Communication No. 1080/2002, *Nicholas v. Australia*
(Views adopted on 19 March 2004, eightieth session)[*]

Submitted by: David Michael Nicholas (represented by counsel, Mr. John Podgorelec)

Alleged victim: The author

State party: Australia

Date of communication: 24 April 2002 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 March 2004,

Having concluded its consideration of communication No. 1080/2002, submitted to the Human Rights Committee on behalf of Mr. David Michael Nicholas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 24 April 2002, is David Nicholas, born in 1941 and currently serving sentence of imprisonment in Port Phillip Prison. He claims to be the victim of a violation by Australia of article 15, paragraph 1, of the Covenant. Without specifying articles of the Covenant, he also alleges that medical treatment he is provided in detention falls short of appropriate standards. He is represented by counsel. The Covenant and the Optional Protocol entered into force for the State party on 13 November 1980 and 25 December 1991.

The facts as presented

2.1 On 23 September 1994, Thai and Australian law enforcement officers conducted a "controlled importation" of a substantial (trafficable) quantity of heroin. A Thai narcotics investigator and a member of the Australian Federal Police (AFP) travelled from Bangkok,

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kalin, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski, and Mr. Maxwell Yalden.

Thailand, to Melbourne, Australia, to deliver heroin which had been ordered from Australia. After arrival, the Thai investigator, operating in conjunction with the AFP, made a variety of calls arranging for handover of the narcotics, which were duly collected by the author and a friend.

2.2 On 24 September 1994, the author and his friend were arrested shortly after handover of the narcotics, and charged on a variety of federal offences under the *Customs* Act, as well as State offences. An ingredient of the federal offences was that the narcotics were imported into Australia "in contravention of [the federal *Customs* Act]".[i] In April 1995, the High Court of Australia handed down its decision in the unrelated case of *Ridgeway v. The Queen*,[ii] concerning an importation of narcotics in 1989, where it held that that evidence of importation should be excluded when it resulted from illegal conduct on the part of law enforcement officers.

2.3 At arraignment and re-arraignment in October 1995 and March 1996, the author pleaded not guilty on all counts. It was uncontested that the law enforcement officers had imported the narcotics into Australia in contravention of the *Customs* Act.

2.4 In May 1996, at a pre-trial hearing, the author sought a permanent stay of the proceedings on the federal offences, on the basis that (as in *Ridgeway v. The Queen*) the law enforcement officers had committed an offence in importing the narcotics. On 27 May 1996, the stay was granted, however leaving the State offences unaffected.

2.5 On 8 July 1996, the federal *Crimes Amendment (Controlled Operations)* Act 1996, which was passed in response to the High Court's decision in *Ridgeway v. The Queen*, entered into force. Section 15X[iii] of the Act directed the courts to disregard past illegal conduct of law enforcement authorities in connection with the importation of narcotics. On 5 August 1996, the Director of Public Prosecutions applied for the stay order to be vacated. In turn, the author challenged the constitutionality of section 15X of the Act. On 2 February 1998, the High Court, by a majority of five justices to two, upheld the constitutional validity of the amending legislation as well as the validity of lifting the stay on prosecution in the author's case. The matter was thus remitted to the County Court for further hearing.

2.6 As a result, on 1 October 1998, the County Court lifted the stay order and directed that the author be tried. On 27 November 1998, he was convicted of one count of possession of a trafficable quantity of heroin and one count of attempting to obtain possession of a commercial quantity of heroin. The Court sentenced him to 10 years' imprisonment on the first count and 15 years' imprisonment concurrently on the second count. The total effective sentence was thus 15 years' imprisonment, with possibility of release on parole after 10 years. On 7 April 2000, the Victoria Court of Appeal rejected the author's appeal against conviction, but reduced the sentence to 12 years' imprisonment, with a possibility of release on parole after 8 years. On 16 February 2001, the High Court refused the author special leave to appeal.

The complaint

3.1 The author complains that he is the victim of an impermissible application of a retroactive criminal law, in violation of article 15, paragraph 1, of the Covenant. Were it not for the introduction of the retroactive legislation, he would have continued to enjoy the effect of a

permanent stay in his favour. The effect of the legislation was to direct courts, to the detriment of the author, to disregard a past fact that in *Ridgeway v. The Queen* was determinative of a decision to exclude evidence. The author points out that, for all material purposes, the relevant illegal conduct in *Ridgeway v. The Queen* was identical to his own subsequent conduct. The violation is exacerbated in that, during his trial after withdrawal of the stay, a central element of the offence for which he was convicted was criminal conduct on the part of law enforcement authorities.

3.2 The author refers to jurisprudence of the European Court of Human Rights for the proposition that a law cannot be retroactively applied to an accused's detriment.[iv] Similarly, national jurisdictions have found impermissible the removal, whether by the courts or by legislation, after the date of a criminal act, of a defence available at the time the offence was committed.[v] By contrast, in Australian law, the presumption against retrospective operation of criminal law is confined to substantive matters, and does not extend to procedural issues, including issues of the law of evidence.

3.3 The author thus argues that the prohibition against retroactive criminal laws covers not only the imposition, aggravation or redefinition of criminal liability for earlier conduct so liable, but also laws that adjust the evidentiary rules required to secure a conviction. Alongside these classes of laws are fundamental requirements that there be certainty in the law, and that an accused ought not be deprived of a benefit of a law to which he was previously entitled. These elements are necessary in order to secure the individual adequate protection against arbitrary prosecution and conviction, and any deprivation thereof would constitute a breach of article 15, paragraph 1, of the Covenant.

3.4 As a result of the above, the author requests that the Committee require Australia to provide him with an effective remedy for the violation suffered, including immediate release, compensation for the violation suffered, and to take steps to ensure that similar violations do not occur in the future.

3.5 The author further contends, without raising any articles of the Covenant, that during his incarceration (four years at the time of submission of the communication) he has suffered serious health problems: these included an attack of bacterial endocartitis (on an already defective heart valve) and removal of an arachnoid cyst resulting in a prostatic enlargement requiring careful treatment to avoid further bacterial attack. As his first attack of endocartitis occurred in the Port Phillip Prison medical unit, he submits that his desire not to be treated there is warranted.

3.6 As to the admissibility of the communication, he argues that all domestic remedies reasonably open to him have been exhausted and points out that the principles of article 15 have neither constitutional nor common law protection in the State party. He argues that any application to the Human Rights and Equal Opportunity Commission would be futile and ineffective as it cannot afford binding relief in case of a violation; it can only offer non-binding recommendations. Alternatively, the author argues that any application of a domestic remedy would be unduly prolonged. He also confirms that the same matter has not been submitted for examination under any other procedure of international investigation or settlement.

The State party's submissions on admissibility and merits

4.1 The State party, by submissions of 20 November 2002, disputes the admissibility and merits, respectively, of the communication. As to a factual clarification, the State party points out that the "controlled operation" conducted in the author's case took place, as was the then current practice, in accordance with the terms of a 1987 ministerial agreement relating to such

operations and with detailed Australian Federal Police guidelines. In advance of an operation, a request was made from the Customs Service to the Federal Police to exempt law enforcement officers from detailed customs scrutiny. It was understood, at the time, that such an approach would not jeopardize prosecutions of alleged narcotics traffickers as such evidence of illegal importation had been held to be admissible evidence in other common law jurisdictions.

4.2 The State party argues that the communication is inadmissible *ratione materiae*. It argues that the plain meaning of article 15, paragraph 1, is to proscribe laws seeking retrospectively to make acts criminal that were not offences at the time they were committed. However, as the situation was interpreted by the High Court, the author was convicted under the criminal offence of section 233 (1) (b) of the *Customs* Act, a provision that existed at the time of his arrest and trial.

4.3 The State party argues that section 15X of the amending legislation is not a criminal offence, imposing liability for any behaviour. No person can be charged or convicted with an offence against it, nor does it alter any elements of a criminal offence; rather, it is a procedural law regulating the conduct of trials. The State party refers to the Committee's deference to the national courts on questions of the proper interpretation of domestic law,[vi] and argues that if the Committee accepts (as it would be appropriate to do) the High Court's classification of the amending law as a procedural act not going to the elements of any offence, then no issues under article 15, paragraph 1, are raised.

4.4 The State party rejects the author's contention that article 15, paragraph 1, extends beyond a prohibition on retrospective criminal laws to cover any laws operating retrospectively to the disadvantage or detriment of an accused. It submits that this interpretation is not supported by the ordinary meaning of the text of the article, which prohibits laws that seek retrospectively to make acts or omissions criminal (that is, punishable by law), when those acts or omissions were not criminal at the time they were committed. Nor is the author's view supported by the *travaux préparatoires* of the Covenant, which suggest that the objects and purposes of this provision were to prohibit the extension of the criminal law by analogy, to prohibit the retrospective creation of criminal offences, and to ensure that criminal offences were clearly stated in law.[vii] Equally, in the case of *Kokkinakis v. Greece* cited by the author, the European Commission referred specifically to "criminal law", rather than any law, being covered by article 7 of the European Convention on Human Rights when it stated that the "retrospective application of the criminal law where it is to the accused's detriment" is prohibited. As the amending law in the present case does not amount to such a criminal law, the author's case raises no issue under article 15, paragraph 1.

4.5 As to the merits, the State party refers to the arguments made above with respect to the admissibility of the case, in particular that the relevant "criminal offence" remained at all times the unchanged provisions of section 233 (1) (b) of the *Customs* Act, and advances further

contentions for the proposition that no violation of article 15, paragraph 1, of the Covenant has occurred. The State party contends that the amending legislation, as a procedural law, merely affected the admissibility of certain evidence in the author's trial.

4.6 The State party further argues that the decision in *Ridgeway v. The Queen* did not create or recognize any "defence"; rather, it concerned the exercise of a court's discretion to exclude certain forms of evidence on public policy grounds. The exercise of a court's discretion to exclude certain evidence may affect a prosecution's outcome, but an evidentiary rule is not the same as a "defence", which is an issue of law or fact that, if proved, relieves a defendant of liability. It follows that if the judgement in *Ridgeway v. The Queen* did not introduce or recognize a defence, then the amending legislation did not remove or vary the existence of any defence.

4.7 The State party also points out that after the amending legislation the courts retain a discretion to exclude evidence which would be unfair to an accused or to the trial process. It also notes that its High Court rejected the notion that the amending legislation was directed at the author, with the judgement of the Chief Justice observing that it did not direct the court to find any particular person guilty or innocent, and that its effect was merely to increase the amount of evidence available to the court.

4.8 As to the author's health concerns, the State party disputes the relevance of these issues to the claim under article 15. The State party observes that the St. Vincent Correctional Health Service, supplying extensive primary and secondary medical care to Port Phillip Prison, provides inter alia 24 hour availability of medical and nursing staff, a 20-bed in-patient ward at the prison, resuscitative facilities (including defibrillation), bi-weekly visits by a consultant physician, and ready availability of transfer in the event of major cardiac problems to St. Vincent's Hospital (possessing a purpose-built 10-bed in-patient ward). These health services comply with all Australian standards, and the State party refutes any suggestion the author is receiving any less than the utmost care and professional treatment.

The author's comments and the State party's further submission

5.1 By letter of 28 March 2003, the author disputed the State party's submissions. In response to the State party's invitation to the Committee to defer to the High Court's assessment of domestic law, the author argues (i) that the Court's powers are circumscribed by Australian law inconsistent with the Covenant, (ii) that the High Court dealt a question of constitutional interpretation rather than the issues under the Covenant presently before the Committee, and (iii) that the authors are not contending that domestic law had been improperly applied, as in *Maroufidou v. Sweden*,[viii] but rather that domestic law is inconsistent with the Covenant.

5.2 The author disputes that, on the plain meaning of article 15, paragraph 1, no issue arises under the Covenant. Due to the illegal conduct of the police, an essential element of the offence (an "act or omission" in the terms of the article) could not, based on the criminal law applicable at the time of the offence, be made out. Thus, his conduct did not and could not constitute a criminal offence at the time of the commission of the alleged offence and article 15, paragraph 1, comes into play.

5.3 The author points out that, in contrast to his own submissions, the State party has advanced no international law to support its narrow construction of article 15, paragraph 1, as applicable solely to the offence described in section 233 B of the *Customs* Act. The author emphasizes that if the legislature is barred from enacting retroactive criminal laws, it must also be barred from achieving the same result in practice by criminal laws that are labelled "procedural".

5.4 In the author's view, it is "artificial" in view of the actual effect on the author and in ignorance of the legislative intent lying behind the amending legislation to deny the existence of a retrospective criminal effect in circumstances where otherwise inadmissible evidence of an essential element of the offence is brought into play. Such an argument impermissibly elevates form over substance, for, on any view, the amending legislation - while ignoring the illegal acts of the State party's officers - changed a criminal law to the accused's detriment (whether by altering the law relating to the elements of the offence or by attempting to legalize otherwise illegal police conduct).

5.5 The author argues that Covenant safeguards should be rigorously applied in the light of the serious consequences for the individual and the possibilities for abuse. Because under Australian law, the seriousness of an offence and the concomitant sentence are partly determined by the quantity of drugs involved, State officers on "controlled operations" can pre-determine the potential offences and sentencing range by importing specific amounts. This is particularly significant in the author's case, as despite no evidence of communications or orders placed by him, he was sentenced to a serious penalty of 12 years' imprisonment, clearly influenced by the amounts of narcotics involved.

5.6 As to health issues, the author states that he recently completed radiotherapy treatment for mid-range prostate cancer, and is awaiting the results. If positive, he will then be operated upon for a hernia and hydrocele condition.

5.7 In a subsequent submission of 6 August 2003, the State party provided certain additional comments on the author's submissions. This new submission was received on the very day that the Committee, at its seventy-eighth session, was discussing its Views in the case. In order to provide the author with an opportunity to respond to the State party's new submission, the consideration of the case was deferred. No further comments have been received from the author.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

6.3 As to the issues of the standard of medical care provided to the author, the Committee, taking into account the responses of the State party to the points advanced by the author, considers that the author has failed to substantiate, for the purposes of admissibility, the contention that the nature of medical treatment provided to him raises an issue under the

Covenant. This aspect of the communication is accordingly inadmissible under article 2 of the Optional Protocol.

6.4 As to the arguments relating to exhaustion of domestic remedies that have been advanced by the author, the Committee observes that, given the absence of the State party's invocation of any such ground of inadmissibility, it need not further address these issues.

6.5 Regarding the State party's argument that the communication falls outside the scope of article 15, paragraph 1, of the Covenant, properly construed, and is thus inadmissible *ratione materiae*, the Committee observes that this argument raises complex questions of fact and law which are best dealt with at the stage of the examination of the merits of the communication.

6.6 In the absence of any other obstacles to the admissibility of the claim under article 15, paragraph 1, of the Covenant, the Committee declares this portion of the communication admissible and proceeds to its consideration of the merits of the claim.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 Before addressing the merits of the author's claim under article 15, paragraph 1, of the Covenant, the Committee notes that the issue before it is not whether the possession by the author of a quantity of heroin was or could under the Covenant permissibly be subject to criminal conviction within the jurisdiction of the State party. The communication before the Committee and all the arguments by the parties are limited to the issue whether the author's conviction under the federal *Customs* Act, i.e. for a crime that was related to the import of the quantity of heroin into Australia, was in conformity with the said provision of the Covenant. The Committee has noted that the author was apparently also charged with some State crimes but it has no information as to whether these charges related to the same quantity of heroin and whether the author was convicted for those charges.

7.3 As to the claim under article 15, paragraph 1, the Committee observes that the law applicable at the time the acts in question took place, as subsequently held by the High Court in *Ridgeway v. The Queen*, was that the evidence of one element of the offences with which the author was charged, that is to say, the requirement that the prohibited materials possessed had been "imported into Australia in contravention of the *Customs* Act", was inadmissible as a result of illegal police conduct. As a result, an order staying the author's prosecution was entered, which was a permanent obstacle to the criminal proceedings against the author on the (then) applicable law. Subsequent legislation, however, directed that the evidence of illegal police conduct in question be regarded as admissible by the courts. The two issues that thus arise are,

firstly, whether the lifting of the stay on prosecution and the conviction of the author resulting from the admission of the formerly inadmissible evidence is a retroactive criminalization of conduct not criminal, at the time it was committed, in violation of article 15, paragraph 1, of the Covenant. Secondly, even if there was no proscribed retroactivity, the question arises whether the author was convicted for an offence, the elements of which, in truth, were not all present in the author's case, and that the conviction was thus in violation of the principle of *nullum crimen sine lege*, protected by article 15, paragraph 1.

7.4 As to the first question, the Committee observes that article 15, paragraph 1, is plain in its terms in that the offence for which a person is convicted to be an offence at the time of commission of the acts in question. In the present case, the author was convicted of offences under section 233 B of the *Customs* Act, which provisions remained materially unchanged throughout the relevant period from the offending conduct through to the trial and conviction. That being so, while the procedure to which the author was subjected may raise issues under other provisions of the Covenant which the author has not invoked, the Committee considers that it therefore cannot conclude that the prohibition against retroactive criminal law in article 15, paragraph 1, of the Covenant was violated in the instant case.

7.5 Turning to the second issue, the Committee observes that article 15, paragraph 1, requires any "act or omission" for which an individual is convicted to constitute a "criminal offence". Whether a particular act or omission gives rise to a conviction for a criminal offence is not an issue which can be determined in the abstract; rather, this question can only be answered after a trial pursuant to which evidence is adduced to demonstrate that the elements of the offence have been proven to the necessary standard. If a necessary element of the offence, as described in national (or international) law, cannot be properly proven to have existed, then it follows that a conviction of a person for the act or omission in question would violate the principle of *nullum crimen sine lege*, and the principle of legal certainty, provided by article 15, paragraph 1.

7.6 In the present case, under the State party's law as authoritatively interpreted in *Ridgeway v. The Queen* and then applied to the author, the Committee notes that it was not possible for the author to be convicted of the act in question, as the relevant evidence of the unlawful import of narcotics by the police was inadmissible in court. The effect of the definitive interpretation of domestic law, at the time the author's prosecution was stayed, was that the element of the crime under section 233 B of the *Customs* Act that the narcotics had been imported illegally, could not be established due to the fact that although the import had been based on a ministerial agreement between the authorities of the State party exempting import of narcotics by the police from customs scrutiny, its illegality had not technically been removed and the evidence in question was hence inadmissible.

7.7 While the Committee considers that changes in rules of procedure and evidence after an alleged criminal act has been committed, may under certain circumstances be relevant for determining the applicability of article 15, especially if such changes affect the nature of an offence, it notes that no such circumstances were presented in the author's case. As to his case, the Committee observes that the amending legislation did not remove the past illegality of the police's conduct in importing the narcotics. Rather, the law directed that the courts ignore, for the evidentiary purposes of determining admissibility of evidence, the illegality of the police

conduct. Thus, the conduct of the police was illegal, at the time of importation, and remained so ever since, a fact unchanged by the absence of any prosecution against the officers engaging in the unlawful conduct. In the Committee's view, nevertheless, all of the elements of the crime in question existed at the time the offence took place and each of these elements were proven by admissible evidence by the rules applicable at the time of the author's conviction. It follows that the author was convicted according to clearly applicable law, and that there is thus no violation of the principle of *nullum crimen sine lege* protected by article 15, paragraph 1.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of article 15, paragraph 1, of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

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[i] Section 233 B (1) (c) of the Customs Act provides:

> "Any person who:
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> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act: …
>
> shall be guilty of an offence".

[ii] (1995) 184 CLR 19 (High Court of Australia).

[iii] The full text of section 15X of the Act provides, in material part:

> "In determining, for the purposes of a prosecution for an offence against section 233 B of the Customs Act 1901 or an associated offence, whether evidence that narcotic goods were imported into Australia in contravention of the Customs Act 1901 should be admitted, the fact that a law enforcement officer committed an offence in importing the narcotic goods, or in aiding, abetting, counselling, procuring, or being in any way knowingly concerned in their importation, is to be disregarded, if:
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> (a) the law enforcement officer, when committing the offence, was acting in the course of duty for the purposes of a [duly exempted] controlled operation …"

[iv] *Ecer et al. v. Turkey* Applns. 29295/95 and 29363/95; judgement of 27 February 2001 and *Kokkinakis v. Greece* Series A No. 260-A, 22; judgement of 25 May 1993.

[v] *Kring v. Missouri* (107 US 221), *Dobbert v. Florida* (432 US 282) and *Bouie v. Columbia* (378 US 347) (United States Supreme Court).

[vi] *Maroufidou v. Sweden*, communication No. 58/1979, Views adopted on 9 April 1981.

[vii] The State party refers to proceedings in the Third Committee (1960), where "Many representatives were in favour of the text submitted by the Commission on Human Rights. The draft article embodies the principle *nullum crimen sine lege*, and prohibited the retroactive

application of criminal law. It was pointed out that there could be no offences other than those specified by law, either national or international." M Bossuyt: *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, 1987, at 323.

[viii] Op. cit.