IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2014 04972

MARIA MATSOUKATIDOU — Plaintiff

v

YARRA RANGES COUNCIL — Defendant

S CI 2014 04973

BETTY MATSOUKATIDOU — Plaintiff

v

YARRA RANGES COUNCIL — Defendant

JUDGE:	Bell J
WHERE HELD:	Melbourne
DATE OF HEARING:	18 & 26 June, 24 July and 21 October 2015
DATE OF JUDGMENT:	28 February 2017 (revised 25 May and 19 October 2017)
CASE MAY BE CITED AS:	*Matsoukatidou v Yarra Ranges Council*
MEDIUM NEUTRAL CITATION:	[2017] VSC 61

CRIMINAL LAW – judicial review – practice and procedure – applications before judge in County Court OF Victoria for orders reinstating struck out appeals from sentences of Magistrates' Court of Victoria – applicants self-represented – whether judge ensured fair trial by giving them due advice and assistance – relationship between that duty and human rights to equality and fair hearing – equal access to justice – *Criminal Procedure Act 2009* (Vic) s 267(3), *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 6(2)(b), 8(3) and 24(1), *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 56.

HUMAN RIGHTS – equality – fair hearing – equal access to justice – daughter and mother sentenced in Magistrates' Court for offences – appeals to County Court struck out – applications made for orders reinstating appeals – applicants self-represented – daughter an invalid pensioner with disability and mother her carer – applications dismissed – human rights applying to hearings in court and tribunals – application and scope of procedural dimension of right to equality – application and scope of right to fair hearing – whether judge made adjustments and accommodations to hearing procedure to ensure daughter did not suffer discrimination by reason of disability – whether judge ensured that daughter and mother effectively participated in and thereby obtained fair hearing – 'equality of arms' – *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 6(2)(b), 8(3) and 24(1).

APPEARANCES:	Counsel	Solicitors

For the plaintiffs	Mr L Howson (18 June 2015) Ms E Tadros (24 July 2015) Ms K Evans with Ms E Tadros (21 October 2015)	Colin Biggers & Paisley
For the defendant	Mr P Lawrie	Goddard Elliott Lawyers
For the Attorney-General	Ms S Fitzgerald (24 July 2015) Ms M Richards SC with Ms S Fitzgerald (21 October 2015)	Victorian Government Solicitor's Office

HIS HONOUR:

INTRODUCTION

1 Yarra Ranges Council charged Maria Matsoukatidou and her mother Betty with committing certain offences against the *Building Act 1993* (Vic) arising out of their failure to secure and demolish their home after an arsonist burnt it down. At the hearing of the charges in the Magistrates' Court of Victoria, they appeared self-represented. Maria was fined without and Betty was fined with conviction.

2 Maria and Betty appealed to the County Court of Victoria under the *Criminal Procedure Act 2009* (Vic) but the appeals were struck out for non-attendance. Believing that they had good explanations, they applied to the County Court for orders reinstating the appeals. While the matters were not urgent, the registry of the court notified them that their applications would be heard the next day.

3 At this hearing also Maria and Betty appeared self-represented. The judge dismissed the applications without explaining to them the procedure that would be followed or the legal test that would be applied. Maria, a disability pensioner with a learning disability, and Betty, her daughter's carer and whose first language is not English, struggled to give their explanations and the judge gave them only limited assistance. The hearing was conducted quickly, confused in relation to important background facts and not fully understood by Maria and Betty.

4 Under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), Maria and Betty now seek judicial review in this court of the orders of the judge. They contend that, in the way that the hearing was conducted, his Honour failed to ensure their human rights to equality under s 8(3) and a fair hearing under s 24(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The case raises important questions about the obligation of courts and tribunals to ensure equal access to justice for self-represented parties in matters of practice and procedure and the conduct of hearings.

5 Pursuant to s 35(1)(a) of the Charter, notice was given that the following questions of law arose in in the proceeding:

(1) Whether the County Court of Victoria was obliged to comply with ss 8 and 24(1) of the Charter in relation to the conduct of the hearing ...

(2) If so, whether that court was obliged … to conduct the hearing in a manner, and if so what manner, that took into due account that the [plaintiffs were] self-represented.

Submissions were made on behalf of Maria and Betty and the Attorney-General in relation to those questions.

CRIMINAL PROCEEDINGS AGAINST MARIA AND BETTY

6 The fire occurred on 26 August 2012. The house that was destroyed was Maria and Betty's home and located at 132 Belgrave-Ferny Creek Road, Tecoma.

7 The orders under the *Building Act* were issued by the Council shortly afterwards on 13 September 2012. An 'emergency' order was issued under s 102 and required Maria and Betty to secure the building. A 'minor' works building order was issued under s 113 and required them to carry out demolition and other work.

8 After Maria and Betty failed to carry out the required works, an officer of Yarra Ranges Council issued a charge and summons dated 13 March 2013 against them specifying two offences under s 118(1) being the offences of failing to comply with the emergency order (charge 1)[1] and failing to comply with the minor works order (charge 2).[2]

9 The damage done to Maria and Betty's home in the fire rendered them homeless and they had to obtain alternative accommodation. When the charges were issued in March 2013, they were living in rented premises at 20 Dean Avenue, Mount Waverly. Because they were no longer living at the Belgrave-Ferny Creek Road address, they could not be served there.

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1 As described in the charge against Betty, this was that:

> 1. The accused on the 16th of September 2012 and continuing being the owner of land situated at 132 Belgrave—Ferny Creek Road Tecoma, in the municipality of Yarra Ranges Council, did commit an offence, namely that she (being a person to whom an Emergency Building Order dated 13th of September 2012 and issued under section 102 of the *Building Act 1993* was directed) did fail to comply with the terms of that Order, contrary to the provisions of section 118 of the *Building Act 1993*)…

Charge 1 against Maria was expressed in the same terms.

2 As described in the charge against Betty, this was that:

> 2. The accused on the 13th of November 2012 and continuing being the owner of land situated at 132 Belgrave—Ferny Creek Road Tecoma, in the municipality of Yarra Ranges Council, did commit an offence, namely that she (being a person to whom a Minor Works Building Oder dated 13th of September 2012 and issued under section 113 of the *Building Act 1993* was directed) did fail to comply with the terms of that Order, contrary to the provisions of section 118 of the *Building Act 1993*.

Charge 2 against Maria was expressed in the same terms.

Copies of the charges were sent to them by mail to the Dean Avenue address, which they received and acted upon.

10 The charges were issued in the Magistrates' Court at Ringwood. There were mention hearings on 4 July and 24 October 2013. Maria and Betty attended but were not represented at these hearings. At a hearing on 15 November 2013 and as recorded in a certified court extract dated 19 December 2013, each of them pleaded guilty to charge 2. Charge 1 was withdrawn. Again, they attended but were not represented at this hearing.

11 The two proceedings were adjourned for a month on the undertaking of Betty to comply with the order. When that was not done, just before Christmas on 19 December 2013 and in the absence of Maria and the presence of Betty (who was not represented), the magistrate imposed penalties upon them both, without conviction in relation to Maria[3] and with conviction in the case of Betty.[4]

12 From the certified extracts of the court, the orders convicting Betty and imposing fines on Maria and Betty were for committing 'a breach of Act 93/126.118.1' (the *Building Act*) which makes it an offence to fail to comply with an emergency order or a building order. From the orders, the magistrate, separately and additionally to imposing penalties for non-

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3 The order in relation to Maria was:

> COURT ORDER
>
> PURSUANT TO S253(2)(B) & (D) OF THE *BUILDING ACT*, THE COURT ORDERS BOTH ACCUSED DEMOLISH AND REMOVE EXISTING FIRE DAMAGED BUILDINGS AND REMNANTS OF BUILDING ON THE LAND (THE BUILDING WORKS) BY 19/1/2014. IF THE ACCUSED FAIL TO CARRY OUT THE WORKS, THE RESPONSIBLE AUTHORITY BY ITS AUTHORIZED AGENTS ARE HEREBY AUTHORIZED BY THE COURT TO ENTER THE LAND AND CARRY OUT THE BUILDING WORKS AND CHARGE ITS EXPENSES TO THE ACCUSED.
>
> A MATSOUKATIDOU (Accused) ordered to pay costs in the amount of $5,965.00 without conviction, fined $4,000.00
>
> But for the plea of guilty the sentence I would have otherwise imposed is AS BEST AS I CAN ESTIMATE, A FINE IN EXCESS OF $10,000.

4 The order in relation to Betty was:

> COURT ORDER
>
> PURSUANT TO S253(2)(B) & (D) OF THE *BUILDING ACT 1993*, THE COURT ORDERS BOTH ACCUSED DEMOLISH AND REMOVE EXISTING FIRE DAMAGED BUILDINGS AND REMNANTS OF BUILDINGS ON THE LAND (THE BUILDING WORKS) BY THE 19/1/2014. IF THE ACCUSED FAIL TO CARRY OUT THE WORKS, THE RESPONSIBLE AUTHORITY BY ITS AUTHORIZED AGENTS ARE HEREBY AUTHORIZED BY THE COURT TO ENTER THE LAND AND CARRY OUT THE BUILDING WORKS AND CHARGE THE EXPENSE TO THE ACCUSED.
>
> B MATSOUKATIDOU (Accused) ordered to pay costs in the amount of $5,965.00 with conviction, fined $10,000.00
>
> But for the plea of guilty the sentence I would have otherwise imposed is AS BEST AS I CAN ESTIMATE, A FINE EXCEEDING $20,000.

compliance with the building order, made orders under s 253(2) of the Act requiring them to demolish the fire damaged building and carry out the other required minor building works and, in default, authorising Yarra Ranges Council to do so.

13 By notice of appeal dated 2 January 2014 (County Court reference AP-14-0002), Betty appealed under s 254(1) of the *Criminal Procedure Act* to the County Court against the conviction and sentence imposed by the magistrate. The notice, which Betty signed, specified an appeal hearing date of 15 April 2014. The notice of appeal specified both offences as 'FAIL TO COMPLY WITH BUILDING ORDER', stating the first so described to be 'Struck out – Withdrawn' and the second (identically so described) as attracting the conviction and penalties set out above. The notice gave Betty's address for personal service as '20 DEAN AVENUE, MOUNT WAVERLEY 3149 VIC' (which was the correct address at time). It specified the reasons for the appeal as 'the appellant is not guilty'.

14 By application also dated 2 January 2014, Maria made application to the magistrate for a rehearing. The application was signed by her and described the offences and penalties in the same terms as the certified extracts already referred to. Maria specified the grounds of the application to be:

> The order was made in the absence of the accused. The reason for the accused's non-attendance was:
> I WASN'T THERE BECAUSE I WAS SICK AND HAVE A MEDICAL CERTIFICATE. AND I WISH TO PLEAD NOT GUILTY AND I CAN'T AFFORD THE COSTS IMPOSED IN THIS MATTER AS I AM A STUDENT.

15 Maria's application for a rehearing was heard in the Magistrate's Court at Ringwood on 20 February 2014. The magistrate refused the application and Maria was ordered to pay $450.00 costs.

16 On the same day, Maria issued two appeals under s 254(1) of the *Criminal Procedure Act* to the County Court. The first (reference AP-14-0332) was an appeal against the orders by way of fine without conviction and costs made by the Magistrate's Court on 19 December. The second (reference AP14-0367) was an appeal against orders by way of refusing her application for rehearing and costs made by that court on 20 February 2014. The notices, which Maria signed, both specified an appeal hearing date of 13 May 2014. The notices also

gave 20 Dean Avenue, Mount Waverley as Maria's address for personal service (which was the correct address at the time).

17 As can be seen, because Betty had appeared at the hearing before the magistrate on 19 December 2013, she appealed directly to the County Court. Because Maria had not so appeared, she first made an application for rehearing to the Magistrates' Court. When that was refused, she too appealed to the County Court. Because Maria and Betty's appeals were issued at separate times, different appeal hearing dates were specified, resulting in the unfortunate and confusing procedural separation of two related appeal proceedings.

18 Betty's evidence to this court was that she was with Maria at the Magistrate's Court at Ringwood on 20 February 2014 when Maria's application for a rehearing was refused and she appealed to the County Court. Because she wanted her own appeal and Maria's appeal to be heard together, she asked the registry officer of the Magistrate's Court to have the appeals listed for hearing in the County Court on the same day, that is, 13 May 2014. She said that the registry officer for the Magistrates' Court telephoned the County Court and arranged for the two appeals to be listed together as 'it's a mother and daughter'. She left the court believing that this would occur.

19 In fact, Betty's appeal was heard and determined in her absence on 15 April 2014, the date specified in the notice of appeal. A judge ordered: 'Appeal struck out – No appearance'. This order was made under s 267(1) of the *Criminal Procedure Act*. The prosecutor at the Council later told her of that order (see below).

20 Under a tenancy agreement dated 29 April 2014 and from 6 May 2014, Maria and Betty moved from the Deans Avenue address to new rented premises at 120 Berwick Springs Promenade, Narre Warren South. According to the evidence given by Betty in this court, they instructed Australia Post to redirect all their mail to their new address.

21 As revealed by a letter dated 9 May 2014 from the solicitors for the Council, Maria and Betty spoke with the Council prosecutor the previous day. They were informed that, in the County Court, Betty's appeal had been struck out in her absence on 15 April 2014 and that Maria's appeals were listed for hearing on 13 May 2014. They requested 'an adjournment to have

[the] matters heard together', apparently thinking that that was still possible. The solicitors for the Council advised them to make that application to the presiding judge.

22 Maria could not attend the hearing on 13 May 2014 due to ill health. Betty so notified the County Court on 12 May 2014. The hearing was therefore adjourned, as it transpired until 3 September 2014. Maria and Betty maintain that they were not notified of the adjourned date. The evidence reveals that Maria and Betty did not notify the County Court of their new address but that Betty had their mail redirected to that address (see above). Her evidence to this court is that she thought that this would be sufficient to ensure that she would receive any court notifications at her new address. In any event, Maria was also ill on 3 September 2014 and could not have attended that hearing.

23 So Maria and Betty did not attend the County Court on 3 September 2014. On that day, Maria's first appeal (reference AP-14-0332) against the orders by way of fine without conviction and costs made by the Magistrate's Court on 19 December was struck out by a judge (with $9,750 costs), also under s 267(1) of the *Criminal Procedure Act*. The sentencing and costs orders made by the Magistrate's Court were confirmed. The evidence does not reveal what if any orders were made in relation to the second appeal. It may still be on foot.

24 As can be seen, Betty's appeal was struck out in her absence on 15 April 2014 and Maria's appeal was struck out in her absence on 3 September 2014. They were informed of the outcome of their appeals but it is not known how and when. It is known that about a week after Maria's appeal was struck out and on 11 September 2014, they both made application under s 267(3) of the *Criminal Procedure Act* to the County Court to set aside the strike-out orders. I infer that Betty completed both of the application forms and without legal assistance. The forms required the applicant to specify 'the grounds that the failure to appear was not due to fault or neglect on the part of the appellant'. Betty wrote: 'We moved house from 20 Dean Av. Mount Waverly- to 120 Berwick Spring Promenade Narre Warren South 3805: from 6 May 2014'. She wrote to the same effect in Maria's application. As regards Betty's application, this was obviously confused, as her appeal had been dismissed in her absence on 15 April 2014 before that move. Her application was clearly made upon the

misconceived basis that the relevant appearance date for both her and Maria was 3 September 2014.

25 In summary:

- Maria and Betty (except as noted below) attended:
  - the mention hearings in the Magistrates' Court at Ringwood on 4 July 2013 and 24 October 2013
  - the initial sentencing hearing at the Magistrates' Court at Ringwood on 15 November 2013
  - the final sentencing hearing in the Magistrates' Court at Ringwood on 19 December 2013 (Betty only)
  - Maria's rehearing application in the Magistrates' Court at Ringwood on 20 February 2014
- Maria and Betty did not attend:
  - the hearing of Betty's appeal in the County Court of Victoria on 15 April 2014 (relevant only to Betty), which Betty thought, at her request, would be heard at the same time as Maria's appeal
  - the hearing of Maria's appeal on 13 May 2014, which was adjourned by the court until 3 September 2014 at Maria's request
  - the adjourned hearing of Maria's appeal on 3 September 2014, of which Maria and Betty received no notice because their mail was not forwarded to their new address as directed

26 On 11 September 2014 Maria and Betty attended at the County Court to issue an application to set aside the strike-out orders made by the judges. Later on that same day, they and the solicitors for the Shire were notified that the applications for setting aside the strike-out orders would be heard and determined the next day by a judge of the court, that is, on less than one day's notice. On 12 September, the judge dismissed the applications. The procedure followed by the judge will be discussed in detail below.

27 It is now necessary to identify the principles under the Charter that govern the hearing and determination of legal proceedings involving self-represented parties, beginning with the general application of the Charter to courts and tribunals.

GENERAL APPLICATION OF CHARTER TO COURTS AND TRIBUNALS

Human rights relating to court and tribunal proceedings

28 The Charter generally applies to 'public authorities' as defined in s 4(1).[5] Section 38(1) obligates a public authority to act compatibly with human rights and give human rights proper consideration when making decisions, subject to contrary legislation (see s 38(2)). Under s 4(1)(j), courts and tribunals are public authorities only when acting in an administrative capacity In that capacity, courts sometimes do but usually do not so act and it is the opposite with tribunals.[6] Under the definition in s 4(1), courts and tribunals are not public authorities and therefore do not have obligations under s 38(1) when acting in a judicial capacity. Accordingly, when the judge in the County Court, acting in a judicial capacity, dismissed Maria and Betty's applications, his Honour did not have an obligation to apply the Charter under s 38(1).

29 However, courts and tribunals have an obligation to apply human rights in the circumstances covered by s 6(2)(b) of the Charter, which provides:

> This Charter applies to-
>
> …
>
> (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; …

30 As can be seen, s 6(2)(b) makes the human rights in the Charter generally apply to courts and tribunals 'to the extent that they have functions under Part 2 and Division 3 of Part 3' of the Charter, which obligation applies even when they act in a judicial capacity. Part 2 contains the human rights that are protected by the Charter (ss 8-27) and also stipulates a demonstrable justification test for determining when (under law) they may be limited (s 7(2)). Division 3

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5 On the concept of a public authority under the Charter, see generally *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009) [88]–[141] (Bell J).

6 On the concept of acting in an administrative capacity under the Charter, see *Sabet v Medical Practitioners Board* (2008) 20 VR 414, 432–3 [119]–[127] (Hollingworth J) and *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 68–71 [283]–[298] (Bell J) ('*Kracke'*).

of pt 3 contains provisions in relation to the interpretation of legislation, including s 32(1). Whether courts and tribunals have human rights obligations under the Charter when acting in a judicial capacity therefore depends on whether, and to what extent, they have 'functions' under pt 2 and div 3 of pt 3, as specified in s 6(2)(b).

31 The scope of the application of s 6(2)(b) to the functions of courts and tribunals under div 3 of pt 3 of the Charter can readily be ascertained because the provisions of that division clearly impose functions upon them. For example, when exercising their judicial and administrative functions, courts and tribunals are regularly required to interpret legislation and the provisions of s 32(1) therefore apply to the performance of those functions.

32 The scope of the application of s 6(2)(b) to the functions of courts and tribunals under pt 2 of the Charter must be ascertained by properly interpreting this provision.[7] As discussed in *Kracke v Mental Health Review Board*[8] by reference to a leading text,[9] there are three possible interpretations of s 6(2)(b): the narrow, the intermediate and the broad. As more fully explained by Tate JA in *Victoria Police Toll Enforcement v Taha*,[10] the narrow interpretation is that the Charter would apply only where the function of the court or tribunal is directly to enforce a specified right; the intermediate interpretation is that the Charter requires a court or tribunal directly to enforce those rights that relate to legal proceedings; the broad interpretation is that the Charter requires a court or tribunal directly to enforce any and all of those rights. After analysing those three possible interpretations, it was concluded in *Kracke* that the intermediate interpretation is to be preferred. Therefore:

> the functions under Pt 2 referred to in s 6(2)(b) are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings.[11]

As submitted on behalf of Maria and Betty and the Attorney-General, this approach appears to be well accepted.[12]

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7 *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [51] (Neave JA and Williams AJA) ('*De Simone*'), citing *Kortel v Mirik and Mirik* (2008) 28 VAR 405, 408–9 [12] (Bell J) ('*Kortel*').

8 (2009) 29 VAR 1, 61–4 [241]–[254] (Bell J).

9 Carolyn Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis Butterworths, 2008) 12–13.

10 [2013] VSCA 37 (4 March 2013) [246] (Nettle and Osborn JJA not deciding) ('*Taha*').

11 (2009) 29 VAR 1, 63 [250] (Bell J).

12 See *De Simone* (2009) 25 VR 237, 247 [52] (Neave JA and Williams AJA), cited with approval in *Slaveski v Smith* (2012) 34 VR 206, 221 [54] n 27 (Warren CJ, Nettle and Redlich JJA) ('*Slaveski*'); *DPP v A Mokbel (Orbital & Quills – Ruling No 1)* [2010] VSC 331 (5 August 2010) [159] (Whelan J); *Secretary, Department of*

Specific rights in issue

33 In the present case, Maria and Betty rely upon the right to equality in s 8(3) and the right to a fair hearing in s 24(1) of the Charter. It is necessary to determine whether, under s 6(2)(b) as so interpreted, a judge in the County Court is required to apply those rights according to their terms when hearing and determining legal proceedings. As the right in s 24(1) applies to a person charged with a criminal offence, a separate question arises as to whether the obligation in s 24(1) applied to the judge in respect of Maria and Betty's applications to set aside the strike-out orders (see below).

Fair hearing: s 24(1)

34 Taking the relevant rights in reverse order, consistently with the intermediate approach to the interpretation of s 6(2)(b) of the Charter, courts and tribunals in Victoria must apply the right to a fair hearing in s 24 (and s 25) according to its terms in proceedings to which the right applies. So held *De Simone v Bevnol Constructions & Developments Pty Ltd,*[13] where Neave JA and Williams AJA stated that the fair hearing rights in ss 24 and 25 'apply directly to courts and tribunals, when they exercise their functions'.[14] In *DPP v A Mokbel (Orbital & Quills – Ruling No 1*),[15] Whelan J followed *Kracke* to hold that the Charter applies to this court in a criminal proceeding because its functions include providing a fair hearing under ss 24 and 25.[16] In *Secretary, Department of Human Services v Sanding*[17] I held that the Children's Court of Victoria was obligated by s 6(2)(b) to apply s 24(1):[18]

> the functions of courts and tribunals under Pt 2 referred to in s 6(2)(b) are the functions of applying and giving effect to those human rights which relate to court

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Human Services v Sanding (2011) 36 VR 221, 258–9 [166] (Bell J); *Taha* [2013] VSCA 37 (4 March 2013) [248] (Tate JA; Nettle and Osborn JJA not deciding); *DPP v SL* [2016] VSC 714 (29 November 2016) [6] (Bell J) ('*SL'*); *Application for bail by HL* [2016] VSC 750 (13 December 2016) [72] (Elliott J) ('*HL'*); *DPP v SE* [2017] VSC 13 (31 January 2017) [12] (Bell J) ('*SE'*). In *Momcilovic v The Queen*, Crennan and Kiefel JJ said: 'Some of the rights identified and described in Pt 2 [of the Charter] may require courts or tribunals to ensure that processes are complied with, for example to ensure a fair hearing [under s 24], and that matters guaranteed by the Charter with respect to a criminal trial are provided [s 25]' ((2001) 245 CLR 1, 204 [525]). In *Taha*, Tate JA said that these comments 'appear to implicitly support the intermediate approach' ([2013] VSCA 37 (4 March 2013) [248] n 281).

13 (2009) 25 VR 237 (Neave JA and Williams AJA).

14 Ibid 247 [52], cited with approval in *Slaveski* (2012) 34 VR 206, 221 [54] n 27 (Warren CJ, Nettle and Redlich JJA).

15 [2010] VSC 331 (5 August 2010).

16 Ibid [159].

17 (2011) 36 VR 221.

18 Ibid 258–9 [166] (footnote included).

> and tribunal proceedings. By excluding courts and tribunals from the definition of a public authority (except when acting administratively), while at the same time making the Charter apply directly to them in respect of the specified functions, the legislation has preserved the substantive legal foundation of the jurisdiction of courts and tribunals, while making it obligatory for them to act compatibly with the Charter in respect of those matters which are within their own direct control, including the conduct of proceedings in accordance with the right to a fair hearing under s 24(1) of the Charter.[19]

In *Taha*, Tate JA held that 'the right to a fair hearing relates to the core functions courts perform and falls within the intermediate construction'.[20] In one sentencing case and two bail cases in this court concerning children,[21] an element of the right to a fair hearing (the right of children in s 25(3) to age-appropriate and rehabilitation-focused criminal procedures) has been applied under s 6(2)(b.)

35 Therefore, under s 6(2)(b) of the Charter, a judge in the County Court is required to apply the right to a fair hearing in s 24(1) according to its terms when deciding a charge brought against a person charged with a criminal offence. As already noted, a separate question arises as to whether the obligation in s 24(1) applied to the judge in respect of Maria and Betty's applications to set aside the strike-out orders (see below).

Equality: s 8(3)

36 I now turn to the right to equality in s 8(3) as to which two issues arise in the present case. The first concerns the general question of how the 'functions' referred to in s 6(2)(b) are to be identified. The second concerns the application of s 6(2)(b) to the right in s 8(3).

Identifying 'functions' under s 6(2)(b)

37 We have seen that the 'functions' of courts and tribunals under pt 2 of the Charter specified in s 6(2)(b) are 'the functions of applying or enforcing those human rights that relate to court and tribunal proceedings'.[22] As submitted on behalf of the Attorney-General, it may conveniently be said that those functions may be identified by reference to a list of rights

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19 On the same analysis, other human rights may be applicable because they also engage court and tribunal proceedings, such as equality before the law: see *Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286, 318 [142] (Bell J) ('*Lifestyle Communities (No 3)*').

20 [2013] VSCA 37 (4 March 2013) [248] (Nettle and Osborn JJA not deciding) (her Honour found it otherwise unnecessary to determine if the intermediate interpretation was correct).

21 *SL* [2016] VSC 714 (29 November 2016) [4], [6] (Bell J) (sentencing); *HL* [2016] VSC 750 (13 December 2016) [72] (Elliott J) (bail); *SE* [2017] VSC 13 (31 January 2017) [12], [15] (Bell J) (bail).

22 *Kracke* (2009) 29 VAR 1, 63 [250] (Bell J).

approach or a functional approach. The list of rights approach focusses on the functions that may be derived from the nature of the rights that are specified in pt 2 of the Charter while the functional approach focusses upon the functions that are performed by a court or tribunal in legal proceedings in a given case.

38 In *Kracke*, I adopted the list of rights approach and identified a number of human rights in pt 2 of the Charter as being human rights which, by their nature, related to legal proceedings conducted by courts and tribunals.[23] I there concluded that, under s 6(2)(b), courts and tribunals were obligated to apply those human rights. However, the list was not intended to be and has not been immutable. For example, the right in s 15 of the Charter to freedom of expression was not included in the list yet, correctly with respect, it has been applied in two cases in this court concerning suppression orders.[24] Further, the right in s 8(3) to equality was not included in the list yet it has recently been applied in the procedural respect in two of the three cases I mentioned concerning children.[25]

39 That being said, I accept the submission of the Attorney-General that a limitation of the list of rights approach is the risk of under and over-inclusion. Moreover, the relevance of a human right to a particular court and tribunal proceeding may only become apparent when the issues in the proceeding have been properly examined. Therefore, when applying s 6(2)(b), it is always necessary to examine whether, in the given case, the court or tribunal is exercising functions involving the application of human rights that 'relate to court or tribunal proceedings'.[26]

Procedural implications of right to equality in s 8(3) for courts and tribunals

40 The second issue is whether the right to equality in s 8(3) of the Charter comes within s 6(2)(b) such that it must be applied in procedural respects in court and tribunal proceedings. It was submitted on behalf of Maria and Betty and the Attorney-General that it must so be applied. I accept these submissions. While s 8(3) actually specifies a number of closely

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23 Ibid [253].

24 *X v General Television Corporation Pty Ltd* [2008] VSC 344 (8 September 2008) [34]–[45] (Vickery J); *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 259 [38] (Warren CJ and Byrne AJA).

25 *SL* [2016] VSC 714 (29 November 2016) [4], [6] (Bell J) (sentencing); *SE* [2017] VSC 13 (31 January 2017) [12], [15] (Bell J) (bail).

26 *Kracke* (2009) 29 VAR 1, 63 [250] (Bell J).

related equality rights between which it will later be necessary to distinguish, for present purposes it is sufficient to examine the provision in cognate terms.

41 In the present case, the issue arises in relation to the way in which the judge of the County Court conducted the hearing of Maria and Betty's applications. As an alternative to s 24(1), Maria and Betty contend that they did not have equality under s 8(3) because the judge did not conduct the hearing in a way that adequately took into account that that they were self-represented. Maria made separate submissions in relation to s 8(3) based on her disability. This raises the issue of whether the right in s 8(3) applies in relation to the procedures adopted by courts and tribunals, especially in hearings. I have discussed this and related issues previously.

42 In the early case of *Kortel v Mirik and Mirik,*[27] I raised the question whether the equality right in s 8, 'in so far as it may have procedural implications', had application to courts and tribunals acting judicially by reason of s 6(2)(b) of the Charter. That was a case, like the present, in which parties were (initially) self-represented. It was not necessary to resolve the issue as those parties became represented under the *pro bono* scheme operated by the Victorian Bar, as have Maria and Betty in this court in the present case, with the court's great appreciation.

43 Then in *Kracke* I examined the operation of s 6(2)(b) generally and identified a list of rights to which it applied. I expressly excluded the right specified in s 8(3) from the scope of s 6(2)(b) because it related 'to the rights possessed by individuals rather than to court and tribunal proceedings'.[28] I was there concerned with the substantive and not the procedural operation of s 8(3), for that is what was in issue in *Kracke*.

44 Finally, in *Lifestyle Communities Ltd (No 3)*[29] I clarified what I stated in *Kracke* in this regard. I held that that the equality right (see especially s 8(3)) applied to the procedures of courts and tribunals. Referring to both *Kortel* and *Kracke*, I wrote:

> In *Kortel*...,[30] I raised the question whether the equality rights in s 8, 'in so far as [they] may have procedural implications', applied to courts acting judicially by

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27 (2008) 28 VAR 405, 407 [5].
28 (2009) 29 VAR 1, 63 [253].
29 (2009) 31 VAR 286.

> reason of s 6(2)(b) of the [Charter]. In *Kracke*, I held that human rights relating to court and tribunal proceedings in judicial cases were applicable under that provision.[31] I excluded the right to equality before the law in s 8 from that category. I had there in mind the substantive application of the whole of s 8 to courts and tribunals and the law they administer. On the analysis in the present case, the equality rights in s 8 do have 'procedural implications', for they impact on the way people can be treated in court and tribunal proceedings. To that extent, following the principles in *Kracke* on this point, under s 6(2)(b) those rights are applicable to courts and tribunals in judicial cases, thus supplementing the right to a fair hearing in ss 24 and 25. Of course, the [Charter] applies generally to the administration of courts and tribunals and when they are acting in an administrative capacity in the public law sense.[32]

I maintain those views,[33] which I applied in the sentencing case and one of the two bail cases concerning children that I mentioned above.[34]

45 Thus, on the proper interpretation of s 6(2)(b) of the Charter, courts and tribunals are bound to apply the human right specified in s 8(3) because, in procedural respects, the elements of the equality right that it enshrines relate to court and tribunals proceedings, including the conduct of hearings. Therefore, in relation to proceedings and hearings, courts and tribunals are obliged by s 8(3) to ensure that every person is equal before the law and given the equal protection of the law without discrimination and equal and effective protection of the law against discrimination. Under s 8(4), measures taken by courts and tribunals to accommodate the procedural needs of persons disadvantaged because of discrimination do not themselves constitute discrimination. This general obligation under s 6(2)(b) to apply s 8(3) in procedural respects is in addition to any obligation of a court or tribunal under s 24 and the common law to ensure a fair trial[35] and applies in relation to the conduct of proceedings and hearings by court and tribunals where (persons who are) parties are self-represented.[36]

46 Given that s 6(2)(b) of the Charter makes s 8(3) (in procedural respects) and s 24(1) generally applicable according to their terms in court and tribunal proceedings, including hearings, an issue arises as to whether, in Maria and Betty's specific cases, ss 8(3) and 24(1) required the judge of the County Court to ensure those human rights. Determination of this issue involves

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30 (2008) 28 VAR 405, 407 [5].

31 (2009) 29 VAR 1, 63 [250], [253].

32 *Lifestyle Communities (No 3)* (2009) 31 VAR 286, 318 [142].

33 In *Taha*, Tate JA said that it was arguable that these views were correct but it was unnecessary to determine the question in that case: [2013] VSCA 37 (4 March 2013) [249].

34 *SL* [2016] VSC 714 (29 November 2016) [4], [6] (sentencing); *SE* [2017] VSC 13 (31 January 2017) [12], [15] (bail).

35 See generally *Tomasevic v Travaglini* (2007) 17 VR 100, 129–130 [138]–[142] (Bell J) ('*Tomasevic*').

36 When applying this general proposition, it is necessary to distinguish between the different elements of the right specified in s 8(3) (see below).

consideration of whether, according to their terms, ss 8(3) and 24(1) specifically applied in those proceedings.

APPLICATION OF SPECIFIC RIGHTS IN CHARTER

Different elements of the right to equality in s 8(3)

47 Here are sub-ss 8(3) and (4) of the Charter:

> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
>
> (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Section 4(1) of the Charter defines 'discrimination' as follows:

> ***discrimination***, in relation to a person, means discrimination (within the meaning of the **Equal Opportunity Act 2010**) on the basis of an attribute set out in section 6 of that Act;
>
> **Note**
>
> Section 6 of the **Equal Opportunity Act 2010** lists a number of attributes in respect of which discrimination is prohibited, including age; disability; political belief or activity; race; religious belief or activity; sex; and sexual orientation.

It can be seen that these and indeed other[37] provisions of the Charter do not adopt an unlimited concept of discrimination but rather a definition of discrimination that means discrimination within the meaning of the *Equal Opportunity Act 2010* (Vic) on the basis of an attribute set out in s 6 of that Act. 'Discrimination' is relevantly defined in s 7(1)(a) to mean 'direct or indirect discrimination on the basis of an attribute', while s 8(1) defines 'direct discrimination' and s 9(1) defines 'indirect discrimination'. As the note to s 4(1) of the Charter indicates, s 6 of the *Equal Opportunity Act* sets out a number of attributes, including '(e) disability'. The definition in s 4(1) incorporates by reference into the Charter the specified (and not other) provisions of the *Equal Opportunity Act*. So incorporated, they operate according to their own terms to give protection against discrimination on the basis of an attribute within the free-standing legislative framework of the Charter (including under s 8(3)) whether or not the discrimination is unlawful within the separate legislative framework of the *Equal Opportunity Act.*

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37 See eg s 25(2).

48 In the present case, it is important to note that, when applying s 8(3), a distinction must be drawn between Maria and Betty. In regard to Maria, the conduct of the hearing engaged the attribute of 'disability' set out in s 6(e) of the *Equal Opportunity Act*, for she suffered from a learning disability. [38] Her disadvantage in the hearing was not due only to her being self-represented but was also substantially due to her having a disability. In regard to Betty, the conduct of the hearing by the judge of the County Court did not engage such an attribute. Her disadvantage in the hearing was due entirely to her being self-represented. Therefore the judge was obliged to ensure that the hearing was conducted so that both Maria and Betty were equal before the law (the first element of s 8(3)) and also that Maria was protected by the law without and against discrimination (the second and third elements of s 8(3)).

49 The Attorney-General submitted that the judge of the County Court was obliged by s 8(3) to give positive assistance to Maria and Betty to adjust and accommodate for the disadvantage of their position as self-represented parties. In scope, this obligation equated to the obligation of the judge under the common law as explained in *Tomasevic v Travaglini.*[39] This submission was connected with the submission of the Attorney-General that s 24(1) did not apply to Maria and Betty's applications to set aside the strike-out orders as they did not involve the hearing and determination of criminal charges. Maria and Betty supported the submissions of the Attorney-General in relation to s 8(3) but not in relation to s 24(1), which they submitted was applicable.

50 It is here that it is necessary to pay regard to the different elements of the equality right in s 8(3). As regards the first element (equality before the law), I do not accept the submission made on behalf of Maria and Betty and the Attorney-General, highly attractive as the submissions were, that this element of the right has a substantive operation. As regards the second and third elements (equal protection of the law without discrimination and to equal and effective protection against discrimination), I accept the submissions made on their behalf that these elements of the right, in procedural respects, have a substantive operation and apply to courts and tribunals, but only in respect of discrimination as defined.

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38 Under para (d)(ii) of the definition of 'disability' in s 4(1) of the *Equal Opportunity Act,* there is included 'a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder'. It was common ground in the present case that this applied to Maria's disability.

39 (2007) 17 VR 100, 129–30 [139]–[142] (Bell J).

51 Drawing upon art 26 of the *International Covenant on Civil and Political Rights*[40] ('ICCPR') on which s 8(3) of the Charter was modelled and directly relevant international sources, in *Lifestyle Communities (No 3)*[41] I analysed the scope and purpose of the human right to equality generally and, importantly for present purposes, as specifically enacted in s 8(3) of the Charter. It is not necessary to repeat that analysis, which I here adopt. I particularly drew attention to certain distinctions between the three elements[42] of the human right to equality as so enacted which are relevant in the present case.

52 In relation to the first element of s 8(3), which requires every person to be equal before the law, I stated:

> Equality before the law is the principle of the general application of the law and the equal treatment of all persons who come before the law, whether that is before a court or tribunal applying the law or before someone administering the law. It is directed to the application and administration of the law, not to the content of the law. Equality before the law is procedural, not substantive, in character. It gives no entitlement to laws of a particular content. It is a principle of universal application. Unlike the other components of s 8(3), it is not limited to unequal treatment that constitutes discrimination. Equality before the law proscribes arbitrary treatment, that is, treatment devoid of objective justification, in the application and administration of the law.
>
> The human right to equality before the law requires the tribunal to apply and administer the laws within its responsibility equally towards every person. In doing so it must not treat people arbitrarily (without objective justification).[43]

53 In relation to the second and third elements of s 8(3), which require every person to have the equal protection of the law without discrimination and equal and effective protection against discrimination, I stated:

> The human right to equal protection of the law without and against discrimination expresses the fundamental value of substantive equality in the content and operation of the law. It protects the interests that all people have, as of right, in being equally protected by the law from discrimination, including protection from laws that are discriminatory in nature.
>
> The principle negatively prohibits making discriminatory laws, for they subject people to, rather than protect people from, discrimination; it also positively requires people to be equally protected from discrimination in law or fact, for the principle goes further than mere formal equality to encompass substantive equality in the content, application and operation of the law in all respects.
>
> By discrimination is meant making distinctions in the content and administration of the law within the meaning of 'discrimination' in the *Equal Opportunity Act*. The right to equal protection of the law without and against discrimination is not breached by legal or administrative distinctions which, under the test in s 7(2), are regarded as reasonable, objective, for legitimate purposes and proportionate to those purposes.

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40 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

41 (2009) 31 VAR 286, 310–46 [105]–[303].

42 On those three elements, see also *Taha* [2013] VSCA 37 (4 March 2013) [209] (Tate JA).

43 *Lifestyle Communities (No 3)* (2009) 31 VAR 286, 344 [285]–[286].

> Treating people equally in substance can require the equal treatment of people who are alike and the unequal treatment of people who are unalike. Therefore, when necessary, it is not discriminatory to take affirmative action to redress the historical or entrenched disadvantage suffered by some people and groups.[44]

54 In so interpreting s 8(3) of the Charter, I took into account the difference in scope of art 26 of the ICCPR[45] on which s 8(3) was broadly based as compared with the narrower scope of s 8(3) as enacted:

> In s 8(3) of the [Charter], the rights to equality before the law and to equal protection of the law without and against discrimination reflect the same rights in art 26 of the ICCPR ... I interpret s 8(3) in that light and give those rights a corresponding scope and operation, with three qualifications.
>
> The first qualification concerns equal protection of the law without and against discrimination. As I have already noted, s 8(3) is expressed in terms of discrimination within the meaning of the *Equal Opportunity Act*. The protection in art 26 of the ICCPR is expressed in terms of discrimination as such (in respect of equal protection of the law) and discrimination on the enumerated and other grounds (in respect of equal protection against discrimination). The inclusion in the [Charter] of a closed definition of 'discrimination' has the effect of limiting somewhat the relative scope and operation of s 8(3) in this respect, such that the focus must be on discrimination as defined, not on discrimination as it is more widely expressed in art 26.[46]

The other qualifications are not here relevant.

55 I have considered in the present case whether the first element of the right to equality in s 8(3) of the Charter has a substantive operation applying in relation to the procedures followed and hearings conducted by courts and tribunals even if it does not generally have that kind of operation. In s 24(1), the legislature did not enact the right in the first sentence of art 14(1) of the ICCPR that '[a]ll persons shall be equal before the courts and tribunals', which encompasses substantive equality.[47] It might be suggested that the legislature did not do so because the first element of the right to equality in s 8(3) was intended to have that substantive operation in its specific application to courts and tribunals even if it did not generally do so. In this connection, the submissions of the Attorney-General relied upon *General Comment 18 – Non-discrimination* of the Human Rights Committee, which explains the right to equality before the courts and tribunals in the first sentence of art 14(1) as a specific application of the broader right to equality and non-discrimination in art 26.[48]

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44 Ibid 344 [287]–[290].

45 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

46 *Lifestyle Communities (No 3)* (2009) 31 VAR 286, 322 [162]–[163]; this analysis of s 8(3) of the Charter was adopted by Garde J in *Kuyken v Chief Commissioner of Police* [2015] VSC 204 (14 May 2015) [33]–[35].

47 Human Rights Committee, *General Comment 18 - Non-discrimination*, UN Doc HRI/GEN/1/Rev 1 (1994).

48 Ibid 26 [3].

56 This approach to interpreting the first element of the right in s 8(3) of the Charter has high purposive attractions. However, it requires a shifting interpretation of the right, namely that it has a substantive operation in relation to court and tribunal proceedings and an operation based on non-arbitrariness in relation to other cases. This is not supported by the extrinsic materials. It would be inconsistent with both the express exclusion of the first sentence of art 14(1) of the ICCPR from s 24(1) and the express confining of the substantive operation of the right in the second and third elements in s 8(3) to cases involving discrimination as defined under the *Equal Opportunity Act*.[49] The better view is that the legislature intended that the right to equality before courts and tribunals in the first sentence of art 14(1) of the ICCPR was to be subsumed in the cognate right in s 24(1) to have civil and criminal proceedings decided by them competently, independently and impartially after fair and public hearings.

57 As so understood, the different elements of the equality right specified in s 8(3) have application under s 6(2)(b) in relation to the position of self-represented persons in courts and tribunals. But the content of the obligation of the court or tribunal must take account of the specific terms in which the elements of the right have been enacted.

58 In its application under s 6(2)(b) of the Charter, the first element of the equality right in s 8(3) – equality before the law - specifies a fundamental obligation to avoid arbitrary treatment (treatment that is devoid of objective justification) in the application and administration of the law in relation to court and tribunal proceedings. Procedures and hearing practices that are based on distinctions between parties or other participants which are arbitrary in the sense of lacking objective justification run up against the proper application of this right (subject to s 7(2)). This element of the right applied to the judge of the County Court in relation to the hearing of both Maria and Betty's applications. But equality before the law under s 8(3) does not impose an obligation to ensure substantive equality, which is what they really needed and a more enlightened concept of equality really demanded.

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[49] For the sake of clarity, I was not suggesting in *Kracke* ((2009) 29 VAR 1, 86 [374]) that the legislature had transferred the content of the first sentence of art 14(1) of the ICCPR to s 8(3) of the Charter. I was pointing out that the subject of equality was dealt with in s 8(3) of the Charter, without dealing with the content of the elements enacted, which I dealt with subsequently in *Lifestyle Communities (No 3)* (see above).

59 The limitations in the formal nature of the first element of the right to equality in s 8(3) of the Charter are illustrated by Mara and Betty's cases. As it happens, Maria has a disability protected by the limited definition of discrimination that is incorporated by reference. Fortunately, her equality rights are fully protected in the circumstances by the other elements of the right (the third is pertinent). The circumstances of Maria's mother, Betty, are otherwise identical and, it might be thought, demand a like response under the human right to equality. Unfortunately, she is not protected by the other elements of the right in s 8(3) because of the limited definition of discrimination. The inconsistent manner in which the substantive aspect of the equality right in s 8(3) applies in the facts of this case thus gives rise to cause for reflection.

60 Contrary to the submissions made for Maria and Betty and the Attorney-General, I cannot accept that, in its application to the position of self-represented persons, the obligation of courts and tribunals conducting hearings under the first element of the right to equality in s 8(3) equates to their obligation under the common law as explained in *Tomasevic*. The common law obligation as so stated sets a significantly higher standard than not treating self-represented persons arbitrarily. The obligation stated in *Tomasevic* is generally encompassed in the right to a fair hearing in s 24(1) of the Charter, which is applied through the principle of equality of arms, not the first element in s 8(3). Neither does the first element of the right in s 8(3) equate to the obligation in s 24(1) to ensure a fair hearing, which likewise is a much stronger obligation than not treating self-represented persons arbitrarily. As the judge of the County Court did not act arbitrarily towards Maria or Betty when conducting the hearing, their human right to equality was not breached in this respect (see below).[50]

61 The second and third elements of the right in s 8(3) of the Charter guarantee to every person the equal protection of the law without discrimination and equal and effective protection against discrimination and require substantive equality in the content and *operation* of the law. These elements of s 8(3) applied to the judge of the County Court in relation to Maria's but not Betty's hearing as Maria had a relevant disability and Betty did not. It is the third element – ensuring equal and effective protection against discrimination – that is pertinent.

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[50] Giving only one day's notice of hearing to an applicant for an order, if selective, might arguably be arbitrary and contrary to equality before the law under s 8(3), but this was not explored in the present case.

Where a relevant disability of a self-represented person substantially contributes to their participatory disadvantage, as occurred with Maria in the present case, the court or tribunal conducting the hearing is positively obliged to make reasonable adjustments and accommodations. Failing to do so would constitute 'discrimination' and specifically 'indirect discrimination' under ss 7(1) and 9(1) of the *Equal Opportunity Act*[51] and therefore would represent a failure to ensure equal and effective protection against discrimination as required by s 8(3) of the Charter. In almost all circumstances, the steps referred to in *Tomasevic* would be sufficient. In the present case, the judge of the County Court conducting the hearing failed to make reasonable adjustments and accommodations in respect of Maria's disability. As there was no justification for so failing (see s 7(2)), her human right to equality in this respect was breached.

A 'person charged with a criminal offence' under right to fair hearing in 24(1)

62 This is s 24(1) of the Charter:

> 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.

The matter in issue is whether the right in s 24(1) applied to Maria and Betty in respect of the hearing and determination of their applications under 267(3) of the *Criminal Procedure Act* to set aside the orders made by the judge of the County Court to strike out their appeals against the sentencing orders of the Magistrates' Court.

63 In Victoria, the *Civil Procedure Act 2010* (Vic) governs civil procedure and the *Criminal Procedure Act* governs criminal procedure. The summary charges brought against Maria and Betty in the Magistrates' Court were brought pursuant to the procedure specified in the latter Act (s 6(1)), as were the appeals, which I will consider in more detail.

64 Part 6.1 of the *Criminal Procedure Act* makes provision for appeals from the Magistrates' Court of Victoria to the County Court of Victoria in criminal cases. Under s 254(1), an appeal may be brought by 'a person convicted of an offence by the Magistrates' Court in a

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[51] It is difficult to see how failing to made adjustments and accommodations of the kind required in Maria's case could be ever be reasonable under s 9(2) and (3) of the *Equal Opportunity Act.*

[relevant] criminal proceeding', including persons found guilty but not convicted of an offence.[52] Such an appeal may be brought against both conviction and sentence or against sentence alone (s 254(1)(a) and (b)). If the appellant is not in custody because of the sentence appealed from, the appeal operates as a stay of sentence, but not of any conviction imposed in respect of the sentence (s 264(1)). If the appellant is in custody because of the sentence appealed from, the appeal operates as a stay of sentence (not conviction) if bail is granted (s 264(2)(b)). An appellant in custody because of the sentence appealed from may apply for bail from the Magistrates' Court (s 265(1)). An appeal is conducted by way of rehearing and the appellant is not bound by the plea entered in the Magistrates' Court (s 256(1)). As now to be seen, whatever was the position of the Magistrates' Court at first instance, a judge of the County Court must therefore determine the appeal upon the evidence admitted in the appeal proceeding and has jurisdiction to determine whether, on that evidence, the appellant is guilty or not guilty of the charge and, if guilty, what the sentence should be.

65 It has been observed that '[t]here are different meanings to be attached to the word "rehearing".'[53] In *X v Secretary, Department of Human Services*,[54] Gillard J discussed different forms of appeal to which the word 'rehearing' could be applied:

> There are at least three types of appeal which could be described as a re-hearing. The first is where an appeal court makes its own decision on the evidence before the court below. Secondly, an appeal by way of re-hearing based upon the evidence given in the court of first instance supplemented by further evidence and finally, an appeal by way of hearing de novo (sometimes described as a re-hearing de novo).[55]

The third form of rehearing to which his Honour refers — the 'hearing de novo' — describes an appeal in which 'the court on the appeal is not bound by anything that occurred at the prior hearing and considers the matter afresh.'[56] An appeal will be heard de novo if it is explicitly defined as such in the relevant legislation, or if the legislation describes it as a 'rehearing' but a correct construction requires that it be heard de novo.[57]

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52 See the definition of 'conviction' in s 3 of the *Criminal Procedure Act.*

53 *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, 620 (Mason J), quoting *Powell* v *Streatham Manor Nursing Home* [1935] AC 243, 249 (Viscount Sankey LC).

54 [2003] VSC 140 (12 May 2013) (Gillard J).

55 Ibid [57].

56 Ibid [58]; *R v Pilgrim* (1870) LR 6 QB 89, 95 (Lush J).

57 *X v Secretary, Department of Human Services* [2003] VSC 140 (12 May 2013) [59] (Gillard J); see also Law Reform Committee, Parliament of Victoria, *De Novo Appeals to the County Court* (2006) 8.

66 Historically, appeals by way of rehearing from the courts of petty sessions to the courts of general sessions were treated as appeals in the form of a hearing de novo.[58] These courts are the equivalent of the modern day Magistrates' Court and County Court, respectively.[59]

67 Prior to the *Criminal Procedure Act*, appeals from the Magistrates' Court to the County Court were governed by ss 83–6 of the *Magistrates' Court Act 1989* (Vic). Section 85 of that Act required such appeals to be conducted as a 'rehearing'. It is well-established that the word 'rehearing' in this provision meant that such appeals were to be heard 'de novo'.[60] Thus, in *DPP v His Honour Judge Fricke*,[61] Fullagar, Tadgell and JD Phillips JJ held:

> By virtue of s 85 of the *Magistrates' Court Act*, an appeal under s 83(1) to the County Court 'must be conducted as a rehearing'. The word 'rehearing' is here used in the sense of a hearing de novo.[62]

The meaning of this proposition was explained by Hargrave J who stated in *Candolim Pty Ltd v Garrett*[63] that the effect of s 85 of the *Magistrates' Court Act* was 'that everything which happened in the Magistrates' Court [was] to be disregarded on the hearing of the County Court appeal,'[64] which was approved in *Quick v Creanor; Taylor v Wilkins*[65] by the Court of Appeal (Maxwell P, Beach and Kaye JJA).

68 An issue in *Quick* was the extent of the powers of the County Court on appeal when compared with the powers of the Magistrates Court at first instance. As we have seen, criminal appeals from the Magistrates' Court to the County Court are now governed by ss 254 and 256 of the *Criminal Procedure Act*. *Quick* made clear that these provisions are 'relatively the same' as ss 85 and 86 of the *Magistrates' Court*:[66]

> Plainly enough, that is a provision [s 254] of very broad scope, intended to place the County Court in the same position as the Magistrates' Court and with complete control over the criminal proceedings before it.[67] It follows that, on an appeal from the Magistrates' Court, the County Court can exercise the power of reinstatement just as the Magistrates' Court could have done.

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58 *Sweeney v Fitzhardinge* (1906) 4 CLR 716, 729 (Griffith CJ), quoting *R v Pilgrim* (1870) LR 6 QB 89, 95 (Lush J).

59 *X v Secretary, Department of Human Services* [2003] VSC 140 (12 May 2013) [59] (Gillard J).

60 *DPP v His Honour Judge Fricke* [1993] 1 VR 369, 374 (Fullagar, Tadgell and JD Phillips JJ); *Neill v County Court of Victoria* (2003) 40 MVR 255, 272 [19] (Redlich J); *Candolim Pty Ltd v Garrett* [2005] VSC 270 (5 August 2005) [30] (Hargrave J); *DPP v Shoan* (2007) 176 A Crim R 457, 462 [20] (Buchanan JA). See also Law Reform Committee, Parliament of Victoria, *De Novo Appeals to the County Court* (2006).

61 *DPP v His Honour Judge Fricke* [1993] 1 VR 369.

62 Ibid 374.

63 [2005] VSC 270 (5 August 2005).

64 Ibid [30].

65 [2015] VSCA 273 (30 September 2015) ('*Quick*').

66 Ibid [18]–[20].

67 An equivalent provision equips the Victorian Civil and Administrative Tribunal ('VCAT') in its merits review jurisdiction with all of the powers of the primary decision-maker: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51(1).

> This conclusion is reinforced by the nature of an appeal to the County Court. Section 256(1) of the [*Criminal Procedure Act*] provides that an appeal under s 254 must be conducted 'as a re-hearing'. That provision, and its predecessors in the *Magistrates' Court Act* and the *Justices Act*, have long been understood as requiring the County Court to conduct a hearing de novo. In other words, the Court starts afresh. Thus, for example, amendments made to a charge by the Magistrates' Court are of no effect before the County Court. As Hargrave J correctly stated in *Candolim Pty Ltd v Garrett,*[68] the effect of ss 85 and 86 of the *Magistrates' Court Act 1971* (which are relevantly the same as s 256(1) and s 256(2)(a) of the [*Criminal Procedure Act*]), is '… that everything which happened in the Magistrates' Court is to be disregarded on the hearing of the County Court appeal'.[69]
>
> That aspect of the process of appeal, from the Magistrates' Court to the County Court, was made abundantly plain by Beach J in *Helfenbaum v Sattler & Anor*,[70] in which his Honour said:
>
> > I think that the correct view of the matter is that when the hearing of the appeal commences, and it must be borne in mind that it is a hearing 'de novo', the order of the Magistrates' Court should be either formally set aside or at the least be deemed to be set aside. I say that for the reason that as the hearing is a hearing de novo and regardless of the outcome the order the Magistrates' Court must be set aside there should no longer be any order on foot in respect of the matter at the time the hearing of the appeal commences before the County Court.[71]

Accordingly, appeals from the Magistrates' Court to the County Court under the *Criminal Procedure Act* have been found to be in the form of a hearing de novo.[72]

69 As an appeal from the Magistrates' Court to the County Court under pt 6.1 of the *Criminal Procedure Act* is an appeal de novo, it is appropriate to describe the appellant as a person charged with a criminal offence for the purposes of s 24(1) of the Charter. As I conclude below, it is but a short step to describe an applicant to set aside an order striking out an appeal under the same appellant process in the same way.

70 Under s 267(1) of the *Criminal Procedure Act*, a judge of the County Court has discretion in cases where the appellant fails to appear at the time listed for the hearing of an appeal. The appeal may be struck out or the proceeding may be adjourned on appropriate terms (s 267(1)(a) and (b)). In Maria and Betty's cases, the appeals were stuck out. The effect of striking out an appeal for failing to appear is to reinstate the sentence of the Magistrates' Court from which the appeal is brought (s 267(2)(a)). Therefore, when the strike-out orders were made, the finding of guilt and sentence of Maria and the conviction and sentence of Betty were reinstated.

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68 [2005] VSC 270 (5 August 2005).
69 Ibid [30]; *Neill v County Court of Victoria* (2003) 40 MVR 255, [19] (Redlich J).
70 [1999] 3 VR 583.
71 Ibid 587; see also *DPP v Shoan* (2007) 176 A Crim R 457, [20] (Buchanan JA).
72 See also *Walters v Magistrates' Court of Victoria* [2015] VSC 88 (24 March 2015) [117] (Zammit J).

71 Under s 267(3), the court may set aside an order striking out an appeal because the appellant failed to appear if 'the appellant satisfies the court that the failure to appear was not due to fault or neglect on the part of the appellant'. If the court grants such an application, it must order the reinstatement of the appeal. A reinstated appeal operates as a stay of sentence but not of conviction (s 267(7)). An application for bail pending the reinstated appeal may be made the County Court (s 267(6A)).

72 The Attorney-General submitted that the right in s 24(1) of the Charter did not apply to the hearing and determination of Maria and Betty's applications under s 267(3) of the *Civil Procedure Act* to set aside the strike out-orders because, in that proceeding, they were not persons 'charged with a criminal offence' and, in hearing and determining their applications, the judge of the County Court was not deciding those charges. In the submission of the Attorney-General, it was also doubtful whether, in respect of the appeals, Maria and Betty were persons charged with an offence. Maria and Betty dispute those submissions.

73 As stated in *PJB v Melbourne Health (Patrick's Case),*[73] the scope and application of the human rights in pt 2 of the Charter are to be ascertained by a process of interpretation that takes account of the beneficial purposes of the Charter:[74]

> [human] rights are interpreted purposively and, in the words of Warren CJ in *Re Application under the Major Crime (Investigative Powers) Act 2004*,[75] 'in the broadest possible way'. Following that decision, Hargrave J said in *Director of Public Prosecutions v Ali (No 2*) that the general approach was to interpret the rights in the Charter 'broadly and in a non-technical sense.'[76] Speaking of the *New Zealand Bill of Rights Act 1990*, Elias CJ said in *R v Hansen*[77] that the 'meaning of the right is to be ascertained from the "cardinal values" it embodies.' In reference to the *Canadian Charter of Rights and Freedoms*, Dickson J said in *R v Big M Drug Mart Ltd*[78] that the 'meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.' Reasonable and demonstrable limitation of the right is not taken into account when identifying its scope.[79]

Kracke decided that s 24(1) of the Charter was to be so interpreted.[80]

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73 (2011) 39 VR 373 (Bell J) ('*Patrick's Case'*).
74 Ibid 384 [36] (including footnotes).
75 (2009) 24 VR 415, 434 [80]; followed in *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 157–8 [55] (Emerton J).
76 [2010] VSC 503 (10 November 2010) [29] (Hargrave J).
77 [2007] 3 NZLR 1, 15 [22].
78 [1985] 1 SCR 295, [116].
79 See generally *Kracke* (2009) 29 VAR 1, 28–32 [75]–[91] (Bell J); *Director of Housing v Sudi* (2010) 33 VAR 139, 159 [90] (Bell J).
80 (2009) 29 VAR 1, 94 [411] n 544 (Bell J).

74 Applying this approach, the interpretation for which the Attorney-General contends is far from the broadest one that is reasonably open. In the context of human rights legislation, I think it is overly technical to doubt that an appellant in a criminal appeal that operates as a rehearing, and that might thereby result in an acquittal or lower sentence, is not a person charged with a criminal offence. It is equally overly technical not to treat an applicant under the appellant criminal process for orders reinstating a struck-out appeal, which might result in the reinstatement of the appeal, as a person charged with a criminal offence.

75 The underlying purpose of the right in s 24(1) of the Charter is the fair determination of criminal charges by a competent, independent and impartial criminal process, which is fundamental to respect for the dignity of the individual and the rule of law in democratic society. That process encompasses an appeal proceeding and includes such associated processes as applications for bail[81] and, in the present case, orders setting aside orders striking out an appeal. In respect of such proceedings and processes, appellants and applicants, such as Maria and Betty, are to be regarded as persons charged with a criminal offence and therefore enjoy the fundamental protections of s 24(1) of the Charter.

76 While s 32(2) of the Charter permits resort to decisions of foreign and international jurisdictions when interpreting of the Charter, I accept the submission of the Attorney-General that this should be done cautiously, as pointed out by Warren CJ in *Bare v Independent Broad-based Anti-corruption Commission*[82] by reference to *Momcilovic v The Queen*.[83] The starting point is not that s 24(1) was modelled upon art 14(1) of the ICCPR so that the court can go straight to the international jurisprudence. It is necessary to start and end with the language of s 24(1), which may be examined in the broader context of the Charter and other relevant Victorian statutes and then, if relevant, the court could resort to international jurisprudence. (Adopting this approach to interpreting s 8(3) of the Charter, I have concluded that it was deliberately enacted in somewhat narrower terms than art 26 of the ICCPR (see above)).

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81 See the analogous cases decided under s 25(3) of the Charter of *HL* [2016] VSC 750 (13 December 2016) [72] (Elliott J) and *SE* [2017] VSC 13 (31 January 2017) [15] (Bell J).

82 (2015) 326 ALR 198, 246–248 [179]–[186].

83 (2011) 245 CLR 1, 37–8 [19]–[20] (French CJ), 90 [159] (Gummow J).

77 Therefore I also accept the attention given in the submissions of the Attorney-General to the language of s 24(1), which relevantly applies to a 'person charged with a criminal offence', rather than in 'the determination of any criminal charge', as does art 14(1) of the ICCPR and (similarly) art 6(1) of the European Convention on Human Rights[84] ('ECHR') (see below). Further I accept that the legislature has made deliberate modifications to the rights that are specifically applicable in criminal proceedings in a related provision, s 25(2). For example, under that provision, a person charged with a criminal offence has a right to legal aid only if entitled under the *Legal Aid Act 1978* (Vic), which limits the right in a way that art 14(3)(d) of the ICCPR is not.[85]

78 Giving these and related submissions the best consideration I can, I cannot find in the language of s 24(1) the restricted meaning for which the Attorney-General contends. In particular, the words of application – a 'person charged with a criminal offence' – do not suggest that the right to a fair hearing by a competent, independent and impartial court was intended to be confined in criminal cases to the actual determination of the charge at first instance. The context of s 24(1) in the Charter as a whole does not support such a restrictive interpretation. The language of s 25(2) (which lists minimum guarantees for persons 'charged with a criminal offence') and s 25(4) (which specifies a right of review of convictions and sentences for persons 'convicted of a criminal offence') does not support a restrictive interpretation of a person 'charged with a criminal offence' in s 24(1). The distinction between persons 'charged with' and 'convicted' of a criminal offence in s 25(2) and (4) is not hard and fast for all purposes, including s 24(1). It is a practical way of describing the application of the different kinds of rights in s 25. I note that s 25 is headed 'Rights in criminal proceedings'. This general expression is apt to cover a number of different processes, as in that provision, and s 24(1), it does. As was pointed out by Hollingworth J in *Sabet v Medical Practitioners Board*, in reference to s 25,[86] '[h]eadings form part of the Charter, and are to be used in its interpretation'.[87]

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84 *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953).

85 See generally *Slaveski v Smith* (2012) 34 VR 206, 220-221 [52]-[53] (Warren CJ, Nettle and Redlich JJA).

86 (2008) 20 VR 414.

87 Ibid 432–3 [119]–[127], referring to s 36(2A) of the *Interpretation of Legislation Act 1984* (Vic).

79 Nothing to which I was taken in Victorian statute law supports such a restrictive interpretation of s 24(1). The provisions of the *Criminal Procedure Act* (which regulates criminal procedure comprehensively) do not support it. Indeed, as the analysis above shows, appeals from the Magistrates' Court to the County Court under the provisions of pt 6.1 of that Act involve hearings de novo; the strike-out and set-aside procedures form part of that process. The broader interpretation of s 24(1) for which Maria and Betty contend fits well into the operation of those provisions.

80 The word 'decided' in s 24(1) does not take the matter further. It would frustrate the beneficial purposes of the Charter to exclude from the right conferred by s 24(1) decisions in relation to appeals by way of rehearing under pt 6.1 of the *Criminal Procedure Act*. It would equally frustrate the beneficial purposes of the Charter to exclude associated decisions, such as decisions to refuse applications to set aside strike-out orders. In appeals, both decisions by way of rehearing and associated decisions form part of the criminal process under the *Criminal Procedure Act* for the final determination of charges that have been commenced in the Magistrates' Court. Under s 24(1) of the Charter, an accused person engaged in that process remains 'a person charged with a criminal offence' until it has been finalised.

81 This is a case in which international sources are relevant because s 24(1) was based on art 14(1) of the ICCPR, and that in turn was influenced by art 6(1) of the ECHR. The Victoria legislature did not state that s 24(1) was intended to create a right to a fair hearing in criminal cases that was more restrictive than those rights. My conclusion as to how s 24(1) should be interpreted is supported by decisions of the United Nations Human Rights Committee under art 14(1) and (3) of the ICCPR and of the European Court of Human Rights under art 6(1) of the ECHR.

82 Article 14(1) of the ICCPR relevantly provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(3) specifies a number of particular rights applying in the determination of criminal charges against persons, as follows:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
>
> (g) Not to be compelled to testify against himself or to confess guilt.

Article 14(4) specifies a particular right in relation to juvenile persons, as follows:

> In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

83 In relation to the rights conferred by art 14, the Human Rights Committee has published *General Comment No 32: Right to equality before courts and tribunals and to a fair trial*.[88] If the rights in art 14 were to be confined to the actual hearing and determination of the criminal charge but not to related aspects of the criminal procedure such as appeals, it is to be expected that this would be made clear in the General Comment. It is not discussed. Determinations of individual complaints by the Committee do not reflect such a narrow conception of the rights conferred by art 14.

84 For example, the Committee has decided that the rights in art 14(1) apply to post-trial review proceedings. In *Currie v Jamaica*,[89] the author of the communication complained that he was not provided with legal aid for the purposes of filing a matter before the Constitutional Court of Jamaica in relation to his conviction for an offence. The Committee noted that:

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88 Human Rights Committee, UN Doc CCPR/C/GC/32 (23 August 2007).

89 Communication No 377/1989, UN Doc CCPR/C/50/D/377/1989 (29 March 1994).

> The role of the Constitutional Court is not to determine the criminal charge itself, but to ensure that applicants receive a fair trial in all cases, whether criminal or civil. The State party has an obligation, under article 2, paragraph 3, of the Covenant, to make the remedies in the Constitutional Court addressing violations of fundamental rights available and effective.[90]

Nevertheless, it stated that art 14(1) and (3) applied:

> The determination of rights in proceedings in the Constitutional Court must conform with the requirements of a fair hearing in accordance with article 14, paragraph 1. In this particular case, the Constitutional Court would be called on to determine whether the author's conviction in a criminal trial has violated the guarantees of a fair trial. In such cases, the application of the requirement of a fair hearing in the Constitutional Court should be consistent with the principles in paragraph 3(d) of article 14. It follows that where a convicted person seeking constitutional review of irregularities in a criminal trial has not sufficient means to meet the costs of legal assistance in order to pursue his constitutional remedy and where the interests of justice so require, legal assistance should be provided by the State.[91]

85 The basis of the ruling by the Committee against the State party in *Thomas v Jamaica*[92] was that, contrary to art 14(3)(d), legal aid was not provided to investigate possible legal remedies in relation to a criminal conviction.[93]

86 The same reasoning has been applied to pre-trial hearings in relation to criminal charges. In *Wright v Jamaica*,[94] the complaint was that legal aid had not been provided in relation to such a hearing, admitting that it was not the hearing and determination of the charge. The Committee decided that the requirement to provide legal aid 'applies not only to the trial and relevant appeals, but also to any preliminary hearings relating to the case'.[95]

87 The Committee has upheld complaints where the victim was denied legal aid in relation to his interrogation by police well prior to the determination of any criminal charge against them. That occurred in *Gunan v Kyrgyzstan*[96] where the author was interrogated on several occasions in the absence of a lawyer. The Committee found that this constituted a violation of art 14(3)(b) and (d),[97] quite apart from the violation of art 14(1) that occurred at a subsequent trial.[98] Likewise, in *Krasnova v Kyrgystan*[99] an abusive pre-charge seizure of

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90 Ibid [13.3].
91 Ibid [13.4].
92 Communication No 532/1993, UN Doc CCPR/C/61/D/532/1993 (4 December 1997).
93 Ibid [6.4].
94 Communication No 459/1991, UN Doc CCPR/C/55/D 459/1991 (27 October 1995).
95 Ibid [10.2].
96 Communication No 1545/2007, UN Doc CCPR/C/102/D/1545/2007 (25 July 2011).
97 Ibid [6.3].
98 Ibid [6.4].

evidence and interrogation of the author's son was found to constitute a violation of art 14(3)(b).

88 It was confirmed in *LaVende v Trinidad and Tobago*[100] that the guarantees in art 14(3)(d) apply not only to the hearing and determination of criminal charges but to 'all stages of the legal proceeding' and 'all stages of appellate remedies'.[101]

89 Even where the Committee has felt constrained to find that a particular proceeding did not relate to the determination of a criminal charge, it has decided that the guarantees in civil proceedings in art 14(1) apply. At issue in *Everett v Spain*[102] was whether the criminal guarantees in art 14(2) and (3) were applicable to extradition proceedings. The Committee decided that they were not because:

> the Committee considers that even when decided by a court the consideration of an extradition request does not amount to the determination of a criminal charge in the meaning of article 14.[103]

However, it decided that the civil guarantees in art 14(1) were applicable in such proceedings:

> Particularly, in cases where, as in the current one, the judiciary is involved in deciding about extradition, it must respect the principles of impartiality, fairness and equality, as enshrined in article 14, paragraph 1, …[104]

90 On the basis of the wording of art 14(1) of the ICCPR and these decisions of the Human Rights Committee, I think it is clear that the hearing and determination of Maria and Betty's application to the County Court for setting aside the strike-out orders would be regarded as part of the criminal process for determining the criminal charges against them within that article. In my view, the scope of the right conferred by s 24(1) of the Charter in relation to persons charged with a criminal offence is not narrower in that regard.

91 Turning to the ECHR, art 6(1) specifies a right to a fair trial, as follows:

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99 Communication No 1402/2005, UN Doc CCPR/C/101/D/1402/2005 (29 March 2011).
100 Communication No 554/1993, UN Doc CCPR/C/61/D/554/1993 (17 November 1997).
101 Ibid [5.8].
102 Communication No 961/2000, UN Doc CCPR/C/81/D/961/2000 (26 August 2004).
103 Ibid [6.4].
104 Ibid.

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …

In relation to persons charged with a criminal offence, art 6(3) specifies these minimum guarantees:

> Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

92 The European Court of Human Rights at Strasbourg has not confined the scope and application of the rights in art 6(1) and (3) to the actual determination of the criminal charge at first instance. Rather it has applied the right to various stages of the criminal process, including the pre-trial and post-trial (appeal) stages.

93 As to the pre-trial stage, the issue in *Imbrioscia v Switzerland*[105] was whether art 6(1) and (3)(c) had been breached when the applicant had been interrogated (after arrest) on six occasions without a lawyer being present. The court did not accept Switzerland's submission that the interrogation did not involve the determination of a criminal charge against the applicant. It held that it did not follow from the focus of the right in art 6(1) and (3) upon the fair determination of criminal charges that it 'has no application to pre-trial proceedings'.[106] But it found that no breach had occurred because the applicant had raised no complaint at the time of being interrogated and voluntarily participated.[107]

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105 (1993) 17 EHRR 441.
106 Ibid 455 [36].
107 Ibid 456–7 [39]–[42].

94 The court considered the same issue in detail in *Salduz v Turkey*.[108] The applicant alleged that his defence rights under art 6(3)(c) had been violated because he had been denied access to a lawyer during his police custody. Approving *Imbrioscia* and other cases, the court confirmed that the fair trial guarantees in art 6(1) and (3) applied to the investigative stage of criminal proceedings, especially given the vulnerability of accused persons in custody, for which access to a lawyer was a necessary compensation.[109] It stated the following general principle:

> Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently 'practical and effective'[110] art 6(1) requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction — whatever its justification — must not unduly prejudice the rights of the accused under art 6.[111] The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.[112]

The court found that the applicant's fair trial rights had been breached,[113] especially taking into account that he was a minor, stressing 'the fundamental importance of providing access to a lawyer where the person in custody is a minor'.[114]

95 The similar complaint of the applicants in *Ibrahim v United Kingdom*[115] was rejected but not because they were inadmissible. Applying *Salduz* and other cases, the court stressed the general importance to a fair trial of criminal charges under art 6(1) and (3) of access to a lawyer during the initial stages of police interrogation.[116] However, it held that the terrorism charges against the applicants and other special circumstances provided compelling reasons why temporary limitations upon their access to a lawyer at this stage were justified.[117] In doing so, the court took into account the safeguards in the criminal process, considered as a whole.

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108 (2009) 49 EHRR 19.
109 Ibid 436 [54].
110 Ibid [51] above.
111 *Magee v United Kingdom* (2001) 31 EHRR 35, 835 [44].
112 (2009) 49 EHRR 19, 437 [55].
113 Ibid 438 [62].
114 Ibid [60].
115 (2015) 61 EHRR 9.
116 Ibid 301 [193].
117 Ibid 308–9 [213]; 313 [224].

96 As to the post-trial (appeal) stages of the criminal process, the issue in *Artico v Italy*[118] was whether it was a breach of art 6(3)(c) for the applicant to appear self-represented in an appeal against his fraud conviction when he could not obtain a legal aid lawyer to represent him. Of the rights in art 6(1) and (3)(c), the court said:[119]

> Paragraph 3 of Article 6 (art 6(3)) contains an enumeration of specific applications of the general principle stated in paragraph 1 of the Article (art 6(1)). The various rights of which a non-exhaustive list appears in paragraph 3 reflect certain of the aspects of the notion of a fair trial in criminal proceedings. When compliance with paragraph 3 is being reviewed, its basic purpose must not be forgotten nor must it be severed from its roots.

It went on:[120]

> The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.[121]

The court concluded that art 6(3)(c) had been breached.[122] Other examples of the court upholding complaints of breach of art 6(1) and (3) in relation to appeal proceedings include *Nideröst-Huber v Switzerland*,[123] *Bulut v Austria*[124] and *Batsanina v Russia*.[125]

97 The complaint in *Eckle v Federal Republic of Germany*[126] was that, contrary to art 6(1), the criminal charges had not been completed within a 'reasonable time'. Two of the relevant proceedings lasted 20 years and 15 years respectively from date of initial complaint to disposal of final appeal. The complaint raised the issue of whether the appeal proceedings were to be included in the period in which the charges had been determined. The court adopted a generous interpretation of art 6(1) to hold that they were. Applying *König v Federal Republic of Germany (No. 1)*,[127] it held:

> As regards the end of the 'time', in criminal matters the period governed by Article 6(1) covers the whole of the criminal proceeding in issue, including appeal proceedings.[128]

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118 (1981) 3 EHRR 1 ('*Artico*')
119 Ibid 12 [32] (footnote omitted).
120 Ibid 13 [33].
121 See *Airey v Ireland* (1979) 2 EHRR 305, 314–15 [24] and [32] ('*Airey*').
122 *Artico* (1983) EHRR 1, 13 [33].
123 (1997) 25 EHRR 709.
124 (1997) 24 EHRR 84.
125 (2014) 58 EHRR 16.
126 (1983) 5 EHRR 1 ('*Eckle*').
127 (1979–80) 2 EHRR 170, 196–7 [98].

In relation to the concept of determination of criminal charges, applying *Ringeisen v Austria (No 1)*,[129] it said:

> In the event of conviction, there is no 'determination … of any criminal charge', within the meaning of Article 6(1), as long as the sentence is not definitively fixed.[130]

98 It can be seen that, as with the interpretation by the Human Rights Committee of art 14(1) and (3) of the ICCPR, the European Court of Human Rights interprets art 6(1) and (3) of the ECHR generously so as not to confine the specified protections to the actual determination of the criminal charge. Thus supports the interpretation of s 24(1) of the Charter that I have adopted.

99 In conclusion, as applicants under s 267(3) of the *Criminal Procedure Act* for orders setting aside the orders striking out their appeals, Maria and Betty were persons 'charged with a criminal offence' for the purposes of s 24(1) of the Charter and the judge of the County Court hearing their applications was, under s 6(2)(b), obliged to ensure their human right to a fair hearing.

OBLIGATION OF COURTS AND TRIBUNALS TO ENSURE HUMAN RIGHTS OF SELF-REPRESENTED PARTIES

100 It is now necessary to identify the scope of the obligation on the judge of the County Court under s 6(2)(b) of the Charter to apply the human rights in ss 8(3) and 24(1) having regard to the fact that Maria had a disability and Maria and Betty were self-represented.

101 As noted above, a relevant difference exists between Maria and Betty because Maria has a disability that is a protected attribute under the *Equal Opportunity Act* but Betty does not. The first element of the right to equality in s 8(3) does not advance Betty's case, which falls to be considered entirely under the right to a fair hearing in s 24(1). All of the elements of the right to equality in s 8(3) apply to Maria, as well as the right to a fair hearing in s 24(1). I will therefore consider s 8(3) as it relates to Maria and s 24(1) as it relates to Maria and Betty.

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128 *Eckle* (1983) 5 EHRR 1, 28 [76] (footnote omitted).
129 (1979–80) 1 EHRR 455, 471 [48] and 495–6 [110].
130 *Eckle* (1983) 5 EHRR 1, 28 [77].

Equality under s 8(3) and self-represented parties with a disability

102 The main purpose of the *Charter* is 'to protect and promote human rights'.[131] Towards that end, it implements the fundamental principle, expressed in the Preamble, that 'all people are born free and equal in dignity and rights' and 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'. That is the proper context for application of the right to equality in s 8(3).

103 In summary, the right to equality in s 8(3) of the Charter has three elements that, under s 6(2)(b), may be relevant to the conduct of hearings and procedures followed by courts and tribunals.

104 The first element is the right to equality before the law, which is based on the concept of formal equality in law. This requires that, in the operation and administration of the law in relation to court and tribunal proceedings, courts and tribunals must treat people equally and not arbitrarily (in a manner that is devoid of objective justification). As discussed, procedures and hearing practices that are based on distinctions between parties or other participants which are arbitrary in the sense of lacking objective justification run up against the proper application of this right (subject to s 7(2)). This element of the right does not require a court to make procedural adjustments and accommodations in relation to particular parties because it does not call for substantive equality.[132] Although the right to (formal) equality before the law remains fundamentally important, the limited nature of this right led to the evolution of the right to (substantive) equality in terms of the second and third elements.

105 The second element is the right to equal protection of the law without discrimination as defined in the *Equal Opportunity Act*, which is based on the concept of substantive equality in law and in fact. This requires that (in content) the law ensures that people are protected against discrimination in substance. This element of the right may require that the substantive law include positive adjustments and accommodations so that some parties are treated differently to other parties in order to ensure that they have equal protection of the

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131 Section 1(2)(a)–(e).

132 *Lifestyle Communities (No 3)* (2009) 31 VAR 286, 316–7 [135]–[136], 340 [256] (Bell J).

law.[133] As this right is concerned with the content of the law in terms of (substantive) equality rather than the operation and administration of the law, it will be the third element that is more relevant in relation to the conduct of hearings and procedures followed by courts and tribunals.

106 The third element is the right to equal and effective protection against discrimination as defined in the *Equal Opportunity Act*, which is also based on the concept of substantive equality in law and in fact. This goes beyond requiring that the law (in content) be equal in substance to requiring that, in the operation and administration of the law, people have equal and effective protection against discrimination. This element of the right may require that, in the conduct of hearings and procedures followed by courts and tribunals, positive adjustments and accommodations are made so that some parties are treated differently to other parties in order to ensure that they have equal and effective protection of the law.[134] It is this element of the right that is most relevant in the present case.

107 The present case concerns the application of the right to equality in relation to an individual, Maria, who was vulnerable to discrimination by reason of disability. The ultimate purpose of the right to equality — protection of everyone's human dignity — deserves emphasis in this connection. As was said in *Patrick's Case*, a case concerning the human rights of a person with a disability:[135]

> The bedrock value of human rights is that every individual without exception has a unique human dignity which is their birthright. The dignity of the individual and their entitlement to human rights protection 'cannot be separated from universal human nature'[136] and is to be respected whether the person is able or disabled. [137]

In that case,[138] reference was made to the judgment of Brennan J in *Marion's Case* [139] which also concerned the human rights of a person with a disability:

> Human dignity is a value common to our municipal law and to international instruments relating to human rights. The law will protect equally the dignity of the hale and hearty and the dignity of the weak and lame; of the frail baby and of the frail aged; of the intellectually

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133 *Taha* [2013] VSCA 37 (4 March 2013) [210] (Tate JA); *Lifestyle Communities (No 3)* (2009) 31 VAR 286, 317 [137]–[138], 340 [257] (Bell J).

134 *Lifestyle Communities (No 3)* (2009) 31 VAR 286, 317–8 [139]–[141], 340 [257] (Bell J).

135 (2011) 39 VR 373 (Bell J).

136 *South West Africa Cases (2nd Phase)* [1966] ICJR 6, 297 (Judge Tanaka).

137 *Patrick's Case* (2011) 39 VR 373, 382–3 [32] (Bell J).

138 Ibid 383 [32].

139 *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218.

> able and of the intellectually disabled…Our law admits of no discrimination against the weak and disadvantaged in their human dignity. Intellectual disability justifies no impairment of human dignity, no invasion of the right to personal integrity. [140]

Reference was also made[141] to the inimical impact of discrimination upon human dignity, as relevantly explained by Iacobucci J in *Law v Canada*:[142]

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within … society. [143]

These remarks apply to the treatment of persons with a disability in legal proceedings by courts and tribunals.

108 In its application in this context, the right to equal and effective protection against discrimination in s 8(3) has operation in respect of persons who, without that protection, could not effectively participate in a court or tribunal proceeding (including in any hearing) by reason of age, race, disability or other protected attribute under the *Equal Opportunity Act*. The ability of such a person effectively to participate in the proceeding might be due to a number of attribute-related physical, communicative or cognitive capability deficits. Those experiencing the effect of discrimination on a number of intersecting grounds are likely to be in a position of aggravation in this regard.[144] In order to ensure equal protection against such discrimination, the court is required to make such adjustments and accommodations as may be reasonably necessary and available to ensure the effective participation of the individual despite their disability, subject to the fundamental requirements of judicial independence, impartiality and fairness and respect for the human rights of other participants.

109 The importance of such adjustments and accommodations is underlined by the *Convention on the Rights of Persons with Disabilities*,[145] to which Australia is a party. Article 13(1) and (2), under the heading 'Access to justice', provides:

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140 Ibid 266
141 *Patrick's Case* (2011) 39 VR 373, 383 [33] (Bell J).
142 [1999] 1 SCR 487.
143 Ibid 530 [53].
144 *SE* [2017] VSC 13 (31 January 2017) [28] (Bell J).
145 Opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

> (1) States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
>
> (2) In order to help to ensure effective access to justice for persons with disabilities, State Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

These provisions help to inform the more general content of art 8(3) (and 24(1)) of the Charter that courts and tribunals are obliged by s 6(2)(b) to apply in relation to legal proceedings and are also relevant as permissive discretionary considerations.[146] The *Disability Access Bench Book* that has been recently published by the Judicial College of Victoria[147] is an important contribution to compliance in Victoria with art 13(2) (see further below).

110 A recent sentencing and a recent bail case in this court concerning children that I have mentioned illustrate the procedural application of the right to equal and effective protection against discrimination in s 8(3) in a legal proceeding.[148] The court made reasonable and available adjustments and accommodations in the procedures that were followed in the pre-hearing or hearing stages of the two proceedings, in part because this was required to avoid discriminatory exclusion in the participation of the child-applicants.[149] Age is an attribute of discrimination under s 6(a) of the *Equal Opportunity Act*; following procedures and conducting hearings without taking account of the age of the applicants might have led to that exclusion.

111 The obligation of a court or tribunal under s 6(2)(b) of the Charter to ensure equal protection against discrimination under s 8(3) is additional to the obligation of a court or tribunal under the common law to ensure a fair trial. However, the two obligations run in the same river of principle - equal access to justice - and their combined operation magnifies the force of the flow.

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146 See *Tomasevic* (2007) 17 VR 100, 114 [73] (Bell J).

147 Judicial College of Victoria, *Disability Access Bench Book* (2016).

148 *SL* [2016] VSC 714 (29 November 2016) (Bell J) (sentencing); *SE* [2017] VSC 13 (31 January 2017) (Bell J) (bail).

149 *SL* [2016] VSC 714 (29 November 2016) [4], [7], [14], [25] (Bell J); *SE* [2017] VSC 13 (31 January 2017) [11], [13], [15], [17] (Bell J).

112 Many authorities could be chosen as sources for the fundamental principle that courts and tribunals must ensure a fair trial. The following statement in *Dietrich v The Queen*[150] by Gaudron J is one:

> The requirement of fairness is not only independent, it is intrinsic and inherent. According to our legal theory and subject to statutory provisions or other considerations bearing on the powers of an inferior court or a court of limited jurisdiction, the power to prevent injustice in legal proceedings is necessary and, for that reason, there inheres in the courts such powers as are necessary to ensure that justice is done in every case. Thus, every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial. Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court. [Footnotes omitted.][151]

In *Tomasevic* is to be found a discussion of the principle explained in *Dietrich* as it may fall to be applied in different circumstances:

> What is required to produce a fair trial depends on the circumstances. In some cases it may be necessary to have interpreters, acceptable custodial facilities or a special court venue.[152] In other cases, evidence may have to be excluded because of its unfair prejudicial effect[153] or an adjournment granted to allow pre-trial publicity to abate. This list is far from exhaustive and the categories are not closed. Indeed 'the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances'.[154] The general principle is that the courts possess all the necessary powers to ensure a fair trial,[155] one aspect of which is the power to give assistance to a litigant in person.[156]

The steps that may be required to ensure a fair trial at common law, as so explained, might equally be required to ensure equal and effective protection against discrimination under art 8(3) of the Charter.

113 The close connection between the obligations to ensure equal protection against discrimination and the obligation and to ensure a fair trial is specifically illustrated by the case of the deaf mute, *Gradidge v Grace Bros Pty Ltd*,[157] which is considered in *Tomasevic*[158] in the context of a general discussion about the relationship between human rights and the common law duty of a judge to assist self-represented parties. The party having these

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150 (1992) 177 CLR 292.
151 Ibid 363–4.
152 Ibid 331 (Deane J); 363 (Gaudron J).
153 Ibid 363 (Gaudron J).
154 Ibid 328 (Deane J); see also *Jago v District Court of New South Wales* (1989) 168 CLR 23, 57 (Deane J).
155 *Barton v The Queen* (1980) 147 CLR 75, 96 (Gibbs ACJ and Mason J); cited in *Dietrich v The Queen* (1992) 177 CLR 292, 327 (Deane J).
156 *Tomasevic* (2007) 17 VR 100, 118 [88] (Bell J).
157 (1988) 93 FLR 414 (Court of Appeal of New South Wales) ('*Gradidge'*).
158 (2007) 17 VR 100, 112 [66] (Bell J).

intersecting disabilities was denied access to an interpreter in respect of counsel's submission. The Court of Appeal of New South Wales held that the judge's procedural discretion had miscarried under the common law. In doing so, Kirby P and Samuel and Clarke JJA took into account the human rights specified in the ICCPR, especially equality before the law in arts 14(1) and 26.[159]

114 In the present case, Maria had a disability *and* was a self-represented party. As discussed below, self-represented parties usually suffer from two important disadvantages — they lack legal training and are too emotionally involved in their cases to be objective. These disadvantages aggravated Maria's capability for effective participation in the proceeding when it was already substantially diminished by her disability.

115 In a manner that deserves careful consideration, the *Disability Access Bench Book* discusses the issues that may need to be considered by courts and tribunals when art 8(3) of the Charter is engaged:[160]

> Courts and tribunals may need to treat people differently in order to achieve an equal outcome. Different treatment will often involve making adjustments for people with a disability to participate in court proceedings on an equal basis with others.
>
> Issues to consider include:
>
> - *equal participation*: People with a disability may require a variety of measures and adjustments to ensure their participation in hearings is both effective – in terms of understanding and communicating –and meaningful in terms of being heard. Measures to address inequalities in participation include use of language assistance such as Auslan communication adjustments, access to legal advice, provision of accessible material and information, and use of supports …
>
> - *equal understanding of proceedings*: Some people with a disability can find it difficult to understand all or parts of a court hearing. Legal representatives and judicial officers can use legal terminology or complex communication styles. The format of hearings, roles of people in a hearing room and complexities of the legal system can also be confusing. Failing to understand the hearing will have implications on decisions including whether to settle a matter, how to plead, how to present relevant evidence, how to respond to questions, and where the burden of proof lies.
>
> - *equal capacity to exercise decision-making*: People with a disability, unless subject to a guardianship or other substituted decision making order, have the right to exercise legal capacity. They may require support to make and communicate their decisions. Both substituted and supported decision-making arrangements must be free of undue influence and conflicts of interest.

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159 *Gradidge* (1988) 93 FLR 414, 422 (Kirby P), 426 (Samuel JA) and 427 (Clarke JA).

160 I take as implied in the statement of principle in the opening sentence that the participation to be ensured is effective participation and not participation that is purely formal.

- *equal access (modifications or adjustments)*: People with a disability may need specific adjustments during hearings, such as physical adjustments, technology, and communication adjustments. The requirement for modifications or adjustments may not always be identified in a timely manner or sometimes not at all. Modifications must be tailored to the particular circumstances to ensure they effectively facilitate equal access.

- *equal treatment of evidence*: Stereotyping and assumptions about reliability and credibility can serve as barriers for witnesses with a disability. Witnesses with a disability may be viewed as unreliable, not credible or not capable of giving evidence ...[161]

116 Proper consideration of these and other relevant issues depends upon recognition of the party as a person with a disability. As will be seen, a fundamental deficiency that occurred in relation to Maria as regards her right equally and effectively to be protected from discrimination (s 8(3)) was that the judge of the County Court did not, but should have, recognised her to be a person with a disability. Therefore his Honour did not give any consideration to these or like issues and failed to make any adjustments and accommodations in relation to the conduct of the hearing.

Fair hearings under s 24(1) and self-represented parties

117 The right in s 24(1) of the Charter is not just to a fair and public hearing; it is to decision by a competent, independent and impartial court or tribunal after such a hearing.[162]

118 Section 25 (which, as already noted, is headed 'Rights in criminal proceedings') is related to s 24(1) but is not in issue in the present case. Without derogating from the general guarantees in s 24(1), in relation to persons charged with a criminal offence it makes provision for the presumption of innocence (sub-s (1)) and a number of minimum guarantees in relation to persons charged with a criminal offence (sub-s (2)). Sub-section 25(3) provides that children charged with criminal offences have the right to a procedure that takes account of their age and the desirability of promoting their rehabilitation. As noted, it has been held that this right requires adjustments and accommodations in the procedures in this court for sentencing[163] and bail[164] hearings. Sub-section 25(4) gives persons convicted of a criminal offence the right to have the conviction and sentence reviewed by a higher court in accordance with law.

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161 Judicial College of Victoria, *Disability Access Bench Book* (2016) [3.2].
162 See generally *Kracke* (2009) 29 VAR 1, 85–100 [370]–[447] (Bell J).
163 *SL* [2016] VSC 714 (29 November 2016) (Bell J).
164 *SE* [2017] VSC 13 (31 January 2017) (Bell J).

The availability of appeals against sentences of the Magistrates' Court of Victoria to the County Court of Victoria under pt 6.1 of the *Criminal Procedure Act,* such as those issued by Maria and Betty, is one means of putting this right into effect.

119 Participation by self-represented parties in criminal or civil legal proceedings, including but not only where the other party is represented, gives rise to human rights challenges. Their lack of legal representation creates serious risk of unfairness by reason of ineffective participation in the proceeding or participatory inequality between the parties. This risk arises because self-represented parties lack the professional skill and ability and objectivity usually necessary for effective participation in legal proceedings and adequately to respond to other parties who are represented. The risk is exacerbated when a self-represented party has a disability that renders them vulnerable to discrimination.

120 By reference to a report prepared by the Australian Institute of Judicial Administration to assist courts and tribunals in planning for the management of litigants in person,[165] the discussion in *Tomasevic* elaborates:

> This is how the Institute describes the disadvantage that comes from a lack of professional skill and ability:
>
> > By definition litigants in person lack the skills and abilities usually associated with legal professionals. Most significantly, lack of knowledge of the relevant law almost inevitably leads to ignorance of the issues that are for curial resolution for the court or tribunal… This ranges from lack of knowledge of courtroom formalities, to a lack of knowledge of how the whole court process works from the initiation of a proceeding to hearing. Litigants in person also lack familiarity with the language and specialist vocabulary of legal proceedings.[166]
>
> This is the disadvantage that comes from a lack of objectivity:
>
> > The problem of self-representation is not just a lack of legal skill — it is also a problem of a lack of objectivity and emotional distance from their case. Litigants in person are not in a good position to assess the merits of their claim …[167]
>
> I would adopt this description of the disadvantages suffered by self-represented litigants, for it is consistent with decisions of courts in Australia, in respect of both the lack of skill and ability[168] and the lack of objectivity,[169] and of courts overseas,[170] as well as my own

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165 Australian Institute of Judicial Administration Incorporated*, Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001).

166 Ibid 3 (footnote omitted).

167 Ibid 4 (footnote omitted).

168 *Nagy v Ryan* [2003] SASC 37 (19 February 2003) [40]–[41] (Gray J); *Commissioner of Taxation v Metaskills Pty Ltd* (2003) 130 FCR 248, 273 (Lindgren J); *R v White* (2003) 7 VR 442, 454–59 (Chernov JA); *Tobin v Dodd* [2004] WASCA 288 (3 December 2004)[13] (Heenan J); *Panagiotopoulos v Rajendram* [2005] NSWCA 58 (6 April 2005) [33] (Pearlman AJA); *Stock v Anning* [2006] WASC 275 (8 December 2006) [54] (Johnson J); *R v Rostom* [2007] SASC 210 (12 April 2007) [59] (Gray and Sulan JJ) (accused could not read English); *In the Marriage of Sajdak* (1992) 16 Fam LR 280, 283–4 (Nicholson CJ, Nygh and Purdy JJ) (no legal representation

experience.[171]

121 The inimical consequences of ineffective or unequal participation in legal proceedings by self-represented parties have been eloquently described in more recent scholarship:

> Where the law, the rules of procedure, and the legal processes are unintelligible or unfamiliar to one or more of the litigants, cases stop being a dialogue between informed and experienced participants within a framework designed to test evidence and facilitate truth seeking. Instead, cases turn into a frustrating exercise in imposing legal norms on parties who do not grasp their significance, and who see them as arbitrary, or simply unintelligible.[172]

Referring to the role of the judge in making reasonable accommodations, the author went on:

> Without some form of direction and assistance, many self-represented litigants do not appreciate the legal tests or standards they must meet. This, in turn, makes it difficult for them to determine what evidence they should present and which arguments might advance their case. Litigation can become akin to donning a blindfold and hoping for the best. The legal outcome of proceedings may depend on whether the litigants have mastered legal rules and processes rather than whether their case has merit. [173]

These remarks repay careful consideration in relation to cases like the present.

122 Human rights attempts to meet with the challenges presented by the participation of self-represented parties in legal proceedings through the contextual application of their right to a fair hearing (as well as their right to equality), which encompasses the principle of equality of arms, as reflected in s 24(1) (and s 8(3)), of the Charter. Of that right and principle, T Forrest J in *Knight v Wise*[174] said:

> The right to a fair hearing is concerned with the procedural fairness of a decision.[175] What fairness requires will depend on all the circumstances of the case.[176] Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent.[177] This principle is commonly known as the principle of equality of arms.[178]

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or reliable interpreter, so 'almost laughable to speak of notions such as equality of access to the courts').

169 *Dietrich v The Queen* (1992) 177 CLR 292; *Awan v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 120 FCR 1, 12 [46]; *Nagy v Ryan* [2003] SASC 37 (19 February 2003) [40] (Gray J).

170 See eg Canada: *R v Phillips* 2003 ABCA 4 [16]–[19] (Court of Appeal of Alberta*); Wagg v Canada* [2004] 1 FC 206 [26] (Federal Court of Appeal of Canada); *Barrett v Layton* (2004) 69 OR (3d) 384, 390–91 (Ontario Superior Court of Justice).

171 *Tomasevic* (2007) 17 VR 100, 116–7 [80]–[83] (Bell J).

172 Michelle Flaherty, 'Self-Represented Litigants, Active Adjudication and the Perception of Bias: Issues in Administrative Law' (2015) 38 *The Dalhousie Law Journal* 119, 125 (footnote omitted).

173 Ibid.

174 [2014] VSC 76 (7 March 2014) ('*Knight*').

175 *Dietrich v The Queen* (1992) 177 CLR 292 [2] (Gaudron J).

176 *Taha* [2013] VSCA 37 [205] (Tate JA).

177 *Ragg v Magistrates Court of Victoria* (2008) 18 VR 300, 310–12 [45]–[51] (Bell J) ('*Ragg'*).

178 *Knight* [2014] VSC 76 [36] (T Forrest J).

123 The principle of 'equality of arms' is applied under both art 14(1) of the ICCPR (from which s 24(1) of the Charter is derived) and art 6(1) of the ECHR (see below) as one feature of the wider concept of a fair trial in civil and criminal cases. As explained in *Ragg v Magistrates Court of Victoria*[179] by reference to *Foucher v France*,[180] this principle requires that 'each party must be afforded a reasonable opportunity to present [his or her] case in conditions that do not place him at a disadvantage *via-à-vis* his opponent'.[181] In *Ragg*,[182] is also to be found this longer explanation of the principle by a leading scholar:

> The right to a fair trial entails protecting the 'equality of arms' principle, an inherent element of the due process of law in both civil and criminal proceedings. Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality. Indeed, at the core of the concept of 'equality of arms', as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial. Fundamental procedural safe-guards aimed at securing such equality are guaranteed in most domestic legal orders, enshrined in human rights treaties and other relevant international instruments, and set out in the Statutes and Rules of the major international courts and tribunals. [183]

124 Equality of arms is thus a general principle for operationalizing important aspect of the human right to a fair hearing. It has been so employed by the Human Rights Committee under art 14 of the ICCPR. In the General Comment on that article, the Committee states that equality of arms means:

> the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.[184]

The principle has been applied by the Committee in many cases,[185] including in a case concerning Australia.[186] An interesting example concerns the negative impact on equality of arms of costs orders that impede access to justice.[187] However, the leading cases on the specific content of the right and

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179 (2008) 18 VR 300, 310–14 [45]–[66] (Bell J).

180 (1998) 25 EHRR 234 (European Court of Human Rights) (*'Foucher'*).

181 Ibid 247 [34] (footnotes omitted).

182 (2008) 18 VR 300, 310 [47] (footnote omitted).

183 Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' (2005) 5 *International Criminal Law Review* 513.

184 Human Rights Committee*, General Comment 32: Right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 (23 August 2007) [13] (footnote omitted).

185 See eg *Jansen-Gielen v The Netherlands*, Communication No 846/1999, UN Doc CCCPR/C/71/D/846/1999 (14 May 2001) [8.2]; *Perterer v Austria*, Communication No 1015/2001, UN Doc CCCPR/C/81/D/1015/2001 (20 August 2004) [9.2].

186 *Dudko v Australia*, Communication No 1347/2005, UN Doc CCPR/C/D/1347/2005 (29 August 2007) [6.4].

its application through the principle come from the European Court of Human Rights at Strasbourg. A discussion of these cases is to be found in *Ragg*,[188] particularly in relation to access by the defence to documents and the prosecutorial duty of disclosure. Here I focus upon the content of the right to a fair hearing and the application of the principle of equality of arms in relation to self-represented parties.

125 In relation to self-represented parties, the right to a fair hearing has been considered by the court at Strasbourg in cases in which the complaint has been that legal aid in civil cases has been denied in breach of human rights. It was established in early cases that there is no automatic right to legal aid in such cases but failing to provide it may be a breach of the right in art 6(1) of the ECHR because, depending on the nature and circumstances of the case, it may be indispensable for effective access by the party to a court, however great the assistance offered by the judge.[189] However, in a number of other cases, the court has considered whether the self-represented party was denied a fair trial, not because the party was denied legal aid, but because of deficiencies in the procedure followed by the court or tribunal prior to or at the hearing. In doing so, the court at Strasbourg has applied the principle of equality of arms.

126 *Foucher,*[190] for example, was a case in which a self-represented defendant was denied access to his criminal file and copies of the documents therein. The court at found that the principle had been breached and therefore a fair trial had not been afforded.[191]

127 In *Kerajarvi v Finland*[192] the court found that the principle had been breached because the Supreme Court of Finland had failed to make documents available to a self-represented appellant in proceedings related to injury compensation. Importantly, the court emphasised that a fair hearing necessarily required proper participation by the parties:

> The notion of 'fair hearing' required that the applicant himself should have been given the opportunity to assess their relevance and weight and to formulate any such

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187 *Aerela and Nakkalajarvi v Finland*, Communication No 779/1997, UN Doc CCPR/C/73/D/779/1997 [7.2] and [7.4].

188 (2008) 18 VR 300, 312–15 [55]–[63] (Bell J).

189 *Golder v United Kingdom* (1979–80) 1 EHRR 524, 536 [36]; *Airey* (1979–80) 2 EHRR 305, 316–18 [26]–[28]; *P, C and S v United Kingdom* (2002) 35 EHRR 31, 1098 [89] ('*P, C and S'*).

190 (1998) 25 EHRR 234.

191 See also *De Haes and Gijsels v Belgium* (1998) 25 EHRR 1 ('*De Haes and Gijsels'*).

192 (2001) 32 EHRR 8.

> comment as he deemed appropriate. Since no such opportunity was afforded to him, the procedure had not enabled him to participate properly in the proceedings before the Supreme Court.[193]

Further, the court conducting the proceeding has a particular duty to self-represented persons to ensure that participation:

> Where, like the applicant, an appellant does not have legal assistance, there is a greater onus on the Supreme Court to ensure of its own motion that justice is not only done but also seen to be done.[194]

The court found that breach of art 6(1) had occurred because 'the procedure followed by the [court] was not such as to allow proper participation by the appellant party'.[195] This was a case in which the self-represented party was denied a fair trial not because legal aid was denied but because the court could have but did not make that party's participation effective. Maria and Betty's cases fall into this category.

128 *P, C and S v United Kingdom*[196] concerned a party with a mental illness who was self-represented in a child-removal and adoption proceeding. The court applied the principle of effective participation in determining whether the trial had been fair:

> There is the importance of ensuring the appearance of the fair administration of justice and a party in civil proceedings must be able to participate effectively, *inter alia*, by being able to put forward the matters in support of his or her claims. Here, as in other aspects of Article 6, the seriousness of what is at stake for the applicant will be of relevance to assessing the adequacy and fairness of the procedures.[197]

The court found that, despite the latitude granted by the judge and other assistance that the self-represented party obtained, the denial of legal aid meant that the presentation of that party was not made 'in a proper and effective manner on the issues which were important'.[198] This was a case in which the self-represented party was denied a fair trial trial because the self-represented party did not have legal aid without which participation in the trial could not be effective. Maria and Betty's cases do not fall into this category, but the principle of effective participation is nonetheless important.

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193 Ibid 165 [39].
194 Ibid.
195 Ibid 166 [42].
196 (2002) 5 EHRR 31.
197 Ibid 1099 [91].
198 Ibid 1101 [99].

129 For the trial to be fair, participation by the individual must be effective. That fundamental principle is derived from the core concept of the ECHR that human rights guarantees are intended to be practical and effective. Thus, in another case involving self-represented parties, the court stated in *Steel and Morris v United Kingdom*:[199]

> The Court recalls that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to court in view of the prominent place held in a democratic society by the right to a fair trial.[200] It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.[201]
>
> Article 6 (1) leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure.[202]
>
> The question whether the provision of legal aid is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case and will depend *inter alia* upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively.[203]

Applying this principle, the court went on to 'assess the extent to which the applicants were able to bring an effective defence despite the absence of legal aid'.[204] It was held that their participation had not been effective despite the 'extensive judicial assistance and latitude granted to the applicants as litigants in person' by the trial judge.[205] This was another case, like *P, C and S*, where self-represented parties were denied a fair trial because the parties did not have legal aid, which is not in issue in the present case. It is the principle of effective participation that is important.

130 Likewise, the Charter is intended to guarantee human rights that are practical and effective, not theoretical or illusory. Respect for the equal dignity of all individuals and their right to equal access to justice and a fair trial under the rule of law are values of foundational significance in democratic society and not just matters of manner and form. Under ss 8(3)

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199 (2005) 41 EHRR 22, 427 [59]–[61] (footnotes included).
200 See *Airey* (1979–80) 2 EHRR 305, 312–15 [24].
201 See, among many other examples, *De Haes and Gijsels* (1998) 25 EHRR 1, 56–7 [53].
202 See *Airey* (1979–80) 2 EHRR 305, 316–17 [26] and *McVicar v United Kingdom* (2002) 25 EHRR 22, 583–4 [50] ('*McVicar'*).
203 *Airey* (1979–80) 2 EHRR 305, 316–17 [26]; *McVicar* (2002) 25 EHRR 22, 583–4 [48] and [50]; *P, C and S* (2002) 35 EHRR 31, 1098–9 [91]; and also *Munro v the United Kingdom* (1988) 10 EHRR CD 376.
204 Ibid (2005) 41 EHRR 22, 429 [67].
205 Ibid 429–30 [69].

and 24(1) of the Charter, it is especially important that the right of all persons equally to access, and effectively to participate in proceedings in, the courts and tribunals of justice are applied in a way that is practical and effective, not theoretical or illusory. In both a criminal and civil proceeding, a trial is not fair in human rights terms if the procedures followed do not ensure that all parties can effectively participate and have equality of arms with the opposing side. Where the party is self-represented, it is the duty of the court to ensure that this occurs, subject to the fundamental requirements of judicial independence, impartiality and fairness and respect for the human rights of other participants.

131 *Tomasevic*[206] was a case in which the plaintiff applied to this court under O 56 of the *Supreme Court (General Civil Procedure) Rules* for judicial review of a decision of a judge of the County Court refusing leave to bring an appeal out of time against a sentencing order of the Magistrates' Court. It has some similarities with this case because a ground of the application was that, in the conduct of the hearing, the judge breached the rules of natural justice by failing to provide due assistance to the plaintiff as a self-represented person.

132 The judgment in *Tomasevic* draws attention to the overriding duty of a judge to ensure a fair trial.[207] Following well-accepted authorities and drawing also upon human rights sources, it identifies the scope of the duty of a judge to ensure a fair trial by providing due assistance to self-represented persons, as follows:

> Every judge in every trial, both criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights … The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.
>
> Most self-represented persons lack two qualities that competent lawyers possess — legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of grave disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.
>
> The matters regarding which the judge must assist a self-represented litigant are not limited, for the judge must give such assistance as is necessary to ensure a fair trial. The proper scope of the assistance depends on the particular litigant and the nature of the case. The touchstones are fairness and balance. The assistance may extend to issues concerning substantive legal rights as well as to issues concerning the

206 (2007) 17 VR 100 (Bell J).
207 Ibid 117 [86]ff.

> procedure that will be followed. The Family Court of Australia has enunciated useful guidelines on the performance of the duty.
>
> The judge cannot become the advocate of the self-represented litigant, for the role of the judge is fundamentally different to that of an advocate. Further, the judge must maintain the reality and appearance of judicial neutrality at all times and to all parties, represented and self-represented. The assistance must be proportionate in the circumstances — it must ensure a fair trial, not afford an advantage to the self-represented litigant.[208]

As submitted on behalf of Maria and Betty and the Attorney-General, this statement of principle is well accepted.[209]

133 It was held in *MacPherson v The Queen*[210] that at common law there is

> no limited category of matters regarding which a judge must advise an unrepresented accused – the judge must give an unrepresented accused such information as is necessary to enable him to have a fair trial.[211]

The same may be said in relation to the obligation of a court or tribunal under s 24(1) of the Charter to make reasonable and available accommodations for ensuring effective participation and equality of arms in respect of self-represented parties.

134 However, under both the common law and s 24(1) there is a boundary that cannot be crossed by virtue of the judicial nature of the function of the court or tribunal, which requires maintenance of both the appearance and reality of neutrality in the proceeding between the parties. Under the common law, the limits of this boundary are marked out by the fundamental requirement that advice and assistance provided by the court or tribunal must not be such as to give rise to a reasonable apprehension of bias in the mind of a properly informed fair-minded observer.[212] Under s 24(1), the limits are marked out by the

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208 Ibid 129–30 [139]–[142].

209 The submissions referred to *Waddington v Kha* [2015] VSC 339 (22 July 2015) [60] (Daly AsJ*); Zhong v Melbourne Health* [2015] VSCA 165 (25 June 2015) [68] (Santamaria, McLeish JJA and Dixon AJA) ; *Stone v Braun* [2015] WASCA 103 (28 May 2015) [64] (Buss and Mazza JJA and Beech J); *Love v Roads Corporation* [2014] VSCA 30 (6 March 2014) [21] (Maxwell P, Whelan and Santamaria JJA) ; *Pham v Ex Parte, Drakopoulos* [2013] VSCA 43 (1 March 2013) [55] (Vickery AJA, Whelan JA agreeing); *Slaveski v Rotstein & Associates Pty Ltd* [2012] VSCA 291 (16 November 2012) [17] (Maxwell P, Warren CJ agreeing); *Pamamull v Albrizzi (Sales) Pty Ltd (No 2)* [2011] VSCA 260 (6 September 2011) [101] (Neave, Harper and Hansen JJA); *Isherwood v Tasmania* [2010] TASCCA 11 (2 September 2010) [60] (Crawford CJ, Evans and Blow JJ); *Bauskis v Liew* [2013] NSWCA 297 (5 September 2013) [68] (Gleeson JA, Beazley P and Barrett JA agreeing).

210 (1981) 147 CLR 512.

211 Ibid 524 (Gibbs CJ and Wilson J); see also 546–7 (Brennan J).

212 *Tomasevic* (2007) 17 VR 100, 121–32 [97]–[132] (Bell J) and authorities cited therein; more recent authorities include *McWhinney v Melbourne Health* (2011) 31 VR 285, 293 [26] (Neave, Redlich and Mandie JJA).

fundamental requirements of judicial independence, impartiality and fairness and respect for the human rights of other participants.

135 In applying these limits, it is accepted under the common law that the rule against bias is administered upon the basis that the fair minded observer is to be attributed with awareness of the features of the case that make it necessary for the court or tribunal to provide the advice and assistance that was required by the obligation to ensure a fair trial or hearing.[213] In that connection, a critical question is whether the advice and assistance was proportionate in the circumstances – whether it ensured a fair hearing for or rather conferred an unfair advantage upon the self-represented party.

136 It is equally accepted in relation to the human right to a fair hearing that the impartiality of the court or tribunal must be preserved. However, the concept of impartiality takes account of the need, in the interests of substantive equality and a fair hearing, to make procedural adjustments and accommodations for ensuring effective participation by self-represented persons in legal proceedings, in other words, for ensuring that the proceeding is substantively impartial in the procedural respect whatever be the impartial outcome required by the binding law. Again, a critical question is whether the adjustments and accommodations were proportionate in the circumstances – whether they ensured effective participation and equality of arms for or rather conferred an unjustified advantage upon the self-represented party.

137 In the present case, these limits did not in any way prevent the judge of the County Court who heard and determined Maria and Betty's applications from ensuring that they effectively participated in the hearing, which, as will be seen, his Honour did not do.

138 It is noted in *Tomasevic* that the 'proper scope of the assistance to be provided depends on the particular litigant and the nature of the case' and 'may extend to issues concerning *substantive legal rights* as well as … the procedure that will be followed' (emphasis added).[214] That statement was based on a review of the authorities in this connection,[215] particularly *R v*

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213 *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 446 (Full Court); see especially the illuminating discussion in *Mentyn v Law Society of Tasmania* [2004] TASSC 24 (25 March 2004) [49]–[73] (Slicer J).

214 *Tomasevic* (2007) 17 VR 100, 130 [141] (Bell J).

215 Ibid 127 [130]–[134].

White.[216] In that case, Chernov JA held that the duty to assist extended to giving assistance about 'the legal position as to the *substantive* and procedural issues in the case',[217] a position recently confirmed by Redlich, Osborn and McLeish JJA in *Loftus v Australia and New Zealand Banking Group Ltd [No 2]*.[218] This is particularly important in the present case because the judge in the County Court did not inform Maria and Betty what the applicable legal test was.

WHETHER JUDGE ENSURED HUMAN RIGHTS

139 It is now necessary to determine whether the judge of the County Court who heard and determined Maria and Betty's applications ensured that Maria was equally and effectively protected against discrimination under s 8(3) of the Charter and that Maria and Betty had a fair hearing under s 24(1).

Equality: s 8(3)

140 In their applications for judicial review, Maria and Betty were represented pro bono, with the great appreciation of the court, by counsel from the Victorian Bar Duty Barrister Scheme instructed by solicitors, as arranged by the Self-represented Litigants Coordinator of the court.

141 At the start of the hearing, it was immediately apparent to me from Maria's appearance, language and demeanour that, although she was a young adult in age, she was not a fully functioning young adult. I initially had concerns that she may lack capacity to instruct counsel, which it was my duty to consider. The applicable test is discussed in *Goddard Elliott v Fritsch*,[219] which I applied. I concluded that Maria did have capacity to engage in the proceeding through counsel.

142 It is a different question whether Maria would have had the capacity to appear before this court self-represented. The applicable test in that regard is stated in *Goddard Elliott* follows:[220]

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216 (2003) 7 VR 442.
217 Ibid 456 [38] (emphasis added).
218 [2016] VSCA 308 (8 December 2016) [27].
219 [2012] VSC 87 (14 March 2012) [554] (Bell J) ('*Goddard Elliott'*).
220 Ibid [558].

> As an aspect of the general duty to ensure a fair trial, the courts have a responsibility to provide certain assistance to self-represented persons.[221] The courts have the same duty not to allow a self-represented person lacking the required mental capacity to participate in legal proceedings without a litigation guardian being appointed as they do in relation to persons represented by a lawyer. But the test of capacity which is applied in the case of self-represented persons is more intensive than in the case of represented persons. As has been held, 'the level of mental capacity required to be a "capable" litigant [in person] will be greater than that required to instruct a lawyer because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation.'[222] It follows that a person who does not have the mental capacity to represent themselves may have sufficient capacity to be able to give instructions to a lawyer to represent them.[223]

As this matter did not arise, I did not consider it.

143 It was not put on behalf of Maria in this court that she did not have capacity to appear self-represented in the hearing before the judge in the County Court and I did not consider that issue either. However, the evidence given by Maria and Betty to this court revealed that Maria had a learning disability, that her schooling had been significantly affected, that her language skills were simple, that she was a disability pensioner and that her mother Betty was her carer. While I accepted the presumption of her capacity to engage in the hearing before the judge in the County Court,[224] it was clear that she had a diminished capability to participate in that hearing.

144 Counsel for the Council in the proceeding in this court was the same counsel who appeared on behalf of the Council in the proceeding before the judge in the County Court. On the instructions of the Council, which I acknowledge were in commendable fulfilment of its duty to the court as the prosecutor of the charges brought against Maria, counsel conceded that it should have been readily apparent to the judge that Maria had a disability diminishing her capability to participate in the proceeding, and I so find. Both as to the substantive outcome and the hearing procedure adopted, Maria's disability may also be relevant to the rehearing of her application for an order setting aside the strike-out order that I will be ordering (see below), as well as the appeal against sentence should it be reinstituted.

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221 *Pamamull v Albrizzi (Sales) Pty Ltd* [2011] VSCA 260 (6 September 2011) [101]–[103] (Neave, Harper and Hansen JJA); *Tomasevic* (2007) 17 VR 100, 129–30 [138]–[142] (Bell J).

222 *Slaveski v the State of Victoria* [2009] VSC 596 (14 December 2009) [31] (Kyrou J), following *Murphy v Doman* (2003) 58 NSWLR 51, 58 [35] (Handley JA, Tobias JA agreeing).

223 *Slaveski v the State of Victoria* [2009] VSC 596 (14 December 2009) [33] (Kyrou J), following *Skrijel v Mengler* [2003] VSC 128 (23 April 2003) [5] (Nettle J).

224 *Goddard Elliott* [2012] VSC 87 (14 March 2012) [545]–[547] (Bell J).

145 As discussed above, the learning disability from which Maria suffers is a protected attribute under ss 6(e) ('disability') and 4(1) (para (d)(ii) of the definition of 'disability') of the *Equal Opportunity Act*. The obligation of the judge under s 6(2)(b) of the Charter was to ensure that she was equally and effectively protected against discrimination by reason of this attribute in the conduct of the hearing of her application, as required by s 8(3).

146 Maria's disability substantially diminished her capability to participate effectively in the hearing in a number of ways. On the basis of her evidence in this court and the transcript of the hearing before the judge in the County Court, I find that Maria's disability so diminished her understanding of what the judge said to her, the issues that his Honour was required to consider and the nature of her application and also her ability to communicate with the judge. Therefore, without some advice and assistance from the judge, she could not make fully effective decisions about what to say and what evidence to give.

147 For Maria to be equally and effectively protected against discrimination, it was necessary for the judge to conduct the hearing differently in relation to her. To conduct the hearing upon the basis that she was an adult without a disability, as his Honour effectively did, had and was likely to have had the effect of disadvantaging Maria, and was not reasonable. It therefore amounted to indirect discrimination.[225] It was indirect discrimination whether or not the judge was not actually aware of Maria's disability[226] (and his Honour was not, although he should have been) or he did not intend to discriminate against her[227] (and he certainly did not).

148 Under s 8(3) of the Charter, the judge was obliged to make reasonable adjustments and accommodations to compensate for Maria's disability and ensure her effective participation in the proceeding. With the kind of advice and assistance that a judge is required to give self-represented parties, but also taking into account that her position was one of aggravated participatory disadvantage by reason of disability, Maria could have participated effectively in the proceeding.

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225 *Equal Opportunity Act* s 9(1).
226 Ibid s 9(4).
227 Ibid s 10.

149 Reasonable adjustments or accommodations of such kind to the hearing procedure would have equally and effectively protected Maria against discrimination. The conduct of the hearing would no longer have been discriminatory.[228] Far from creating the appearance of lack of impartiality, such adjustments and accommodations would have ensured that the hearing procedure followed by the judge was substantially impartial as between the parties, and seen to be so. On the evidence, the Council would not have complained, and indeed would have welcomed, the provision of advice and assistance by the judge that took Maria's disability into account. In any event, no reasonable observer fully informed of the need for adjustments and accommodations could have entertained a reasonable apprehension of bias.

150 The fundamental reason why the judge did not make reasonable adjustments and accommodations is that his Honour did not recognise Maria as a person with a disability, as his Honour should have done. This was probably due in part to the fact that the applications to set aside the strike-out orders were listed for hearing one day after being issued in the registry of the court. The judge would have had very little time to prepare for the hearing, which also impacted upon the procedures followed in relation to Betty's application (see below). There was no apparent reason for such haste. The Council did not seek the short listing, to which it too had to respond.

151 Under ss 6(2)(b) and 8(3) of the Charter, persons with a disability are entitled to equal and effective protection against discrimination in the conduct of hearings and the procedures followed by courts and tribunals. A judicial officer is required to make reasonable adjustments and accommodations so that such persons are not prevented by reason of their disability from effectively participating in a proceeding, including hearings, and have equality or arms with other parties. The judge in the County Court did not make such adjustments and accommodations when hearing and determining Maria's application for setting aside the strike-out order in which she appeared self-represented. Therefore her right to equality in s 8(3) of the Charter was breached.

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228 Ibid s 9(3)(e).

Fair hearing: s 24(1)

152 As noted, the evidence in this court reveals that Maria and Betty's applications for setting aside the strike out orders were listed for hearing in the County Court one day after being issued in the registry of that court. They appeared before the judge self-represented and the Council appeared legally represented through counsel instructed by a solicitor.

153 I do not accept the submissions of the Council in this court that the principle of equality of arms that informs the human right to a fair hearing had no or only limited application in the circumstances of this case. While it is correct to point out that the Council played little role in the hearing before the judge, Maria and Betty were still in the position of appearing self-represented in their own criminal proceeding in which the other party was the prosecutor legally represented by counsel instructed by a solicitor. In any event, the right to a fair hearing under s 24(1) of the Charter and the principle of equality of arms embrace the position of self-represented parties in proceedings whether or not the other parties are legally represented. The court or tribunal must ensure that the self-represented party effectively participates in the proceeding or hearing and have equality of arms with other parties whatever be the overall pattern of representation.

154 The judge hearing Maria and Betty's applications did not adopt the role of passive adjudicator. His Honour asked some questions of Maria and many questions of Betty. With respect, the judge is not to be faulted for engaging in an active form of adjudication, which he necessarily did, but for the manner in which the hearing was conducted in other fundamental respects.

155 Reflecting the speed with which the applications for were listed for hearing one day after being issued, at the start of the hearing his Honour called the '[m]atter of Matsoukatidou'. In fact, there were two matters. Counsel for the Council then announced his appearance, which his Honour took. Addressing 'Miss Matsoukatidou', his Honour described the matter as 'an application' to set aside the strike out order of 3 September 2014. Betty said '[y]es'. In fact there were two applications and Betty's had been struck out on 15 April 2014. His Honour referred to Betty's ground of set aside (as specified in the application) as being that she had relocated from the Dean Avenue address to the Berwick Springs Promenade address on 6

May 2014. This shows that she had misunderstood the applicable test because this was after her appeal was struck out on 15 April 2014.

156 At this early stage of the proceeding, his Honour:

- did not recognise Maria and Betty as self-represented parties or call upon them to announce their appearance before counsel for the Council announced his appearance;
- did not appreciate that Maria and Betty had made two separate applications arising out of two different but related procedures and orders;
- did not explain to Maria and Betty the procedure that would be followed;
- did not explain to Maria and Betty that the central issue raised by their applications was whether their failures to appear was not due to fault or neglect on their part or that this test had to be applied separately to their applications.

157 Without request by his Honour, or criticism by me, counsel for the Council rose to clarify that there were two applications, one to set aside the strike out order made on 15 April 2014 by a judge of the court in relation to Betty's appeal and the other made by a judge of the court on 3 September 2014 in relation to Maria's appeal. His Honour then confirmed that information with that counsel. His Honour did not confirm the information with Maria and Betty or provide any explanation to them.

158 When speaking with counsel for the Shire, his Honour referred to the legal test in s 267(3) of the *Criminal Procedure Act*. He asked counsel for the Shire if the test was whether the failure to appear was not due to fault or neglect on the part of the applicant. Counsel agreed. This was a conversation between the judge and the legal representative for the Council, not between the judge and the parties. His Honour did not pause to speak with Maria or Betty in the same way or give any explanation. He said he would deal with Betty's matter first and, precipitously, asked 'what's the basis for [the] application?'

159 In answer, Betty referred to Maria's appeal, the arrangement for her appeal and Maria's appeal to be heard together and Maria being sick (with a medical certificate) and failing to

appear. Betty said she 'was not even aware of the 15 of April'. The judge did not ask for further explanation of the telephone arrangement made by the registry-officer of the Magistrates' Court at Ringwood with the County Court to have the two matters listed together and Maria being sick. His Honour focussed upon Betty's statement that she was not aware of the date of her appeal (15 April 2014). He asked Betty to acknowledge that her signature was present in her notice of appeal dated 2 January 2014 which specified 15 April 2014 as the hearing date (see above), which Betty did. He did not ask whether she understood the contents of the notice of appeal, the meaning of her signature or that she had thereby given an undertaking to notify the court of any change of address in writing. He did not explain the relevance of this questioning or how her answers related to the legal test in s 267(3) of the *Criminal Procedure Act*. When Betty then sought to refer to Maria's later appeal, he cut her off and said 'we are dealing with yours first of all'.

160 Betty was allowed to go on to explain that, after Maria later appealed (on 20 February 2014), Betty was present when a registry officer of the Magistrates' Court 'called the County Court' and 'asked the Court [for] both matters to be [listed] together'. She said it was only when she advised the prosecutor of Maria's illness the day before the hearing on 13 May 2014 that she realised that the two cases had not been listed together.

161 The judge then asked Betty whether she had received notification of the order of the court striking out her appeal. She said she had not. She said she was not aware of it until Maria's case came up. When asked by his Honour whether she had taken action before September to have the April strike-out order set aside, Betty said 'I am not aware if that was done on the phone, if they said that they would relist it' and '[y]es I did, I advised the County Court that I will call the person that she' (sic). His Honour asked: '[n]o, no, did you make an application to set aside'? Betty said: 'I haven't, only yesterday'. She then tried to refer to the 'arsonists they burned my house' but his Honour cut her off and said: '[n]o, no, I don't want to hear any of that'.

162 After cutting Betty off, his Honour went straight on to ask Maria why she was 'not present on the 3rd of September when this matter was called on for hearing?' She said: '[b]ecause changed address and I was sick and …'. His Honour then cut her off and asked her to

identify her signature on the notice of appeal, which specified the hearing date of 13 May 2014, which she did. His Honour did not ask any questions of Maria about whether she actually understood what her signature meant or that she had thereby given an undertaking to notify the court in writing of any change of address or how this related to the legal test.

163 The judge then asked Maria whether she had attended on 13 May 2014. When she said '[n]o' his Honour asked '[w]hy not', apparently not appreciating that her application had been adjourned from that day until 3 September 2014 for reasons of ill health. He asked other questions of Maria that confused the dates of hearings with the parties to hearings. There was particular confusion about the hearing dates of 13 May 2014 and 3 September 2014 and why Maria did not attend those hearings. His Honour was asking about who attended the hearing on 13 May 2014 when Maria was seeking to explain that she could not attend the hearing on 3 September 2014 because she was not notified of it and was sick in any event. This confusion was ultimately resolved with Betty, not Maria, whose relatively short contribution there ended. By this time at least is should have been readily apparent to his Honour that Maria had a disability.

164 At his Honour's request, Betty explained that 'there was nothing on the 13th of May' and nobody attended because the court was notified of Maria's ill health. His Honour then asked Betty what steps she took to find out the adjourned date, namely 3 September 2014. The transcript records these questions and answers:

> His Honour: And did you take any steps to find out when the adjourned date was, namely the 3rd of September?
>
> BMatsou: Your Honour
>
> His Honour: Did you take any steps to find out when the date, that the fresh date the Court set?
>
> BMatsou: Yes, I did one call, I didn't have the reference number
>
> His Honour: Who did you phone?
>
> BMatsou: The Registry
>
> His Honour: Of the County Court?
>
> BMatsou: I called the Magistrates Court
>
> His Honour: What were you told?

BMatsou: I asked whether there is a listing today

His Honour: Yeah, and what did they say?

BMatsou: That was the prior, right after the May hearing Maria made

His Honour did not ask for any further details of this answer. Betty clearly wanted to explain what steps she took to ascertain the date of Maria's adjourned hearing.

165 The questioning and answering then went on as follows:

His Honour: Did you notify the County Court in writing of your change of address in accordance with …?

BMatsou: I haven't, I was not aware of that I missed the date, I understand m[y] obligation was that, but we've been through so much lately

His Honour: Well look

BMatsou: I understand it was my obligation

His Honour and Betty were here referring to the undertaking on the notices of appeal, signed by both Maria and Betty, 'to notify the County Court in writing of any change of address …' However, at no time did his Honour ask for clarification of Maria and Betty's frequent statements that they did not know of the new date because they had changed address. It is clear that, if that clarification had been sought, Betty and probably also Maria would have informed his Honour that their mail had not been forwarded to their new address as Betty had directed. In saying that 'we've been through so much lately', I infer that Betty was alluding to the arson attack on her and Maria's home and subsequent changes of address, details of which his Honour did not elicit.

166 After Betty said 'I understand it was my obligation', his Honour announced his decision to refuse the applications as follows:

His Honour: I think it's very clear, that I'm not in a position to find that your failure to appear on either of these occasions was not due to your fault or neglect and I make that finding and I refuse your application to set aside the striking orders

BMatsou: Your Honour, besides that I think this Court needs to examine whether I have grounds for my appeal

His Honour: Well, you don't get that chance because you have failed to appear and your daughter failed to appear and the Court has properly, in my view, struck out the appeals and the appeals are no longer before the

Court and I have refused yours and your daughter's applications to set aside the respectively striking out orders

BMatsou: Your Honour, not being notified because of the change of

His Honour: I have made my order, do you want to say anything Mr [counsel for the Shire].

From Betty's first interjection and her evidence in this court, it is clear that she was confused as to the nature of the proceeding. She thought that the proceeding before his Honour was the appeal when it was the hearing of her application to set aside the strike-out orders. From her second interjection, it is clear that she wanted to say more about not being notified because of the change of address, namely that her mail had not been forwarded in accordance with her direction. But the judge cut her off.

167 It can be seen from Maria and Betty's participation in the hearing before his Honour and this court that English is not their first language. I would describe Maria's level of English as simple and Betty's as functional. I am not suggesting that the hearing before his Honour should have been adjourned until an interpreter was obtained. But his Honour did not appear to take Maria and Betty's capacity to speak English into account. In consequence, the hearing was conducted too quickly for their level of English, which compounded the disadvantage that they experienced. In particular, I think they were struggling to understand what the real issue was, especially given the time taken up with clarifying the confusion surrounding the various hearings and applications.

168 Having regard to the particular self-represented person and the nature of the case in *Tomasevic*, it was held that the duties of the trial judge in that case were to:

- recognise Mr Tomasevic as someone who, as a self-represented litigant, was gravely disadvantaged;
- explain to him the procedures that would be followed in the hearing and determination of the application;
- explain to him the legal requirements that he had to satisfy, namely that the delay was due to exceptional circumstances and the informant's case was not materially prejudiced;
- encourage him to make submissions on relevant issues, but explain to him what was relevant;
- discourage him from making submissions on irrelevant issues, but explain to him what was irrelevant;

- ask appropriate questions to confirm he was fully putting forward the matters he wished to rely on, and ask for elaboration of any areas apparently not fully covered; and
- before deciding the application, ask him if there was anything else that he wanted to add.[229]

It was accepted in the submissions made on behalf of Maria and Betty and the Attorney-Geneal that the conduct of the hearing of the judge of the County Court in the present case could be assessed within this framework.

169 As relevant in the present case, it was held in *Tomasevic* that the judge did not ensure a fair trial because his Honour failed to explain to the plaintiff the procedures that would be followed in the hearing and determination of the application and the legal requirements that he had to satisfy, particularly the elements of the test which governed whether an application for leave to appeal out of time would be granted.[230] I have respectfully concluded that the judge in the present case committed errors of the same kind.

170 It is difficult to see how the judge could have conducted the hearing fairly without recognising Maria and Betty as self-represented parties. In the circumstances, recognition of this difference would have helped to equalise their position as self-represented parties with the position of the represented party. It would have demonstrated that the court would give equal respect to each after having due regard to their individual position. The court could also have inquired into whether they wished to apply to have the hearing adjourned to obtain legal representation, especially as only one day's notice was given.[231] Moreover, in the light of them being self-represented, some assessment needed to be made by the judge as to how the hearing would be conducted. For this purpose, his Honour needed to obtain some understanding of their capabilities by appropriately engaging with them at the outset, which he did not do. This would probably have revealed even more readily that Maria had a disability.

171 Effective participation in a hearing by self-represented parties requires (among other things) a basic understanding by them of the procedures to be followed. In this regard, the position of

229 (2007) 17 VR 100, 130–1 [146] (Bell J).
230 Ibid 131 [147]–[148].
231 Maria's evidence to this court was that she wanted an adjournment to obtain legal representation but did not feel able to ask the judge.

Maria and Betty was fundamentally unequal to that of the Council, for its legal representatives knew what procedure would be followed while Maria and Betty did not. The judge made no attempt to equalise the position by explaining the procedure to them. Indeed, the procedure followed was initially confusing because only one application was called. Then his Honour spoke with counsel for the Council and immediately afterwards asked Betty for the basis of the applications.

172 Perhaps the most important thing for a self-represented party to know is the applicable legal test. To be effective, their participation must be directed towards satisfaction of this test. The judge clarified with the legal representative for the Council what the test was. With respect, this process did not include Maria and Betty. His Honour did not explain the test to them or how it was applied. Therefore their submissions were often generalised and not pertinent.

173 The procedure adopted by the judge was one of active questioning. It was not one in which Maria and Betty were asked to provide information and make submissions towards satisfaction of an understood legal standard. The hearing was conducted quickly and there were no breaks. There was confusion about relevant facts and the relationship between the two applications and the events behind them. Betty was cut off on occasions. So was Maria. Maria and Betty's participation in the proceeding was directed towards the often confused and confusing questions of his Honour rather than towards the coherent narrative that they wished to communicate. The result was that their participation was ineffective and they were not given a fair opportunity to present their case.

174 With respect, Maria and Betty should not have been prevented from explaining how the loss of their home to arson had affected their participation in the criminal legal process. The loss of their home would have been a traumatic event. Events moved very quickly thereafter, as the sequence of events described above shows. This would have been very difficult for them and potentially relevant to whether their failure to appear could reasonably be regarded as due to their fault or neglect.

175 As in the case of Maria under s 8(3) of the Charter, reasonable adjustments or accommodations to the conduct of the hearing in relation to Betty could have been made by the judge as required by s 24(1) of the Charter without creating the appearance of lack of impartiality. Such adjustments and accommodations would have ensured that the hearing procedure followed by the judge was substantially impartial as between the parties, without risk of criticism for crossing the boundary of judicial neutrality.

176 Under ss 6(2)(b) and 24(1) of the Charter, parties to a criminal proceeding of the kind in which Maria and Betty were engaged are entitled to a fair hearing before the court or tribunal concerned. As they were self-represented, the judge in the County Court hearing their applications was required to give them such advice and assistance as would ensure their effective participation in the hearing and equality of arms with the legally represented party. His Honour did not do so. Therefore Maria and Betty's rights to a fair hearing under s 24(1) of the Charter were breached.

RELIEF BY WAY OF JUDICIAL REVIEW

177 Maria and Betty have sought relief by way of judicial review under O 56 of the *Supreme Court (General Civil Procedure) Rules*. This relief is available in respect of orders made by a court in breach of the rules of procedural fairness and thereby in excess of jurisdiction.[232] A court commits a breach of the rules of procedural fairness and thereby exceeds it jurisdiction where it makes orders after conducting a hearing in which the judge fails to ensure a fair trial by providing due assistance to a self-represented party. [233]

178 The human right of parties to court or tribunal proceedings to a fair hearing under s 24(1) of the Charter and the common law obligation of the court or tribunal to ensure a fair hearing both give effect to equality before the law and equal access to justice. In relation to the participation of self-represented parties in such proceedings, they are very close both in content and in application. Thus *Tomasevic*[234] explains the obligation at common law of a

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232 *Criag v South Australia* (1995) 184 CLR 163, 176 (Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Taha v Broadmeadows Magistrates' Court* [2011] VSC 642 (16 December 2011) [76]-[80] (Emerton J), upheld *Taha* [2013] VSCA 37 (4 March 2013) (Nettle, Tate and Osborn JJA); *Tomasevic* (2007) 17 VR 100, 132 [148] (Bell J).

233 *Tomasevic* (2007) 17 VR 100, 131 [157]-[158]. (Bell J).

234 Ibid 129–30 [138]–[142] (Bell J).

court or tribunal to ensure a fair hearing in a way that draws upon, and is consistent with, the human right to a fair hearing in that context. Both categories of right promote respect for the personal dignity, agency and capacity for self-determination of individuals in the legal system and aim to ensure, as far as reasonably possible, that participation by self-represented parties in court and tribunal proceedings is effective. As Heydon J stated in *International Finance Trust Company Ltd v New South Wales Crime Commission*, ensuring that parties to legal proceedings are fairly heard is justified because it 'respects human dignity and individuality'.[235] In this connection, his Honour endorsed the following statement by a learned author:

> [W]e think we owe it to a man as a human being to engage in argument with him, and allow him to engage in argument with us, rather than take decisions about him behind his back, completely disregarding, as it were, his status as a rational agent, able to appreciate the rationale of our decisions about him, possibly willing to co-operate in carrying them out.[236]

His Honour went on to endorse this further statement by the same author which explicitly applies to litigants in person:

> [E]ach man ought himself to have some say of his own in his own future, and … each man ought to count, to count as being himself, and not merely as one instance among many of the human species. We therefore think each man ought to be able to instruct his own counsel (or appear in person) to represent his own views, not merely those views which a benevolent authority might deem him to hold. … [O]n a matter on which he is likely to have very strong wishes, namely where a decision (judicial or administrative) is in danger of being taken adversely to his interests, he should have a chartered right of having a say, that is, the authority has a duty to hear him.[237]

179 As two sources of positive law applying in cases like the present, human rights and the common law are mutually reinforcing and the obligations arising under each are almost always co-extensive. The contemporary human rights dimension brings a broader rationale and added strength to the existing obligation under the common law and brings to the fore the need to achieve substantive procedural equality and effective participation as regards self-represented parties. In its procedural application to court and tribunal proceedings, the right to equality in s 8(3) may be regarded in a similar way.

180 In relation to self-represented parties in a court or tribunal proceeding, I hesitate to say that the content of the human right to a fair hearing and the common law obligation to ensure a

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235 (2009) 240 CLR 319, 381 [144].

236 Ibid, citing John Randolph Lucas, *The Principles of Politics* (Clarendon Press, 1966) 132.

237 Ibid 381 [145], citing John Randolph Lucas, *The Principles of Politics* (Clarendon Press, 1966) 270.

fair hearing are conterminous.[238] But the obligations imposed by the two rights are so close and overlapping that a court or tribunal is almost always entitled to proceed upon the basis that advice and assistance which satisfies the common law standard will also represent reasonable adjustments and accommodations under the human rights standard, and vice versa.

181 Therefore, a court or tribunal that, under the common law, gives adequate advice and assistance to a self-represented party depending on the needs of that party and the nature on the case, also ensures, under human rights, their effective participation in the proceeding, equality of arms and a fair hearing, and vice versa.[239] The explanation in *Tomasevic* as to the scope of the obligation of a court or tribunal under the common law is equally relevant to its compliance with s 24(1) of the Charter. The discussion in this judgment of the principle of equality of arms and ensuring effective participation of the self-represented party in the proceeding are also relevant.

182 It follows that, where a court of judicial review finds that a court or tribunal has not ensured that a self-represented party obtains a fair hearing under the common law as so explained, it would almost always be entitled to find that the failure constitute a breach of the human rights of that party under the Charter.[240] The obverse case is one of a court of judicial review finding that a court or tribunal has not ensured that a self-represented party obtains a fair hearing under s 24(1) of the Charter by reference to the standards discussed in this judgment, including the principle of equality of arms. In that kind of case, it will almost always be entitled to find that the failure constitutes a breach of the rules of procedural fairness and an excess of jurisdiction under the common law for which relief in the nature of judicial review is available, as in the present case. As was submitted on behalf of the Attorney-General, it is well established that judicial review is available at common law for excess of jurisdiction based on want of procedural fairness, in the case of both administrative tribunals and inferior courts, regardless of whether the error appears on the face of the record. The procedural

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238 As pointed out in the submissions made on behalf of the Attorney-General, the common law does not reflect the right to expedition, which is an aspect of the human right to a fair hearing, as discussed in *Kracke* (2009) 29 VAR 1, 100-108 [448]-[486] (Bell J).

239 I am not here dealing with those cases in which no amount of judicial assistance will make the hearing fair because legal representation is indispensable for that purpose (see eg *Dietrich* (1992) 177 CLR 292).

240 There may be cases in which justification under s 7(2) may need to be considered.

implications of the right to equality in s 8(3) as herein discussed and applied feed into the same reasoning.

183 In both applications for judicial review in this court, the court will therefore make orders to the effect that the orders of the judge of the County Court dated 12 September 2014 refusing Maria and Betty's applications to set aside the strike-out orders will be set aside and the applications will be remitted to a different judge for hearing and determination according to law.

CONCLUSION

184 In relation to the procedures followed in hearings, courts and tribunals must apply the right to equality in s 8(3) and the right to a fair hearing in s 24(1) of the Charter. This obligation applies in relation to self-represented parties generally and it applied specifically in relation to the hearing of the applications made by Maria and Betty in the County Court for reinstatement of their appeals. They have established that the judge hearing those applications did not apply those rights.

185 Maria is a person with a disability and a disability pensioner. Under s 8(3) of the Charter, the judge was obliged to ensure that she was equally and effectively protected against discrimination by reason of this disability. This required the judge to make certain adjustments and accommodations to the procedures that were adopted, which his Honour did not make. Maria's inability effectively to participate in the hearing was substantially due to the judge's failure to do so. Therefore the judge did not apply her right to equality under s 8(3).

186 Maria and Betty both had the right under s 24(1) of the Charter to a fair hearing of their applications. As they appeared self-represented, the judge was obliged by s 24(1) to give them certain advice and assistance to ensure that they effectively participated in the hearing, which his Honour did not give. Their inability effectively to participate in the hearing was

due (in Maria's case as an additional reason) to the judge's failure to do so. Therefore the judge did not apply their right to a fair hearing under s 24(1).

187 In almost all cases, a self-represented party in a case like the present will be entitled to make application for an order for judicial review for breach of the rules of procedural fairness and thereby excess of jurisdiction under the common law when a court or tribunal fails to apply the right to equality under s 8(3) (where relevant) and a fair hearing under s 24(1) of the Charter in respect of that party. This is because the obligations of courts and tribunals under the Charter to apply those human rights in proceedings are very close to, and in almost all cases coextensive with, their obligations under the common law to give self-represented parties such advice and assistance as will ensure that they have a fair trial.

188 The court will therefore make orders in the nature of judicial review that the orders of the judge of the Count Court dismissing Maria and Betty's applications are set aside and remitting their applications for reinstatement of their appeals to be reheard and determined according to law by a different judge.