

CREATION OF TENANCY IN PUBLIC HOUSING: A HUMAN RIGHTS PERSPECTIVE

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People living in public housing who are not named on the tenancy agreement can be summarily evicted when the tenancy agreement comes to an end, for example by the death of the tenant. The Residential Tenancies Act 1997 (Vic) allows such people to apply to the Victorian Civil and Administrative Tribunal (VCAT) for an order that they be made a tenant at the premises. However VCAT has consistently refused such applications, giving much weight to the 'orderly administration' of the public housing waiting list, rather than the human rights of the person being evicted from their home. The enactment of the Charter of Human Rights and Responsibilities Act 2006 (Vic), which includes the right to home and the right to protection of the family unit, has forced VCAT to consider the human rights involved in applications for creation of a tenancy agreement.

I: INTRODUCTION

The *Residential Tenancies Act 1997* (Vic) ('RTA') empowers the Victorian Civil and Administrative Tribunal ('VCAT') to order a landlord of residential premises to enter a tenancy agreement with a person who lives in the premises as their home.¹ Although this provision applies to both private and public landlords, all the reported decisions involve the Director of Housing or a social housing provider, rather than a private landlord. Remarkably, all these decisions (by VCAT or, on appeal, by the Supreme Court of Victoria) have been decided against the applicant.

In a recent decision however VCAT ordered a social housing provider to enter a tenancy agreement with an applicant.² This landmark decision was based on the right to home and right to protection of the family unit contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'). The decision was also based on VCAT's obligations as a 'public authority' in terms of the Charter when making such decisions. This decision signals a more human rights focused approach by VCAT to creation of tenancy applications in public housing.

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¹ RTA ss 232-233. The previous Act (the *Residential Tenancies Act 1980* (Vic)) contained a similar provision (s 135).

Similar provisions are contained in other State and Territory residential tenancy legislation: see s 77 *Residential Tenancies Act 2010* (NSW), s 149(2) *Residential Tenancies Act 1994* (Qld) and s 85 *Residential Tenancies Act 1997* (ACT).

² *DS v Aboriginal Housing Victoria* [2013] VCAT 1548 (3 July 2012).

II: THE PRECARIOUS POSITION OF A NON-TENANT

Under the *RTA* a non-tenant who resides at rented premises as their principal place of residence may apply to VCAT for an order that they be made a tenant at the property. This application may be made only if the existing tenancy agreement has been or will be terminated in accordance with the *RTA*.³ An application may be made before or after VCAT has granted a possession order to the landlord.⁴

Before ordering the creation of a tenancy agreement VCAT must be satisfied of three matters:

- The applicant could reasonably be expected to comply with the duties of a tenant under the *RTA*; and
- The applicant would be likely to suffer severe hardship if compelled to leave the rented premises; and
- The applicant's hardship would be greater than the landlord's hardship if the order was granted.⁵

Each of these preconditions is mandatory; an application can fail on any one of these grounds. Even if VCAT is satisfied of these matters it has a residual discretion whether or not to make an order.⁶

Residential tenancy law otherwise provides little protection to people living in rented premises who are not named as tenants on the tenancy agreement. When a tenancy agreement ends (for example following the death of a tenant) non-tenant occupants (such as the spouse or child of the tenant) can be evicted very quickly from their home. The ability to order a landlord to enter a tenancy agreement with a non-tenant was included in the *RTA* to ameliorate this hardship.⁷

While a tenancy agreement is still on foot a non-tenant may request to become a tenant at the property, either in addition to or substitution for the existing tenant. However assignment of the agreement is valid only if the landlord gives written consent.⁸ Public housing policies provide that consent will be refused unless the applicant has lived continuously at the rented premises for at least 12 months and their income has been included in assessing the rent charged on the property for this same period.⁹

A common scenario in the reported decisions involves a family member moving in to care for a sick relative who is a public housing tenant. The family member never signs on to the lease, although their income is included in assessing the rental charged for the property

³ That is, the landlord has applied for a possession order, the tenant has abandoned the rented premises, has delivered up vacant possession of the premises or has given a notice of intention to vacate the premises, or if the tenant has died leaving no surviving tenants (see s 232 *RTA*).

⁴ *Ludlow v Director of Housing* (Unreported, Supreme Court of Victoria, Chernov J, 4 June 1997).

⁵ *RTA* s 233.

⁶ *Cosic v Director of Housing* [2007] VSC 486 (7 December 2007) ('*Cosic*').

⁷ The extensive parliamentary debate during the passage of both the 1980 and the 1997 *RTA* contains no specific reference to the purpose of ss 232 and 233, apart from the intention of the 1980 Act to 'achieve fairness for all parties' and the need for 'special provisions where a party suffers severe hardship' (Victoria, *Parliamentary Debates*, Legislative Assembly, 23 October 1980, 1631 (MacLellan)).

⁸ See s 81 *RTA*.

⁹ In relation to premises let by the Director of Housing, a non-tenant whose income is included in assessing the rental amount is known as a 'resident'.

(effectively they are paying rent on the property). When the tenant dies the public landlord moves to quickly evict the non-tenant, who has no right to continue residing at the property. If the person's request for transfer of the tenancy into their name is refused then their only option is to apply to VCAT for creation of a tenancy agreement.¹⁰

Most of the reported decisions involve the situation described above, or minor variations. Remarkably, in each of these decisions, VCAT has decided against the applicant (resulting in the applicant being evicted from their home).¹¹ The Supreme Court of Victoria has confirmed this trend in a recent decision.¹²

III: WHY DOES VCAT REJECT CREATION APPLICATIONS?

The Victorian *RTA* does not distinguish between public and private landlords in regards to applications for creation of a tenancy agreement. In this respect the *RTA* is more generous than similar provisions in residential tenancy legislation in other States and Territories, which all either prohibit or restrict creation applications in relation to public housing.¹³ However the restrictive way in which the relevant provisions have been interpreted in Victoria has effectively produced the same result.

A: *The Cosic decision and its legacy*

In deciding creation of tenancy applications VCAT often refers to the decision of Forrest J in *Cosic*.¹⁴ This decision involved the meaning of 'hardship' in s 233 of the *RTA* and the relevance of the public housing waiting list to applications for creation of a tenancy agreement.

In *Cosic* Forrest J reached two conclusions in relation to 'hardship'. First his Honour noted that in relation to creation applications, only the hardship of the applicant and the landlord are relevant. For VCAT to take into account the hardship of any other person would be an irrelevant consideration and therefore grounds for an appeal. Second his Honour found that 'hardship' should be interpreted broadly as meaning 'any appreciable detriment' and was not limited to financial hardship. Applying this reasoning Forrest J found that in relation to a public landlord such as the Director of Housing 'hardship' could include 'disruption to the orderly administration of the waiting list'.¹⁵

¹⁰ Certain decisions by the Director of Housing are subject to internal review, however eviction decisions are excluded from this process: Department of Human Services (Vic), *Business Practice Manual: Housing Appeals, Version 4.3* (October 2012), 4-8 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/business-practice-manual>>.

¹¹ See *Heywood v Director of Housing* (Unreported, VCAT, Residential Tenancies List, Senior Member Lambrick, 4 January 2010) ('*Heywood*'), *Stafford v Director of Housing* [2008] VCAT 2083 (17 March 2008).

¹² *Giotopoulos v Director of Housing* [2011] VSC 20 (7 February 2011) ('*Giotopoulos*').

¹³ See s 77 *Residential Tenancies Act 2010* (NSW), s 149(2) *Residential Tenancies Act 1994* (Qld) and s 85 *Residential Tenancies Act 1997* (ACT).

¹⁴ [2007] VSC 486 (7 December 2007).

¹⁵ *Ibid* [43].

VCAT often refers to this passage in the course of rejecting applications for creation of a tenancy agreement. Such applications are assumed to be inherently disruptive to an 'orderly waiting list'. In *Cosic* however Forrest J based his decision on actual evidence of the state of the relevant waiting list, and the effect on the waiting list of VCAT granting a tenancy agreement to the applicant.¹⁶ This was a finding of fact, not a conclusion of law.

There is an obvious tension in the reasoning of Forrest J in *Cosic*. If VCAT can only consider the hardship of the landlord and applicant (and not that of those on the waiting list) then the 'hardship' to a public landlord in being ordered to grant a single tenancy agreement could only be minor and purely administrative. There is a real question whether purely administrative inconvenience could ever amount to an 'appreciable detriment', particularly when compared to the hardship of an applicant being evicted from their home and possibly being made homeless.

Cosic requires VCAT members to apply this difficult distinction in each application they hear. Often, and understandably, VCAT members appear to do what they are specifically prohibited from doing: considering the hardship of those on the waiting list, rather than just the administrative hardship of a public authority.

B: 'Queue jumping' and the public housing waiting list

There is a perception that applicants for creation of tenancy are merely 'queue jumpers' who are seeking access to a publicly funded resource out of turn or not through the proper channels. This is not an insignificant consideration in certain cases, especially when there is evidence that the applicant has taken advantage of elderly and vulnerable public housing tenants in gaining access to their home.¹⁷ However this is not the situation of the applicant in any other reported decision. The majority of applicants came to reside in the rented premises for legitimate reasons, and are entitled to exercise the rights given to them by Parliament to apply to remain in the premises under a secure tenancy.

The 'waiting list' for public housing is not in fact one list of individuals in chronological order of the date of their application. Rather, it is a multi-layered series of lists, based on the particular housing needs of the applicant, the geographical areas selected by the applicant, and the particular type of housing preferred or required by the applicant. The interaction of these factors means that people with special needs (such as a disability or chronic medical issues) may be offered housing before other applicants who have applied for housing earlier.¹⁸

Also, a transfer of tenancy policy applies to public housing, which allows a non-tenant residing at a public housing property to request to become a tenant at the premises. This internal administrative process is similar to the process of applying to VCAT for an order creating a tenancy, and similar considerations are relevant (such as the length of time the

¹⁶ Ibid [51] Forrest J refers to the 'evidence [before VCAT in this case] as to the state of the waiting list'.

¹⁷ Such as Emerton J found to be the case in *Giotopoulos* [2011] VSC 20 (7 February 2011) [61], [68].

¹⁸ See Department of Human Services (Vic), *Allocations Manual* (December 2012), chs 3-10 <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/allocations-manual>>.

person has resided at the rental premises).¹⁹ The outcome of these processes is also the same: the creation of a tenancy agreement. As tenant transfers are a normal and accepted part of managing public housing stock, they cannot truly be considered a ‘disruption’ to the orderly administration of public housing.

C: *Is VCAT exercising original or review jurisdiction?*

VCAT also appears to be hesitant to override the decision of a public authority regarding the allocation of scarce public housing resources. As outlined above most creation applications are preceded by a request to the landlord to transfer the tenancy to the applicant (which must necessarily have been rejected). In the Residential Tenancies List (‘RT List’), VCAT exercises only original jurisdiction- it has no power to review the decisions of other administrative decision-makers.²⁰ Other lists of VCAT are authorised to review and set aside the decisions of other public authorities for example regarding statutory planning decisions and freedom of information requests. Members sitting in the RT List may be reluctant to exercise a power that looks like they are reviewing and overturning decisions of a public authority.²¹

D: *Contract law and property law issues*

Finally, a successful creation application results in an order that the landlord enter a tenancy agreement with the applicant. This seems to run counter to deeply entrenched legal principles.²² Freedom of contract provides that people may choose who they enter legal relations with, and they cannot and should not be forced to assume obligations to others against their will. The very idea of an ‘agreement’ is that it is freely and voluntarily entered into.

A landowner’s property rights are some times regarded as ‘sacred and inviolable’.²³ Being ordered to enter a tenancy agreement seems to subvert a landlord’s essential property rights. Central to property rights is the ability to choose who can use and occupy the property (for example as a tenant). Losing the right to exclusive and immediate possession of the premises is a significant limitation on a landowner’s property rights. The essential purpose of property law is that an owner is (and should be) allowed to do what they like with their property.

¹⁹ See Department of Human Services (Vic), *Tenancy Management Manual- Transfer of Tenancy* (July 2012) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/tenancy-management-manual>>.

²⁰ See *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011).

²¹ *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) established that social housing providers are ‘public authorities’ in terms of the *Charter*. This concept is explored further below.

²² Kevin Bell, ‘Protecting Public Housing Tenants in Australia from Forced Eviction: The Fundamental Importance of the Human Right to Adequate Housing and Home’ (Paper presented at Monash University Faculty of Law, Melbourne, 18 September 2012).

²³ *Declaration of the Rights of Man and Citizen 1789* (France) art 17. The *Charter* provides ‘a person must not be deprived of his or her property other than in accordance with law.’ This provision has no application to a public authority.

In *Cosic* Forrest J powerfully summarised these arguments:

Section 233 [of the *RTA*] is a powerful provision within the armoury of the Tribunal. It permits the Tribunal, inevitably against the wishes of the landlord, to compel a landlord to enter into a tenancy agreement with a tenant [sic]. It deliberately frustrates the landlord's desired use of the premises provided the Tribunal is satisfied that the three conditions are met and that it ought, in the circumstances, exercise its discretion to require the landlord to enter into the agreement.²⁴

This paragraph is often repeated by VCAT in the course of rejecting creation applications.²⁵ It is difficult to imagine a stronger or clearer message from a superior court which has power to overturn VCAT orders on appeal.²⁶

IV: THE CHARTER AND THE RIGHT TO HOME

The enactment of the *Charter* in 2006 was regarded by the Attorney-General as 'an historic day for Victoria'.²⁷ The *Charter* seeks to protect human rights in two ways. First, it requires that all Victorian legislation be interpreted compatibly with human rights.²⁸ It also requires 'public authorities' to act compatibly with human rights and to give proper consideration to human rights when making a decision.²⁹ 'Public authority' is defined as including public officials, Ministers, Victoria Police and statutory bodies exercising functions of a public nature. Parliament, and Victorian courts and tribunals, are generally excluded.³⁰

Part 2 of the *Charter* sets out the human rights that Parliament specifically seeks to protect and promote. Section 13 provides that:

A person has the right-

- a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

Section 17 provides that 'families are the fundamental group unit of society and are entitled to be protected by society and the State'. The *Charter* contains a general limitations provision in s 7(2). This section provides that:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including-

²⁴ *Cosic* [2007] VSC 486 (7 December 2007) [36].

²⁵ See *Heywood* (Unreported, VCAT, Residential Tenancies List, Senior Member Lambrick, 4 January 2010) [11].

²⁶ See s 148 *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

²⁷ Victoria, *Parliamentary Debate*, Legislative Assembly, 4 May 2006, 1289 (Rob Hulls).

²⁸ *Charter* s 32.

²⁹ *Ibid* s 38.

³⁰ *Ibid* s 4.

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

A: The right to home and its importance

The right to home in s 13 of the *Charter* is based on art 17 of the *International Covenant on Civil and Political Rights* ('ICCPR').³¹ The jurisprudence of the United Nations Human Rights Committee ('UNHCR') is the primary resource for the interpretation of the *ICCPR*.³²

According to the UNHCR, 'home' is simply 'the place where a person resides'.³³ This does not depend on a pre-existing right to live or remain in a particular place, but is established simply by the fact of residence. The duration of a person's residence, and their connection with the house and the area (such as their parents or other family member having lived there, or use of local schools and other services) have usually been regarded as relevant, even prior to the enactment of the *Charter*.³⁴

When a public authority is alleged to have interfered with a right contained in the *Charter*, courts and tribunals adopt a two-stage analysis. First, the court determines whether the conduct or decision in fact 'engages' (or 'limits') any right in the *Charter*. Then the court determines whether the action is 'reasonable' and 'demonstrably justified' in accordance with s 7.

Eviction from one's home clearly engages the right to home. In relation to reasonableness, courts and tribunals must consider the nature of the right. With respect to the nature of the right to home, the Constitutional Court of South Africa has stated:

[A] home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people in particular) is a turbulent and hostile world.³⁵

Having a secure home is central to the achievement of many other human rights in the *Charter*, such as privacy and security of the person. It is also central to the values of human dignity, freedom and equality, on which the *Charter* is based.³⁶ Justice Kevin Bell has stated that home is:

³¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³² Section 32(2) of the *Charter* provides that international law may be considered in interpreting a statutory provision (which includes the *Charter* (s 3(1)).

³³ *CCPR General Comment No 16: Article 17 (Right to Privacy)*, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Human Rights Committee, 32nd session (8 April 1988) [5].

³⁴ See *Heywood* (Unreported, VCAT, Residential Tenancies List, Senior Member Lambrick, 4 January 2010).

³⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [17]. This case concerned the interpretation of s 26 of the *Constitution of the Republic of South Africa 1996*, which prohibits arbitrary eviction from one's home.

³⁶ *Charter* (preamble).

...much more than a shelter, a dwelling, and a place to inhabit...It is the primary location of individual physical existence, which is indispensable for human flourishing in every respect, including participation in work and education and in cultural, social and religious life.³⁷

Courts and tribunals must also consider the nature and extent of the interference with the right (s 7(2)(c)). In this regard the European Court of Human Rights has stated that ‘the loss of one’s home [by eviction] is a most extreme form of interference with the right’.³⁸ (This statement was made in relation to art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,³⁹ which is the equivalent of s 13 of the *Charter*).

The justification analysis required by s 7 of the *Charter* essentially involves a determination of reasonableness and proportionality. When a public authority (such as the Director of Housing) is alleged to have ‘limited’ a right contained in the *Charter* (by evicting a person from their home), the issue is whether the objective sought to be achieved by the action is reasonable (or proportionate) to the interference with the right. It is not enough that the authority’s actions are ‘lawful’ (permitted by law) - they must also be ‘reasonable in the particular circumstances’.⁴⁰

As indicated by the decisions referred to above, eviction from one’s home is a complete and final denial of the right to home. Therefore, compelling justification will be required, especially when this would result in the person being made homeless.

V: VCAT AND THE CHARTER

A: Is the Director of Housing a public authority?

The enactment of the *Charter* raised many questions regarding definitions and the scope of its application. A primary question was whether the Director of Housing was a ‘public authority’ and therefore bound to comply with *Charter*. In 2010 the President of VCAT held that the Director of Housing is a ‘public authority’ in terms of the *Charter*, and therefore must act compatibly with human rights and give proper consideration to human rights, when evicting tenants from public housing.⁴¹ Considering the definition of ‘public authority’, and the effect of eviction on the right to home, this conclusion was unsurprising.

However Justice Bell went on to hold that VCAT members sitting in the RT List have jurisdiction to examine the decisions of the Director, when an application is made to VCAT for a possession order. Further, if the Director has not acted compatibly with the *Charter* or given proper consideration to human rights, the member can and must dismiss the application for a possession order.⁴²

³⁷ Bell, above n 22, 6

³⁸ *McCann v United Kingdom* (European Court of Human Rights, Application No 19009/04, 13 May 2008) [50].

³⁹ *European 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).

⁴⁰ *CCPR General Comment No 16: Article 17 (Right to Privacy)*, *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Human Rights Committee, 32nd session (8 April 1988) [4].

⁴¹ *Director of Housing v Sadi* (Residential Tenancies) [2010] VCAT 328 (31 March 2010).

⁴² *Ibid*.

This decision meant that when the Director of Housing sought to evict a tenant, the Director not only had to show valid grounds for the eviction under the *RTA*, but also had to show that proper consideration had been given to rights such the right to home, and that the decision to evict was compatible with human rights. Although this made proceedings for eviction longer and more complicated, Justice Bell held that this is what the Charter and proper respect for human rights required.

The Director appealed Justice Bell's decision and in November 2011 the decision was overturned.⁴³ The Victorian Court of Appeal accepted that the Director is a public authority and is bound to act compatibly with human rights and to give proper consideration to the human rights in the *Charter*. However the Court of Appeal emphasised that VCAT, as a statutory tribunal of limited jurisdiction, has only the powers specifically given to it by legislation. Although some divisions of VCAT have power to review, vary or set aside decisions of administrative decision makers, the RT List has no such power. The RT List has no power to review the decisions of the Director for compliance with the *Charter*. Essentially this would be exercising a power of judicial review, which would be entirely foreign to the role given to VCAT under the *RTA*. According to the Court of Appeal, VCAT's role in eviction proceedings is limited to determining the landlord's formal compliance with the requirements of the *RTA*.⁴⁴

B: *Is VCAT itself a public authority?*

The *Sudi* decisions considered whether the Director of Housing is a public authority in terms of the *Charter*. The more recent decision in *Giotopoulos*,⁴⁵ however, considered whether VCAT itself is a public authority and if so in what circumstances. As mentioned above, the *Charter* provides that Victorian courts and tribunals generally are not public authorities. The exception however is when the court or tribunal is 'acting in an administrative capacity'.⁴⁶

The *Charter* lists some examples of 'acting in an administrative capacity', such as when a court or tribunal is listing a case for hearing, or issuing a warrant. These are clear examples of administrative processes. In a series of decisions, Bell J has considered when VCAT is acting in an 'administrative capacity'.⁴⁷ His Honour has interpreted this term as involving an exercise of administrative power, as opposed to judicial or legislative power.⁴⁸ Judicial power broadly involves the enforcement of existing legal rights and duties according to existing legal principles. Legislative power broadly involves the creation or formulation of new rules of law having general application.⁴⁹ Bell J held that VCAT will often be exercising administrative power, and thus acting in an administrative capacity, when it is exercising a statutory discretion in its original jurisdiction.

⁴³ *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011).

⁴⁴ *Ibid*.

⁴⁵ [2011] VSC 20 (7 February 2011).

⁴⁶ *Charter* s 4.

⁴⁷ See *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 (22 September 2009).

⁴⁸ *Ibid*.

⁴⁹ *Ibid*[42]-[43].

Giotopoulos was an appeal to the Supreme Court from an unsuccessful application to VCAT for the creation of a tenancy agreement in public housing. Ultimately the Court dismissed the appeal on the grounds that the appellant did not meet the mandatory requirements set by the RTA for the grant of a tenancy agreement.

However in *obiter* the Court made two important conclusions regarding applications for creation of a tenancy agreement. First, Emerton J assumed (without deciding) that VCAT is a public authority in certain circumstances, including when it is exercising its residual discretion whether to order a tenancy agreement.⁵⁰ This means that VCAT must act compatibly with human rights and properly consider human rights when exercising this discretion. Otherwise VCAT would be acting unlawfully and this would provide grounds for an appeal.

Second, Emerton J confirmed that VCAT's decision whether or not to order a tenancy agreement specifically engages the right to home (s 13) and to protection of the family (s 17) of the person facing eviction. In exercising its discretion VCAT must give proper consideration to the nature and extent of its decision on these rights.⁵¹

These important statements by the Court in *Giotopoulos* did not of course assist the appellant in that case. However it did provide arguments to be used in future cases, if an application was able to meet the mandatory requirements set by the RTA for creation of a tenancy agreement.

VI: VCAT GRANTS A TENANCY AGREEMENT

In *DS v Aboriginal Housing Victoria*⁵² the applicant's mother ('TH') was the sole tenant of premises let by Aboriginal Housing Victoria ('AHV'). The applicant ('DS') lived in the premises with his mother and three younger siblings (aged 13, eight and 3 years) since around 1999. The house was the family home and the only house DS could remember living in.

In March 2011 TH was incarcerated. DS requested AHV to transfer the tenancy into his name but this application was refused and soon after AHV issued a notice to vacate for no specified reason. VCAT granted a possession order to AHV but delayed the eviction for one month. DS applied for an order that AHV enter a tenancy agreement with him in respect of the rented premises. DS had recently turned 18 years of age.

In relation to the requirements for ordering a tenancy agreement VCAT found that DS could reasonably be expected to comply with the duties of a tenant, as he had continued to pay rent for the premises since his mother's incarceration. In relation to DS's hardship VCAT found that DS had a 'long connection' to the rented premises. He had lived in the premises for 13 years, had grown up there with his three younger siblings and regarded it as his home. VCAT also found that DS had significant ties to the local area: the rented premises were within walking distance of the house where DS's siblings were living temporarily until their mother was released and also within walking distance of the schools attended by DS's

⁵⁰ *Giotopoulos* [2011] VSC 20 (7 February 2011) [84]-[89].

⁵¹ *Ibid* [89].

⁵² [2013] VCAT 1548 (3 July 2012).

siblings. VCAT accepted evidence that TH was due to be released in September 2012 and intended to return to live at the rented premises with DS and the three younger children on her release.

VCAT found that because of his low income and lack of rental history DS was unlikely to be able to secure private rental accommodation in the local area and would likely be rendered homeless if compelled to leave the rented premises. VCAT found that this amounted to ‘severe hardship’.

In relation to AHV’s hardship VCAT considered that the ‘practical effect’ of making an order in DS’s favour would be the transfer of the tenancy agreement from DS’s mother to DS. VCAT regarded this not as a form of hardship but as ‘part of the normal process of administering a housing [waiting] list’⁵³

VCAT found that AHV’s investigation and consideration of DS’s request for transfer of the tenancy agreement into his name was flawed in several significant respects. AHV had failed to speak with, or attempt to speak with, DS regarding his request. Further, AHV’s rejection of DS’s request appeared to be based on several significant factual errors. VCAT stated that if the investigation had been conducted properly, including the direct involvement of DS, the outcome ‘may well have been very different’⁵⁴ In these circumstances VCAT was satisfied that AHV’s hardship would not be greater than DS’s hardship.

Having considered the mandatory requirements VCAT then considered its residual discretion whether or not to make an order. In exercising this discretion VCAT accepted that it is a “public authority” for the purposes of the *Charter* and is bound to act compatibly with relevant human rights, and to properly consider relevant rights when making a decision.⁵⁵

In relation to specific *Charter* rights VCAT found that the applicant’s right to non-interference with the home (s 13) and to protection of the family unit (s 17) were both engaged by the application for creation of a tenancy agreement. VCAT then referred to s 7 of the *Charter* and considered whether the limitation of DS’s human rights was ‘justified’.

In considering justification, VCAT examined the practical consequences of granting or refusing the application. (This approach, it is submitted, is consistent with the requirement that the interference must be ‘reasonable in the particular circumstances’.⁵⁶ This approach is also implicit in VCAT’s determination of the relative hardship of DS and AHV).

In this case, VCAT found that refusing the application would result in DS being evicted from his home and the family unit being split up, rather than DS residing at the rented premises with his family. VCAT found ‘no justification’ for exercising the discretion in this way, and therefore ordered AHV to enter a tenancy agreement with DS. Although VCAT did not refer to any authority on this point, it was correct in holding that the onus of proof regarding justification ultimately rests on the respondent (that is, the authority which is alleged to have limited the right).⁵⁷

⁵³ Ibid [101].

⁵⁴ Ibid [103].

⁵⁵ See *Giropoulos* [2011] VSC 20 (7 February 2011) [84]-[89].

⁵⁶ *CCPR General Comment No 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, UN Human Rights Committee, 32nd session (8 April 1988) [4].

⁵⁷ *Director of Housing v Sudi* (Residential Tenancies) [2010] VCAT 328 (31 March 2010).

VII: CONCLUSION: A TURNING OF THE TIDE?

In the past VCAT has consistently refused applications for creation of a tenancy agreement where the respondent is a public housing provider. Since the decision of Forrest J in *Cosic* VCAT has given inordinate weight to the (perceived) effect of granting an order on the public housing waiting list.

*DS v Aboriginal Housing Victoria*⁵⁸ however sees VCAT taking a more balanced and considered approach to such applications. In this decision VCAT recognised that granting a tenancy agreement does not necessarily disrupt the ‘orderly maintenance’ of the public housing waiting list. In this case the practical effect of VCAT granting a tenancy agreement would be exactly the same as if the landlord approved a transfer of tenancy to the applicant (which is a normal and accepted part of tenancy management for a public housing provider).

This decision also showed VCAT rigorously engaging with the *Charter* aspects of an application for creation of a tenancy agreement. Although VCAT cannot consider a public landlord’s compliance with the *Charter* in determining an application for a possession order,⁵⁹ VCAT as a public authority must consider the *Charter* when exercising its residual discretion in an application for creation of a tenancy agreement. In many cases the right to home and to protection of the family unit will both be engaged, and VCAT must consider evidence of the likely effect of granting or not granting a tenancy on the relevant family unit and in maintaining the connection with the applicant’s home.⁶⁰

⁵⁸ [2013] VCAT 1548 (3 July 2012).

⁵⁹ *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011).

⁶⁰ In certain cases other *Charter* rights, such as the right to protection of a person’s culture (s 19), will also be relevant.