Human Rights Law Centre

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RIGHTS AGENDA

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OPINION: IMPLEMENTATION IS NOT OPTIONAL

If the Australian Government was serious about human rights and the rule of law, it wouldn't treat the implementation of decisions of UN treaty bodies as optional, writes the HRLC's **Rachel Ball**.

NEWS: AUSTRALIA DEFIES UN HUMAN RIGHTS COMMITTEE

In a stunning rebuke, the Australian Government has advised the UN Human Rights Committee that it "respectfully disagrees" with a directive to allow a deported man to return home to Australia.

CASE NOTES:

A UK court has held that police used excessive force against a 16 year old autistic boy.

IF I WERE ATTORNEY-GENERAL…

The Centre for International Governance and Justice's **Professor Hilary Charlesworth**, provides four steps the AG could take to signal a renewed commitment to the integrity of the UN treaty body system.

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OPINION

Implementation is not optional: The Australian Government's response to the views of UN treaty bodies

Back in 2008, the Australian Government's accession to the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women* was warmly welcomed. Many felt optimistic about its potential to contribute to the realisation of women's rights in Australia. The Government's National Interest Analysis, informed by submissions from individuals and organisations around the country, argued that:

> [a]cceding to the Optional Protocol would give women in Australia greater opportunity to contest the implementation and application of human rights, thus providing for greater accountability within Australia for the promotion of gender equality and non-discrimination between men and women.

More than two years after the Optional Protocol's entry into force, it is clear that accession has not yet increased accountability for women's rights in Australia for the simple reason that the Optional Protocol has not been used. Of course, there is symbolic and educational value in Australia's accession, but the Optional Protocol is primarily an accountability tool and symbolism and education alone will not ensure the realisation of women's rights.

The absence of individual communications against Australia cannot be attributed to an absence of violations of women's rights. For an outline of some areas of concern, see the Committee on the Elimination of Discrimination against Women's most recent Concluding Observations on Australia.

The under-utilisation of the Optional Protocol mirrors a worldwide trend. Since its entry into force in 1999, the Committee on the Elimination of Discrimination Against Women has issued views on the merits of 10 individual communications (this post focuses on individual communications, rather than the Optional Protocol's less popular inquiry function). Advocates have offered various explanations for the disuse of the Optional Protocol, including lack of awareness, difficulties fulfilling the exhaustion of domestic remedies requirement and insufficient access to legal assistance.

An additional deterrent in Australia is the ongoing failure of the Australian Government to implement treaty bodies' decisions. It is entirely reasonable for a prospective victim/author to question the value of submitting an individual communication when they cannot be confident that the Government will implement, or even engage in a good faith consideration of, the Committee's views in the event that a violation is found.

Committee views are not judicial decisions and are not binding in the way that decisions of domestic courts are binding. Nevertheless, by becoming party to an individual communications procedure, a State recognises the competence of the relevant treaty body to receive and make determinations on individual communications. It also assumes a legal obligation to cooperate in good faith with the Committee's procedures and provide an effective remedy where a violation of human rights is found.

The Human Rights Committee's General Comment on The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights states that views constitute an "authoritative" interpretation of the treaty, are "determinative" of states' rights and

obligations and that States Parties therefore have an obligation to "use whatever means lie within their power in order to give effect to the views issued by the Committee".

The Australian Government's track record on implementation of the Human Rights Committee's views under the Optional Protocol to the ICCPR gives us cause to question its commitment to the good faith consideration and implementation of the views of UN treaty bodies.

Since Australia ratified the Optional Protocol to the ICCPR, the Human Rights Committee has issued 32 views identifying violations of the ICCPR. Of those, only two, arguably three, have received a satisfactory response from the Australian Government.

A low point was reached when, in its refusal to accept the Human Rights Committee's determination in *Young v Australia*, Australia informed the Committee that "further dialogue on this matter would not be fruitful and [the Government declined] the offer to provide more information".

More recently, the Australian Government's lack of commitment to the implementation of views was demonstrated in its draft National Human Rights Action Plan, which commits to "review whether any Treaty Body recommendations can be accepted as consistent with the Government's immigration detention policies". The notion that a Government would only implement those views that are consistent with existing Government policy, whether or not that policy violates international human rights, undermines the purpose and integrity of the treaty body system.

The Human Rights Committee commented on Australia's approach to and poor record of responding to views in its most recent Concluding Observations on Australia:

> While acknowledging the measures taken by the State party to reduce the likelihood of future communications regarding issues raised in certain of its views, the Committee expresses once again its concern at the State party's restrictive interpretation of, and failure to fulfill its obligations under the First Optional Protocol and the Covenant, and at the fact that victims have not received reparation. The Committee further recalls that, by acceding to the First Optional Protocol the State party has recognised its competence to receive and examine complaints from individuals under the State party's jurisdiction, and that a failure to give effect to its views would call into question the State party's commitment to the First Optional Protocol.

Ultimately, the unimplemented views of treaty bodies may have educational and symbolic value, but these outcomes are rarely going to justify the significant time, energy and resources that an individual or organisation will need to commit to an individual communication. Further, Australia's failure to implement views gives license to other states to eschew their obligations.

If the Australian Government is seriously committed to positive engagement with UN treaty bodies, the development of a rules-based international order and the effective implementation of human rights, it must do better in its response to treaty body views. Steps in this regard could include keeping to the Committee's time limits and establishing a mechanism to monitor and report on responses to views, such as that modelled by the UK's Joint Parliamentary Committee on Human Rights.

Most importantly, the Government should accept the authority of the UN treaty bodies to determine human rights breaches and implement their views. Without this commitment Australia's accession to the Optional Protocol to CEDAW, and other mechanisms such as the complaints procedure under the Disabilities Convention, should be viewed as little more than empty rhetoric.

Rachel Ball *is Director of Policy and Campaigns at the Human Rights Law Centre.*

NEWS IN BRIEF

Australian Government defies UN Human Rights Committee directive to allow deported man to return home

In a stunning rebuke, the Australian Government has advised the UN Human Rights Committee that it "respectfully disagrees" with a directive to allow a deported man to return home to Australia. The HRLC's Rachel Ball said the Government was in flagrant breach of its international human rights obligations and risked undermining its candidacy for a seat on the UN Security Council by ignoring its obligations under treaties it has ratified.

Government under increasing pressure to limit length of asylum seeker detention

Immigration Minister Chris Bowen has said the Government will aim to limit immigration detention to the 90 days limit recommended by a Parliamentary Committee, but has stopped short of making any promises.

Errors in wrist x-rays can send kids to jail

The Australian Human Rights Commission's Catherine Branson is concerned the Australian Federal Police's use of 1930s scientific techniques to determine the age of alleged people smugglers is not sufficiently informative or useful to the courts.

10 year old appeals for release from detention

The Immigration Department says it is considering a letter written by a 10 year old Vietnamese girl appealing for her release after more than a year in detention.

Human Rights Watch calls on Australia to raise human rights issues with Vietnam

In advance of bilateral talks in Hanoi, Human Rights Watch has said Australia should be pushing for human rights improvements in Vietnam.

Call for prison watchdog

The Ombudsman's report into the death of Melbourne underworld figure, Carl Williams, exposes many systemic failings in our prison system, perhaps the most acute of which is the lack of an independent prison inspectorate writes Amanda George of Western Suburbs Legal Service.

"Third world" jails in NT

The Prison Officers Association has described conditions in Northern Territory jails as third world, saying overcrowding has reached crisis point, which is putting enormous pressure on prison staff.

NT man wins compensation after unlawful arrest, detention and assault

The Northern Territory Government has been ordered to pay compensation after an Aboriginal man was unlawfully arrested, detained and assaulted by the police.

Police shoot two teenagers in stolen car

NSW Police have been accused of being "hyped" before they shot two Aboriginal teenagers in a stolen car and calls are mounting for the officers to be charged. The shootings came less than a week after Queensland Police shot a man dead in Brisbane.

Reviews for detained psychiatric patients

The NSW Government has announced that psychiatric patients who are detained in hospital will now have their detention reviewed by an independent tribunal.

War crimes conviction for former Liberian President

The Sierra Leone community in Australia has welcomed the war crimes conviction of former Liberian President Charles Taylor.

INTERNATIONAL HUMAN RIGHTS DEVELOPMENTS

Governments must take action to strengthen UN human rights treaty body system

On 24 February 2012, the United Nations General Assembly adopted Resolution 66/254 entitled, *Inter-governmental process of the General Assembly on Strengthening and Enhancing the Effective Functioning of the Human Rights Treaty Body System*.

The resolution recognises the important, valuable and unique role and contribution of the treaty bodies to the promotion and protection of human rights. It mandates the President of the GA to launch an open-ended inter-governmental process to conduct open, transparent and inclusive negotiations on how to strengthen the UN treaty body system.

The adoption of GA Resolution 66/254 has happened at a time when States Parties and other stakeholders in the treaty body system have been participating in a consultation process that was launched by the High Commissioner for Human Rights in September 2009 – the so-called "Dublin Process". Those multi-stakeholder consultations have resulted in rich and varied proposals, many of which reflect the complementary and mutually reinforcing nature of different treaty body activities. It is critical that the inter-governmental process now builds on those recommendations.

A Briefing Paper on the effective participation of NGOs in the intergovernmental process, which was endorsed by 24 leading human rights NGOs, including the HRLC, was issued on 9 March 2012.

On 12 April 2012, a further Briefing Paper was issued by 26 leading NGOs that regularly contribute to the work of the treaty bodies and that firmly believe that the treaty body system requires strengthening to improve its effectiveness. The paper sets out seven key areas in which action should be taken through the inter-governmental process to enhance the treaty bodies, improve the fulfilment of States Parties' obligations and strengthen the capacity of rights-holders to enjoy their human rights.

The HRLC's engagement with the inter-governmental process complements and builds on our work with the UN High Commissioner for Human Rights and other NGOs to strengthen the UN human rights treaty body system.

See: http://www.hrlc.org.au/content/topics/international-human-rights-mechanisms/strengthening-access-to-remedies-for-violations-of-international-human-rights-21-oct-2011/

NATIONAL HUMAN RIGHTS DEVELOPMENTS

New National Children's Commissioner will promote and protect the human rights of vulnerable children and young people

The establishment of a National Children's Commissioner will help to promote and protect the human rights of children and young people and ensure that the best interests of children are taken into account in the development of national law and policy.

Welcoming the Attorney-General's announcement that the Government will appoint a Children's Commissioner to sit within the Australian Human Rights Commission, the Human Rights Law Centre said that the position will assist to safeguard the rights of children and young people who are vulnerable and disadvantaged.

"The Convention on the Rights of the Child requires that the best interests of children be considered paramount, that they are treated with dignity and respect, and that they be able to participate in decision-making processes. For the first time, Australia will now have an institutional mechanism to ensure that these international human rights obligations are implemented at home," said Ben Schokman of the Human Rights Law Centre.

Mr Schokman said that the creation of a national Children's Commissioner has been consistently advocated by non-government organisations and was also a key recommendation of the UN Committee on the Rights of the Child when it last reviewed Australia in 2005. Australia is due to appear before the Committee again next month. The UN Human Rights Council also recommended that Australia appoint a national Children's Commissioner when it reviewed Australia's human rights record in 2011.

"Comparable jurisdictions such as New Zealand, the United Kingdom and Norway all have full-time children's rights commissioners," said Mr Schokman. "The experience from those jurisdictions shows that an adequately resourced and mandated commissioner can play a valuable role in advocating for the rights of children and young people, ensuring that their voices are heard by governments and decision makers."

"In an Australian context, the Government's recent appointment of full-time race and age discrimination commissioners has helped advance the human rights of those groups and put their issues on the policy agenda," said Mr Schokman. "A full-time Children's Commissioner could play a similar role in advocating for the rights and interests of children who experience disadvantage or discrimination, such as Aboriginal and Torres Strait Islander children, children who are homeless and children with disability."

Call for nominations for Children's Law Awards

On 30 March 2012, the National Children's Youth and Law Centre in partnership with King & Wood Mallesons announced that the 2012 Children's Law Awards are open for nominations. The Awards are supported by the Commonwealth Attorney-General's Department.

The Children's Law Awards recognise the achievements and commitment of those individuals and organisations who advance the legal rights and interests of children and young people

across Australia. The Awards present a unique opportunity to highlight the important legal issues confronting children and young people, and they serve as a means to focus the Australian community on the need to continually promote and advocate for children's legal rights.

The Awards themselves recognise that the tireless efforts of those who work to represent, advocate for, and raise awareness of children's legal rights are worthy of public recognition and support. The Children's Law Awards aim to effect real and lasting change for children, and to ensure that children, one of the most vulnerable groups in our society, receive the best possible start to life.

Nominations for the 2012 Children's Law Awards are sought in the following categories:

- The National Award for Outstanding Legal Representation of the Rights and Interests of Children and Young People;
- The National Award for Outstanding Advocacy in Policy or Law Reform to Advance the Legal Rights and Interests of Children and Young People; and
- The National Award for Youth in Advancing the Legal Rights and Interests of Children and Young People.

Nominations close on 8 June 2012. The Awards will be presented in August 2012 at King & Wood Mallesons' office in Melbourne. For more information visit www.ncylc.org.au.

STATE-BASED HUMAN RIGHTS DEVELOPMENTS

Death in prison van leads to transportation changes

The NSW Government has responded to the recommendations of Deputy State Coroner MacMahon in the inquest into the death of Mark Holcroft in 2009. Mr Holcroft died after he suffered a heart attack in a prison van travelling from Bathurst Correctional Centre to Mannus Correctional Centre.

The Coroner made eight significant recommendations regarding humane treatment of prisoners when being transported in prison vans over long distances.

The Government response indicates that Corrective Services NSW has taken some positive steps toward implementation of all eight recommendations.

Corrective Services NSW has responded to the key recommendations of the Coroner as follows:

- A "Commissioner's Instruction" has been issued which ensures the provision of water, food, toilet and exercise stops to inmates during designated journeys.
- Inmates who are being transported for two hours or more are given food at the beginning of a journey. If a trip is more than three hours, inmates are given food again, and at each subsequent three-hour interval.
- Transport officers on journeys of more than three hours are required to provide inmates with toilet and exercise breaks at designated secure locations at correctional centres or police stations.
- 39 transport vehicles have been fitted with two-way intercom systems.

The Public Interest Advocacy Centre has welcomed these responses to the Coroner's recommendations.

PIAC urged the NSW Government to ensure that the minimum standards recommended by the Coroner be consolidated into an accessible and publicly available set of standards regarding the transportation of prisoners and said these standards should comply with human rights principles and be adopted Australia-wide.

Source: Public Interest Advocacy Centre.

AUSTRALIAN HUMAN RIGHTS CASE NOTES

Examining the right to equality in the context of the Victorian Charter

BAE Systems Australia Limited (Anti-Discrimination Exemption) [2012] VCAT 349 (28 March 2012)

Summary

In a recent application for an exemption under the *Equal Opportunity Act 2010* (Vic) (EO Act), Member Dea of the Victorian Civil and Administrative Tribunal has considered the interaction between the right to equality under the EO Act and the Victorian Charter of Human Rights and Responsibilities.

Facts

The applicant, BAE Systems Australia Limited (BAE), applied for and was granted an exemption that permits it to discriminate against employees and prospective employees on the grounds of nationality.

In practice, the exemption enables BAE to restrict access to sensitive, defence-related data on the basis of a person's nationality or place of birth. BAE submitted that such discrimination is necessary to comply with Australian and US national security laws. BAE said if VCAT did not grant the exemption it would be left with only two options: either breach those security laws, or be forced to move its Victorian operations to another state (where exemptions are already in force).

VCAT granted the exemption subject to a raft of conditions that require BAE, among other things, to take "all steps reasonably available" to avoid discriminating and to report to VCAT on a six-monthly basis about its compliance with the exemption and the extent of the discriminatory conduct.

Decision

Principles of interpretation

The Tribunal reiterated that, in light of *Momcilovic*, section 32(1) of the Charter requires the decision maker to "seek to ensure that Charter rights are kept in mind when a statute is constructed but does not require the language of a section to be strained to effect consistency with the Charter".

In that context, the Tribunal noted that it has a broad discretion to grant, renew or revoke exemptions from the EO Act, which must be exercised by taking relevant human rights into account. The Tribunal also acknowledged its own obligation as a "public authority" to give proper consideration to relevant human rights under the Charter.

While equality is certainly a relevant human right, applications for exemptions may also engage other Charter rights depending on the circumstances.

A reasonable limitation on the right to equality?

Echoing Justice Bell's discussion in *Lifestyle Communities Ltd (No* 3), the Tribunal re-stated that the right to equality is an important and fundamental human right.

Pursuant to section 90 of the EO Act, the Tribunal then considered whether the exemption would constitute a "reasonable limitation" on the right. It did so by importing the test in section 7(2) of the Charter, which states that a human right "may be subject under law only to such reasonable limits as can be justified in a free and democratic society based on human dignity, equality, and freedom, taking into account all relevant factors" including, for example, "the importance and purpose of the limitation" (s 7(2)(b)).

A key question for the Tribunal was: what weight should be given to BAE's own economic interests and the broader community's interests of providing employment for Victorians, where those interests conflict with human rights? The Victorian Equal Opportunity and Human Rights Commission made submissions on this important point in its capacity as intervener.

The Commission submitted that the prioritising of private economic interests over human rights was inconsistent with the "value system" of the Charter. Hence, profitability alone does not constitute a legitimate reason for limiting human rights. Referring to the decision in *Raytheon Australia Pty Ltd v ACT Human Rights Commission,* the Commission also said the community's broader interests in providing employment opportunities may not be sufficient to overcome the need to protect human rights. Therefore, the loss of employment opportunities and commercial interests "may be the cost of ensuring that important human rights are protected". The Commission noted, however, that issue of public or national security would provide a stronger basis for limiting human rights.

The Tribunal accepted that commercial interests alone cannot justify limiting human rights. However, in weighing up the proposed limitation, the Tribunal took into account the public interest in providing employment opportunities, as well as issues of national security and the fact that the exemption was designed to have the "smallest possible degree" of interference with human rights. The Tribunal also took into account the fact that the same exemption had been in force for a number of years and had not been the subject of any complaints since 2008. It also found that there were no other reasonably available alternatives to the exemption.

For those reasons, the Tribunal concluded that the exemption constituted a reasonable limitation on the right to equality.

Other human rights engaged

The Tribunal also considered the right to privacy. The right to privacy arose because BAE proposed to collect and use information relating to employee's race, including place of birth and citizenship details, which might intrude on a person's privacy protected by the Charter.

The decision contains some discussion about what the right to privacy means and, in particular, what is an "arbitrary" interference with privacy. The Tribunal noted that there is currently some tension between different interpretations of the term "arbitrary" in decisions before VCAT.

Nonetheless, it found that BAE's proposed conduct could not be considered an arbitrary interference with the right to privacy because, in the context, it was not "capricious" or "unpredictable", nor was it unjust, disproportionate or unreasonable in the circumstances.

Conclusions

This decision is significant because it illustrates the interactions between Victorian legislation, in this case the EO Act and the Charter. In particular, the Tribunal's adoption of the test in

section 7 (2) of the Charter in order to determine whether the exemption was reasonable within the meaning of the EO Act is useful.

The decision also contains some valuable discussions around the meaning of the rights to equality and privacy and the hierarchy of reasons for which those rights may be limited.

The decision is available online at: http://www.austlii.edu.au/au/cases/vic/VCAT/2012/349.html

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Right to trial without unreasonable delay

R v Dennis Michael Nona [2012] ACTSC 41 (23 March 2012)

Summary

In *R v Nona* the ACT Supreme Court considered the right to a fair trial without unreasonable delay in the context of whether or not to stay criminal proceedings. The key issues related to a breach of a statutory human right and the appropriate remedy for that breach. While the court found that the right to a trial without unreasonable delay had been breached, it considered that a declaration would be an appropriate remedy rather than a permanent stay. This decision is important because it discusses the relevance of section 30 (interpretation of laws and human rights) of the *Human Rights Act 2004* (ACT) (HRA) when interpreting ACT legislation, and the common law and statutory principles of undue delay.

Facts

Dennis Michael Nona (the Applicant) sought to have proceedings permanently stayed based upon an alleged breach of section 22(2)(c) of the HRA, which provides that anyone charged with a criminal offence is guaranteed the right to be tried without unreasonable delay.

The offences

The proceedings related to two series of offences relating to sexual assault against persons under 16, JG and HG. The series concerning JG was relatively straight forward, containing four counts of offences. There was a delay of approximately three years and four months from the date of summons to the date of trial. The series concerning HG was more complicated, containing 12 counts of offences. There was a delay of approximately three years from the date of summons to the date of trial.

Timeline

The offences occurred between September 1995 and June 1996. In September 1996, the applicant moved to northern Queensland. It was around this time the authorities became aware of the offences concerning JG.

Statements were given by JG implicating the Applicant in February 2009, summons were served in March 2009. In an interview in 2010, HG implicated the Applicant in the second series of offences, for which summons were served in September 2010.

Decision

The Supreme Court dismissed the application. The central issue was whether the proceedings should be stayed.

Arguments

The Applicant submitted that section 22(2)(c) of the HRA guaranteed him the right to be tried without unreasonable delay. He argued that this right had been breached, and that the Director of

Public Prosecutions acted unlawfully in maintaining the prosecution against him, as it was incompatible with his rights under that section.

The DPP contended that the Court's power is statutory, and as such was to be interpreted consistently with human rights principles. Section 30 requires that in construing the provision, the Court must interpret it in a manner compatible with human rights, specifically, the DPP argued, section 11(2) the right of a child to protection.

Decision and consideration of HRA

Justice Burns considered the relevant common law and statutory principles. His Honour found that in this proceeding, section 30 of the HRA required that "the interpretation of any ACT statutory provision concerning the grant of a stay must be conducted with s 22(2)(c) of the HRA in mind."

Section 22(2)(c) of the HRA states that anyone charged with a criminal offence is entitled to "be tried without unreasonable delay". For the purposes of determining "unreasonable delay", it was necessary to determine the starting point for the calculation of "delay".

Determination of this involved consideration of the reasons for proscription of undue delay, namely to prevent oppressive pre-trial incarceration, to minimise the anxiety and concern of the accused and to limit the impairment of, or prejudice to, the defence. Relevantly, the Applicant had never been held in custody, nor had he been subject to bail conditions with respect to the pending charges.

In his Honour's opinion, a plain reading of section 22(2)(c) suggested "a temporal connection between the rights recognised by the section and the existence of charges against the person. [Therefore it] recognises a right which residues in a charged person" and not a right that could be asserted by an applicant prior to being charged. Justice Burns subsequently held that the start date for the calculation of the delay should be the date summonses were issued, or the date they came to the attention of the Applicant. In these proceedings that was 25 March 2009 for JG, and late September 2010 for HG.

In determining unreasonableness, Justice Burns considered the key elements to be the length of delay and the nature of the charges. The charges concerning HG were delayed by approximately three years. Given the nature and complexity of the charges, and the date of the allegations, Justice Burns found this delay did not breach the provision. The charges concerning JG were delayed by approximately three years and four months. Given the nature of the case and the authorities' possession of evidence for almost 14 years, his Honour found that this delay did breach the Applicant's rights under section 22(2)(c).

However, the remedy was not to grant a delay, as a stay of proceedings is not automatic upon establishing breach. The Court stated that "the right is to trial without undue delay; it is not a right *not* to be tried after undue delay". Justice Burns considered that his judgment constituted a public acknowledgement of that delay and furthermore, that the public interest of allegations of sexual assault against children being determined in a court outweighed "any prejudice to the applicant, especially as any such prejudice will not preclude the applicant obtaining a fair trial... [as it could] ...be ameliorated by appropriate directions to the jury."

Commentary

This judgment was interesting in that it concerned a breach of a statutory human right and a consideration of the appropriate remedy for that breach; however, those elements were only dealt with cursorily. The judgment was detailed in relation to unreasonableness and prejudice, but Burns J was noticeably brief in the manner in which he considered and determined the breach itself and the appropriate remedy.

Relevance to the Victorian Charter

Section 30 of the HRA provides that, where possible, the interpretation of any ACT statutory provision must be interpreted compatibly with human rights. This is a provision that is also contained in the Charter in section 32.

While this judgment will be not be binding on Victorian courts, it has direct relevance as the wording of section 30 of the HRA and section 32(1) of the Charter are identical.

This case bears similarity to *Kracke v Mental Health Review Board* [2009] VCAT 646, in which Justice Bell considered that a declaration that the applicant's rights had been breached was an appropriate remedy.

The decision can be found online at: http://www.austlii.edu.au/au/cases/act/ACTSC/2012/41.html

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Online newspaper publisher liable for racial vilification in user generated content

Clarke v Nationwide News Pty Ltd trading as The Sunday Times [2012] FCA 307 (27 March 2012)

Summary

Justice Barker in the Federal Court held that Nationwide News, the publisher of *The Sunday Times* newspaper in Perth, was liable under section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA) for comments posted by readers underneath articles in the online version of the paper, which amounted to racial vilification.

The Court made declarations of contravention and ordered Nationwide News to remove the comments from its website and pay the applicant damages of $15,600.

Facts

Natalie Clarke is an Aboriginal woman and the mother of three boys aged 15, 11 and 10 who were killed in a motor vehicle accident on 27 June 2008. One of the boys' cousins aged 17 was also killed in the accident. A fifth teenage boy survived the accident.

On 29 June 2008, *The Sunday Times* published an article about Ms Clarke's deceased sons and their cousin. Further articles were published by Nationwide News on its website *PerthNow* in relation to the same incident on seven other occasions.

Nationwide News invited readers to make comments about the online articles. Comments were reviewed by journalists employed by Nationwide News and, if approved by them for publication, appeared on the website underneath the articles. Ms Clarke complained that 16 comments made by members of the public amounted to racial vilification in breach of section 18C of the RDA. The Court upheld her claim in relation to four of these comments.

Decision

The act of publishing a comment will contravene section 18C if:

- the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- the act is done because of the race, colour or national or ethnic origin of the other person or some or all of the people in the group.

The second aspect is particularly important when considering the liability of publishers for content published by them.

In the case of *Eatock v Bolt* [2011] FCA 1103, decided in September 2011, Justice Bromberg found that the publisher of the *Herald Sun* newspaper in Melbourne was liable under section 18C for publishing two articles by one of its journalists which suggested that certain "fair-skinned Aboriginal people" were not genuinely Aboriginal and had falsely identified as Aboriginal because they were motivated by career opportunities available to Aboriginal people or by political activism.

Justice Bromberg held that where a publisher of an article is aware that the author's motivation includes the race, colour, national or ethnic origin of the people the article deals with, then the act of publication (as an act in aid of the dissemination of the author's intent) was done because of the racial or other attributes that motivated the author.

The *Clarke* case was different in that the comments complained of were not in the articles published by Nationwide News or written by its journalists, but were comments by readers published underneath the articles.

Justice Barker held that where a publisher actively solicits and moderates contributions from readers before publishing them, and reserves the right not to publish or to modify them, the potential for a finding of contravention of section 18C is real. In such circumstances, it will be no defence for the publisher to say: "But we only published what the reader sent us".

On the question of whether the publication was done "because of" race, his Honour took into account the fact that the comments were objectively offensive because of race and the fact that the comments were moderated prior to publication. In such circumstances, unless the respondent can establish that a comment was reasonably published, his Honour held that the Court should infer that one of the reasons for the publication of the comment was race.

There are a number of exemptions to section 18C in section 18D, for example for things done reasonably and in good faith in the course of a discussion or debate held for any genuine purpose in the public interest. These exemptions were not found to apply, principally because the publication of the relevant comments was found not to be reasonable.

Commentary

The decision emphasises the role of the newspaper publisher in actively soliciting and moderating content prior to publication. In those circumstances, the publisher has a responsibility to ensure that what is published does not amount to racial vilification.

One possible objection to this result is it may have the perverse incentive of encouraging publishers not to pre-moderate content in order to avoid the potential for liability.

However, there are good reasons to think that such a criticism may be overstated. First, many publishers choose to pre-moderate for a range of reasons that are not related to potential liability under section 18C. This includes potential liability under defamation and other statutory restrictions on certain types of publications. Secondly, the actions of Nationwide News in this case in moderating comments (albeit imperfectly) was a relevant factor in considering whether exemplary damages would be awarded.

Justice Barker considered that it was an open question whether exemplary damages could be awarded under the *Australian Human Rights Commission Act 1986* (Cth). However, assuming the Court had the power to award them, his Honour was not satisfied that exemplary damages were appropriate in this case.

In particular, his Honour noted that Nationwide News endeavoured to moderate comments before they were published to avoid precisely this kind of claim being brought. Evidence tendered by Nationwide News showed a range of comments that had been culled by moderators and never

published. Significantly, Justice Barker considered that Nationwide News had not adopted a "cavalier approach" to the publication of readers' comments.

In these circumstances, there still seems to be good reasons for publishers to:

- pre-monitor user generated content before it is published;
- prevent the publication of comments that would be in breach of section 18C; and
- promptly take down any comments that are published which would be in breach of section 18C as soon as the publisher is aware of them, particularly if there is a complaint about such comments.

The decision can be found online at: http://www.austlii.edu.au/au/cases/cth/FCA/2012/307.html

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INTERNATIONAL HUMAN RIGHTS CASE NOTES

State responsibility to investigate possible racist nature of criminal acts

Dawas v Denmark, UN Doc CERD/C/80/D/46/2009 (2 April 2012)

Summary

The UN Committee on the Elimination of Racial Discrimination was asked to consider whether the Applicants' rights under articles 2 (prevention of racial discrimination) and 6 (effective preventions and remedies) of the Convention on the Elimination of All Forms of Racial Discrimination had been breached by Denmark's failure to investigate the racist character of an attack on the Applicants and to prosecute the attackers on the basis that their alleged crimes had a racist character. The Committee held that various deficiencies in Denmark's investigation of the attack and its prosecution of the attackers gave rise to contraventions of articles 2 and 6.

Facts

The Applicants, Mahali Dawas and his son Yousef Shava, as well as Mr Dawas's wife and other seven children, are Iraqi citizens with refugee status in Denmark. In 2004, they were living together in a house in Sorø, Denmark.

On 21 June 2004, a group of 15 to 20 youths gathered in front of Mr Dawas's house. They acted aggressively, and alleged that the Applicants had stolen from them. During the altercation, tensions mounted and the number of youths swelled to 35. Ultimately, individual youths attacked the Applicants' persons and property. They broke windows, forced their way into the house, threw a potted plant at Mr Dawas's leg, punched Mr Shava in the face, and struck him in the arm with a bat. Others shouted "go home" and made other offensive statements. Shortly before the attack, an unknown person placed a sign near the house saying "no blacks allowed". Immediately before the attack, one of the attackers telephoned a friend and asked them to join him, as he "had problems with some *perkere*" (a Danish pejorative term for a foreigner).

On 30 July 2004, four suspects were charged with joint violence under section 245(1) of the Danish Criminal Code, as well as with gaining unauthorised access to another person's home under section 264(1). Two of the defendants were also charged with vandalism under section 291(1).

Towards the end of 2004, hearings took place in the District Court of Sorø. During proceedings, the prosecution requested that that Court hear the matter summarily based on the defendants' guilty pleas. It also requested that the joint violence charge be reduced to a lesser assault charge under section 244 of the Code. The Court granted these requests.

On 26 January 2005, the suspects were convicted based on their guilty pleas. The Court sentenced each to a suspended jail term of 50 days. It did not consider the racist nature of the attacks, which, under section 81(1)(vi) of the Danish Criminal Code, could have been an aggravating circumstance, and did not award compensation to the Applicants.

Subsequently, on 23 May 2006, the Applicants instituted civil proceedings. They sought non-pecuniary damages for the physical and mental injuries they sustained as a result of the attack, and they cited the racist element of the crimes as an aggravating factor. On 11 September 2007, the District Court of Naestved rejected the Applicants' claim. It found that there was no evidence establishing a racist character to the actions, and that the harm suffered by the Applicants was not sufficient to establish a tort. On 3 October 2008, the High Court of Eastern Denmark upheld the judgment of the District Court. Finally, on 12 December 2008, the Danish Supreme Court denied the Applicants leave to appeal.

Arguments and decision

On 16 June 2009, the Applicants petitioned the Committee. They alleged that Denmark violated their rights under articles 2 (prevention of racial discrimination) and 6 (effective preventions and remedies) of the Convention by failing to investigate the racist character of the attack, and by failing to provide an effective legal remedy for the pain and humiliation they suffered as a result of the attack. They also alleged that "the violent attack and the vandalism suffered, as well as the related racist motive and intent to have the family leave and take up residence in another municipality" were tantamount to violations of articles 3 (condemnation of apartheid) and 4 (prohibition of incitement).

Denmark argued that the Applicants failed to establish a prima facie case as there was no evidence that the attack was racially motivated. Therefore, it argued that the Applicants' communication was inadmissible. The Committee agreed that the Applicants had failed to establish a prima facie case in relation to the alleged violations of article 3, as they had failed to substantiate their claim that the attackers' intent to have them leave the municipality qualified as an act of segregation or apartheid. However, it found that they had established a prima facie case in relation to the other alleged violations.

In relation to the other alleged violations, the Committee observed that "the issue … is whether the State party fulfilled its positive obligation to investigate and prosecute the assault suffered by the [Applicants], having regard to its duty under article 2 of the Convention, to take effective action against reported incidents of discrimination". It observed that, by hearing the matters summarily and downgrading the charges against the suspects, the District Court had set aside "the possibly racist nature of the attacks" during the investigation and had failed to adjudicate them at trial. It also observed that the attack on the Applicants was grave. Ultimately, the Committee concluded that "in circumstances as serious as those in this case … enough elements warranted a thorough investigation by public authorities into the possible racist nature of the attack … Instead, the possibility was set aside at the level of criminal investigation, thereby preventing the issue from being adjudicated at criminal trial". The Committee commented that the onus was on the State party "to initiate an effective criminal investigation, instead of giving the petitioners the burden of proof in civil proceedings".

This was not sufficient to found an independent breach of article 4. However, it was enough to establish breaches of articles 2 and 6. Ultimately, the Committee recommended that Denmark grant the Applicants compensation for the material and moral injuries caused by the attack.

Relevance to the Victorian Charter

Section 8(3) of the Victorian Charter gives every person "the right to equal and effective protection against discrimination". As section 8(3) resembles article 2(1)(d) of the Convention, the Committee's decision provides guidance as to how section 8(3) of the Charter should be interpreted.

The Committee's decision establishes that, where circumstances suggest that an alleged crime may have a racist element, to comply with article 2(1)(d) of the Convention, a State must thoroughly investigate that possibly racist element, and, when appropriate, vigorously prosecute the suspect on the basis that the alleged crime has a racist element. In turn, the decision suggests that, to comply with section 8(3) of the Charter, Victorian authorities must seriously investigate and prosecute the possibly racist nature of criminal acts.

The decision can be found online at: http://www2.ohchr.org/english/bodies/cerd/docs/jurisprudence/CERD-C-80-D-46-2009_en.doc

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Extradition contrary to the European Convention on Human Rights

Wright v Argentina [2012] EWHC 669 (Admin) (20 March 2012)

Summary

The appellant (Wright) appealed her extradition to Argentina under the *Extradition Act 2003* (UK) to the High Court of Justice. The appellant contended that her extradition to face drug charges would contravene her rights under articles 3 (inhumane and degrading treatment), 5 (trial within reasonable time) and 8 (respect for private life) of the European Convention on Human Rights.

Justice Silber held that the extradition would contravene the appellant's rights under article 3 of the Convention, however he confined his decision to the facts. The facts were unique in that: (a) no undertakings were given by the Government of Argentina with respect to the appellant's treatment in Argentina; and (b) the respondent did not cross-examine the respondent's expert evidence on article 3.

Facts

The appellant (Wright) was detained at Ezeiza Ministro Pistarini Airport in Buenos Aires when she attempted to leave Argentina on a flight to the United Kingdom with approximately 6kg of an illegal substance stored in her luggage. While on bail, she fled Argentina and returned to the United Kingdom. The Government of Argentina formally sought her extradition to face the charge of drug trafficking.

The appellant admitted that if she were tried in the United Kingdom she would plead guilty to a charge of attempting to import cocaine into the United Kingdom and/or being a party to a conspiracy to import cocaine. She challenged the extradition proceedings brought against her pursuant to the *Extradition Act 2003* (UK). She appealed the decision at first instance of the Magistrates' Court to allow the extradition on the following grounds:

- New evidence not before the Senior District Judge showed there was a real risk that if extradited to Argentina, the appellant would face inhumane and degrading treatment contrary to article 3 of the Convention.

- New evidence not before the Senior District Judge showed that if extradited, the appellant would not face "trial within a reasonable time", contrary to article 5(3) of the Convention.
- The Senior District Judge failed to attach sufficient weight to the prospect of a serious deterioration in her mental condition as a consequence of serving a sentence away from family and friends, which would infringe her rights under article 8 of the Convention.

Decision

Justice Silber considered that the Court's approach should be to (a) make factual findings on how the appellant would be treated if extradited to Argentina and then (b) decide, using applicable principles, whether the appellant's rights under articles 3, 5 and 8 of the Convention would be infringed.

Article 3: Inhumane and degrading treatment

In considering whether the appellant's extradition to Argentina would subject her to inhumane and degrading treatment, Justice Silber relied heavily on the uncontested expert evidence of an Argentinian human rights lawyers and lecturer.

In assessing this evidence, Justice Silber applied the test in *Soering v United Kingdom* (1989) 14 EHRR 439 that the evidence must establish "sufficient grounds" to show a "real risk" that if extradited, the appellant would face torture or inhumane or degrading treatment or punishment.

Justice Silber found that the appellant would not receive basic supplies of food and hygiene products if detained in Argentina. Further, Justice Silber found that the appellant would also face widespread and systemic abuse because of her gender and nationality in the form of physical attacks from other inmates and degrading strip searches from prison officials. Accordingly, it was held that extradition would contravene the appellant's rights under article 3 of the Convention.

Article 5: Trial within reasonable time

Justice Silber held that for this ground to succeed, there must be a real risk of a "flagrant" breach of article 5. Justice Silber held that while there was evidence that the appellant would face a long period of pre-trial detention, there was no evidence that such detention would not count as time already served in calculating her ultimate sentence. On this basis, there was no flagrant breach of article 5.

Article 8: Respect for private life

Justice Silber noted the well-settled principle that "the preservation of mental stability is … an indispensable precondition to effective enjoyment of the right to respect for private life. In this case, however, Silber J said that "there is nothing strikingly unusual or exceptionally compelling about the appellant's position as she is not currently suffering from any mental or depressive illness or other ailment." Consequently, the evidence was not sufficient to overcome the threshold test in *Norris v Government of United States of America (No.2)* [2010] 2 AC 487, in which Lord Philips said that "the consequences of interference with article 8 rights must be exceptionally serious before this can outweigh the importance of extradition."

Commentary

Justice Silber's reasoning shows systematic consideration and application of established legal principles to the evidence at hand. However, his Honour stated that his conclusion may have been very different had the Government of Argentina given appropriate undertakings, or had the respondent contested the expert evidence relating to article 3 of the Convention.

In the Australian context, undertakings are especially important when the executive and judiciary are considering extradition to countries with the death penalty. For example, the Commonwealth Attorney-General must not surrender a person under section 22 of the *Extradition Act 1988* (Cth) unless the death penalty is off the table and the person would not be subjected to torture. In addition, the executive and judiciary are precluded from surrendering a person for extradition if to do so would lead to: prosecution for political offences; prosecution or punishing on account of a person's race, religion, nationality or political opinions; or being prejudiced at trial, or punished, detained or restricted in personal liberty, by reason of race, religion, nationality or political opinions (see, for example, sections 7, 16, 19 and 22 of the *Extradition Act 1988* (Cth)).

The decision can be found online at: http://www.bailii.org/ew/cases/EWHC/Admin/2012/669.html

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UK Metropolitan Police assault autistic boy and infringe his human rights

ZH v The Commissioner of Police for the Metropolis [2012] EWHC 604 (QB) (14 March 2012)

Summary

The England and Wales High Court has held that police who applied excessive force to a 16 year old autistic boy infringed several laws, including the European Convention on Human Rights. The Court found that the treatment of the boy by the police amounted to assault and battery, false imprisonment, unlawful disability discrimination, inhuman or degrading treatment, deprivation of liberty, and interference with private life.

Facts

ZH, an autistic, epileptic boy, was a student at a specialist school in London which took a number of students, including ZH, to the local swimming pool for a "familiarisation visit". It was not intended that the students would actually enter the water.

At the pool, ZH became fixated upon the water, moving within centimetres of the deep end. His carer from the school, as well as the pool's lifeguards, tried to coax him away without success. Because he had an aversion to touch, they were reluctant to use force to move him away.

Eventually, the police were called, and upon their arrival two police officers ignored the advice of ZH's carer and approached him. One officer touched him to see how he would respond, and ZH panicked and jumped into the pool fully clothed.

The police directed the lifeguards to move him to the shallow end of the pool, and then out of the water. ZH resisted violently, and it ultimately took five police officers to lift him out of the water. Twice, he slipped and fell on his back. At one point he tried to bite one of the officers. His carer tried to comfort him, but was ordered by the police to move away. When ZH would not calm down, he was placed in handcuffs and leg restraints in the back of the police van. Shortly afterwards, he was examined by ambulance officers and released.

ZH suffered severe psychological trauma from this incident, and claimed damages for assault and battery, false imprisonment, unlawful disability discrimination and breaches of the European Convention (for which damages are available under the *Human Rights Act 1998* (UK)).

Decision

The Court decided each claim in favour of ZH, and awarded damages of £28,500. The Court found that the actions of the police were "over-hasty and ill-informed" and amounted to assault, battery and false imprisonment. The *Mental Capacity Act 2005* (UK) provides that any act or decision made for a person who lacks capacity must be made in that person's best interest, after

taking into account the views of that person's carers and considering whether the person's interests can be equally protected in a manner that is less intrusive on their rights and freedom. The Court also found that the police had breached the *Disability Discrimination Act 1995* (UK) by failing to take account of ZH's condition when deciding to follow standard procedure and place him in restraints.

ZH's human rights claims were brought under section 6 of the Human Rights Act, which states that it is an offence for a public authority to act in a way that is incompatible with any of the European Convention rights. ZH alleged the police had infringed three such rights:

Article 3: No person shall be subjected to torture or to inhuman or degrading treatment or punishment

The European Court of Human Rights held in *Mayeka v Belgium* that for treatment to be inhuman or degrading, it must exceed a "minimum level of severity" having regard to all of the circumstances.

The Court considered that the amount of time for which ZH was in restraints, the degree of psychological trauma suffered, and his age, health and level of vulnerability meant that this "minimum level of severity" had been exceeded. As a result, ZH's treatment by the police constituted inhuman or degrading treatment.

The Court noted that this finding was justified even though there was no intention on the part of the police to humiliate ZH.

Article 5: Everyone has the right to liberty and security of person

Article 5(1) of the European Convention states that no person shall be deprived of liberty, except in a number of specific cases. The Court noted that "deprivation of liberty" is a broad concept that is not limited to incarceration, but requires more than a mere restriction of movement. The difference between the two is a matter of intensity, not substance, and the Court was satisfied that the circumstances in this case amounted to an unlawful deprivation of liberty.

Counsel for the police argued that the court should take the purpose of a deprivation of liberty into account, which in this case was to protect ZH from harming himself and others. Counsel for ZH argued that because the text of article 5 made no reference to the purpose behind a depravation of liberty, it was not a factor for the court to consider.

The Court found that although purpose is not specifically mentioned in article 5, it is clear from case law that courts must consider all relevant circumstances, including whether there is a need to place a person in restraints for their own protection. Nevertheless, the actions of the police in this case, while well-intentioned, still amounted to an unlawful deprivation of liberty. The conduct "involved the application of forcible restraint for a significant period of time for an autistic epileptic young man, when such restraint was in the circumstances hasty, ill-informed and damaging".

Article 8: Everyone has the right to respect for his private and family life; his home and his correspondence

Article 8(2) of the European Convention provides that public authorities may only interfere with this right if it is "in accordance with the law" and "necessary in a democratic society in the interests of ... public safety ... for the protection of health ... or for the protection of the rights and freedoms of others".

Because, as outlined above, the Court found the actions of the police in this case were unlawful on the other grounds brought by ZH, they were not "in accordance with the law" for the purposes of article 8(2). Further, the Court found they went beyond what was necessary in the circumstances, and that article 8 was also breached.

Despite these contraventions, the Court did not award any damages in respect of the human rights claims. Section 8(3) of the Human Rights Act states that damages should not be awarded unless the award is necessary to afford just satisfaction to the plaintiff, taking account any other relief or remedy granted by the court. In this case, the Court determined that ZH was adequately compensated by the damages awarded in respect of the other claims.

Relevance to the Victorian Charter

This decision highlights the importance of human rights considerations for public authorities, especially police officers, when dealing with people with disabilities.

Given the European Convention rights in question in this case have equivalent provisions in the Victorian Charter, police should take care not to apply excessive or unnecessary force or restraint to persons with disability. Courts will consider all relevant factors, including the condition of the plaintiff, when determining whether any human rights have been breached.

However, unlike the UK Human Rights Act, a claim cannot be brought in Victoria for the breach of a Charter right alone, and damages are not an available remedy for such breaches. As this case was brought in conjunction with other causes of action, it could be brought in Victoria under section 39(1), but the court could not consider awarding damages to compensate ZH for the breach of his human rights as it did in this case. Rather, his only available remedy under section 39(3) of the Charter would be a declaration that his rights were infringed.

The decision can be found online at http://www.bailii.org/ew/cases/EWHC/QB/2012/604.html

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Anti-prostitution laws violate right to liberty and security

Canada (Attorney General) v Bedford, 2012 ONCA 186 (26 March 2012)

Summary

The Ontario Court of Appeal considered the legality of certain restrictions on prostitution – a lawful activity in Canada. It held that provisions which prevent prostitutes from taking measures to secure their safety, and substantially increase their risk of harm, contravene the right to liberty and security of the person under section 7 of the *Canadian Charter of Rights and Freedoms*.

Facts

The applicants in the case were three female prostitutes. They sought a declaration that three provisions of the Canadian Criminal Code interfered with their right to liberty and security of the person under section 7 of the Canadian Charter.

In Canada, prostitution is technically legal. However, the Criminal Code imposes significant restrictions on the manner and location in which it may occur. It makes it virtually impossible to legally, and – as the Court found – safely, conduct prostitution. The challenged provisions were:

- The prohibition on the operation of so-called “bawdy-houses”. This prevents prostitutes from offering their services out of fixed indoor locations such as brothels or private homes (“prohibition on brothels”).
- The prohibition on anyone “living on the avails of another’s prostitution”. This prevents someone, such as a pimp, profiting from another’s prostitution, and prevents a prostitute from employing someone in connection with their work, such as a bodyguard or receptionist (“prohibition on living on the avails”).

- The prohibition on communicating regarding the sale of sex in public. This prevents prostitution from occurring on the street ("prohibition on communicating").

Section 7 of the Canadian Charter provides that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Section 1 of the Canadian Charter provides that: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

At trial, the judge held that all three provisions of the Criminal Code deprived the applicants' rights to liberty and to security, and were unconstitutional. The judge reasoned that the laws "exacerbate the harm that prostitutes already face by preventing them from taking steps that could enhance their safety", such as working indoors, alone or with other prostitutes, paying security staff and screening customers encountered on the street to assess the risk of violence. The judge found that none of the interferences were in accordance with the principles of fundamental justice nor consistent with section 1 of the Canadian Charter.

Decision

The Court of Appeal held that the prohibitions on brothels and on living on the avails violated a prostitute's right to liberty and security. These prohibitions prevented prostitutes from taking measures to secure their safety while conducting a legal activity, namely working in a brothel or employing security staff. Neither could be justified under section 1 of the Canadian Charter. By contrast, it was held that the prohibition on communication in public was a valid interference with section 7 rights, as it complied with "the principles of fundamental justice", including proportionality with legislative objectives, as specified under section 7. Significantly, the Court did not consider that the safety benefits that flowed from communication with clients on the street (to ascertain potential risks) were significant.

Question 1: Do the provisions interfere with any rights under section 7?

The Court noted that each right in section 7 – to life, liberty and security of the person – must be treated as distinct and analysed separately.

Interference with right to liberty

The Court held that all three challenged provisions interfered with the right to liberty as each imposed penal sanctions for contravention. The "risk of imprisonment flowing from conviction" was sufficient to engage the applicants' rights to liberty.

The Court dismissed a "broader liberty claim" made by some interveners that the right to liberty extended to the freedom to engage in a chosen occupation. The Court held that the decision to engage in prostitution was an "economic or commercial" one and could not be characterised as "so fundamentally and inherently personal and private as to fall under the right to liberty".

Interference with the right to security of the person

The Court held that the provisions interfered with the right to security by increasing the risk of physical harm to prostitutes as they prohibited "obvious" and "significant" safety measures. Counsel for the Government submitted that the legislative provisions did not in themselves "cause" interference with a prostitute's right to security. The acts of third parties were the direct cause of harm. The Court insisted that it was sufficient that the provisions "increase the risk" of physical harm to prostitutes by criminalising potentially effective safety measures. It noted that a "traditional" causation analysis was not appropriate in the case of legislation.

The Court also strongly dismissed the argument that the causal chain between the provisions and the harm was broken by the "personal decision" to engage in an "inherently dangerous" activity. The Court insisted that prostitution was a legal activity, and to deprive prostitutes the ability to protect themselves while conducting a legal activity would be to imply "that those who choose to engage in the sex trade are for that reason not worthy of the same protection as those who engage in other dangerous, but legal enterprises."

Question 2: Are the interferences in accordance with the fundamental principles of justice?

Under section 7, an interference with rights is permissible if the interference is "in accordance with the principles of fundamental justice".

The principles of fundamental justice relate to the relationship between the interference and the legislative purpose sought to be achieved. An interference is permissible if it is:

- consistent with the legislative objective sought to be achieved (not arbitrary);
- necessary to achieve the legislative objective (not overbroad); and
- not disproportionate to any legitimate government interest (not grossly disproportionate).

This analysis is similar to that under section 7(2) of the Victorian Charter which provides that, in determining whether a limitation is "reasonable" and "demonstrably justified in a free and democratic society", a court may consider the "relationship between the limitation and its purpose".

The Court ruled that only the prohibition on communication was "in accordance with the principles of fundamental justice". Both the prohibitions on brothels and on living on the avails were "overbroad" and "grossly disproportionate".

Importance of characterising the legislative objectives

Key to the Court's findings on overbreadth and disproportionality was its characterisation of the legislative objectives. The Court did not find that the objective of prohibiting brothels or of living on the avails was to eradicate prostitution. Instead, it concluded that "the challenged provisions are not aimed at eradicating prostitution, but only some of the consequences associated with it, such as disruption of neighbourhoods and the exploitation of vulnerable women by pimps."

On the basis of this narrow characterisation, the Court found the prohibitions to be overbroad:

- It found that the prohibition on brothels was intended to combat "neighbourhood disruption or disorder", but in fact extended to individual prostitutes operating discretely from their own homes.
- It also found that the prohibition on living on the avails of another's prostitution was designed to prevent exploitative relationships, but in fact criminalised "non-exploitative commercial relationships", such as the hiring of bodyguards or receptionists.

Given this narrow objective, the interference caused by both provisions was also considered to be "grossly disproportionate". In reaching this conclusion, the Court emphasised the significance of the safety benefits denied to prostitutes.

The Court approached the prohibition on communication differently. It characterised the objective broadly: to prevent the serious social impacts of street prostitution. And it gave little credit to the safety value denied by the prohibition on communication. The Court considered that speaking to clients on the streets was "not the only method prostitutes use to assess the risk of harm", and that street prostitution remained highly dangerous. On this basis, the interference was neither overbroad, nor grossly disproportionate.

Question 3: Can the provisions be saved as a "reasonable limit" under section 1 of the Canadian Charter?

Neither the prohibition on brothels nor the prohibition on living on the avails was saved by section 1. The Court did not address this question in detail, but simply reiterated its reasoning above.

Remedy

The Court emphasised the need to "avoid undue intrusion into the legislative sphere, while also respecting the purposes of the *Charter*".

It struck down the prohibition on brothels, but suspended the effect for 12 months to enable the legislature to amend it. Significantly, the Court noted that the section could be amended to maintain compliance with the Canadian Charter*:* "It would be open to Parliament to draft a bawdy-house provision that is consistent with the modern values of human dignity and equality and is directed at specific pressing social problems, while also complying with the *Charter*."

The Court read in words of limitation to the provision on living on the avails so that it applies only in "circumstances of exploitation", such profiteering by a pimp.

Commentary

The key lesson from this case appears to be one of legislative drafting. To prevent a challenge under section 7, Parliament must make its intention to ban an activity clear. Otherwise, it risks a finding that the interference is arbitrary, unnecessary and potentially grossly disproportionate.

In this case, Parliament had not explicitly banned prostitution. It had simply sought to make it virtually impossible to legally, and safely, conduct it. The Court indicated that, had the provisions contained such a clear prohibition, they may have passed the section 7 test (though potentially still challengeable under section 1): "It would be difficult for the respondents to establish that the provisions are arbitrary or overbroad and perhaps even disproportionate if, in some way, the laws advance the objective of reducing or abolishing prostitution."

The judgment has been hailed as a victory by certain feminist organisations, such as the Simone de Beauvoir Institute at Concordia University, who claim that the ruling "means that women can work more safely and … can work together". Other commentators caution, however, that the judgment effectively encourages governments to take steps to expressly prohibit prostitution, given the comments of the court regarding legislative objectives.

Relevance to the Victorian Charter

In Victoria, prostitution in private brothels is legal under the *Sex Work Act 1994* (Vic), but street prostitution remains illegal. One of the Act's stated purposes is to "maximise the protection of sex workers from violence and exploitation".

The comparable provision of the Victorian Charter is section 21, which protects the right to liberty and security of the person. It does not, however, contain a provision that interference with rights is permissible "if in accordance with the fundamental principles of justice".

The key aspects of the decision relevant to the Victorian Charter are:

- provisions that make it dangerous for individuals to undertake an otherwise legal activity may interfere with an individual's right to security under section 21;
- a crime-creating provision may be presumed to interfere with the right to liberty if it contains penal sanctions due to "the risk of imprisonment flowing from conviction"; and

- the right to liberty does not extend to decisions to engage in a particular commercial activity, but may be limited to decisions that "go to the heart of an individual's private existence".

The decision can be found online at:
http://www.ontariocourts.ca/decisions/2012/2012ONCA0186.pdf

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When is legal representation essential to the right to a fair trial?

R v Fleischman, 2012 ONCJ 120 (24 February 2012)

Summary

This was a Canadian case in the provincial division of the Ontario court system. The applicant was charged with impaired driving and driving with greater than 80mg of alcohol in 100ml of blood ("over 80"). He brought an application pursuant to sections 7, 11(d) and 24(1) of the Canadian Charter of Rights and Freedoms for the proceedings against him to be conditionally stayed until state-funded counsel was provided for his trial. The judge found that counsel was essential to the applicant's right to a fair trial and that the applicant was unable to afford to obtain counsel, and on that basis stayed the proceedings until state funding could be provided. The judge also found that there is a right to a fair trial (which may include the provision of state-funded counsel), regardless of whether jail is likely.

Facts

Phillip Fleischman was charged with impaired driving and over 80 (which is driving with greater than 80mg of alcohol in 100ml of blood). He brought an appeal under sections 7, 11(d) and 24(1) of the Canadian Charter for the charges against him to be conditionally stayed until state-funded counsel was provided for his trial. He was 63 years old and on a low income. He had no savings and his only asset was a car which was essentially worthless. He was divorced and had four adult children whom he was in limited contact with. He had a number of debilitating health issues including cancer, diabetes, high blood pressure and severe heart disease. The applicant had undertaken some tertiary education including some law courses but had not worked for a number of years because of ill health.

Decision

The Judge considered the preliminary legal issue of whether the probability of jail is a precondition for an order that counsel is essential for a fair trial. The Judge held that the right to a fair trial exists regardless of whether jail is likely: "The issue is whether he is indigent and has no other means to retain counsel, and, if so, whether counsel is essential to his right to a fair trial."

Pursuant to sections 7 and 11(d) of the Canadian Charter, the applicant had to establish three things on a balance of probabilities:

- that he was ineligible for legal aid;
- that he was indigent and had no other means to retain counsel; and
- that counsel was essential to his right to a fair trial.

The Court found that on the balance of probabilities the applicant was indigent and had no other means to retain counsel including that it was not reasonable that the applicant should have approached two of his adult children for financial assistance.

Was counsel essential to the applicant's right to a fair trial? The court considered the seriousness of the charges, the length and complexity of proceedings and the applicant's ability to participate effectively and defend the case. The Court held that the applicant had established on the balance of probabilities that counsel was essential to his right to a fair trial and the matter was conditionally stayed until such time as state-funding was provided. Her considerations included that the applicant was:

- facing a criminal conviction;
- it was a complicated case set for three days with the Crown calling seven witnesses;
- there were complexities over and above similar matters concerning the identity of the applicant and the medical defence to be mounted by the applicant;
- the applicant's education, despite including some tertiary study, did not include training in criminal procedure, evidence or substantive criminal law, and he did not have expertise in the subject matter; and
- the applicant's significant health issues.

Relevance to the Victorian Charter

The right to a fair trial and the role of state-funded legal aid are expressed in the *Charter of Rights and Responsibilities 2006* (Vic) in slightly different terms to the Canadian Charter. Section 24 provides for rights in relation to a fair hearing, while section 25 provides for minimum guarantees for a person charged with a criminal offence. Section 25(2) of the Victorian Charter provides that a person charged with a criminal offence is entitled without discrimination to a number of minimum guarantees, including having legal aid provided if the interests of justice require it. Section 24(2) of the *Legal Aid Act 1978* (Vic) also includes a test for whether it is in the interests of justice that legal aid be provided.

In the recent case of *Slaveski v Smith & Anor* [2012] VSCA 25, the applicant had been in receipt of a grant of legal assistance for his appeal, but VLA revoked his grant for breach of the grant's terms, after he changed lawyer several times and refused to follow reasonable advice. The Victorian Court of Appeal found that while the Victorian Charter recognises the importance of VLA's role in providing legal assistance to eligible people, it acknowledged VLA's discretion and that while a trial without representation is usually slower, more stressful and might be imperfect, a trial does not have to be perfect to be fair.

Dietrich provided that it is only where the lack of representation results in a miscarriage of justice that the trial is unfair. The Court of Appeal in *Slaveski* held that: "While the circumstances of the particular case, including the background of the person are relevant, a proceeding should only be stayed where the judge is truly satisfied that, without legal representation, the accused will not receive a fair hearing."

This Canadian case would appear to represent a more interventionist approach than in the Australian and Victorian context where the importance of discretion in the context of limited resources and the other means judges have to ensure that justice is done have been emphasised. It also makes a clear statement that the likelihood of imprisonment is not the appropriate test in regard to whether counsel is necessary to ensure a fair trial.

The decision can be found online at:
http://canlii.ca/en/on/oncj/doc/2012/2012oncj120/2012oncj120.html

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Cellular confinement and segregation not in breach of European Convention rights

King & Ors, R (on the application of) v Secretary of State for Justice [2012] EWCA Civ 376 (27 March 2012)

Summary

This case concerned three separate appeals challenging the legality of cellular confinement and segregation procedures, imposed on prisoners who were serving custodial sentences. The appellants argued that their confinement and segregation whilst in prison engaged article 6 of the *European Convention on Human Rights*. The appellants further argued that article 6 was invoked on the basis that their custodial confinement interfered with rights under articles 3 and 8 of the Convention and the common law right to procedural fairness. By a majority of 2-1, the England and Wales Court of Appeal held that the right to associate with other prisoners whilst serving a custodial sentence was not a "civil right" under article 6 of the Convention. Further, decisions to impose cellular confinement and segregation did not engage articles 3 or 8 of the Convention and did not breach any common law rights to procedural fairness. All appeals were dismissed.

Facts

Each appellant in this case was subject to a period of cellular confinement or segregation whilst in prison. Ben King was subjected to confinement for two days for failing to follow orders to leave a prison shower cubicle. Kamel Bourgass was confined for six months in total after being involved in significant bullying and intimidation of other prisoners. Tanvir Hussain seriously assaulted another prisoner in his prison cell and was placed in a segregation unit for approximately six months, with restricted telephone access. The main question before the Court was whether decisions to confine and segregate these prisoners conflicted with their civil rights under article 6 of the Convention.

Decision

Five issues were raised for determination by the Court:

- whether the right to associate with other prisoners was a civil right engaged by article 6 of the Convention;
- in the alternative, whether cellular confinement or segregation engaged article 6 by interfering with the appellants' rights under articles 3 and 8 of the Convention;
- whether the availability of judicial review cured any deficiencies concerning the right to a fair trial under article 6 of the Convention;
- whether the appellants' common law right to procedural fairness had been curtailed; and
- whether restricting access to a telephone in Hussain's case was unlawful.

Right to associate with other prisoners – a civil right?

Article 6 of the Convention relevantly provides that "[i]n 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". The appellants argued that the right to associate with other prisoners constituted a "civil right" that could only be curtailed by an independent and impartial tribunal. Cellular confinement and segregation were imposed in these cases by administrative decision-makers, being a prison governor and Segregation Review Board. As confinement and segregation were not imposed by

an independent judicial body, the appellants argued that their rights under article 6 of the Convention were curtailed.

By a majority of 2-1, the Court of Appeal held that the right to associate with other prisoners was a "normal privilege" of a custodial sentence, but did not attain the status of a civil right. Factual considerations were of "fundamental importance" to the majority's decision in this case. Maurice Kay LJ, with whom Lloyd LJ agreed, held that it would be unrealistic to require an initial decision to segregate to be taken by an "independent and impartial tribunal established by law", when dealing with urgent disciplinary proceedings against individual prisoners. Elias LJ dissented on this point, holding that the right to associate with other prisoners should be treated as a civil right under the Convention.

Articles 3 and 8 of the Convention

In the alternative, the appellants submitted that confinement and segregation determined their civil rights under article 6, as these procedures interfered with other rights under articles 3 and 8 of the Convention. Article 3 concerns a prohibition on torture and degrading treatment. Article 8 provides a right to respect private and family life. The Court held that neither articles 3 nor 8 of the Convention were engaged on the facts of these appeals.

Judicial review

The Court considered an additional question of whether, if article 6 did apply, the absence of an independent and impartial tribunal in this decision-making process was cured by the availability of judicial review. Maurice Kay LJ held that the internal procedures surrounding custodial segregation decisions, combined with the availability of judicial review, satisfied the requirement of an independent and impartial tribunal under article 6. Elias LJ agreed on this point, noting that he would be "very reluctant" to require key areas of prison discipline to be subjected to external determination.

Common law procedural fairness and telephone access

The Court dismissed the appellants' submission that they were not provided with adequate disclosure or reasons to challenge their segregation. Following Taylor LJ's decision in *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58, their Lordships held that there was no legal right afforded to every prisoner to receive reasons for their segregation.

Concerning the lack of telephone access argued by Hussain, the Court found that this submission was not established on the evidence presented.

Relevance to the Victorian Charter

This case may be of relevance to interpreting section 24 of the Victorian Charter. Section 24 provides a right in all criminal and civil proceedings to have a charge or proceeding decided by a "competent, independent and impartial court or tribunal". The Court of Appeal's decision in *King & Ors* indicates that an administrative decision to confine or segregate a prisoner will not breach that prisoner's right to a fair trial, provided that the decision may be subject to judicial review.

The decision can be found online at: http://www.bailii.org/ew/cases/EWCA/Civ/2012/376.html

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UK national security concerns trump freedom of expression

Lord Carlile and Others and Maryam Rajavi v Secretary of State for the Home Department [2012] EWHC 617 (Admin) (16 March 2012)

Summary

In this decision, the High Court of England and Wales considered whether concerns relating to national security justified infringement of the right to freedom of expression. The British Secretary of State for the Home Department refused permission for Iranian dissident Maryam Rajavi to enter the UK to address British parliamentarians at Westminster, allegedly infringing the claimants' common law and *European Convention of Human Rights* right to freedom of expression. Although it expressed sympathy with the claimants' position, the High Court held that the Secretary's decision to exclude Rajavi was proportionate in light of the Secretary's concerns for national security and public order.

Facts

The original claimants, sixteen cross-party members of the House of Lords and the House of Commons, had invited Rajavi (subsequently added as an additional claimant) to address members of the British parliament at Westminster. Rajavi is an eminent dissident Iranian politician and leader of the People's Mojahedin Organisation of Iran, known by its Farsi acronym MeK. Rajavi had previously been excluded from the UK on the basis that MeK was a proscribed terrorist organisation. However, MeK was de-proscribed in late 2007 as a result of "a significant change in MeK's activities dating from June 2001 onwards".

Despite this, in three decisions between February 2011 and January 2012, the Secretary decided to exclude Rajavi from entering the UK due to "the Foreign and Commonwealth Office's apprehension or fear of unlawful reprisals by the government of Iran if her exclusion [were to be] lifted". Essentially, the Secretary was concerned that:

- MeK advocates the overthrow of the current Iranian regime and is still considered a terrorist organisation by the government of Iran;
- permission for Rajavi to enter the UK so as to address parliamentarians would be perceived by Iran as a "deliberate political move" against it; and
- such a decision would "damage existing UK interests in relation to Iran".

The Secretary's decision was motivated by the concern that lifting Mrs Rajavi's exclusion "would cause damage to the UK interests in relation to Iran and endanger the security, wellbeing and properties of British officials overseas." These concerns and the Secretary's decision were subsequently affirmed following a deterioration of relations between the UK and Iran after the severance of British financial ties with Iran, the subsequent expulsion of the British ambassador in November 2011, and the sacking of the British Embassy by protestors shortly thereafter.

Decision

Lord Justice Burnton (with whom Justice Underhill agreed) identified the claimants' substantial ground for judicial review to be that their article 10 rights of freedom of expression had been infringed. His Honour noted that the right to freedom of expression found in article 10 of the Convention "expressly protects the right to receive and impart information and ideas", and that Rajavi's exclusion consequently affected the rights of parliamentarians to hear from her. Lord Justice Burnton noted the particular importance of the right to free expression with regards to members of the legislature, and rejected the submission that a meeting via video link would have provided an equivalent substitute. His Honour considered that, because the right of free

expression engaged was that of parliamentarians, the justification for curtailing the right would have to be "particularly strong". Lord Justice Burnton quoted with strong approval the approach in *Naik v Secretary of State for the Home Department* [2011] EWCA Civ 1546. In that decision, two Court of Appeal judges found that the exceptions to the right of freedom of expression provided in article 10.2 of the Convention (which include national security and public order) must be construed strictly and the need for any restrictions must be convincingly established. However, their Honours further held that a decision of the Secretary to refuse an alien entry into the UK on national security or public order grounds must be entitled to great weight and enjoy a wide margin of appreciation, because the Secretary is likely to have advice and a perspective not readily available to the court. In short, the court's role is restricted to a review based upon a proportionality analysis.

Applying this approach, Burnton LJ found that the present case was "concerned with fears or apprehensions, based on assessments or judgements made with the wide experience and expertise and information available … which the Court is not in a position to gainsay." His Honour regarded it as "entirely credible, indeed likely" that permission for Rajavi to enter the UK and address parliamentarians would be regarded as "a hostile act of the UK government" by the Iranian government. His Honour further regarded it as "credible" that, given Iran had previously "flouted international law", the risk of retaliation was sufficiently great (especially against locally-employed UK embassy staff). For these reasons, despite being sympathetic to the claimants, his Honour considered the Secretary's decision as proportionate and justified for the purposes of article 10.2.

Relevance to the Victorian Charter

This case confirms well-established principles regarding judicial review of governmental decision-making which allegedly infringes common law and Convention rights. These include that the court will undertake only a proportionality review of the decision-maker's decision (rather than a de novo assessment), and that where the decision involves assessment of matters which the court cannot determine easily (if at all) – here, issues of foreign policy and impact on overseas British diplomatic missions – then the decision-maker will be afforded a wide margin of appreciation.

Lord Justice Burnton's judgment contains useful comments on the importance of the right of free expression, including its protection of the receipt (as well as the dissemination) of ideas. Although this decision may provide guidance to Victorian courts, the legitimate restrictions on freedom of expression articulated in section 15(3) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) and the general limitations provided by section 7 of the Charter differ from the restrictions provided in article 10.2 of the Convention. These differences may limit or otherwise impact upon the application of this decision in a Victorian context.

This decision can be found online at: http://www.bailii.org/ew/cases/EWHC/Admin/2012/617.html

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Extradition from the UK to US not a breach of rights to freedom from torture or ill-treatment

Babar Ahmad & Ors v United Kingdom [2012] ECHR 609 (10 April 2012)

Summary

The European Court of Human Rights was required to consider applications by six men facing extradition from the United Kingdom to the United States on terrorism related charges. The decision of the Court in the case of *Babar Ahmad and Others v The United Kingdom* indicates the

approach the court is taking to the interpretation of article 3 rights under the European Convention on Human Rights. In this case, the Court confirmed that extradition to the US was not a breach of the suspects' human rights.

Facts

The men, four English Nationals, an Egyptian and a Saudi Arabian, submitted that their right to freedom from torture, inhuman or degrading treatment or punishment would be violated if they were extradited and convicted in the US. More specifically, the applicants alleged that they would be at real risk of ill-treatment in the US either as a result of:

- the conditions in "Super-Max" prisons in the US, including "special administrative measures"; or
- the possible length of sentencing in the US.

Decision

The Court's decision considered a range of issues, including:

- the distinction between torture and other types of ill-treatment;
- the nature of the absolute right to freedom from torture, inhuman or degrading treatment or punishment; and
- the threshold for ill-treatment, including length of sentencing and conditions at "Super-Max" prisons such as the ADX Florence.

Distinction between torture and ill-treatment

The UK Government submitted that it was important to distinguish between torture and lesser forms of ill-treatment in the extradition context and contended that:

> A real risk of torture in the receiving State should be an absolute bar on extradition. However, for all other forms of ill-treatment, it was legitimate to consider the policy objectives pursued by extradition in determining whether the ill-treatment reached the minimum level of severity required by Article 3.

The Court agreed that there is such a distinction. It was noted that it may not be possible to draw such a distinction where the treatment complained of has not yet occurred. In such circumstances, the Court said that the focus must be on whether the risk is "real" or "whether it was alleviated by diplomatic and prosecutorial assurances given by the requesting State".

Nature of the article 3 right

The applicants sought to argue that, as the rights to freedom from torture or to inhuman or degrading treatment or punishment is an absolute right, the Convention does not allow for a balancing exercise of any kind in relation to article 3.

However, the Court stressed that "the absolute nature of Article 3 does not mean that any form of ill-treatment will act as a bar to removal from a Contracting State", meaning that the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States.

Conditions and length of sentencing

The Court was also required to consider, on the facts, whether the conditions the suspects would face in US prisons would meet the threshold for a violation of article 3. In analysing the applicants' claims that conditions at "Super-Max" Prisons, and in particular, the imposition of "Special Administrative Measures", would constitute a violation of their article 3 rights, the Court noted that:

> For any violation of Article 3 to arise from an applicant's conditions of detention, the suffering and humiliation involved must go beyond that inevitable element of suffering or humiliation connection with a given form of legitimate treatment or punishment.

The Court further stated that whilst prolonged removal from association with others is undesirable, whether such a measure falls within the ambit of article 3 of the Convention "depends on the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned."

The applicants had also submitted that the sentences which could be imposed by US courts were grossly disproportionate to their alleged crimes. In this context, the Court considered whether sentences of life imprisonment could give rise to a breach of article 3. It was noted that while "matters of appropriate sentencing largely fall outside the scope of the Convention …, a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition." The Court found that it would "only be in very exceptional cases that an applicant will be able to demonstrate that the sentence he or she would face in a non-Contracting State would be grossly disproportionate and thus contrary to Article 3." Given the seriousness of the criminal allegations against the applicants, and the fact that aggravating and mitigating circumstances would be taken into account by the sentencing judge; the Court found that the sentences would not be grossly disproportionate.

Commentary

The decision demonstrates the approach that the European Court of Human Rights will take to the interpretation of article 3 rights under the Convention.

This decision comes at an important time for the UK Government, which has been facing increasing public unease regarding deportation and extradition law, particularly in relation to terrorism related offences. It is also a decision likely to be welcomed by the US, not only because it makes extradition of the applicants more likely, but also because of the positive reflections on the US super-max prison system and the favourable comparison made between the conditions in ADX Florence and some European prisons.

Relevance to the Victorian Charter

The Victorian Charter of Human Rights also protects the right to freedom from torture and cruel, inhuman or degrading treatment or punishment under section 10. This decision adds to the body of international jurisprudence about what the right means, particularly what the threshold is for "ill treatment". This case suggests, for example, that a "grossly disproportionate" criminal sentence imposed by a Victorian court could give rise to a breach of human rights under the Charter, particularly if the sentence was mandatorily imposed.

The decision is available online at: http://www.bailii.org/eu/cases/ECHR/2012/609.html

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Placing asylum seeker in situation causing death contravenes the Convention against Torture

Sonko v Spain, UN Doc CAT/C/47/D/368/2008 (20 February 2012)

Summary

The UN Committee against Torture has found that Spain violated its obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in its treatment of Senegalese asylum seeker Mr Sonko, who drowned after being forced out of a

Spanish Civil Guard vessel. This decision exemplifies that placing a person in a situation that causes his or her death will constitute cruel, inhuman or degrading treatment in contravention of article 16 of the Convention.

The Committee demanded that Spain investigate the circumstances of the case, prosecute those responsible and provide compensation to Mr Sonko's family.

Facts

On the night of 26 September 2007, the Spanish Civil Guard intercepted four African migrants attempting to enter the Autonomous City of Ceuta (a Spanish enclave in northern Morocco) by swimming along the coast with the aid of a life jacket. One of these persons was Mr Lauding Sonko, from Senegal. The Civil Guard brought the four persons into the vessel and, after taking them into Moroccan territorial waters at a distance out from the shore, forced them into the water.

The complainant alleged that the Guard forced the asylum seekers into water out of their depth and punctured the life jackets of the three men. Spain denied these facts.

Mr Sonko clung to the vessel and explained that he could not swim but was nonetheless forced into the water. It was disputed whether the guards understood Mr Sonko's protests. Seeing Mr Sonko struggling to reach the shore, a guard entered the water to help him. Despite efforts to revive Mr Sonko, he died shortly after.

The complainant was Ms Sonko, a Senegalese national living in Spain and the sister of Mr Sonko. Ms Sonko submitted that Spain had contravened its obligations under article 1 (prohibition on torture) and article 16 (prohibition on cruel, inhuman or degrading treatment) of the Convention.

Decision

Before considering the merits of the application, the Committee dismissed Spain's argument that the complaint was not admissible for failure to exhaust domestic remedies, finding that the fact that the national court had dismissed the case was sufficient.

In considering the merits, the Committee noted that Spain denied that the life jackets were punctured. Despite being confronted with conflicting facts, the Committee declined to make an assessment saying that "it is not its task to weigh the evidence or to reassess the statements made regarding the facts or the credibility of the relevant national authorities." What was important was that both parties agreed that the swimmers, including Mr Sonko, were alive when brought onto the vessel but that Mr Sonko died shortly after being brought to shore. Therefore, "an undeniable cause-effect relationship [existed] between Mr Sonko's death and the actions of the Civil Guard officers".

As a State's jurisdiction extends to territory where the State exercises effective control, the Committee held the Civil Guard officers were responsible for the swimmers' safety because they exercised control over the persons in the vessel. The Committee said that it was for Spain to explain the circumstances surrounding Mr Sonko's death. Further, irrespective of whether the life jackets were punctured or at what distance from shore the swimmers were forced into the water, Mr Sonko "was placed in a situation that caused his death."

The Committee held that the actions of the Civil Guards were sufficient to meet the threshold of cruel, inhuman or degrading treatment and were, therefore, a contravention of article 16 of the Convention. The Committee stated, however, that this treatment and the physical and mental suffering of Mr Sonko prior to his death did not amount to a violation of the prohibition on torture in article 1 of the Convention.

While the complainant did not contend that article 12 of the Convention had been breached, the Committee also held that Spain failed in its "absolute" obligation under this article to investigate the circumstances of Mr Sonko's death. The Committee urged Spain to investigate the events and to prosecute and punish any person responsible for Mr Sonko's death, and provide the complainant with adequate compensation.

Dissenting opinion

In a strong dissent, Felice Gaer described the Committee's statement that "it is not its task to weigh the evidence or to reassess the statements made regarding the events in question or the credibility of the relevant national authorities" as a "shocking pronouncement". She argued that this is the very role of the Committee and that it is authorised and required to engaged in a "free assessment" of the facts at issue under the Committee's General Comment No. 1.

To illustrate the need to assess the facts, Ms Gaer noted that every death in custody of the State will not amount to a finding that the State party committed cruel, inhuman or degrading treatment. Further, negligent treatment is not necessarily enough to constitute a contravention of article 16 of the Convention. It was, therefore, necessary for the Committee to assess the facts and decide on what caused Mr Sonko's death to find that the Convention was contravened. Ms Gaer concluded by saying that the Committee "has apparently determined that the State's version of the events is not credible. It is well within its power to do so and should have stated so plainly."

Relevance to the Victorian Charter

Section 10 of the Victorian Charter protects a person from cruel, inhuman or degrading treatment or punishment.

Due to the Committee's refusal to analyse the facts (as soundly criticised in the dissenting opinion) this decision does not provide us with an analysis of what aspect of the Civil Guards' behaviour amounted to cruel, inhuman or degrading treatment. However, it can be surmised that placing an asylum seeker's life in danger will amount to cruel, inhuman or degrading treatment where a person is aware of the asylum seeker's particular vulnerability and acts in a way to exacerbate the danger.

This decision serves as a strong reminder of Australia's obligation to follow established procedures when handling persons seeking asylum.

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Failure to take reasonable measures to prevent the contagion of tuberculosis in prison not enough to deem state liable

Minister of Correctional Services v Lee (316/11) [2012] ZASCA 23 (23 March 2012)

Summary

In this case the Supreme Court of Appeal in South Africa ruled that while prison authorities failed to take reasonable measures to prevent the contraction of tuberculosis in custody, causation was not made out and therefore the State was not liable.

Facts

Lee was arrested in November 1999 and remained in prison for a total period of four years before being acquitted and permanently released in September 2004. During this time Lee was diagnosed with pulmonary tuberculosis. Lee sought damages against the Minister of Correctional Services, claiming the authorities failed to have "reasonably adequate precautions against contagion" of tuberculosis.

Pulmonary tuberculosis is transmitted by inhalation. Once inhaled, the disease can either be destroyed by the host, remain dormant for numerous years, or immediately become active. The active stage is necessary for transmission. Active disease presents itself as shortness of breath, persistent coughing, loss of weight and appetite, chest pain, and night sweats and fever. Testing for tuberculosis can sometimes result in a false negative result.

Lee experienced coughing and weight loss towards the middle of 2003. He underwent two tuberculosis tests. Both results were negative. In May 2003 Lee was hospitalised for the removal of a hernia. X-rays in preparation for the operation revealed the presence of tuberculosis.

Tuberculosis can be managed fairly easily through proper screening and diagnosis, isolation of the carrier for the period they are contagious (usually two weeks after the commencement of treatment), and antibiotic treatment. Nugent JA recognised four events which reveal that the ordinary procedure adopted by the prison did not satisfactorily meet these protocols. Firstly, the prison's practice of superficially screening the prisoners upon their arrival, followed by their placement in a communal cell regardless of a positive tuberculosis result. Secondly, upon the authorities gaining knowledge of Lee's tuberculosis, he was placed in a communal hospital cell. Thirdly, upon being returned to the prison after hospitalisation, Lee was again placed in a cell with one or at times two other prisoners notwithstanding that he would remain contagious for a further two weeks. Fourthly, Lee was sent to and from court in a communal police van, likely to be filled with new prisoners, during his time of contagion. These events display the prison's failure to adequately follow a reasonable tuberculosis management system.

Human rights issues

Section 12(1) of the *Correctional Services Act 1998* (South Africa) obliges prison authorities to "provide, within its available resources, adequate health care services, based on the principles of primary care, in order to allow every inmate to lead a healthy life." Section 35(2)(e) of the *South African Constitution* also provides an inherent right to all prisoners that ensure "conditions of detention that are consistent with human dignity." These provisions are consistent with the rights set out in articles 7 (no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment) and 10 (all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person) of the ICCPR.

Nugent JA found that the conditions in South African prisons did not uphold these human rights by negligently omitting to put in place reasonable measures to protect prisoners from disease and infection.

The Minister argued that "public duties should not translate into a private action for damages when they are not fulfilled." The Minister stated that to do so would impose an "inordinate burden" on the state, it would expose the state to indeterminate liability and that there are other avenues for which prisoners to vindicate their rights. Nugent JA discredited each of these arguments. His Honour held that where a "state takes away the autonomy of an individual by imprisonment" it then adopts the responsibility for the physical welfare of the prisoner. His Honour found that the "state has important responsibilities to its citizens. It might not always be able to fulfil them but it ought to properly recognise where it has failed."

Decision

Nugent JA stated that three elements of a negligence claim are well established: "a legal duty in the circumstances to conform to the standard of the reasonable person, conduct that falls short of that standard, and loss consequent upon that conduct." In this case, Nugent JA found that the first two elements are clearly present, as "prison authorities failed to maintain an adequate

system for management of the disease and in that respect they were negligent." Lee's claim failed on the third point: the matter of causation.

His Honour questioned whether Lee would have still been infected if the prison had imposed "reasonable management of the disease." He found that Lee would. This is a two stage enquiry of fact: what would a reasonable person have done to avoid the occurrence of harm and whether the harm would be avoided if that were done?

Nugent JA discussed in great detail what would be considered reasonable management of the disease. His Honour reiterated that while the failure of the authorities to meet a reasonable standard deems them negligent, that alone does not determine whether the harm was caused by their omission. In addition, what the prison authorities *ought* to have done must be established.

Because the prison was large, congested, and had limited access to resources, Nugent JA suggested that it would be unreasonable to expect prison authorities to isolate Lee immediately after he reported his symptoms, especially after receiving a negative tuberculosis test result. His Honour suggested as an example that if Lee's cellmate had contracted the disease after contact with Lee during this time, it would be difficult to attribute it to the fault of the authorities. Nugent JA held that this is because "whatever management strategies might be put in place there will always be a risk of contagion if only because diagnosis is necessarily a precursor to intervention, and the disease might often be diagnosed only well after the prisoner has become contagious."

Relevance to the Victorian Charter

Section 10(a) (which mirrors article 7 of the ICCPR) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) requires that a "person must not be … treated or punished in a cruel, inhuman or degrading way". Section 22(1) (which mirrors article 10 of the ICCPR) also provides that "persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person". The decision in this case suggests that the threshold to find that a negligent omission amounts to inhuman or degrading treatment is high. While a negligent act which results in such treatment may be easier to establish, this case suggests that where an authority omits to take reasonable measures to ensure a prisoner is treated with humanity, this may not be enough to prove liability for a breach of human rights.

The decision is available online at: http://www.saflii.org/za/cases/ZASCA/2012/23.html

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What is the standard of review to determine whether a public authority has acted compatibly with human rights?

Doré v Barreau du Québec, 2012 SCC 12 (22 March 2012)

Summary

The Supreme Court of Canada has delivered a key decision clarifying the standard of review to be applied in considering whether administrative decision-makers have exercised their discretion compatibly with the Canadian Charter. The Court held that, rather than using the test in *R v Oakes* [1986] 1 SCR 103, which is used to determine whether legislation is Charter compatible, a more flexible reasonableness test should be used, drawing on administrative law concepts and providing greater deference to administrative decision-makers.

The decision may have implications for the test to be applied in challenges to decision of public authorities using section 38 of the Victorian Charter.

Facts

Doré, a lawyer in Quebec, appeared before a judge on behalf of a client in criminal proceedings in June 2001. In the course of argument, the judge criticised Doré. In his written reasons, the judge continued his criticism, accusing Doré of using bombastic rhetoric and hyperbole, of being impudent and of doing nothing to help his client discharge his burden (the judge would later be reprimanded by a panel of fellow judges for these actions).

Shortly afterwards, Doré wrote a private letter to the judge, calling him, among other things, loathsome, arrogant, fundamentally unjust, accusing him of failing to master any social skills and of using his court to launch ugly, vulgar and mean personal attacks.

Perhaps unsurprisingly, Doré was taken to the disciplinary council of the local lawyers' association on the basis that the letter was likely to offend, rude and insulting. His arguments relating to freedom of expression (protected in article 2(b) of the Canadian Charter) were rejected by the council, and he was reprimanded and suspended for 21 days.

Doré appealed to an administrative tribunal, sought judicial review in the Superior Court of Quebec, appealed to the Quebec Court of Appeal and, having failed at every stage, appealed to the Supreme Court of Canada. In the Supreme Court, Doré asserted that the finding of a breach of professional ethics by the council violated his right to freedom of expression.

Decision

The Supreme Court dismissed the appeal, and upheld the decision of the council in reprimanding Doré.

However, the Court noted that different tests for determining the question of Charter compatibility had been applied at different stages of the proceeding, and took the opportunity to reconsider the appropriate standard of review of discretionary administrative decisions for compatibility with the Charter.

In Canada, rights and freedoms may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" under section 1 of the Charter. The test for applying section 1 in the context of considering whether legislation is Charter compatible (and therefore constitutional) was set out in the celebrated *Oakes* case in 1986. That test formed the basis of the reasonable limitations provision in section 7(2) of the Victorian Charter.

Three years later, in the 1989 *Slaight* decision, the Canadian Supreme Court held that the test in *Oakes* also applied to review of discretionary administrative decisions. At the time, this was done in part because of a view by the Court that the existing administrative law standard of review was not suited to Charter issues, because it did not permit enquiry into the substance of discretionary decisions. The Court noted that the relationship between the traditional administrative law standard of review and Charter review would be worked out in future cases.

The judgment in *Doré* notes these and a number of other key Canadian decisions on the interaction between traditional administrative law and Charter review of discretionary decisions. Notably, the court refers to the 2008 Supreme Court decision of *Dunsmuir*, which it describes as introducing a "revised administrative law template". This decision set out a new reasonableness standard of review and stated that judicial review should be "guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state".

In light of these developments, the Court determined that the appropriate standard of review of administrative decisions for Charter compatibility is reasonableness, and not the "correctness" approach in the *Oakes* test. Accordingly, a different standard would apply to review of the constitutionality of laws and in reviewing administrative decisions that are said to violate the rights of a particular individual.

Although a proportionality analysis is at the heart of both standards of review, there are differences. Notably, in review of administrative decisions, a court should adopt a more deferential standard that takes account of expertise and specialisation of the primary decision-maker. This ensures that the superior courts are not assuming in effect a de novo appeal of the decision, which could lead to judicial-micromanaging of administrative decisions.

Relevance to the Victorian Charter

The decision provides food for thought in considering the approach that Victorian courts should take in reviewing decisions of public authorities for compatibility with their obligations under section 38 of the Charter.

In particular, the role of the reasonable limitations provision section 7(2) in the process of review of lawfulness under section 38 is still in some doubt. In *P J B v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327, Justice Bell held that section 7(2) has a role to play under section 38.

In *Momcilovic* the Court of Appeal held that section 7(2) has no role in the interpretation provision in section 32, although it does have a role in determining whether to make a declaration of inconstant interpretation under section 36. It did not address the role of section 7(2) in relation to section 38.

The High Court in *Momcilovic* was split on the role of s 7(2) in s 32 and s 36, such that there is probably no binding authority on these questions from the decision. As such, the most likely result is that the Court of Appeal judgment in *Momcilovic* remains good law for now on these issues.

There was some support for the proposition that s 7(2) has a role in compatibility with s 38 in the judgments of Justice Gummow (with whom Justice Hayne relevantly agreed) and Justice Bell of the High Court in *Momcilovic*, while Chief Justice French took a different approach. This issue still probably remains to be determined in a suitable case, unless clarified by legislative amendment.

The Human Rights Law Centre has previously argued that s 7(2) should not play a role in determining whether administrative decisions are compatible with the Charter. Rather, the Centre has argued that compatibility should be determined by reference to s 38(2) which states that the obligation on public authorities does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

One could argue that the decision in *Doré* supports the argument that s 7(2) should not play a role in determining whether a decision is compatible s 38. This is because s 7(2) is based on the test in *Oakes*, which the Canadian Supreme Court – the very court that decided *Oakes* – has determined is not appropriate for review of administrative decisions. Rather, the kind of reasonableness assessment in s 38(2) is closer to the reasonableness test set out in *Doré*.

However, there are some differences. First, it is not clear what role s 38(2) plays in discretionary decisions such as the one in *Doré*. The provision is modeled on a provision from the United Kingdom *Human Rights Act* that is aimed more at non-discretionary decisions, although the wording was changed in the Victorian Charter. Second, much of the reasoning in *Doré* is based

around the idea of aligning Charter review with non-Charter standards of administrative review. However, as the reasonableness standard is not used in non-Charter review of administrative decisions in Australia, this reasoning would not apply in Victoria.

Finally, although it may seem that review of administrative decisions under s 38 of the Charter raises several difficult issues to resolve, it is worth noting that these issues have been considered and resolved over a period of decades in Canada. Charter jurisprudence in Victoria is still at an early stage, particularly in relation to section 38, and it may not be necessary to resolve these complex issues immediately – the point is rather to give effect to the legal protection of basic human rights in the cases that arise.

The decision is available online at: http://canlii.ca/en/ca/scc/doc/2012/2012scc12/2012scc12.html

Hugh Mannreitz *is a Melbourne-based lawyer.*

HRLC POLICY WORK AND CASE WORK

Upholding Children's Rights: Australia must ratify the Third Optional Protocol to the CRC

The Human Rights Law Centre has strongly encouraged Australia to sign and expeditiously ratify the Third Optional Protocol to the Convention on the Rights of the Child.

The Third Optional Protocol opened for signature on 28 February 2012 and establishes a complaints procedure to allow individuals or groups to submit a complaint to the Committee of an alleged violation of any of the rights contained in the Convention.

In a submission to the Attorney-General's Department, the HRLC has highlighted that ratification of the Third Optional Protocol by Australia would:

- complement and strengthen existing domestic mechanisms in Australia for protecting children's rights;
- give effect to Australia's international legal obligations to provide effective remedies for violations of human rights;
- demonstrate international human rights leadership; and
- involve minimal implementation obligations and costs.

Further information about the UN Convention on the Rights of the Children, including the Third Optional Protocol, is available at http://www2.ohchr.org/english/bodies/crc/index.htm.

Ombudsman's report reveals major failings in oversight, monitoring and accountability in places of detention

The Ombudsman's report into the death of Carl Williams at Barwon Prison highlighted a number of systemic failings in Victoria's prison system.

Among these failings, the Ombudsman was highly critical of the lack of independent monitoring or oversight of Victoria's prisons. The Ombudsman quoted extensively from an HRLC briefing paper on correctional accountability as follows:

> Victoria does not have an independent body responsible for monitoring and oversight of prisons and other places of detention… The Victorian Office of Correctional Services Review, an internal business unit within the Department of Justice which

> reports to the Secretary of the Department [of Justice], is not sufficiently independent, empowered or publicly accountable to undertake this function. The OCSR's lack of independence is exacerbated by the fact that it does not publicly publish its reports or findings.

The Ombudsman concluded that this reflected his own finding as to institutional failings in correctional oversight, including:

> a lack of separation from those who undertake correctional roles the OCSR is monitoring and reviewing; limited transparency and accountability; investigations that vary in quality; and a failure to complete investigations in a timely manner.

Following the release of the Ombudsman's report, the Victorian Premier announced that the Government will review "the structure and management systems of Corrections Victoria and the Department of Justice" and that former Australian Federal Police commissioner Mick Palmer will lead a review to independently audit and benchmark the implementation of the Ombudsman's 57 recommendations.

The establishment of a fully independent, adequately resourced and appropriately mandated body to inspect places of detention and to publicly report its findings and recommendations should be a priority for this review.

The Ombudsman's report is available at:
http://www.ombudsman.vic.gov.au/resources/documents/The_death_of_Mr_Carl_Williams_at_HMP_Barwon-investigation_into_Corrections_Victoria_Apr_2012.pdf

The HRLC briefing paper referred to in the report is available at:
http://www.hrlc.org.au/content/our-work/law-reform-and-policy-work/domestic-submissions/reducing-offending-and-strengthening-correctional-accountability-for-a-safer-victoria/

Government defies UN directive to allow deported man home

Australia is flagrantly violating its international human rights obligations and undermining the rule of law by refusing to abide by a decision of the United Nations Human Rights Committee – the world's highest expert human rights body.

In the landmark decision of *Nystrom v Australia* issued in September 2011, the Committee held that Australia violated the human rights of a permanent resident, Stefan Nystrom, by deporting him to Sweden. Australia was given six months to abide by international law and to support Mr Nystrom to return home.

However, in a stunning rebuke, the Australian Government has now advised the Committee that it "respectfully disagrees" with the decision and will not allow Mr Nystrom to re-enter the country. This is despite the fact that Mr Nystrom was just 27 days old when he arrived in Australia and, until his deportation at the age of 32, had never left. His mother, sister and all his family are Australians and live in Australia. He has no meaningful ties with Sweden whatsoever and does not even speak the language.

The Human Rights Law Centre's Rachel Ball said the Australian Government was undermining the UN human rights system with a flagrant breach of its international human rights obligations.

"If the Government is serious about human rights, it needs to stop picking and choosing which laws it will abide by and which it will ignore. Australia's mounting track record of rejecting the decisions of UN treaty bodies lays us open to the charge of speaking with a forked tongue on human rights. It throws into doubt Australia's intention to abide by various human rights treaties that the Government has signed," said Ms Ball

The Government's brazen decision is also completely at odds with the UN Security Council candidacy which pitches Australia as a country which "does what we say".

"We're either committed to international human rights and the rule of law or we're not. Whether it's the rights of women, people with disability, or prisoners – the Australian Government needs to respect its legal obligations and heed the clear direction of the world's highest expert human rights body," said Ms Ball.

According to leading barrister Brian Walters SC, who acted pro bono for Mr Nystrom together with the Human Rights Law Centre, the Government's decision could damage international relations, noting that Sweden requested that Australia not deport Mr Nystrom on humanitarian grounds.

"Australia's reputation as a country which supports the United Nations human rights system is being diminished. This response from the Australian Government sends a terrible message to the world about Australia's attitude to human rights," said Mr Walters.

Mr Walters said the Government was refusing to play by the human rights rules – rules that under former Labor Minister Doc Evatt, Australia played a leading role in establishing.

"The Human Rights Committee is an eminent body of independent international human rights experts. Quite rightly, Australia has submitted to the jurisdiction of that Committee. Now it should do the right thing, abide by international law, give effect to the Committee's judgment, and bring Stefan home," said Mr Walters.

HRLC MEDIA COVERAGE

The HRLC has featured in the following media coverage since the last Bulletin:

- Farah Farouque, 'Children's rights pressure mounts', *The Age*, 30 April 2012
- Darren Mara, 'Gillard government defies UN over deportation', *SBS World News Australia Radio*, 26 April 2012
- Fran Kelly, 'Nystrom deportation', *ABC Radio National*, 26 April 2012
- World News Australia, 'UN ruling on Australian-Swedish man 'ignored'', *SBS News*, 26 April 2012
- Lisa Martin, 'Goverment ignores UN ruling on Swedish man Stefan Nystrom', *Herald Sun*, 25 April 2012
- Jeff Waters, 'Security Council seat at risk over deportation stoush', *ABC Lateline*, 25 April 2012
- Jeff Waters, 'Australia defies UN on deportation case', *ABC TV News*, 25 April 2012
- Lisa Martin, 'Govt ignores UN ruling on Aust-Swedish man', *Sydney Morning Herald*, 25 April 2012
- Farah Farouque, 'More checks on detention', *The Age*, 16 April 2012
- Philip Lynch, 'Human rights agenda for a new foreign minister', *ABC The Drum*, 03 April 2012
- Maris Beck and Marc Moncrief, 'Use of force by police most likely in CBD', *The Age* , 02 April 2012
- Ben Schokman, 'In pursuit of a fair trial', *Law Institute Journal*, 01 April 2012

SEMINARS & EVENTS

Annual Human Rights Dinner

Friday 15 June, Melbourne

The Annual Human Rights Dinner is an opportunity to come together to celebrate the human rights achievements of the last twelve months and to look to the challenges and opportunities ahead. It's a fun night and an important fundraiser for the Public Interest Law Clearing House and the Human Rights Law Centre. Book your tickets now!

A fundraising auction will be held on the night. If you can't attend the Dinner, you can still place bids on some of the auction items prior to the event, so be sure to visit our auction page to see what is on offer and to lodge an early bid.

Exclusive screening: A common purpose

Thursday 3 May, Melbourne

Reprieve Australia and the Human Rights Law Centre are hosting an exclusive screening of the Winner of the Audience Award for Best Documentary at Sydney Film Festival 2011. *A Common Purpose* is the dramatic story behind a notorious murder trial that marks South Africa's transition from apartheid to democracy. There will be a Q&A after the film with Andrea Durbach and Director, Mitzi Goldman. Tickets are $30 and can be booked here. All proceeds of ticket sales will go to Reprieve Australia and the Human Rights Law Centre.

Judicial War? Human rights lawyers at risk around the world

Wednesday 16 May, Melbourne

A fascinating look at how Peace Brigades International helps protect human rights lawyers at risk in Columbia, Nepal, Guatemala, Mexico, and Indonesia. A lawyer in Australia can stand up in court without feeling personally at risk. Sadly, the same is not the case everywhere. Join Debbie Mortimer SC, Chair of the Victorian Bar Human Rights Committee, and Jomary Ortegon, lawyer with CCAJAR, Colombia (via skype) for a discussion of the threats faced by human rights lawyers in Colombia and around the world, and what assistance the Australian legal community can offer. This event is free, but places are limited so please register here.

Human rights, protest and police surveillance: a forum on intelligence gathering and monitoring of public protest

Thursday 17 May, Melbourne

This forum, hosted by the Castan Centre for Human Rights Law, brings together experts in law, human rights and surveillance, as well as individuals who have sought to protect their privacy through the courts, and asks: What kind of monitoring and surveillance techniques are currently being utilised? What are the effects of this practice from a democratic and human rights perspective? And what legal protections are available and how adequate are they? Keynote speakers include, **Michael Pearce SC** Barrister and former President of Liberty Victoria, **Anthony Kelly** Executive Officer, Flemington & Kensington Community Legal Centre and trainer

with Pt'chang Nonviolent Community Safety Group, and **Anna Brown**, Director of Advocacy and Strategic Litigation, Human Rights Law Centre.

Click here for further details and bookings.

Susan Campbell AM Memorial Dinner

Wednesday 20 June 2012, Melbourne

Susan Campbell AM (1943-2011) was a pioneer of community legal centres and Clinical Legal Education at Monash. Through her work, she inspired a generation of law students to give back to their communities. This event will celebrate Susan's professional life and her work with the Monash Clinical Legal Education program.

For more information see: https://community.monash.edu/suecampbell

Castan Centre Annual Human Rights Law Conference

Friday 20 July 2012, Melbourne

Keynote speakers include: Gareth Evans AO QC – The responsibility to protect after Libya; Professor Tim Flannery – Global warming and human rights; Sami Ben Gharbia – The Arab spring; Susan Ryan AO – Human rights never age; Dr Samantha Thomas – Public health and human rights (Obesity); Allan Asher – People just like us; human rights for asylum seekers!; Ron Merkel QC – Recent human rights cases in the courts; Dr Kerry Arabena – Recognition of Indigenous peoples in the Australian Constitution.

Click here for further details and registration forms.

2nd World Congress on Adult Guardianship

Guardianship and the United Nations Disabilities Convention: Australian and International Perspectives

15-16 October 2012, Melbourne

The congress will provide an opportunity to assess the impact of the Convention in reforming Australian and International guardianship laws and practices six years after its adoption by the UN General Assembly and four years after ratification by Australia. Click here for further information.

HUMAN RIGHTS JOBS

Public Interest Law Clearing House

PILCH is an independent, not-for-profit organisation that is committed to furthering the public interest, improving access to justice for those who are disadvantaged or marginalized, and protecting human rights. PILCH is seeking a Lawyer to play a vital role in delivering pro bono services to members of the public.

BOOK REVIEW

Book review: *Australians and Modern Slavery* by Roscoe Howell

This book shocks. It's a steady, factual account, but disturbing all the same. Slavery, most people think, is dead and buried, consigned to history by William Wilberforce and the abolitionist movements of the nineteenth century. But nothing could be further from the truth.

Shamefully, slavery is alive and well, and it is estimated that there are 27 million slaves in the world today. This book unpicks who they are, where they are and how they got there. Slavery has to be stopped! But how?

There is no better place to start than Roscoe Howell's *Australians and Modern Slavery*. It examines the notion of slavery, the forms it takes, and how it may be encountered. It considers official attempts to control modern slavery, the array of international instruments and measures that have been developed, and most importantly what the ordinary person can do.

The book is presented in a disarmingly engaging style, and packed with masses of useful information. It is eminently readable, entertaining while it educates. It is chock-full of tables and charts and photos – and cartoons! This is a "must buy" for anyone concerned to pursue the fight against slavery.

And it is not just for the general reader. The lawyer will benefit. It bridges the human rights–criminal law divide. It gives examples (from Africa and South Asia) of how the law has helped, it analyses gaps and overlaps between the "official" system and what happens in practice. The social scientist will find its analysis of slavery as a human phenomenon illuminating and instructive. And the activist and reformer will find its practical advice and concrete recommendations indispensable.

*Associate Professor **David Wood** is a Principal Fellow at the Faculty of Law, University of Melbourne*

FOREIGN CORRESPONDENT

UN Human Rights Committee makes landmark recommendation on reproductive health care and considers relationship with NGOs

The UN Human Rights Committee held its 104th session in New York from 12 to 29 March 2012.

During its session, the Human Rights Committee reviewed five State Reports on the implementation of the *International Covenant on Civil and Political Rights*, namely by the Dominican Republic, Yemen, Turkmenistan, Guatemala and Cape Verde. All the meetings were held in public and webcast by the Centre for Civil and Political Rights. The videos have also been archived and can be downloaded at www.treatybodywebcast.org. Several NGOs from the five States reviewed participated in the session and briefed the Committee.

At the end of the session, the Human Rights Committee released its concluding observations (see Dominican Republic: http://bit.ly/I4N7yP; Yemen: http://bit.ly/K15ejF; Turkmenistan: http://bit.ly/I4eA2S; Guatemala: http://bit.ly/JjcNWo and Cape Verde: http://bit.ly/IiKKpg). The Concluding Observations underline the Committee's main subjects of concern for each country and recommending concrete steps to improve the implementation of the ICCPR at the domestic

level. The Committee also set a deadline for the submission of the next periodic reports, depending on the difficulties encountered by the States in the implementation of the ICCPR. Unsurprisingly, the Committee requested that Turkmenistan submit its next report in 2015 (three-years, a deadline reserved to the most serious situations). The same deadline was given to Yemen, a State that the Committee wants to closely monitor due to the fact that it "is currently going through a period of political instability and insecurity which intensified in February 2011". Both Guatemala and the Dominican Republic were requested to provide their reports by 2016 (a four-year deadline).

Specific attention should be given to the situation of Cape Verde, where the review was made in absence of the State report. The initial report of Cape Verde was due in 1994 and never submitted to Human Rights Committee. Due to the special circumstances, the Committee triggered its special procedure, namely a review in the absence of a report, relying only on the information provided by the other stakeholders, including civil society. In a positive move decided in July 2011, the Human Rights Committee changed its procedure so as to hold this review in public. Also for the first time it made public its concluding observations on a State review in absence of report.

All States were requested to submit a follow-up report on the measures taken on the most urgent recommendations within one year.

With regard to the different substantive issues discussed by the Human Rights Committee during the session, one should pay close attention to the concluding observations on the Dominican Republic with respect to the issue of abortion. In a positive development, the Committee recommended, for the first time, that the State should amend its abortion laws and specifically authorise it for therapeutic reasons.

With regard to its other activities, the Human Rights Committee ruled on more than 25 cases under the Optional Protocol on Individual Complaints. The Committee also adopted an important position paper on its cooperation with the NGOs (UN Doc. CCPR/C/104/R.2) where "the Committee's relationship with NGOs" is clarified and strengthened.

Finally, the Committee decided that its next General Comment will be devoted to article 9 of the ICCPR (the right to liberty and security). It is expected that the review of the first draft will take place in Fall 2012 or in Spring 2013.

The next session of the Human Rights Committee will take place in Geneva from 9 to 27 July 2012. The State reports of Armenia, Iceland, Kenya, Lithuania and Maldives will be reviewed.

Patrick Mutzenberg *is Director of the Centre for Civil and Political Rights (CCPR-Centre) in Geneva.*

IF I WERE ATTORNEY-GENERAL…

Time to renew Australia's commitment to the integrity of the UN treaty system

By Hilary Charlesworth

If I were Attorney-General, I would work to overcome the entrenched Australian scepticism about the international human rights system and use it to strengthen and enrich Australian law.

Since the time of the Whitlam Labor government, elected in 1972, Australia has been an active participant in the UN human rights system. Both of the major parties have been willing, when in government, to sign and ratify major human rights treaties. Currently Australia is a party to seven of the nine core UN human rights conventions and it has accepted the right of individual communication under four of them.

At least on paper, then, Australia seems well engaged in the international human rights system. There remain however some gaps in this engagement. For example, Australia has been reluctant to accept the new right of individual communication under the International Covenant on Economic, Social and Cultural Rights, although it asserts that that treaty is fully implemented in Australian law. And Australia, like many other Western countries, is not yet a party to the Convention on the Rights of Migrant Workers and their Families, nor the Convention on Enforced Disappearances.

But the major problem is that we tend to regard international human rights standards as applicable to other (non-Western) countries, and as having little relevance to Australian law. Australia views itself – in the words of a former Commonwealth Attorney-General – as a "gold-plated democracy", largely immune to human rights scrutiny and setting a high standard for unfortunate dictatorships or failing states in our region and elsewhere. This attitude is manifested in Australia's rejection of the views of the UN human rights treaty bodies in a number of significant cases, most recently in the case of Stefan Nystrom's deportation.

This approach has led to questions in international circles about the depth of Australia's commitment to international human rights standards. Australia's self-satisfaction about its human rights performance is also not based in reality: there is a significant mismatch between our treaty obligations and our actions in, for example, the treatment of asylum seekers, the conditions in which prisoners are held in Australian gaols, the rights of children, and policies and practices relating to Australia's Indigenous population. While Australians are fortunate to live in a wealthy country, with a lively democratic tradition and an independent judiciary, the benefits of these attributes are not spread evenly.

Both Australia's complacency about its human rights performance and its porous implementation strategies emerged in the Universal Periodic Review, a mechanism of the UN Human Rights Council. Australia was reviewed in January 2011. It is important to note that many aspects of the process were beneficial: Australia consulted extensively with civil society on its "national report" to the UPR; and the report was candid in acknowledging some problems in Australia's human rights record, for example the lower life expectancy rates of Indigenous Australians and the fact that women's earnings are on average lower than those of men.

But the Australian report also glossed over some problematic aspects of human rights implementation: for example it did not dwell on the fact that the protection of human rights in

Australia is a complex, and sometimes contradictory, patchwork of laws and practices. It noted that Australia had rejected a major recommendation of its National Human Rights Consultation to introduce a legislative bill of rights on the basis of the shaky argument that existing principles of statutory interpretation and new measures such as statements of human rights compatibility for new legislation would be adequate for protecting human rights.

During the UPR session, countries raised concerns over a great range of matters: Australia's treatment of its Indigenous people, the rights of refugees and asylum seekers, protection of children's rights, the use of Tasers by police, sex discrimination, the lack of national human rights legislation, and Australia's reservations to human rights treaties.

Australia's response to the draft report was presented to the Human Rights Council in June 2011. The response took some significant steps, such as a commitment to appoint a full time Race Discrimination Commissioner and to tabling both UPR recommendations and concluding observations of treaty bodies in Parliament. At the same time, Australia rejected some major recommendations with little explanation. These included a call to enact a Human Rights Act, to compensate the Stolen Generations and to end mandatory detention of asylum seekers.

The international human rights system is far from perfect. Its institutions are cumbersome and susceptible to the vagaries of international politics. But it nevertheless offers an important safety net for the protection of human rights in Australia, a country without a coherent national system of human rights legislation.

Leadership from an internationally-minded Attorney-General could change our international reputation and also strengthen the Australian legal system. Four ideas for our new Attorney-General to consider are:

1. Acknowledging the gaps in Australia's implementation of its human rights obligations and setting out a plan to remedy them systematically and in a way that can be measured. The UPR recommendations (including those rejected by Australia) provide a valuable starting point.
2. Participating more fully in the international human rights system by ratifying the Optional Protocol to the Convention against Torture (now being considered by JSCOT) and becoming a party to the Optional Protocol to ICESCR and the Migrant Workers and Disappearances Conventions.
3. Standing for election to the UN Human Rights Council and encouraging the Council to work on strengthening human rights protection across the globe.
4. Becoming more active in objecting to reservations made by countries to human rights treaties when the reservations are incompatible with the object and purpose of the treaty.

This would signal a renewed commitment to the integrity of the UN treaty system.

*Professor **Hilary Charlesworth** is an Australian Research Council Laureate Fellow and Director of the Centre for International Governance and Justice*

The Human Rights Law Centre would like to thank everyone who contributed to the production of this Bulletin.

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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