Cases before International Courts and Tribunals concerning Questions of Public International Law Involving Australia 2021

Mary Crock, Mia Bridle, Ben Dajkovich, Emily Halloran, Kathryn McCormack, Eden McSheffrey, Madeline Pfeffercorn and Alicia Vakalopoulos

1 Introduction

In 2021 COVID-19 once again cast a long shadow over legal proceedings all over the world. In fact, the International Court of Justice (‘ICJ’) handed down only three decisions, which did not involve Australia. We acknowledge here that 2021 saw the untimely passing of renowned international jurist, James Crawford, ICJ Justice, former Dean of Sydney Law School and much-loved friend and mentor to so many international lawyers across Australia. On a happier note we celebrate the election to the ICJ of distinguished Australian scholar, Laureate Professor Hilary Charlesworth.

Australia’s engagement with international law in 2021 was heavily weighted towards international human rights law. The country faced its five-year Universal Periodic Review (‘UPR’) before the Human Rights Council. We include here both the conclusions by the Council and Australia’s response to recommendations made. The human rights theme was carried over into a series of cases brought before human rights treaty bodies on Australia’s

migration health rules,\(^5\) and on border closures in response to the COVID-19,\(^6\) as well as a statement submitted to the Human Rights Council about the response of Australia and other states to China’s alleged acts of genocide of Uighur people.\(^7\) As noted in our companion article, challenges to border closures was again a significant theme in domestic proceedings in 2021, as was the case in 2020.

Other cases of interest involve a decision by the Court of Sport Arbitration in relation to Australian athlete Shayna Jack\(^8\) and the ongoing legal drama around the extradition from the United Kingdom (‘UK’) to the United States (‘US’) of Australia’s Julian Assange.\(^9\) The theme of international security law that was so prominent in 2020 returns in 2021 with the report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security.

### 1.1 Theme 1: Human Rights

#### 1.1.1 Human Rights Council and Australia in 2021


#### 1.1.1.1 Report of the Working Group on the Universal Periodic Review—Australia

The Report of the Working Group on the UPR for Australia was handed down during the 47th session of the Human Rights Council. The Review was

---

5 Committee on the Rights of Persons with Disabilities, _Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 20/2014, 24th sess, UN Doc CRPD/C/24/D/20/2014_ (30 April 2021, adopted 19 March 2021) 2 [2.2] (‘Sherlock v Australia’).


8 _World Anti-Doping Agency v. Swimming Australia, Sport Integrity Australia & Shayna Jack (Award) AS 2020/A/7579._

9 See _The Government of USA v Julian Paul Assange [2021] EWHC 3313 (Admin) (‘Assange’)._
facilitated by Italy, the Marshall Islands and Senegal. General comments noted Australia’s ‘proactive approach to human rights domestically’ since the last UPR in 2015, specifically the ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the implementation of the National Agreement on Closing the Gap and the legalisation of same-sex marriage. However, it was also observed that Australia still faces issues relating to human rights, most notably relating to the ‘mistreatment of vulnerable people in institutional settings and challenges faced in improving the lives of Indigenous Australians’.

Australia was commended for its response to the COVID-19 pandemic, success as a multicultural society and actions taken to address domestic violence. Despite the strong protections of civil and political rights noted in the UPR, it was observed that efforts still need to be made to address racism and discrimination against Indigenous Australians and other minority groups.

A total of 122 delegations made 344 specific comments relating to Australia’s human rights record. A brief summary of the most popular recommendations are as follows:

1. Australia should sign and/or ratify the following international human rights instruments:
   a. International Convention for the Protection of All Persons from Enforced Disappearance;
   b. Optional Protocol to the Convention on the Rights of the Child;
   c. Convention on Migrant Workers;
   d. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights; and
   e. the ILO Indigenous and Tribal Peoples Convention.

2. Australia should withdraw its reservations to the Convention on the Rights of the Child (requiring children to be detained separately to adults and raising the age of criminal responsibility).

---

11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid [5]–[9].
15 Ibid.
16 Ibid [9]–[27].
3. The Australian Government should provide greater support for the Australian Human Rights Commission and steps should be taken to ensure greater integration of human rights commitments into domestic law, including the implementation of a domestic Human Rights Act at the federal level.

4. Necessary steps should be taken in order to combat racial discrimination and ensure the protection of the rights of vulnerable people and minorities.

5. Australia should take measures to ensure its target contribution of 0.7% of GDP to official development assistance is met.

6. Additional policies regarding climate change should be implemented.

7. Laws and policies relating to incarceration should be reformed. This includes areas such as violence in prisons and mandatory minimum sentences, as well as ensuring access to mental support services for prisoners with disabilities, as well as all prisoners generally. There was significant support for an increase in the age of criminal responsibility, with the consensus being to 14 years of age. Comments were also made that the disproportionate representation of Indigenous Australians in the prison system should be addressed, and that allegations of war crimes within the Australian Defence Force should be thoroughly investigated.

8. Policies should be strengthened to attempt to eliminate gender-based violence, the gender pay gap and discrimination against women.

9. A national plan to protect the rights of children should be developed to provide better access to childhood services (including mental health services), increased school funding and inclusive education for children with disabilities.

10. Discriminatory practices against people with disabilities should be eliminated, noting especially unjustified medical procedures (including forced sterilisation) and better access to resources relating to the justice system.

11. Action to recognise and promote the human rights of Indigenous Australians should continue to occur. This includes steps to address housing needs, access to quality education, meaningful political participation and access to health services.

12. Efforts to improve the human rights of migrants should be strengthened. The comments noted particularly the processing of asylum seekers, observing that families should not be separated and that children should not be kept in immigration detention centres. It was also suggested that the non-refoulement principle (under which Australia could not send asylum seekers back to a country where they would be subject to harm) should be guaranteed.
13. Protections relating to free speech of journalists and whistle-blowers should be increased.

14. Additional frameworks should be implemented to prevent human trafficking and modern slavery, including increased cooperation with regional neighbours.

15. Laws relating to counter-terrorism should be reviewed to ensure they are in compliance with international human rights obligations.

The UPR concluded with five voluntary commitments made by the Australian Government to address Australia’s human rights record. These were:17
1. Implement a new national disability strategy for 2021–2030. This will act as the primary mechanism by which Australia will implements its obligations under the Convention on the Rights of Persons with Disabilities.
2. Continue to support older Australians to live in their own homes, including greater access to home-based aged care services.
4. Commit to work in partnership with Aboriginal and Torres Strait Islander Australians on decisions that impact them, with an emphasis on Indigenous voice and partnering with Indigenous community organisations.
5. Commit to work towards a referendum recognising Australian and Torres Strait Islander Australians in the Constitution, to be held when the referendum has the best chance of succeeding.

1.1.1.2 Addendum to the Report of the Working Group on the Universal Periodic Review—Australia: Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review

Australia provided a response to the conclusions and recommendations provided in the UPR in the form of an addendum. It was noted by Australia that a number of recommendations in the UPR were highly aspirational, and that the federal government shares the responsibility of implementing the recommendations with the states and territories.18 This addendum covered the following topics and recommendations:19

17 Ibid [27].
19 Ibid [2]–[8].

2. International engagement: Australia considers its current $4bn development assistance program budget to be proportionate and sustainable.

3. Domestic frameworks: Australia considers the Australian Human Rights Commission to be adequately resourced, and the current network of anti-discrimination legislation to be sufficient. There is no intention to introduce any bill of rights at the federal level or to consolidate existing anti-discrimination legislation.

4. Indigenous Australians: The commitment to co-designing an Indigenous ‘voice’ to Parliament was discussed in addition to the implementation of the new Closing the Gap Agreement.

5. Racism: Australia committed to preventing racism and race-based discrimination.

6. Older Australians: The Addendum noted the establishment of the Royal Commission into Aged Care Quality and Safety.

7. Sexual orientation, gender identity and intersex status: The Addendum noted the requirement for authorisation from a court or guardianship tribunal if a person is a child or otherwise unable to consent to non-therapeutic procedures.

8. Climate change: The Addendum restated Australia’s commitment to meeting the goals of the Paris Agreement and working with vulnerable communities to create local solutions to natural disasters and extreme weather events.

9. Rights of women: Australia’s National Plan to Reduce Violence against Women and Children was noted, as well as the target of a 50% reduction in violence against Indigenous women as contained in the Closing the Gap Framework.

10. Rights of children: It was noted that the minimum age of criminal responsibility is partially the responsibility of states and territories, although some states and territories have announced an intention to raise this minimum age. Australia considers that its obligations under the Convention on the Rights of the Child have been adequately implemented into domestic law.

11. Rights of persons with disabilities: It was noted that the National Disability Strategy exists, and that the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was currently in progress.

Migrants, refugees and asylum seekers: The Addendum states that immigration detention is an ‘essential component’ of border management, but is (along with the immigration detention of children) a last resort. Australia maintains that the current system is consistent with non-refoulement obligations.

Civil and political rights: Australia is committed to protecting free speech and freedom of opinion, and specifies that legislation should not infringe upon these freedoms unless it expresses a clear intention to do so. However, it was noted that the freedom to publish is subject to laws on defamation, criminal offences, the right to a fair trial and national security. Australia is satisfied that its temporary suspension of the right to vote for persons serving a sentence of at least three years is reasonable, proportionate and non-discriminatory.

Freedom of religion: Mention was made of the Religious Discrimination Bill, and the prohibition on discrimination on the basis of religion at the federal level.

Criminal justice and counter-terrorism: Australia considers that the current national security laws contain ‘appropriate safeguards and protections’ to protect against human rights abuses such as arbitrary deprivation of liberty and the right to privacy.

Economic, social and cultural rights: Australia is concerned by the disproportionate impact on vulnerable groups of the COVID-19 pandemic, and states that it is monitoring and responding to issues as they arise.

International humanitarian law: Regarding the ADF’s alleged war crimes in Afghanistan, the Australian government has created the Inspector General of the Australian Defence Force Afghanistan Inquiry. Any relevant matters arising from the findings of this inquiry will be referred to the Commonwealth Director of Public Prosecutions.

Australia’s response to the UPR made mention of China’s recommendation relating to the use of false information to make ‘baseless accusations against

---

20 Ibid [6].
21 Ibid [7].
other countries for political purposes and did not respond to this comment as it did not consider it to be within the scope of the UPR.

1.1.2 Human Rights Council Forty-sixth session 22 February–19 March 2021

1.1.2.1 Written Statement Submitted by Jubilee Campaign, a Nongovernmental Organization in Special Consultative Status (A/HRC/46/NGO/52): China's Genocide of Uyghurs and Other Ethnic and Religious Minorities in Xinjiang Uighur Autonomous Region, China

The Jubilee Campaign statement alleges that China's persecution of Uyghurs and other Muslim minorities in the Xinjiang Uighur Autonomous Region of China (Xinjiang), also known as East Turkestan, has met the internationally recognised definition of genocide. The statement refers to responses by Australia, the United States of America, Canada, and the United Kingdom, and concludes by providing three urgent recommendations to be implemented by the United Nations to address these humanitarian concerns.

The factual circumstances said to indicate that China's conduct amounts to a genocide include: arbitrary detention, enforced disappearance, physical torture, forced reindoctrination, sterilisation, forced abortion, infanticide and more. Whilst China has reportedly claimed that this is 'fake news' and consists of 'groundless accusations', comprehensive investigations by human rights and religious freedom organisations confirm the existence of such a genocidal campaign.

According to the statement, the responses from Australia and other states to the alleged genocide are as follows.

Australia: The Australian Strategic Policy Institute (ASPI) 2020 Report titled: Uyghurs for Sale, and its Xingjiang Data Project identified that China was indeed engaging in 'cultural genocide'. ASPI is a think tank founded by the Australian government and partially funded by the Australian Department of Defense. Chinese foreign ministry spokesperson Hua Chuying has claimed the APSI and Australian Government are disseminating 'anti-China' 'fabrications'.

The US: The US Secretary of State, Michael Pompeo made a public statement on 19 January 2021, claiming that the persecution of the Uyghurs and other minorities as not only a genocide, but also amounting to crimes against humanity. The US was the first nation to formally and officially describe the conduct as containing both genocidal acts and intent.

Canada: The Canadian Parliamentary Subcommittee on International Human Rights conducted a series of meetings in October 2020 to discuss and hear testimonies from scholars, civil parties and survivors of the persecution in Xinjiang. The Subcommittee condemned the persecution, and stated that it was persuaded that ‘the actions of the Chinese Communist Party constitute genocide’ according to the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide.

UK: The UK Parliament has been debating an amendment to the Trade Bill, which states that trade agreements would be ‘revoked if the High Court of England and Wales makes a preliminary determination that they should be revoked on the ground that another signatory to the relevant agreement has committed genocide under Article 2 of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide’.

The House of Lords finally consented to this provision on 22 March 2021, and it now waits Royal Assent to be made into law.

Recommendations

Jubilee Campaign urges members and observer states of the Human Rights Council to:

1. Similarly designate the Chinese government’s persecution of Uyghurs and other Turkic Muslims as genocide and crimes against humanity, and publicly condemn this genocidal campaign;

2. Establish an impartial and independent United Nations mechanism to closely monitor, analyse, and report on the human rights situation in China, particularly in the Xinjiang Uyghur Autonomous Region;

3. Urge China to allow United Nations independent experts free and unfettered access to the Xinjiang Uyghur Autonomous Region and other affected regions to investigate the crimes against humanity.

---

United Nations Human Rights Committee

George v Australia; Marshall v Australia; Zeenat v Australia

Request for Interim Measures by the Committee under Rule 92 of the Committee’s Rules of Procedure, concerning communication No 3915/2021

United Nations Human Rights Committee

HUMAN RIGHTS—Discrimination—Freedom of movement—Freedom to return to country of nationality—COVID-19 pandemic—PROCEDURE—Exhaustion of domestic remedies—Interim measures

United Nations Human Rights Committee

### Background

The authors (complainants) are three Australian citizens who were living overseas and unable to return home to Australia due to the federal government’s imposition of ‘caps’ on international arrivals into Australia. These restrictions were put in place in response to the COVID-19 pandemic in 2020, for the purported purpose of protecting the health of the Australian public. In March 2021, the complainants submitted a petition to the Human Rights Committee (‘Committee’), claiming that the travel cap breached article 12(4) of the International Covenant on Civil and Political Rights (‘ICCPR’ or ‘Covenant’), which provides that ‘[n]o one shall be arbitrarily deprived of the right to enter his own country’.27 Australia ratified the Covenant in 1980. The Optional Protocol to the International Covenant on Civil and Political Rights (‘Optional Protocol’), which Australia ratified in 1991, allows individuals to make complaints to Committee regarding the violation of their rights under the Covenant.28

In 2021, the number of Australians stranded overseas and unable to return home due to the government’s travel restrictions reached over 47,000,29 over 50 of whom died overseas.30 The authors’ petition raised important issues

---


regarding the ‘right to return home’ for Australian citizens and the legality of Australia’s COVID-19 border closures.

1.1.3.1.2 Facts Submitted by the Authors

Jason George is a 51-year-old Australian citizen who was living in the US for work. George wished to return to Australia because: he wished to support a close family member undergoing cancer treatment, and another expecting a baby; his US work visa was due to expire in December 2021; he needed to attend to his investment property in Australia; and the reunification with his families was desirable for his wife’s mental health. Like author Marshall, George was vaccinated and willing to follow Australia’s quarantine requirements. However, George and his wife were unable to return home to Australia, due to the prohibitively expensive costs of flights and repeated cancellations.

Alexander Marshall is a 24-year-old Australian citizen who was living in Hawaii on a US student visa. Marshall wished to return to Australia for a number of reasons: his US student visa was due to expire in August 2021; he was due to commence a Masters of Science degree at the University of Melbourne; he wished to apply the knowledge from his US degree in Australia; and he was anxious to be reunited with his family. Marshall submitted that he would not pose a threat to the health of the Australian community as he was being vaccinated and was willing to quarantine for 14 days upon arrival.

Despite his best efforts, Marshall was unable to return home to Australia. Between March 2020 and January 2021, bookings on three flights to Australia were cancelled. Australian governments had introduced strict caps on international arrivals and airlines had responded by cancelling flights or drastically increasing their prices. At this point, Marshall’s finances were depleted as he had not received refunds from any of the flights but had instead been supplied

31 Australian Permanent Mission, ‘Jason George v Australia (Communication No. 3915/2021) under the Optional Protocol to the International Covenant on Civil and Political Rights’, Communication to the Human Rights Committee in George v Australia, 28 May 2021, [10].
33 ‘Stranded Australians lodge petition with the UN over inability to return home’ (Press Release, Stranded Aussies, 29 March 2021) 2.
34 Ibid.
35 Marshall’s Communication (n 6) 4 [10].
36 Ibid 8 [29].
37 Ibid 8 [30].
38 Ibid 5 [13]–[14], 7 [25].
39 Ibid 6 [21].
with ‘travel credit’. He then applied to the Department of Foreign Affairs and Trade (‘DFAT’) for a loan to assist in purchasing a ticket. However, at the time of his communication to the Committee (‘Marshall’s Communication’), DFAT had not responded to his application and Marshall remained in the US.

Finally, author Zeenat Khan is an Australian citizen who was living in the UK. She wished to return home with her husband and seven-month-old baby in order to be closer to family and friends in Australia. However, Ms Khan was unable to book a flight due to the travel caps, despite being willing and able to purchase a ticket. Again, she was in the processes of being vaccinated, and was willing to undergo quarantine.

1.1.3.1.3 Complaint
A preliminary requirement for a communication to the Committee is that the authors must have exhausted all available domestic remedies. The authors submitted that they had done this. They relied on the expert opinion of Professor Kim Rubenstein of the University of Canberra. She observed that there is no specific legal right in Australia for citizens to return home. Because the High Court has not implied such a right in the Constitution, any domestic challenge to the restrictions would be ‘futile’ in returning the authors home in a timely manner. Therefore, the authors had exhausted all domestic remedies which would be effective and not unreasonably prolonged.

Before the Committee, the authors claimed that Australia had violated their right to enter their own country under article 12(4) of the ICCPR. They argued that the Australian Government’s limitations on the number of international arrivals had the effect of arbitrarily depriving the authors of their right to enter into Australia.

The authors accepted that, under article 12(3) of the ICCPR, a State party may permissibly restrict a person’s freedom of movement for the purposes of public health, such as to prevent the spread of the COVID-19 pandemic. However, the authors noted that article 12(3) expressly does not apply to

---

40 Ibid 8 [27].
41 Ibid 8[27]–[28].
42 Ibid.
44 Optional Protocol (n 6) art 2.
45 Marshall’s Communication (n 6) 2 [2].
47 Marshall’s Communication (n 6) 2–3 [2]–[4].
48 Marshall’s Communication (n 6) 3–4 [9].
article 12(4), such that the Australian Government cannot justify its travel restrictions on the basis of public health.49

The authors accepted that State Parties may derogate from the right in article 12(4) in certain circumstances prescribed by article 4 of the ICCPR.50 However, these circumstances must involve an ‘officially proclaimed’ public emergency which ‘threatens the life of the nation’.51 Further, a State party wishing to derogate in such a circumstance must immediately inform the other State parties of that intention.52 As Australia had not informed the other State parties of intention to derogate, or asserted that COVID-19 threatens the life of the nation, it is not permitted to derogate from the right in article 12(4).53

The authors submitted that because there is no established exception to article 12(4), Australia would violate the article if it ‘arbitrarily deprived’ a citizen of their right to enter Australia.54 The authors submitted that the travel restrictions were arbitrary because they were not necessary, reasonable, or proportionate, and lacked predictability.55 First, they argued that Australia’s travel restrictions—with Australia the only in the world to prevent citizens returning home—could not not be deemed necessary. At the time of the communication, Australia was one of the countries with the lowest number of COVID-19 cases.56 Second, they argued that the restrictions were neither reasonable nor proportionate, because preventing the spread of COVID-19 could have been achieved through less restrictive means, such as testing, quarantine, and vaccination requirements.57 The authors also submitted that any attempt to justify the travel caps, set by state governments, as a reflection of the capacity of quarantine facilities, was inexcusable because quarantine is a federal government responsibility under the Constitution.58 Finally, the authors argued that the unpredictability of the restrictions, which could be (and have been) significantly tightened at any time, result in citizens being arbitrarily denied of their right to enter into Australia as airlines cancel flights.59 Therefore, the

49 Ibid 9 [32].
50 Ibid 9 [33].
51 ICCPR (n 27) art 4(1).
52 Ibid art 4(3).
53 Marshall’s Communication (n 6) 10 [34].
54 Ibid 13 [35].
55 In General Comment No. 35, the Committee states that ‘arbitrariness’ includes ‘elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality’.
56 Marshall’s Communication (n 6) 10 [43].
57 Ibid 11 [41].
58 Ibid 12 [42].
59 Ibid 12 [43].
authors claimed that they had been arbitrarily deprived of their right to return to Australia, in breach of article 12(4) of the ICCPR.60

On this basis, the authors applied to the Committee for urgent interim measures. Under Rule 94 of the Committee's Rules of Procedure, the Committee can request a State party to take interim measures before a determination on the merits has been reached, to avoid the possibility of irreparable consequences for the rights of the authors.61 The authors submitted that such measures were necessary to avoid irreparable harm. In Marshall's Communication, it was argued that he would suffer irreparable harm as: he was at risk of unlawfully residing in the US due to the imminent expiry of his student visa; he was financially insecure following the exhaustion of his funds on airline tickets; and his career would be impeded if he was not able to attend the University of Melbourne.62 Therefore, the authors applied to the Committee to request Australia to lift the travel restrictions and allow the authors to return home.63

1.1.3.1.4 Interim Measures

In April 2021, the Committee requested urgent interim orders from Australia, ‘to facilitate and ensure the author’s prompt return to Australia, while his case is pending before the Committee’.64

In May 2021, Australia responded to the Committee by requesting that the Committee withdraw its request for interim measures, with specific reference to George's complaint. Under Rule 94(4) of the Committee's Rules of Procedure, the Committee may withdraw a request for interim measures according to information provided by the State party.65 The Australian Government submitted that the threshold for the requesting of interim measures in Rule 94(1) had not been met.66

The Australian Government argued that the authors would not face ‘irreparable harm’ if they were unable to return to Australia promptly. Australia submitted that international arrival caps are temporary measures which operate to protect the health of the Australian community, and do not result in the

60 Ibid 12 [44].
62 Marshall's Communication (n 6) 13–14 [48].
63 Ibid 14 [49].
65 HRC Rules of Procedure (n 61) rule 94(4).
66 Australian Permanent Mission (n 31) [17].
permanent alienation of citizens from their right to return home. Further, the Government iterated that the restrictions have not made it unlawful to return to Australia, but have merely placed limitations on citizens' return. With regard to George's specific reasons for wishing to return home, the Government submitted that George had failed to substantiate the harm he would face if he was unable to be close to his family or maintain his property in Australia. Further, Australia submitted that the need for George to renew his US work visa should be categorised as a 'disagreeable consequence', rather than an irreparable one. The Government also submitted that there was no suggestion that George's wife's mental illness would improve upon return to Australia.

Second, Australia argued that the travel caps did not ‘deprive’ Australians of their right to return home. Rather, they merely amounted to temporary restrictions which were necessary in light of the COVID-19 pandemic. The Government submitted that the interim measure is unnecessary given the Government's ongoing efforts to facilitate the return of all overseas Australians. Further, the Government contended that the interim measure prejudices both Australia’s effort to protect public health and its prioritisation of the return of more vulnerable Australians. For these reasons, Australia submitted that the Committee should withdraw the interim measures request.

At the time of writing, the Committee has not adopted its final views and recommendations in response to the communication. However, in October 2021, the federal government announced that it would be allowing citizens, permanent residents, and their families to both travel from and return to Australia from 1 November 2021.

---

67 Ibid [19].
68 Ibid [20].
69 Ibid [21].
70 Ibid [22].
71 Ibid [23].
72 Ibid [25].
73 Ibid.
74 Ibid [26].
75 Ibid [28].
1.1.4 Committee on the Rights of Persons with Disabilities

1.1.4.1 *Sherlock v Australia*

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 20/2014

United Nations Committee on the Rights of Persons with Disabilities

HUMAN RIGHTS—Discrimination—Freedom of movement—Freedom to choose one's own residence—Access to a work visa

PROCEDURE—Jurisdiction

1.1.4.1.1 Background

The author of the communication is Grainne Sherlock, a national of Ireland born on 28 January 1997. In 2014, Sherlock claimed to be a victim of Australia's violations of articles 4, 5 and 18 of the *Convention on the Rights of Persons with Disabilities* (‘CRPD’ or ‘Convention’).77 The Convention entered into force for Australia on 16 August 2008. The *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (‘Optional Protocol’), which allows for individuals to make complaints to the Committee regarding the violation of their rights under the CRPD, entered into force for Australia on 20 September 2009.78

On 19 March 2021, the Committee on the Rights of Persons with Disabilities (‘CPRD Committee’ or ‘Committee’), acting in accordance with the Optional Protocol, adopted its views in response to Sherlock's complaint.

1.1.4.1.2 Facts Submitted by the Author

Sherlock's complaint concerned her access to a work visa. In 2012, Sherlock applied to the Department of Immigration and Citizenship of Australia (‘the Department’) for a temporary work (skilled) visa (subclass 457).79 The visa was sponsored by Oracle, her current employer in Dublin, where she had accepted a more senior position in their Melbourne offices.80

As a requirement for all applications for a subclass 457 visa at that time, Sherlock needed to satisfy Public Interest Criteria (‘PIC’) 4006A. PIC 4006A stipulated that the applicant must be free from any disease or condition for which the provision of health care or community services would be likely...

---


79 *Sherlock v Australia* (n 5) 2 [2.2].

80 Ibid.
to result in ‘a significant cost to the Australian community’ or ‘prejudice the access of an Australian citizen or permanent resident to health care or community services’.81 This requirement could be waived where the applicant’s employer undertook to meet all the applicant’s health care costs.82

In her application, Sherlock disclosed that she was diagnosed with multiple sclerosis in 2001. Sherlock was healthy and symptom-free at the time of her application, due to treatment with a medication called Tysabri. Sherlock received monthly infusions of Tysabri, which required a brief hospital admission.83

In January 2013, the Department notified Oracle that Sherlock did not meet the health requirement in PIC 4006A.84 The Department had assessed Sherlock’s condition as presenting ‘a significant cost to the Australian community’; the estimated cost of her treatment with Tysabri over four years was AUD$97,000, which exceeded the ‘significant cost threshold’ of AUD$35,000 at the time of application.85 Sherlock was unable to obtain a waiver of the health requirement as Oracle declined to sign an undertaking to cover all the costs of the author’s treatment.86 Oracle subsequently withdrew Sherlock’s visa application.87

Following the withdrawal of her application, Sherlock described adverse effects on her and her family’s life, including substantial loss of income, stress, and anxiety.88 Sherlock was unable to seek Australian domestic remedies, as the withdrawal of her application by Oracle was not a decision reviewable under the Migration Act 1958 (Cth). Further, the health requirements are exempt from the anti-discrimination provisions of the Disability Discrimination Act 1992 (Cth).89

1.1.4.1.3 Complaint
Before the Committee, Sherlock claimed that Australia had violated her rights under article 18(1) of the CRPD,90 which recognises ‘the rights of persons

81 Migration Regulations 1994 (Cth) sch 4 para 4006A, as repealed by Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018 (Cth).
82 Ibid.
83 Sherlock v Australia (n 5) 2 [2.1].
84 Ibid 2 [2.4].
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid 3 [2.7].
89 Ibid 3 [2.8].
90 Sherlock v Australia (n 5) 3 [3.1].
with disabilities to liberty of movement [and] to freedom to choose their residence’. She argued that the health requirement discriminated against her on the basis of her disability. She was unable to obtain a visa, and thus move to and reside in Australia, due to the cost of her treatment, whereas similar applicants without such a disability would have met the requirement and been granted a visa.

While Sherlock acknowledged that migration laws and regulations may permissibly discriminate against non-nationals where the discrimination is legitimate, objective and reasonable, she submitted several reasons to demonstrate that PIC 4006A represented an impermissible discrimination. Firstly, due to a health care agreement with Ireland, Sherlock was eligible for Medicare, which would cover the cost of any essential medical treatment. Further, as a condition of Sherlock’s visa, she had obtained private health insurance, which would have covered any further costs. As such, Sherlock argued that the cost of her treatment was not significant, nor prejudicing the access of Australians to health care, but was rather borne by the existing health care frameworks. Sherlock had also offered to create a private agreement with Oracle, in which she personally covered any costs that the company was charged if it agreed to an undertaking. Lastly, Sherlock argued that the discrimination was not reasonable because it failed to consider her and her family’s future contribution to Australian society.

Further, Sherlock submitted that Australia had failed to fulfil its obligations under articles 4(1)(a)–(e) and 5(2), which include undertakings to modify or abolish laws which discriminate against persons with disabilities and prohibit all discrimination on the basis of disability.

In regard to jurisdiction, Sherlock claimed that she was subject to Australia’s jurisdiction, such that the State owed the above obligations to her, by reason of her visa application to migrate to Australia.

91 CRPD (n 77) art 18(1).
92 Sherlock v Australia (n 5) 4 [3.2].
93 Ibid 4 [3.3].
94 Ibid 2 [2.4].
95 Ibid 4 [3.3].
96 Sherlock v Australia (n 5) 3 [3.1].
97 CRPD (n 77) arts 4(1)(b), 5(2).
98 Sherlock v Australia (n 5) 3 [3.1].
Views and Recommendations of the Committee

Sherlock’s complaint was found to be admissible under the Optional Protocol. Without objection from Australia, the Committee accepted Sherlock’s evidence that there were no available domestic remedies, such that article 2(d) of the Optional Protocol was satisfied. Despite objection from Australia,99 the Committee also accepted that Sherlock was subject to Australia’s jurisdiction as required by article 1(1) of the Optional Protocol. The notion of ‘subject to its jurisdiction’ was read broadly to encompass the effective control the State has over extra-territorial non-nationals through the visa application process.100

On the merits of Sherlock’s claim, the Committee found that the Department’s decision that Sherlock did not meet PIC 4006A amounted to discrimination on the basis of disability.101 It noted that health rules in immigration contexts could be justified if based on reasonable and objective criteria—for example, in instances of disease posing public health risks.102 The Committee noted that Sherlock’s application for a work visa was rejected solely due to her diagnosis of multiple sclerosis and the economic cost it could represent. The Department did not consider her full capacity to perform her job, her ability to personally cover the costs of her treatment, nor the impact on her personal and professional life.103 Therefore, the Committee concluded that PIC 4006A prevented Sherlock from utilising immigration proceedings on an equal basis with others, thus contravening articles 4, 5 and 18 of the CRPD.104

Upon finding that Australia had failed to fulfil its obligations under the Convention, the Committee made two recommendations. Firstly, that Australia provide Sherlock with an ‘effective remedy’, including compensation and reimbursement of legal costs. Secondly, the Committee recommended that Australia ensure that ‘barriers to the enjoyment by persons with disabilities of the right to utilize the immigration proceedings on an equal basis with others are removed under national legislation’.105

The Committee adopted these views on 19 March 2021 and requested that Australia provide the Committee with a written response, including details of

99 See Sherlock v Australia (n 5) 5 [4.6], 9 [6].
100 Ibid 10 [7.4].
101 Ibid 14 [8.8].
102 Ibid 13 [8.4].
103 Ibid 13 [8.7].
104 Ibid 14 [8.8].
105 Ibid 14 [9].
its actions taken in response to the above views and recommendations, within six months.\textsuperscript{106}

\section*{Theme 2: Extradition}

The Government of the United States of America v Julian Paul Assange \textsuperscript{[2021]} \textit{EWHC 3313 (Admin)}

In the High Court of Justice, Queen’s Bench Division, Administrative Court

The Lord Burnett of Maldon Lord Chief Justice of England and Wales and Lord Justice Holyroyde

\subsection*{Background and Extradition Trial}

Julian Assange, an Australian citizen, was indicted in the United States of America (‘USA’) on eighteen counts in connection with his conduct as a founder and operator of Wikileaks. In July 2020, the USA requested the United Kingdom (‘UK’) extradite Assange pursuant to the UK-US Extradition Treaty as incorporated in the \textit{Extradition Act 2003} (UK) (‘EA’) for the purpose of standing trial.\textsuperscript{107} The USA allegations pertained to Assange obtaining and disclosing materials relating to the defence and national security of the USA, primarily in relation to Wikileaks 2009 and 2010 disclosures.\textsuperscript{108} These disclosures included, among many others, classified footage of the 2007 Baghdad airstrike which revealed that approximately a dozen civilians were mistakenly gunned down by United States forces. The USA summarised the charges as being complicit in attempts ‘to obtain databases of classified information’, making attempts to obtain such information ‘through computer hacking’, and publishing ‘classified documents that contained the un-redacted names of innocent people’.\textsuperscript{109}

This case concerned an appeal by the USA of the decision of the District Judge Baraitser (‘the trial judge’) not to extradite Assange because, in light of his mental condition and the conditions he would likely face following extradition, to do so would have been oppressive within the meaning of s 91 of \textit{EA} and therefore barred by it.\textsuperscript{110} Section 91 provides that if the Court is satisfied that the ‘physical or mental condition’ of a person is such that extradition would be unjust or oppressive, the Court ‘must order the person’s discharge’ or ‘adjourn the extradition hearing until it appears’ that it would no longer be unjust or oppressive to extradite them.\textsuperscript{111}

\begin{thebibliography}{99}
\bibitem{106} Ibid 14 [10].
\bibitem{107} \textit{Assange} (n 9) [3]–[4].
\bibitem{108} Ibid [3].
\bibitem{109} Ibid [3].
\bibitem{110} Ibid [2].
\bibitem{111} Ibid [8]; \textit{Extradition Act 2003} (UK) s 91(2)–(3) (‘EA’).
\end{thebibliography}
The trial judge’s finding that s 91 was satisfied was predicated on evidence establishing that Assange suffered from clinical depressive and anxiety disorders, post-traumatic stress disorder, autism spectrum disorder, and suicidal ideation. Accordingly, there was a real and substantial risk of suicide if extradition ensued. Emphasis was placed on the likelihood Assange would be held at Alexandria Detention Centre in Virginia (‘ADC’), where he would be subjected to ‘restrictive special administrative measures’ (‘SAMS’) including conditions of near complete isolation, and if convicted was likely to be detained at the Administrative Maximum-Security prison (‘ADX’) located in Florence, Colorado, where inmates are confined to their 7 square metre cells for 23 hours a day. Her Honour considered the criteria set out in Turner v United States, concluding s 91 was satisfied, despite observing that oppression under s 91 is a high bar and that there is a strong public interest rationale for giving effect to treaty obligations. Pursuant to s 105 of the EA, the USA appealed the decision on five grounds.

1.2.1.2 Decision

1.2.1.2.1 Dismissal of Ground One

In the first ground of appeal, the USA contended that the trial judge erred in applying the law under s 91. To resolve this matter, Their Honours reviewed two key authorities: Turner v United States and Polish Judicial Authority v Wolkowicz. Relevantly, they noted that to satisfy s 91, ‘the risk that the person will commit suicide, whatever steps are taken, [must be] sufficiently great to result in a finding of oppression’. Additionally, it was necessary to consider whether the person’s mental condition ‘remove[d] his capacity to resist the impulse to commit suicide’, and whether, once extradited, the prison system would have ‘appropriate arrangements … [to] cope properly with the person’s...
mental condition. After considering the relevant law against the trial judge’s approach, Their Honours concluded that she had correctly ascertained and applied the relevant law to the facts. For example, she had considered evidence that the ADC is a well-run jail with ‘a stellar record’ of preventing suicide.

1.2.1.2.2 Dismissal of Grounds Three and Four

In the third ground of appeal, the USA argued that after finding the defence psychiatric expert, Professor Kopelman, had given misleading evidence, the trial judge ought to have ruled the totality of the evidence inadmissible or attached little weight to it. Argumentis, it followed that the trial judge erred in the overall assessment of the evidence (ground 4). The USA contended that the trial judge would not have discharged Assange pursuant to s 91 if Professor Kopelman’s evidence been given the appropriate weight.

In response to grounds three and four, Their Honours opined that while there were substantial reasons to question the impartiality and reliability of Professor Kopelman’s evidence, the trial judge was entitled to accept the evidence. Their Honours explained that although Professor Kopelman’s evidence was a weighty factor in her decision, it was not the only expert evidence that proved influential. It followed that the trial judge’s fact finding and assessment of the evidence ought to be respected.

1.2.1.2.3 Appeal Allowed on Grounds Two and Five

The issues raised in respect of the second and fifth grounds for appeal were whether (i) the trial judge ought to have informed the United States of her preliminary view in respect of s 91 and provided them with the opportunity to give assurances such that extradition may not be caught by the threshold test; (ii) whether the appellate court could receive the assurances; and if so (iii) whether the assurances ameliorated the facts which led Her Honour to

123 Assange (n 9) [65], quoting Turner (n 116) [28] (Aikens LJ). See also Rot v District Court of Lubin, Poland [2010] EWHC 1820 [13], [26] (Mitting J).
124 Assange (n 9) [69].
125 Ibid [69].
126 Ibid [22].
127 Ibid.
128 Ibid [90]–[91].
129 Ibid [92].
130 Ibid [93].
The Court determined that extradition would be oppressive and therefore barred by s 91. The assurances were that:

i. the United States would not subject Assange to SAMS nor imprisonment at ADX unless Assange's conduct post extradition justified their imposition;\textsuperscript{132}

ii. should Assange be convicted, and his country of citizenship and Australia submits a transfer application pursuant to the ‘Council of Europe Convention on the Transfer of Sentenced Persons’ (COE Convention), the United States will accept Australia's application to serve out any sentence in Australia;\textsuperscript{133}

iii. should a qualified treating prison clinician recommend any such clinical psychological treatment while Assange is held in custody, he will receive it.\textsuperscript{134}

Following \textit{India v Dhir},\textsuperscript{135} the Court held that an appellate court hearing an extradition case may receive and consider assurances offered by a requesting state, although if offered on appeal, it would be necessary to examine the reasons why the assurances had not been provided earlier.\textsuperscript{136} Assurances withheld for tactical reasons or in bad faith would not be accepted.\textsuperscript{137} Their Honours found that the primary reason why the assurances were not offered at first instance was due to there not being an oral hearing such that ‘the issues to which any such assurances might relate only crystallised when the judge provided counsel with a draft of her judgment’.\textsuperscript{138} In turn, it was open to the court to receive the assurances, although Their Honours noted the trial judge should have offered the USA the opportunity to provide assurances as soon as her preliminary view was formed.\textsuperscript{139}

The Court then turned to consider whether the assurances ameliorated the concerns that led the trial judge to find that extradition would be oppressive. The USA submitted that the decision was predicated on Her Honour's finding that there was a high likelihood that Mr Assange would be subjected to SAMS

\begin{itemize}
  \item \textsuperscript{131} Ibid [22], [29].
  \item \textsuperscript{132} Ibid [22], [30].
  \item \textsuperscript{133} Ibid.
  \item \textsuperscript{134} Ibid [33].
  \item \textsuperscript{135} [2020] EWHC 220 (Admin) (‘Dhir’).
  \item \textsuperscript{136} Assange (n 9), [40]–[42], citing Dhir (n 135), [36].
  \item \textsuperscript{137} Ibid [43].
  \item \textsuperscript{138} Ibid [44].
  \item \textsuperscript{139} Ibid [45]–[46].
\end{itemize}
and/or detained at the ADX. Against this submission, Mr Assange argued that extradition itself was the reason for the finding of oppression as opposed to any one particular condition in which he might be detained in the USA.

Their Honour's preferred the view of the USA, reasoning that in the trial judge's conclusion, reference to 'these harsh conditions' meant those of SAMS and/or detention in ADX, and so, her assessment of the risk of suicide was predicated on the effect of these regimes. Because the 'key point' was that the SAMS and ADX were identified as 'the most restrictive regimes,' the Court viewed the possibility of Assange being subject to other regimes involving 'some degree of isolation' as not material. In turn, Their Honours held that, had the assurances provided by the USA been put to the trial judge, she would have 'answered the relevant question differently' and not discharged Mr Assange on the ground of oppression.

1.2.1.2.4 Further Submissions

Assange submitted that, pursuant to s 106(6)(c) of the *EA* Their Honours should remit that matter for the determination of the trial judge, who may, at the same time, consider whether extradition might contravene Article 3 of the European Convention on Human Rights, which the trial judge had not determined. Article 3 provides that: '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Their Honours refused to accept this submission, reasoning that an assessment of Article 3 could not realistically be extricated from a section 91 *EA* assessment, and even if the two could be considered separately, it would only be open for the trial judge to find that USA's assurances addressed any concerns that may be raised in relation to Article 3.

1.2.1.2.5 Orders

Therefore, rather than directing the trial judge to decide the relevant question again with consideration of the USA's assurances pursuant to section 106(1)(b) of the *EA*, the Court allowed the USA's appeal on Grounds 2 and 5, quashed the trial judge's discharge order, and substituted their decision 'in accordance

---

140 Ibid [57].
141 Ibid [58].
142 Ibid [59].
143 Ibid.
144 Ibid [62].
145 Ibid [94].
146 Ibid [95].
with section 106(6)(c) of the EA. Their Honours ordered the case be remitted to the Westminster Magistrates’ Court with the direction that they send the matter to the Secretary of State as the trial judge would have had to do, having differently decided the oppression question.

1.2.1.2.6 Appeal?
On 24 January 2022 the High Court granted Assange permission to apply to the Supreme Court on one point of law relating to the assurances received. On 15 March 2022 the Supreme Court refused to hear it on the basis that it was not an arguable point.

1.3 Theme 3: Sport
1.3.1 Court of Arbitration for Sport
CAS 2020/A/7579 World Anti-Doping Agency v. Swimming Australia, Sport Integrity Australia & Shayna Jack
CAS 2020/A/7580 Sport Integrity Australia v. Shayna Jack & Swimming Australia Limited
Arbitral Award delivered by the Court of Arbitration for Sport
President: Prof. Jan Paulsson, Attorney-at-Law, Manama, Kingdom of Bahrain
Arbitrators: The Hon. Michael Beloff M.A. QC, Barrister in London, United Kingdom Prof. Richard H. McLaren O.C., Professor and Barrister in London, Ontario, Canada in an arbitration between
Sport Integrity Australia (SIA), Canberra, Australia, Represented by Ms Houda Younan SC, Barrister, Sydney, Australia (Appellant 1) & World Anti-Doping Agency (WADA), Montréal, Canada, Represented by Mr Ross Wenzel & Mr Nicolas Zbinden, Kellerhals Carrard, Lausanne, Switzerland (Appellant 2) and
Ms Shayna Jack, Brisbane, Australia, Represented by Thomas K. Sprange Q.C., King & Spalding International LLP, London, UK (Respondent 1) & Swimming Australia, Melbourne, Australia, Represented by Ms Lydia Dowse, Head of Integrity & Risk (Respondent 2)

147 Ibid [98]–[99].
148 Ibid [99].
1.3.1.1 *Factual Background*

On 26 June 2019, the Shayna Jack (the ‘Athlete’) underwent an out-of-competition doping control test and returned a positive result for an Adverse Analytical Finding for Di-Hydroxy LGD-4033, a metabolite of Ligandrol. Ligandrol is always prohibited as per the 2019 World Anti-Doping Code—International Standard—Prohibited List. On the 12 July 2019, Swimming Australia imposed a mandatory Provisional Suspension on the Athlete in accordance with Article 7.9.1 of the Swimming Australia Limited Anti-Doping Policy 2015.

On 7 November 2019, the Anti-Doping Rule Violation Panel determined it was satisfied that the Athlete had possibly committed an Anti-Doping Rule Violation (‘ADRV’). On 19 December 2019, the Anti-Doping Rule Violation Panel of Swimming Australia confirmed the Panel’s preliminary finding. As a result of the ADRV, a four-year period of ineligibility was imposed on the Athlete commencing from 12 July 2019 (the date the original Provisional Suspension was issued).

On 2 January 2020, the Athlete submitted an application to the Court of Arbitration for Sport Oceania (the ‘CASO’) challenging the determination which imposed a four-year period of ineligibility. She initially sought a determination that the Code of Sports should determine that she bears no fault or negligence and eliminate her period of ineligibility. She amended the relief sought in her Submissions in Reply filed on 24 August 2020, acknowledging that she had failed to prove the source of the Prohibited Substance, but nevertheless maintaining that the ADRV was unintentional and was not a result of her recklessness. She sought a determination that she had provided all available and sufficient evidence to this end, sought a finding of No Significant Fault or Negligence under clause 10.5 of the Swimming Australia Limited Anti-Doping Policy. The Athlete also sought for the Period of Ineligibility to be reduced to 2 years.

The hearing proceeded on 15 and 28 December 2020 at the CASO Registry, Sydney under a Sole Arbitrator. The appeal filed by the Athlete was partly upheld. The Sole Arbitrator determined that the Athlete had not

---

152 Ibid [13].
153 Ibid [17].
154 Ibid.
155 Ibid [18].
156 Ibid [19].
discharged the onus necessary to place her case within the ambit of either Article 10.4 or 10.5 of the Policy; thus, the sanction imposed upon her could not be any less than a two-year period of ineligibility. To rely on Article 10.4 or 10.5, the Athlete would have had to establish how the Ligandrol entered her system. It followed that the critical issue in the proceeding was whether the Athlete had discharged the burden of proving that the ADRV was neither intentional nor the result of her own recklessness.

The Sole Arbitrator determined that the Athlete had proven the ADRV was not intentional, and her period of ineligibility was reduced to 2 years commencing from 12 July 2019. In coming to its decision, the Sole Arbitrator considered the Athlete’s own evidence, her prior diligence in observing advised protocols, a lack of obvious incentive on the Athlete’s part to achieve better results, the steps she had taken at personal expense to identify the origin of the Prohibited Substance, character evidence by individuals on behalf of the Athlete, and the absence of evidence of long-term use. The Sole Arbitrator also noted that there were limited scientific studies regarding the effects of taking Ligandrol on athletic performance, particularly for female athletes, which therefore could not be used to support the contention that the Athlete had intentionally taken the prohibited substance.157

1.3.1.2 Jurisdiction

Article 13.2 and of the Policy provides that a ‘a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation’ may under article 13.2.1, in cases involving International-Level Athletes, be appealed exclusively to the Appeals Division of CAS.

1.3.1.3 Issues at Appeal

On 7 December 2020, SIA and WADA filed separate Statements of Appeals against the Appealed Decision. SIA was the principal Appellant and was joined by WADA as the second active Appellant; both seeking relief to reinstate the Athlete’s four-year period of ineligibility.

The Sole Arbitrator found that the Athlete did not discharge the onus placed upon her to bring a case under Article 10.4 or 10.5 of the Policy by establishing how Ligandrol entered her system. Therefore, the critical issue became whether the Athlete had discharged the burden of showing that the ADRV was not intentional or the result of recklessness. To have the default sanction of a four-year period of ineligibility reduced to two years, the Athlete had to ‘pass through the narrowest of corridors’ by discharging the burden of proving an

157 Ibid [33].
absence of intention to cheat or recklessness, while not proving the source of the prohibited substance.

WADA and SIA challenged the Appealed decision, arguing that the Sole Arbitrator had relied excessively on evidence of the Athlete’s credibility, resulting in a decision that was based on speculative rather than actual evidence. WADA, speaking as the international authority for the curtailment of doping, acknowledged that the Policy does not explicitly require proof of the source or origin of the prohibited substance, but insisted that failure on the part of an athlete to prove the source should present a significant obstacle to the success of their case.

The Athlete disagreed with WADA and SIA’s contention that the sole arbitrator’s reliance on her evidence of a previous clean record, her attempts at her own expense to discover the source of the prohibited substance, and character evidence was erroneous. She sought a confirmation of the Appealed Decision.

The Athlete bore the burden of proof to demonstrate that her violation was neither intentional nor reckless. The major issues for the court were whether the burden of proof for the Athlete was higher than a ‘balance of probabilities’ and the nature of the evidence that the Athlete could adduce to prove it.

1.3.1.4 Discussion
The Panel referred to previous ADRV cases to determine the appropriate rules regarding evidence and burden of proof. They referred to the reasoning of the Panel in Abdelrahman (CAS 2017/A/5016 & 5036), which concluded that ‘the establishment of the source of the prohibited substance in an athlete’s sample is not mandated in order to prove an absence of intent’. The Panel in Abdelrahman could ‘envisage the possibility’ where it could be persuaded by an athlete’s assertion of a lack of intent to commit an ADRV, supported by the surrounding circumstances of the case, without the athlete proving the source of the prohibited substance. Nevertheless ‘such a situation may inevitably be extremely rare’ because if an athlete cannot prove the source of the prohibited substance, ‘it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him’.

Even if an athlete is not required to demonstrate the source of the prohibited substance, the burden of proof to show a lack of intention or recklessness

---

158 Ibid [60(g)].
159 Ibid [110].
160 Abdelrahman (CAS 2017/A/5016 & 5036), [123].
161 Ibid.
is nevertheless very high. While the Panel in *Jamnicky* (CAS 2019/A/6443) had considered a number of possible ‘pathways’ which might have brought the Athlete into contact with the prohibited substance, in order to disprove that the Athlete did so intentionally or recklessly.\(^{162}\) However the Panel in *Iannone* (CAS 2020/A/6978) emphasised that athletes could not rely on ‘simple protestations of innocence’ or ‘mere speculation’ as to how they came into contact with a prohibited substance in order to substantiate a lack of intention—athletes must adduce ‘concrete and persuasive evidence’ which establishes ‘on the balance of probabilities’ a lack of intent.\(^{163}\)

The Panel determined that the Appealed Decision was not in accordance with the Policy.\(^{164}\) The Sole Arbitrator’s finding that the Athlete had discharged the burden of proving that she had not intentionally or recklessly ingested Ligandrol was based largely on her own personal evidence of an aversion to cheating and a lack of prior history of ingesting prohibited substances, character evidence, and the lack of sufficient scientific evidence to show any long-term benefits of Ligandrol to the athlete or substantiate long-term use.\(^{165}\) The Court acknowledged that, while jurisprudence in this area appeared to be unsettled at present, the Appealed Decision nevertheless failed to come to a decision on the basis of evidence beyond mere speculation and subjective evidence of character and conscience by the Athlete.\(^{166}\)

**Judgment**

The court concluded that the correct test for the burden of proof on the athlete was that *on the balance of probabilities* there was no intent or recklessness.\(^{167}\) Proving the source of the prohibited substance is often important but is not indispensable to disproving intent or recklessness.

The court recognised that while the relevant rules are inflexible in principle, the wide variety of circumstances surrounding cases of ADRV and the different consequences means that jurisprudence has not yet yielded specific criteria which can be applied to all cases to determine whether an athlete should be sanctioned.\(^{168}\) While the Court will not give weight to uncorroborated assertions of good character by the Athlete or persons close to them;

---

162 World Anti-Doping Agency v. Swimming Australia (n 150) [121].
163 Iannone CAS 2020/A/6978, [134].
164 World Anti-Doping Agency v. Swimming Australia (n 150) [125].
165 Ibid [127–9], [131].
166 Ibid [133].
167 Ibid [171].
168 Ibid [182].
character references and evidence of an athlete’s past conduct and attitude toward anti-doping regulations are relevant evidence.\footnote{169}{Ibid [172]–[174].}

After reviewing the objective evidence of the Athlete’s achievements and prospects, as well as the subjective evidence regarding character and the Athlete’s attitude toward anti-doping policy, the court concluded that it appeared more likely that she came into contact with the prohibited substance innocently than intentionally or recklessly.\footnote{170}{Ibid [180].}

\subsection*{1.3.1.6 Result}

A majority of the Panel found that Athlete had on the balance of probabilities proven she did not intentionally or recklessly consume the prohibited substance. The appeals filed by Sport Integrity Australia and World Anti-Doping Agency against Shayna Jack and Swimming Australia Limited was dismissed. The Athlete’s Period of Ineligibility of two years, commencing on 12 July 2019 is confirmed.

\subsection*{1.4 Theme 3: Cybersecurity}


provides valuable up-to-date clarity on the position of States in the developing field of cyberspace and international law. The group was established in 2019 with the purpose of assessing international information security threats, seeking to clarify the rules, principles and international law which governs the use of information and communication technologies (‘ICTs’) by States. Australia was one of twenty-five States who contributed to the group, and the 2021 report alongside its official compendium of voluntary national contributions provided States with a rare opportunity to express *opinio juris* in relation to a burgeoning field of international law.

1.4.1.1 *The 2021 GGE Consensus*

The 2021 GGE Report begins by outlining existing and emerging threats to international security. The GGE observe trends such as the growing militarisation of ICTs, the proliferation of more complex ICT operations such as covert information campaigns to exert influence, increasingly harmful attacks on critical infrastructure, and the difficulty of attribution in cyberspace. It is in view of these and other threats which leads the group to reaffirm the need for both non-binding norms and international law in this area to prevent conflict and contribute to the peaceful use of ICTs. In relation to non-binding norms, the 2021 GGE Report expands on the content of each of the eleven norms identified in its 2015 predecessor.

The GGE reaffirmed the applicability of fundamental principles of international law to cyberspace, such as certain customary principles found within the United Nations Charter and the prohibition on the use of force and the

---

176 Advancing responsible State behaviour in cyberspace in the context of international security, GA Res 73/266, UN Doc A/RES/73/266 (2 January 2019, adopted 22 December 2018), 3 [3].
177 2021 GGE Report (n 171), 5, 24.
178 See, Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266, UN Doc A/76/136 (13 July 2021) (‘2021 GGE Compendium’).
179 2021 GGE Report (n 171), 7 [7].
180 Ibid 7, [9].
181 Ibid 7, [10].
182 Ibid 7–8, [14].
183 Ibid 8, [15]–[16].
184 Ibid [18].
principle of non-intervention. The group then went on to build on the 2015 GGE Report by introducing seven new developments, including:

(a) That States who are a party to an international dispute shall first seek a solution by such means as described in Article 33 of the United Nations Charter;

(b) Reaffirming the applicability of State sovereignty to States’ ICT activities and to their jurisdiction over ICT infrastructure within their territory. The group clarified under this principle that states exercise jurisdiction over ICT infrastructure by setting policy and law and establishing protective mechanisms over ICT infrastructure in their territory;

(c) In relation to non-intervention, that States must not use ICTs to intervene directly or indirectly with the internal affairs of another State;

(d) That States shall refrain from the threat or use of force against the territorial integrity or political independence of any state when using ICTs;

(e) The applicability of the United Nations Charter in its entirety and the inherent right of States to take measures consistent with international law;

(f) That international humanitarian law applies only in situations of armed conflict and the principles of humanity, necessity, proportionality and distinction are established. But the group noted that further study is required in relation to how this area of law applies to ICTs;

(g) Reaffirming that States are obliged to meet their international obligations regarding acts attributable to them. The GGE also reaffirmed that States must not use proxies to commit internationally wrongful acts using ICTs and that merely because an ICT activity was launched from their territory does not necessarily mean the act is attributable to that State. The Group added that invoking State responsibility involves complex technical, legal, and political considerations.

185 Ibid 17, [70].
186 Ibid [71].
1.4.1.2 **Australia’s Contributions**

In its national contribution, Australia affirmed multiple customary international law rules and their applicability to activity in cyberspace. Namely, the applicability of the United Nations Charter and the prohibition on the use of force,\(^1\) limitations and thresholds governing self-defence to armed attacks,\(^2\) international humanitarian law,\(^3\) international human rights law,\(^4\) the customary international law on State responsibility,\(^5\) countermeasures,\(^6\) and certain remedies.\(^7\) In relation to the use of force, Australia noted that States should consider the intended or reasonably expected consequences of a cyber operation and whether its scale and effects are comparable to kinetic operations.\(^8\) On the principle of non-intervention, Australia offered certain helpful factual examples which would be unlawful in the context of ICTs, for example altering the results of an election in another State, or significantly disrupting a State’s financial systems.\(^9\)

Initiatives such as the 2021 GGE Report, and the broader Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security’s 2021 report, illuminate the legal positions of a wide range of States on ICTs and international law.\(^10\) To this end, these reports and national contributions to them are essential for the development of international law in an area which is rapidly evolving and becoming ever-more critical to States’ infrastructure.

---

\(^1\) 2021 GGE Compendium, 4–5.
\(^2\) Ibid 5.
\(^3\) Ibid.
\(^4\) Ibid 6–7.
\(^5\) Ibid 7.
\(^6\) Ibid.
\(^7\) Ibid 8.
\(^8\) Ibid.
\(^9\) Ibid 5.
\(^10\) Ibid.

---

Open-ended working group on developments in the field of information and telecommunications in the context of international security, UN Doc A/AC.290/2021/CRP.2 (10 March 2021); see, Developments in the field of information and telecommunications in the context of international security, GA Res 73/27, UN Doc A/RES/73/27 (11 December 2018, adopted 5 December 2018), 5 [5].