

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
IN THE COURT OF APPEAL  
CIVIL DIVISION

Nos.: S APCI 2010 0051  
S APCI 2010 0052

BETWEEN :

**DIRECTOR OF HOUSING**

Applicant

and

**WARFA SHIRE SUDI**

Respondent

**THE HUMAN RIGHTS LAW RESOURCE CENTRE LTD'S  
OUTLINE OF SUBMISSIONS**

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Filed on behalf of: The Human Rights Law Resource Centre Ltd

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1. The Human Rights Law Resource Centre Ltd (**HRLRC**) seeks leave to appear as *amicus curiae* to make brief oral submissions.<sup>1</sup>
  2. The HRLRC was granted leave to appear as *amicus curiae* in *R v Momcilovic*.<sup>2</sup> The submissions which the HRLRC seeks to make in the present proceeding are analogous to those made (and accepted by this Court) in *Momcilovic* and are not being made by any other party.
  3. Set out below is an outline of the HRLRC's proposed submissions if granted leave.

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<sup>1</sup> The application is made by summons dated 6 September 2010 supported by an affidavit of Philip Alan Lynch sworn 6 September 2010.

<sup>2</sup> (2010) 265 ALR 751.

## INTRODUCTION

4. The HRLRC's submissions are directed to the role that s 7(2) of the Charter plays in relation to:
  - (a) s 38 of the Charter when assessing the lawfulness of actions or decisions of public authorities; and
  - (b) the human rights contained in Pt 2, and particularly the right to privacy and reputation in s 13 and its express protection of a right against unlawful or arbitrary interference.
  
5. In essence, the HRLRC's submissions address the following questions.
  - (a) Is an action or decision of a public authority only unlawful within the meaning of s 38 of the Charter if that action or decision cannot be justified pursuant to s 7(2) of the Charter?
  - (b) Is the scope of each of the rights enacted in Pt 2 of the Charter qualified by s 7(2) of the Charter?
  
6. The HRLRC submits that the answers to these questions are:
  - (a) No. Just as s 7(2) of the Charter has no role to play when construing a statutory provision compatibly with human rights pursuant to s 32 of the Charter, so too it has no role to play when determining whether a public authority has acted compatibly with human rights pursuant to s 38(1) of the Charter.
  - (b) No. The scope of each of the rights in Pt 2 is determined by the words used to enact it and a right is not to be read down, qualified or limited by any other provision of the Charter. The scope of s 13 of the Charter is expressly qualified by the requirement that any interference be "unlawful" or "arbitrary".

## SECTION 38 OF THE CHARTER

7. The Tribunal held that the Director's act of applying for a possession order, if not justified under s 7(2) of the Charter (and Bell J held it was not so justified), would be unlawful under s 38(1) of the Charter.<sup>3</sup> That conclusion about the relationship between s 7(2) and

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<sup>3</sup> *Director of Housing v Sudi* [2010] VCAT 328 at [112], [122]-[123]. See also *Antunovic v Dawson* [2010] VSC 377 at [70] (Bell J) and the cases there cited.

s 38 is inconsistent with the reasoning of the Court of Appeal in *R v Momcilovic*<sup>4</sup> and to the statutory language used in the Charter.

8. In *Momcilovic*, the Court of Appeal gave four reasons for holding that s 7(2) had no role to play in relation to s 32 of the Charter, which reasons are equally applicable in relation to s 38:
  - (a) first, the Charter is directed at the protection and promotion of human rights and not at the more limited concept of protection and promotion of rights *as limited by* s 7(2) (at [107]-[108]);
  - (b) secondly, collapsing the interpretation of a human right and the justification provision is insufficiently protective of the right (at [109]);
  - (c) thirdly, s 7(2) is directed to those making or advising on the making of legislative prescriptions potentially limiting of human rights (at [109]);
  - (d) fourthly, if s 7(2) had to be applied before the meaning of legislation could be ascertained, there would be inconsistencies in the application of the justification provision and uncertainties in interpretation (at [110]).
  
9. An additional reason also emerges from the judgment in *Momcilovic*. The Court accepted that evidence is usually required when determining whether a breach of human rights is justifiable under s 7(2) of the Charter (at [142]-[146]). If the lawfulness of a public authority's act or decision depended upon such evidence in order to establish the justification for the act or decision, then public authorities, together with courts and tribunals at all levels, would be required to receive and weigh evidence about reasonable limitations in all cases involving potential or alleged unlawfulness. There is nothing in the Charter or the extrinsic materials to suggest that Parliament intended to impose such an onerous task on public authorities, courts or tribunals.
  
10. The statutory language of the Charter also tells against s 7(2) having any operation in relation to s 38(1):
  - (a) first, s 38(1) expressly uses the language of "compatibility", which is precisely the same concept that lies at the heart of, and is expressly used in, s 32(1). It would be incongruous for the concept of compatibility to import by implication s 7(2) of the Charter in relation to s 38(1), but not in relation to s 32(1);

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<sup>4</sup> (2010) 265 ALR 751.

- (b) secondly, s 38 itself marks the metes and bounds of the standard of unlawfulness in sub-s (1), by disapplying that standard in the circumstances referred to in sub-ss (2) and (3) and elaborating upon it in sub-ss (4). A government body may also be exempted from compliance with s 38(1) by a regulation declaring it not to be a public authority;<sup>5</sup>
- (c) thirdly, s 7(2) expressly states that human rights may only be limited “under law”. That expression, which plainly encompasses legislative limitations, confirms that Parliament did not intend that executive action that limited human rights be measured for lawfulness against s 7(2).<sup>6</sup>
11. The Explanatory Memorandum affirms that s 38(1) of the Charter is “modelled” on s 6 of the *Human Rights Act 1998* (UK).<sup>7</sup> In that jurisdiction, there is no equivalent of s 7(2) of the Charter and so no work for a provision of that kind to do. The scope or ambit of some of the rights under the European Convention is, however, expressly qualified and so, in relation to those rights, some analysis of lawfulness, legitimate aim and proportionality is necessary in order to determine whether the right itself has been breached. But, having established that a protected right has been breached, s 6 of the *Human Rights Act* does not require a distinct inquiry into whether that breach might be justified. Given the express statement that s 38 of the Charter is modelled on the UK provision, Parliament’s intention must have been that s 7(2) have no operation in relation to s 38.
12. Just as this Court held in *Momcilovic* that s 32 of the Charter is a codification of the common law principle of legality,<sup>8</sup> so too s 38 of the Charter is a codification of the common law principle most famously identified with *Entick v Carrington*<sup>9</sup> that executive action that interferes with common law rights is unlawful unless expressly authorised by statute. With its codification, the range of rights protected by the principle is also expanded and codified. Understood in that way, the relationship between ss 32 and 38 also becomes apparent, as does the role of s 38(2) of the Charter.

<sup>5</sup> Charter, s 4(1)(k).

<sup>6</sup> The Explanatory Memorandum confirms that the reference in s 7(2) of the Charter to “subject under law” does not include actions by public authorities (at 8). Further, in those foreign jurisdictions that have a provision comparable to s 7(2), those provisions operate to justify interferences with human rights that are authorised by legislation and do not extend to justify interferences with human rights that arise by executive conduct; see *New Zealand Bill of Rights Act 1990* (NZ), s 5 (“such reasonable limits prescribed by law”); *Canadian Charter of Rights and Freedoms*, s 1 (“such reasonable limits prescribed by law”); *South African Bill of Rights*, s 36 (“limited only in terms of law of general application”).

<sup>7</sup> Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill at 27.

<sup>8</sup> [2010] VSCA 50; 265 ALR 751 at [104].

<sup>9</sup> (1765) 2 Wils 275; 95 ER 807. See also *Coco v R* (1993) 179 CLR 427 at 454.

13. Parliament's enactment of s 38(2) makes plain that executive action that breaches human rights is only lawful if there was statutory authorisation for the action and that the public authority "could not reasonably have acted differently".
14. In conclusion, in *Momcilovic* this Court held that s 32 of the Charter required the Court to interpret legislation so as to be compatible with human rights, not human rights as subject to reasonable limits under s 7(2).<sup>10</sup> By parity of reasoning, s 38(1) requires public authorities to act in a way which is compatible with human rights, not human rights as subject to reasonable limits under s 7(2).

### THE SCOPE OF HUMAN RIGHTS

15. Section 7(2) has no role to play in relation to either s 32 or s 38 of the Charter. That is because s 7(2) speaks to legislators. It does not purport to permit interpretations of legislation pursuant to s 32 that would be compatible with rights as limited. Nor does it purport to authorise executive action pursuant to s 38 that is compatible with rights as limited.
16. Further, because s 7(2) speaks to legislators, it also has no role to play in defining the scope or ambit of the rights protected in Pt 2 of the Charter. The scope of those rights is to be determined broadly, purposively and by reference to the terms in which they have been enacted.<sup>11</sup> The scope of some of the rights, including s 13 (which is at issue in this case), has been expressly qualified in the terms in which the right was enacted. Thus, the scope of s 13 extends only to interferences that are unlawful or arbitrary.<sup>12</sup>
17. This means it is not accurate to say that the rights enacted in Pt 2 are subject to the general limitation principle in s 7(2) of the Charter. They are not so subject whether through s 32, through s 38 or through the construction of the rights themselves. Determining whether the breach of a human right is justifiable is a quite distinct inquiry from determining the scope or ambit of the right in the first place and distinct again from determining whether particular acts or decisions breach a human right.

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<sup>10</sup> *R v Momcilovic* (2010) 265 ALR 751 at [35], [105]-[110].

<sup>11</sup> *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 at [80] per Warren CJ.

<sup>12</sup> The meaning of "unlawful" or "arbitrary" does not fall for determination in this case but those terms are construed in comparative foreign and international jurisdictions in a way that is broader than was accepted by Kaye J in *WBM v Chief Commissioner of Police* [2010] VSC 219 at [51]ff. See, eg, *Castles v Secretary to the Department of Justice* [2010] VSC 310 at [70] per Emerton J; *Kracke v Mental Health Review Board* [2009] VCAT 646 at [201]-[202].

18. Further, it is inaccurate in the context of s 13 of the Charter to say that any interference with privacy, family, home or correspondence is a breach of the right.<sup>13</sup> The scope of the right is expressly limited to interferences of a particular kind: namely, interferences that are unlawful or arbitrary.

Dated: 6 September 2010

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<sup>13</sup> See *Director of Housing v Sudi* [2010] VCAT 328 at [34].