



Convention on the Rights of Persons with Disabilities

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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*, **

<i>Communication submitted by:</i>	Grainne Sherlock (represented by Australian Centre for Disability Law)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	24 February 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 70 of the Committee's rules of procedure, transmitted to the State party on 13 June 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	19 March 2021
<i>Subject matters:</i>	Disability-based discrimination; access to a work visa
<i>Procedural issue:</i>	Jurisdiction
<i>Substantive issues:</i>	Disability-based discrimination; freedom of movement; freedom to choose one's own residence; access to a work visa
<i>Articles of the Convention:</i>	4–5 and 18
<i>Article of the Optional Protocol:</i>	1 (1)

1. The author of the communication is Grainne Sherlock, a national of Ireland born on 28 January 1977. She claims to be a victim of violations by the State party of articles 4–5 and 18 of the Convention. The Optional Protocol entered into force for the State party on 19 September 2009. The author is represented by counsel.

* Adopted by the Committee at its twenty-fourth session (8 March–1 April 2021).

** The following members of the Committee participated in the examination of the communication: Rosa Idalia Aldana Salguero, Soumia Amrani, Danlami Umaru Basharu, Gerel Dondovdorj, Gertrude Oforiwa Fefoame, Vivian Fernández de Torrijos, Odelia Fitoussi, Mara Cristina Gabrilli, Amalia Gamio Ríos, Samuel Njuguna Kabue, Kim Mi Yeon, Sir Robert Martin, Floyd Morris, Jonas Ruskus, Markus Schefer, Saowalak Thongkuay and Risnawati Utami. Pursuant to rule 60 (1) (c) of the Committee's rules of procedure, Rosemary Kayess did not participate in the examination of the communication.



A. Summary of the information and arguments submitted by the parties

Facts as submitted by the author

2.1 In 2001, the author was diagnosed with multiple sclerosis. Since 2008, Tysabri, a monoclonal antibody, had been prescribed as her primary treatment. Tysabri is administered by intravenous infusion once every four weeks and requires a brief admission in hospital. It has been a very effective treatment for the author, who has been able to remain fit, healthy and symptom-free. The author is married and has two children.

2.2 The author held a senior executive sales position at Oracle in Dublin. In June 2012, in the middle of a recession, she applied for a more senior position in Oracle's office in Melbourne, Australia, which would have provided her with job security, a promotion and career advancement opportunities. On 5 November 2012, she was offered the position, which she accepted on 8 November 2012. On 30 November 2012, she submitted an electronic application to the Department of Immigration and Citizenship of Australia for a temporary work (skilled) visa (subclass 457 visa). Her visa application was sponsored by Oracle.

2.3 In the course of her application, the author provided the information required. All applicants for a subclass 457 visa must satisfy the health requirements of Public Interest Criterion 4006A, which is set out in the Migration Regulations 1994 and provides that applicants must be free of any disease or condition in relation to which they would be likely to require health care or community services during the period of the visa in circumstances where the provision of such treatment would constitute a "significant cost to the Australian authorities or prejudice the access of an Australian citizen or permanent resident to health care". Such a requirement may be waived if the nominating employer undertakes to meet all relevant health-care costs. In addition, as required for all subclass 457 visa applicants, the author acquired the "platinum overseas visitors' cover policy" with Bupa insurance company. Additionally, as Australia has a reciprocal health-care agreement with Ireland, the author was entitled to enrol in Medicare upon arrival in Australia. The cost of Tysabri would have been subsidized by Medicare and the author's enrolment in Medicare would have exempted her from the requirement to have private health insurance.

2.4 In the visa application, the author disclosed her diagnosis of multiple sclerosis, which was subsequently considered by the Department of Immigration and Citizenship as a "significant medical condition". On 21 December 2012, the author underwent a medical examination, as requested by the Department. On 28 January 2013, the Department notified Deloitte, a "migration agent" of Oracle, that the author had failed to meet the health requirement because the cost of her treatment for multiple sclerosis for four years was estimated to be around 97,000 Australian dollars, exceeding the "significant cost threshold" of 35,000 Australian dollars. The Department also reported that the author might be eligible for a health waiver by submitting, within 28 days, Oracle's "nominator undertaking" indicating that it would meet all costs related to her medication and treatment for multiple sclerosis during her stay in Australia. She communicated this information to Oracle. On 31 January 2013, she also informed both Oracle and Deloitte that she was willing to meet personally any uninsured health-care costs incurred in Australia and to have such amount deducted from her salary. On 1 February 2013, the Department advised Deloitte that such a private agreement was not permissible under Australian law. On 15 February 2013, Oracle declined to sign the "nominator undertaking" because of the unlimited liability that this would place on it. On 22 February 2013, Oracle withdrew the author's visa application, as well as her nomination for the position in Melbourne.

2.5 In the meantime, on 19 February 2013, the author confirmed with Bupa that her insurance policy would cover the costs of Tysabri, if administered as inpatient treatment at a private hospital. Bupa also advised the author that its policy would cover hospital accommodation for a same-day infusion where admission was clinically required, as well as inpatient pathology care at 100 per cent of the Australian Medical Association's schedule fee or through Bupa's gap cover scheme if her doctor were to utilize that scheme. Outpatient pathology would be covered at 150 per cent of the scheme fee. The author communicated this information concerning the insurance coverage to Oracle and the Office of the Migration Agents Registration Authority. Furthermore, on 1 May 2013, she wrote a letter to the Minister

of Immigration and Citizenship expressing concerns about the refusal of her subclass 457 visa application and the discrimination she had suffered on the basis of her illness. She stressed that she had proposed a number of agreements to make the health waiver more palatable to her employer; that all costs associated with her treatment and pharmaceuticals would have been covered by her private insurance; and that the Department had stated that such an arrangement would contravene Australian law. In the letter, the author requested an investigation into the Department's approach to her case.

2.6 On 14 June 2013, the author received a reply from an official of the Department indicating, *inter alia*, that he had confirmed with Bupa that the author's insurance policy would cover pharmaceuticals only up to a total value of 500 Australian dollars and that there was a 12-month waiting period for treatment in relation to her pre-existing conditions, including the multiple sclerosis. In that regard, the author claims that the Department failed to consider that she would receive inpatient treatment and that she would be fully covered by her insurance policy without a waiting period. The Department also indicated that the regulations governing applications for subclass 457 visas did not prevent a private agreement between an employer and an employee regarding payments for any health-care costs that the employer undertook to cover. The author claims that this information contradicted the Department's advice of 1 February 2013 provided to Oracle and Deloitte.

2.7 The author submits that the refusal of her visa application has adversely affected her and her family. After she accepted the position in Melbourne, the author's client base in Dublin was assigned to her successor. During the first two months following the author's return to her original position in Dublin, she had no clients, resulting in a reduction of about 9,000 euros in her income in 2013. Also, her husband closed his business on 23 December 2012 in preparation for the family's migration to Australia. Thus, he remained unemployed for four months and had to accept a less favourable job once the visa application was rejected. Also, as the author and her husband had already arranged to rent out their house in Dublin and had disposed of all the furniture, they were then obliged to terminate the rental agreement and were left with little furniture. Their elder daughter experienced setbacks at school, including in relation to preparations for the junior certificate examination that she had not expected to take. The shock and disappointment associated with the cancellation of the family's plan resulted in serious stress and anxiety for the elder daughter. The author's younger daughter also became socially isolated. Additionally, the author's decision to relocate to Australia was in part a joint plan with her sister. In December 2012, her sister and her husband had migrated to New Zealand, expecting the author's family to be moving to Australia shortly thereafter. Upon the refusal of the author's visa application, the author had far fewer prospects of direct personal contact with her sister. As these events have severely affected her emotionally and psychologically, the author has had to obtain psychological counselling.

2.8 Regarding the exhaustion of domestic remedies, the author claims that her visa application was terminated when Oracle refused to sign the "nominator undertaking" and withdrew her nomination for the position in its Melbourne office. In Australia, decisions or conduct of this nature cannot be reviewed under the Migration Act 1958. Moreover, divisions 1, 2 and 2A of the Disability Discrimination Act 1992 do not affect the discriminatory provisions in the Migration Act or any legislative instrument made under that Act. In addition, the Disability Discrimination Act cannot render unlawful any act or decision that is permitted or required under the Migration Act.

Complaint

3.1 The author claims that the State party has violated her rights under articles 4 (1) (a)–(e), 5 (2) and 18 (1) of the Convention. She contends that, by applying to migrate to the State party, she became subject to its jurisdiction in respect of her visa application. The State party is thus under the obligation to treat her visa application without discrimination. She also submits that, pursuant to articles 4 (1) (a)–(e), 5 (2) and 18 (1) of the Convention, the State party is obliged to adopt all appropriate measures, including legislation, to prohibit discrimination on the basis of disability and provide effective legal protection against discrimination on all grounds in relation to the right to liberty of movement and the freedom to choose residence.

3.2 The author claims that the State party has failed to recognize her right to liberty of movement and to freedom to choose her residence on an equal basis with others. She argues that she was unable to obtain a subclass 457 visa on an equal basis with others because she failed to satisfy the health requirement due to the cost of her treatment, which includes taking a specific medicine on a monthly basis. Visa applicants without a disability such as hers are able to satisfy the requirement and their prospective employers are not required to provide the State party with a health waiver. The author therefore considers that the State party's immigration law manifestly discriminated against her on the basis of her disability.

3.3 The author notes that the State party's migration laws and regulations cannot discriminate against non-nationals based on a particular status, unless such discrimination is for a legitimate purpose and is based upon reasonable and objective criteria. Criterion 4006A does not include a legitimate purpose justifying differential treatment on the basis of disability. First, the distinction has no reasonable or objective basis, as all applicants for a subclass 457 visa, not just those with disabilities, are obliged to acquire private health insurance that can cover health costs incurred in Australia. The author satisfied this requirement. Second, her private insurance policy would have covered any additional health-care costs and Australia has a reciprocal health-care agreement with Ireland that would ensure coverage by Medicare of any costs of essential medical treatment. Any costs to Australia would therefore be borne in the framework of its reciprocal agreement with Ireland. The author also claims that a risk to the Australian public health system is insufficient, from a reasonable or objective point of view, to justify a refusal of her visa application or the requirement that her employer sign a health waiver. Moreover, her migration to Australia would not prejudice Australian nationals' access to public health-care services. Lastly, the rejection of her visa, which reflected a difference in treatment, is not reasonable because it is based on the estimated cost of treating her multiple sclerosis without considering what her and her family's contribution to the Australian community would be.

State party's observations on admissibility and the merits

4.1 On 27 April 2015, the State party submitted its observations on admissibility and the merits of the communication. It asserts that the communication is inadmissible because the author was not, and never has been, subject to its jurisdiction for the purposes of article 1 (1) of the Optional Protocol to the Convention. It also contends that the author's claim under article 18 of the Convention is inadmissible, as she is not lawfully in its territory. Should the Committee find the communication admissible, the State party considers that it is without merit.

4.2 The State party submits that there is no right to enter or reside in a country under the Convention or under international law. It maintains that the placing of a migration health requirement on the subclass 457 visa programme is not discriminatory because it constitutes legitimate differential treatment aiming to achieve a purpose that is legitimate, is based on reasonable and objective criteria and is proportionate to the aim to be achieved.

4.3 The State party notes that the subclass 457 visa programme is the most commonly used to sponsor overseas skilled workers on a temporary basis for up to four years. The programme is uncapped and is driven by employer demand. Applicants for this visa should meet certain requirements, including an adequate private health insurance. With regard to the author's claim concerning the reciprocal health-care agreement and Medicare, the State party argues that the author's Irish nationality would have been sufficient to meet the private health insurance requirement. In addition to the health insurance requirement, almost all visa applicants must satisfy a "migration health requirement". To meet this requirement, a person must be free from tuberculosis; a disease or condition that is or may result in the applicant being a threat to public health in Australia or a danger to the Australian community; and a disease or condition in relation to which, among others, the provision of the health care or community services would be likely to: (a) result in a significant cost to the Australian community in the areas of health care and community services; or (b) prejudice the access of an Australian citizen or permanent resident to health care or community services.

4.4 The State party explains that the health insurance requirement and the migration health requirement are separate and distinct for the subclass 457 visa and that both must be satisfied at the time of the decision. Any health insurance policy held by a visa applicant cannot be

taken into account when assessing whether the migration health requirement has been met. This reflects the rationale that the subclass 457 visa programme is based solely on sponsorship by an employer so that any health costs incurred by the employee are not borne by the Australian community. The State party notes that the author's claim that her private insurance would cover medical costs is unsubstantiated and that, in any case, the coverage of her insurance has no bearing on the migration health requirement. When assessing whether the migration health requirement has been met, a medical officer of the Commonwealth carries out a "hypothetical person" test and does not consider the applicant's personal financial circumstances. Where a hypothetical person with the same severity of condition as the applicant is likely to incur health-care costs or require a particular service on medical or other grounds, it is assumed that costs will be incurred and services will be used. Such a test allows the State party to ensure that it will not be responsible for the medical costs even if, for example, the applicant's financial circumstances change.

4.5 The State party submits that, while for most temporary visa categories the health requirement cannot be waived, it may be waived for subclass 457 visa applicants if their employer undertakes to cover all medical costs. This is consistent with the nature of the subclass 457 visa programme, which is based upon sponsorship by an employer. The State party's law does not prohibit any private arrangements between an employee and his or her employer concerning the payment or reimbursement of those costs. Nevertheless, such arrangements are not part of the visa criteria and thus cannot be taken into consideration. Only the sponsoring employer is legally liable for covering those costs. While the author alleges that the Department of Immigration and Citizenship advised Oracle and Deloitte that such arrangements were not legally permitted, the State party is unaware of any such advice having been provided and finds this claim unsubstantiated.

4.6 The State party further considers that the author's claims are inadmissible to the extent that she is not subject to the jurisdiction of the State party for the purposes of article 1 (1) of the Optional Protocol and is not lawfully within the State party's territory for the purposes of article 18 of the Convention. While the Convention does not contain any specific clause other than article 4 (5) that defines its coverage, it is subject to a limited territorial application. While acknowledging that it has accepted extraterritorial human rights obligations under very limited circumstances, the State party considers that the threshold has not been met in the case at hand. It also notes that in some cases a liberal approach may be taken in relation to jurisdiction under the International Covenant on Civil and Political Rights, including in cases concerning the rights of a State's own citizens. In the present case, however, the author and her family are nationals of another State and had no previous connection with Australia and no right to enter or reside in Australia under international law. In this regard, the State party refers to the jurisprudence of the Human Rights Committee, according to which the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory.¹ While jurisdiction indicates some level of right of control over a person, the State party's migration law does not allow it to influence the behaviour of non-nationals and is simply a legislative framework for controlling entry into the country, principally through visas. Furthermore, while individuals may apply for a visa from outside the State party, this does not mean that they come under its jurisdiction.

4.7 The State party further asserts that the author's claim under article 18 of the Convention should be considered inadmissible because she is not lawfully within its territory. The Convention does not create any new human rights but, rather, expresses existing rights in a manner that addresses the needs of persons with disabilities, including the practical obligations to enable them to enjoy their pre-existing rights on an equal basis with others. Accordingly, it is clear that article 18 of the Convention expresses the pre-existing rights in a way that makes them accessible to persons with disabilities. The State party contends that the right to liberty of movement and freedom to choose residence under article 12 (1) of the Covenant only applies to persons lawfully within the territory of a State. While the requirement that persons be lawfully in the territory of a State party is not explicitly included in article 18 of the Convention, the State party submits that, to the extent that article 18

¹ General comment No. 15 (1986), para. 5.

reflects the pre-existing rights in article 12 of the Covenant, the inherent limitations in article 12 of the Covenant would also apply to article 18 of the Convention.

4.8 The State party submits that, should the Committee find the author's claim under article 18 to be admissible, the claim is nevertheless without merit. It is evident from the negotiations on the Convention that article 18 was designed to address problems such as obtaining identity documents or recognition as citizens. Article 18 (1) (b) provides that persons with disabilities must be granted the same rights as anyone else to apply for visas and to have immigration decisions reviewed on an equal basis with others and subject only to the same restrictions. It does not provide persons with disabilities with any additional right to obtain citizenship, permanent residence or any kind of visa in Australia.

4.9 The State party submits that persons with disabilities have access to its immigration processes on an equal basis with others and consequently enjoy liberty of movement and freedom to choose their residence on an equal basis with others, in compliance with article 18 of the Convention. All subclass 457 visa applicants are subject to a migration health requirement and applicants with disabilities or in need of medical treatment are assessed against the same requirement as any other applicant. A disability or medical condition will not necessarily in and of itself result in a failure to meet the health requirement.

4.10 The State party emphasizes that the Convention is firmly anchored in existing principles of international human rights law and that articles 4 and 5 thereof should be interpreted in line with the established approach under international law that legitimate differential treatment does not constitute discrimination.² It notes that differential treatment should aim at achieving a purpose that is legitimate, be based on reasonable and objective criteria and be proportionate to the aim to be achieved.³ It notes that, in its interpretative declaration made with respect to article 18 of the Convention, Australia declared its understanding that "the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria". The State party maintains that its immigration processes do not directly treat persons any differently by reason of their disability while providing for the differential treatment of individuals in certain cases, including where a person does not meet the migration health requirement. It acknowledges that the existence of the health requirement is likely to disproportionately affect some persons who may not meet the required criteria for reasons associated with disability. Nevertheless, the migration health requirement applicable to subclass 457 visa applicants constitutes legitimate differential treatment and so does not constitute discrimination under articles 4 and 5 of the Convention.

4.11 First, the State party contends that the migration health requirement is aimed at achieving a legitimate purpose. Many countries have had health and medical requirements in place at their borders long before specific immigration regulations were introduced. The introduction of specific regulations in this area by many countries has generally sought to address two objectives: to protect their communities against threats to public health, including by preventing the spread of communicable diseases, and to reduce the costs of or demands for health care or social services that migrants may require so as to protect their health-care systems.

4.12 Second, the State party submits that the migration health requirement for subclass 457 visa applicants is based on reasonable and objective criteria. It explains that a set of health-related questions are included in most temporary visa application forms and that such

² Human Rights Committee, general comment No. 18 (1989); *Love et al. v. Australia* (CCPR/C/77/D/983/2001); Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13; and Committee on the Elimination of Racial Discrimination, general recommendations No. 32 (2009), para. 8, No. 14 (1993), para. 2, and No. 30 (2004), para. 4. See also CERD/C/AUS/CO/14, para. 24; and *G.D. and S.F. v. France* (CEDAW/C/44/D/12/2007), para. 12.15.

³ Committee on the Elimination of Racial Discrimination, general recommendation No. 14 (1993), para. 2; Human Rights Committee, general comment No. 18 (1989), para. 13; and Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13.

questions aim at establishing whether the applicants have lived in countries where the tuberculosis incidence rate is high and whether they intend to incur any health-care costs or seek medical treatment during their stay in Australia. The responses of the applicants to these questions and any information held by the Australian immigration authorities are taken into account when assessing whether medical examinations may be required. Approved doctors and radiologists perform medical examinations and, if an applicant's medical condition is considered to be significant, they refer the medical report to medical officers of the Commonwealth for an opinion as to whether the health requirement under criterion 4006A has been met. In order to estimate the costs of health care and community services that will be required by the concerned applicant, the medical officer of the Commonwealth reviewing the application carry out a "hypothetical person" test (see para. 4.5 above). Accordingly, medical officers of the Commonwealth cannot consider information, for example, regarding the applicant's personal savings, reciprocal health-care agreements or private health insurance. Once the medical officers of the Commonwealth have determined the estimated costs, they must determine whether the provision of health care or community services would be likely to result in a significant cost to the Australian community contrary to criterion 4006A. To do so, they compare the estimated costs against a significant cost threshold. The threshold applicable to the author was 35,000 Australian dollars at the time of her application.⁴

4.13 The State party submits that the migration health requirement may be waived, for instance, in cases of offshore refugee and humanitarian visa programmes. It notes that for the migration health requirement to be waived in respect of a subclass 457 visa applicant, the sponsoring employer must undertake to cover all medical costs (see para. 4.6 above). This is a reasonable limitation to place on a visa programme that is uncapped and based on employer sponsorship. The employer is expected to accept responsibility for covering the costs of any health care or community services incurred by its employees that it brings into the State party.

4.14 Third, the State party contends that the migration health requirement at issue is proportionate to the aim it seeks to achieve. The health requirement framework has been "purpose-built to contain migration-generated health costs while also providing flexibility for designated migration streams to manage sensitive cases". There is a pragmatic balance between compassion and cost containment by imposing a standard health requirement on visa applicants while also making available for some visa subclasses a tailored health waiver and, where appropriate, ministerial intervention.

4.15 The State party reiterates that an applicant for a subclass 457 visa who fails to meet the health requirement may still be granted a visa, so long as the sponsoring employer undertakes to be responsible for those costs. This strikes an "effective balance between allowing free movement of persons for the purposes of employment opportunities, and the need to preserve access by Australian citizens and permanent residents to health care and community services that may be in short supply".

Author's comments on the State party's observations on admissibility and the merits

5.1 On 11 October 2019, the author submitted her comments on the State party's observations. The author asserts that she was subject to the jurisdiction of the State party at the material time of her communication because the phrase "subject to its jurisdiction" in article 1 of the Optional Protocol is to be read broadly with regard to the scope of power and authority that inheres in the State party. As the Convention does not create any new rights but, rather, describes the specific elements that are necessary to ensure the right to equality before the law for people with disabilities, it may be possible to use the International Covenant on Civil and Political Rights and the Convention relating to the Status of Refugees to interpret the meaning of article 1 of the Optional Protocol. Also, referring to article 31 of the Vienna Convention on the Law of Treaties,⁵ the author claims that interpretations that favour the rights and dignity of individuals would be preferred over those that do not. When

⁴ That amount increased to 40,000 Australian dollars on 1 July 2013.

⁵ Article 31 (1) reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

a provision is ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, supplementary means of interpretation, such as the preparatory work of a treaty and the circumstances of its conclusion, may be used to determine its meaning.⁶ By consideration of the object and purpose of the Convention, the author argues that “within the jurisdiction” does include the situation of a non-citizen outside the geographic territory of the State and that she was therefore within the jurisdiction of Australia at all material times during the treatment of her visa application.

5.2 The author further argues that a proper reading of article 2 (1) of the Covenant cannot support a literal interpretation that asserts that a State is only in violation of its obligations if the alleged act occurred both within its territory and subject to its jurisdiction. This interpretation would lead to a manifestly absurd result that is inconsistent with the object and purpose of the Covenant and directly conflicts with articles 31 and 32 of the Vienna Convention on the Law of Treaties. The author cites the International Court of Justice, which has stated that the jurisdiction of States may sometimes be exercised outside the national territory and that the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.⁷ In this regard, she refers to Human Rights Committee general comment No. 31 (2004), in which the Committee indicated that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party. She notes that the standard of effective control has been replaced by a new standard, one that considers a State’s impact on a person⁸ and that views that impact as a form of exercise of power by the State, which is one of two forms of the exercise of extraterritorial jurisdiction. The new standard provides a broader scope than the former standard of “power over an individual”. The author further notes that the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. This principle also applies to those within the power or effective control of the forces of a State party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained.⁹

5.3 The author admits that, since there is no humanitarian consideration for the subclass 457 visa programme, “being within the power or effective control” is a relatively high threshold test for a visa applicant to meet, given the principle of State sovereignty in international law and because the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the States to decide who it will admit to its territory.¹⁰ However, it must be considered how high the threshold test of control must be for the State party to exercise jurisdiction outside of its territory over a non-national. The author finds contradictory the State party’s statement that its migration legislation does not enable it to influence the behaviour of non-nationals, as the sole purpose of the migration legislation is to control the behaviour of non-nationals through visa processes. The State party’s decision to grant a subclass 457 visa would enable a non-national to enter its territory, while its refusal would restrict entry. The author asserts that a person who applies to a State party to reside in its territory or acquire nationality is subject to the State party’s jurisdiction with respect to that application. She refers to the jurisprudence of the Human Rights Committee and the European Court of Human Rights,¹¹ which she deems

⁶ Ibid., art. 32.

⁷ See, inter alia, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, p. 136, at p. 179.

⁸ Human Rights Committee, general comment No. 36 (2018).

⁹ Ibid., general comment no. 15 (1986), para. 10. See also *Lopez Burgos v. Uruguay* (CCPR/C/13/D/52/1979).

¹⁰ Human Rights Committee, general comment no. 15 (1986), para. 5.

¹¹ In its 20 October 2005 decision concerning *Haydarie and others v. Netherlands* (Application No. 8876/04), the European Court of Human Rights held that, “as regards the family life at issue in the present case – the existence of which is not in dispute –, no distinction can be drawn between the two applicants living in the Netherlands and the three others currently residing in Pakistan. In these circumstances, it does not find it necessary to determine the Government’s argument that the three

relevant to the question of jurisdiction in the context of visa applications. Furthermore, while a State may, in general, determine if and on what terms a non-citizen may enter its territory, it is not entitled to discriminate on the basis of disability in these arrangements.

5.4 The author claims that, given the absence of a reference to territoriality and the overarching obligation to apply human rights law universally, a State is obliged to meet its Convention obligations irrespective of the territorial scope. She notes that the Committee, in its general comment No. 1 (2014), has supported this position.¹² Additionally, as concerns the interpretative declaration made by the State party with respect to article 18 of the Convention, the author asserts that such a declaration, unlike a reservation, does not affect the State party's obligations under international law.

5.5 The author further contends that, when read together, articles 5 and 18 of the Convention bolster the right of persons with disabilities to choose their residence free from discrimination on an equal basis with any other person. Article 12 (1) of the Covenant, being the parent article of article 18 of the Convention, should be read in conjunction with articles 2 and 26 of the Covenant, which provide for a broader interpretation of States' obligations. In this regard, the author finds unsubstantiated and unsupported the State party's claim that article 18 of the Convention expresses only the pre-existing rights contained in article 12 of the Covenant.

5.6 The author submits that, if all persons are entitled to equal protection under the law under article 26 of the Covenant, the granting of entry must not infringe upon the right to be protected from discrimination. The broad construction of article 26 suggests that, while States have the right to exercise control over their sovereign borders, the exercise of this power would require them to apply the law to nationals and non-nationals in a non-discriminatory manner. The author further states that a broader interpretation of a State's obligation not to discriminate is preferred, in accordance with the principle of *pacta sunt servanda*.

State party's additional observations

6. On 29 May 2020, the State party submitted additional observations on the author's comments. It reiterates its argument that the author has not substantiated that she is an individual subject to the jurisdiction of the State party, in the sense intended in article 1 of the Optional Protocol. It argues that the territorial scope of the Convention is central to whether or not an individual can be considered to be within the jurisdiction of a State party for the purposes of the Optional Protocol. It reiterates the argument made in its initial submissions that the scope of the Convention is primarily territorial in nature. It notes that it accepts that, in very limited circumstances, a State party may have human rights treaty obligations extraterritorially. It argues that, under international law, States must exercise a high degree of control in order to establish "effective control" over persons outside their territory and that this threshold has not been met in the author's case. It argues that States can only really exercise effective control over persons outside their territory by having their officials detain or impose coercive conditions on those individuals, or by having their officials take those individuals into physical custody. It notes that the author alleges that the application of Australian migration laws in relation to her visa application constituted a level

applicants in Pakistan cannot be regarded as finding themselves within the jurisdiction of the Netherlands State within the meaning of Article 1 of the Convention jurisdiction". That case involved applicants who were residing in the Netherlands and were seeking to bring their family members from outside the country. Regarding that decision, the author claims that the Court held that a State could be in breach of its human rights obligations by failing to grant the visa as the individuals were within the jurisdiction of the Netherlands purely by virtue of the fact that they were applying for a family reunification visa. The author adds: "This may be the strongest evidence that the granting of a visa may fall within a State's jurisdiction and will therefore be the proviso of a State's obligations under international law".

¹² Specifically, in paragraph 5 of that general comment, the Committee has stated the following:

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with Disabilities each specify that the right to equal recognition before the law is operative "everywhere". In other words, there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited.

of control sufficient to trigger human rights treaty obligations under the Convention. It submits that if the author's argument were to be accepted, this would have the radical and far-reaching implication of extending a State's human rights treaty obligations to any individual who has applied for a visa to enter that State. This outcome would be contrary to the well-established principle in international law that States are entitled to control the entry of non-citizens and it is a matter for the State to decide whom it will admit to its territory.¹³

B. Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the case is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee and nor has it been or is it being examined under another procedure of international investigation or settlement.

7.3 The Committee takes note of the author's claim that there are no available domestic remedies, as her visa application was terminated by Oracle when it refused to sign the undertaking to cover her health-related costs. It further notes the author's assertion that the Migration Act does not provide for any right of review of decisions or conduct of this nature and that provisions under the Migration Act are exempt from the Disability Discriminatory Act. In this regard, the Committee notes that the author does not challenge her employer's decision not to sign the undertaking and to withdraw her visa application, but focuses on the alleged disability-based discriminatory impact that the migration health requirement has had on the assessment of her application for a subclass 457 visa. The Committee also notes that the State party has not presented any objection on the issue of the exhaustion of domestic remedies. In view thereof, it concludes that article 2 (d) of the Optional Protocol does not preclude it from examining the author's communication.

7.4 The Committee then notes the State party's claim that the author is not subject to its jurisdiction for the purposes of article 1 (1) of the Optional Protocol. In this connection, it notes the State party's argument that, while jurisdiction indicates some level of right of control over a person, its migration law is merely a legislative framework regulating the entry into its territory and that, apart from her visa application, the author had no previous connection with the State party and no right to enter it or reside in it under international law. The Committee notes the State party's position that the Convention is subject to a limited territorial application and that a high threshold for its extraterritorial application has not been met in this case. In this regard, the Committee notes the author's claim that the notion of being "subject to its jurisdiction" contained in article 1 of the Optional Protocol should be read broadly with regard to the scope of power and authority of the State party; that the State party has the power to control the behaviour of non-nationals through its visa application process even if they are not in its territory; and that, by seeking to migrate to the State party, she was within the State's power or effective control. The Committee recalls that article 18 (1) (b) of the Convention provides for the right of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others, including by ensuring that they can utilize the immigration proceedings that may be needed to facilitate the exercise of the right to liberty of movement. The Committee therefore considers that, in the light of article 18 (1) (b) of the Convention, article 1 (1) of the Optional Protocol needs to be read as extending the jurisdiction of a State party to its relevant processes, including immigration proceedings. The Committee therefore concludes that the author was subject to the jurisdiction of the State party.

7.5 The Committee notes the State party's claim that the communication should be held inadmissible because the author is not lawfully within its territory for the purposes of article 18 of the Convention. It takes note of the State party's arguments that the Convention does not recognize any new human rights of persons with disabilities but, rather, clarifies the

¹³ Human Rights Committee, general comment No. 15 (1986), para. 5.

application of existing rights to the specific situation of persons with disabilities; that the Covenant does not provide aliens with the right to enter or reside in the territory of a State party and that it is in principle a matter for the State to decide whom it will admit to its territory;¹⁴ and that the limitations in article 12 of the Covenant would also apply to article 18 of the Convention, to the extent that article 18 reflects the pre-existing rights in article 12 of the Covenant. In this regard, the Committee notes the author's argument that articles 5 and 18 of the Convention reinforce the right of persons with disabilities to choose their residence free from discrimination and that a State is not entitled to discriminate on the basis of disability in determining whom to admit to its territory.

7.6 The Committee recalls that, while the Convention as a whole and its article 18 specifically do not create any new rights, they do extend the obligation to protect existing rights to immigration proceedings. In the present case, the Committee considers that, by challenging a health requirement in the State party's migration law that allegedly resulted in discrimination on the basis of disability, the author is claiming that the State party violated her right, enshrined by article 18 (1) (b) of the Convention, to utilize the immigration proceedings on an equal basis with other non-nationals seeking to migrate to the State party. For the foregoing reason, the Committee concludes that it is not precluded from considering the author's claim under article 18 of the Convention.

7.7 Accordingly, and in the absence of other obstacles to admissibility, the Committee declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of the its rules of procedure.

8.2 As to the author's claims under articles 4 (1) (a)–(e), 5 (1)–(2) and 18 (1) of the Convention, the issue before the Committee is whether the migration health requirement under criterion 4006A contained in the Migration Regulations 1994 violated the author's rights under the Convention. The Committee notes that, under the above-mentioned criterion, applicants for a subclass 457 visa who do not meet the health requirement may obtain a waiver only upon submission of their employer's undertaking to cover health-care costs. It notes the author's argument that the health requirement constitutes a barrier to the ability of persons with disabilities to enjoy the right to utilize the immigration proceedings on an equal basis with others, in violation of article 18 of the Convention. It also notes the State party's arguments that applicants for almost all Australian temporary visas are subject to the same health requirement; that all applicants for a subclass 457 visa are assessed against the same requirement on an equal basis; and that the requirement may be waived if the employer undertakes to cover all health-care costs.

8.3 The Committee further notes that the State party has made an interpretative declaration indicating that the Convention does not "impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria". The Committee recalls that "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.¹⁵ Thus, "the character of a unilateral statement as a reservation or as an interpretative declaration is determined by the legal effect that its author purports to produce".¹⁶ Moreover, "to determine whether a unilateral statement formulated by a State or an international organization in respect of a treaty is a reservation or an interpretative declaration, the statement should be interpreted in good faith in accordance with the ordinary

¹⁴ Human Rights Committee, general comment No. 15 (1986), para. 5.

¹⁵ Vienna Convention on the Law of Treaties, art. 2 (1) (d).

¹⁶ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10/Add.1)*, chap. IV, sect. F, guideline 1.3. The Human Rights Committee, in its decision of 8 November 1989 concerning communication No. 220/1987 on *T.K. v. France*, stated that "it is not the formal designation but the effect the statement purports to have that determines its nature".

meaning to be given to its terms, with a view to identifying therefrom the intention of the author, in the light of the treaty to which it refers”.¹⁷ This requires an objective analysis, whereby the general rules of interpretation provide useful guidance.¹⁸ The text of the declaration made by Australia lays out the State party’s legal understanding that the Convention does not have an impact on its “health requirements for non-nationals to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria”. This text does not purport to exclude or to modify the legal effect of the Convention in its application to the State party’s health requirements for non-nationals to enter or remain in Australia. Rather, it intends to clarify the legal view that health requirements in the present context are permissible if they are based on legitimate, objective and reasonable criteria. This interpretation of the declaration is corroborated by the State party’s understanding, as shown by the fact that the statement was named an interpretative declaration at the time of registration¹⁹ and by the way the State party has treated it throughout the procedure before the Committee. The analysis of the declaration made by Australia clarifies that it is an interpretive declaration and cannot be considered as a reservation. The interpretive declaration therefore does not preclude the Committee from examining the health requirement issue, in particular its conformity with article 5 of the Convention.

8.4 The Committee notes that the author did not meet the migration health requirement under criterion 4006A because the estimated cost for her treatment for multiple sclerosis exceeded the threshold set by the national authorities. She was thus required to obtain her employer’s undertaking to cover all her health-related costs in order to be granted a visa. The Committee also notes that the author informed Oracle and Deloitte that she would be willing to cover all her health-related expenses on her own through a private agreement with Oracle, but was notified that it was not permitted under Australian law (see para. 2.4 above). It also notes that it is undisputed that the existence of a migration health requirement for the subclass 457 visa programme may disproportionately affect applicants with disabilities.²⁰ In this regard, the Committee notes the State party’s position that such differential treatment does not violate the Convention, as it is based on legitimate, objective and reasonable criteria.²¹ The Committee also notes the State party’s statement that the objective of this requirement is, inter alia, to reduce the health-care costs incurred by migrants and thus protect its public health-care system. However, the Committee also notes that, in compliance with criterion 4006A and the Migration Regulations 1994, the national authorities carry out a “hypothetical person” test to determine whether those costs would constitute an undue burden for the State party. In this context, it is assumed that costs will be incurred and that services will be used by the visa applicants. The State party does not take into consideration any other factors that may be relevant to the cited aim of protecting its nationals’ access to health care and community services that may be in short supply” (see para. 4.15 above).

8.5 The Committee recalls that, under article 2 of the Convention, “discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation. The Committee also recalls that a law that is applied in a neutral manner may have a discriminatory effect when the particular circumstances of the individuals to whom it is applied are not taken into consideration. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention can be violated when States, without objective and reasonable justification, fail to treat differently persons whose situations are significantly

¹⁷ *Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10/Add.1)*, chap. IV, sect. F, guideline 1.3.1.

¹⁸ *Ibid.*, commentary to guideline 1.3.1.

¹⁹ *Records of the General Assembly, Sixty-sixth Session, Supplement No. 10 (A/66/10/Add.1)*, chap. IV, sect. F. Guideline 1.3.2 reads as follows: “The phrasing or name of a unilateral statement provides an indication of the purported legal effect.”

²⁰ In its observations, the State party stated that “the Australian Government acknowledges that the existence of the health requirement is likely to disproportionately affect some persons who may not meet the required criteria for reasons associated with disability”.

²¹ Human Rights Committee, general comment No. 18 (1989), para. 13.

different.²² The Committee recalls that, in cases of indirect discrimination, laws, policies or practices that appear neutral at face value have a disproportionately negative impact on persons with disabilities. Indirect discrimination occurs when an opportunity that appears accessible in reality excludes certain persons owing to the fact that their status does not allow them to benefit from the opportunity itself.²³ The Committee notes that treatment is indirectly discriminatory if the detrimental effects of a rule or decision exclusively or disproportionately affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁴ Being a woman with a disability falls within such categories. The Committee further observes that, under article 5 (1)–(2) of the Convention, States parties have obligations to recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law; and to prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.

8.6 Before examining whether the denial of a work visa to the author on the basis of her multiple sclerosis amounts to discrimination on the basis of disability, the Committee has to determine whether the author’s condition can be considered a disability. In this connection, the Committee recalls that, under article 1 of the Convention, persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others. The Committee considers that the difference between illness and disability is a difference of degree and not a difference of kind. A health impairment which initially is conceived of as illness can develop into an impairment in the context of disability as a consequence of its duration or its chronicity. A human rights-based model of disability requires the diversity of persons with disabilities to be taken into account together with the interaction between individuals with impairments and attitudinal and environmental barriers.²⁵ In the present case, the information provided by the parties does not preclude the Committee from considering that the author’s physical impairment, in interaction with barriers, did in fact hinder her full and effective participation in society on an equal basis with others.

8.7 The Committee recalls that, while not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Convention,²⁶ “a failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition in an effort to address and eliminate the discrimination, as a matter of priority”.²⁷ Noting that the mere fact that the author had multiple sclerosis resulted in her failure to satisfy the health requirement, which prevented her from obtaining the work visa she required to go to Australia and take up the position for which she had previously been selected. In addition, it is contrary to the Convention because the State party is focusing on the person and not on attitudinal and environmental barriers that hinder the full and effective participation in society of persons with disabilities on an equal basis with others.²⁸ The Committee finally notes that, in this context, the State authorities focused on the potential cost of the medical treatment that the author requires and that the moment the author was identified as a person with multiple sclerosis, her visa application was rejected. The competent authorities did not take into account, inter alia, the author’s full capacity to perform the functions corresponding to the position for which she had been selected; the impact of such denial on her personal and professional life; or the alternatives that she proposed to ensure that the medical treatment she requires would not create a financial burden

²² *H.M. v. Sweden* (CRPD/C/7/D/3/2011), para. 8.3.

²³ General comment No. 6 (2018), para. 18 (b).

²⁴ See, for example, *Althammer et al. v. Austria* (CCPR/C/78/D/998/2001), para. 10.2.

²⁵ Convention on the Rights of Persons with Disabilities, preamble, paras. (e) and (i). See also *S.C. v. Brazil* (CRPD/C/12/D/10/2013), para. 6.3.

²⁶ Human Rights Committee, general comment No. 18 (1989), para. 13.

²⁷ Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009), para. 13.

²⁸ Convention on the Rights of Persons with Disabilities, preamble, para. (e).

for the State party. The State party instead conveyed the whole responsibility of a potential financial impact of the author's presence in the State party on the employing company. In view thereof, the Committee considers that, in the present case, the author's request for a work visa was rejected on the sole basis of her multiple sclerosis, without further consideration, and that the migration health requirement under the Migration Act thereby disproportionately affected the author as a person with disabilities and resulted in her being subjected to indirect discriminatory treatment.²⁹

8.8 The Committee therefore finds that the fact that the national authorities decided that the author did not meet the requirement for a subclass 457 visa on the basis of her multiple sclerosis, without taking into account any other elements of her personal and professional situation, amounted to indirect discrimination on the basis of disability. The Committee also concludes that the Migration Regulations 1994 had the effect of impairing or nullifying the author's enjoyment and exercise of the right to utilize the immigration proceedings on an equal basis with others, in violation of her rights under articles 4 (1) (a)–(e) and 5 (1)–(2), read alone and in conjunction with article 18 (1), of the Convention.

C. Conclusion and recommendations

9. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under articles 4, 5 and 18 of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning the author, the State party is under an obligation to provide her with an effective remedy, including reimbursement of any legal costs incurred by her and compensation;

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In this regard, the Committee requires the State party to 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. As the State party's law does not prohibit any private arrangements between an employee and his or her employer concerning the payment or reimbursement of health-care costs, the Committee recommends that such arrangements be part of the visa criteria and thus be taken into consideration.

10. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee within six months a written response, including information on any action taken in the light of the present Views and recommendations of the Committee.

²⁹ See also *Domina and Bendtsen v. Denmark* (CRPD/C/20/D/39/2017), para. 8.5.