

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

BETWEEN:

No. M73 of 2018

AB (a pseudonym)
Appellant

and

CD (a pseudonym)
First Respondent

EF (a pseudonym)
Second Respondent

Commonwealth Director of Public Prosecutions
Third Respondent

Victorian Equal Opportunity and Human Rights Commission
Fourth Respondent



No. M74 of 2018

BETWEEN:

EF (a pseudonym)
Appellant

and

CD (a pseudonym)
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AB (a pseudonym)
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**WRITTEN SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY
AND HUMAN RIGHTS COMMISSION**

PART I CERTIFICATION

1. This submission is not suitable for publication on the internet.

PART II STATEMENT OF ISSUES

2. The Fourth Respondent (the **Commission**) intervened in the proceedings below pursuant to s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the **Charter**), after having been given notice by AB that two questions arose in the proceedings concerning the application of the Charter:

(a) whether, and if so how, ss 9, 13, 21, 24, 25 and 38 of the Charter are relevant to the central issue in this proceeding: whether the public interest in protecting the identity of a police informer precludes disclosure by [CD] of information that might assist a convicted person to have a conviction quashed; and

(b) whether, and if so how, ss 9, 13, 21 and 24 of the Charter are relevant to the question of whether the Court can and should determine the issues raised by [AB] and grant the relief sought in the absence of any extant criminal proceedings and where the convicted persons directly affected by the issues have not been named as parties to the proceedings, are not represented in the proceedings, and have not been notified of the proceedings.

3. The questions both concern the relevance of the Charter, including particular Charter rights, in this proceeding, but one is substantive and one is procedural.

(a) The first question (the **substantive question**) is directed to the central issue raised for determination in the proceeding, and concerns the relevance of the Charter to the public interest immunity balancing exercise.

(b) The second question (the **procedural question**) concerned the procedure by which the claims relating to public interest immunity were heard and determined, specifically, whether it was compatible with the Charter for the public interest immunity claim to be determined by the Supreme Court without notice to, and in the absence of, the seven convicted individuals who have been identified in the proceedings (the **Convicted Individuals**).¹

¹ This leaves to one side the possible interests of any other unidentified persons who might be similarly affected by the issues raised in these proceedings.

4. In the proceedings, and particularly in the Court of Appeal, the Commission's intervention was primarily focused on the procedural question concerning whether the Supreme Court could, and should, determine the issues in the absence of the Convicted Individuals. Before the primary judge, the Commission also made brief written submissions on the substantive question concerning the limited role of the Charter in the application of the common law test to determine the public interest immunity claim. The Commission has made no submission as to how the balancing exercise should be resolved nor as to whether the proposed disclosures by CD can or should be made.

10 5. Both the primary judge and the Court of Appeal considered whether the Court could conduct the proceedings, and determine the central issue, compatibly with the applicable Charter rights of the Convicted Individuals.² Both the primary judge and the Court of Appeal concluded that the proceedings could be conducted without notice to the Convicted Individuals.³ It was central to this conclusion that amici curiae had been appointed in order "to ameliorate the effect of the Convicted Individuals not being parties to the proceedings",⁴ by advancing arguments that were in the interests of the Convicted Individuals (albeit without acting for or receiving instructions from those persons).⁵ In particular, the Court of Appeal engaged in an analysis of whether the limitations on the rights of the Convicted
20 Individuals under ss 24(1) and s 25(2)(b) of the Charter were demonstrably justified under s 7(2) of the Charter, and concluded that it was compatible with the Convicted Individuals' rights for the appeal proceeding to be conducted without giving notice to them.⁶

6. In this appeal, the Commission makes submissions in respect of the following issues:

(a) the application of the Charter to the proceedings below, and whether there is any occasion for the procedural question to be revisited by this Court; and

² *AB and EF v CD* [2017] VSC 350R (SC Reasons) at [70]-[81]; Core Appeal Book (CAB) 39-41; *AB v CD* [2017] VSCA 338R (VSCA Reasons) at [161]-[168]; CAB 203-205.

³ SC Reasons at [80]-[81]; CAB 41; VSCA Reasons at [176]; CAB 208-209.

⁴ VSCA Reasons at [11]; CAB 155.

⁵ SC Reasons at [65]; CAB 36.

⁶ VSCA Reasons at [172]-[176]; CAB 207-209.

(b) the substantive question as to whether, and if so how, the Charter applies to the common law public interest immunity test, either in the proceedings below or in this appeal.

7. The Commission does not advance any arguments on the grounds of appeal relied upon by AB and EF.

8. In summary, the Commission makes the following submissions.

(a) The Court of Appeal correctly found that the Charter made it necessary for the Court to be satisfied that a fair hearing of the public interest immunity claim could take place without notice to the Convicted Individuals. The Court correctly found that, having regard to the appointment of the amici curiae, the conduct of the appeal proceeding was compatible with the Convicted Individual's rights to a fair hearing. On this basis, and absent any challenge to this finding by any party, it is unnecessary for this issue to be revisited in this appeal.

(b) While the Charter does not directly apply to the common law public interest immunity test, the balancing process involved in determining whether information can be disclosed encompasses the relevant human rights protected by the Charter and by the common law.

PART III SECTION 78B NOTICES

9. The Commission does not consider that any notice pursuant to s 78B of the *Judiciary Act 1903* is required.

PART IV FACTUAL ISSUES

10. The Commission makes no submission on any factual issue in contention.

PART V STATEMENT OF ARGUMENT

THE PROCEDURAL QUESTION

11. Section 6(2)(b) of the Charter provides that the "Charter applies to ... (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3." The Charter defines "court" in s 3(1) to mean the Supreme Court, the County Court, the Magistrates' Court or the Children's Court.

12. Sections 24(1) and 25 of the Charter are contained in Part 2 of the Charter. To the extent that a court or tribunal has “functions” under ss 24(1) and 25 of the Charter, the court or tribunal is obliged to apply and enforce the rights under those sections, even when acting in a judicial capacity.⁷

The Charter rights under s 24(1) and 25(2)(b) were engaged

13. Section 24(1) of the Charter provides:

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

- 10 14. The Charter right to a fair hearing is a statutory expression of the fundamental common law right to a fair trial.⁸ Its importance is underscored by the fact that the effective observance of human rights ultimately depends on the proper administration of justice.⁹
15. The content of the Charter right will generally be the same as the common law right; they are “mutually reinforcing” and raise obligations that are “almost always co-extensive”.¹⁰ The Charter right applies in criminal and civil proceedings. Under the Charter, as for the common law, the right to a fair hearing is absolute in the sense that a fair trial is the only trial that a court can judicially conduct. However, what is required to ensure a fair trial may vary from case to case.¹¹ The right
- 20 requires that the proceedings, viewed as a whole, are “fair”.
16. The Charter right under s 24(1) should be construed broadly¹² so as to apply to persons who are not parties to a proceeding, but whose rights and interests are

⁷ *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [34]; *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237 at 247 [52]; followed in respect of s 24(1) in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [247]; *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 258-9 [166]-[167].

⁸ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292 at 299-300 (Mason CJ and McHugh J), 325-326, 353, 361 and 362; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 (Mason CJ), 56 (Deane J), 72 (Toohey J), 75 (Gaudron J).

⁹ *Pham v Drakopoulos* [2013] VSCA 43 at [66] (Vickery AJA, with whom Whelan JA agreed).

¹⁰ *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 at [179]; cf *R v Griffin* [2007] ACTCA 6 at [4]; *R v DA* [2008] ACTSC 26 at [7].

¹¹ *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [205] (Tate JA); *Knight v Wise* [2014] VSC 76 at [36]; *R v A (No 2)* [2002] 1 AC 45; [2001] UKHL 25 at [38] (Lord Steyn).

¹² *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415; [2009] VSC 381 at [80] (Warren CJ); *DPP v Ali (No 2)* [2010] VSC 503 at [29] (Hargrave J); *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 at [97] (Bell J); *Antunovic v*

directly affected by it. When a court or tribunal hears a proceeding in the absence of a person whose interests are directly affected, and without notice to that person, the person's Charter right to a fair hearing is engaged.

17. Further, the criminal limb of s 24(1) was potentially engaged by this proceeding, in so far as it involved an aspect of the process commenced by the bringing of criminal charges against the Convicted Individuals, and concerns the disclosure of information that might provide substantial assistance to those persons in challenging their convictions. Applying a broad and purposive construction of s 24(1), the Charter right to a fair hearing is capable of encompassing any appeal proceedings and associated processes.
18. Section 25(2)(b) of the Charter provides that "[a] person charged with a criminal offence is entitled without discrimination... to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her." This minimum guarantee is an aspect of the requirement for a fair trial. The subject matter of the proposed disclosures by CD engages the Charter rights of the Convicted Individuals under s 25(2)(b), in so far as it raises issues concerning whether each of them had a proper defence with independent legal advice and representation.

The proceedings below were compatible with the Charter rights of the Convicted
Individuals

19. Because ss 24(1) and 25 of the Charter applied to the Court below by reason of s 6(2)(b), the Court was required to be positively satisfied that a fair hearing could take place in the absence of the Convicted Individuals, and without notice to them. In so far as the absence of the Convicted Individuals involved limits on their Charter rights, any such limits were required to be reasonable and demonstrably justified under s 7(2) of the Charter. This did not contemplate that the Court was permitted to conduct something less than a fair hearing, but rather that there may be limits on the "golden rule"¹³ of full disclosure which are nevertheless compatible with the right to a fair hearing.

Dawson (2010) 30 VR 355 at [71] (Bell J); *Castles v Department of Justice* (2010) 28 VR 141, [55]-[56] (Emerton J); and *DPP v Kaba* (2014) 44 VR 526 at [108] (Bell J).

¹³ *R v H* [2004] 2 AC 134 at 155-156 [36].

20. The Court of Appeal considered whether the rights protected by s 24(1) and s 25(2)(b) of the Charter were subject to limitations within the scope of s 7(2) of the Charter. The Court of Appeal found that the limitations on the Charter rights of the Convicted Individuals were within the scope of s 7(2), and that deciding the applications for leave to appeal without notice to the Convicted Individuals was compatible with their rights under s 24(1) and s 25(2)(b).

10 21. The Commission maintains its submission (which was accepted by the Court of Appeal) that there is no means of giving notice of these proceedings to the Convicted Individuals which would be effective to protect the countervailing public interests and the rights of EF and her children. In the proceedings below, amici curiae were appointed to advance arguments in the interests of the Convicted Individuals. The Court of Appeal correctly found that there was no alternative course open that was less restrictive of the Charter rights of the Convicted Individuals under s 24(1) and s 25(2)(b), and that the hearing and determination of the proceedings without notice to the Convicted Individuals but with the appointment of the amici curiae involved a reasonable limit on any such Charter rights that was demonstrably justified under s 7(2) of the Charter.

20 22. The Commission submits that there was no error in the reasoning process of the Court of Appeal on the procedural question, and no party has challenged the finding on that question in this appeal. The amici curiae have been granted leave to intervene in this appeal.¹⁴ In these circumstances, there is no occasion for this Court to revisit the procedural question.

THE SUBSTANTIVE QUESTION

23. The relevance of the Charter to the central issue in these proceedings might be described as peripheral. There is no potential application for the interpretative principle under s 32 of the Charter, and no party has sought to rely on the Charter in advancing or responding to any ground of appeal.

30 24. The balancing exercise to be performed in determining whether a proposed disclosure is protected by public interest immunity is to be performed under common law principles. The Commission does not submit that the Charter has a

¹⁴ Order 2 made on 25 May 2018 by Nettle J.

direct application in the formulation of those common law principles. There is one common law in Australia,¹⁵ and the enactment of human rights legislation in Victoria has not been mirrored throughout the Australian federation.

25. Nevertheless, the relevant human rights reflected in and given expression by the Charter may be taken into account in conducting the balancing exercise.¹⁶ In other jurisdictions with human rights instruments, it has been acknowledged that it may be necessary to withhold evidence from the defence so as to preserve the fundamental rights of another person or to safeguard an important public interest.¹⁷ Human rights considerations form part of the *public interests* weighed in the balancing process. In this case, the balancing process involves weighing the public interests in disclosure which may include (but are not limited to) the fair trial rights of a convicted person who may obtain substantial assistance if the information is disclosed, and the public interests in non-disclosure which include (but are not limited to) the informer's right to life, right to liberty and security, right to privacy, and right to protection of family and children. The public interests for and against disclosure also encompass matters going beyond the human rights of any particular identified individual (such as the public interest in the administration of justice and the integrity of the criminal justice system, or the public interest in the ability of law enforcement bodies to recruit informers).
- 20 26. In so far as this Court is required to balance these public interests in determining the present appeals, the Commission makes no submission about the relative weight that should be given to the public interests, including any human rights (or Charter rights) which may be addressed in the balancing process.

¹⁵ *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520 at 562-3; *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 61-62 (Gleeson CJ, Gaudron and Gummow JJ).

¹⁶ SC Reasons at [415]; CAB 131; *cf.* VSCA Reasons at [186]; CAB 210-211.

¹⁷ *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, [61]; *R v H* [2004] 2 AC 134; *R (on the application of Haralambous) (Appellant) v Crown Court at St Albans and another (Respondents)* [2018] UKSC 1, [26]-[27] (Lord Mance, with whom Lord Kerr, Lord Hughes, Lady Black and Lord Lloyd-Jones agreed).

PART VI ORAL ARGUMENT

27. It is not presently anticipated that the appeal will be listed for oral arguments.

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