

Charter Assists to Prevent Eviction of Family into Homelessness

Director of Housing v TP (Residential Tenancies) [2008] VCAT 1275 (24 June 2008)

In this case, VCAT considered that the rights to privacy and family, and to protection of children and the family unit, were relevant to determining whether an application for an order of possession by the Director of Housing should be granted as against a single mother of four children.

Facts

The respondent, TP, has lived as a tenant in Office of Housing premises since 1993. She lives there with her four children. On 21 March 2007, DG, the father of the youngest two of TP's children, was arrested on the rented premises and charged with using, possessing and cultivating cannabis.

On 31 May 2007, the applicant, the Director of Housing, served a notice on TP to vacate the premises. Section 250 of the *Residential Tenancies Act 1997* (Vic) provides that a landlord may serve such a notice 'if the tenant has used the rented premises or permitted their use for any purpose that is illegal at common law or under an Act'. The applicant alleged that TP had permitted the premises to be used for an illegal purpose.

Following service of the notice to vacate, the applicant applied to VCAT for an order for possession of the premises.

The central issue in the case was the circumstances in which DG had come to be arrested on TP's premises. DG has a mental illness and was frequently violent towards TP. Prior to DG's arrest, TP had taken out an intervention order against DG which DG frequently breached. The police, when informed by TP of these breaches, rarely took action. DG came to TP's premises after his mother threw him out for attempting to bring his marijuana onto her land. Despite protests from TP that he could not stay, DG insisted that he be allowed to stay and became violent. TP eventually relented and agreed that DG could stay for a few days on the condition that the plants be kept outside.

Findings

The Tribunal was called upon to consider two primary questions:

- Whether or not the premises were used, by DG, for an illegal purpose; and
- If so, whether or not TP had permitted that the premises be used for that illegal purpose?

VCAT found that the premises had not been *used* for an illegal purpose by DG. Accordingly, TP could not be held to have *permitted* the use of the premises for an illegal purpose. VCAT went on to state that even had the premises been used for an illegal purpose by DG, TP would still not have *permitted* the use of the premises for the illegal purpose because she had no power to prevent DG's actions.

The applicant was therefore unsuccessful in obtaining an order for possession of the premises. Although the result of the case ultimately did not turn on an application of the *Charter of Rights and Responsibilities*, the Tribunal made some important observations about the application of the *Charter*, both in relation to the *Residential Tenancies Act*, and more generally.

Application of the *Charter*

VCAT noted that s 32(1) of the *Charter* 'requires that a human rights consistent interpretation be adopted when it is possible to do so, having regard to the language and purpose of, in this case, s 250 of the Act'. VCAT considered that a landlord's right to serve a notice to vacate under s 250 of the Act (and subsequently obtain an order for possession if necessary) enlivens two of the substantive rights protected under the *Charter*, namely ss 13 and 17. Those sections relevantly provide:

- 13(1)(a) A person has the right (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.
- 17(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.
- 17(2) Every child has the right, without discrimination, to such protection as is in his or her best interest and is needed by him or her by reason of being a child.

Although the rights guaranteed under the *Charter* must be respected, they may be subject to reasonable limitations in circumstances where such limitations are demonstrably justified. Section 7(2) sets out those factors which may be taken into account when considering whether or not a limitation is reasonable. They include:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

VCAT considered the purpose of section 250 of the Act was the protection of a landlord's interest in his or her property. VCAT noted that in many cases this purpose will justify an intrusion upon, or limitation of, the rights contained in ss 13 and 17 of the *Charter*.

The Tribunal went on to consider whether there might be any less restrictive means reasonably available to achieve the purpose of the provision (as required by s7(2)(e) of the *Charter*). This required an assessment of proportionality. Even if the facts were such that the premises had been used for an illegal purpose, and the respondent had been found to have permitted them to be so used, then the respondent and her family would have been evicted from their family home of 15 years. The respondent and her family may also have faced the prospect of extended homelessness. On the other hand, the only interference with the landlord's rights was that a person stayed in the premises for three days with cannabis plants.

At this point it is necessary to return briefly to VCAT's reasoning in relation to the substantive finding that the premises were not in fact used for an illegal purpose. VCAT was referred to numerous authorities which described a continuum along which fact situations may be placed in determining whether premises were *used* for an illegal purpose. For example, the use of the premises as a brothel or gaming house would sit at one end of the continuum, while having drugs in one's pocket whilst visiting the premises at the other end of the continuum. The former scenario would constitute a clear use of the premises for an illegal purpose. Conversely, in the latter scenario, the illegal conduct would be so incidental and remote to the relevant person's presence on the premises that the conduct could not constitute use of the premises for an illegal purpose.

Applying this analysis, VCAT considered that there must be a half way point along the continuum at which the conduct would be regarded as use of the premises for an illegal purpose. DG's conduct in bringing his cannabis plants onto the premises for three days was found to fall short of the half way mark. However, the Tribunal noted that, 'if the fact situation of the case had placed it close to the half way mark along the continuum, an interpretation of the statutory provision in accordance with the Charter may have tipped it to one side'. In this particular case, that would have meant that the tenant would have been protected from eviction, as the interference with her rights and those of her family's would have been disproportionate to the potential interference with the landlord's interest in the property.

This case highlights an important feature of the *Charter* in its application to statutory interpretation. In considering whether particular conduct offends a statutory provision such as s 250 of the *Residential Tenancies Act*, Victorian courts and tribunals now have the power to import a key value judgment into that decision: namely, whether the limitation of an individual's rights under the provision is reasonably and justifiably proportional to the object of the legislation. Rather than being bound by rigid legal principles, Victorian courts and tribunals can interpret legislation flexibly, making a proportional assessment of the impact of the relevant statutory provision in each particular case. The case also provides a valuable precedent for the practical application of s 7 of the *Charter*. The Tribunal Member should be commended for considering the *Charter* issues, notwithstanding the fact that the *Charter* did not impact on the final decision.

The decision is available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VCAT/2008/1275.html>.

Jesse Rudd and Jason Pobjoy, Mallesons Human Rights Law Group