

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CIVIL DIVISION
JUDICIAL REVIEW AND APPEALS LIST

No. SCI 2014 1278

BETWEEN:

LOUISE GOODE

Applicant

AND

COMMON EQUITY HOUSING LIMITED

Respondent

OUTLINE OF SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY
AND HUMAN RIGHTS COMMISSION

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervenes in this proceeding under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). The Commission's submissions are confined to the first question of law identified by the applicant. That question raises a question of law concerning the proper construction of s 39(1) of the Charter.
2. The Commission submits that the Tribunal erred in holding that, because the Tribunal member was not satisfied on the evidence that there had been any breach of the *Equal Opportunity Act 1995* (Vic) or the *Equal Opportunity Act 2010* (Vic) (**the EO Act**), the Tribunal had no jurisdiction to consider the applicant's Charter claims.¹ As Maxwell P explained in *Director of Housing v Sudi* (**Sudi**):²

"s 39(1) has an operation which is both conditional and supplementary.³ The condition to be satisfied is that a person be able to seek, independently of the Charter, 'any relief or remedy in respect of an act of decision of a public authority on the ground that the act or decision was unlawful.' If – but only if – that condition is satisfied, then s 39(1) enables that person to seek 'that relief or remedy' on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter."
3. It is sufficient that the person be able to "seek" some relief or remedy on a ground of unlawfulness arising otherwise than because of the Charter. Section 39(1) does not require that the person satisfy the court or tribunal that there has in fact been some act or decision of a public authority that was unlawful otherwise than because of the Charter. That was recognised by Kyrou J in *Director of Public Prosecutions v*

¹ *Goode v Common Equity Housing Ltd* [2013] VCAT 2188, [36].

² (2011) 33 VR 559, [96].

³ See *PJB v Melbourne Health* [2011] VSC 327, [296]-[297].

Debono,⁴ where his Honour said that:

“the mere exercise of an available right to seek relief or remedy in respect of an act or decision of a public authority on a ground that is independent of the Charter is sufficient to satisfy the condition in s 39 of the Charter; that is, s 39 does not depend upon a successful exercise of that right based on the non-Charter ground.”

4. His Honour’s analysis is, with respect, consistent with *Sudi*. *Sudi* is authority for the proposition that s 39(1) does not give jurisdiction to the Tribunal to engage in collateral review of the decisions of public authorities where the Tribunal did not, otherwise than because of the Charter, have such jurisdiction.⁵ However, where the lawfulness of an act or decision of a public authority is, independently of the Charter, directly in issue in proceedings in the Tribunal, s 39(1) operates to enable the lawfulness of the act or decision to be reviewed on a ground of unlawfulness arising under the Charter.⁶
5. That was the case here. Part 4 of the EO Act prohibits persons from discriminating against another person in certain areas of activity. The applicant exercised her right under s 122 of the EO Act to bring an application against the respondent seeking relief or remedy under s 125 on the ground that various acts and decisions of the respondent were unlawful under Pt 4 of the EO Act. There is no dispute that the respondent is a public authority for the purposes of the Charter. Accordingly, the condition in s 39(1) was satisfied, with the result that the applicant was entitled to seek the same relief or remedy on a ground of unlawfulness arising under the Charter. The fact that the Tribunal dismissed the EO Act claims did not deprive it of jurisdiction to hear and determine the applicant’s Charter claims. The Tribunal was obliged to determine those claims.
6. The Commission makes no submission on the further question of whether leave to appeal out of time should be granted. However, if leave is refused, the Commission asks that the Court give reasons which address the construction and operation of s 39(1) of the Charter in the circumstances of this case.

Dated: 29 August 2014

A.D. POUND

⁴ [2013] VSC 407, [82].

⁵ See (2011) 33 VR 559, [48] per Warren CJ, [98] per Maxwell P, [281]-[282] per Weinberg JA.

⁶ See (2011) 33 VR 559, [152], [282] per Weinberg JA; *Caripis v Victoria Police* [2012] VCAT 1472; *Slattery v Manningham City Council* [2013] VCAT 1869 at [160].