without legal representation.

Accordingly, the applicant served a notice on the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission ('the Commission') under s 35(1)(a) of the *Charter*, and the Commission gave notice of statutory intervention in the proceeding under s 40(1).

When the matter returned to court, the Solicitor-General (on behalf of the Attorney-General) argued that the question as to the application of the *Charter* no longer existed, as the respondents were by then represented.

The Commission, however, argued that the application question remained, and that both the Commission and the Attorney-General retained the right to intervene in the proceeding under s 40(1) of the *Charter* because the question had arisen. Also in issue was whether this right of intervention should be determined as a separate question.

Judgment

The respondents were granted legal aid and thus secured legal representation, so the potential application of the *Charter* had no practical implications for the proceedings. The question of the application of the *Charter* in keeping with s 6(2)(b) was no longer an issue before the Court.

Before the respondents had secured representation, the situation was different: a concrete question arose as to whether s 6(2)(b), together with ss 8 and 24(1), put a positive obligation on the Court to ensure a fair hearing by giving due assistance to the respondents as unrepresented litigants.

Any right of the Attorney-General and the Commission to intervene in the proceedings under s 40(1) of the *Charter* had ceased.



***Guneser v The Magistrates Court of Victoria* [2008] VSC 57**

Habersberger J

5 March 2008

Charter provisions: ss 2, 4, 39, 49

Summary

The applicant sought a stay of proceedings against him following a committal by the Magistrates' Court. The applicant was a taxi driver charged with intentionally or recklessly causing serious injury. The proceedings had been adjourned several times because the applicant was without legal representation. The applicant had failed to elect summary jurisdiction, and extra indictable charges were laid against him. A magistrate refused a further adjournment of the proceedings, and the applicant was eventually committed for trial on all of the charges against him.

Although none of the applicant's grounds for review referred to the *Charter*, during the hearing the applicant repeatedly complained that many of his rights under the *Charter* had been denied.

In particular, the applicant sought to rely upon s 39(1) of the *Charter*, which allows a person to seek relief against the decision of a public authority on the ground of unlawfulness arising because of the *Charter* if the person can seek relief otherwise than because of the *Charter*.

The respondent submitted that the transitional provisions in s 49 of the *Charter* meant that it did not apply to the applicant's complaints.

Judgment

The application was dismissed.

Habersberger J considered the applicant's complaints under the *Charter*, and found that the magistrate's decision to commit the applicant was a decision of a public authority for the purposes of s 39.

However, Section 49(3) of the *Charter* states that Division 4 of Part 3, of which s 39 is part, does not apply to any decision made by a public authority before 1 January 2008. In this case, all the acts or decisions the applicant wished to challenge were made before that date.



Gray v DPP [2008] VSC 4

Bongiorno J

16 January 2008

Charter provisions: ss 21, 25

Summary

The applicant and a co-accused were charged with aggravated burglary and other offences. The accused applied for bail pending a committal hearing.

The applicant was remanded in custody and had been refused bail in the Magistrates' Court. He claimed that his continued detention was not justified as a delay was likely before the matter was finalised.

Judgment

The application was granted.

Bongiorno J found that the provisions of the *Charter* were highly relevant to the question of bail in this case. Of particular relevance were s 21(5)(c), which sets out the guarantee of fair trial without unreasonable delay, and s 21(3), which sets out the prohibition on the deprivation of liberty other than according to law.

The release of the applicant on bail was the only remedy the Court could provide for the Crown's failure to meet its *Charter* obligation to provide a timely trial, or to ensure that the breach of this obligation did not prejudice the applicant



Tomasevic v Travaglini (2007) 17 VR 100, [2007] VSC 337

Bell J

13 September 2007

Charter provisions: s 24

Summary

The applicant applied for judicial review of a decision of the Victorian County Court. He had been found guilty without conviction of threatening to kill and using threatening words in a public place. The applicant was an unrepresented litigant who sought leave to appeal out of time to the County Court, which dismissed his application on the basis that the three-year delay was too great.

In doing so, the County Court failed to inform the applicant of the requirement to establish exceptional circumstances, and to show that the respondent's case would not be materially prejudiced by delay.

The applicant claimed, among other things, that the County Court had failed to perform its duty to give him – an unrepresented litigant – guidance in breach of his right to natural justice.

Judgment

The application was granted.

Bell J held that judges had a duty to ensure a fair trial by giving unrepresented litigants due assistance to ensure that they had equal treatment before the law and equal access to justice. The matters in which a judge was required to assist were not limited, as the proper scope of assistance necessary to ensure a fair trial depended on the particular litigant and the nature of the case.

In this case, the County Court had failed to explain its procedures or assist the applicant in the presentation of the case, which constituted a failure to ensure a fair trial and was a breach of the rules of natural justice.

Although the *Charter* was held not to apply to this proceeding, the International Covenant of Civil and Political Rights was recognised as having an independent significance for the exercise of judicial powers and discretions that was enhanced by the enactment of the *Charter*.



JR Mokbel Pty Ltd v DPP (Vic) [2007] VSC 119

Hargrave J

3 May 2007

Charter provisions: ss 17, 21

Summary

Renate Mokbel was arrested and taken into custody in March 2007 as a result of her husband, Tony Mokbel, breaching his bail conditions. She had signed an undertaking to pay \$1 million into court if her husband breached his bail conditions, after he had been arrested and charged with drug trafficking offences. Mrs Mokbel made application to the Supreme Court under s 26 of the *Confiscation Act 1997*, seeking that the applicant company (of which she was sole director and shareholder) be permitted to sell property to enable her to raise the amount of \$1 million, and thus to be released from custody. All dealings in the property had previously been restrained under s 18 of the *Confiscation Act*.

One of the arguments made by the applicant was that the right to protection of families and children in s 17 of the *Charter* was relevant in circumstances where her family and children had been disrupted by the imprisonment of both parents. She submitted that this situation was offensive to the rights recognised by s 17, and that this was a matter to take into account in the exercise of the Court's discretion under s 26 of the *Confiscation Act*.

Mrs Mokbel also relied on s 21(8) of the *Charter*, which provides that a person must not be imprisoned only because of his or her inability to perform a contractual obligation. It was argued that the surety obligation undertaken by her was akin to a contractual obligation.

Judgment

The application was dismissed.

Hargrave J found that making the orders sought would be inconsistent with the general policy underlying the *Confiscation Act* in circumstances where evidence demonstrated that the majority of the relevant assets had been acquired using the proceeds of crime.

The provisions of Part 2 of the *Charter* may be relevant to the exercise of a discretion under s 26 of the *Confiscation Act*. However, the rights in ss 17 and 21(8) should not cause the Court, either alone or in combination with other matters, to exercise the discretion in the manner sought by the company and Mrs Mokbel.

- With regard to s 17 of the *Charter*, giving effect to the *Confiscation Act* regime, which was designed to protect the community (and its various family units) from the effects of illegal drug trafficking, was more important than the individual needs of the Mokbel family.
- With regard to s 21(8), s 26 of the *Confiscation Act* was not an appropriate vehicle to consider this issue.

The power to make a restraining order under s 18 of the *Confiscation Act*, and the power to imprison a defaulting surety under s 6(1) of the *Crown Proceedings Act 1958*, were reasonable limits upon the human rights relied upon by Mrs Mokbel. Having regard to the policies underlying these legislative provisions, they could, to the extent that they might be inconsistent with ss 17 or 21(8) of the *Charter*, be 'demonstrably justified' within the meaning of s 7(2) of the *Charter*.



***R v Williams* (2007) 16 VR 168, [2007] VSC 2**

King J

15 January 2007

Charter provisions: ss 4, 6, 7, 24, 25, 32, 49

Summary

The applicant was charged with a serious criminal offence and committed for trial at a date when his counsel of choice was unavailable. He sought adjournment of his trial for period of six months to allow his counsel of choice to represent him at the trial.

The applicant claimed that the *Charter* applied to his adjournment application, and in particular, that s 25(1) of the *Charter*, which applies to persons charged with criminal offences, gave him an absolute right to counsel of choice. The applicant argued that a court, in listing a trial, acted in an ‘administrative capacity’, and therefore fell within the *Charter* definition of a ‘public authority’. It was therefore obliged to act in a manner that was compatible with human rights, and in particular, the rights contained in s 25(1).

The Crown claimed that the *Charter* did not apply, as s 49(2) restricted its application to legal proceedings commencing after 1 January 2008.

Judgment

The application was dismissed.

King J held that, in light of the transitional provision in s 49(2), the *Charter* was not applicable to the adjournment application as the proceedings had been brought prior to the commencement of Part 2. However, the Court made some further comments to clarify issues that had been raised by the applicant in relation to the *Charter*.

First, for the purposes of the *Charter*, a judge was not acting in ‘an administrative capacity’ when hearing an adjournment application of a trial which had already been listed, and did not fall within the definition of a ‘public authority’. Accordingly, the decision to adjourn a trial date already fixed was a matter of judicial discretion.

Second, the rights established in s 25(1) were not absolute but limited by the general limitation in s 7 of the *Charter*. The rights in s 25(1) may be subject under law to such reasonable limitations as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

In light of this limitation, even if the *Charter* had been operative in this case, the Court’s decision would have been the same. It was not in the interests of justice to order an adjournment in this case on the expectation that the applicant would be able to brief his counsel of choice, particularly given the fact that the applicant had the opportunity to engage other counsel.



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