

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

RESIDENTIAL TENANCIES LIST

VCAT REFERENCE NOS. R2009/1177,
R2009/3264 AND R2009/33454

APPLICANT IN R2009/1177 AND R2009/33454	Director of Housing
APPLICANT IN R2009/3264	Warfa Sudi
RESPONDENT IN R2009/1177 AND R2009/33454	Warfa Sudi
RESPONDENT IN R2009/3264	Director of Housing
WHERE HELD	Melbourne
BEFORE	Justice Kevin Bell, President
HEARING TYPE	Hearing
DATE OF HEARING	15 April 2009, 1-2 October 2009 and 31 March 2010
DATE OF ORDER	31 March 2010
CITATION	<i>Director of Housing v Sudi</i> (residential tenancies) [2010] VCAT 328

ORDER

Application nos. R2009/1177 and R2009/33454:

1. The tribunal has jurisdiction to determine whether or not an application for a possession order under s 344(1) of the *Residential Tenancies Act 1997* which has been made in breach of the applicant's obligations under s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* is valid.
2. The Director of Housing breached the human rights of Warfa Sudi and Shire Sudi to family and home under s 13(a), and acted unlawfully under s 38(1), of the Charter in seeking to evict them from, and in making an application for a possession order under s 344 of the *Residential Tenancies Act* in respect of, the premises which are the subject of these applications.
3. The director's applications were thereby invalid.

4. The tribunal has no jurisdiction to hear and determine the applications.
5. The applications are dismissed.

Application no. R2009/3264:

1. When determining an application for the creation of a tenancy agreement under ss 232 and 233 of the *Residential Tenancies Act*, the tribunal is acting in an administrative capacity within the meaning of s 4(1)(j) of the Charter and is therefore a public authority for the purposes of s 4(1) of the Charter.
2. The application is adjourned to a date to be fixed.

Justice Kevin Bell
President

APPEARANCES:

For Director of Housing:	Ms R Orr of counsel
For Warfa Sudi:	Mr A D Pound of counsel

REASONS

A INTRODUCTION

- 1 Evicting people living in public housing is a severe infringement of their human rights, especially those which protect the family and the home. Unless interference is demonstrably justified, it breaches human rights and is 'unlawful' under the *Charter of Human Rights and Responsibilities Act 2006*. The onus is on the person seeking to uphold the infringement to establish this justification.
- 2 A young man, Warfa Sudi, and his three year old son Shire, live as a family in a home in premises belonging to the Director of Housing. The director is trying to evict them and has declined to offer any submissions or evidence by way of justification.
- 3 In this application for an order for possession, which is a test case on the point, the director contends the human rights issues are not justiciable in the tribunal. While it may be unlawful for the director to seek the eviction of Mr Sudi and his son, the tribunal does not have jurisdiction over those issues and must make the order sought. All that Mr Sudi can do is take his case under the Charter to the Supreme Court of Victoria.
- 4 Mr Sudi contends that, when determining the director's application, the tribunal must consider the human rights issues. It should not entertain an application for a possession order when the director is in breach of his obligations under the Charter and his actions in seeking the order are actually unlawful.
- 5 The tribunal only has limited statutory jurisdiction. It is not a court and has no inherent jurisdiction. Previously, where (among other things) the director was legally entitled to possession, the *Residential Tenancies Act 1997* required the tribunal to make the order, even if it would make people like Mr Sudi and his young son homeless.
- 6 I have to decide whether the enactment of the Charter changes the position. Can the tribunal do complete justice by deciding all the issues in dispute at the one time, including the human rights issues? Alternatively, must it ignore the human rights issues, even if the director's actions are unlawful under the Charter, and then evict this little family from their home, leaving them to find the wherewithal to take their case to Victoria's highest court?

B FACTUAL CIRCUMSTANCES

- 7 Mr Sudi was born in Somalia on 1 January 1982.
- 8 He came to Australia with his mother, Qamar Ali, and his siblings as refugees. They arrived in 1995 and lived initially in Sydney. The family moved to Melbourne in early 1998.

- 9 The director entered into a tenancy agreement with Ms Ali in respect of the premises on 24 February 1998. The tenancy commenced on 1 March 1998.
- 10 Mr Sudi lived at the premises with his mother from March 1998 until about August-September 2005, from May until about June 2007 and from June 2008 to date.
- 11 While Mr Sudi was living with his mother and was then about 21 years of age, he made application for the transfer of the tenancy of the premises from her to him. She also made application for such a transfer. The application was refused by the director on 9 October 2003 on account of outstanding rental arrears. That was in breach of the relevant guidelines. If the guidelines had been properly applied, this controversy may have been avoided.
- 12 Mr Sudi married Mariam Shek in a Muslim ceremony on 20 November 2005. He was not living with his mother at the premises at the time.
- 13 Mr Sudi and Ms Shek's son, Shire Warfa, was born on 1 November 2006. Ms Shek was his primary care giver from November 2006 until November 2008. From November 2008, Shire has lived with Mr Sudi at the premises and he has been his primary care giver. Under an informal arrangement, Mr Sudi looks after Shire except from Saturday afternoon to Sunday afternoon, when he is looked after by Ms Shek.
- 14 In November or December of 2006, Mr Sudi and Ms Shek separated.
- 15 Mr Sudi returned home to live at the premises to care for his ailing mother, who had cancer, for about three months from May 2007.
- 16 Ms Ali died whilst receiving treatment for cancer in Germany.
- 17 From about November 2008, Mr Sudi has been unemployed. He lives on Centrelink payments. His only assets are a car, worth about \$5,000, and his household goods, worth about \$3,000.
- 18 Mr Sudi moved back into the premises in about June 2008. On 5 December 2008, Mr Sudi's support worker advised the director that he was living at the premises.
- 19 On 29 December 2008, the director sent a letter to the occupier of the premises requiring them to vacate. This purported to terminate any lease or licence which Mr Sudi had to occupy the premises.
- 20 In these factual circumstances, both parties have made applications to the tribunal. The applications were argued as test cases on the operation of the applicable provisions of the *Residential Tenancies Act* in the context of the Charter.
- 21 The director has made two applications (R2009/1177 and R2009/33454). Both are for orders for possession under s 344 of the

Residential Tenancies Act. I will give a determination in these applications.

- 22 There is a cross-application by Mr Sudi (R2009/3264) for the creation of a tribunal-ordered tenancy under s 232 of the Act. The tribunal is a public authority under s 4(1) of the Charter when determining such applications, and it will be so declared. Otherwise it will not be necessary to determine this application, which will be adjourned. My preliminary view is that Mr Sudi has a convincing case. He has a strong and genuine connection with the premises over a long period of time, and certainly cannot be regarded as a 'queue jumper'.
- 23 Before examining the statutory provisions governing possession orders, it is important to identify the human rights which are engaged.

D HUMAN RIGHTS TO FAMILY AND HOME

(1) Charter

- 24 Under s 38(1) of the Charter, it is unlawful for a public authority to act incompatibly with, or to make decisions without taking proper account of, a human right, unless a contrary statute requires otherwise under s 38(2).
- 25 As I held in *Metro West v Sudi*,¹ the director is a public authority under the Charter. By reason of s 38(1), in making decisions about the housing of tenants and other people in possession of premises, such as whether to apply for their eviction, the director is obliged to act and decide compatibly with their human rights. The director accepts that this is so.
- 26 Mr Sudi relies on the rights specified in section 13 (privacy, family and home), section 17 (protection of families and children) and section 19 (cultural rights) of the Charter. All are important, but the first is the main right that is engaged.
- 27 This is s 13 of the Charter:
- A person has the right –
- (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
 - (b) not to have his or her reputation unlawfully attacked.
- 28 Section 13 is based on article 17 of the *International Covenant on Civil and Political Rights*,² which is expressed in almost identical

¹ [2009] VCAT 225, [150]

² General Assembly Resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976).

terms. It is a little different to article 8 of the *European Convention on Human Rights*,³ which provides this:

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The difference is that article 8(1) is expressed in terms of a ‘right to respect’, which has a positive connotation. Section 13 is expressed in terms of the negative right against unlawful and arbitrary interference. Further, article 8(2) contains an internal limitations test, while section 13 prohibits unlawful and arbitrary interference. Nothing turns on these differences in this case, and I will draw on the jurisprudence of the European Court of Human Rights at Strasbourg under article 8, as well as the courts in the United Kingdom under the *Human Rights Act 1998* (UK).

- 29 The rights to privacy, family, home and correspondence in section 13 (a) are of fundamental importance to the scheme of the Charter. Their purpose is to protect and enhance the liberty of the person - the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure people can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society. They protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family and that capacity for communication (by whatever means) with others which is their correspondence, each of which is indispensable for their personal actuation, freedom of expression and social engagement.⁴
- 30 These rights operate in many different contexts, but always towards those purposes. The present case concerns public housing. By way of example in another context, I would mention *Kracke v Mental Health Review Board*.⁵ In that case, I discussed the right to privacy in reference to the compulsory treatment of people who were mentally ill. After examining the origin of and principles applicable to the right, I identified its general scope and nature in these terms:⁶

³ Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁴ See generally Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised ed, 2005) 377 ff.

⁵ [2009] VCAT 646.

⁶ Ibid [619]-[620].

The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.

The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.

- 31 'Disadvantaged people in need of social housing and at risk of homelessness are among the most vulnerable in the community. Their human rights are imperilled by their circumstances.' I made that statement in *Metro West v Sudi*.⁷ If I may say so, it explains the obvious reason why the application of the rights in section 13(a) is very important in the context of public housing. As this case mainly concerns Mr Sudi's home, I will focus on his rights in that respect.
- 32 In human rights, identifying a person's 'home' is approached in a common-sense and pragmatic way. It depends on the person showing 'sufficient and continuous links with a place in order to establish that it is his home'.⁸ Manfred Nowak, speaking of article 17(1) of the ICCPR, says 'the home symbolises a place of refuge where one can develop and enjoy domestic peace, harmony and warmth without fear of disturbance.'⁹ If someone's links with the place where they live are 'close enough and continuous enough', that is their home.¹⁰ The general approach is 'to apply a simple, factual and untechnical test, taking full account of the factual circumstances but with very little of legal niceties.'¹¹ The concept of 'home' in human rights is autonomous¹² and is not based on 'domestic notions of title, legal and equitable rights, and interests'¹³ In short, it is a question of fact, not law. A home may be where a person or family is living in unlawful occupation. Where a tenant is living in social housing, the rented premises are their home for the purposes of s 13(a) of the Charter. This remains so where the tenant continues to live in the premises

⁷ [2009] VCAT 2025, [1].

⁸ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [9] per Lord Bingham and [67] - [68] per Lord Hope (approving *Buckley v United Kingdom* (1996) 23 EHRR 101 and other Strasbourg authorities).

⁹ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 399.

¹⁰ *Kay v Lambeth London Borough Council* [2006] 2 AC 465, [28] per Lord Bingham.

¹¹ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [10] per Lord Bingham.

¹² *Ibid* [61] per Lord Hope.

¹³ *Ibid* [27] per Lord Steyn.

after the end of the tenancy, or continues to occupy the premises without consent.¹⁴ The same principle applies to other arrangements under which a person may be living in a place which is their home.¹⁵

- 33 The Charter does not define ‘family’. In this human rights context, it would not be narrowly interpreted or confined. A father and his three year old son – Mr Sudi and Shire – are a family within s 13(a) (and s 17(1)).
- 34 Likewise, the question of what amounts to an ‘interference’ with the rights in s 13(a) is approached in a ‘simple and untechnical’ manner.¹⁶ This is Manfred Nowak, again speaking of article 17(1) of the ICCPR: ‘Every invasion of that sphere paraphrased by the term “home” that occurs without the consent of the individual affected... represents interference.’¹⁷ Evicting or seeking to evict someone living in social housing is interfering with the human rights relating to their home.¹⁸ Any attempt to do so, directly or indirectly or by process of law, constitutes such interference.¹⁹ Serving a notice to quit and bringing possession proceedings constitute such interference.²⁰ The latter is especially applicable in the present case. Where a family is living in the premises, such actions also constitute an interference with the human rights relating to their family.²¹ Other decisions which deprive a person of, or impair their capacity to live in, their home also constitute an interference, such as denying them planning permission²² and undertaking enforcement measures,²³ and withdrawing a permission already held, rendering people homeless.²⁴
- 35 There is a substantial jurisprudence on the subject of these rights, especially at the Strasbourg court and in the United Kingdom. I will first look at some of the important decisions of the court at Strasbourg. They have been much discussed in subsequent decisions under the *Human Rights Act* by the courts in the United Kingdom, to which I will refer next.

¹⁴ Ibid [11] per Lord Bingham and [68] per Lord Hope; *McCann v United Kingdom* [2008] ECHR 385, [46].

¹⁵ See eg *Buckley v United Kingdom* (1996) 23 EHRR 101, *Chapman v United Kingdom* (2001) 33 EHRR 399 and *Connors v United Kingdom* (2005) 40 EHRR 9 (gypsies unlawfully occupying their home site, discussed below).

¹⁶ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [12] per Lord Bingham.

¹⁷ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised ed, 2005) 400.

¹⁸ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [23] per Lord Bingham; *Kay v Lambeth London Borough Council* [2006] 2 AC 465, [28] per Lord Bingham.

¹⁹ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [70] per Lord Hope, citing *Lambert London Borough Council v Howard* (2001) 33 HLR 636, [30].

²⁰ *McCann v United Kingdom* [2008] ECHR 385, [47].

²¹ *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [70] per Lord Hope, citing *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 70, [67] per Lord Woolf CJ.

²² *Buckley v United Kingdom* (1996) 23 EHRR 101, [60] and [81].

²³ *Chapman v United Kingdom* (2001) 33 EHRR 399, [78].

²⁴ *Connors v United Kingdom* (2005) 40 EHRR 9.

(2) European Court of Human Rights

- 36 The applicant in *Buckley v United Kingdom*²⁵ lived with her three children in caravans parked on land which she owned. Having occupied the land without the required planning permission, she sought it retrospectively. When the permission was refused, the applicant was prosecuted for unlawfully occupying the site.
- 37 The Strasbourg court held the land was the applicant's 'home'. It was therefore unnecessary to consider the right to respect for 'private life' and 'family' in article 8.²⁶
- 38 Although article 8 did not allow people to choose where they could live,²⁷ the refusal to grant the planning permission was clearly an interference with the right to respect for the applicant's home, as that was where she was living.²⁸ The interference was in accordance with law²⁹ and was for the legitimate aim of enforcing planning controls, ensuring highway safety and protecting the environment and public health.³⁰ The only issue was whether it was 'necessary in a democratic society' within s 8(2).
- 39 The court acknowledged the wide margin of appreciation which national authorities enjoyed in operating their own discretionary planning systems.³¹ The role of the court was not to conduct merits review of individual decisions made under such systems.³² However, the court held that in this case:³³

the interests of the community are to be balanced against the applicant's right to respect for her 'home', a right which is pertinent to her and her children's personal security and well-being.³⁴

The importance of that right for the applicant and her family must also be taken into account in determining the scope of the margin of appreciation allowed to the respondent State.

The court went on to hold that the supervision of the discretion was a critical consideration:³⁵

Whenever discretion capable of interfering with the enjoyment of a Convention right such as the one at issue in the present case is conferred on national authorities, the procedural safeguards available to the individual will be especially material in

²⁵ (1996) 23 EHRR 101.

²⁶ Ibid [55].

²⁷ Ibid [81].

²⁸ Ibid [60] and [81].

²⁹ Ibid [61].

³⁰ Ibid [62].

³¹ Ibid [75].

³² Ibid [84].

³³ Ibid [76].

³⁴ *Gillow v United Kingdom* (1989) 11 EHRR 535, [55].

³⁵ Ibid [76].

determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. Indeed it is settled case law that, whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded to the individual by Article 8.³⁶

- 40 The safeguards in the case before the court included a right of appeal to the Secretary and independent assessment by a qualified expert (an inspector), to whom the applicant could make representations. Taking these safeguards into account, the regulatory framework provided due respect for the applicant's interest in her home.³⁷ The court held there had been no violation of article 8.³⁸
- 41 *Chapman v United Kingdom*³⁹ was another planning case. This time a family bought land and immediately applied for permission to use it for their caravans. It was close to a school which the four children could attend. When permission was refused, they were given fifteen months to leave. When they did not, they were prosecuted and forcibly evicted. Permission was refused because the land was in a Green Belt in which non-essential residential living was discouraged, mainly for environmental protection reasons.
- 42 The court held the applicant (who was the mother) had a right to respect for her private life, family life and home, which was engaged.⁴⁰ The decision of the planning authority to refuse permission to remain on the land, as well as the enforcement measures, interfered with that right.⁴¹ The interference was in accordance with law and for the legitimate aim of environmental protection.⁴² Again, the issue was one of justification.
- 43 The court began by recognising what was at stake for the applicant, which was the security of her home and 'her right to live, with her family, in the traditional gypsy lifestyle'.⁴³ This 'weighed very heavily in the balance'.⁴⁴ The court said that interference would be 'necessary in a democratic society' if it answered a 'pressing social need' and was 'proportionate to the legitimate aim pursued'.⁴⁵ A margin of appreciation was enjoyed by national authorities

³⁶ *McMichael v United Kingdom* (1995) 20 EHRR 205, [87].

³⁷ *Ibid* [79] and [84].

³⁸ *Ibid* [85].

³⁹ [2001] 33 EHRR 399.

⁴⁰ *Ibid* [74].

⁴¹ *Ibid* [78].

⁴² *Ibid* [82].

⁴³ *Ibid* [83].

⁴⁴ *Ibid*.

⁴⁵ *Ibid* [90].

who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions.⁴⁶

- 44 Applying these principles to the planning decisions in the case before it, the court said it was not well equipped to review decisions regarding the use of particular sites:⁴⁷

It cannot visit each site to assess the impact of a particular proposal on a particular area in terms of beauty, traffic conditions, sewerage and water facilities, education facilities, medical facilities, employment opportunities and so on. Because planning inspectors visit the site, hear the arguments on all sides and allow the examination of witnesses, they are better placed than the Court to weigh the arguments.

- 45 The court held that the vulnerable position of gypsies meant that ‘some special consideration should be given to their needs and their different lifestyle both in the relevant planning framework and in reaching decisions in particular cases ...’⁴⁸ However, neither article 8 nor the jurisprudence of the court recognised ‘a right to be provided with a home.’⁴⁹

- 46 Considering the procedural safeguards in the planning legislation, and the individual consideration given to the applicant’s case by the authorities, the steps taken were not disproportionate to the legitimate aim of enforcing the objectives of the planning framework.⁵⁰ The court found there had been no violation of article 8.⁵¹

- 47 *Connors v United Kingdom*⁵² was not a planning case but, like the present case, an eviction.

- 48 For fifteen years, the gypsy family had a licence lawfully to occupy a plot with their mobile homes, which the local council terminated by notice to quit without explanation, probably because their relatives on a neighbouring site were trouble-makers. The family was forcibly removed and given no assistance to find alternative accommodation. Their application for permission for judicial review was refused. The family alleged a breach of article 8.

⁴⁶ Ibid [91].

⁴⁷ Ibid [92].

⁴⁸ Ibid [96].

⁴⁹ Ibid [99].

⁵⁰ Ibid [114]-[115].

⁵¹ Ibid [116].

⁵² (2005) 40 EHRR 9.

- 49 The court restated its principles on article 8,⁵³ again stressing that national authorities had a wide margin of appreciation in areas like public housing:⁵⁴

in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context⁵⁵ ... the Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless the judgment is manifestly without reasonable foundation.⁵⁶

It went on to stress again the importance of procedural safeguards and the need to afford special consideration to the minority lifestyle of gypsies.⁵⁷

- 50 The court noted the family had been 'rendered homeless, with the adverse consequences on security and well-being which that entails.'⁵⁸ Therefore s 8 was engaged.⁵⁹ The court would not review the merits of the eviction, but would consider the adequacy of the legal framework and whether it 'provided the applicant with sufficient procedural protection of his rights'.⁶⁰ In this case, unlike in the previous planning cases, the applicants were lawfully living on the land.⁶¹ Further, the applicants had been denied permission to commence judicial review proceedings, and the local council did not have to give reasons to evict the family. Thus:⁶²

even allowing for the margin of appreciation which is to be afforded to the State in such circumstances, the Court is not persuaded that the necessity for a statutory scheme which permitted the summary eviction of the applicant and his family has been sufficiently demonstrated by the Government. The power to evict without the burden of giving reasons liable to be examined as to their merits by an independent tribunal has not been convincingly shown to respond to any specific goal or to provide any specific benefit to members of the gypsy community.

⁵³ Ibid [81]-[82].

⁵⁴ Ibid [82].

⁵⁵ *Buckley v United Kingdom* (1996) 23 EHRR 101, [75].

⁵⁶ *Mellacher v Austria* (1990) 12 EHRR 391, [45]; *Immobiliare Saffi v Italy* (2000) 30 EHRR 756, [49].

⁵⁷ *Connors v United Kingdom* (2005) 40 EHRR 9, [83].

⁵⁸ Ibid [85].

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid [94].

⁶² Ibid [94].

- 51 A woman lost her protected tenancy in *Blecic v Croatia*.⁶³ She had vacated the flat to visit family, but was prevented from returning by temporary armed conflict. Another family moved into it, and she failed to return for a year. The local authority succeeded in an application before a court to terminate the tenancy on the ground she had been absent without justification for six months. Her various appeals failed.
- 52 The court held the termination of the tenancy interfered with the applicant's right to respect for her home under article 8.⁶⁴ While she was away from the flat for a time, she had lived in it for over forty years, left it locked with her belongings still in place and in a neighbour's care. She intended to return. But the termination of the tenancy was under law and for the legitimate aim of satisfying the housing needs of other families, which promoted 'the economic well-being of the country and the protection of the rights of others'.⁶⁵
- 53 On justification, the court repeated its established principles. It said the legitimate purpose of satisfying housing needs:⁶⁶

must be balanced against the applicant's right to respect for her home, a right which is pertinent to her own personal security and well-being. The importance of such a right to the individual must be taken into account in determining the scope of the margin of appreciation allowed to the Government.⁶⁷

The court emphasised it was not its function to substitute its decisions on the merits for those of local authorities, 'but rather to review, in the light of a Convention, the decisions taken by those authorities in the exercise of their margin of appreciation.'⁶⁸ It emphasised that:⁶⁹

State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the State in implementing social and economic policies is necessarily a wide one. The domestic authorities' judgment as to what is necessary to achieve the objectives of those policies should be respected unless that judgment is manifestly without reasonable foundation. ... Thus, the Court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued.

⁶³ (2005) 41 EHRR 13.

⁶⁴ Ibid [52]-[54].

⁶⁵ Ibid [58].

⁶⁶ Ibid [60].

⁶⁷ See *Gillow v United Kingdom* (1989) 11 EHRR 335, [55].

⁶⁸ *Blecic v Croatia* (2005) 41 EHRR 13, [61] citing *Hokkanen v Finland* (1995) 19 EHRR 139, [55] and *Elsholz v Germany* (2002) 34 EHRR 58, [48].

⁶⁹ Ibid [65].

- 54 The court again stressed the importance of fair procedures for ensuring that, taken as a whole, the laws at issue were sufficient to provide the degree of human rights protection which was necessary.⁷⁰ It was satisfied that, in the case before it, the applicant had several opportunities to present her case and found no violation of article 8.
- 55 Finally, in *McCann v United Kingdom*⁷¹ the joint tenancy was terminated by one tenant serving a notice to quit on the other, who remained in occupation. Usually the County Court had discretion to refuse an order of possession if it was reasonable to do so. But the social landlord followed the procedure for recovering possession from an occupier who did not have lawful authority, in which case there was no discretion.
- 56 The Strasbourg court found that the property was the applicant's 'home' within article 8, even though he was not in lawful occupation.⁷² Serving the notice to quit and *bringing the possession proceedings* (which is important in the present case) interfered with this right, but it was in accordance with law.⁷³ The court held the law pursued two legitimate aims: protecting the right of a local authority to recover possession against an unlawful occupier and protecting the statutory scheme for providing public housing.⁷⁴ The central question was whether the interference was necessary in a democratic society.⁷⁵
- 57 The court held the 'loss of one's home is a most extreme form of interference with the right to respect for the home.'⁷⁶ It went on to stress the importance of the role of independent review:⁷⁷
- Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention notwithstanding that, under domestic law, his right of occupation has come to an end.
- 58 The court noted that this requirement for independent review was met in the usual case in the United Kingdom because public tenants could not be evicted unless the court decided it was reasonable to make the order.⁷⁸ But in cases like the present, the procedure was summary and there was limited capacity to challenge the decision to terminate the

⁷⁰ Ibid [68].

⁷¹ [2008] ECHR 385.

⁷² Ibid [46].

⁷³ Ibid [47]-[48].

⁷⁴ Ibid [48].

⁷⁵ Ibid [49].

⁷⁶ Ibid [50].

⁷⁷ Ibid.

⁷⁸ Ibid [51].

tenancy and bring recovery proceedings.⁷⁹ Judicial review was a possibility, but did not allow any assessment of the proportionality issues.⁸⁰

- 59 The court held that article 8 was violated because this was a case in which one joint tenant had terminated the tenancy by serving a notice to quit, in which case the applicant ‘was dispossessed of his home without any possibility to have the proportionality of the measure determined by an independent tribunal.’⁸¹
- 60 That is enough on the Strasbourg jurisprudence. I will say something briefly about the decisions in the court in the United Kingdom.

(3) United Kingdom

- 61 The Strasbourg jurisprudence has been much considered in a series of cases in the Court of Appeal⁸² and the House of Lords⁸³ decided under the *Human Rights Act* in the United Kingdom.⁸⁴ The cases have discussed the principles governing the compatibility with human rights of orders to evict tenants or others in possession of social housing or living spaces. There is general acceptance in the United Kingdom of the Strasbourg jurisprudence on the scope of the rights in article 8 of the ECHR, and also on the manner in which those rights are engaged by decisions of this nature. The controversy has concerned justification under article 8(2), which has been extensively considered in these authorities. The issues considered have included whether making an order for possession must be individually justified in each case, whether the balance in the applicable law itself supplies sufficient justification, the significance of review mechanisms and discretions allowing the reasonableness of evictions to be independently examined in individual circumstances, the significance of those mechanisms or discretions being lacking and how the compatibility of the applicable law itself fits into the analysis. Depending on how these issues are determined, an individual decision to obtain and make an order for possession may or may not be a breach of human rights.

⁷⁹ Ibid [52].

⁸⁰ Ibid [53].

⁸¹ Ibid [55].

⁸² See *R (McLellan) v Bracknell Forest Borough Council* [2002] QB 1129; *Castle Vale Housing Action Trust v Gallagher* (2001) HLR 72; *Somerset County Council v Isaacs* [2002] EWHC 1014 (Admin); *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48; *Sheffield City Council v Smart* [2002] EWCA Civ 4; *Doran v Liverpool City Council* [2009] EWCA Civ 146; *Central Bedfordshire Council v Taylor* [2009] EWCA Civ 613; *Pinnock v Manchester City Council* [2009] EWCA Civ 853.

⁸³ See *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430; *Harrow London Borough Council v Qazi* [2004] 1 AC 983; *Kay v Lambeth London Borough Council* [2006] 2 AC 465; *Doherty v Birmingham City Council* [2009] 1 AC 367.

⁸⁴ See generally Richard Clayton QC and Hugh Tomlinson QC, *The Law of Human Rights* (2nd ed, 2009) [12.184]-12.190].

62 The principles discussed in these decisions would have been important to consider had the director offered submissions and evidence in justification of his actions in the present case. They may need to be considered in another case in which he does so.

(4) 'Unlawful' or 'arbitrary' interference

63 You have seen that s 13(a) specifies the right not to have your privacy, family, home or correspondence 'unlawfully or arbitrarily' interfered with. This is known as a 'legality requirement'. Article 8(2) of the ECHR contains a similar provision (see above).

64 In *Kracke v Mental Health Review Board*,⁸⁵ I discussed the scope and content of legality requirements. I will mention only the main elements here.

65 The requirement for interference with human rights not to be 'arbitrary' and 'lawful' is not adjectival. It is an essential component of fundamental importance. This is Lord Bingham in *R (Gillan) v Commissioner of Police of the Metropolis*,⁸⁶ in reference to the ECHR:⁸⁷

The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.

66 The Human Rights Committee has published General Comment 16 on article 17 of the ICCPR, on which s 13(a) of the Charter was based. It describes what is 'unlawful' and 'arbitrary'. As to the first:⁸⁸

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

⁸⁵ [2009] VCAT 646, [162]-[196].

⁸⁶ [2006] 2 AC 307.

⁸⁷ Ibid [34].

⁸⁸ Office of the High Commissioner for Human Rights, General Comment 16, 8 April 1988, [3].

Then the second:⁸⁹

In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.

67 In *Toonen v Australia*,⁹⁰ the Human Rights Committee considered a complaint against Tasmanian legislation which criminalised consenting sex between homosexual adults. It upheld the complaint and confirmed 'that adult consensual sexual activity in private is covered by the concept of "privacy"'.⁹¹ As the interference was legislative, it was lawful. The committee repeated General Comment 16 on what was arbitrary. As to the reasonableness component, it said this:⁹²

The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The committee found the legislation to be arbitrary and it was later repealed.

68 There have been several important decisions in the European Court of Human Rights at Strasbourg on the legality requirement. They are discussed in *Kracke*.⁹³ Here I will mention only two.

69 *Malone v United Kingdom*⁹⁴ was concerned with the right to respect for private and family life in article 8(1) of the ECHR in the context of wire-tapping activity by the police. To be compatible with human rights, the wire-tapping had to be 'in accordance with the law', as required by article 8(2).

70 The court considered 'the quality of the law', which had to be compatible with the rule of law, for that was a purpose of the Convention.⁹⁵ The law had to provide 'a measure of legal protection ... against arbitrary interferences by public authorities with the rights

⁸⁹ Ibid [4]. The decisions of the Human Rights Committee on these concepts are discussed in Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2nd ed, 2004) chapter 16.

⁹⁰ Communication no 488/1992, CCPR, 50th sess, UN Doc CCPR/C/50/D/488/1992 (1994).

⁹¹ Ibid [8.2].

⁹² Ibid, [8.3].

⁹³ [2009] VCAT 646, [173]-[188].

⁹⁴ (1985) 7 EHRR 14.

⁹⁵ Ibid [67]. As the court said in *Amuur v France* (1996) 22 EHRR 533, [50] to satisfy article 5(1), 'the quality of the law [requires] it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention.'

safeguarded' by article 8(1).⁹⁶ Domestic laws must be foreseeable, which meant they must 'be sufficiently clear in [their] terms to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to' infringe this right.⁹⁷ A law which conferred discretion was not in itself inconsistent with the requirement for foreseeability, if the scope of the discretion and the manner of its exercise were identified "with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference."⁹⁸

71 The court held the wire-tapping laws of the United Kingdom were too vague and upheld the applicant's complaint.⁹⁹

72 *Olsson v Sweden*¹⁰⁰ offered a summary of the three requirements of being 'in accordance with law' under article 8(2): (a) precision and foreseeability (which did not mean excessive rigidity); (b) protection against arbitrariness, consistent with the rule of law; and (c) reasonable indication of the scope of any discretion, having regard to its legitimate aims.¹⁰¹

73 The importance of safeguards has been emphasised in a number of cases concerning people with mental illness.¹⁰² The general principle was explained by Beatson et al as follows:¹⁰³

Absence of arbitrariness, in Convention law, means that the law contains adequate safeguards, both procedural and substantive, to ensure that the power may be used only for its designated purpose and may not be abused.

74 In cases under the *Human Rights Act*, the English courts have followed the Strasbourg jurisprudence. For example, in *R (Munjaz) v Mersey Care NHS Trust*,¹⁰⁴ which concerned a patient's rights under article 8, the House of Lords took a broad view. As Lord Bingham put it, the legality requirement:¹⁰⁵

is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and

⁹⁶ (1985) 7 EHRR 14, [67].

⁹⁷ Ibid.

⁹⁸ Ibid [68]. See further *Gillow v United Kingdom* (1986) 11 EHRR 335, [52] and *Amuur v France* (1996) 22 EHRR 533, in which it was held that the law 'must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness.'

⁹⁹ (1985) 7 EHRR 14, [80].

¹⁰⁰ (1989) 11 EHRR 259.

¹⁰¹ Ibid [61].

¹⁰² See eg *Storck v Germany* (2006) 43 EHRR 6, [117].

¹⁰³ Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008) [3-21].

¹⁰⁴ [2006] 2 AC 148.

¹⁰⁵ Ibid [34].

procedures adopted are predictable and foreseeable by those to whom they are applied.

The court considered the limitations not to be arbitrary because they were clear, written, accessible and ‘sets out standards in the light of which under domestic law judicial review of such interferences is available.’¹⁰⁶

(5) Comparing South Africa

75 The position as regards the right to privacy, family and home as an obligatory civil and political right may be contrasted with the right to housing as an enforceable economic, social and cultural right. For example, this is s 26 of the *Constitution of the Republic of South Africa*:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

These rights are justiciable before the courts in South Africa, ultimately by the Constitutional Court. The settled position is that, under the Constitution, the ‘state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing.’¹⁰⁷ The question is how the rights are to be enforced in a given case, given the express power in s 38 of the Constitution to do so. I will briefly digress to give a few examples of the operation of these provisions.

76 In *The Government of the Republic of South Africa v Grootboom*,¹⁰⁸ 510 children and 390 adults were forcibly evicted from informal homes on private vacant land which they had invaded, and thus were rendered homeless. The community found itself on a dusty sports field with no shelter and no land on which to build any. A court had ordered the government to provide them with emergency accommodation, which it appealed. The Constitutional Court identified the scope of the right to access adequate housing in s 26¹⁰⁹ and upheld the order. It held the reasonableness of state action to implement the right had to take account of the inherent dignity of

¹⁰⁶ Ibid [92] per Lord Hope.

¹⁰⁷ *The Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), [24].

¹⁰⁸ 2001 (1) SA 46 (CC), [24].

¹⁰⁹ Ibid [35].

human beings. Yacoob J said: ‘human beings are required to be treated as human beings.’¹¹⁰

- 77 The constitutional right to housing was the backdrop to *Port Elizabeth Municipality v Various Occupiers*.¹¹¹ The court reconciled the legitimate rights of land owners not to be arbitrarily deprived of their property with the equally legitimate rights of everyone to have access to housing. The context was legislation for the control of illegal squatting. The Constitutional Court held that it was not ‘just and equitable’ to order the eviction of the occupiers.¹¹² They had been on unused land for a long time and the municipality had not listened to their problems or attempted to deal with their needs.¹¹³ The court held the case required it ‘to go beyond its normal functions, and to engage in active judicial management’ towards finding a solution to the problem.¹¹⁴ Doing so had procedural and other dimensions. For example, the court decided the fact that mediation had not been tried was an important factor in deciding whether it was just and equitable for an eviction order to be made.¹¹⁵
- 78 The importance of innovative procedural solutions was taken a step further in *Occupiers of 51 Olivia Road v City of Johannesburg*.¹¹⁶ The Constitutional Court held it would not be just and equitable to evict the squatting community where the municipality had not meaningfully engaged with the residents to find functional solutions.¹¹⁷
- 79 In *President of the Republic of South Africa v Modderklip Boerdery Pty Ltd*,¹¹⁸ the Constitutional Court held the state had effectively expropriated the property of the private land owner by failing to provide a mechanism to give effect to an eviction order. It ordered compensation, but permitted the squatter community, which numbered thousands of people, to remain until alternative land was made available by the state.¹¹⁹
- 80 Finally, in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*¹²⁰ the government wished to relocate a large and settled community of some 20,000 people (some 4,400 households) so that better housing could be built. It obtained eviction orders and the community complained about the adequacy of the alternative accommodation. The Constitutional Court upheld the eviction orders, because eviction was a reasonable means to facilitate the housing

¹¹⁰ Ibid [83].

¹¹¹ 2005 (1) SA 217 (CC).

¹¹² Ibid [59].

¹¹³ Ibid.

¹¹⁴ Ibid [36] per Sachs J.

¹¹⁵ Ibid [47].

¹¹⁶ 2008 (3) SA 208 (CC).

¹¹⁷ Ibid [16].

¹¹⁸ 2005 (5) SA 3 (CC).

¹¹⁹ Ibid [68].

¹²⁰ [2009] ZACC 16.

redevelopment programme.¹²¹ But the relocations brought about by the evictions had to be consistent with ‘justice and equity’.¹²² To this end, the court made very specific orders about the standard of accommodation to be offered.

- 81 In ending this digression, I emphasise that I am mentioning these cases only by way of contrast. They illustrate how a court carries out its functions in a jurisdiction where these matters are justiciable. Under the Charter, we have the right against unlawful or arbitrary interference with privacy, family and home as an obligatory civil and political right, not a right to housing as an enforceable economic, social and cultural right. However, both of these different systems of rights protection share something deeply in common: recognition of the fundamental importance of housing to human dignity, to personal and family wellbeing and to democratic society.
- 82 That being the scope of the human rights against unlawful or arbitrary interference with the family and home in s 13(a) of the Charter, let me now determine whether the tribunal has jurisdiction to consider the issues arising from the application of those rights in this case.

F DIRECTOR’S APPLICATION FOR POSSESSION

(1) Director is legally entitled to possession

- 83 Section 344(1) of the *Residential Tenancies Act* allows a person who claims to be ‘entitled to the possession’ of premises to apply to the tribunal for a possession order. Section 345 requires the tribunal to make the order if it is satisfied ‘the applicant under s 344’ is ‘entitled to possession’ of the premises and there are reasonable grounds for believing the premises are being occupied by a person without licence or consent.
- 84 The interpretation of these provisions is subject to s 32(1) of the Charter. Therefore, so far as possible consistently with their purpose, the provisions must be interpreted consistently with human rights.
- 85 The proper approach for interpreting legislation consistently with the Charter under s 32(1) was recently considered by the Court of Appeal (Maxwell P, Ashley and Neave JJA) in *R v Momcilovic*,¹²³ which overruled my decision on this point in *Kracke v Mental Health Review Board*.¹²⁴
- 86 The court held that s 32(1) was not a principle of reinterpretation, or a special rule of interpretation, as is s 3(1) of the *Human Rights Act 1998* (UK).¹²⁵ Rather, it is a codification of the principle against

¹²¹ Ibid [116].

¹²² Ibid [114].

¹²³ [2010] VSCA 50.

¹²⁴ [2009] VCAT 646.

¹²⁵ [2010] VSCA 50, [69].

interference with rights.¹²⁶ That is the principle of legality which, in *Kracke*, I held should be applied at the first stage (engagement) of an interpretative analysis.¹²⁷ This is the critical passage in the judgment of Maxwell P, Ashley and Neave JJA:¹²⁸

Compliance with the s 32(1) obligation means exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation with least infringes Charter rights. What is ‘possible’ is determined by the existing framework of interpretative rules, including of course the presumption against interference with rights.

The court went on to note the significance of this principle being legislatively embraced in the Charter in ‘emphatic terms’.¹²⁹

87 In connection with this way of applying s 32(1), the court cited with approval the views of Elias CJ in *R v Hansen*¹³⁰ that the interpretative provision in s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) applied to the rights and freedoms as enacted, without reference to justification under s 5 of that Act. The court also cited¹³¹ the views of Elias CJ that justification was a ‘distinct and later inquiry’ to interpretation at first instance.¹³²

88 The court summarised its decision about the steps to be taken as follows:¹³³

Accordingly, when it is contended that a statutory provision infringes a Charter right, the correct methodology is as follows:

- Step 1:** Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).
- Step 2:** Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
- Step 3:** If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

89 The court went on to hold that s 32(1) of the Charter was relevant to all interpreters, including courts and tribunals, but they were *not* to

¹²⁶ Ibid [103]-[104].

¹²⁷ [2009] VCAT 646, [41]-[50], [97].

¹²⁸ [2010] VSCA 50, [103].

¹²⁹ Ibid [104].

¹³⁰ [2007] 3 NZLR 1, 9.

¹³¹ Ibid, [109].

¹³² [2007] 3 NZLR ,1 [22].

¹³³ [2010] VSCA 50, [35].

consider justification ‘before the meaning of legislation was finally ascertained’.¹³⁴

- 90 To comply with this approach, I think it is still necessary to identify the scope of any right engaged by the statutory provision at issue. It is not possible to identify what interpretation least infringes human rights unless the scope of the right is first identified. For the reasons I gave in *Kracke*, the scope of a human right is identified in its plain state, purposefully and generously, by reference to the cardinal values which it expresses and focussing on the interests which it was meant to protect, without taking justification of potential limits into account.¹³⁵ Once the scope of the right has been so identified, the interpretation of the provision which least infringes this right can be adopted, if that is possible consistently with its purpose under s 32(1).
- 91 As I did with the same submission in *XYZ v Victoria Police*,¹³⁶ I here reject the applicant’s submission that I must search for and adopt the interpretation which least infringes human rights. That submission does not specify any limits at all to the interpretation which must be adopted. It is not the approach which was established by the Court of Appeal in *R v Momcilovic*, as the above passage makes clear. Under that approach, I must explore all ‘possible’ interpretations and adopt that which least infringes human rights, but what is ‘possible’ is determined by reference to the existing principles of interpretation, including the principle of legality. These principles supply *the* framework for determining what least infringing interpretations might possibly be available for consideration. If you refer to the need to adopt the least infringing interpretation which is possible, you must also refer to what the court specifically said about how the possibilities are to be identified.
- 92 Applying the principles established in *R v Momcilovic* to the present case, Mr Sudi submitted that, of the possible interpretations of s 345, the one which least infringed human rights was that which required the tribunal to determine whether an applicant who was a public authority had complied with its obligations under the Charter as part of determining whether that applicant was ‘entitled to possession’ of the premises. That submission has to be considered against what Maxwell P, Ashley and Neave JJA said about the identification of ‘possible’ interpretations.
- 93 According to the existing rules of interpretation, a human right will be relevant to the interpretation of a provision if it is engaged by its operation, in the sense that it limits or impairs the enjoyment of the right by the individual. As we have seen, the scope of the right is

¹³⁴ Ibid [110].

¹³⁵ [2009] VCAT 646, [75]-[91].

¹³⁶ [2010] VCAT 255, [386]..

broadly and purposefully identified in this context. Justification is not part of the analysis.

- 94 I have identified the scope of the rights at issue in the present case, especially the right not to have your privacy, family or home unlawfully or arbitrarily interfered with (s 13(a) of the Charter). Taking those rights into account, Mr Sudi and his son have something very significant at stake in this case. Because a possession order would result in them being evicted, it would seriously interfere with and engage their rights to family and home, at least. It is not necessary to consider whether their other human rights would also be engaged.
- 95 It is next necessary to determine whether it is possible to interpret the provisions consistently with those rights under the existing rules of interpretation, as established in *R v Momcilovic*.¹³⁷ This is the ordinary process of interpretation, including the principle of legality, not reinterpretation. An interpretation will not be possible under s 32(1) if it is inconsistent with the purpose of the provision according to the conventional understanding of that concept of purpose, not the broader understanding inherent in s 3(1) of the *Human Rights Act* which, according to Lord Phillips in the first decision of the recently established United Kingdom Supreme Court, requires consideration of the ‘underlying’ purpose of the provision.¹³⁸ The existing framework of the rules of interpretation includes the ‘powerful presumption’¹³⁹ of the principle of legality. In *R v Momcilovic*, Maxwell P, Ashley and Neave JJA cited¹⁴⁰ this explanation of that principle by Gleeson CJ in *Plaintiff S157/2002 v The Commonwealth*:¹⁴¹

courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment ... [I]n the absence of express language or necessary implication, even the most general words are taken to be ‘subject to the basic rights of the individual’.

- 96 From the express language of the provisions of Division 3 of Part 7 of the *Residential Tenancies Act*, it is clear enough that their purpose is to enable people who are ‘entitled to possession’ of premises to

¹³⁷ [2010] VSCA 50.

¹³⁸ *Her Majesty's Treasury v Ahmed* [2010] UKSC 2, [115] (the decision contains an extensive analysis of the principle of legality, pursuant to which the issues were resolved, rather than under s 3(1) of the *Human Rights Act*).

¹³⁹ *R v Momcilovic* [2010] VSCA 50, [103].

¹⁴⁰ *Ibid.*

¹⁴¹ (2003) 211 CLR 476, 492 (footnotes omitted).

recover that possession by a simple and convenient process. The focus of the provisions is the entitlement ‘to possession’ of the premises and the means by which that ‘possession’ may be recovered.

- 97 Section 344(1) specifies who may make applications and gives them the discretionary capacity to do so. It allows a person who ‘claims to be entitled to the possession of premises’ to apply for a possession order in the specified circumstances.
- 98 Section 345(1) requires the tribunal to make a possession order when the specified conditions are met. Section 345(a) requires the tribunal to determine whether ‘the applicant under section 344’ is ‘entitled to possession’ of the premises. Section 345(b) requires the tribunal to determine whether there are reasonable grounds for believing the person is occupying the premises without licence or consent. The provisions describe the entitlement (if any) of the occupier – ‘licence or consent’ – in legal terms. Under these provisions, if the applicant is an applicant under s 344 and the conditions are satisfied, the tribunal has no discretion to refuse to make or to defer making a possession order. This is a scheme for the compulsory making of possession orders in favour of people who have exercised their capacity to make application under s 344 and who have the requisite possessory entitlement against persons occupying premises without licence or consent.
- 99 Section 346(1) makes provision for what the possession order must provide and for how the principal registrar is to carry it out. Under s 346(a), the order may direct the principal registrar to issue a warrant of possession. Under s 346(b), the order may provide for the giving of notice to the occupiers of a hearing in the tribunal, and requiring their attendance.
- 100 Section 347 makes provision for the serving of orders and notices, including by affixing them to a door of the premises.
- 101 Section 348 requires the tribunal to direct the principal registrar to issue a warrant of possession if the occupier fails to appear in response to being given notice.
- 102 Section 349 specifies what the tribunal must do at a hearing, if it orders one. Section 349(a) requires it to determine ‘the matter’, after giving the parties an opportunity to be heard. From the context of the provisions of Division 3 and s 349(a), (b) and (c), I think ‘the matter’ is the entitlement to possession of the applicant under s 345(a) and whether the respondents are occupying without licence or consent under s 345(b). Section 349(b) requires the tribunal to direct the issue of a warrant, if it is satisfied the applicant is ‘entitled to the premises’ (I think this means entitled to possession of them). Section 349(c) allows the tribunal to cancel a possession order if it is satisfied the applicant is not entitled to possession.

- 103 That being the purpose and operation of the provisions, I think the words ‘entitled to possession’ in s 345(a) refer to the entitlement of the applicant to possession of the premises under a law governing that subject. An entitlement to possession would usually arise under the law of property as an incident of the applicant’s ownership of the premises, but clearly other legally recognised possessory interests, such as an entitlement under a head lease or legislation, would also suffice. Nothing in Division 3, and ss 345 and 349 in particular, suggests the tribunal can, in determining a valid application for possession under s 344, consider matters beyond the possessory entitlement of the applicant in terms of the law of property or other law of that kind. ‘Entitled to possession’ does not involve human rights considerations.
- 104 I think the provisions clearly and unambiguously show the legislature intended to allow a person who was legally entitled to possession of the premises to make application for and obtain an order for possession against someone in occupation without licence or consent, even if that meant evicting them from their home, as it usually would. Although the word ‘entitled’ might, in another context, be capable of having a more general meaning, I think here the word relates only to the applicant’s possessory entitlement in terms of law of property or other law of that kind.
- 105 Mr Sudi contends that to interpret s 345(a) as referring only to a legal entitlement to possession would read words of limitation into the provision, which would be inconsistent with both s 32(1) of the Charter and the common law presumption against interference with rights. On the contrary, it would read words of limitation into the provision to do otherwise.
- 106 There is no dispute that the director is legally entitled to possession of the premises in the necessary sense.
- 107 Although the making of a possession order would severely interfere with Mr Sudi’s human rights to family and home, and those of his son Shire also, it is not possible under the existing rules to interpret the provisions consistently with those rights.
- 108 This case was fully argued before the Court of Appeal delivered its judgment in *R v Momcilovic*.¹⁴² Extensive submissions were made about whether the provisions of Division 3 could be interpreted under s 32(1) of the Charter on the basis that it operated as a principle of reinterpretation like s 3(1) of the *Human Rights Act* in the United Kingdom. After *R v Momcilovic*, the parties agree this is not possible.

¹⁴² [2010] VSCA 50.

(2) Director's application is unlawful

- 109 To repeat, the director is a public authority under s 38(1) of the Charter. He is obliged to take actions and make decisions in a way that is compatible with human rights. Section 38(2) excludes the obligation where there is contrary legislation, but there is none in the present case.
- 110 Mr Sudi and his young son Shire live as a family at their home in premises belonging to the director. The director is seeking to have them evicted. To that end, he has made an application for a possession order under s 344(1) of the *Residential Tenancies Act*.
- 111 Mr Sudi and his son have the human rights to family and home in s 13(a) of the Charter. By reasons of s 38(1), it is unlawful for the director to take action or make decisions incompatibly with those rights.
- 112 Seeking to evict Mr Sudi and Shire, and applying for the possession order specifically, severely interferes with their human rights to family and home. If not justified under s 7(2) of the Charter, this would breach those rights and be unlawful under s 38(1).
- 113 The director points out that application under s 344(1) can be made by persons who are public authorities and persons who are not. That is true. But s 38(1) applies to the actions and decisions of persons who are public authorities, including making applications under s 344(1), while it does not apply to the actions and decisions, or such applications, of persons who are not.
- 114 The question whether seeking to evict people from their home in particular cases is incompatible with human rights has been considered in the courts in Strasbourg and the United Kingdom. The resolution of the question in those jurisdictions has turned on issues of justification. I have referred to the relevant authorities and principles. Rather than presenting evidence and making submissions along those lines, the director has offered nothing by way of justification for his interference with the human rights of Mr Sudi and his son. That course was deliberate. The director submits the tribunal has no jurisdiction to consider that question. Having failed to offer anything in justification of the interference, he accepts that, if the tribunal does have jurisdiction, he will be found to have acted in breach of human rights.
- 115 On the director's submission, the tribunal has a limited statutory jurisdiction. That I accept. The director further submits the tribunal's jurisdiction does not extend to determining whether the director, in seeking to evict Mr Sudi and his son and in making the application under s 344(1), breached the Charter, and thus took actions and made decisions which were 'unlawful' under s 38(1). That I do not accept.

- 116 VCAT is a tribunal not a court and has no inherent jurisdiction.¹⁴³ Although it has certain obligations under the Charter as a public authority, and can determine certain issues under the Charter when they legitimately arise in proceedings within its jurisdiction, it has no express jurisdiction with respect to the question of whether a public authority has breached human rights.
- 117 On the other hand, the tribunal has both the jurisdiction and the obligation to determine whether it has jurisdiction in a proceeding, including the validity of provisions which impact on that jurisdiction. It also has the jurisdiction to determine legal issues which legitimately arise in a proceeding within its jurisdiction,¹⁴⁴ including issues concerning the interpretation and application of the Charter. Such determinations are subject to the supervisory jurisdiction of the Supreme Court.
- 118 In the present case, the tribunal is hearing and determining an application for a possession order under s 344(1) of the *Residential Tenancies Act*. I have already described the procedures and the powers of the tribunal under Division 3 of Part 7 in such applications.
- 119 When exercising the jurisdiction of the tribunal under Division 3, and ss 344(1) and 345 in particular, the tribunal determines the legal rights of people to possession of premises according to the provisions specified in the legislation. This is jurisdiction of a civil and judicial nature.¹⁴⁵ It is not regulating access to or use of the premises according to discretionary criteria. The jurisdiction of the tribunal is original jurisdiction under s 40(a) of the *Victorian Civil and Administrative Tribunal Act 1998*, not review jurisdiction under s 40(b). When exercising jurisdiction in applications under s 344(1), the tribunal is not a public authority under the Charter, except for certain procedural purposes which are not material.
- 120 Section 344(1) of the *Residential Tenancies Act* provides that the applicant ‘may’ apply to the tribunal for the possession order. By using the word ‘may’, the provision confers discretion on the director to make or not to make such an application. I don’t think anything turns on describing that capacity as discretionary. The critical consideration is that the director can decide whether or not to make the application, and doing so enlivens the jurisdiction of the tribunal. Further, making a decision to apply for a possession order comes within the director’s obligation under s 38(1) of the Charter to take action or make decisions compatibly with human rights.

¹⁴³ The authorities are collected in *Kracke v Mental Health Review Board* [2009] VCAT 646, [276].

¹⁴⁴ The authorities are collected in *Garde-Wilson v Legal Services Board* [2007] VSC 225, [76] (upheld on appeal on this point in *Garde-Wilson v Legal Services Board* [2008] VSCA 43, [96] per Dodds-Streeton JA, Buchanan and Nettle JJA agreeing).

¹⁴⁵ The principles are discussed in the authorities collected in *Kracke v Mental Health Review Board* [2009] VCAT 646, [285] ff.

- 121 If making the application is itself ‘unlawful’ under s 38(1) of the Charter, it is not effective to commence a valid application in the tribunal. In consequence, the tribunal has no jurisdiction to determine the application and make the possession order. Let me give my reasons for that conclusion.
- 122 There are a number of ways in which the director could have sought to establish that, in making an application for a possession order under s 344(1) of the *Residential Tenancies Act*, he fulfilled his obligation under s 38(1) of the Charter to take action and make decisions compatibly with human rights. But, as we have seen, he has not done so in the present case. His position is the extreme one that the tribunal cannot look at that matter at all. The director is prepared to offer justification of the Supreme Court in judicial review proceedings but not to the tribunal when it is actually evicting the people concerned
- 123 Section 7(2) of the Charter requires limitations on human rights to be ‘demonstrably justified’. As Warren CJ held in *DAS v Victorian Human Rights and Equal Opportunity Commission*,¹⁴⁶ the onus of establishing that a limitation on a human right is so justified, and hence not a breach of human rights, is on the party seeking to uphold the limitation.¹⁴⁷ In many cases, that requires evidence.¹⁴⁸ The ‘standard of proof is high’¹⁴⁹ and requires ‘a degree of probability which is commensurate with the occasion’.¹⁵⁰ The evidence must be ‘cogent and persuasive’.¹⁵¹
- 124 Seeking to evict Mr Sudi and his son, and making the application for a possession order under s 344(1), constituted a serious interference with their human rights to family and home under s 13(a) of the Charter. That conclusion is fully justified, indeed demanded, by the decisions on comparable rights of courts of high authority in Strasbourg and the United Kingdom, which I have analysed in detail above.¹⁵² As the director has failed to offer anything in justification of that interference, I am driven to conclude that taking such actions, and specifically making the application, breached those human rights and was ‘unlawful’ under s 38(1).
- 125 The question may now be asked, what jurisdiction does the tribunal possess over an application which was unlawful for the applicant to

¹⁴⁶ [2009] VSC 381.

¹⁴⁷ Ibid [147], citing *Kracke v Mental Health Review Board* [2009] VCAT 646, [108]; cited with approval by the Maxwell P, Ashley and Neave JJA in *R v Momcilovic* [2010] VSCA 50, [144].

¹⁴⁸ *R v Momcilovic* [2010] VSCA 50, [143]-[146].

¹⁴⁹ *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381, [147]

¹⁵⁰ *Bater v Bater* [1950] 2 All ER 458, 459 per Lord Denning, cited with approval in *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381, [147].

¹⁵¹ *R v Oakes* [1986] 1 SCR 103, 138 per Dickson CJ

¹⁵² See for example *McCann v United Kingdom* [2008] ECHR 385, [47]-[48]; *Harrow London Borough Council v Qazi* [2004] 1 AC 983, [23] per Lord Bingham, [70] per Lord Hope (citing *Lambert London Borough Council v Howard* (2001) 33 HLR 636, [30]); *Kay v Lambeth London Borough Council* [2006] 2 AC 465, [28] per Lord Bingham.

make? This is not a case in which the application was ‘unlawful’ because it was lacking in proper form or because some condition precedent in the *Residential Tenancies Act* was not satisfied. Nor is it only a case in which the making of the application by the director as a public authority might be attacked on judicial review grounds, such as improper purposes. Rather, there is a specific obligation in the Charter, binding on the director as a public authority, to comply with human rights. The director breached that obligation by making the application. The Charter – a law of the Parliament on a subject of fundamental importance to democratic society – specifies with absolute clarity what the consequence is: making the application was ‘unlawful’.

- 126 I have referred to the principle that an administrative tribunal has jurisdiction to review a decision which is invalid. In other words, a valid application may be made for review of an invalid decision. This principle is not directly relevant here. The tribunal is exercising original (not review) jurisdiction of a judicial (not administrative) nature, and it is the applicant’s decision or conduct in making the application which is ‘unlawful’. The principle that establishes the tribunal has jurisdiction to review an invalid decision is not the issue in this case.
- 127 When the tribunal is exercising its jurisdiction, it can determine all issues of jurisdiction, fact and law which legitimately arise for its determination. That is true for the original jurisdiction of the tribunal, as it is for its review jurisdiction, and it is true for the civil and judicial jurisdiction, as it is for the administrative review jurisdiction.
- 128 So, in an application for a possession order under s 344(1), the tribunal must determine whether the applicant is legally ‘entitled to possession’ and whether the occupants have ‘licence or consent’. Those are mixed questions of facts and law. So also, in my view, must the tribunal determine whether the application before it is valid, for only a valid application can properly enliven its jurisdiction. I would also refer to the general jurisdiction of the tribunal in s 446 of the *Residential Tenancies Act* to hear and determine applications relating to ‘any matter arising in relation to a tenancy agreement or a proposed tenancy agreement or premises situated in Victoria’.
- 129 On the other hand, the tribunal does not possess a judicial review jurisdiction, neither in its original nor its review jurisdictions. If the issues raised by the director’s breach of the Charter in making the application can only be determined in a proceeding for judicial review, they would not be within the tribunal’s jurisdiction to determine. I do not think they can only be determined in that way, and they can and should be determined by the tribunal.
- 130 Although determining whether a public authority has behaved unlawfully by breaching human rights has some analytical similarities

with judicial review, this is not what the tribunal would be doing in determining the issue in these proceedings. The tribunal would be determining whether the human rights standards in the Charter applied to the director, whether the standards were breached by his actions or decisions in this case and whether any breach was justified (unless this was conceded, as it effectively has been here). If the conclusion was that the director did breach the Charter, s 38(1) specifies the consequence that the actions or decisions were ‘unlawful’. These are mixed questions of fact and law arising in the course of determining an application within the tribunal’s original jurisdiction. It is entirely appropriate for the tribunal to be determining such questions, which come well within its expertise, subject of course to the supervisory jurisdiction of the Supreme Court.

131 Here is s 39(1) of the Charter:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

132 The provisions of s 39(1) operate such that a person who may seek a relief or remedy in respect of an act or decision of a public authority on the grounds of unlawfulness, as in a case where a person can commence a non-colourable application for judicial review on the recognised administrative law grounds, may seek that relief or remedy in the relevant process on the additional and free-standing ground that the action or decision was unlawful by reason of s 38(1). As the explanatory memorandum for the Charter makes clear, s 39(1) does not create any new or independent right to relief as a remedy.¹⁵³ It adds to the grounds on which relief or remedies may presently be obtained in the exercise of existing rights, without subtracting from or qualifying existing rights, relief or remedies in any way.¹⁵⁴

133 Section 39(1) is not in terms of law confined in its operation to the courts, or even to any one court. The heading refers to: ‘Legal proceedings’. It would not be interpreted otherwise. It is capable of applying to the tribunal. Further, as an enabling and beneficial provision, it would be interpreted generously and not narrowly.

134 While s 38(1) operates thus to extend the sphere of human rights protection, it does not at the same time constrain the existing jurisdiction and powers of courts or tribunals in this regard. In particular, it does not qualify the existing jurisdiction of the tribunal to determine issues of fact and law concerning the Charter which

¹⁵³ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 28.

¹⁵⁴ See also s 39(2).

legitimately arise in the course of determining applications within its jurisdiction, or (for example) to make declarations with respect to such matters in appropriate cases, as I did in *Kracke v Mental health Review Board*¹⁵⁵ under s 124(1) of the *Victorian Civil and Administrative Tribunal Act*, and will in this case. In the present case, the existing jurisdiction of the tribunal allows me to determine the question in issue. I do not need to rely on s 39(1).

- 135 *Minister for Immigration and Multicultural Affairs v Bhardwaj*¹⁵⁶ decided an administrative decision ‘involving jurisdictional error has no legal foundation and is properly to be regarded, in law, as no decision at all.’¹⁵⁷ That principle does not operate to prevent the tribunal from exercising its review jurisdiction over such a decision.¹⁵⁸ On the other hand, since I am here exercising original jurisdiction, and the making of the application was unlawful on the part of the director, it might be said the application was no application at all, and hence the tribunal has no jurisdiction to determine it. That, in my view, is the correct conclusion, but the real question is whether the tribunal has the jurisdiction to express it.
- 136 The legal consequences flowing from an action or decision being ‘unlawful’ under s 39(1) of the Charter have not yet been determined. But ‘unlawful’ is a strong word and is very apt to describe actions taken or decisions made in breach of an obligation to observe human rights. The specific question before me is, what is the consequence, and can the tribunal determine that consequence, when the unlawful act is actually making an application under s 344(1)?
- 137 I am troubled by the fact that the unlawfulness arises under the Charter but the application was made under the *Residential Tenancies Act*. No doubt the making of an application might offend a legal requirement external to the *Residential Tenancies Act*, yet the application can still be regarded as valid to enliven the tribunal’s jurisdiction. Another case may be where a breach of human rights has occurred along the way in making an application for possession, but the making of the application itself was not unlawful. The present application does not come within any of these categories. This is an eviction application the making of which, in itself, was unlawful for breaching human rights.
- 138 The tribunal’s primary function is to uphold and apply the law, including the Charter. As Blackburn J said in *Re Cilli’s Objection*,¹⁵⁹

¹⁵⁵ [2009] VCAT 646, [800] ff.

¹⁵⁶ (2002) 209 CLR 597.

¹⁵⁷ Ibid [53] per Gaudron and Gummow JJ.

¹⁵⁸ *Garde-Wilson v Legal Services Board* [2007] VSC 225, [69]-[70] (upheld on appeal on this point in *Garde-Wilson v Legal Services Board* [2008] VSCA 43, [96] per Dodds-Streeton JA, Buchanan and Nettle JJA agreeing).

¹⁵⁹ (1970) 15 FLR 426.

an administrative body (for present purposes, this would include the tribunal in its civil and judicial jurisdictions):¹⁶⁰

must satisfy itself that all its procedures are in accordance with the law. It must therefore receive and consider, whenever the point is taken, an argument that it has no jurisdiction. To say that is, in truth, to say no more than that it must at all times act lawfully.

139 In the present case, the director has acted unlawfully under s 38(1) of the Charter in making the application under s 344(1) the *Residential Tenancies Act* for a possession order. Does that mean the tribunal will be acting unlawfully under the *Residential Tenancies Act* or the *Victorian Civil and Administrative Tribunal Act* in determining the application? That question really is, does the tribunal have jurisdiction under that legislation to determine such an application when making it was unlawful under s 38(1) by reason of the director's breach of human rights? In my view, if the unlawfulness of the application affects its validity and hence the jurisdiction of the tribunal, as I think it does, the tribunal must have jurisdiction to determine it.

140 Before turning to that issue, I repeat what I said in *Kracke* about the importance to the community of human rights issues being considered by the tribunal, making due allowance for the present case being within the civil and judicial jurisdiction:¹⁶¹

Human rights arguments based on the Charter come squarely within the authority of statutory tribunals to consider all the legal and factual issues which are relevant to the case before it. People must be able to come to tribunals and rely on human rights which are relevant to their case. It is contrary to the principle of access to justice that people should have to bring their administrative applications to the tribunal and take their Charter arguments somewhere else, such as a court. It is contrary to the principle of giving cheap, prompt and final resolutions of legal problems to split cases up like that. The tribunal's decision should reflect the whole of the applicable law. All the issues should if possible be resolved in the one justice institution at the one time, subject only to merits or judicial review (including appeal) as allowed.

141 In that case, I also referred to *Tranchemontagne v Ontario (Director, Disability Support Program)*,¹⁶² in which the Supreme Court of Canada stressed the importance of the Ontario Social Benefits

¹⁶⁰ Ibid, 428 (cited with approval by Brennan J in *Re Adams and Tax Agents Board* (1976) 1 ALD 252).

¹⁶¹ *Kracke v Mental Health Review Board* [2009] VCAT 646, [794].

¹⁶² [2006] 1 SCR 513.

Tribunal taking human rights arguments into account. Bastarache J cited¹⁶³ with approval the judgment of Sopinka J in *Zurich Insurance Co v Ontario (Human Rights Commission)*,¹⁶⁴ where that judge described human rights legislation as being the ‘final refuge of the disadvantaged and the disenfranchised’ and the ‘last protection of the most vulnerable members of society’.¹⁶⁵ Mr Sudi and his son fall directly into this category. Bastarache J went on to say that ‘this refuge can be rendered meaningless by placing barriers in front of it. Human rights remedies must be accessible in order to be effective.’¹⁶⁶ Of the powers of a tribunal, his Honour said that, where it was ‘properly seized of an issue’, it would be ‘extremely rare’ for it not to be the one ‘most appropriate to hear the entirety of the dispute.’¹⁶⁷

- 142 If the tribunal does not have jurisdiction to decide that making the application for the possession order was unlawful under the Charter, this means that Mr Sudi and his son, and people in their position, must take their case to the Supreme Court of Victoria by way of an application for judicial review.
- 143 From the point of view of ensuring equal access to justice, which is an important value and purpose of the Charter, this would be a bad outcome. The tribunal is the most suitable forum at first instance. Its expertise and procedures are especially adapted for the resolution of disputes of this nature. Moreover, it is the only forum which can deal with the entirety of the dispute and determine all the issues at the one time. Finality and complete dispute resolution are fundamental purposes of justice.
- 144 The Supreme Court is the highest court in the State of Victoria. It has very significant judicial responsibilities, including the exercise of the jurisdictions which are supervisory of the tribunal. For the court to deal with such applications at first instance, without the benefit of the tribunal’s determination, is hardly an effective use of its scarce resources.
- 145 Within the scope of its limited statutory jurisdiction, the function of the tribunal is to uphold justice and the rule of law. Unless the governing legislation of the tribunal so required, I cannot see how, holding to that function, the tribunal could make an order for possession in an application under s 344(1) the making of which by the director was ‘unlawful’ under s 38(1) of the Charter. The tribunal’s governing legislation does not so require.
- 146 An application which the director has purportedly made under s 344(1) of the *Residential Tenancies Act* in breach of his human rights

¹⁶³ Ibid [49].

¹⁶⁴ [1992] 2 SCR 321

¹⁶⁵ Ibid 339.

¹⁶⁶ [2006] 1 SCR 513, [49].

¹⁶⁷ Ibid [50].

obligations under s 38(1) of the Charter, and which is therefore ‘unlawful’, is not a valid and proper application under s 344(1). It is in law no application at all and does not enliven the jurisdiction of the tribunal to make the possession order sought. The making of the director’s application was itself an ‘unlawful’ act; the jurisdiction of the tribunal cannot be built on an ‘unlawful’ foundation. In a proceeding under s 344(1), the tribunal cannot just shut its eyes to the unlawfulness of the making of the application, as the director suggests I do. That would rob “unlawful” of the potent force of its natural meaning, create confusion about the consequences of breaching human rights and mock the rule of law, including the human rights protections in the Charter, which parliament has wisely obliged public authorities to respect, on pain of their actions being ‘unlawful’. I acknowledge the force of the contrary view, as expressed in decisions of the tribunal.¹⁶⁸ With respect, I cannot accept it.

147 Further, one of the conditions in s 345(a) which must be satisfied before the tribunal can make a possession order is that the tribunal is satisfied ‘the applicant under s 344’ is entitled to possession. Where the making of the application by the director was itself unlawful under the Charter, the director cannot be regarded as ‘the applicant under s 344’ and the tribunal has no jurisdiction to make the order.

148 It is unnecessary to consider whether s 345(b) is satisfied, given that the director’s purported termination of Mr Sudi’s ‘licence or consent’ to occupy the premises was part of seeking to evict him, which I have found to be unlawful under s 38(1) of the Charter for breaching human rights.

149 The director’s application under s 344(1) of the *Residential Tenancies Act* for an order for possession will be dismissed.

CONCLUSION

150 The Director of Housing is a public authority under the *Charter of Human Rights and Responsibilities Act 2006* and obliged by s 38(1) to take actions and make decisions consistently with human rights. It is ‘unlawful’ for the director to breach that obligation, to which private landlords and property owners are not subject.

151 Warfa Sudi and his son Shire, who is three years of age, live as a family in a home in premises belonging to the director. They have the human rights which prohibit unlawful or arbitrary interference with their family and home under s 13(a) of the Charter.

152 This is an application by the director under s 344(1) of the *Residential Tenancies Act 1998* for a possession order in respect of the premises. I have found that, in seeking to evict Mr Sudi and his son, and in

¹⁶⁸ See eg *Director of Housing v IF* [2008] VCAT 2413, [51]; cf *Homeground Services v Mohamed* [2009] VCAT 1131, [25].

making the application for the possession order, the director has breached their human rights. I made that finding because the director declined to offer anything in justification of the serious infringement of human rights which his actions constituted. Being in breach of human rights, the director's actions, including the actual making of the application for a possession order, were 'unlawful' under s 38(1) of the Charter.

- 153 The director offered no justification because, in his view, it is not within the tribunal's jurisdiction to consider the human rights issues in cases like this. He contended Mr Sudi must take his complaints under the Charter to the Supreme Court. The director is prepared to offer justification to the Supreme Court in a judicial review application, if Mr Sudi and his son can find the wherewithal to make one, but not to the tribunal when it is actually ordering their eviction. I have rejected that approach.
- 154 The tribunal can and should address the Charter issues in this case. It has the jurisdiction, the expertise and the procedures for doing so. When issues under the Charter legitimately arise in applications before the tribunal, it should resolve them if it can properly do so. The tribunal is the most suitable forum for determining human rights issues in cases of this nature. It is the only body which has the jurisdiction finally to resolve all of the issues in dispute at the one time, subject to appeal to the Supreme Court.
- 155 If the director had chosen to offer submissions and evidence in justification of his actions, there would have been significant issues to consider. In comparable jurisdictions overseas, human rights legislation has not been interpreted so as to impose unreasonable constraints on social housing providers in making decisions about the management of their scarce housing resources.
- 156 The tribunal's jurisdiction to make a possession order is enlivened by the making of an application under s 344(1). I think that means a valid application which has been properly made. Under s 345, its jurisdiction to make such an order depends on the director being 'the applicant under s 344'. I think that means an applicant who has properly made a valid application.
- 157 As the director's making of the application for a possession order was itself an 'unlawful' act under the Charter, it was not a valid application which was properly made under s 344(1). The jurisdiction of the tribunal cannot be built on an 'unlawful' foundation. Being unlawfully made by the director, in law the application was no application at all. The application was ineffective to enliven the jurisdiction of the tribunal, except to the extent necessary to determine that question. Further, as the director did not properly make a valid application, he cannot be regarded as 'the applicant under s 344' for

the purposes of s 345(a). The tribunal has no jurisdiction under that provision to make the order.

- 158 The director's application for a possession order is not within the jurisdiction of the tribunal and will therefore be dismissed. There will be a declaration and order accordingly.

Justice Kevin Bell
President