Australian Cases before International Courts and Tribunals Involving Questions of Public International Law 2006

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Human Rights

Deprivation of liberty – whether violation of right to be treated humanely and with respect for inherent dignity of human person

Corey Brough v Australia
Communication No 1184/2003
UN Doc CCPR/C/86/D/1184/2003 (2006)
Human Rights Committee
Views adopted on 17 March 2006

The author of the communication was a young Aboriginal man who suffered from a mild mental disability that impaired his adaptive behaviour, communication skills and cognitive functioning. At age 17, the complainant was convicted of burglary, assault and causing bodily harm, and sentenced to a period of eight months imprisonment. After participating in a prison riot at a juvenile detention centre in New South Wales, the complainant was transferred to an adult correctional facility where he was segregated from adult inmates. He was placed in a 'safe cell' to protect him from self-harm and from other inmates. On several occasions the complainant attempted self-harm, which culminated in an attempted suicide despite the removal by prison authorities of his clothing. The complainant was administered an anti-psychotic medication against his will.

The complainant contended that he was a victim of violations of Articles 2(3), 7, 10 and 24 of the 1966 International Covenant on Civil and Political Rights[1] on

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1 [1980] ATS 23. Art 2(3) provides that 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.' Art 7 provides that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.' Art 10 provides that '1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. 2. (a) Accused persons

the grounds that he was a juvenile referred to an adult correctional centre, and the conditions of detention were cruel, degrading and inhuman. He argued that having regard to his age, disability and Aboriginality, he was placed in a vulnerable position requiring special care and attention.

The Committee found that the complainant had admissible claims concerning periods of solitary confinement, removal of his clothes and blanket, continued exposure to artificial light and prescription of an anti-psychotic medication. In relation to the exhaustion of local remedies, the Committee found that although the complainant had not complained to the New South Wales Ombudsman, Corrective Services Minister or the Serious Offenders Review Council given his age, intellectual disability, and vulnerable position, 'he had made reasonable efforts to avail himself of existing administrative remedies, to the extent that these remedies were known to him' and were effective.[2] Judicial remedies, including a possible cause of action in negligence, were available however the Committee found that in the circumstances it would have been futile to have commenced such proceedings because there was lack of evidence of a recognisable psychiatric injury, notwithstanding that it was clear the author had suffered emotional distress and anxiety.

In relation to the merits of the complaint, the Committee recalled that persons deprived of their liberty shall not be subjected to hardship or constraint beyond that resulting from the deprivation of liberty and concluded that:

> In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt. The Committee therefore concludes that the author's treatment violated article 10, paragraphs 1 and 3, of the Covenant.[3]

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shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons; (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.' Art 24 provides, relevantly, that '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

2 UN Doc CCPR/C/86/D/1184/2003 (2006), [8.9].

3 Ibid [9.4].

Right to liberty and security of person – whether lengthy immigration detention arbitrary

D and E, and their two children v Australia
Communication No 1050/2002
UN Doc CCPR/C/87/D/1050/2002 (2006)
Human Rights Committee
Views adopted on 11 July 2006

The authors were all Iranian nationals living in Australia who claimed to be victims of violations of 9(1), 9(4) and 24 of the 1966 International Covenant on Civil and Political Rights.[4] The authors arrived in Australia by boat without required travel documents and were placed in immigration detention under the Migration Act 1958 (Cth), s 189. D applied for asylum in 2000 on the grounds that, were she returned to Iran, she feared punishment (including the possible application of the death penalty) for her involvement in making pornographic films in Isfahan. The application was refused by the Refugee Review Tribunal as D was not a member of a 'particular social group' by virtue of her activities. The authors were ultimately granted Global Special Humanitarian visas in March 2006.

Before the Committee, the authors alleged that they had been unlawfully detained. The Committee found the claims admissible in so far as the exhaustion of local remedies was concerned as the authors could not challenge the lawfulness of their detention in the courts. As regards the merits of the communication, the Committee noted that the authors had been detained in immigration detention for three years and two months. The Committee found that a violation of Article 9(1) had been made out (thereby making it unnecessary to consider whether a violation of Article 9(4) had occurred). The Committee gave the following reasons for this conclusion:

> Whatever justification there may have been for an initial detention … [Australia] has not demonstrated that their detention was justified for such an extended period. It has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances.[5]

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4 Art 9(1) provides that 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.' Art 9(4) provides that 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.'

5 UN Doc CCPR/C/87/D/1050/2002 (2006), [7.2].

Right to freedom of expression – whether conviction for making public address in pedestrian mall a restriction of free speech

Patrick Coleman v Australia
Communication No 1057/2003
UN Doc CCPR/C/87/D/1057/2003 (2006)
Human Rights Committee
Views adopted on 17 July 2006

The author of the communication was charged and convicted for making a public address in a pedestrian mall in Townsville without a permit in writing from the town council. The conviction in the Townsville Magistrates Court was upheld by the Queensland Court of Appeal, which held that the relevant bylaw serves a legitimate purpose of preventing users of an area of a pedestrian mall from being harangued by public addresses. Special leave to appeal to the High Court was refused.[6]

Mr Coleman's central contention was that his conviction and sentencing amounted to a breach of Article 19 of the 1966 International Covenant on Civil and Political Rights.[7] The Committee found parts of the author's communication inadmissible by reason that they were directed at constituent political sub-units (including the Townsville City Council) and not Australia as a state party to the Covenant. In relation to the merits the Committee observed that the author had made a public address on issues of public interest (including issues such as bills of rights, freedom of speech and land rights) and that there was no suggestion that the address was threatening, unduly disruptive or in any other way likely to jeopardise public order. The Committee concluded that 'the State party's reaction in response to the author's conduct was disproportionate and amounted to a restriction of the author's freedom of speech' inconsistent with Article 19(3).

Committee members Mr Nisuko Ando, Mr Michael O'Flaherty and Mr Walter Kälin delivered a concurring opinion in which they supported the Committee's conclusion for reasons different from those expressed in the Committee's views. They noted that by declining to seek a permit the author deprived the authorities of an opportunity to consider the issues in the cases. They further observed that permit

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6 The author was successful in an appeal to the High Court in relation to a later conviction for using insulting words to a police officer contrary to the Vagrants, Gaming and Other Offences Act 1931 (Qld). In *Coleman v Power* [2004] HCA 39; 220 CLR 1; 209 ALR 182; 78 ALJR 1166 a majority of the High Court found that the legislation contravened the implied constitutional freedom of political communication.

7 Art 19 provides that '1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.'

systems are, in principle, wholly consistent with the Covenant and have the advantages of 'fostering clarity, certainty and consistency, as well as providing an easier means of review … of a decision by the authorities.'[8] In the case before the Committee a violation of Article 19 was nonetheless established, for the reason that 'the totality of the State party's action lies in such disproportion to the author's original underlying conduct that we are not satisfied that the State party has shown the necessity of these restrictions'.[9]

Right to liberty and security of person – whether lengthy immigration detention arbitrary

Danyal Shafiq v Australia
Communication No 1324/2004
UN Doc CCPR/C/88/D/1324/2004 (2006)
Human Rights Committee
Views adopted on 31 October 2006

Danyal Shafiq was born in 1972 in Bangladesh and arrived in Australia by boat in 1999 and remained in immigration detention since then. The author was effectively stateless as he held no citizenship records from Bangladesh, and the Bangladesh Government had no record of his birth or nationality. The author was refused a protection visa on the basis that there were serious reasons for considering that he had committed a serious non-political crime outside Australia. Mr Shafiq had been recruited into an illegal political organisation in Bangladesh, the Sharbahara, at age 15 and carried out various activities including the smuggling of arms and drugs. He was told that if he left the party he would be killed by the police or by Sharbahara activists.

The author alleged violation of Article 9 on account of his detention, and Article 7 on account of the decision by immigration authorities to deport the author to Bangladesh. The Committee found the latter complaint inadmissible as an application by the author for a visa on humanitarian grounds remained pending. The Committee found the Article 9 complaint admissible, and that it had been made out on the merits.

The Committee recalled its jurisprudence that the notion of 'arbitrariness' must 'be interpreted … broadly to include such elements as inappropriateness and injustice', that 'every decision to keep a person in detention should be open to periodical review' and that 'detention should not continue beyond the period for which a State party can provide adequate justification'. [10] The Committee concluded in relation to Article 9(1) that:

> [T]he author was placed in an institution as a result of his mental illness, which [was] the consequence of his prolonged detention which, by then, had lasted for some six years. From the time of his placement in an open institution … he has not

8 UN Doc CCPR/C/87/D/1057/2003 (2006), Appendix.
9 Ibid.
10 UN Doc CCPR/C/88/D/1324/2004 (2006), [7.2].

> attempted to abscond. The State party has not provided any other justification … which would justify his continued detention for a period of over seven years.[11]

In relation to Article 9(4), the Committee reaffirmed its views in *A v Australia*[12] and noted that the power of Australian courts to order the release of a person in immigration detention was limited to the formal determination as to whether the person was an unlawful non-citizen, and did not encompass a review of the substantive grounds for the continued detention. The Committee concluded that 'court review of the lawfulness of detention under [Article 9(4)], which must include the possibility of ordering release, is not limited to mere formal compliance of the detention with domestic law governing the detention'.[13]

Right to compensation following conviction as a consequence of a miscarriage of justice

Tim Anderson v Australia
Communication No 1367/2005
UN Doc CCPR/C/88/D/1367/2005 (2006)
Human Rights Committee
Views adopted on 31 October 2006

The author was a member of a religious organisation known as Ananda Marga which was investigated in connection with the bombing of the Hilton Hotel in Sydney in 1978. The author was arrested, charged, and in 1979 was convicted with conspiracy to murder by means of explosives and sentenced to 16 years imprisonment. In 1985 the author was pardoned by the New South Wales government following a judicial inquiry that revealed police criminality, and he was released from prison after serving seven years. The author requested and received an ex gratia payment of $100,000 from the New South Wales government.

In 1989 the author was again arrested in relation to the hotel bombing, and was charged with murder of three persons. He was convicted and sentenced by the Supreme Court of New South Wales, but successfully appealed to the New South Wales Court of Criminal Appeal which quashed the conviction. The author's application to the New South Wales government for compensation was refused on the grounds that charges of misconduct against the prosecutor were dismissed.

Before the Committee the author claimed a violation of Articles 2(3) and 14(6) of the 1966 International Covenant on Civil and Political Rights.[14] The Committee

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11 Ibid [7.3].
12 UN Doc CCPR/C/59/D/560/1993 (1997).
13 UN Doc CCPR/C/88/D/1324/2004 (2006), [7.4].
14 Art 2(3) provides that '3. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.' Article 14(6) provides that '6. When a person has by a final decision been convicted of a

decided that the petition was inadmissible *ratione temporis* and *ratione materiae*. In relation to the first conviction and subsequent decision to pardon the author and grant compensation, the Committee noted that the alleged violation of Article 14(6) took place before the entry into force of the 1966 Optional Protocol to the International Covenant on Civil and Political Rights for Australia on 25 December 1991.[15] In relation to the second conviction and subsequent acquittal on appeal the Committee found that the latter decision was the relevant 'final decision' for the purposes of Article 14(6), and therefore that the author's claim was inadmissible as he had suffered no punishment as the result of a conviction. It followed that the author's allegation of a violation of Article 2 was also inadmissible.

Trade Law

GATT Article X – the requirement to administer customs laws in a uniform manner – application to states in a customs union

European Communities – Selected Customs Matters
Report of the Panel WT/DS315/R and report of the Appellate Body WT/DS315/R both adopted by the WTO Dispute Settlement Body on 11 December 2006

The *EC – Selected Customs Case*, brought by the United States, concerned the consistency of administration of customs law in the 25 Members States of the European Communities (EC). It involved issues that could potentially arise in a federal state such as Australia. The panel ruling could have had implications on the lengths to which Australia would be required to go to ensure uniform administration of customs law at ports and airports in different locations throughout the states and territories of Australia so as to avoid violating the General Agreement on Tariffs and Trade (GATT) Article X:3(a) which requires members to administer regulations affecting trade in goods in a 'uniform, impartial and reasonable manner'. Similarly, the decision could also have had implications for the extent of obligations on Australia to provide appeal mechanisms against customs determinations so as to avoid violating GATT Article X:3(b) and (c) which require members to 'maintain … judicial, arbitral or administrative tribunals or procedures' which provide 'objective and impartial review of administrative action'. Presumably for these reasons Australia made third party submissions in the proceedings.

The case is the first time that the GATT or World Trade Organization (WTO) dispute settlement process has been presented with a problem that raises the question as to the extent to which Members forming a customs union (supposedly justified under Article XXIV) are required to ensure that customs administration is uniform.

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criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.'

15 [1991] ATS 39.

The relevant EC laws were the Common Customs Code (CCC), the CCC Implementing Regulations and the Common Customs Tariff. These laws were administered separately by the governments of the 25 EC Member States. There were three areas of alleged inconsistency:

1. Customs classification: The United States alleged that divergent classification of goods arose from the decisions of the separate customs authorities in the 25 EC Member States. The EC had implemented a Binding Tariff Information (BTI) system under which traders could seek a decision on classification that would be binding on the customs administrations in all 25 Member States. The United States was not satisfied that the BTI system ensured consistent and uniform application of the law.
2. Customs Valuation: The United States alleged that there were a number of aspects of decisions on customs valuation that led to divergent decisions between different member states.
3. Customs Procedures: There were some other aspects of procedures which were alleged to differ from state to state.

In addition to alleging that a number of specific instances of conduct violated Article X, the United States also alleged that the EC was in breach of Article X:3(a) because the overall design and structure of the system necessarily led to non-uniform administration.

The panel found that its terms of reference did not include the review of whether the entire system of EC law and administration violated Article X:3 but that it was only required to consider the specific allegations of actual situations in which the EC had allegedly violated the rules. This decision was reversed by the Appellate Body (AB) but the AB declined to complete the analysis because of the absence of findings of fact by the panel on issues which would be necessary to determine the issue.

In respect of the 19 specific instances, the panel found only three violations and two of these were reversed by the Appellate Body. In the area of customs classification, the panel found no violation in relation to decisions on classification of three specific items (network cards for personal computers, drip irrigation products and unisex articles or shorts) but did find non-uniform administration in violation of Article X:3(a) in relation to: (a) administrative processes leading to classification of blackout drapery lining (reversed by the AB); and (b) classification of liquid crystal display monitors with digital video interface (upheld by the AB).

Also in the area of customs classification, the panel found that the United States had failed to prove that four other areas of conduct amounted to non-uniform administration contrary to Article X:3(a). The relevant allegations were (a) that member states were not treating the BIT rulings as binding; (b) that a refusal by the United Kingdom to withdraw the revocation of BTI on Sony Playstation2 amounted to non-uniform administration; and (c) that certain explanatory notes to the Common Custom Tariff regarding Camcorders amounted to non-uniform administration.

In the area of customs valuation, the panel found that one of the four allegations amounted to non-uniform administration in violation of Article X:3(a) but this one finding of violation was reversed by the AB. The violation found by the panel but reversed by the AB related to the application of a successive sales provision. The other allegations found not to constitute violations related to (a) differences between member states in apportioning royalty fees to the valuations of imports goods; (b) differing administration of a provision affecting the inclusion of vehicle repair costs under warranties in the valuation of goods; and (c) variations in the administration of EC law concerning when parties are to be treated as related parties.

With respect to other customs procedures, no violations were found. The allegations included those related to variations in administration of rules concerning post release audits and differences between penalties imposed in different member states. Lastly, the panel did not find that the EC had failed to provide prompt review and correction of administrative action under Article X:3(b). It rejected the argument that Article X:3(b) required exactly the same system of review to apply throughout the EC or that review decisions made in the EC should necessarily apply throughout the EC.

The decision suggests a degree of latitude being given to allow some differences in the uniformity of regulation. On this approach it seems very unlikely that any minor differences in the administration of Australian customs law around the different ports and airports in Australia would amount to a violation of Article X. The decision suggests that even in a federation in which the national government did not have the degree of control over these matters some variation in administration by different sub-national governments can exist without creating a violation of GATT Article X:3(a).

Although the question of compliance with Article XXIV was not addressed, this litigation was the first time that the facts of a dispute settlement case have raised the question of the extent to which members forming customs unions are required to unify the administration of their customs laws. Clearly the panel and AB have not hinted that administration of laws and appellate processes needs to be handed to a supernational authority. In fact, the panel and AB seem to have been reasonably tolerant of the EC's relatively loose control over the administration by the individual member governments of what is required by Article XXIV to be substantially the same regulations of commerce. However, the reversal by the AB on the question of whether the terms of reference covered the overall design and structure of the system leaves open for future consideration this more general question as to the extent to which states entering into customs union are required to take measures to ensure uniform application of customs laws.