Cases before Australian Courts and Tribunals concerning Questions of Public International Law 2022


I. Introduction

This article reviews decisions made in 2022 by select federal courts (the High Court of Australia, Federal Court of Australia, and newly created Federal Circuit and Family Court of Australia), along with the state and territory supreme and appeal courts, in which international law played a part.

Australia is a dualist system, meaning international law is not incorporated into national law without an act of parliament. However, Australian courts can and do consider international law as an interpretive tool. There are several landmark cases of this nature that are familiar names in Australian law schools. They include Polites v Commonwealth (‘Polites’), which held that legislation must be interpreted in line with Australia’s international obligations unless parliament has unambiguously expressed an intention to do otherwise, Mabo v Queensland (No 2) (‘Mabo No 2’) in which the lead judgment considered the International Court of Justice’s criticism of the ‘terra nullius’ concept in its 1975 Western Sahara advisory opinion, and Nulyarimma v Thompson which confirmed that crimes under international law (in that case, genocide) cannot be prosecuted by an Australian court unless incorporated into domestic law by statute, to name just a few.

And yet, the topic of ‘international law in Australian courts’ is not limited to those well-worn precedents. It is a topic of perennial interest to scholars and practitioners with an interest in the waxing and waning influence of international law within this country’s state, territory, and federal courts. Years of conservative governments have seen legislative changes – particularly in the area of immigration and refugee law – that are facially dissonant with obligations assumed when Australia became party to various international conventions. These matters are a recurrent theme in these yearly reviews, but was particularly prominent in the 2022 term.

1 The Sydney Centre for International Law (SCIL), within the University of Sydney Law School, was established in 2003 as a centre of excellence in research and teaching in international law. Each year, the Centre’s interns prepare an article for the Australian Year Book of International Law about the role of international law in Australian courts, under supervision of SCIL staff. The following case summaries were prepared by the 2022–2023 SCIL interns under the supervision of Dr Rosemary Grey, Professor Stacie Strong, and Professor Mary Crock. The keywords for each summary are sourced or adapted from the court records. Dr Grey is accountable for any errors that remain.


3 Polites v Commonwealth (1945) 70 CLR60 (‘Polites’).

4 Mabo and others v Queensland (No 2) (1992) 175 CLR 1 (‘Mabo No 2’), 40–1 (Brennan J, Mason CJ and McHugh J concurring).

Discrimination

In 2022, the influence of international law in Australian courts was most apparent in discrimination proceedings, broadly defined. In *Athwal v Queensland* (*Athwal*), 6 *Bara v Blackwell* (*Bara*), 7 and *Hamzy v Commissioner of Corrective Services NSW* (*Hamzy*), 8 state supreme and appeal courts were asked to determine whether state and territory legislation was invalid under s 109 of the *Constitution* because it violated a federal law, namely, the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*). In these cases, the courts considered the 1966 *International Convention on the Elimination of All Forms of Racial Discrimination* (*Convention on Racial Discrimination*), 9 which is expressly referenced in the *Racial Discrimination Act*, 10 as well as the 1966 *International Covenant on Civil and Political Rights* (*ICCPR*). 11 In *Larter v Hazzard*, 12 the New South Wales (NSW) Court of Appeal adjudicated and dismissed a claim that COVID-19 public health orders requiring vaccination in order to work as a paramedic were discriminatory on religious grounds, and therefore invalid under the ICCPR.

International law was also considered in private law discrimination proceedings. In *Barilaro v Google LLC*, 13 the Federal Court considered the Convention on Racial Discrimination when ordering tech giant Google to pay damages to the former NSW Deputy Premier for publishing, and failing to remove, racist videos about him. In *Vergara v Bunnings*, 14 the Federal Circuit and Family Court of Australia considered the 1958 *Discrimination (Employment and Occupation) Convention* when dismissing the plaintiff’s claim that Bunning’s decision to terminate his employment due to a finding that he had committed sexual harassment amounted to termination by reason of ‘social origin’, in violation of the *Fair Work Act 2009* (Cth). 15

Civil and political rights in criminal law

There were also several decisions that considered the ICCPR in relation to civil and political rights in criminal law, all in states and territories that have enacted a Human Rights Act. In *Davidson v Director-General, Justice and Community Safety Directorate* (*Davidson*), 16 Loukas-Karlsson J in the Supreme Court of the Australian Capital Territory (ACT) considered the ICCPR when interpreting the *Human Rights Act 2004* (ACT) in the context of a complaint about a detainee’s limited access to outside space while in prison. In *Deng v Australian Capital Territory (No 3)* (*Deng*), 17 Her Honour further considered the ICCPR in a complaint of arbitrary imprisonment by a plaintiff who had been detained after being charged (but not convicted) of a serious

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6 *Athwal v Queensland* [2022] QSC 209 [18][21] (*Athwal*).
7 *Bara v Blackwell* [2022] NTCCA 17 (*Bara*).
8 *Hamzy v Commissioner of Corrective Services NSW* (2022) 107 NSWLR 544 (*Hamzy*).
10 *Racial Discrimination Act 1975* (Cth) s 10(2).
12 *Larter v Hazzard* [2022] NSWCA 238 (*Larter*).
13 *Barilaro v Google LLC* [2022] FCA 650 (*Barilaro*).
16 *Davidson v Director-General, Justice and Community Safety Directorate* (2022) 18 ACTLR 1 (*Davidson*).
17 *Deng v Australian Capital Territory (No 3)* [2022] ACTSC 262 (*Deng*).
offence. In R v Ware, in the ACT Court of Appeal turned to the ICCPR in a sentencing appeal by the Crown, to determine if a sentence imposed for sexual offences against a child was compliant with the Human Rights Act 2004 (ACT). In SQH v Scott, the Queensland Supreme Court referred to the ICCPR when interpreting the Human Rights Act 2019 (Qld), to the decide if the right against self-incrimination had been breached.

In several of these human rights cases (including discrimination cases, as well as those concerning civil and political rights), namely Ware, Bara, Hamzy, and Davidson, the court also considered the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘European Convention on Human Rights’ or ECHR). Seemingly reflecting a European orientation by the parties and the relevant Australian courts, there was no reference to the analogous regional human rights instruments from Africa and the Americas.

Immigration and Refugee law

As in past years, Australian courts also analysed international law in numerous immigration cases, with multiple references to the 1951 Convention Relating to the Status of Refugees as amended by the 1969 Protocol (‘Refugee Convention’). This part of the article begins with BST 15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘BST 15’), a case that raised issue about the rights under international law of Australian-born children. The context this time involved a long term unlawful non-citizen who had used numerous devices to avoid removal from the country. In 2022 the issue of Australia’s non-refoulement obligations arose again in the context of the removal of permanent residents convicted of serious crimes. As noted in earlier years, the Migration Act 1958 (Cth) has been amended many times to telegraph an uncompromising approach to migrants who commit crimes or who are otherwise deemed not to pass the test of good character. The sovereign right to remove unwanted migrants conflicts with international human rights and refugee law when the un-wanted migrants are from refugee backgrounds, cannot be physically removed and/or would face death or cruel punishment upon return to their country of origin. All these cases inevitably involve matters of international law.

Those from the 2022 term – including DBWG v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘DBWG’), Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘Nuon’), and Plaintiff M1/2021 v Minister for Home Affairs (‘Plaintiff M1/2021’), - suggest that Australia’s highest judicial officers are generally reluctant to require compliance with international obligations where the domestic law does not do this expressly. As well as resulting in forced removals into harm, the cases also leave the ‘un-removable’ in mandatory indefinite detention. As we see in the

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18 R v Ware (2022) 17 ACTLR 273 (‘Ware’).
19 SQH v Scott (2022) 10 QR 215 (‘SQH’).
22 BST 15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 570 (‘BST 15’).
23 DBWG v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 653 (‘DBWG’).
24 Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 653 (‘Nuon’).
25 Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALR 497 (‘Plaintiff M1/2021’).
article accompanying this piece, Australia’s dereliction of its international human rights obligations has not
gone unnoticed by international treaty mechanisms.27 The 2022 term also included two cases involving
permanent residents convicted of drug and alcohol related offences who claimed that their removal from
the country would be a death sentence: HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘HRZN’)28 and Kwatra v Minister for Immigration, Citizenship and Multicultural Affairs (‘Kwatra’).29 In both instances the uncompromising nature of Australia’s ‘crimmigration’ laws – and relevant
High Court authorities – meant that the claims could not succeed.30

As a segue to cases on international criminal law we have included two cases involving immigration control
and individuals found to be involved in terrorist activities – Alexander v Minister for Home Affairs (‘Alexander’s Case’),31 – or alleged to be so involved – SDV.

International criminal law

The commission of war crimes and the use of child soldiers is an issue that is seldom considered in
Australian courts. However, the case of BYJB v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘BYJB’)32 required the Federal Court to review the Administrative Appeals Tribunal’s (AAT’s) findings on these issues in relation to an applicant’s participation in the Sri Lankan civil war. The applicant sought Australia’s protection on the basis of his experiencing persecution for his involvement with the Tamil Tigers, a separatist military group that sought to establish an independent Tamil state. Although establishing Australia’s protection obligations, the applicant was denied the visa because there were serious reasons for considering that he had recruited and used child soldiers in the conflict.

It is relatively rare to see Australian courts consider war crimes or other crimes under international law.
However, there have been some other examples in recent years, as noted in our previous article in this Year
Book.33 These include the Roberts-Smith v Fairfax Media Publications proceedings,34 in which former Special Air Service Corporal Ben Roberts-Smith brought a defamation suit against Fairfax in respect of several news articles which, he claims, accused him of having committed war crimes while deployed in Afghanistan. In these proceedings, the Federal Court has considered the merits of that accusation, as a result of Fairfax having raised a defence of truth.35

27 Refer to article in this volume of the Australian Year Book of International Law titled ‘Cases before International Courts and Tribunals Concerning Questions of Public International Law Involving Australia 2022’.
28 HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 133 (‘HRZN’).
29 Kwatra v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 194 (‘Kwatra’).
30 Crock and Bones (n 26).
32 BYJB v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 734 (‘BYJB’).
The Roberts-Smith case only requires that the Federal Court adjudicate allegations of war crimes to a civil standard of proof: Fairfax must establish its claims on the ‘balance of probabilities’. The BYJB case likewise involved a relatively low standard of proof (whether the Minister had ‘serious reasons for considering’ that the applicant had committed war crimes). However, Australian courts may soon be asked to adjudicate war crimes allegations to a criminal standard (beyond reasonable doubt), if the Commonwealth Director of Public Prosecutions commences proceedings for war crimes under federal law as a result of the 2020 Brereton report into the conduct of Australian Defence Force personnel in Afghanistan.

International child abduction

In 2022, the Federal Circuit and Family Court of Australia determined three cases relating to international child abduction, with consideration of the 1980 Hague Convention on the Civil Aspects of International Child Abduction (‘Child Abduction Convention’), as incorporated in the Family Law Act 1975 (Cth). These cases were Bamfield v Secretary, Department of Communities and Justice (‘Bamfield’), Nicoli v Jeryn (‘Nicoli’), and Secretary, Department of Communities and Justice v Woodard (‘Woodard’). An interesting and somewhat un-examined feature of the Bamfield judgment related to questions of Australian Aboriginal culture and identity. The case concerned a child with Aboriginal Australian heritage, whose non-Aboriginal father intended to keep the child in Belgium against the wishes of the Aboriginal mother. The Court dismissed with very limited analysis the mother’s argument that the child ought to be in Australia in order to access and participate in the relevant First Nations culture, and did not refer to international human rights treaties concerning a child’s cultural rights.

Other treaties

There were several other 2022 decisions that considered treaties to which Australia is a state party in order to interpret domestic legislation. These were Wells Fargo Trust Company, National Association (as owner trustee) v V/B Leaseco Pty Ltd (administrators appointed) (‘Wells Fargo’), in which the High Court of Australia referred to a convention on aviation equipment, Ng v Commissioner of the Australian Federal Police, in which the Western Australian (WA) Supreme Court of Appeal examined a treaty on the proceeds of crime, and DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd (‘DFD Rhodes’), in which the WA Supreme Court considered the UN model law on International Commercial Arbitration.

A detailed summary of each of these 2022 decisions can be found below.

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36 Evidence Act 1995 (NSW) s 140; Briginshaw v Briginshaw (1938) 60 CLR 336, 362 (Dixon J).
37 Migration Act 1958 (Cth) s 5H(2) (‘Migration Act’).
38 Crock et al (n 33).
40 Family Law Act 1975 (Cth) s 111B.
41 Bamfield v Secretary, Department of Communities and Justice [2022] FedCFamC1A 35, [46]–[60] (‘Bamfield’).
42 Nicoli v Jeryn [2022] FedCFamC1F 42 (‘Nicoli’).
43 Secretary, Department of Communities and Justice v Woodard [2022] FedCFamC1F 52 (‘Woodard’).
45 Ng v Commissioner of the Australian Federal Police (2002) 367 FLR 67 (‘Ng v Commissioner of AFP’).
46 DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd [2022] WASCA 97 (‘DFD Rhodes’).
II. Civil and political rights in criminal law

Davidson v Director-General, Justice and Community Safety Directorate (2022) 18 ACTLR 1

Australian Capital Territory Supreme Court
Loukas-Karlsson J
21 April 2022

HUMAN RIGHTS — prison facilities – separate confinement — access to open air and exercise when in separate confinement — Human Rights Act 2004 (ACT) — right to humane treatment while deprived of liberty — right to protection from cruel, inhuman, or degrading treatment — right to protection from arbitrary detention — s 45 Corrections Management Act 2007 (ACT) — Mandela Rules

Background

The plaintiff, Nathan Davidson, was a sentenced detainee at the Alexander Maconchie Centre having been sentenced in 2018 to imprisonment for six years and nine months, with a non-parole period of three years and eight months. During the sentence Davidson was held in solitary or separate confinement and placed in the Management Unit for a total of 63 Days. The plaintiff brought proceedings before the ACT Supreme Court against the defendant, the Director-General of the Justice and Community Safety Directorate, complaining that the defendant’s practice of using the rear courtyard does not comply with its obligations under the Corrections Management Act 2007 (ACT) and is unlawful under the Human Rights Act 2004 (ACT). In particular, the plaintiff claimed that the rear courtyard, ‘a small adjoining area connected to his cell enclosed by four concrete walls and a mesh ceiling,’ made him feel that he was still in his cell when in the courtyard due to its size and structure. The plaintiff also stated that the rear courtyard had no air circulation, no direct sunlight nor was there adequate space for him to exercise (jog or run) which the plaintiff noted was a coping technique for his long-standing diagnosed condition of bipolar disorder.

Decision

The first key legal issue addressed is the proper construction of s 45 of the Corrections Management Act, which identifies the rights of detainees with regard to open air and exercise. As noted in the decision, s 45 is to be constructed in accordance with the ordinary statutory interpretation principles applicable in the ACT, which favour a purposive interpretation. Justice Loukas-Karlsson refers to Director of Public Prosecutions (ACT) v Graham which summarises the principles relating to statutory construction. Drawing from domestic jurisprudence of the High Court of Australia, and the Legislation Act 2001 (ACT) the principles summarised in Director of Public Prosecutions (ACT) v Graham include: regard for context and purpose of the statutory provision in conjunction with the text of the statute; consistency with the language and purpose of the statute provisions; and ‘an interpretation that would best achieve the purpose of the Act.’ Furthermore, s 30 of

47 See R v Davidson [2018] ACTSC 227
48 Davidson (n 16) [1].
49 Ibid [43].
50 Ibid [44]–[47].
51 Director of Public Prosecutions (ACT) v Graham (2018) 13 ACTLR 280.
52 Legislation Act 2001 (ACT) s 139(1).
the *Human Rights Act*, states where ‘possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.’\(^{53}\) Section 30 of the *Human Rights Act* is pertinent to the statutory construction of s 45 due to the express prominence of detainees’ human rights expressed in the *Corrections Management Act* and the obligation stated in s 30 of the *Human Rights Act* to interpret other Territory legislation with consideration to Human Rights consistent with the purpose of the respective legislation. \(^{54}\)

Additionally, Loukas-Karlsson J concluded that s 19(1) of the *Human Rights Act*, which refers to the right to humane treatment while deprived of liberty, \(^{55}\) is relevant to the construction of s 45 of the *Corrections Management Act*. The right confirmed in s 19(1) is sourced from Article 10 of the *International Covenant on Civil and Political Rights* as confirmed by Schedule 1 of the *Human Rights Act*.\(^{56}\) As this right is contained in international law, Loukas-Karlsson J referred to jurisprudence of other countries and other International Conventions to reach this conclusion. Her Honour’s conclusion was based on consideration of jurisprudence from New Zealand (*Taunoa v Attorney-General*)\(^{57}\) and the *European Convention on Human Rights*.\(^{58}\)

As Loukas-Karlsson J determined s 45 of the *Corrections Management Act* ‘must be approached in light of s 30 of the *Human Rights Act*,\(^{59}\) the phrases ‘access to the open air’, ‘can exercise’, and ‘as far as practicable’, ‘must be ascribed the meaning that accords with the human right in question’\(^{60}\); the right to humane treatment whilst an individual is deprived of liberty. Justice Loukas-Karlsson stated in relation to ‘access to open air’, guided by international authorities (*Poltoratskiy v Ukraine*) and Rule 23(1) of the Mandala Rules, may be interpreted as meaning an ‘outdoor space.’\(^{61}\) Therefore ‘access to outdoor space’ constitutes an area that ‘changes in the weather, permits natural light and glimpse of the world outside can be obtained.’\(^{62}\)

In relation to, ‘can exercise,’ Loukas-Karlsson J concluded that the rear courtyard was not suitable or equipped for exercise ‘in the way envisaged by international materials.’\(^{63}\) The rear courtyard, based on the viewing undertaken by Loukas-Karlsson J, was not the correct size for physical exertion nor was there enough air ventilation or natural light; elements submitted by the plaintiff.\(^{64}\)

Justice Loukas-Karlsson rejected the defendant’s arguments that certain measures, such as additional staffing, were not practical to take. Loukas-Karlsson J postures the measures were possible and therefore within the understanding of ‘as far as practicable.’\(^{65}\)

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\(^{53}\) Davidson (n 16) [79]–[81].

\(^{54}\) Ibid [181].

\(^{55}\) Human Rights Act 2004 (ACT) s 19(1).

\(^{56}\) Ibid Schedule 1.

\(^{57}\) Taunoa v Attorney-General (2004) 7 HRNZ 379.

\(^{58}\) ECHR (n 20).

\(^{59}\) Davidson (n 16) [232].

\(^{60}\) Ibid.

\(^{61}\) Ibid [238], [243] citing Poltoratskiy v Ukraine (European Court of Human Rights, Application No 38812/97, 29 April 2003) and Standard Minimum Rules for the Treatment of Prisoners Rule 23(1).

\(^{62}\) Ibid [238], [243] citing Poltoratskiy v Ukraine (European Court of Human Rights, Application No 38812/97, 29 April 2003).

\(^{63}\) Ibid [250].

\(^{64}\) Ibid [249].

\(^{65}\) Ibid [274].
The second key legal issue was whether the defendant had acted consistently with s45 of the *Corrections Management Act*. The phases relevant to the construction of s 45 were reviewed with Loukas-Karlsson J determining, having inspected the Management Unit, that the rear courtyard is not located in ‘the open air,’ there was no adequate space where the plaintiff ‘can exercise’ and that the defendant had not ensured access ‘as far as practicable.’ Justice Loukas-Karlsson therefore stated that the ‘rear courtyard does not meet the open air and exercise requirements established by the international jurisprudence.’

Similarly, the defendant’s actions were examined against the *Human Rights Act* to determine their consistency with the Act. As the defendant is a public authority, s 40 of the *Human Rights Act* applies. A public authority has an obligation to act in a way that does not limit human rights and which complies with s 28 of the *Human Rights Act*, which discusses the circumstances an individual’s human rights may be limited. Additionally, a public authority is required to give proper consideration to relevant human rights. Justice Loukas-Karlsson concluded that plaintiff had correctly submitted that by denying him access to open and an adequate space to exercise, the defendant had acted inconsistently with its obligations prescribed in the *Human Rights Act*. The plaintiff, according to Loukas-Karlsson J, is therefore entitled to a declaration pursuant to s 40C of the *Human Rights Act*.

The Final Orders issued included a declaration that rear courtyard did not comply with s 45 of the *Corrections Management Act*, a declaration under s 40C of the *Human Rights Act* that the defendant had breached the human rights of the plaintiff, and a Declaration under s 32 of the *Human Rights Act* that cl 4.3 of the Operating Procedure is incompatible with the plaintiff’s human rights. Consequently, the defendant was ordered to pay the costs of the plaintiff.

Comment on international law

Justice Loukas-Karlsson referred frequently to international law and jurisprudence in the considerations and opinions made regarding the proper construction of s 45 of the *Corrections Management Act*. The understanding of the construction of this provision was shaped by the examination of standards set by international jurisdictions and *ICCPR*, the *European Convention on Human Rights*.

*Deng v Australian Capital Territory* [2022] ACTSC 262

Australian Capital Territory Supreme Court
Justice Loukas-Karlsson
28 September 2022

CIVIL LAW — where plaintiff arrested for breach of interim family violence order — where order expressed to operate ‘until all related charges were finalised’ — whether Magistrates Court orders to remand the plaintiff were within jurisdiction — whether the first or second defendant liable for false imprisonment

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66 Ibid [332].
67 Ibid [332].
68 Human Rights Act 2004 (ACT) s 40.
69 Ibid s 28.
70 Ibid s 40(b).
71 Davidson (n 16) [418].
whether interim family violence order revoked — whether first or second defendant otherwise breached duty of care to the plaintiff — held that remand orders were made within jurisdiction — held that interim family violence order was not revoked — held that plaintiff was not owed a duty of care —.

HUMAN RIGHTS — whether s 18(7) of the Human Rights Act 2004 (ACT) creates cause of action resulting in a right to compensation to the plaintiff — whether remand orders made arbitrarily or without, or in excess of jurisdiction contrary to ss 18(1) or 18(2) of the Human Rights Act, with reference to the International Covenant on Civil and Political Rights

Background

In this case, the ICCPR, as interpreted in New Zealand jurisprudence, was relied upon to build an understanding of s 18 of Human Rights Act 2004 (ACT). In particular, the ICCPR was used to interpret s 18(1), which recognises the right to liberty and states that ‘no-one may be arbitrarily arrested or detained’, and s 18(2), which states that ‘[n]o-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.’ In addition, the international law principle of ubi jus ibi remedium (where there is a right there is a remedy) was utilised by both the plaintiff and defendants' counsel.

In April 2019, the plaintiff, Mr Atem Deng, appeared before the ACT Magistrates Court on property damage charges contrary to s 116(3) of the Crimes Act 1900 (ACT). A Special Interim Family Violence Order (SIFVO) pursuant to s 112 of the Family Violence Act 2016 (ACT) was initiated by the Court prohibiting the plaintiff from certain conduct until the matter was finalised. In August 2019, the plaintiff was convicted and fined for property damages, thus finalising the matter.

In October 2019, the plaintiff was arrested for contravening the SIFVO. His bail application was refused, and he remained in custody. In November 2019, the plaintiff entered a plea of not guilty and was remanded in custody until January 2020 for hearing. However, the prosecution presented no evidence and in December 2019, the charge of contravening the family violence order was dismissed before the hearing was scheduled to take place. In total, the plaintiff was detained for 58 days.

The plaintiff made a claim in the ACT Supreme Court for relief including a declaration that the second defendant (the Magistrates Court of the Australian Capital Territory) acted without or in excess of jurisdiction, damages from the second defendant pursuant to s 17A of the Magistrates Court Act 1930 (ACT) and compensation from the first defendant (the Australian Capital Territory) pursuant to s 18(7) of the Human Rights Act with additional damage claims (including interest) and costs.

Decision

Before the ACT Supreme Court, one of the key issues was whether the SIFVO was revoked on 30 August 2019. Justice Loukas-Karlsson determined that the SIFVO was not revoked on 30 August 2019 taking into consideration s 88 of the Family Violence Act, rather, the revocation of a special interim order requires a
positive order of the Magistrates Court which can only be made where it ‘is satisfied that the special interim order is no longer necessary for the protection of the protected person.’

A second key issue was whether the October 2019 and November 2019 remand orders were made without or in excess of jurisdiction. The plaintiff submitted that an error had been made in relation to the Second Defendant’s SIFVO and a non-satisfaction of a jurisdictional fact of which the Second Defendant should have been aware. The plaintiff claimed that the lack of consideration raised doubts as to whether the 2019 remand orders were made without or in excess of jurisdiction. Justice Loukas-Karlsson determined that the remand orders were made within jurisdiction referring to Thompson which held that the Court’s jurisdiction to try a case does not depend upon a guilty verdict but instead relies upon the content of the charge. Her Honour’s view was that the proper application of Thompson compels the conclusion the remand orders were made within the jurisdiction and statutory powers afforded to the Court.

A related issue, which drew in considerations of international law, was whether the remand orders were made without jurisdiction considering the Human Rights Act. Specifically, the plaintiff argued that the remand orders were ‘arbitrary’ in contravention of s 18(1) and 18(2) of that Act. The plaintiff referred to New Zealand jurisprudence, citing Hammond J’s decision in Manga v Attorney-General that detention will be ‘arbitrary’ if it is unjust. Justice Hammond, relying on jurisprudence of Article 9 of the ICCPR (right to liberty), noted ‘all unlawful detentions are arbitrary; and lawful detentions may also be arbitrary, if they exhibit elements of inappropriateness, injustice, or lack of predictability or proportionality.’

Justice Loukas-Karlsson determined that the plaintiff’s detention was not imposed capriciously or unreasonably, or without reasonable cause, or without following proper procedures. He had been charged with a serious offence and Due consideration was given to matters relevant to whether or not bail should be granted. Her Honour further noted that it is unknown in the law for a person to be remanded in custody to answer charges which are ultimately not established. Therefore, the remand orders were made within jurisdiction considering the Human Rights Act.

A third key issue was whether s 18(7) of the Human Rights Act gives rise to a cause of action for compensation. Section 18(7) states that ‘anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.’ The defendants submitted that s 18(7) ‘does not establish a free-standing right to compensation for unlawful detention’ noting this is reaffirmed by the text, general comments and travaux preparatoires of Art 9(5) of the ICCPR on which s18(7) is based. In considering this issue, Loukas-Karlsson J referred to the international law principle ubi jus ibi remedium, which was confirmed in Factory at Chorzow (Germany v. Poland). Her Honour noted that a similar proposition might be

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76 Ibid [74].
78 Ibid [158].
80 Ibid [169]-[173].
81 Ibid [178].
82 Ibid [220].
83 Ibid [234].
84 Ibid [234] citing Factory at Chorzow (Germany v Poland) (Merits) [1928] PCIJ (Ser A) No 17.
applicable in respect of s18(7), such that an enforceable right to compensation might be implied by the Court. However, she determined that the remand orders were not made arbitrarily or without or in excess of jurisdiction in this case, and there it was unnecessary to resolve whether s 18(7) creates a cause of action. Justice Loukas-Karlsson dismissed the application, and the plaintiff was ordered to pay the first and second defendant’s costs of the proceeding as assessed or agreed.

Comment on international law

International law was somewhat significant in the determination of several issues in this case. International law, specifically, the ICCPR and related jurisprudence from New Zealand were utilised to bolster both parties’ cases around the legal issues pertaining to the Human Rights Act. Loukas-Karlsson considered these submissions, but her decisions on these issues were predominantly informed by domestic jurisprudence and interpretations of domestic legislation.

SQH v Scott [2022] 10 QR 215

Supreme Court of Queensland
Justice Williams
23 February 2022 (restricted); 4 March 2022 (public)

Criminal law — coercive investigation — where presiding officer of Crime and Corruption Commission hearing compelled applicant to answer questions about their knowledge of co-offenders’ involvement in drug trafficking — where the applicant claims reasonable excuse not to answer, citing potential harm to their right to a fair trial — where the Attorney-General for the State of Queensland and the Queensland Human Rights Commission intervened on the basis of the Human Rights Act 2019 (Qld) — where the applicant claims the decision violated right to not be compelled to testify against themselves or confess guilt, derived from International Covenant on Civil and Political Rights and protected by Human Rights Act 2019 (Qld) — whether applicant had a reasonable excuse under section 194(1) of the Crime and Corruption Act 2001 (Qld)

Background

The Supreme Court of Queensland considered the ICCPR in its determination of the proportionality of the limit on the right not to be compelled to testify against oneself or confess guilt, which is derived from Article 14(3)(g) of the ICCPR and outlined in the Human Rights Act 2019 (Qld).

The case concerns an SQH (the applicant) and their partner who have been charged with a number of offenses. Following the execution of a search warrant at their residence by police officers, certain items were located. Subsequently, the Crime and Corruption Commission (CCC) issued an attendance notice to the applicant, requiring them to attend for examination in relation to their knowledge of offending in a specified geographical area. During the examination, the presiding officer of the CCC (the respondent) asked the applicant about their knowledge of the involvement of two co-accused in the trafficking of

85 Ibid [235].
86 Ibid [254].
87 Deng (n 17) [1], [420].
dangerous drugs. The applicant declined to answer the question, claiming a reasonable excuse not to do so. Specifically, the applicant stated that the question touched upon their current charge and that answering it would have an impact on their ability to receive a fair trial. The CCC ruled against the applicant and compelled them to answer the question.\textsuperscript{88}

The applicant appealed that decision on the grounds that it violated their rights under the \textit{Human Rights Act 2019} (Qld) (‘\textit{HRA}’), specifically s 32(2)(k), which states that a person charged with a criminal offense has the right not to be compelled to testify against themselves or confess guilt. The appeal was heard by the Supreme Court of Queensland (‘the Court’).

In determining whether the respondent’s decision violated s 32(2)(k) of the \textit{HRA}, the Court considered the following questions:

\begin{itemize}
  \item Whether section 32(2)(k) of the \textit{HRA} is relevant and engaged in the present case.
  \item Whether the limit on this right is justified under the test for proportionality set out in s 13 of the \textit{HRA}.
\end{itemize}

\textit{Decision}

\textit{Whether section 32(2)(k) of the HRA is relevant and engaged}

In order to determine the relevance and restrictions of Section 32(2)(k) of the \textit{HRA}, the Court conducted a comprehensive examination of the relevant authorities and materials, such as other sections of the \textit{HRA} and \textit{Re Application under Major Crime (Investigative Powers) Act 2004}\textsuperscript{89} within submission made by the parties, the Attorney-General for the state of Queensland, and the Queensland Human Rights Commission. It determined that the right to not be compelled to testify against oneself or confess guilt, as outlined in Section 32(2)(k) of the \textit{HRA}, is indeed relevant and engaged in the present case.\textsuperscript{90} The Court emphasised the importance of interpreting this right in the broadest possible manner, consistent with the authorities and the overall purpose of the \textit{HRA}, which is ‘to protect and promote human rights, to help build a culture in the Queensland public sector that respects and promotes human rights; and to help promote a dialogue about the nature, meaning and scope of human rights’.\textsuperscript{91}

\textit{Whether the limit on s 32(2)(k) is justifiable under s 13 of the HRA}

Section 13 of the \textit{HRA} establishes that limitations on human rights must be reasonable, able to be justified, and in line with principles of human dignity, equality, and freedom in a democratic society. In assessing whether the limitation imposed on the right not to be compelled to testify against oneself as outlined in section 32(2)(k) of the \textit{HRA} is justifiable, the Court engaged in a balancing exercise. It was trying to find a balance between protecting the public and allowing individuals to retain their rights and privacy, as well as making sure that the use of coerced examination was proportionate and not overly restrictive. The Court considered various factors, such as whether there were other less restrictive ways to achieve the same goal,

\begin{itemize}
  \item \textsuperscript{88} SQH (n 19) [55].
  \item \textsuperscript{90} SQH (n 19) [324].
  \item \textsuperscript{91} Ibid [324]; \textit{HRA} ss 3(a)–(c).
\end{itemize}
the nature of the organised crime, the protective measures in place to safeguard the rights of the individual, and the court's role in supervising the process.

The Court also noted s 32(2)(k) of the HRA is derived from art 14(3)(g) of the ICCPR. The Court referred to the interpretation provided by the United Nations Human Rights Committee, which states that this safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.

Overall, the Court found that the limit imposed on s 32(2)(k) of the HRA was proportionate. This is because the legislative scheme provides ‘direct use immunity’ and confidentiality in respect of the identity of the witness and any evidence given, as well as a further protective order requiring limited disclosure of the evidence to prevent it from being given to the prosecution. Moreover, the Court highlighted that it still has a supervisory role to play under s 31 of the HRA at the trial and has discretion in respect of admissibility of evidence under section 130 of the Evidence Act 1977 (Qld) which provides further protection to the applicant.

Comment on international law

International law was not a significant factor in the decision of the court because the case was primarily focused on the interpretation and application of the HRA and the rights protected by it, rather than on international law. The Court referred to the ICCPR and its provisions on the right not to be compelled to testify against oneself or confess guilt, but it was not central to the court's decision. Instead, the court's focus was on determining the relevance and restrictions of the right under the HRA and whether the limit on this right was justified under the test for proportionality set out in the act. The Court conducted a comprehensive examination of the relevant authorities and materials under the HRA, and international law was considered only in the context of interpreting the provisions of the act.

R v Ware (2022) 17 ACTLR 273

Supreme Court of the Australian Capital Territory — Court of Appeal
Elkaim ACJ, McWilliam and Walmsley AJJ
25 March 2022

Sentencing — Human rights — Retrospective criminal laws — Determination of applicable maximum penalty — Whether international law prohibits heavier penalties being imposed on offenders than that applicable at the time of the offending conduct

92 SQH (n 19) [361].
93 Ibid [362].
94 Ibid [363].
95 Ibid [36], [284] citing ICCPR (n 11).
96 Human Rights Committee, General Comment No 32 — Article 14: Right to equality before courts, tribunals and to a fair trial, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 13 [41]; SQH (n 19) [284].
97 Direct use immunity refers to a legal protection granted by the laws enacted by parliaments (the HRA in this case), which provide that answers given by individuals in response to questions posed during investigative hearings cannot be used as evidence against them in any subsequent criminal proceedings. See Lee v New South Wales Crime Commission (2013) 251 CLR 196.
Background

The ACT Court of Appeal examined whether the Crown’s proposed construction of s 56(1) and s 56(6) of the Crimes Act 1900 (ACT) (‘Crimes Act’) conformed with international human rights laws and more specifically, whether international law prohibits heavier penalties being imposed on offenders than that applicable at the time when the offending conduct took place.

The respondent pleaded guilty to multiple sexual offences, including an offence of maintaining a sexual relationship with a child, contrary to s 56(1) of the Crimes Act, in the years from 1998 to 2002.98 The victim was the respondent’s son.99 The victim was sexually abused by his father between the ages of 11 and 15, with all the incidents occurring at their Canberra home.100

The question considered by the Court, is whether the sentence imposed by the sentencing judge, Burns J, was manifestly inadequate, and if so, whether it should be set aside, and the respondent re-sentenced by the Court of Appeal.

The offence currently carries a maximum sentence of 25 years imprisonment.101 This current maximum sentence o is qualified by s 56(6) of the Crimes Act, with lesser maximum sentences prescribed by Table 56 depending on when the offending occurred. As in this case, for conduct that occurred prior to 2 March 2018, the maximum penalty is one that was applicable at the time of the offending conduct.102 At trial, the sentencing judge imposed a sentence of three years and two months for the offence contrary to s 56 of the Crimes Act.103

Arguments by the parties

The Crown appealed against that sentence on the grounds that it was ‘manifestly inadequate’.104 The Crown submitted that, although the maximum sentence for an s 56(1) offence in the period relevant to this case is 14 years, the sentencing judge should have considered the current maximum sentencing period of 25 years.105 It further submitted that despite the absence of a penetrative act, a series of sexual acts over a sustained period time, particularly within a domestic or familial relationship, warranted a sentence of greater than four years, which was the starting point used by the sentencing judge before applying a discount.106

While the Crown did acknowledge that sentences in the ACT are generally more lenient than in other Australian jurisdictions, perhaps emphasising the rehabilitation of the offender, the Crown submitted that there was no logical reason for more lenient sentences for convicted sexual offenders, particularly against children, and that deterrence should be the primary consideration.107 Moreover, the Crown did accept that

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98 Ware (n 18).
100 Ibid [12]–[13].
101 Crimes Act 1900 (ACT) s 56(1) (‘Crimes Act’).
102 Ibid s 56(6).
103 Ware (n 18) [4].
104 Ibid [1].
105 Ibid [47].
106 Ibid [52].
107 Ware (n 18) [53]–[54], citing Monfries v The Queen (2014) 245 A Crim R 80 [91] (Murrell CJ).
the Court must take into consideration the offender’s subjective features, namely that Mr Ware was 69 years old, was a pastor for 34 years and that he resigned immediately when the allegations came to light but also emphasised the ‘superficial empathy’ he displayed during his psychological evaluation. However, despite the factors, the Crown submitted that the sentence did not conform with current sentencing practices and also that it would erode public confidence in the judicial system if it were allowed to stand.

Furthermore, the Crown submitted that in construing s 56, there should be a maximum sentence of 25 years, whenever occurring, subject to a cap of the maximum sentence at the time of the offending conduct. This was the construction favoured by Mossop J in R v Kellan. Further, the Crown argued that s 25(2) Human Rights Act 2004 (ACT) (‘HRA (ACT)’) does not prohibit an increase in the maximum penalty but merely forbids the imposition of a ‘heavier penalty’ than that capable of being handed down at the time the offence was committed. Moreover, the Crown submitted that there contrary intention was show by Parliament through the wording in s56(6) CA, ‘for an offence committed partly or wholly before 2 March 2018, the maximum penalty is the current penalty’, which establishes a 25–year maximum together with retrospectivity.

The respondent based his submissions upon the ss 25 and 30 of the HRA (ACT). Section 25 establishes that ‘a penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed’, and section 30 dictates that all laws of the ACT must, as far as possible be interpreted in a manner that is compatible with human rights.

Decision

The ACT Court of Appeal did find that the sentencing judge had correctly construed and applied s 56(6) of the Crimes Act. However, the Court of Appeal decided that the sentence imposed by the trial judge was indeed ‘manifestly inadequate’ on the basis that Mr Ware’s conduct was clearly egregious, it occurred over a long period of time and was directed against his son in their family home.

With respect to the proper construction of s 56 of the Crimes Act, the Court of Appeal decided that the provisions of s 56, must be construed in light of s 84A Legislation Act 2001 (ACT) as well as s 25(2) HRA (ACT), both of which prohibit offenders from having ‘heavier penalties’ imposed on them than existed at the time they committed the offence.

The Court of Appeal held that the construction of the words in s 25(2) of the HRA (ACT) submitted by the Crown was too narrow and was not supported by international jurisprudence. Importantly, s 31 of

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108 Ibid [57].
109 Ibid [57]–[58].
110 Ibid [68].
111 Ibid [68], citing R v Kellan [2021] ACTSC 314 [22].
112 Ibid [70].
113 Ibid.
114 Ibid [62].
115 HRA (ACT) ss 25, 30.
116 Ware (n 18) [103].
117 Ibid [81]; Legislation Act 2001 (ACT) s 84A (‘LA’); HRA (ACT) s 25(2).
118 Ibid [86].
the HRA (ACT) expressly provides that current international jurisprudential thought can be considered when interpreting the provisions of the Act.

The ACT Court of Appeal identified as being relevant to this case, Art 15 of the ICCPR and also, Art 7 of the European Convention on Human Rights both of which prohibit a heavier ‘penalty’ being imposed than the one that was applicable at the time the crime was committed. Indeed, in Welch v United Kingdom, where Art 7 ECHR was under consideration, in order to render the protection provided by Art 7 effective, it was held that in considering the concept of ‘penalty’, ‘the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a ‘penalty’ within the meaning of this provision.’ In that case, the European Court of Human Rights was asked to determine whether a ‘confiscation order’ imposed following a conviction was indeed a heavier ‘penalty’. The European Court of Human Rights decided that it was a heavier ‘penalty’ because the applicant suffered a more far more serious detriment as a result of the order than that to which he was exposed to at the time he committed the offence.

Furthermore, in the ACT Supreme Court case R v PM, Refshauge J outlined that the English Court of Appeal in R v Field referred to Welch as the leading case on the issue and established a number of criteria applicable to determining what constitutes a ‘penalty’. Guided by this approach, the ACT Court of Appeal in Ware held that in considering the ‘practical realities of the sentencing process’ and in ensuring protection for human rights, s 25 of the HRA (ACT) should be applied ‘to permit consideration of sentencing patterns at the time when the relevant offence was committed, where those patterns were more lenient than current sentencing patterns’. Therefore, in interpreting s 56 of the Crimes Act in accordance with the provisions of the ICCPR and ECHR, as they were applied in Welch, the ACT Court of Appeal held that the Crown’s construction of s 56(6) CA, being a 25-year maximum with a 14-year cap, would manifestly offend s 25 of the HRA (ACT), as the offender would face greater detriment as they would be punished more severely now than they would have been punished at the time of the offence, that is, 14-years imprisonment. Thus, in order s 25 of the HRA (ACT) to operate concurrently with s 56 of the Crimes Act, the ACT Court of Appeal decided that the words ‘the sentence imposed must not be more than the penalty mentioned in column 3 for that period’ in s 56(6) must mean that the maximum penalty for this case is that which applied at the time that the offending conduct took place, namely 14 years imprisonment. There was, therefore, no defect in the trial judge’s construction and application of s 56 Crimes Act.

119 ICCPR (n 11).
120 ECHR (n 20).
121 Welch v United Kingdom (1995) 307-A Eur Court HR (ser A) 247, 247 (‘Welch’).
122 Ibid.
123 Ware (n 18) [87].
125 Ware (n 18) [88], citing R v Scherren [2014] ACTSC 272, [57], applied in R v WR (No 5) [2015] ACTSC 258, [36]–[38]; R v EN [2019] ACTSC 354, [10]–[11].
126 Ware (n 18) [92].
127 Ibid [82]; Crimes Act s 56(6).
128 Ibid. [94].
Despite the Court of Appeal holding that the sentencing judge had correctly interpreted s 56 of the *Crimes Act*, it was decided that the sentence was manifestly inadequate.\(^\text{129}\) The ACT Court of Appeal therefore allowed the Crown’s appeal and ordered that the sentence for the offence of maintaining a sexual relationship with a child be set aside and that the respondent, in lieu thereof, be sentenced to imprisonment for four years and ten months.\(^\text{130}\)

*Comment on international law*

In this case, the Court turned to international law, particularly the ICCPR and *European Convention for the Protection of Human Rights*, as interpreted in the *Welch* case, in the context of a sentencing appeal. Consistent with these international authorities, the Court held that the ACT’s *Human Rights Act 2004* prohibited the imposition of heavier penalties on offenders than would have been applicable at the time when the offending conduct took place.

**III. Discrimination**

*Athwal v Queensland* [2022] QSC v 209

Supreme Court of Queensland  
Justice Brown  
30 September 2022

Discrimination — Racial discrimination — where State legislation prohibits the carrying of a knife in a public place without reasonable excuse — where State legislation was amended to create an exception for a ‘genuine religious purpose’ — where exception did not extend to school grounds — where applicant is an initiated Sikh — where the Kirpan [knife] is a mandatory article of faith — where applicant complains that initiated Sikhs are because of their religious beliefs prevented from entering school grounds as a result — whether State legislation deprives the applicant from enjoying a human right or fundamental freedom to the extent that it is enjoyed by persons of another race — whether there is an inconsistency between s 10 of the *Racial Discrimination Act 1975* (Cth) and the State legislation — where the *International Convention on the Elimination of All Forms of Racial Discrimination* is used to interpret the *Racial Discrimination Act*

**Background**

In this case, the Supreme Court of Queensland referred to the *Convention on Racial Discrimination*\(^\text{131}\) to interpret the *Racial Discrimination Act 1975* (Cth) (*RDA*), which guarantees religious freedom, freedom of movement, and access to public places.

Ms Kamaljit Kaur Athwal (the applicant) is a Sikh who has been initiated as an ‘Amritdhari Sikh’ and is required to wear a Kirpan, a ceremonial sword, as part of her faith. Section 51(1) of the *Weapons Act 1990* (Qld) (*Weapons Act*) prohibits carrying a knife in a public place or school without a ‘reasonable excuse.’ Sections 51(4) and (5) state that carrying a knife for ‘genuine religious purpose’ is a ‘reasonable excuse’ in a ‘public place’, but *not* in a school. The applicant argued that this prohibition regarding schools [s 51(5)]

\(^{129}\) Ibid [102].  
\(^{130}\) Ibid [115].  
\(^{131}\) *Convention on Racial Discrimination* (n 9).
violates her human rights as it prevents her from entering school grounds. She also argued that this caused difficulties for some Sikhs to participate in school life as parents, or attend school as students, or vote in local elections held at schools.\footnote{Athwal (n 6) [18]–[20].}

She sought a declaration that this section of the \textit{Weapons Act} is in violation of s 10(1) of the \textit{RDA}, which prohibits the differentiation in the enjoyment of rights ‘by reason of’ a State, Territory, or Commonwealth law in relation to members of a particular race or ethnic origin. She further sought a declaration that this section of the \textit{Weapons Act} is invalid under s 109 of the Constitution due to inconsistency with a federal law (the \textit{RDA}).\footnote{Ibid [3].} The State of Queensland (the respondent) concedes that the applicant has standing to bring the case but contested the discrimination claims.\footnote{Ibid [4].}

Consequently, the central dispute involved the proper classification of the rights impacted by s 51(5) of the \textit{Weapons Act} and whether these rights are enjoyed to a lesser extent by Sikhs ‘by reason of’ this section. The applicant argued that s 51(5) results in ‘operational discrimination’\footnote{Ibid [46].} and deprives her of certain rights, chiefly the right of access to schools.\footnote{Ibid [59].} The respondent asserted that the \textit{Weapons Act} is not directed towards any particular race and that the rights affected by this law are freedom to manifest religion by carrying a knife as well as freedom of movement by carrying a knife, which are equally limited for Sikhs and non-Sikhs.\footnote{Ibid.}

\textit{Decision}

In interpreting the \textit{RDA}, Brown J in the Supreme Court of Queensland referred to the \textit{Convention on Racial Discrimination}. Section 10(1) of the \textit{RDA} guarantees equality before the law for persons of different races, colours, or national or ethnic origins, and ensures that these individuals can enjoy the same rights as others in the same way. Section 10(2) defines the relevant rights as including those ‘of the kind’ identified in Article 5 of the \textit{Convention on Racial Discrimination}. These include the right to freedom of movement, religion, equal participation in cultural activities, and access to any place or service intended for use by the general public.\footnote{Ibid [26]. See also \textit{Convention on Racial Discrimination} (n 9) art 5.} Justice Brown noted that, in order to determine whether s 10 of the \textit{RDA} is engaged, the court must compare the rights enjoyed by members of different races or ethnicities.\footnote{Ibid [75].} On the question of which right(s) were affected by s 51(5) of the \textit{Weapons Act}, Her Honour identified ‘the rights to religious freedom and freedom of movement, while wearing a knife as an article of faith in a school’, by reference to Articles 5(d)(vii), 5(d)(i) and 5(f) of the \textit{Convention on Racial Discrimination}.\footnote{Ibid [69] nn 51–3.}

In Her Honour’s view, ‘[t]he question is whether initiated Sikhs enjoy a lesser right by reason of the s 51(5) of the \textit{Weapons Act}, given that no person, Sikh or non-Sikh, is permitted to access schools while in possession of a knife for a genuine religious purpose.’\footnote{Ibid [76].} She concluded that in this case, s 51(5) did not
cause Sikh people to enjoy this right to a lesser extent than non-Sikh people. Rather, both Sikhs and non-Sikhs enjoy the same right of lawful excuses to possess a knife as an exception to the gendered prohibition found in s 51(1) of the *Weapons Act*.

For these reasons, Brown J concluded that the law in question does not impose a greater burden on the enjoyment of the relevant rights by members of the Sikh community, as compared other races or ethnicities. Therefore, s 10 of the *RDA* is not engaged and Ms Athwal’s application was dismissed.

**Comment on international law**

Overall, international law played only a limited role in determining the outcome of the case. The final decision was made primarily by reference to national laws. Although the court referred to the *Convention On Racial Discrimination* to interpret the *Racial Discrimination Act*, the decision was ultimately based on the provisions and interpretation of national laws and not directly on international law.

**Barilaro v Google LLC [2022] FCA 650**

Federal Court of Australia

Rares J

6 June 2022

Defamation — compensatory and aggravated damages for defamatory YouTube videos — racist, hate speech and cyber-bullying — where respondent became liable as publisher after being notified of their defamatory content — whether publisher’s conduct improper, unjustifiable or lacking in bona fides — where respondent published and failed to take down further racist, hate speech and cyber-bullying videos in campaign against applicant despite maintaining that it had policies against such publications — where policies reflected norms from international and domestic laws against racial discrimination

**Background**

The applicant, Mr John Barilaro, is the former Deputy Premier of NSW. During the year prior to his resignation, he was the subject of a racist cyberbullying campaign created by Mr Jordan Shanks via videos uploaded on YouTube, a platform operated by Google LLC. Mr Barilaro brought his case against the respondent, Google LLC (‘Google’) due to two YouTube videos uploaded by Mr Shanks in 2020 which accused Mr Barilaro of extreme corruption and included abusive and racially-driven verbal attacks against him. Having settled his issues with Mr Shanks out of court, the present Federal Court case concerned Mr Barilaro’s action against Google for publishing and subsequently failing to remove the offending videos.

**Issue**

During the proceedings, Google progressively dropped its legal defences, and the Federal Court (‘the Court’) was consequently tasked with determining compensatory and aggravated damages. In determining the award of damages, Rares J considered the fact that Google held itself out as having policies which

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142 Ibid [87].
143 *Barilaro* (n 13) [1].
144 Ibid [3]–[5].
purported to regulate YouTube content to protect those who might be harassed or subjected to hate speech, vilification, and bullying.\textsuperscript{145}

\textit{Decision}

Justice Rares considered the concept of racially directed hate speech with reference to the \textit{International Convention on the Elimination of All Forms of Racial Discrimination}\textsuperscript{146}, whose ratification was approved by s 7 of the \textit{Racial Discrimination Act 1975} (Cth) (‘RDA’) and whose terms were set out in the Schedule to the Act. In particular, His Honour pointed to Article 4 of the Convention, which says that state parties ‘condemn all propaganda and all organizations…which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination’. Justice Rares noted that Article 4 is given domestic effect in Pt IIA of the RDA, which makes it unlawful to undertake an act ‘communicated to the public, that is reasonably likely…to offend, insult, humiliate or intimidate another person and that is done because of the person’s race, national or ethnic origin’.\textsuperscript{147}

Justice Rares held that Google’s internal hate speech policies, specifically those which prohibit the use of repeated racial slurs and stereotypes that incited hatred on a racial basis, reflected the international commitment in article 4 of the Convention to ‘adopt immediate and positive measures designed to eradicate … acts of [racial] discrimination’, thus expressing Google’s purported adherence to a well-known international norm against racial discrimination.\textsuperscript{148} With Google having failed to remove Mr Shanks’ videos in which he uses numerous racial slurs targeted at Mr Barilaro’s Southern European heritage, Rares J concluded that Google did not apply its policies and the internationally-recognised norms from the Convention that they reflect consequently aggravating the damage in this case.\textsuperscript{149} As to why Google breached its own policies, His Honour stated ‘Google did not appear to take the application of its policies seriously, no doubt because Mr Shanks was very popular and YouTube publications, such as his, earned Google revenue’.\textsuperscript{150}

Considering Google’s significant aggravation of the damage caused by Mr Shanks’ videos and the need to vindicate Mr Barilaro’s reputation, Rares J awarded a substantial sum of $715,000 in damages due to the corporation’s failure to act as a responsible or reasonable publisher by applying its regulatory policies, as evinced by its lack of any action taken with respect to the videos.\textsuperscript{151}

\textit{Comment on international law}

The Convention on Racial Discrimination was not determinative in this case, it played only a limited role in Rares J’s reasoning. However, His Honour’s choice to expressly recognise how Google’s actions departed from the norms set out in that Convention was an effective way of communicating the gravity of the

\textsuperscript{145} Ibid [326]–[327].

\textsuperscript{146} Convention on Racial Discrimination (n 9).

\textsuperscript{147} Barilaro (n 13) [328].

\textsuperscript{148} Ibid [330]–[332], [334].

\textsuperscript{149} Ibid [331]–[333], [349].

\textsuperscript{150} Ibid [332].

\textsuperscript{151} Ibid [402]–[405].
company’s behaviour.

*Bara v Blackwell* [2022] NTCCA 17

Court of Criminal Appeal of the Northern Territory
Kelly, Barr and Brownhill JJ
14 December 2022

Human rights — Racial discrimination — Constitutional law — Inconsistency of laws — Whether s 5D of the *Misuse of Drugs Act 1900* (NT) is invalid due to inconsistency with s 10 of the *Racial Discrimination Act 1975* (Cth) — Interpretation of right to liberty under international legal instruments — Application the interpretation into Australian legislation — Legislation does not impose any relevant limitation or prohibition on equality of treatment — Article 14 of the *International Covenant on Civil and Political Rights (ICCPR)* — Whether s 5D of the *Misuse of Drugs Act 1900* (NT) is a special measure within s 8(1) of the *Racial Discrimination Act 1975* (Cth) — Definition of special measure under Article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* — Section 5D of the *Misuse of Drugs Act* is valid.

**Background**

In this case, the Court of Appeal of the Northern Territory (NT) turned to international law when determining the scope of the right to liberty and the right to equal treatment before the court, in the context of an argument as to whether a certain drug offence had the effect of limiting that right for Indigenous persons compared with non-Indigenous persons in the Northern Territory.

The appellant, Mr Darly Bara was charged with an indictable offence under s 5D of the *Misuse of Drugs Act 1990* (NT) for supplying less than a commercial quantity of cannabis to persons in the Malkala community on Groote Eylandt. Section 5D makes the supply of less than a commercial quantity of Schedule 2 dangerous drugs in an ‘indigenous community’ an offence, the maximum penalty for which is imprisonment for 9 years.152

**Proceedings in the NT Supreme Court**

In an earlier 2022 decision, Southwood J of the NT Supreme Court discussed whether section 5D of the *Misuse of Drugs Act* is invalid under section 109 of the *Australian Constitution* due to inconsistency with section 10 of the *RDA*.153 Section 10(1) of the *RDA* ensures that individuals of a specific race, colour, or national or ethnic origin should have the same right to the same extent as other groups, even if the law of the Commonwealth or a State or Territory restricts their right. Section 10(2) clarifies that the right referenced in subsection 10(1) include rights of the kind specified in Article 5 of the *Convention on Racial Discrimination*.154

In *Gerhardy v Brown*, Mason J indicated that subsection 10(1) of the *RDA* can operate in one of two following ways for a Territory law: (1) when a Territory law creates a non-universal right by excluding persons of a

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152 *Bara* (n 7) [6]–[13].
153 *Blackwell v Bara* [2022] NTSC 17 (*Blackwell*).
154 *Convention on Racial Discrimination* (n 9).
particular race, s 10(1) can confer a complementary right on persons of that race; or (2) when a Territory law limits the right of enjoying fundamental human rights and freedom of persons of a particular race, s 10(1) can remove these limits and confer the right on persons of that race.\footnote{Gerhardy v Brown (1985) 159 CLR 70, 94 (Mason J).} In the NT Supreme Court, Mr Bara claimed that the second of these two options applied to his case. Specifically, he argued that s 5D of the Misuse of Drugs Act limits the enjoyment of the rights to liberty and to equal treatment before the courts of Aboriginal people who live in the indigenous community of Groote Eylandt.\footnote{Blackwell (n 153) [43].}

In the NT Supreme Court, Southwood J held that section 5D of the Misuse of Drugs Act is valid and consistent with s 10(1) of the RDA and that in order to demonstrate an inconsistency between s 5D of the Misuse of Drugs Act and s 10(1) of the RDA, the claimant must identify and establish:

1. The legislative provisions which are said to be challenged;
2. The human rights and fundamental freedoms which are said to be unfavourably limited
3. The persons of a particular race whose enjoyment of the identified human rights and fundamental freedoms is said to be unfavourably limited, and the other group of persons whose enjoyment of the identified human rights and fundamental freedoms is said to be unlimited or less limited; and
4. How it is said those persons of a particular race enjoy to a more limited extent the identified human rights and fundamental freedoms, and whether the Territory law caused a disparity in the enjoyment of those rights and freedoms.\footnote{Ibid [52].}

In relation to question 1, Southwood J noted that the defendant challenged Section 5D of the Misuse of Drugs Act in this case.\footnote{Ibid [56].} In relation to question 2, Southwood J discussed two rights based on the defendant’s submission: the right to liberty and the right to equal treatment before the courts. For the right to liberty, His Honour accepted the defendant’s argument that although Article 5 of the Convention does not expressly recognise the right to liberty, this right still should be considered as a right under s 10(1) of the RDA.\footnote{Gerhardy v Brown (1985) 159 CLR 70, 101; Mabo v Queensland (1988) 166 CLR 186, 216–17; Maloney v The Queen (2013) 252 CLR 168, 294.} The Court accepted the argument for two reasons: first, s 10(2) should not be translated as an exhaustive list of rights,\footnote{Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (‘UDHR’).} and second, liberty is considered the most fundamental human right in international law and is recognised in Article 3 of the Universal Declaration of Human Rights,\footnote{Williams v The Queen (1986) 161 CLR 278, 292; Al-Kateb v Godwin (2004) 219 CLR 562, 577.} which provides ‘everyone has the right to life, liberty and security of person’.\footnote{UDHR (n 161).}

Justice Southwood further explained that the right to liberty is a qualified human right, which means that the right to liberty can be restricted if it is allowed under the law. Articles 9 and 11 of the Universal Declaration of Human Rights,\footnote{ECHR (n 20).} Article 5(1) of the European Convention on Human Rights,\footnote{ICCPR (n 11).} and Article 9 of the ICCPR all

\begin{itemize}
\item \footnote{Gerhardy v Brown (1985) 159 CLR 70, 94 (Mason J).}
\item \footnote{Blackwell (n 153) [43].}
\item \footnote{Ibid [52].}
\item \footnote{Ibid [56].}
\item \footnote{Ibid [67].}
\item \footnote{Gerhardy v Brown (1985) 159 CLR 70, 101; Mabo v Queensland (1988) 166 CLR 186, 216–17; Maloney v The Queen (2013) 252 CLR 168, 294.}
\item \footnote{Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) (‘UDHR’).}
\item \footnote{Williams v The Queen (1986) 161 CLR 278, 292; Al-Kateb v Godwin (2004) 219 CLR 562, 577.}
\item \footnote{UDHR (n 161).}
\item \footnote{ECHR (n 20).}
\item \footnote{ICCPR (n 11).}
recognise the right to liberty as a qualified right in two ways: ‘the right not to be deprived of liberty except by due process of law’ and ‘a separate but related right to be free from arbitrary detention’.166 His Honour held that although the right to liberty is a qualified right that can be interfered with by law, the interference will still be invalid if it sets more limitations on the right to liberty of the persons of one race compared with others.

For the right to equal treatment before the courts, Southwood J noted that Article 5(a) of the Convention on Racial Discrimination expressly recognises this right.167 However, His Honour held that this right should be narrowly foc used on the administration and enforcement of laws by courts rather than the general content of laws.168 Hence, the right to equal treatment before the courts cannot be applied to the general content of s 5D of the Misuse of Drugs Act.

In relation to question 3, Southwood J held that Aboriginal people who live in the indigenous communities, in particular Groote Eylandt, are not a group whose rights are unfavourably limited by s 5D for four reasons. First, ‘[t]he fact that more Aboriginal people than non-indigenous people have committed an offence against s 5D does not mean that the legislation is discriminatory against them’.169 Second, supplying Schedule 2 dangerous drugs is not a right anywhere in the Territory.170 Third, persons of any race, and living anywhere in the Territory, can be liable for the offence under s 5D.171 Fourth, s 5D only applies to Aboriginal people in indigenous communities, which is only a small portion of Aboriginal people in indigenous communities overall.172

For these reasons, counsel for the defendant was asked to re-identify the two groups of people who it argues experienced a differential enjoyment of human rights according to their race.173 In response, counsel for the defendant submitted that Aboriginal people in indigenous communities who committed the s 5D offence were subject to more severe sentencing regime than non-indigenous offenders who committed an offence against s 5A in a non-indigenous community (the s 5A offences imposes a maximum sentence of 5 years’ imprisonment for less than a commercial quantity of a Schedule 2 drug). In making this argument, counsel argued that Aboriginal people are overwhelmingly the residents of indigenous communities, and therefore overwhelmingly the persons prosecuted under s 5D. In that way, the geographic limitation in s 5D functioned as a proxy for race.174 Again, Southwood J rejected this argument on the basis that both ss 5A and 5D are of general application: both Indigenous and non-Indigenous persons can and do commit the s 51 offence, and both groups can and do commit the s 5D offence.175

In relation to question 4, as noted previously, Southwood J took the view that s 5D does not unfavourably limit the rights of Aboriginal people living in indigenous communities compared with other groups.

166 Blackwell (n 153) [82].
167 Ibid [83].
168 Ibid [84].
169 Ibid [89]–[91].
170 Ibid [90].
171 Ibid.
172 Ibid [90]–[91].
173 Ibid [92].
174 Ibid [93].
175 Ibid [94]–[95].
However, ‘for the sake of argument’, His Honour considered whether, even if that contention was true, s 5D was the cause. His Honour pointed out that the bail and sentencing measurement applies equally to both Aboriginal and non-indigenous s 5D offenders. Therefore, even if s 5D unfavourably limits the enjoyment of rights of Aboriginal people, their right to liberty and right to equal treatment before the courts are not subject to a more limited extent than non-indigenous s 5D offenders as a result of this section. His Honour added:

The purpose of the section is to try to protect Aboriginal people who reside in deprived and disadvantaged indigenous communities from the ravages of the illicit drug trade that are well known to the courts. The words ‘indigenous community’ in s 5D identify the protected persons, not the persons whose rights are affected. The purpose of s 5D is to deter all people (not just Aboriginal people residing in indigenous communities) from engaging in the supply of less than a commercial quantity of Schedule 2 dangerous drugs in indigenous communities.

Therefore, Southwood J held that s 5D of the Misuse of Drugs Act is valid and consistent with s 10(1) of the RDA.

Decision of the NT Court of Appeal

The Court of Appeal agreed with Southwood J’s decision related to the inconsistency between s 5 of the Misuse of Drugs Act and s 10 of the RDA. It also considered whether section 5D is a ‘special measure’ for the purposes of section 8(1) of the RDA.

Section 8(1) ensures that Part II of the RDA, including s 10, does not apply to ‘special measures’ covered by Article 1(4) of the Convention on Racial Discrimination. Article 1(4) of the Convention provides that if ‘special measures’ are taken to promote the advancement of specific racial or ethnic groups or individuals and to protect their human rights and fundamental freedoms, such measures cannot be considered as racial discrimination. However, these measures must not result in the maintenance of separate rights for different racial groups and should only continue until their intended objectives are achieved.

According to the French CJ in Maloney, for a law to be considered a specific measure: (1) it needs to have a legislative determination indicating the necessity to protect a particular racial or ethnic group or individuals in order to ensure their equal enjoyment of human rights and fundamental freedoms. (2) This determination should be reasonably open. (3) The law should aim solely to promote the progress of the relevant group or individuals towards their equal enjoyment of human rights and fundamental freedoms, and (4) it should be reasonably appropriate and adapted to this purpose.

The Court of Appeal found that there was a legislative finding that indigenous communities covered by the intervention under Northern Territory National Emergency Response Act 2007 (Cth) were suffering severe adverse effects from alcohol consumption and were at risk of further social harm due to the consumption of

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176 Ibid [98].
177 Ibid [117]–[121].
179 Bara (n 7) [116].
180 Ibid [118].
Schedule 2 drugs, especially cannabis. The only purpose of s 5D was to promote the appropriate advancement of Aboriginal people in all indigenous communities, ensuring equal enjoyment of the right to personal security and protection against violence or bodily harm, and possibly also the right to public health. This law was reasonable in light of its purpose and the appellant’s proposed alternative (to impose specific measures for particular communities) was not practical nor reasonable, given that the legislature’s finding was that all indigenous communities were suffering or at risk of suffering the differentially significant harm, and the objectives of this law had not yet been achieved. Therefore, s 5D of the Misuse of Drugs Act is a ‘special measure’ and is not in conflicted with s 10 of the RDA.

Comment on international law

The key international law element in the judgement is that the Court of Appeal applied the interpretation of international legal instruments related to the right to liberty to (1) show the qualified nature of the right to liberty and (2) explain that although s 10 of the RDA does not expressly recognise the right to liberty, the right to liberty still falls into s 10 as a fundamental human right which has been recognised by international legal instruments. The Court of Appeal also relied on Article 1(4) of the Convention on Racial Discrimination to determine if a law can operate as ‘specific measures. Therefore, the enjoyment of the right to liberty should be considered when analysing whether s 5D of the Misuse of Drugs Act is valid and is not in conflict with s 10(1) of the RDA.

Hamzy v Commissioner of Corrective Services NSW (2022) 107 NSWLR 544

Supreme Court of New South Wales — Court of Appeal
Bathurst CJ, Basten and Leeming JJA
23 February 2022

International civil and political rights — Human rights conventions — Discrimination — Where state regulations required most communications by extreme high risk restricted inmates to be in English — Whether regulations were invalid to the extent of an inconsistency with federal anti-discrimination law — Commonwealth Constitution s 109 — (CTH) Racial Discrimination Act 1975 ss 9(1), 10(1).

Background

In this case, international law was relevant to the interpretation of ss 9 and 10 of the RDA and, in particular, whether it could be said that prohibiting communication in Arabic was a form of racial discrimination because it deprived the appellant of a human right or fundamental freedom, based on race.

This case concerned an appeal against a 2020 decision by Bellew J in the Supreme Court of New South

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181 Ibid [121]–[129].
182 Ibid [130]–[147].
183 Ibid [148]–[150].
184 Ibid [151]–[158]
185 Ibid [163].
186 Convention on Racial Discrimination (n 9)
Wales that dismissed challenges to the lawfulness of conditions imposed by the Crimes (Administrative Sentences) Regulation 2014 (NSW) (‘the CAS Regulation’). The appellant, Bassam Hamzy, commenced discrimination proceedings in 2016 challenging the lawfulness of conditions imposed upon him as an ‘extreme high risk restricted inmate’ by the CAS Regulation. One of these conditions required that Hamzy communicate with family members in English. This restriction enabled monitoring of communications without requiring an interpreter and was introduced with the justification of preventing the spread of extremist messaging in the aftermath of the 2014 Lindt Café siege. Hamzy opposed this condition because his family primarily spoke Arabic, there were challenges with translating certain Arabic words into English, and Arabic was said to be essential to the practice of his Islamic faith.

Hamzy claimed that the relevant provisions of the CAS Regulation were inconsistent with ss 9 or 10 of the RDA. Section 9 of the RDA prohibits discrimination based on ‘race, colour, descent or national or ethnic origin’ that directly or indirectly nullifies or impairs ‘any human right or fundamental freedom’ referred to in Article 5 of the Convention on Racial Discrimination. Section 10 provides for the right to equality before the law and corrects unequal enjoyment of a right where enjoyment of that right differs based on ‘race, colour or national or ethnic origin’.

Alternatively, Hamzy argued that the relevant provisions of the CAS Regulation were invalid by operation of s 109 of the Constitution (Cth) because of inconsistency with the federal statute (namely, the RDA).

In 2020, these arguments were rejected by Bellew J in the NSW Supreme Court. Hamzy then appealed to the NSW Court of Appeal (‘the Court’).

Decision

The appeal was allowed in part, with the Court upholding the trial judge’s decision regarding the claims under ss 9 and 10 of the RDA. Leeming JA and Basten JA, with Bathurst CJ agreeing, dismissed Hamzy’s reliance on s 10 because of Hamzy’s failure to identify a corresponding law that granted the right supposedly denied to Hamzy based on his race, colour or national or ethnic origin. Reliance on s 9 was also said to have been misplaced, given how the case was run, as there was nothing to indicate that the requirement to use English was linked to discrimination.
the law in s 10 of the RDA. 198 The trial judge had found that s 10 did not apply in this case for two reasons. Firstly, the appellant never identified a law that provided the right of inmates to converse in their language of choice but was withheld from him, based on race, and instead, the appellant ‘relied on the differential operation of the clauses…with respect to persons of different ethnic origins’. 199 Secondly, the trial judge considered that s 10 could not be breached where the person does not enjoy a right because of his or her individual circumstances being, in this case, the appellant’s incarceration. 200

The first of these reasons was accepted, however, the Court did not consider the overlapping nature of race and language which could make a requirement to speak English ‘an act done by reference to race and/or with race being a material factor in its performance’. 201 If this were the case, and Hamzy argued that he enjoyed freedom of expression less than his fellow prisoners because of this language requirement, it could be posed that the unequal impact ‘discriminates along racial, national or ethnic lines, invoking RDA protection’. 202

The Court did not accept the second of these reasons because limiting the scope of s 10 in this way would defeat its purpose by placing ‘any racially discriminatory treatment of prisoners…beyond the protection of s 10’. 203 International law was relevant here, Basten JA cited analogous cases from the European Court of Human Rights as evidence that adopting such an approach to s 10 ‘would contradict the uniform approach of international bodies in such cases’. 204 In Baybaşin v Netherlands, a high-risk detainee appealed to Article 8 of the European Convention on Human Rights 205 to challenge the restriction on his freedom to communicate in Kurmançî with his family. 206 Article 8 limits the interference of public authorities in private and family life to circumstances where such interference is in accordance with the law, and necessary. 207 In this case, such a restriction was said to be both ‘in accordance with the law’ and ‘necessary’ to enable adequate supervision. 208 The applicants in Nusret Kaya v Turkey and Mehmet Nuri Özen v Turkey succeeded in relying on Art 8 because the restrictions on communication in Kurdish in these cases were not justified by security concerns, and applied to the prison population generally, suggesting that the restrictions were not necessary. 209 For the purposes of Hamzy, these cases indicate that rights cannot be denied to an applicant on the basis of their incarceration alone, without necessary justification.

Claim under s 9

The first question raised by this provision is whether the requirement to speak English during phone calls between the prisoner and his family was unlawful discrimination under the RDA despite the omission of

199 Ibid.
200 Ibid [22]–[23] (Basten JA).
201 Grey and Strauss (n 190) 64.
202 Ibid.
203 Ibid [40] (Basten JA).
204 Ibid.
205 ECHR (n 20).
206 [2006] ECHR 690 (Application 13600/02, 6 July 2006) [23].
207 Hamzy (n 8) [40] (Basten JA).
208 Ibid [40]–[41].
209 Ibid [42].
language as a prohibited ground of discrimination in s 9(1). The Court discussed the approach taken to language in international law, noting that unlike Article 14 of the European Convention of Human Rights, the CERD also omits reference to language, but ultimately concluding based on secondary material and case-law from comparative jurisdictions that the restriction on communicating in Arabic could be a ‘restriction based on ethnic origin’, thus satisfying the first limb of s 9.

The second question is whether any human right or fundamental freedom that is protected under s 9(1) of the RDA had been impaired or nullified by the requirement to communicate in English. The reference to rights and fundamental freedoms in this section includes, but are not limited to, any right referred to in Article 5 of the CERD.

The trial judge identified the relevant right invoked by the appellant to be the right to freedom of expression in Article 5(d)(viii) of the CERD, which raised the issue as to whether this right extended to or encompassed ‘a human right to communicate with other people, in all circumstances, in the language of a person’s choice (in this case the Arabic language)’. On appeal, the Court considered that ‘the formulation of the question in those terms elided the right and the absence of the impugned restriction or constraint. Freedom of expression is not necessarily unqualified, nor a matter of unrestricted personal choice. Nor does it appear that the appellant adopted such an approach.’ The Court also noted that Article 5 only specifies the kinds of rights or freedoms which ultimately derive from other international sources and, therefore, ‘they are not necessarily rights protected under domestic law’.

The Court considered that if the relevant right was freedom of expression, as identified by the trial judge, there is no such thing as a right to unqualified and unconstrained freedom of expression, as indicated by Article 19(3) of the ICCPR.

In the Supreme Court proceedings, Bellew J cited Iliafi as providing ‘authority that ‘the right to freedom of expression does not guarantee a right to use the language of one’s choice in all circumstances’. In Iliafi, Samoan-speaking members of the Church of Latter-Day Saints invoked s 9 of the RDA in a challenge against the Church’s decision to discontinue services in Samoan-speaking wards. Article 27 of the ICCPR, which protects the rights of minorities to use their native language ‘among themselves’ was not said to have been impaired, as the decision to discontinue services only prevented them from using their native language in worship activities in mixed Samoan and non-Samoan speaking communities. On appeal, the Court did not consider that the reasoning applied in Iliafi could ‘directly indicate the proper outcome in the present case’ because of the ‘significant disparity between the right of the State to control the use of minority

210 Ibid [46].
211 Ibid [55]–[60].
212 Ibid [45]–[46] (Basten JA); Racial Discrimination Act (n 10) s 9(1).
213 Racial Discrimination Act (n 10) s 9(2).
214 Crock et al (n 33) 397-398.
215 Hamzy 2022 (n 8) [71] (Basten JA).
216 Ibid [72].
217 Ibid [74], ICCPR (n 11).
218 Crock et al (n 33) 398; Hamzy v Cmr of Corrective Services [2020] NSWSC 414 [152].
219 Iliafi v Church of Jesus Christ of Latter-Day Saints Australia [2014] FCAFC 26 [4].
220 Hamzy [n 8] [86] (Basten JA).
languages by person in custody...and the power of a church to determine in what language its ceremonies
will be conducted’.221 Neither the court at first instance or the appellate court considered added complexity
with the freedom of expression in Hamzy’s specific circumstances, namely that although Hamzy was able
to speak in English his family’s lack of English proficiency may mean that Hamzy is unable to meaningfully
communicate or express himself in any language other than Arabic.222

Ultimately, the Court concluded that while language could invoke s 9 through the ground of ‘national or
ethnic origin’, there were several auxiliary questions that had not been addressed in the proceedings at first
instance and, as such, this aspect of the appeal was dismissed.223 These questions included the
reasonableness of the restriction, the practical operation of the clauses which included the possibility for
relaxation in certain cases, and the relationship between ss (1) and (1A).224

In his conclusions, Basten JA also stressed the question of proportionality, stating that ‘whether such an
act is unlawful discrimination will depend on whether it has a legitimate purpose which is pursued by means
which are not unreasonable...despite its disparate impact on certain ethnic groups’.225 The legitimacy of the
purpose of the CAS Regulation was never challenged, nor was the question of proportionality or
reasonableness ever raised.226 Thus, given how the case was run, the lawfulness of the provisions of the
CAS Regulation was unable to be determined.227

Comment on international law

This case demonstrates how international human rights law can be triggered when interpreting claims under
domestic anti-discrimination law. In particular, this case examines closely the complexity of racial
discrimination and the significance of language in freedom of expression and as a proxy for race, ethnic or
national origin.

_Larter v Hazzard_ [2022] NSWCA 238

New South Wales Supreme Court — Court of Appeal
Brereton JA, Mitchelmore JA
22 November 2022

HEALTH — Public Health — Covid-19 — Public health orders made under Public Health Act 2010
(NSW), s 7, requiring state-employed healthcare workers to be vaccinated by particular dates — Whether it
was open to the Minister to make the orders having regard to the risk to public health — Whether order
could have effect beyond 90-day limit imposed by statute — Whether orders inconsistent with International
Covenant on Civil and Political Rights.

Background

221 Ibid [88].
222 Grey and Strauss (n 190) 62.
223 _Hamzy_ (n 8) [274] (Leeming JA).
224 Ibid.
225 Ibid [89]–[90] (Basten JA).
226 Ibid [91].
227 Ibid.
This case involved the claim that public health orders issued during the COVID-19 pandemic were invalid on several grounds, including their supposed incompatibility with the ICCPR. This claim was made despite it being common ground between the parties that the ICCPR was not implemented and does not form part of Australian law.

The applicant, Larter, sought leave to appeal against a primary judgement dismissing his claim that public health orders requiring vaccination made by the Minister for Health and Medical Research under s 7 of the Public Health Act 2010 (NSW) were invalid. Larter refused to be vaccinated against COVID-19 citing religious grounds, and was prohibited by these public health orders from working in his capacity as a paramedic with the NSW Ambulance Service. During the proceedings the applicant argued that the orders ‘contravene the ICCPR and are therefore invalid because they unduly interfere with the right to work of those who, for religious reasons, have a conscientious objection to vaccination’. This claim was both made and addressed by the Court despite it being common ground between the parties that the ICCPR did not form part of Australian law.

In addressing the arguments under the ICCPR the primary judge, Adamson J, adopted much of the reasoning of Beech-Jones CJ in Kassam v Hazzard; Henry v Hazzard (‘Kassam’), which concerned similar public health orders to those at issue in Larter v Hazzard. In Kassam, Beech-Jones CJ held that Article 17(1) of the ICCPR, which protects individuals from arbitrary or unlawful interference with privacy, family, home or correspondence, did not apply as the public health orders did not impose vaccination as compulsory medical treatment. In Larter, Adamson J likewise accepted that the public health orders do not violate the ICCPR for this reason.

Adamson J also rejected the applicant’s claim that the orders violated the right to freedom of religion and religious expression in Article 18 of the ICCPR because of the applicable public health exception in Article 18(3). As the freedom of thought and expression contained in Article 19 of the ICCPR is likewise qualified by a public health exception, the applicant’s claim under this article was also unconvincing. Her Honour was also unconvinced that the public health orders violated Article 26 of the ICCPR which prevents discrimination on the grounds of religion, inter alia, because the plaintiff would be in the same position regardless of the source of his beliefs.

The applicant challenged these findings regarding the ICCPR, inter alia, in his proposed grounds of appeal.

Following Kassam, the trial judge also made note of Australia’s obligation to ‘prevent, treat and control

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228 Larter (n 12); ICCPR (n 11).
229 Larter v Hazzard (No 2) [2021] NSWSC 1451 [98] (‘Larter (No 2)’).
230 Larter (n 12) [1] (Brereton JA).
231 Larter (No 2) (n 229) [71].
232 Ibid [98].
233 [2021] NSWSC 1320 (‘Kassam’).
234 Larter (No 2) (n 229) [99] citing Kassam (n 231) [271].
235 Ibid.
236 Ibid [100].
237 Ibid.
238 Ibid.
239 Larter (n 12) [38] (Brereton JA).
epidemics’ under the ICESCR. This ICESCR point was not addressed on appeal.

Decision

The NSW Court of Appeal (‘the Court’) refused leave to appeal as it was not satisfied that any of the proposed grounds had sufficient chance of success. The judgment was authored by Brereton JA, with Mitchelmore JA agreeing.

In relation to the ICCPR argument, the Court noted that the application of Articles 12, 18 and 19 of are dependent upon whether the disputed orders were ‘necessary’ public health measures. The Court expressed that there was no reason to depart from Kassam (which had since been upheld on appeal, albeit without reference to the ICCPR), which held that the orders were ‘necessary’ to address the public health risk, and a valid exercise of the Minister’s powers.

The Court also upheld the primary judge’s decision to follow Kassam in determining that the right to privacy in Article 17 had not been contravened because the public health orders did not mandate vaccination as a compulsory medical treatment. The orders did not, therefore, interfere with the applicant’s ‘privacy, family, home or correspondence’. The Court added that even if such an interference had occurred, it would not be arbitrary or unlawful because the power to make such orders was a valid exercise of the statutory power in s 7 of the Public Health Act 2010 (NSW).

The Court upheld the primary judge’s conclusions in respect of Article 26 of the ICCPR. As the trial judge noted, the consequences of non-vaccination were not assigned to a specific religion and were, instead, attached to unvaccinated status. The applicant would have been in the same situation regardless of whether his objection to vaccination was based on religious beliefs or not. As stated by the Court: ‘just because a person’s exposure depends on a stance which is informed by his or her religious beliefs does not mean that he or she is discriminated against on the grounds of religion’.

Larter’s application was ultimately unsuccessful, and leave to appeal was refused. The only ground that the Court considered sufficiently arguable to justify a grant of leave to appeal was Larter’s claim that the order requiring vaccination was invalid because, by requiring workers to have a second vaccination, it purported to have effect outside the 90-day period to deal with emergencies conferred by s 7 of the Public Health Act 2010 (NSW). However, as the relevant part of the Order would be severable, the Court

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241 Larter (n 12) [50] (Brereton JA).
242 Ibid [53] (Mitchelmore JA).
244 Ibid.
245 Ibid [40] (Brereton JA).
246 Ibid.
247 Ibid.
248 Ibid [41]–[42] (Brereton JA).
249 Ibid.
250 Ibid [42].
251 Ibid [50]–[52].
252 Ibid [15], [51].
considered that there were insufficient prospects of ultimate success to justify leave to appeal. Furthermore, there was said to be no utility in granting leave to appeal as the impugned orders had expired and declaring them void would not result in Larter’s reinstatement.

Comment on international law

The Court’s decision to address the compliance of Australian public health orders with the ICCPR, despite conceding that it does not form part of Australian law, is an attempt to respond to popular discourse about the intersection of Australia’s COVID-19 response and human rights. Larter demonstrates how Australian courts may respond to circumstances in which alleged noncompliance with international human rights law is justified by national emergencies and, in the Court’s raising of Australia’s obligation under the ICESCR to prevent health emergencies, how international human rights law could itself justify such intervention.

**Vergara v Bunnings Group Ltd [2022] FedCFamC2G 818**

Federal Circuit and Family Court of Australia (Division 2)
Deputy Chief Judge Mercuri
10 October 2022


**Background**

Bunnings had terminated Mr Vergara’s employment on the 3rd of November 2021 for the reason that Mr Vergara had engaged in sexual harassment in contravention of the Sex Discrimination Act 1984 (Cth) during his employment. Mr Vergara claimed that the sexual harassment finding, as an adverse civil finding, constituted a ‘social origin’ and the termination of his employment based on this ‘social origin’ amounted to a breach of s 351(1) of the Fair Work Act 2009 (Cth) (‘Fair Work Act’), which prohibits adverse action, including but not limited to, the termination of employment based on certain reasons, including but not limited to, a person’s ‘social origin’.

The key issue is whether an adverse civil finding could constitute a ‘social origin’ so that the termination of Vergara’s employment based on the sexual harassment finding amounted to a breach of s 351(1) of the Fair Work Act.

**Decision**

The Federal Circuit and Family Court of Australia (the Court) found that Mr Vergara has no reasonable

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253 Ibid [51].
254 Ibid.
255 Larter (No 2) (n 229) [100]
256 Vergara (n 14) [29]–[31].
prospects of success to the ‘social origin’ claim and dismissed the claim.\textsuperscript{257}

To determine its meaning, the Court analysed the term ‘social origin’ under the \textit{Australian Human Rights Commission Act 1986 (Cth)} (‘\textit{AHRCA}’). Section 3(8) of the \textit{AHRCA} states that ‘except so far as the contrary intention appears, an expression that is used both in this Act and in the Convention...has, in this Act, for the purposes of the operation of this Act in relation to the Convention, the same meaning as it has in the Convention’. Here, the Convention is the 1958 \textit{Discrimination (Employment and Occupation) Convention}, which was adopted by the General Conference of the International Labour Organization, to which Australia is a state party.\textsuperscript{258} The Court then looked at the Convention to define social origin stating:\textsuperscript{259}

In the absence of a definition of ‘social origin’ in the \textit{Fair Work Act} it is appropriate in determining the meaning of ‘social origin’ to have regard to the interpretation of that term by reference to the International Labour Organization (ILO) Committee of Experts considering that term as it appears in the Convention.

The ILO Committee did not define the term ‘social origin.’ Instead, the Committee explained that ‘social origin’ is built upon the concept of ‘social mobility’, which is defined as ‘the possibility for an individual to pass from one class or social category to another.’\textsuperscript{260} The Committee further stated:

\begin{quote}
The problem of discrimination on the basis of social origin arises when an individual’s membership in a class, a socio-occupational category or a caste determines his or her occupational future either by denying him or her certain jobs or activities or, on the contrary by assigning him or her to certain jobs.\textsuperscript{261}
\end{quote}

In conclusion, the Court recognised the lack of clarity surrounding the term ‘social origin’. The Court held that an adverse civil finding, as a descriptive finding of the applicant’s conduct at a specific time, does not amount to a finding based on the applicant’s identity from birth or a group that the applicant belongs to. Therefore, based on the interpretation of ILO experts, Mr Vergara’s proposed interpretation of ‘social origin’ was unlikely to be accepted.\textsuperscript{262}

\textbf{IV. Immigration and refugee law}

\textit{BST 15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FedCFamC2G 203}

Federal Circuit and Family Court of Australia (Division 2)

Egan J

25 March 2022

MIGRATION — application for partner visa — whether considerations required to be taken into account in a partner visa application are akin to those to be taken into account in a protection visa application —
whether the distinction between the two types of visa application was relevant to the Tribunal exercising the power to get any further information under s. 359 of the Act — whether the Tribunal ought to have had regard to the interests of a child or children as a primary consideration — no jurisdictional error established — application dismissed.

Background

This case raised, yet again, issues around the extent to which central principles enshrined in the UN Convention on the Rights of the Child (‘the Convention’) are binding on Australian decision-makers. The applicant is an Egypt national who entered Australia as the holder of a student visa on 1 September 2006. On 20 August 2008, the student visa ceased. On 20 October 2010, a further student visa granted to the applicant ceased. On 6 January 2011, he was refused a further student visa. On 8 December 2014, the applicant was granted a bridging visa on the grounds that he would make arrangements to depart Australia.

On 13 January 2014, the applicant lodged an application for a protection visa and was refused. On 7 August 2015, the Refugee Review Tribunal (RRT) affirmed the protection visa refusal, and a subsequent Federal Circuit Court review of the RRT’s decision lodged by the applicant was unsuccessful. On 15 April 2015, the applicant met the sponsor, who was born in 1985 in Egypt. The sponsor is an Australian citizen who has two children living in Australia. On 19 July 2016, the applicant and the sponsor married under Islamic rites.

In 2016, the applicant was granted two bridging visas on the grounds that he would finally depart by 7 July 2016. On 22 June 2016, he lodged a Partner (Temporary) (Class UK) Visa application. On 14 October 2016, a delegate of the Minister refused the application on the basis that the applicant failed to meet the relevant criteria prescribed under clause 820.211(2)(d)(ii) of Schedule 2 to the Migration Regulations 1994 (Cth) (the Regulations), which provides that an applicant meets the requirement of this subclause if:

the applicant satisfies Schedule 3 criteria 3001, 3003 and 3004, unless the Minister is satisfied that there are compelling reasons for not applying those criteria.

Clause 3001 of Schedule 3 to the Regulations relevantly states that:

(1) The application is validly made within 28 days after the relevant day.

The last substantive visa held by the applicant ceased on 20 October 2010. As the application for the partner visa was not made within 28 days after the cancellation of the substantive visa, the applicant failed to meet the relevant criteria under clause 3001 of Schedule 3 to the Regulations. Having considered the facts submitted by the applicant, the delegate was not satisfied that there were compelling reasons justifying the waiver of the Schedule 3 criteria.

On 24 August 2017, the sponsor gave birth to her and the applicant’s daughter. On 22 November 2017, the Administrative Appeals Tribunal (the Tribunal) affirmed the delegate’s decision upon the applicant’s

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264 BST 15 (n 22).
265 Ibid [2]–[3].
request for review. The Tribunal considered the effect of the applicant’s return to Egypt as follows:

The applicant’s departure from Australia would prevent him from playing an active role in children’s lives and may cause them psychological trauma. The sponsor’s life with a young child is difficult. However, the sponsor continues to receive Government benefits for the three children, and the Tribunal believes that, even if separated, the parties and children can continue to offer each other support. Therefore, these circumstances do not constitute ‘compelling reasons’ for not applying Schedule 3 criteria. 266

At the time of the hearing before the Federal Circuit and Family Court of Australia (FCFCA), the applicant filed an Amended Application for Review of the decision of the Tribunal, the grounds of which were as follows:

1. The Tribunal breached s 359 of the Migration Act 1958 (Cth) by unreasonably failing to get further information from the Department of Foreign Affairs and Trade (DFAT) report about threats the applicant might face should he be returned to Egypt.

2. The Tribunal had an obligation to treat the interests of the applicant’s children as a ‘primary consideration’ relevant to a consideration as to whether there were compelling reasons for waiving the relevant Schedule 3 criteria.

Decision

The FCFCA rejected Ground 1 because the applicant’s argument was concerned with reviewing a decision to refuse to grant a protection visa whereas in this instance, the decision under review related to a partner visa. 267 Moreover, even if the Tribunal had considered further information about the alleged threats of returning to Egypt, it could not have resulted in the Tribunal arriving at a different conclusion because the applicant’s claims did not refer to religious defamation or blasphemy mentioned in generic paragraphs of the DFAT report. 268

In determining the weight to be given to the interests of the children raised by Ground 2, the FCFCA cited Singh v Minister for Home Affairs269 and Kaur v Minister for Immigration and Border Protection270. These cases are similar to our present case in two respects. First, they involved disputes arising from clause 820.211(2)(d)(ii) of Schedule 2 to the Regulations. Second, they dealt with similar arguments that the Tribunal was obliged to apply the Convention in ascertaining whether compelling reasons existed, and that the Tribunal failed to consider the children’s best interests as a primary consideration.

Both cases held that un-enacted treaties do not impose obligations on decision-makers to take into account international obligations arising thereunder and that the provisions of an international treaty to which Australia is a party may be relevant in exercising statutory discretions but such considerations do not become mandatory. 271 Accordingly, the Courts in these cases decided that there was no obligation on the

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266 Ibid [24].
267 Ibid [13]–[14].
268 Ibid [18].
269 See Singh v Minister for Home Affairs (2020) 274 FCR 506 (‘Singh’).
270 See Kaur v Minister for Immigration and Border Protection (2017) 256 FCR 235 (‘Kaur’).
271 Singh (n 269) [62] (Derrington J); Kaur (n 270) [22] (Dowssett, Pagnone, and Burley JJ); see also Snedden v Minister for Justice (2014) 230 FCR 82, [147] (Middleton and Wigney JJ), Pagnone J agreeing at [242]; Minister for Foreign Affairs & Trade v Magno
Tribunal to take into account as a mandatory consideration, in ascertaining whether ‘compelling reasons’ existed, the interests of the applicant’s child – let alone make the interests of that child a primary consideration.  

Consistent with Singh and Kaur, the FCFCA found that the Tribunal was not obliged to treat the interests of the children as a primary consideration and was entitled to make the findings that it did. The Court therefore dismissed the application for review.

**Comment on international law**

This case reflects how the Australian courts determine the extent to which international treaties are binding on Australian decision-makers. Principles enshrined in an international treaty to which Australia is a party (here, the Convention on the Rights of the Child) do not confer upon that treaty any direct legal effect or enforceability for domestic law purposes, nor vest legal rights in individuals justiciable in Australian court unless and until specific legislation is passed implementing those principles. Therefore, provisions of the Convention do not form part of Australian law that obliges the decision-makers to consider international obligations arising thereunder unless those provisions have been validly incorporated into the municipal law by statute.

**Plaintiff M1/2021 v Minister for Home Affairs (2022) 400 ALR 417**

High Court of Australia  
Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward, Gleeson JJ  
11 May 2022

Immigration — Visas — Cancellation of visa — Revocation of cancellation — Where plaintiff’s visa cancelled under s 501(3A) of Migration Act 1958 (Cth) — Where plaintiff made representations seeking revocation of cancellation decision under s 501CA(4) — Where representations raised potential breach of Australia’s international non-refoulement obligations — Where delegate of Minister decided there was not ‘another reason’ to revoke cancellation decision under s 501CA(4)(b)(ii) — Where delegate considered it unnecessary to determine whether non-refoulement obligations owed because plaintiff could make valid application for protection visa — Where delegate considered existence or otherwise of non-refoulement obligations would be fully assessed in course of processing protection visa application — Whether, in deciding whether there was ‘another reason’ to revoke cancellation decision, delegate required to consider plaintiff’s representations raising potential breach of Australia’s non-refoulement obligations — Whether delegate failed to exercise jurisdiction conferred by s 501CA(4) — Whether delegate denied plaintiff procedural fairness — Whether delegate misunderstood Migration Act and its operation

**Background**

This case is the latest, and perhaps most extreme, in a series of High Court cases where Australia’s...
‘crimmigration’ law has been shown to clash with its non-refoulement obligations under international law. Section 501(3A) of the Migration Act 1958 (Cth) (the Migration Act) provides that the Minister must cancel a visa that has been granted to a person if they are ‘satisfied’ that the visa holder does not pass the character test because the person has a substantial criminal record as per s 501(7) of the Migration Act. Despite the operation of the mandatory visa cancellation provision in s 501(3A), an individual can seek revocation of the original cancellation decision under s 501CA(4). The Minister must be ‘satisfied’ that (b)(i) the person passes the character test, or that (ii) there is ‘another reason’ why the cancellation should be revoked. Ministerial Directions made under s 499 of the Migration Act identify ‘primary’ and ‘other’ considerations to guide these determinations. Australia’s non-refoulement obligations are relegated to the ‘other considerations’ category, which are afforded less weight than primary considerations.

The plaintiff, a citizen of the Republic of South Sudan, entered Australia as a holder of a Global Special Humanitarian visa. The plaintiff’s visa was cancelled pursuant to the mandatory cancellation provisions in s 501(3A) of the Migration Act. He sought to have the decision revoked under s 501CA(4) on the basis that there was ‘another reason’ for the revocation. He claimed: ‘Sending me back to South Sudan is sentencing me to the same fate as my father… I will either get killed, or persecuted then killed, or tortured then killed.’ The plaintiff argued that his removal to South Sudan would breach Australia’s non-refoulement obligations under international law. The Minister’s delegate decided against revocation of the decision. In line with earlier authorities, the delegate found it unnecessary to determine whether non-refoulement obligations were owed in respect of the plaintiff. This was because the plaintiff could apply for a protection visa application where Australia’s obligations would be assessed.

Decision

The majority rejected the plaintiff’s contention that his claims were mandatory considerations for the purposes of the revocation ruling. It was open for the delegate to defer the assessment of any non-refoulement obligations to the protection visa application stage. In so doing the majority offered a critique of previous cases in which the Federal Court had found against the Minister in cases raising similar issues. It found that, in prior cases, decision-makers conflated Australia’s non-refoulement obligations under

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275 Migration Act (n 37) 501(3A)(a)(i).
276 Minister for Immigration and Border Protection (Cth), Direction No 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (8 March 2021).
278 Plaintiff M1/2021 (n 25).
279 Migration Act (n 37) s 501(3A).
282 Ibid [23].
283 Ibid [30].
international law with the criteria for a protection visa as codified in the Migration Act. Such reasoning overlooked that Parliament had made a choice about the extent to, and mechanism by which, Australia’s international non-refoulement obligations are incorporated in the Migration Act. Justice Gageler offered a separate, concurring judgement, preferring a different wording of the legal questions to be answered.

Justices Edelman and Gleeson delivered separate dissenting judgments. Edelman J found that even if the plaintiff’s non-refoulement claims were not considered mandatory considerations, the decision maker was required to give the matters more than a cursory or perfunctory consideration. Overall he found the decision to be flawed on the basis of legal unreasonableness. Gleeson J agreed in substance, finding that the delegate’s use of an apparent template for the reasons underscored the absence of clear deliberation of the claims made.

Comment on international law

This case continues the tradition in recent High Court decisions of confirming the dominance of domestic legislation over any consideration of Australia’s obligations under international law that are not obviously enshrined in law. The High Court’s decision in Plaintiff M1 overlooks the degree of decisional freedom in deciding whether a visa cancellation should be revoked under s 501CA which contrasts with the qualitatively different assessment of granting a protection visa under ss 36 and 65 of the Migration Act. The Minister is not restricted to the risks comprehended by ss 36(2)(a) and (aa). As the Full Court identified in BCR16 v Minister for Immigration and Border Protection, the decision-maker can give ‘greater weight to a small risk [of harm], if on the material the decision-maker reasonably determines that it is justified.’ However, taking into account the plaintiff’s mere eligibility to apply for a protection visa under s 36 does not properly engage the deliberative exercise for which s 501CA calls, particularly when the plaintiff, as in this case, would face ‘persecution, torture and death’. Furthermore, the High Court did not address the practical consequences of postponing consideration of protection claims, namely that the protection visa application system requires consideration of the claimant’s character which is likely to be met by refusal. The plaintiff in this case applied for a protection visa after his visa cancellation and unsurprisingly it was refused. Despite the delegate accepting the plaintiff would be ‘forced into destitution, extorted, kidnapped, and possib[ly] killed’, the ineligibility criteria in s 36(1C)(b) of the Migration Act was engaged for having been convicted of a ‘particularly serious crime’. As such, the plaintiff, along with 215 other refugees whose protection visa applications were unsuccessful after a s 501(3A) visa cancellation, now face a ‘perpetual vicious cycle’ that plays out in indefinite

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285 Ibid [32].  
286 Ibid [38].  
287 Ibid [47] (Gageler J).  
288 Ibid [84]–[89].  
289 Ibid [94]–[95].  
290 Ibid [111]–[113] (Gleeson J).  
291 BCR16 v Minister for Immigration and Border Protection (2017) 248 FCR 456, [49].  
292 Plaintiff M1/2021 (n 25) [59].  
293 Ibid [62].  
294 Migration Act (n 37) s 36(1C)(b).  
295 Department of Home Affairs (Cth), Freedom of Information Request (FA No 21/05/00993, 2021).
immigration detention and endless processes. The fact that none of these people were granted a protection visa exposes the artificiality of deferring consideration of non-refoulement obligations to a protection visa application and undermines Australia’s compliance with its international law obligations.

**Nuon v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 653**

Federal Court of Australia
Middleton J
6 June 2022

Migration — application for extension of time in relation to judicial review in original jurisdiction in relation to Minister's cancellation decision under s 501(3) of the Migration Act — Where Minister did not consider national interest implications of Australia potentially breaching its non-refoulement obligations to the applicant — held: Minister under no obligation to consider national interest implications in the circumstances — where Minister alleged to have exercised discretion under s 501(3) in relation to non-refoulement obligations owed to the applicant in error — held: no error in exercise of discretion under s 501(3) — application dismissed

**Background**

From an international law perspective this case covers two key questions: (a) how important a consideration are Australia’s international non-refoulement obligations in relation to the national interest?, and (b) what is the specific nature of these non-refoulement obligations and when will they be owed? It also highlights the concerning trend in Australian ‘crimmigration’ law of non-citizens with disabilities being held in lengthy or even indefinite detention.

The applicant (Nuon) sought judicial review of two decisions made by the respondent: (1) the decision of the ‘Minister for Home Affairs’ to cancel his visa under s 501(3) of the Migration Act — Where Minister did not consider national interest implications of Australia potentially breach its non-refoulement obligations to the applicant — held: Minister under no obligation to consider national interest implications in the circumstances — where Minister alleged to have exercised discretion under s 501(3) in relation to non-refoulement obligations owed to the applicant in error — held: no error in exercise of discretion under s 501(3) — application dismissed

On 22 March 2021, the Minister for Home Affairs cancelled the applicant’s visa pursuant to s 501(3) of the

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296 Crock and Bones (n 26) 195.

297 Ibid.

298 Nuon (n 24) [1]; Migration Act (n 37) s 501(3), 501C (‘Migration Act’).

299 Nuon (n 24) [5], [24].

300 Ibid [5]–[8].

301 Ibid [24].
Act on the basis that he did not pass the character test due to his ‘substantial criminal record’. The applicant subsequently sought revocation of this decision but on 6 July 2021 the Immigration Minister decided not to revoke the cancellation. At the time of the judgment, the applicant had been held in immigration detention since the initial visa cancellation.

**Decision**

The first international law issue was whether the Minister had failed to consider a mandatory relevant consideration, being the national interest implications of Australia potentially breaching its international non-refoulement obligations in cancelling the applicant’s visa. Here Middleton J referenced Allsop CJ in *Acting Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CWY20* (‘CWY20’) who noted Australia’s obligations under Article 26 of the *Vienna Convention on the Law of Treaties* ‘to observe and perform, in good faith, those treaties to which it is a party’ and that relevant violations of international law are ‘inextricably and inherently a matter of national interest’. However, despite these comments, the court in CWY20 ultimately concluded that the implications of Australia breaching its international non-refoulement obligations are not a mandatory relevant consideration in every case. This conclusion raises questions as to the purpose of Australia’s international law obligations when it will only be necessary to consider the national interest implications of these violations of international law on certain occasions. Rather, it would seem logical that any clear violation of enshrined international law should be worthy of at least some minimal consideration in order to determine whether or not it is in the national interest.

As such, Middleton J followed the reasoning in CWY20 wherein the court held that whilst not a mandatory relevant consideration, the key question was in fact whether or not the Minister’s decision not to consider the national interest implications was unreasonable in the circumstances. Here, by distinguishing the specific facts from those in CWY20, Middleton J ultimately concluded that the Minister’s decision not to specifically consider the national interest implications of Australia breaching its international non-refoulement obligations was not unreasonable. In particular, Middleton J noted that there were no findings that the applicant’s return to Cambodia would breach Australia’s non-refoulement obligations and that the cancellation did not prevent the applicant from lodging a valid protection visa application under. Of course this last point ignores the reality of the protection visa application process, which will likely lead to the same outcome where the applicant has already had there visa cancelled.

The final three sub-grounds of review all directly related to the Minister’s decision regarding Australia’s non-

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303 Nuon (n 24) [13]–[14].
304 Ibid [15].
305 Ibid [84]; *Migration Act* (n 37) s 501(3)(d).
307 CWY20 (n 304) [155].
308 Nuon (n 24) [90], [104]–[110]; CWY20 (n 304) [155]–[172].
309 Nuon (n 24) [103]–[110].
310 Ibid [104]–[106].
311 Crock and Bones (n 26) 195–6.
refoulement obligations with the first two focusing on matters of administrative law. Finally, the applicant argued that the Minister had misunderstood Australia’s international non-refoulement obligations, specifically as they related to the applicant’s intellectual disability and mental health issues. Firstly, it was argued that the Minister failed to adequately assess whether the ‘difficulties’ which would confront the applicant upon return to Cambodia as a result of his disability, rose to the level of ‘serious harm’ as per Australia’s non-refoulement obligations.312 Here, Middleton J noted that the Minister’s conclusions when read as a whole were that ‘I am not satisfied that Mr Nuon’s intellectual disability and mental health issues gives rise to a real risk of serious harm’, thus fulfilling the non-refoulement requirements.313 Secondly, the Minister had asked whether harm might arise ‘entirely’ because of these issues whereas most international obligations (including the Refugee Convention) are concerned with whether the harm will be ‘substantially’ because of them.314 Finally, the Minister had asked whether harm would ‘necessarily result’ or was ‘plausible’ when neither of these particular specifications were part of Australia’s international treaty obligations and the Minister should have instead asked if the risk was real.315 However, Middleton J ultimately rejected these arguments on the basis that Minister’s reasoning when read as a whole was to the required effect in concluding that the matters raised did not give rise to a real risk of serious harm and thus met the requirements of Australia’s international non-refoulement obligations.316 As such, the application was dismissed.

Comment on international law

Of course, the conclusion in this case did not really consider whether or not the Minister’s decision was itself reasonable or desirable. Rather, the decision is representative of the ‘crimmigration’ trend wherein Australia’s international non-refoulement obligations as they pertain to non-citizens with mental illness or disability are subjugated to the exercise of executive power.317

DBWG v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022]
FCA 570

Federal Court of Australia
Collier J
18 May 2022

Migration — review of decision of the Administrative Appeals Tribunal — applicant had held temporary protection visa, subsequently Class CD Subclass 851 Resolution of Status visa — where Tribunal affirmed decision not to revoke mandatory cancellation of applicant’s visa — where visa cancelled mandatorily for applicant failing character test — s 501CA(4) Migration Act 1958 (Cth) — Ministerial Direction No 79 — whether applicant had ongoing refugee status at the time of the Tribunal decision — International Treaties

312 Nuon (n 24) [136]–[138]; NAAV v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 123 FCR 298, [455].
313 Nuon (n 24) [104].
314 Ibid [139].
315 Ibid [140].
316 Ibid [144]–[146].
317 Crock and Bones (n 26) 195–6; see also Plaintiff M1/2021 (n 25).
Obligations Assessment (ITOA) conducted — whether the Tribunal failed to consider the terms of Article 1C of the Refugee Convention — whether Australia had international non-refoulement obligations in respect of the applicant

Background

In the Federal Court, Collier J heard an application for review of a mandatory cancellation decision that raised squarely the relationship between crimmigration law and Australia’s obligations under the Refugee Convention. The applicant argued that once he was recognised as a refugee, that status should deliver rights not to be expelled until such time as a decision was made that Art1C of the Refugee Convention was triggered. This is the provision relating to cessation of refugee status. Collier J in the Federal Court was charged with reviewing the Administrative Appeals Tribunal’s (AAT) decision affirming of the Minister for Immigration’s determination under s 501CA(4) of the Migration Act 1958 (Cth) not to revoke the cancellation of the applicant’s Resolution of Status visa. The case stands as another example of the impact of the High Court’s reasoning in Plaintiff M1.

The applicant is a Russian national who entered Australia on a false passport and sought asylum. He was granted a temporary protection visa on 28 August 2006 and transitioned to permanent residence in November 2009, following the change of government in 2007. Between 2008 and 2014, the applicant was convicted of eight offences involving firearms and assault, with four attracting custodial sentences. During the process for cancellation of his visa on character grounds, the applicant was convicted of a further five offences and received two further custodial sentences. In 2019, his Resolution of Status visa was cancelled under s 501(3A). On 3 September 2020, the Minister’s delegate refused to revoke the cancellation, a decision affirmed by the AAT. On 17 December 2020, the applicant sought judicial review of the Tribunal’s decision. The grounds of the application were that the Tribunal acted outside of jurisdiction by failing, when considering international non-refoulement obligations, to consider the terms of Article 1C of the Refugee Convention, as well as the general question of when Australia’s international non-refoulement obligations in respect of the applicant could cease.

Issues

Based on the submissions of both parties, Collier J identified two key issues for determination by the Federal Court:

1. Whether the applicant had ‘refugee’ status at the time of the AAT’s decision; and

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318 [39].
319 DBWG (n 23) [1].
320 Ibid [5], [65]. The Applicant was granted a Resolution of Status visa.
321 Ibid [6].
322 Ibid [10].
324 Ibid [37].
325 Refugee Convention (n 21).
326 DBWG (n 23) [42].
(2) Whether the AAT was required to consider cessation provisions in Art 1C of the Refugee Convention and therefore engages Australia’s non-refoulement obligations under international law, as required by Ministerial Direction 79 and construed with s 5 of the Migration Act.

Decision

On the first question, Collier J set out the definition of ‘refugee’ in s 5H of the Migration Act, which codifies Article 1A(2) of the Refugee Convention. Her Honour noted that the role of the Tribunal was to consider whether the cancellation decision should be revoked. It was not to review a decision to refuse a protection visa or determine whether the applicant was a ‘refugee’ under the Migration Act. Collier J observed further that the applicant was only ever temporarily granted a protection visa. Accordingly, there was never any formal recognition of the applicant as a ‘refugee’. It should be noted here that this finding is a little dissonant for refugee lawyers, insofar as the grant of a Resolution of Status visa in 2009 was predicated on the applicant continuing to engage Australia’s protection obligations. Nevertheless, the case is consistent with High Court jurisprudence stating that criteria for the grant of visas under the Migration Act must be considered independently from an individual’s alignment with a status under international law.

On the second question, Collier J found that, because the applicant did not hold ‘refugee’ status at the time of the Tribunal’s decision, Article 1C of the Convention was inapplicable. Article 1C provides that the Convention ceases to apply to any person who can no longer, because the circumstances with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality. Relevantly, the applicant was not a ‘refugee’ at the time of the Tribunal’s decision nor according to his earlier temporary protection visa. To that extent, the Tribunal was not required to consider Article 1C.

In light of both the fact that the applicant was not a ‘refugee’ and that it was unnecessary for the Tribunal to engage with Article 1C, her Honour followed the reasoning of the High Court in Plaintiff M1, finding that it was not necessary to consider whether the applicant was owed international non-refoulement obligations. International non-refoulement obligations are obligations not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm.

Nonetheless, Collier J considered in obiter whether non-refoulement obligations were owed to the applicant. Her Honour noted that existence of such obligations may be ‘another reason’ to revoke a cancellation decision pursuant to s 501CA (4)(b)(ii) of the Migration Act. Equally, the absence of those

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327 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), Direction 79: Visa refusal and cancellation under s 501 and revocation of mandatory cancellation of a visa under s 501CA (28 February 2019) cl 14, 14.1.
328 1958 (Cth).
329 DBWG (n 23) [44]-[45].
330 Migration Act (n 37).
331 DBWG (n 23) [48]-[49].
333 Ibid [58].
334 Convention on Refugees (n 21).
335 DBWG (n 23) [58]-[59].
336 Plaintiff M1-2021 (n 25).
obligations may mean that there is no adequate reason to revoke the cancellation of the applicant’s visa.337 Justice Collier’s position was that the Tribunal sufficiently had regard to the issue of non-refoulement obligations. Specifically, her Honour found that it was ‘both reasonable and appropriate for the Tribunal to give credence to the International Treaties Obligations Assessment (ITOA) findings’ when forming its own position.338 The Department had found that the applicant’s fear of persecution was not well-founded as, inter alia: (i) the period of time since the applicant’s claims of mistreatment had lapsed; (ii) the Russian President had made attempts to prevent anti-Semitism in Russia; (iii) there was no established evidence to suggest that ethnic Jews were being individually targeted in Russia, let alone the applicant.339

The fact that the Tribunal did not explicitly address Article 1C of the Convention did not mean that the Tribunal failed to consider Australia’s non-refoulement obligations in respect of the applicant.340 Collier J both confirmed that Article 1C was inapplicable and noted that the ITOA and Tribunal engaged in a ‘very lengthy assessment’ of whether the applicant had a well-founded fear of persecution and concluded that the applicant was not a ‘refugee’.341 For these reasons, her Honour did not find that the applicant was owed any non-refoulement obligations. Thus, Collier J dismissed the application.

Comment on international law

This case illustrates the extent to which Australia’s migration decisions with respect to non-refoulement obligations do engage with Australia’s treaty obligations under public international law. Even though her Honour found that Article 1C of the Convention did not apply as the Tribunal was not tasked with deciding whether the applicant was a ‘refugee’, Collier J took care to consider whether the applicant had received a hearing on the issue of possible persecution.

HRZN v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 133

Federal Court of Australia
Yates, Abraham and McElwaine JJ
9 August 2022

Migration — appeal from the decision of the Federal Court of Australia — where the Federal Court dismissed the application for review of the decision of the Administrative Appeals Tribunal — where the Administrative Appeals Tribunal affirmed the delegate’s decision not to revoke cancellation of visa — whether representation was clearly articulated or clearly emerged from the materials — whether Administrative Appeals Tribunal’s misunderstanding of Australia’s unenacted international refoulement obligations amounted to jurisdictional error — appeal dismissed

Background

This case was an appeal from a decision of a single judge of the Federal Court who had dismissed an

338 DBWG (n 23) [68].
339 Ibid [67].
340 Ibid [71].
341 Ibid [69].
application for judicial review of a decision by the Administrative Appeals Tribunal (AAT) upholding the cancellation of the appellant’s subclass 155 Resident Return (Permanent) Visa under s 501(3A) of the Migration Act. The appellant came to Australia at the age of 7 in 1980 as a refugee from the war in Vietnam. Apart from one holiday in 2013, he has remained in Australia ever since, fathering two Australian citizen children who are now adults. He has been a drug user for much of his adult life, with a serious addiction to heroin.

The case turned on the question of whether the AAT had fallen into jurisdictional error by failing to consider a ‘a substantial or significant and clearly articulated claim raised by the representations, or apparent on the face of the material before the Tribunal, that the Appellant may be owed non-refoulement obligations other than under the Refugee Convention by reason of his inability to access anti-viral medication or other treatment in Vietnam for his Hepatitis B and D conditions’. The appellant argued that the trial judge had erred in finding that the AAT was not required to consider the non-refoulement claims or otherwise consider ‘complementary protection’ obligations.

The appellant is a Vietnamese national and long-term drug user, a fact that played out in his accrual of an extensive criminal record. He alleged that, if returned to Vietnam, he was at risk of ‘beatings, forced labour … and prolonged arbitrary detention’ in a compulsory drug treatment centre’. The AAT accepted that drug treatment centres in Vietnam were ‘harsh and degrading’ and that they involve ‘forced labour’. However, it declined to consider whether there was a relevant risk of the Appellant being exposed to these conditions. It ruled that non-refoulement obligations could not be ‘triggered due to a risk of the applicant choosing of his own volition to engage in conduct which is illegal’. As noted below, the appellant contended that the tribunal’s characterisation of the law was incorrect in at least two respects.

**Decision**

The ruling in HRZN placed particular emphasis on the High Court’s ruling in Plaintiff M1/2021 v Minister for Home Affairs (Plaintiff M1). That case concerned the operation of s 501CA(4) of the Migration Act on what might constitute ‘another reason’ why the automatic cancellation of a permanent visa might be revoked. The High Court ruled:

28. Where the representations do not include, or the circumstances do not suggest, a non-refoulement claim, there is nothing in the text of s 501CA, or its subject matter, scope and purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke the cancellation of any visa that is not a protection visa.

29. Where the representations do include, or the circumstances do suggest, a non-refoulement claim by reference to unenacted international non-refoulement obligations, that claim may be considered by the

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343 Ibid [7].
344 Ibid [3].
345 Ibid [2].
346 (2022) 400 ALR 417; [2022] HCA 17 (see also our summary of Plaintiff M1/2021 in this article).
348 See HRZN (n 28) [47].
decision-maker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error — they are not part of Australia’s domestic law.

Their Honours dismissed both grounds of appeal. In relation to the first, they were not persuaded that, before the Tribunal, the appellant clearly articulated a substantial or significant claim that Australia had non-refoulement obligations under the ICCPR or CAT by reason of the limited medical treatment that he might be able to access in Vietnam, or that such a claim clearly emerged (or was squarely raised) on the materials before the Tribunal. The reasoning of the Tribunal accorded with the level of engagement that was required in this case, as stated by the plurality in Plaintiff M1 at [25].

The second ground centered on the fact that the AAT had misunderstood the scope of Australia’s unenacted international non-refoulement obligations. It was accepted that the tribunal was indeed wrong in misunderstanding that Australia may owe non-refoulement obligations arising from unenacted treaties if there is a real risk or chance that a person will engage in conduct in the receiving country of his or her own choosing, even where such conduct is unlawful under the laws of that country. For the Court, however, this error was not material for the simple reason that the AAT was not considering a mandatory relevant consideration under s 501CA(4).

Comment on international law

A disturbing aspect of this case was that the AAT in its merits review process clearly misunderstood the operation of Australia’s non-refoulement obligations. However, because the Court ruled that the tribunal was not required to consider Australia’s non-refoulement obligations, it had committed no error of law.

Kwatta v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCAFC 194

Federal Court of Australia — Full Court
Markovic, Cheeseman and Hespe JJ
8 December 2022

Migration — appeal from decision of the Federal Court of Australia — where primary judge dismissed application for judicial review of Administrative Appeals Tribunal decision not to revoke visa cancellation under s 501CA(4) of the Migration Act 1958 (Cth) — whether primary judge erred in failing to find that the Tribunal erred in failing to consider how Australia’s non-refoulement obligations may be engaged where no non-refoulement claim was advanced by the applicant before the Tribunal

Background

This was an appeal from a decision of a single judge of the Federal Court (‘the primary judge’), who had dismissed an application for judicial review of a decision by the Administrative Appeals Tribunal (AAT) that affirmed the appellant’s visa cancellation under s 501(3A) of the Migration Act 1958 (Cth) (‘the Act’).

349 Ibid [54].
350 See Ibid [42] and the cases there cited.
The appellant, Mr Sanjay Kwatra, is a 57-year-old Indian national who entered Australia as a permanent resident in Australia in 1996. He appears to have slipped into a dysfunctional lifestyle involving substance abuse. He had amassed an extensive criminal record and was sentenced to imprisonment on several occasions. On 6 June 2019, his visa was cancelled by a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘the Minister’) under the mandatory cancellation provisions in s 501(3A) of the Act, on the basis that he did not pass the character test under s 501(6)(a).

Mr Kwatra unsuccessfully sought revocation of the cancellation under s 501CA of the Act on the basis that there was ‘another reason’ why it should be revoked. He applied to the AAT for review of this decision. His argument at each stage was that his state of health and the situation in India – most particularly at the height of the COVID-19 pandemic – meant that his deportation would be a death sentence for him. Although not claiming to be a Convention refugee, Mr Kwatra argued that Australia owed him protection obligations pursuant to the ‘complementary protection’ provisions in the Act.

According to cl 9.1 of Direction No 90 to the Act, Australia’s non-refoulement obligations derive from three international conventions to which it is party: the Refugee Convention as amended by the 1967 Protocol (together, ‘the Refugee Convention’); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’), and the ICCPR and its Second Optional Protocol.

The Kwatra case has had something of a long history, with the Appellant having some success during the COVID-19 lock-down period. On 3 August 2020, the AAT affirmed the initial cancellation decision of the delegate. On 4 February 2021, upon judicial review, the Federal Court quashed the Tribunal’s decision and remitted the matter for redetermination before a differently constituted Tribunal. On 2 September 2021, after considering Mr Kwatra’s application, the AAT again affirmed the decision not to revoke the original visa cancellation.

The appellant’s application for judicial review of the Tribunal’s second decision was dismissed on 15 June 2022 by Burley J. Mr Kwatra’s appealed that ruling to the Full Court of the Federal Court (‘the Court’)

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352 Kwatra (n 29) [1], [4].
353 Ibid.
354 Ibid.
355 Ibid [5].
356 Ibid [28].
357 Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Gth), Direction No. 90: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (8 March 2021).
358 Refugee Convention (n 21).
360 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
361 ICCPR (n 11).
364 Kwatra (n 29) [6]; Kwatra v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 58.
365 Kwatra (n 29) [7]; Kwatra and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 3147.
366 Kwatra (n 29) [8].
on two primary grounds:

1. First, that the Federal Court at first instance erred in not finding that the Tribunal fell into jurisdictional error in that it failed to consider, as relevant considerations:
   (a) The material and submissions relating to Mr Kwatra’s physical and mental health and the extent of the impediments that would be imposed by his health on return to India; and
   (b) The material and submissions relating to Mr Kwatra’s health and how it might engage the question of Australia’s non-refoulement obligations.

2. Second, that Burley J erred in not finding that the Tribunal fell into jurisdictional error in that it was legally unreasonable.\(^\text{367}\)

**Issue**

For the purpose of this article, the most relevant ground for review concerned Australia’s non-refoulement obligations arising under international law (ground 1(b)).

On 21 June 2021, the appellant had given evidence to the Tribunal regarding the impact his repatriation to India would have on his wellbeing. After spending almost 30 years in Australia he claimed that he had no family or social supports, no savings, and no clear prospects of finding work.\(^\text{368}\) He claimed that, in these circumstances, he risked relapsing into a destructive level of alcoholism and would have no access to treatment for his various mental and physical health conditions.\(^\text{369}\) Mr Kwatra adduced evidence of how India’s public health system had been disrupted by the COVID-19 pandemic. He stated that he could not afford treatment in the private health system.\(^\text{370}\) In the course of making his application before the Tribunal, Mr Kwatra did not advance any express non-refoulement claims. These matters were only articulated during the proceedings for judicial review before the primary judge (when he was properly represented).\(^\text{371}\)

Before the Full Federal Court, Mr Kwatra invoked harm arising under the *ICCPR* as giving rise to the non-refoulement obligations under three articles in that Convention. He submitted that the difficulties he would experience upon return to India due to his health concerns constituted harm that would contravene his ‘inherent right to life’ (art 6.1), amounting to ‘cruel, inhuman or degrading treatment or punishment’ (art 7.1), and risk his ‘right to…security of person’ (art 9.1).\(^\text{372}\)

**Decision**

The Full Federal Court found against the appellant on a number of bases. First, it found that the AAT in the second hearing had indeed given proper consideration to all the matters raised by the applicant. It ruled that Burley J was correct in his assessment of the Tribunal decision, including on the finding that the appellant had not raised arguments about non-refoulement in the merits review process. In the result, the

\(^{367}\) Ibid [9].
\(^{368}\) Ibid [20]–[22].
\(^{369}\) Ibid.
\(^{370}\) Ibid.
\(^{371}\) Ibid [31], [35].
\(^{372}\) Ibid [48].
Court’s rulings on the points of international law become somewhat *obiter dicta*, given that the matter concerned an appeal against a visa cancellation under s 501(3A) rather than an application for a visa on grounds of complementary protection.

The Court held that the risk of harm identified by Mr Kwatra as potentially contravening the ICCPR was not the type which gives rise to a non-refoulement obligation. To the extent that Australia has enacted non-refoulement obligations into domestic law deriving from the ICCPR, those obligations are reflected in s 36(2A) of the Act and function consistently, but not co-extensively with Australia’s non-refoulement obligations under unenacted international law.

In the context of s 36(2A), the definitions of ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’, such as alleged to potentially arise in this case, incorporate an element of actual subjective intent to inflict harm. The case of *Afu v Minister for Home Affairs* [2018] FCA 1311 confirmed that a general lack of available medical treatment, even where it might result in loss of life, does not amount to the intentional infliction of harm such as required. Furthermore, to establish ‘deprivation of life’ under s 36(2A)(a), such deprivation must be arbitrary. The prospect of limited access to healthcare, as submitted by Mr Kwatra, does not amount to arbitrary conduct. Thus, the Court did not accept the claims that non-refoulement obligations under the Act were engaged.

The Court affirmed the primary judge’s conclusion that the AAT did not fall into error, and thus dismissed the appeal. This was not only because Mr Kwatra’s application before the Tribunal did not include a non-refoulement claim, but also because the circumstances did not suggest one. The Court ruled that the appellant’s non-refoulement submissions could not be mandatory relevant considerations for the Tribunal. This conclusion is supported by the High Court’s decision in *Plaintiff M1* and echoes the Full Federal Court ruling in *HRZN*.

**Comment on international law**

Like the case of HRZN, the ruling in this matter underscores the gulf opened by the High Court’s ruling in *Plaintiff M1* between international law and Australia’s domestic migration laws. The effect of the two cases is to reinforce the significance of direct appeals to the Minister for Immigration as the only mechanism for humanitarian intervention.

This case highlights how executive action under Australian domestic legislation overshadows any non-refoulement obligations arising from unincorporated international law treaties. In particular, it reinforces that the types of harm that may be invoked to engage a non-refoulement claim in requests to revoke a visa cancellation decision are not provided by the ICCPR or other treaties, but by the much more restricted

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373 Ibid, [43].
374 Ibid.
377 *Kwatra 2022* (n 29) [49].
378 Ibid; *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326, [48] (Gleeson J); *CSV/15 v Minister for Immigration and Border Protection* [2018] FCA 699 [34] (Collier J).
379 *HRZN 2022* (n 28). See *Kwatra* (n 29) [42].
terms of the Migration Act. This ultimately led the Court to affirm the Mr Kwatra’s visa cancellation despite the devastating impact that repatriation would certainly have on his health and wellbeing.

**SDCV v Director-General of Security [2022] HCA 32**

High Court of Australia  
Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ  
12 October 2022

Constitutional law — Judicial power of Commonwealth — Where adverse security assessment of appellant, accompanied by statement of grounds, certified by Director-General of Security on behalf of Australian Security Intelligence Organisation (‘ASA decision’) — Where appellant's visa cancelled on character grounds in consequence of ASA decision— Where appellant applied to Administrative Appeals Tribunal for merits review of ASA decision — Where Minister administering Australian Security Intelligence Organisation Act 1979 (Cth) issued certificates under s 39B(2)(a) of Administrative Appeals Tribunal Act 1975 (Cth) (‘AAT Act’) stating that disclosure of some of contents of documents relating to ASA decision would be contrary to public interest because disclosure would prejudice security of Australia (‘certificated matter’) — Where Tribunal provided with certificated matter but certificated matter not disclosed to appellant or appellant's legal representatives — Where Tribunal affirmed ASA decision — Where appellant appealed to Federal Court of Australia pursuant to s 44 of AAT Act — Where s 46(1) of AAT Act allowed Federal Court to have regard to certificated matter in determining appeal — Where s 46(2) of AAT Act provided that Federal Court shall do all things necessary to ensure that certificated matter not disclosed to any person other than member of court as constituted for purposes of proceeding — Where certificated matter not disclosed to appellant or appellant's legal representatives in Federal Court — Whether s 46(2) of AAT Act invalid on basis that Ch III of Constitution precludes making of law that denied party to proceedings in court of federal judicature fair opportunity to respond to evidence on which order of court which finally altered or determined right or legally protected interest of party might be based – Whether s 46(2) of AAT Act invalid on basis that it required or authorised Federal Court to act in manner inconsistent with essential character of court or with nature of judicial power.

**Background**

The appellant is a citizen of Lebanon. After marrying an Australian citizen in March 2010, he was granted a Class BS Subclass 801 Partner (Residence) visa in December 2012 and subsequently applied for Australian citizenship. On 14 August 2018, the appellant was assessed by ASIO to be a risk to ‘security’ as defined in s 4 of the ASIO Act. This adverse security assessment (‘ASA’) was based upon a finding that the appellant had supported politically motivated violence and ISIL by, inter alia, using encrypted messaging to communicate with ISIL-affiliated relatives in Syria and with relatives in Australia of security interest who had been charged and convicted of serious offences. The ASA was furnished to the Minister for Home Affairs (‘the Minister’) who cancelled the appellant’s visa on 21 August 2018 pursuant to s 501(3) of the

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380 SDCV v Director-General of Security [2022] HCA 32 [18] (‘SDCV High Court’).  
381 Australian Security Intelligence Organisation Act 1979 (Cth) s 4 (‘ASIO Act’).  
Migration Act 1958 (Cth) upon satisfaction that he failed the character test and that cancellation was in the national interest.\textsuperscript{383}

**Merits review**

The appellant sought review of the ASA in the Administrative Appeals Tribunal (AAT) pursuant to s 54 of the \textit{ASIO Act}.\textsuperscript{384} In order to prevent the disclosure of security-sensitive information, the Minister issued certificates under ss 39A(8) and 39B(2)(a) of the AAT Act which required the Tribunal to ‘do all things necessary to ensure’ that such information was not disclosed,\textsuperscript{385} thus denying the appellant access to certain evidence that was before the Tribunal\textsuperscript{386} and precluding him from being present during parts of the hearing.\textsuperscript{387} On 2 December 2019, the Security Division of the AAT affirmed the ASA based upon the evidence heard in closed session in the absence of the appellant.\textsuperscript{388}

**FCA**

The appellant appealed against the decision of the Tribunal to the Federal Court of Australia (‘Federal Court’) pursuant to s 44 of the \textit{AAT Act}.\textsuperscript{389} Since there was a s39B(2) certificate in force certifying that disclosure of particular information would be ‘contrary to the public interest’,\textsuperscript{390} the Federal Court was required under s 46(2) of the \textit{AAT Act} to ‘do all things necessary to ensure’ that the certificated matter was not disclosed to the appellant or his legal representatives during the proceedings.\textsuperscript{391} On 9 April 2021, the Full Court of the Federal Court unanimously rejected each substantive ground of appeal, concluding, among other things, that the ASA was justified by the evidence available to the AAT.\textsuperscript{392}

**Decision**

The appellant appealed to the High Court of Australia (‘the Court’) arguing that s 46(2) was invalid on the grounds that it employed a procedure that allowed evidence adverse to him to be considered by the Federal Court without affording him an opportunity to know and respond to it.\textsuperscript{393} According to the appellant, such an opportunity is a minimum requirement of procedural fairness,\textsuperscript{394} and, consequently, s 46(2) contravened Ch III of the Commonwealth Constitution by requiring the Federal Court to act in a manner that was procedurally unfair and therefore inconsistent with the nature of judicial power.\textsuperscript{395}

By a 4:3 majority, the Court rejected this argument and upheld the validity of s 46(2). It affirmed the Federal Court’s reasoning that the validity of s 46(2) must be assessed against the background of the legislative

\textsuperscript{383} Migration Act (n 38) ss 501(3), 501(6)(g).
\textsuperscript{384} SDCV High Court (n 381) [4].
\textsuperscript{385} Administrative Appeals Tribunal Act 1975 (Cth) s 39B(3) (‘AAT Act’).
\textsuperscript{386} Ibid ss 39A(3) and 39B(2)(a).
\textsuperscript{387} Ibid ss 39A(8) and (9).
\textsuperscript{388} SDCV AAT (n 384) [20].
\textsuperscript{389} AAT Act (n 387) s 44.
\textsuperscript{390} Ibid s 39B(2).
\textsuperscript{391} SDCV High Court (n 381) [5].
\textsuperscript{392} SDCV Federal Court (n 383) [1], [245]-[247].
\textsuperscript{393} SDCV High Court (n 381) [14].
\textsuperscript{394} Ibid [11], [51], [64]. See Appellant’s Submissions [38].
\textsuperscript{395} Ibid [51], [91].
scheme as a whole. By bringing an appeal under s 44, the appellant gained the forensic advantage of s 46(1), which required the Tribunal to send all relevant documents to the Federal Court, along with the disadvantage of s 46(2) which prevented him from accessing such information. According to the Court, these provisions cannot be considered separately: s 46(2) has no operation independent of s 46(1), and thus, when considered as a whole, the procedure established by the provision caused no practical injustice to the appellant. The Court emphasised that the appellant chose to challenge the ASA decision by appealing under s 44, thus exposing him to s 46. Had he instead pursued an avenue of judicial review, the appellant would have avoided the procedural disadvantage of s 46(2) but also the ‘forensic benefit’ of having the certificated matter before the Court under s 46(1).

Dissenting judgments

Gageler, Gordon and Edelman JJ wrote separately in dissent. However, each concluded that s 46(2) was invalid. Gageler J accepted the appellant’s argument that s 46(2) operates impermissibly in a ‘blanket’ fashion to deny a person information about the case against them, rendering the process by which the Federal Court is to hear and determine an appeal under s 44 procedurally unfair. Gordon J similarly found that the non-disclosure requirement ‘operat[ed] as a strait-jacket on the Court's ability to minimise or alleviate practical injustice and require[d] the Court to act unjudicially’. According to Edelman J, the ‘extreme procedural unfairness’ occasioned by s 46(2) could not be justified as necessary to protect the compelling interests in s 39B(2).

Comment on international law

Upon affirmation of the decision to cancel the appellant’s visa, Australian law required that the appellant be detained and subsequently removed from Australia ‘as soon as reasonably practicable’.

As such, one may consider the statutory elimination of procedural fairness rights under Australian law, which deprives non-citizens, such as the appellant here, of the opportunity to know the essential allegations and evidence upon which that assessment is based and violates the right to a fair hearing in the expulsion of non-citizens under Article 13 of the ICCPR. The Human Rights Committee has confirmed that this provision applies to administrative decisions that result in expulsion and to judicial decisions concerning

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396 Ibid [12], [45], [75], [78].
397 Ibid [83].
398 Ibid [12].
399 Ibid.
400 For example, under s 75(v) of the Constitution or s 39B of the Judiciary Act 1903 (Cth).
401 Ibid [70].
402 Ibid [112], [215], [267].
403 Ibid [112].
404 Ibid [189].
405 Ibid [233], [246], [249], [267].
406 Ibid [267].
407 Migration Act (n 37) s 189, 198.
expulsion or deportation. The statutory scheme established by the ASIO Act, AAT Act and Migration Act results in a near-complete denial of this fair hearing right, with the content of the procedural fairness afforded to the appellant was, similarly in the Leghaei Case, ‘reduced, in practical terms, to nothingness.’ The majority in the present case noted the limited rights of the appellant as a visa-holder to enter and remain in Australia which have always been ‘qualified by the statutory process of the executive government to deny the visa holder disclosure of security-sensitive grounds for the making of an ASA.’ While Article 13 of the ICCPR explicitly permits abrogation where ‘reasons of national security’ compel non-compliance with those requirements, one may query whether this permits the right to a fair hearing to be so reduced as to be practically eliminated.

As Ben Saul notes, the statutory modifications of procedural fairness under domestic law ‘may depart considerably (upwards and downwards) from the requirements of international law.’ The present case emphasises the seismic downward departure occasioned by Australian security and migration law in relation to non-citizens suspected of being a national security risk.

*Alexander v Minister for Home Affairs* [2022] HCA 19

High Court of Australia
Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ
8 June 2022

Constitutional law (Cth) — Powers of Commonwealth Parliament — Power to make laws with respect to naturalisation and aliens— Cessation of Australian citizenship — Where s 36B of Australian Citizenship Act 2007 (Cth) provided Minister for Home Affairs may make determination that person ceases to be Australian citizen if satisfied, among other matters, that person engaged in specified conduct demonstrating repudiation of allegiance to Australia — Where plaintiff Australian citizen by birth and Turkish citizen by descent — Where, after departing Australia, plaintiff entered and remained in al-Raqqa Province in Syria — Where al-Raqqa Province a ‘declared area’ for purposes of terrorism-related offence in Criminal Code (Cth) — Where Australian Security Intelligence Organisation (‘ASIO’) reported in June 2021 that plaintiff joined Islamic State of Iraq and the Levant (‘ISIL’) by August 2013 and likely engaged in foreign incursions and recruitment by entering or remaining in al-Raqqa Province — Where ISIL a designated ‘terrorist organisation’ for purposes of terrorism-related offences in Criminal Code (Cth) — Where Minister determined pursuant to s 36B, relying in part on ASIO report, that plaintiff ceased to be Australian citizen

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410 Pursuant to s 38(2)(b) of the ASIO Act (n 383), the copy of the statement of grounds accompanying the ASA that was provided to the appellant had sections omitted.

411 AAT Act (n 387) ss 39A(8), 39B(2), s 46(2).

412 Migration Act (n 37) s 501.

413 Leghaei v Director-General of Security [2005] FCA 1576, [88].

414 SDCV High Court (n 382) [12].


416 See Saul (n 409) 643.

417 Ibid 635.
— Whether s 36B valid exercise of legislative power under s 51(xix) of Constitution.

Constitutional law (Cth) — Judicial power of Commonwealth — Where plaintiff’s conduct relevant to Minister’s determination under s 36B of Australian Citizenship Act 2007 (Cth) amounted to conduct element of terrorism-related offence under s 119.2 of Criminal Code (Cth) — Whether provision providing for cessation of citizenship on determination by Minister on terrorism-related grounds penal or punitive in character — Whether s 36B contrary to Ch III of Constitution for conferring upon Minister exclusively judicial function of adjudging and punishing criminal guilt.

Background

This case concerns the constitutionality of s 36B of the Australian Citizenship Act 2007 (Cth) (‘Citizenship Act’), one of the controversial citizenship-stripping laws introduced in 2020. The plaintiff was a dual citizen, having acquired Australian citizenship by birth and Turkish citizenship by descent. He was stripped of his Australian citizenship in July 2021. After being convicted of certain offences in Syria, the Minister for Home Affairs (‘the Minister’) determined that the plaintiff had engaged in ‘foreign incursions and recruitment’ for the purposes of s 36B(5)(h), thus authorising the Minister to make a determination under s 36B(1)(a) that the plaintiff ceased to be an Australian citizen. The purpose of s 36B is to confer upon the Minister the power to strip Australian citizenship from dual citizens who have engaged in specified conduct which demonstrates that they have ‘repudiated their allegiance to Australia’ and that ‘it would be contrary to the public interest for the person to remain an Australian citizen’. The plaintiff brought proceedings in the original jurisdiction of the High Court of Australia (‘the Court’).

Decision

A 6:1 majority of the Court upheld the appeal. The Court accepted the plaintiff’s argument that s 36B reposed in the Minister the exclusively judicial function of punishing criminal conduct by involuntary denaturalisation, contrary to Ch III of the Constitution pursuant to the ruling in Chu Kheng Lim. The provision was found to have a punitive purpose, operating to punish the plaintiff for his affiliations with ISIL, conduct considered so reprehensible as to be incompatible with the values of the Australian community. The fact that s 36B did not require any person to be detained in custody did not preclude the involuntary cessation of citizenship effected by the provision from being classified as punishment that is punitive in character. Such a characterisation, according to the Court, ‘accords with the long-held understanding of exile as a form of punishment.’ Thus, the power to determine the facts enlivening s 36B were therefore exercisable only by a Chapter III court.

418 Alexander’s Case (n 31) [1].
419 Ibid [2].
420 Australian Citizenship Act 2007 (Cth) s 36B(1)(c).
421 Alexander’s Case (n 31) [97] (Kiefel CJ, Keane and Gleeson J], [127] (Gageler J], [132] (Gordon J], [253] (Edelman J).
422 Ibid [96].
424 Alexander’s Case (n 31) [75].
425 Ibid [72], [120], [247].
426 Ibid [75].
427 Ibid [96].
Dissenting judgment

In the sole dissenting opinion, Steward J disagreed that s 36B conferred judicial power on the executive. He characterised the power of denationalisation granted by the provision as serving a protective, non-punitive purpose as a ‘political precaution’.

Comments on international law

As Crock and Berg state, ‘citizenship in Australia is a somewhat fragile status determined by statutory fiat rather than by birthright’. The operation of the citizenship provisions in the present case certainly demonstrates this. The substantive effect of the Minister’s determination under s 36B(1) was ‘to deprive the plaintiff of his entitlement to enter and live at liberty in Australia, rights conferred by Australian citizenship’. Such rights are also guaranteed under international law. With the decision to revoke his citizenship under s 36B rendered invalid, the plaintiff may be considered to have been ‘arbitrarily deprived of the right to enter his own country’ in violation of Article 12(4) of the ICCPR, and ‘arbitrarily deprived of his nationality’ under Article 15(2) of the Universal Declaration on Human Rights.

V. International child abduction

_Bamfield v Secretary, Department of Communities and Justice_ [2022] FedCFamC1A 35

Federal Circuit and Family Court of Australia

Aldridge, Harper & Christie JJ

14 March 2022

Family Law — appeal — child abduction — Hague Convention on the Civil Aspects International Child Abduction — Appeal from orders requiring the return of the child to Belgium — Habitual residence — Jurisdiction — Intolerable situation — Where the child is of First Nations Australian heritage — No error in fact or law — Findings were open on the evidence — Weight challenges — Adequacy of reasons — No error established — Appeal dismissed — No order as to costs

Background

Ms Bamfield (‘the appellant’), a First Nations Australian woman, gave birth to her child (‘the child’) in Belgium 2020. The child was returned to Australia by her mother, Ms Bamfield, on 17 September 2020 at seven months old. The mother informed the father on 12 November 2020 that she and the child would not be returning to Belgium. At the father’s request, the NSW Department of Communities and Justice (‘the State Central Authority’) applied for the child’s return to Belgium under the Child Abduction Convention (‘the Convention’), as incorporated in the _Family Law Act 1975_ (Cth). Orders were thus made by

428 Ibid [339].
429 Ibid [344].
431 _Alexander’s Case_ (n 31) [79], [96].
432 ICCPR (n 11) art 12(4).
433 UDHR (n 161) art 15(2).
434 Child Abduction Convention (n 39).
435 _Family Law Act 1975_ (Cth) s 111B.
Bennett J in the Federal Circuit and Family Court of Australia (‘Family Court’) for the child’s return on 8 December 2021 and 20 December 2021, to which Ms Bamfield subsequently brought this appeal on 4 January 2022. At the time of the Family Court decision, the child was two years old and remained in Australia with the mother. Parenting proceedings concerning the child also took place in Belgium concurrently with the Australian proceedings in which the Belgian court delivered its final order on 6 January 2022 that the child live in Belgium with the father.

This case involved an appeal made by Ms Bamfield against orders in the Family Court by Bennett J made pursuant to the Family Law (Child Abduction) Regulations 1986 (Cth) (‘the Family Law Regulations’) that her child be returned to Belgium. There were two grounds of appeal: the first relating to whether the child was ‘habitually resident’ in Belgium; and the second relating to the defence of ‘grave risk’ of the child being placed in an ‘intolerable situation’.

**Grounds of appeal**

In the Family Court, the appellant’s first ground of appeal was that the child was not ‘habitually resident’ in Belgium such that the requirements set out in reg 16(1A) of the Family Law Regulations before a return order can be made were not satisfied, and thus the child’s removal to, and retention in, Australia could not be wrongful. The Family Court noted that the question of habitual residence was one of fact and that Ms Bamfield’s subjective intentions about her own residence in Belgium and that of the child was not determinative. Ms Bamfield argued that she was not in a country of her own choosing and was only living in Belgium due to pandemic-related restrictions. Notwithstanding the involuntary nature of Ms Bamfield’s residence in Belgium (by reason of COVID-19 travel restrictions), the Court found that Ms Bamfield was committed to the parties’ relationship and the parties looked for houses in Belgium prior to the birth of the child. It upheld Bennett J’s reasoning that the child’s ‘habitual residence’ was Belgium.

The second ground of appeal was brought under Article 13 of the Convention, as incorporated in reg 16(3)(b) of the Regulations, which provides that an order for the return of a child may be rejected if there is a ‘grave risk of harm’ or that the child will be placed in an ‘intolerable situation’. The appellant argued that returning the child to Belgium would place them in an ‘intolerable situation’ and pose ‘a grave risk of harm’ for two reasons: first, the impact on the child being a First Nations Australian child who would be required to live outside Australia and not have the same access to her First Nations Australian culture; and second, that the decision of the Belgian Court which maintains the child’s primary residence with the father removes the child from the care of her primary carer (the mother). In relation to the first ground, the Family Court held that the child’s First Nations Australian cultural heritage was not part of the evidence.

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436 Department of Communities and Justice & Bamfield [2021] FedCFamC1F 263 [1]–[11] (‘Bamfield 2021’).
437 Family Law (Child Abduction) Regulations 1986 (Cth) (‘Family Law Regulations’).
438 Bamfield (n 41) [3]–[4].
439 Family Law Regulations (n 438) reg 16(1A)(b); Bamfield (n 41) [60].
440 Bamfield (n 41) [60].
441 Ibid [59].
442 Ibid [66].
443 Family Law Regulations (n 438) reg 16(3)(b); Child Abduction Convention (n 39) art 13(b).
444 Bamfield (n 41) [82].
before the primary judge;\textsuperscript{445} therefore, the Family Court was not required to have regard to the significance of the child’s First Nations Australian cultural heritage.

In relation to the second ground, the Family Court referred to the simultaneous parenting proceedings in the Belgium Court, noting that the appellant accepted the jurisdiction of the Belgium Court. It held that Ms Bamfield was not permitted to use the present proceedings as an effective appeal against the determination of the courts of another state party (Belgium) to the Convention by asking the Family Court to find that the decision of the Belgium Court itself places the child in an ‘intolerable situation’.\textsuperscript{446} It concluded that the circumstances did not constitute an ‘intolerable situation’ for the child and thus there was no discretion to refuse to make a return order under reg 16(3) of the Regulations.\textsuperscript{447} No grounds were successfully established, and the appeal was dismissed.

A further ground of appeal argued by the appellant was that the primary judge erred in finding that she (the primary judge) had the power under the Convention to to make necessary orders for the mother’s maintenance by way of ‘conditions to return’ when refusing to exercise the discretion to refuse to return.\textsuperscript{448} Here, the primary judge included in the orders a requirement that the father make payments to the mother and that the mother was not obliged to return unless the payments were made.\textsuperscript{449} The Family Court applied reg 15(1)(b) of the Regulations which empowers the primary judge to make ‘any other order that the court considers to be appropriate to give effect to the Convention’ and dismissed the appeal.\textsuperscript{450}

\textit{Comment on international law}

This case was decided under the Convention to which Australia is a state party. The Convention, in its preamble, speaks of protecting children from the harmful effects of wrongful removal or retention across international boundaries and providing a procedure for the child’s prompt return to their country of residence. The Convention is incorporated into Australian law through s 111B of the \textit{Family Law Act 1975} (Cth) and the \textit{Family Law (Child Abduction) Regulations 1986} (Cth). The Central Authority is charged with satisfying the State party’s responsibilities under the Convention. In Australia, that role is performed by the Attorney General’s Department. In NSW, the State Central Authority is the NSW Department of Communities and Justice.

Schedule 1 of the Regulations sets out the text of the Convention and Article 11 of the Convention provides the Family Court with judicial authority to reach a decision within six weeks of hearing the State Central Authority’s case.\textsuperscript{451} The Family Court made separate reference to the fact that nine months had passed between the filing of the urgent application and determination by the primary judge in the Family Court.\textsuperscript{452} It noted with some disapproval the failure to meet the six-week timeline and emphasised the necessity of hearing and determining matters promptly to avoid defeating the purposes of the Convention. Here, the

\textsuperscript{445} Ibid [82].
\textsuperscript{446} Ibid [85]–[86].
\textsuperscript{447} \textit{Family Law Regulations} (n 438) reg 16(3).
\textsuperscript{448} \textit{Bamfield} (n 41) [69].
\textsuperscript{449} \textit{Bamfield 2021} (n 437) [206]-[210].
\textsuperscript{450} \textit{Bamfield} (n 41) [70].
\textsuperscript{451} \textit{Child Abduction Convention} (n 39) art 11.
\textsuperscript{452} \textit{Bamfield} (n 41) [19].
Family Court cited Kirby J’s comments about delay in *De L v Director-General NSW Department of Community Services* as offending the spirit of Article 11 of the Convention.

The Family Court decided the case in accordance with the provisions of the Regulations which incorporate the provisions of the Convention in an almost identical fashion. The operative provision in the Family Court’s decision was Article 13 of the Convention, as incorporated in reg 16(3)(b) of the Regulations, which provides that an order for the return of a child may be rejected if there is a ‘grave risk of harm’ or that the child will be placed in an ‘intolerable situation’. In the absence of an explicit criteria of what constitutes the threshold ‘grave risk of harm’ in either the Regulations or the Convention, the Family Court exercised significant latitude in establishing that the grounds argued by the appellant did not enliven the discretion to refuse to make an order for return.

To address the concern that courts often overlook Article 13 of the Convention, the Australian government has recently proposed to amend reg 13(1)(b) of the Regulations to explicitly connect ‘grave risk of harm’ with family and domestic violence or to deem such violence an ‘intolerable situation’. Although this amendment would have had no bearing on the outcome in this case as no family or domestic violence was alleged by the appellant, it will require Australian courts to consider allegations of family and domestic violence before any return orders are made for children under the Convention. This will oblige courts to prioritise Article 13 of the Convention over other considerations.

Brief reference was made to Article 30 of the *UN Convention on the Rights of the Child* (‘CRC’) in the primary judgment. Counsel for the respondent mother requested that the primary judge draw an inference that the fact that the child’s First Nations cultural background was not mentioned in the Belgian proceedings indicates that this is not a matter the Belgium courts would consider. However, Bennett J refused to draw that inference because Belgium is a signatory to the CRC and Article 30 makes it clear that children and young people who belong to a minority group have the right to share their culture, language and religion with other people in that group. None of the international instruments potentially relevant to the question of the child’s connection with Aboriginal culture were discussed in the 2022 Family Court decision. These include Article 30 of the CRC, as well as relevant provisions of the *UN Declaration on the Rights of...*
Federal Circuit and Family Court of Australia
Bennett J
4 February 2022

Family Law — abduction — where father obtained permission to take child on a holiday to Russia — where child wrongfully retained in Russia — where courts in Russia ordered that child be returned to Australia pursuant to the 1980 Hague Convention — where taking parent has appealed return order and appeal is yet to be heard in Russia

Family Law — abduction — where father alleges that habitual residence of child changed when child made disclosures to him of inappropriate sexual conduct in mother's household

Family Law — jurisdiction — where Australia retains primary jurisdiction pursuant to 1996 Child Protection Convention — where wrongful retention does not alter Australia's primary jurisdiction

Family Law — enforcement — where original parenting order made in Australia, by consent, in 2018 is to be recognised by operation of law in the Russian Federation and can be declared to be enforceable or registered for enforcement (as the case may be) in the Russian Federation

**Background**

The applicant, Ms Nicoli, sought the return of her child, X (7 years old), to Australia from Russia through the enforcement of Australian parenting orders made by a Russian court of competent jurisdiction under Chapter IV of *The Hague Convention of 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children* (‘the 1996 Convention’).\(^{463}\) The 1996 Convention entered into force between Australia and the Russian Federation on 1 June 2013 and provides for international cooperation between states parties in relation to children.\(^{464}\) Ms Nicoli and the respondent, Mr. Jeryn (X's father) had been separated since 2015 when X was 2 years old.\(^{465}\) On 26 October 2020, Mr Jeryn took X on a purported family holiday to Russia but subsequently failed to return to Australia as planned on 19 November 2020.\(^{466}\)

One of the reasons given by Mr Jeryn for this action was that X had allegedly made certain ‘disclosures of sexualisation’ by the mother and the mother’s partner after X had arrived in the Russian Federation.\(^{467}\) There are no specific details as to the factual content of these disclosures, although it seems possible that

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\(^{462}\) ICESCR (n 240) arts 19(3), 3, 15.

\(^{463}\) *Nicoli* (n 42) [1].

\(^{464}\) *Nicoli* (n 42) [70].

\(^{465}\) Ibid [14].

\(^{466}\) Ibid [35]–[36].

\(^{467}\) Ibid [36].
the allegation may have been made as a result of the father’s disapproval of Ms Nicoli’s same sex relationship (a relationship about which he was ‘aggrieved’) and/or the fact that the mother’s partner posted a photo of her and X unclothed in the bath on Instagram (according to Bennet J, this photo was not ‘sexual or lewd or exploitative or distasteful’, although Her Honour judged it to be ‘not decorous’). As this hearing concerned issues of jurisdiction and enforcement of orders, Bennett J found it inappropriate to make findings on these facts but did request that an Independent Children’s Lawyer be appointed to represent X’s interests as a result of the allegations.

Following Mr Jeryn’s failure to return X to Australia, Ms Nicoli brought an application under the Child Abduction Convention, which was filed in the relevant Russian court on 26 January 2021. Her application was successfully granted but Mr Jeryn subsequently appealed in September 2021 and the decision on his appeal was, at the time of Bennett J’s decision, still pending. In the Federal Circuit and Family Court of Appeal, he instead sought a declaration that X’s habitual residence was Russia and that Russian courts are therefore the appropriate courts to make parenting orders about X.

**Decision**

The major issue in this case was whether Australian court orders were enforceable in the Russian Federation. In determining the key legal issues in this case, Bennett J applied several relevant articles of the 1996 Convention. Under Article 23(1) of that Convention, ‘[t]he measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States’ unless any of the circumstances in Article 23(2) are made out. Justice Bennett thus addressed each of those circumstances to determine if any were made out.

The key question arising under Article 23(2)(a) was whether Australia had primary jurisdiction over the matter. In determining this question, Bennett J applied Article 7(1) of the 1996 Convention which provides that:

> In case of wrongful removal or retention of the child, the authorities of the Contracting State in which the child was habitually resident immediately before the removal or retention keep their jurisdiction until the child has acquired a habitual residence in another State.

As such, it was necessary to determine whether X’s habitual residence immediately before the removal or retention was Australia or Russia. In doing so, Bennett J concluded that as X’s mother had not consented to X being retained in Russia after 19 November 2020 and neither parent had done anything prior to that date to alter X’s habitual residence, X was habitually resident in Australia immediately prior to her wrongful

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468 Ibid [5], [16].
469 Ibid [5], [8].
470 *Child Abduction Convention* (n 39).
471 *Nicoli* (n 42) [88].
472 Ibid.
473 Ibid [2], [6].
474 *The 1996 Convention* (n 464) art 23(1).
475 Ibid art 23(1)(a).
476 Ibid art 7.
retention in Russia on 19 November 2020. Therefore, as per Articles 5 and 7 of the 1996 Convention, Australia retained primary jurisdiction to make orders such as those made by Bennett J in the Federal Circuit and Family Court of Australia.

The next circumstance enumerated in Article 23(2)(b) of the 1996 Convention was whether a measure had been taken ‘without the child having been provided the opportunity to be heard’. In assessing this issue, Bennett J first highlighted that ‘there is no fundamental principle that a child be heard in parenting proceedings’ before noting that in the present proceedings, an Independent Children’s Lawyer had been appointed and heard on X’s behalf. The remaining circumstances in Article 23(2) were all covered quickly by Bennett J without raising any contentious issues. As such, Bennett J concluded that none of the Article 23(2) factors were made out and Australia retained primary jurisdiction pursuant to Article 7 of the 1996 Convention. Her Honour thus ordered that Mr Jeryn return X to Australia no later than 72 hours after the determination of his appeal in the Russian court.

Comment on international law

International law was hugely relevant to the outcome of this case as almost all of the relevant legislation cited and applied by Bennett J was derived from international conventions. The case therefore demonstrates how these conventions can be successfully adopted into Australian domestic law and given effect to by Australian courts.

As a postscript, Bennett J noted that the matter would have been easier to deal with if she had been able to communicate with a Russian judge designated to the International Hague Network of Judges (‘the Network’) of which she is herself a member. Justice Bennett noted a major advantage of that Network is that its designated judges must be experienced in matters relating to the Hague Convention on Child Abduction, which has enabled the establishment of ‘a trustworthy conduit of knowledgeable and trained judges who can facilitate other judges by providing information on questions of law, procedure [and] protections afforded to parties and children’. She therefore recommended that Russia designate judges to the Network in order to make future communication easier between the two jurisdictions and so that they could act ‘in the interests of international comity and in order to secure the best outcomes for children whose families span international borders’.

Secretary, Department of Communities and Justice and Woodard [2022] FedCFamC1F 52

477 Nicoli (n 42) [77].
478 Ibid [81]; The 1996 Convention (n 464) arts 5(2), 7.
479 The 1996 Convention (n 462) art 23(2)(b).
480 Nicoli (n 42) [82].
481 Ibid [83]–[86].
482 Ibid [87]–[89].
483 Ibid [3].
484 Ibid [90], [92].
486 Ibid [90]–[97].
Federal Circuit & Family Court of Australia
Williams J
11 February 2022

Family law — child abduction — 1980 Hague Convention — Child brought to Australia from Japan — Jurisdictional facts conceded by the mother — Consideration of regulatory exceptions (reg 16(3)(a)(ii) and (b)) — Held, it was not the father’s intention to acquiesce to the child remaining in Australia — Held, return of the child to Japan would not expose the child to a grave risk of physical or psychological harm or otherwise place the child in an intolerable situation — Insufficient evidence — Mother has not satisfied any of the regulatory exceptions — Family Law Act 1975 (Cth) s 111B — Family Law (Child Abduction Convention) Regulations 1986 — reg 16 — No conditions to return — Return order made.

Background

The Court considered an application by the Secretary, Department of Communities and Justice for the return of a child to Japan pursuant to the provisions of the Family Law (Child Abduction Convention) Regulations 1986 (Cth) at the request of the child’s father (a Japanese citizen). The child was born in 2019 to Mr C (the father) and Ms Woodard (the respondent, an Australian citizen) after meeting in Sydney and moving to Japan.487 The respondent brought the child to Australia in 2020 to see her family, although commenced another romantic relationship and failed to return back to Japan with the child.

The relevant regulations were made pursuant to s 111B of the Family Law Act 1975 (Cth) to ensure that the provision is necessary to enable the performance of Australia’s obligations under the Child Abduction Convention.488 This Convention in public international law provides the framework for the prompt return of children where there has been an alleged wrongful retention of a child away from their habitual residence. Australia and Japan are both signatories to the Convention.489

Issue

At the outset, the Court noted that there was no dispute regarding the jurisdictional facts. In fact, the respondent conceded that all prerequisites in regs 16(1) and 16(1A) were satisfied.490 The primary issue that faced the Court was therefore whether any of the exceptions canvassed in s 16(3) of the Family Law Act were made out, such that the Court may refuse the concession by the respondent.491 More specifically, the issues were whether the father acquiesced to the child being retained in Australia and whether there was grave risk that returning the child would expose him to physical or psychological harm or otherwise place him in an intolerable situation.

Decision

The Court first considered whether, per reg 16(3)(a)(ii), the father acquiesced to the child being retained in Australia. The Court relied upon the propositions set out in Department of Family and Community Services &
Raelson to explain what may amount to acquiescence. Her Honour found that it was clearly not the father’s subjective intention, through the ongoing negotiations and lack of any unacceptable delay from when the father became aware of his rights under the Convention, to acquiesce not to insist upon the return of the child.

The Court subsequently considered whether, per reg 16(3)(b), there was a grave risk that returning the child to Japan would expose him to physical or psychological harm or otherwise place him in an intolerable situation. The respondent submitted that the child may be exposed to the father’s mental health issues or issues of family violence, although Her Honour found that the evidence adduced ‘could not possibly be regarded as extreme and compelling’ to satisfy the application of the regulatory exception in reg 16(3)(b). The Court found that the mother may face real challenges if she chooses to return to Japan with the child, however none rise to exposing the child to any ‘grave risk’. In fact, the respondent’s evidence was described as the kind of ‘disruption, uncertainty, and anxiety’ which the High Court considered in DP to be an inevitable consequence of the child returning to his country of habitual residence.

Hence, although acknowledging the difficulties for the mother, Williams J found that it would be contrary to the purpose and underlying philosophy of the Child Abduction Convention to refuse to return the child to Japan.

Comment on international law

This decision incorporates public international law in two ways. First, the decision elucidates how domestic legislation can be influenced largely by Australia’s treaty obligations, evidenced through the reliance on the Child Abduction Convention to which both relevant countries (Australian and Japan) are parties. Second, the decision illustrates how Australian courts may rely on the purpose and underlying philosophy of Australia’s international obligations when interpreting domestic legislation.

VI. International criminal law

BYJB v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 734

Federal Court of Australia
Justice Mortimer
24 June 2022

International criminal law — war crimes — child soldiers — Sri Lankan civil war — Tamil Tigers — refusal of Australian protection visa on the basis of the commission of war crimes — immigration — non-refoulement — judicial review

Background

492 Department of Family and Community Services & Raelson [2014] FamCA 131, [100] (Kent J).
493 Woodard (n 43) [60]–[62].
494 Ibid [84].
495 Ibid [85].
496 DP v Commonwealth Central Authority; JLM v Director-General, NSW Department of Community Services [2001] HCA 39 [45].
This is a somewhat unusual case that involved consideration of international criminal law offences relating to the recruitment and use of child soldiers and Australian refugee law. The applicant, Mr BYJB, is a Sri Lankan national of Tamil ethnicity, and was a member of the Liberation Tigers of Tamil Eelam (LTTE) during the Sri Lankan civil war, which was a ‘non-international armed conflict’ in the language of international humanitarian law (IHL). 497

In September 2015, he applied for an Australian protection visa on the basis that he would be persecuted if returned to Sri Lanka because of his former affiliation with the LTTE. The application was declined by a delegate of the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (‘the Minister’) under s 5H(2) of the Migration Act 1958 (Cth), even though the applicant engaged Australia’s protection obligations under s 5H(1), because there were serious reasons for believing he had committed a war crime under the 1998 Rome Statute of the International Criminal Court (‘Rome Statute’). 498

In 2002, Australia ratified the Rome Statute and enacted the International Criminal Court (Consequential Amendments Act 2002 (Cth), the latter of which amended the Criminal Code Act 1995 (Cth). The amendments incorporated the Rome Statute offences of genocide, crimes against humanity, war crimes and the offences against the administration of justice at the International Criminal Court (ICC). 499 Specifically, s 268.68 proscribes conscripting or enlisting children under the age of 15 into an armed group or using them ‘to participate actively in hostilities’ during an international armed conflict; and s 268.88 prohibits that same conduct during a non-international armed conflict. These sections enact Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute, respectively. The Minister’s delegate suspected Mr BYJB of having committed the latter offence during Sri Lanka’s civil war. 500

Mr BYJB challenged the delegate’s decision in the AAT without success. 501 Relevantly, the AAT had concluded that there were serious reasons to believe he had committed the war crime of using children under the age of 15 ‘to participate actively in hostilities’ based solely on evidence that the applicant knew that the LTTE had used persons (of unspecified age) to supply food and clean and store weapons for the LTTE in a particular location (the ‘District B camp’). 502

Mr BYJB sought judicial review of the AAT’s decision in the Federal Court on three grounds. First, that the AAT had not determined sufficiently that the children relevant to the delegate’s decision were under the age of 15 years as required by the Rome Statute. 503

Second, that the AAT had misunderstood the phrase ‘actively participating in hostilities’ as found in Article 8(2)(e)(vii) of the Rome Statute. 504 Specifically, the AAT had failed to demonstrate the existence of a link between the hostilities and the activities of the relevant children, in accordance with the ICC’s interpretation

497 BYJB (n 32) [2], [72].
498 Ibid [3].
500 BYJB (n 32) [3].
501 BYJB v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 3315 (‘BYJB 2021’).
502 Ibid [42].
503 BYJB (n 32) [25]–[26].
504 Ibid [27].
of Article 8(2)(e)(vii) in *Lubanga* (discussed below).  

Third, that the AAT’s findings were legally unreasonable because they relied almost exclusively on the record of an interview between the Applicant and the Minister’s delegate which was affected by mistranslation.  

*Decision*

In the Federal Court, the scope of the review was limited to the applicant’s role in relation to the war crime of using children under 15 ‘to participate actively in hostilities’ (and not their conscription or enlistment) in the ‘District B’ camp.  

Upholding the first ground, Mortimer J accepted the applicant’s argument that the AAT had failed to distinguish between children under the age of 15 years, as required by the Rome Statute, and children generally (that is, those under the age of 18 years). Her Honour held that the AAT had simply relied on the applicant’s statements in his protection visa interview, which were inconclusive as to age, and had failed to inquire further about the age of the recruits at the camp in District B.  

On the second ground, Mortimer J considered the decisions in *Lubanga* in relation to the operation of Article 8(2)(e)(vii) of the Rome Statute. The accused in that case, Mr Thomas Lubanga Dyilo, was the Commander-in-Chief of the *Forces Patriotique pour la Libération du Congo* (FPLC), a military group engaged in the civil war in the Democratic Republic of Congo (DRC). He was prosecuted and convicted in the ICC under Article 8(2)(e)(vii) for the recruitment and use of children under the age for 15 for active participation in hostilities during the civil war in the DRC from 2002 to 2003.  

Mr Lubanga’s trial primarily concerned his involvement and knowledge of the FPLC’s recruitment practices. However, the FPLC’s use of child soldiers as bodyguards to the commanders was relevant to the present judicial review because the ICC trial and appeal judgments provide guidance on the meaning of ‘to participate actively in hostilities’ for the purposes of Article 8(2)(e)(vii). On that issue, the ICC Trial Chamber held that the child’s exposure to risk of being targeted by the enemy was essential to a finding of ‘active participation’.  

The ICC Appeals Chamber rejected Mr Lubanga’s appeal against his conviction. However, it did not accept the Trial Chamber’s finding that a child’s exposure to a risk of being targeted is an essential
component of ‘active participation’. Instead, it held that ‘the crime of using children to participate actively in hostilities’ requires a link between the activities that the child is required to perform and the relevant hostilities. In Lubanga’s case, using children as bodyguards to FPLC commanders was a sufficient link and the requirements of Article 8(2)(e)(vii) was established.

The ICC Appeals Chamber further clarified that the term ‘to participate actively in hostilities’ as used in Article 8(2)(e)(vii) is broader than the term ‘direct participation in hostilities’ used in IHL. In support of this position, it cited the drafting history of the Rome Statute, which indicated that:

The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase [or] the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.

In the Federal Court, Mortimer J adopted the ICC Appeals Chamber’s reasoning, finding that the AAT did not establish the existence of a link between the activities of collecting food and cleaning weapons in District B and the hostilities in which the LTTE was engaged. Her Honour was critical of the AAT’s reliance on a statement made by the applicant in his visa interview, in which he referred to ‘cadres’ being used to collect food and clean weapons, to establish that children under the age of 15 years had been actively participating in hostilities. She found that:

There are no factual findings by the Tribunal about the role or function of the camp in District B, nor about whether soldiers participating in combat for the LTTE were living at the camp in District B, nor where they participated in combat, if they did.

By failing to establish the facts of the activities in District B, the AAT did not establish a ‘link’ or ‘sufficiently close relationship’ between the activities in the camp and the hostilities, and it was incorrect to hold that Article 8(2)(e)(vii) had been satisfied on this basis. Her Honour noted that there may have been evidence which could have justified a finding that there were serious reasons to believe that he had committed this war crime. However, she did not specify what that evidence was.

Mortimer J rejected the final ground of legal unreasonableness. However, she ruled that the errors in

517 Ibid [48].
518 Ibid.
519 Ibid.
520 Ibid, citing Lubanga Appeal Judgment (n 506) [328].
521 Ibid, citing Lubanga Appeal Judgment (n 506) [334].
522 Ibid [91].
523 Ibid, citing BYJB 2021 (n 502) [42].
524 Ibid.
525 Ibid.
526 Ibid.
527 Ibid.
528 Ibid [94].
grounds one and two were of sufficient materiality to place the AAT in jurisdictional error.\textsuperscript{529} The AAT’s decision was set aside, and the case was remitted to the AAT (with a differently constituted Tribunal) for reconsideration according to law.\textsuperscript{530} Mortimer J commented that the protection visa might be considered ‘in a more holistic sense’, as the applicant had been residing in the Australian community for a considerable period.\textsuperscript{531} Her Honour also noted that the provisions of s 5H(2) of the Act do not have a punitive purpose.\textsuperscript{532} As of 1 February 2023, the AAT is yet to reconsider this matter.

Comment on international law

International law, particularly the Rome Statute and relevant decisions of the ICC, played a crucial part of the Federal Court’s decision in this case. The Federal Court made detailed reference to Article 8(2)(e)(vii) of the Rome Statute, and to the ICC’s interpretation of that article in the Lubanga case, to understand the scope of the war crime of using children under the age of 15 ‘to participate actively in hostilities’.

VII. Other treaties

\textit{DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd} [2022] WASCA 97

Western Australian Court of Appeal
Quinlan CJ, Beech JA, Vaughan JA
2 August 2022

Commercial arbitration — Arbitration agreement — Commercial Arbitration Act 2012 (WA) s 8(1) — UNCITRAL Model Law on International Commercial Arbitration — Interpretation of domestic statutes that are modelled on international conventions — Whether party who requested referral to arbitration was not party to relevant dispute

\textbf{Background}

This case turned on the interpretation of s 8 of the \textit{Commercial Arbitration Act 2012} (WA) (‘\textit{CAA}’). The \textit{CAA} was modelled upon the United Nations Commission on International Trade Law’s \textit{Model Law on International Commercial Arbitration} (‘\textit{Model Law}’).\textsuperscript{533} The WA Court of Appeal therefore set out relevant principles of interpreting domestic statutes that are based on international treaties or conventions.\textsuperscript{534}

This background to this appeal arises from a series of other disputes which relate to the Hope Down Deed.\textsuperscript{535} The Hope Down Deed is a deed entered into by a number of persons including Hancock Prospecting Pty Ltd (HPPL), Gina Rinehart, and her children, Bianca, Hope, Ginia and John Rinehart (‘the Children’).\textsuperscript{536} The Deed purports to settle disputes between the aforementioned parties relating to mining

\textsuperscript{529} Ibid [99].
\textsuperscript{530} Ibid [101].
\textsuperscript{531} Ibid [102].
\textsuperscript{532} Ibid.
\textsuperscript{534} \textit{DFD Rhodes} (n 46) [337]-[341].
\textsuperscript{535} Ibid [7].
\textsuperscript{536} Ibid [8].
tenements. Clause 20 of the Deed outlines that any dispute arising under the Deed must be settled through means of a confidential arbitration.

Since entering into the Deed, Bianca and John have brought many judicial proceedings concerning the conduct of Gina, HPPL and others, pertaining to the ownership of the tenements under the Deed. Bianca and John commenced proceedings against Gina, HPPL and Hope Downs Iron Ore (HDIO) (a subsidiary of HPPL) in the Federal Court, where they argued that the tenements were held on trust for all the Children (the Federal Court proceedings). These proceedings were ultimately stayed under s 8(1) of the CAA pending an arbitral referral between the parties.

Concurrently, Wright Prospecting Pty Ltd (WPPL) and DFD Rhodes Ptd Ltd (Rhodes), both of whom are not parties to the Hope Down Deed nor bound to its provisions, claimed an interest in the tenements. WPPL commenced proceedings against HPPL, HDIO and the Children (WPPL proceedings), with Rhodes also commencing proceedings against HPPL, HDIO, the Children and WPPL (Rhodes proceedings).

Bianca and John filed defences to both proceedings as well as counterclaims against Gina, other persons and all the other parties to the Hope Down Deed. In these counterclaims, Bianca and John made the same claims as in the Federal Court proceedings.

HPPL applied for a court order that all of the parties to the Rhodes proceedings and the WPPL proceedings apart from the plaintiffs to those proceedings (Rhodes and WPPL, respectively) be referred to an arbitration in respect of the defence and counterclaims of Bianca and John and also that those defences and counterclaims be stayed pursuant to s 8(1) of the CAA and an order by given that the whole of the proceedings be stayed pending the outcome of the arbitration.

Le Miere J, at trial, stayed the counterclaims against the parties to the arbitration in the Hope Downs Deed pursuant to s 8(1) and stayed the other counterclaims against the other parties pursuant to the court’s general power to control its own proceedings.

The relevant issue of the appeal is Ground 4 which concerns whether HPPL is ‘a party’ that can ‘request’ the court to refer Rhodes and John & Bianca to an arbitration within the meaning of s 8 of the CAA. The primary judge held that HPPL was ‘a party’ within the meaning of s 8, and therefore could request that Rhodes and Bianca and John be referred to an arbitration, despite not being ‘a party’ to the arbitral matter between Rhodes and Bianca and John; indeed, it was sufficient that HPPL was ‘a party’ to the arbitration

537 Ibid [10].
539 Ibid [12].
540 Ibid.
541 Ibid [13].
542 Ibid [14].
543 Ibid.
544 Ibid [15].
545 Ibid.
546 Ibid [16].
547 Ibid [17].
548 Ibid [89]–[90].
agreement and action before the court concerning the arbitral matters.\textsuperscript{549}

\textit{Decision}

Certain sections of the \textit{CAA} contain a reference to a ‘Model Law’ in their headings, which highlights that the wording of those sections is substantially the same as the UN Model Law.\textsuperscript{550} The Court found that by clearly identifying the origins of the provision, the Parliament has manifestly shown its intention to enact the Model Law as part of the domestic law of WA.\textsuperscript{551} Further, s 2A of the \textit{CAA}, establishes that in interpreting that Act, regard must be had to maintaining uniformity between the application of the provisions to domestic commercial arbitrations and the application of the Model Law to international commercial arbitrations.\textsuperscript{552}

Accordingly, s 8 of the \textit{CAA} is based on Article 8 of the Model Law, as evidenced in the heading of the provision.\textsuperscript{553} The two provisions are almost identical, with any differences being merely ‘cosmetic’.\textsuperscript{554} The purpose of s 8 of the \textit{CAA} is to ensure that persons that have agreed to arbitrate their disputes cannot have recourse to a court to settle the dispute.\textsuperscript{555} The section does this by requiring the Court to decline to exercise its jurisdiction to determine the dispute and instead refer the parties to arbitration.\textsuperscript{556}

Section 8(1) outlines that ‘a party’ must request that the Court refer the parties to arbitration.\textsuperscript{557} It is the term ‘a party’ that falls to be resolved. The term ‘party’ is defined in s 2(1) of the \textit{CAA}, as a ‘party to an arbitration agreement’ and includes ‘any person claiming under or through a party to the arbitration agreement’ or ‘in any case where the arbitration does not involve all the parties to the arbitration agreement, those parties to the arbitration agreement who are parties to the arbitration agreement’.\textsuperscript{558} The Model Law does not provide a definition of ‘a party’.\textsuperscript{559}

\textit{Comment on international law}

In interpreting terms in domestic laws that are based on international model laws, the Court approved the applicable legal principles of Maxwell P in \textit{Subway Systems Australia Pty Ltd v Ireland}, namely that (a) ‘certainty and uniformity’ of interpretation are paramount, (b) the general rules of treaty interpretation will override those of domestic law interpretation, (c) the interpretation of those domestic provisions should be ‘unconstrained by technical rules of interpretation and should instead be informed by broad principles of general acceptation’ and (d) recourse can be had to the working documents of the organisation that formulated the rules.\textsuperscript{560}

\begin{footnotesize}
\begin{enumerate}
\item Ibid [308].
\item Ibid [312].
\item Ibid.
\item \textit{Commercial Arbitration Act} 2012 (WA) s 2A (‘\textit{CAA}’).
\item Ibid s 8; \textit{Model Law} (n 542) art 8.
\item \textit{DFD Rhodes} (n 46) [318].
\item Ibid [319]; \textit{CAA} (n 553) s 8(1).
\item Ibid.
\item \textit{CAA} (n 553) s 8(1).
\item Ibid s 2(1).
\item \textit{DFD Rhodes} (n 64) [330].
\item \textit{DFD Rhodes} (n 46) [337], quoting \textit{Subway Systems Australia Pty Ltd v Ireland} (‘\textit{Subway v Ireland}’) (2014) 46 VR 49 [29].
\end{enumerate}
\end{footnotesize}
With respect to Australian law, Maxwell P’s reference to ‘broad principles of general acceptation’ is derived from *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd.* In that case, the High Court stated that courts should ‘construe rules formulated by an international convention, in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation’. Therefore, as Vaughan J makes clear, although the court should look to the context and purpose of the provision whilst placing primacy on the natural meaning of words, as in interpreting a domestic law, ‘it should not take an insular approach’. Rather, the court should take a more liberal approach in interpreting international conventions than it would in construing domestic legislation, in a manner which seeks to advance the purpose and object of the international convention or the ‘mischief’ that the statute seeks to resolve.

Furthermore, great emphasis should be placed on certainty and uniformity where a domestic statute is based upon an international convention. That is to say that when interpreting the *CAA*, the court must ‘promote uniformity by ensuring that as far as possible, the application of the *CAA* to domestic arbitrations is the same as the application of the *Model Law* to international arbitrations. This is even more pertinent when interpreting the *CAA*, as the Act itself highlights that it has been drafted in such a way so as to be as uniform as possible with the *Model Law*.

With this in mind, and after considering the competing interpretations of both parties, the Court held that any party to the arbitration may be a ‘requesting party’ within the meaning of s 8(1) *CAA*, despite the fact that they may not be ‘a party’ to the arbitral matter and regardless of whether or not they are ‘a party to the curial proceedings’. The term ‘a party’ thus means any party to the arbitration agreement. Therefore, HPPL can rely upon s 8(1) *CAA* notwithstanding that it was not a party to the arbitral matter involving Rhodes and, John and Bianca.

Ultimately, Ground 4 of the stay appeal was dismissed. However, with Ground 1 of the stay appeal succeeding, leave was granted to appeal the stay appeal. The strike-out appeal, separate question appeal and discovery appeals were all dismissed and leave to appeal refused.

**Comment on international law**

Therefore, as the *Commercial Arbitration Act 2012* (WA) is modelled upon the UNCITRAL Model Law on

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561 *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142 [159] (‘*Shipping Corporation v Gamlen*’).
562 Ibid.
563 *DFD Rhodes* (n 46) [340].
564 Ibid.
565 Ibid [341], citing *Shipping Corporation v Gamlen* (n 570) (159); *Great China Metal Industries Co Ltd v Malaysian International Shipping Corporation Berhad* (1998) 196 CLR 161 [38], [71]–[72], [137]–[138], [179]–[180]; *Garnett v Qantas Airways Ltd* (2021) WAR 290 [242].
566 Ibid.
567 Ibid.
568 Ibid [386].
569 Ibid.
570 Ibid.
571 Ibid [142].
572 Ibid [183].
573 Ibid [301]–[303].
International Commercial Arbitration, it was necessary for the Court of Appeal to expound the principles that are to be applied when interpreting domestic legislation that is based on international treaties or conventions.

**Ng v Commissioner of Australian Federal Police [2022] WASCA 48**

Western Australia Supreme Court of Appeal  
Buss P, Murphy JA, Mazza JA  
3 May 2022

Constitutional Law — Legislative power of the Commonwealth — Whether s 135.1(1) and s 400.9(1) of the Criminal Code (Cth) are valid enactments of the Commonwealth Parliament — Scope of the ‘external affairs’ power — Convention on Laundering, Search and Seizure and Confiscation of Proceeds from Crime (1997) ATS 21

**Background**

In this case, the Western Australia Supreme Court of Appeal (WASCA) analysed a treaty to which Australia is a state party, namely, the *Convention on Laundering, Search and Seizure and Confiscation of Proceeds from Crime* (‘Laundering Convention’) to determine whether certain Commonwealth legislation was supported by the ‘external affairs’ power in the Australian Constitution.

The background was as follows. Enquiries conducted by the Australian Federal Police (AFP) revealed that the appellants, Ms Ng and Mr Cha, had failed to declare their true income to the Australian Tax Office and had dealt with money and property whose value was grossly out of proportion to their declared taxable income, and which was suspected to be the proceeds of crime. Based on those enquiries, the AFP suspected Ms Ng and Mr Cha of offences under ss 135.1(1) and 400.9(1) of the *Criminal Code Act 1995* (Cth) (‘Criminal Code’). Section 135.1(1) is the offence of acting with the intent of dishonestly obtaining a gain from a Commonwealth entity. Section 400.9(1) is the offence of dealing with money or other property that is worth at least $100,000 and is reasonably suspected to be the proceeds of crime.

In light of the AFP’s findings, the primary judge made restraining orders under ss 18, 19 and 180 of the *Proceeds of Crimes Act 2002* (Cth) (‘POC Act’) to restrain the appellants from disposing of the relevant property, and to examine the appellants and their business associate. The orders were made in closed court in the absence of, and without notice to, the appellants. In their appeal before the WASCA, Ms Ng and Mr Cha argued, among other things, that no head of legislative power under the Constitution supports the POC Act if a person has not been charged with an offence.

**Decision**

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575 Ng (n 45) [29].
576 Ibid [25].
577 Ibid [10], [31]
578 Ibid [10].
579 Ibid [161]–[239].
The WASCA determined that s 135.1(1) of the Criminal Code is supported by s 51(xxxix) of the Constitution (matters incidental to the execution of any power vested in the Commonwealth Parliament, Commonwealth Government, Federal Judicature, or any Commonwealth department or officer) in conjunction with ss 61 and 51(ii) of the Constitution (the executive power, and the power to make laws with respect to taxation, respectively).\(^{580}\)

It then considered whether s 400.9(1) of the Criminal Code is supported by any head of power, including s 51 (xxix) of the Constitution, which gives the Commonwealth Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs (‘the external affairs power’).

On this point, the Court cited \textit{Victoria v The Commonwealth}, in which Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ observed that where legislative power of the Commonwealth is allegedly enlivened by a treaty binding on the Commonwealth, and the law in question prescribes a regime affecting a domestic subject matter, ‘a question arises as to the connection which must exist between the law and the treaty’.\(^{581}\)

It also cited \textit{Zheng v Commissioner of Australian Federal Police}, where the Full Court of the Supreme Court of South Australia noted that the Laundering Convention is relevant to the scope of the Commonwealth Parliament’s legislative power with respect to external affairs under s 51(xxix) of the Constitution.\(^{582}\)

Article 6(1)(a) of the Laundering Convention provides that each state party

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shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally … the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit in the commission of predicate offence to evade the legal consequences of his actions.
\end{quote}

Article 6(3) further provides that each state party

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may adopt such measures as it considers necessary to establish also as offences under its domestic law all or some of the facts referred to in [Article 6(1)] in any or all of the following cases where the offender:
\begin{enumerate}
  \item ‘ought to have assumed that the property was proceeds’;
  \item ‘acted for the purpose of making profit’;
  \item ‘acted for the purpose of promoting the carrying on of further criminal activity’.
\end{enumerate}
\end{quote}

In \textit{Zheng}, Parker J (Kourakis CJ and Kelly J agreeing) held that:

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  \item s 400.9(1) of the Criminal Code is reasonably capable of being considered as appropriate and adapted to give effect to Australia’s obligations under Article 6(1)(a) and Article 6(3) of the Laundering Convention; and
  \item s 400.9(1) is therefore supported by the external affairs power and is not invalid.\(^{583}\)
\end{enumerate}

Consistent with \textit{Zheng}, the WASCA found that s 400.9(1) of the Criminal Code is supported by the external

\[^{580}\]Ibid [82].
\[^{583}\]Ibid [194], citing Zheng (n 583) [128]–[129].
affairs power. It further found that the relevant provisions of the POC Act (ss 18, 19 and 180) are reasonably incidental to the subject matter of the heads of power (other than s 51(xxxix) that support ss 135.1(1) and 400.9(1) of the Criminal Code. The Court further held that the validity of any nexus between the POC Act and a legislative power of the Commonwealth Parliament does not depend upon whether a person has been charged with an offence. Instead, the validity of the nexus between provisions of the POC Act and a head of power depended on the justice and wisdom of, and are matters entirely for, the Commonwealth Parliament and not for the Judiciary.

Comment on international law

This case highlights the significance of international treaty law, namely the Laundering Convention, in determining the scope of the Commonwealth's legislative power with respect to external affairs. The WASCA referred to Article 6(1)(a) and Article 6(3) of the Laundering Convention and found that s 400.9(1) of the Criminal Code gave effect to Australia's obligations arising thereunder. Therefore, the external affairs power supported the valid enactment of s 400.9(1) of the Criminal Code.

Wells Fargo Trust Company National Association v VB Leaseco Pty Ltd (Administrators Appointed) (2022) 399 ALR 461

High Court of Australia
Judges: Kiefel CJ, Gageler, Keane, Edelman, and Steward JJ
Date of decision: 16 March 2022

Aircraft leasing — insolvency — burden of transportation of aircraft engines — 2001 Convention on International Interests in Mobile Equipment — 2001 Protocol to the Convention on International Interests on in Mobile Equipment Matters Specific to Aircraft Equipment — meaning of ‘give possession’

Background

The decision related to a dispute over possession of aircraft engines under a lease agreement after the lessee company went into administration. The High Court set out the obligations of creditors and debtors in insolvency events when very costly and significant pieces of aircraft equipment must be returned to the legal owners, and importantly, which parties must bear the very significant costs of that transportation. International law considered in this case included the 2001 Convention on International Interests in Mobile Equipment (‘the Convention’), which provides rights to each party in relation to the property under lease in the event of the appointment of administrators. Article XI(2) of the 2001 Protocol to the Convention on International Interests on in Mobile Equipment Matters Specific to Aircraft Equipment (‘the Protocol’) requires the debtor to ‘give possession’ of the aircraft to the owner.

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584 Ibid [197].
585 Ibid [199].
586 Ibid [200].
The legal owner of the engines was Wells Fargo Trust Company ('Wells Fargo'), who held on trust for the beneficial owner, Willis Lease Finance Corporation. VB Leaseco Pty Ltd ('Leaseco') leased the engines from Wells Fargo. On 20 April 2020, administrators were appointed to Leaseco, triggering the obligation under Article XI(2) of the Protocol for the administrators to ‘give possession’ of the aircraft to Wells Fargo. On 16 June 2020, Wells Fargo made a demand that Leaseco redeliver the engines to Florida, USA. However, the demand was rejected by Leaseco’s administrators who instead offered Wells Fargo an opportunity to ‘take control’ of the engines where they were situated in Australia. The disagreement related to which party was responsible for collecting and transporting the aircraft from where they were situated in Australia, and incurring the significant expense of transporting the parts back to Wells Fargo in Florida.

**Procedural history**

Wells Fargo initiated proceedings in the Federal Court of Australia arguing that Leaseco was responsible for delivering the aircraft. On 3 September 2020, Middleton J found in favour of Wells Fargo, interpreting the obligation in Article XI(2) of the Protocol to mean that Leaseco was responsible for delivering the aircraft. Leaseco appealed and on 7 October 2020, the Full Court of the Federal Court of Australia overturned Middleton J, finding that the obligation in Article XI(2) does not require physical redelivery of the aircraft. Wells Fargo then appealed in the High Court of Australia, and the Court delivered a unanimous judgment upholding the Full Federal Court’s decision on 16 March 2022.

**Decision**

The High Court had to interpret the content of the obligation to ‘give possession’ under Article XI(2) of the Protocol. The appellant, Wells Fargo, argued that the Federal Court was incorrect and the administrators of Leaseco were obligated to organise for physical redelivery of the aircraft engines to Florida. The Court interpreted the obligation in Article XI(2) of the Protocol to ‘give possession’ of the aircraft in conformance with the ‘applicable principles of interpretation’ as found in Article 31 of the 1969 Vienna Convention on the Law of Treaties, taking into account the context of the Convention and the Protocol.

The Court rejected Wells Fargo’s argument, upholding the Full Court’s decision. The Court held that the obligation was merely to allow Wells Fargo to take back possession of the aircraft, which it had done by offering it the opportunity to take control of the engines on 16 January 2020. In an important statement of principle in relation to insolvency events and the appointment of administrators, the Court said

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589 *Wells Fargo* (n 44) [8], [12].
590 Ibid [8].
591 *Wells Fargo Trust Company, National Association (trustee) v VB Leaseco Pty Ltd (administrators appointed)* [2020] FCA 1269, [8].
592 *L’B Leaseco Pty Ltd and Others v Wells Fargo Trust Company and Another* (2020) FCR 518 at 545 [101] per McKerracher, O’Callaghan and Colvin J.
593 *Wells Fargo* (n 44) [12].
594 Ibid [43].
595 Ibid [14].
596 Ibid [45].
597 Ibid [44].
598 Ibid [55].
It is the creditor who is to undertake, and be responsible for, the burden of the effort and expense of the physical transfer of aircraft objects from the Contracting State to the location nominated by the creditor. This aspect of the context in which Art XI(2) of the Protocol operates tends distinctly against Wells Fargo’s argument that this burden is necessarily part of ‘giving possession’.599

The Court ordered that the appeal be dismissed with costs and that the amount of $500,352.99 pursuant to the orders of the Federal Court is released to Leaseco.600

Comment on international law

The decision highlights the importance of international law in apportioning rights to parties to insolvency proceedings. As the Court stated, the question answered in this decision is of ‘general importance to the aviation industry’.601 This decision is an example of international law’s ability to general regulatory principles across a global and economically significant industry, providing certainty and clarity to creditors and debtors in future disputes. It is also a case in which the High Court of Australia utilised the 1969 Vienna Convention on the Law of Treaties in order to interpret an international instrument to which Australia is a state party.

599 Ibid [49].
600 Ibid [58].
601 Ibid [12].