

NASSIR BARE v INDEPENDENT BROAD-BASED ANTI-CORRUPTION
COMMISSION

SUMMARY

Today, the Court of Appeal, by majority, allowed an appeal by Nassir Bare against a decision by the Director of the Office of Police Integrity ('Director') refusing to investigate a complaint against a member of Victoria Police for cruel, inhuman and degrading treatment ('the decision'). It set aside the orders of the trial judge refusing judicial review of the decision. The Court of Appeal ordered that a fresh decision be made by the Independent Broad-based Anti-Corruption Commission (the organisation that has replaced the Office of Police Integrity) ('IBAC') in accordance with the rights of Mr Bare under the *Charter of Human Rights and Responsibilities* ('the Charter').

Mr Bare claimed that on 16 February 2009 the police stopped a car in which he was travelling. He claimed that when he got out of the car, a police officer pushed him up against the vehicle, handcuffed him and then kicked his legs out from under him causing him to fall to the ground. Mr Bare further alleged that, as he lay on the ground, the officer pushed his head to the ground so that his chin struck the gutter and repeatedly pushed his head into the gutter so as to chip his teeth and cut his jaw. Mr Bare claimed that the officer sprayed him with 'OC' (capsicum) spray several times and said words to the effect 'you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars.'

On 3 February 2010, Mr Bare made a complaint to the Office of Police Integrity ('the OPI'). He complained that the police officer's conduct amounted to a breach of his rights under ss 10 and 8 of the Charter. Section 10(b) provides that a person must not be treated or punished in a cruel, inhuman or degrading way. Section 8 states that every person is entitled to equal protection of the law without discrimination. Further, Mr Bare's complaint claimed that he had a right to an effective investigation independent of Victoria Police pursuant to an implied procedural right found in s 10(b) of the Charter. On 19 October 2010, a delegate of the Director made the decision pursuant to s 40(4)(b)(i) of the *Police Integrity Act 2008* ('the Act') and held that it was not in the public interest for the OPI to investigate Mr Bare's complaint and offered to refer the complaint to Victoria Police.

Mr Bare sought judicial review of the decision on the basis that it breached s 38(1) of the Charter. Section 38(1) provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'. The trial judge dismissed Mr Bare's application for review.

IBAC (along with the Attorney-General for the State of Victoria) contended that a decision of the Director under s 40(4)(b)(i) of the Act was protected by a privative clause in s 109 of the Act, which was argued to prevent a court judicially reviewing a decision of the Director unless it amounted to jurisdictional error. IBAC submitted that a breach of s 38(1) of the Charter did not amount to jurisdictional error as there was not a clear legislative intention that a breach of s 38(1) should result in invalidity. The Attorney submitted that s 38(1) was not applicable as the public interest test in s 40(4)(b)(i) had already been interpreted in compliance with s 32 of the Charter which requires all Victorian Acts to be interpreted, as far as possible, in a way that is

compatible with the rights in the Charter. Finally, IBAC argued that there was no implied right to an effective investigation under the Charter.

Mr Bare submitted that the privative clause did not apply because it only applied to decisions made for the purposes of an investigation. He argued that a decision not to investigate is not a decision made for the purposes of an investigation. The Victorian Equal Opportunity and Human Rights Commission ('the Commission') contended that even if the privative clause ousted review for jurisdictional error, a breach of s 38(1) amounted to jurisdictional error and therefore the decision could still be reviewed. The Commission further argued that s 10(b) contained an implied right to an effective and independent investigation based on decisions of a number of foreign and international jurisdictions. Finally, Mr Bare submitted that the delegate did not give proper consideration to his substantive rights under ss 8 and 10 of the Charter, or his implied right to an effective investigation under s 10(b) of the Charter.

The majority of the Court (Tate and Santamaria JJA) held that the privative clause in s 109 of the Act was limited to decisions of the Director for the purposes of an investigation. A decision of the Director not to investigate did not amount to a decision for the purposes of an investigation. The majority therefore held that the Court was not precluded from reviewing the decision of the Director.

The majority held that the delegate of the Director did not give proper consideration to Mr Bare's rights under the Charter. He did not grapple with the substantive rights of Mr Bare under ss 8 and 10 of the Charter. It was necessary for IBAC to make a fresh decision on whether it should conduct an independent investigation of Mr Bare's complaint.

Chief Justice Warren held that the Court was precluded from reviewing the decision. Her Honour held that before the Director makes a decision whether or not to investigate he has a discretion open to him. The availability of the option to investigate meant that a decision not to investigate was still made for the purposes of an investigation and therefore the privative clause applied to the decision. Although it was therefore unnecessary for her to decide, she also considered that the delegate of the Director did not give proper consideration to Mr Bare's rights.

In light of the finding of the majority of the Court of Appeal, Tate JA considered it unnecessary to decide whether a breach of s 38(1) of the Charter amounted to jurisdictional error and declined to do so. However, Warren CJ went on to decide that a breach of s 38(1) does not amount to jurisdictional error. Her Honour held that it was unlikely that Parliament intended that a decision in breach of s 38(1) should result in invalidity.

All three judges of the Court of Appeal were in agreement in holding that s 10(b) of the Charter did not contain an implied right to an effective and independent investigation. The judges held that while s 32 of the Charter enabled the Court to take into account decisions of foreign courts in interpreting similar provisions, differences in legal systems and constitutional settings meant that the Court should do so with caution.

NOTE: This summary is necessarily incomplete. The only authoritative pronouncement of the Court's reasons and conclusions is that contained in the published reasons for judgment.