

UN Human Rights Committee Condemns Mandatory Immigration Detention...Again

Danyal Shafiq v Australia, CCPR/C/88/D/1324/2004 (13 November 2006)

Introduction

On 13 November 2006, the UN Human Rights Committee further elaborated on what constitutes arbitrary detention for the purposes of art 9(1) of the *ICCPR*, finding that there must be 'appropriate justification' for continued mandatory detention in light of the circumstances of the particular case. It further re-affirmed its view that, pursuant to art 9(4), the protection against arbitrary arrest or detention provides individuals who have been arrested or detained with the right to take proceedings before a court that is empowered to decide on the lawfulness of the detention and order release if the detention is not lawful.

Background

The author of the communication, Danyal Shafiq, claimed a violation by Australia of art 7 (freedom from cruel, inhuman or degrading treatment or punishment), art 9 (freedom from arbitrary detention) and art 10(1) (right to humane treatment in detention) of the *ICCPR*. Born in Bangladesh in 1979, Mr Shafiq has been detained indefinitely as an unlawful non-citizen since his arrival by boat in 1999. Mr Shafiq argued that such detention contravenes the protections afforded under art 9. Mr Shafiq further claimed that Australia would violate arts 7 and 10 if he was deported to Bangladesh, fearful of being imprisoned in inhuman conditions, tortured and subject to cruel and inhuman treatment.

Mr Shafiq's application for a protection visa (refugee status) was denied, and his application for merits review to the AAT was rejected as there were grounds to consider that he had committed serious non-political crimes prior to his entry into Australia (article 1F(b) *Refugees Convention*). The Federal Court further denied his appeal for legal review, and the Minister for Immigration and Multicultural affairs refused to exercise her discretion to grant a protection visa on humanitarian grounds under s 417 of the *Migration Act*.

Views under Arts 7 and 10

The Committee found that Mr Shafiq's claims under arts 7 and 10 were inadmissible on the grounds that he had not exhausted domestic remedies. This was because, at the time of the decision, Mr Shafiq had applied for a visa under s 501J of the *Migration Act*, which was found to provide an 'in principle' remedy by providing the Minister with power to substitute a decision of a review tribunal in circumstances which include those that bring Australia's obligations as a signatory to the *ICCPR* into consideration. As Mr Shafiq's application remains pending, both related claims under arts 7 and 10 were found to be inadmissible at the time of the decision.

Notably, the Committee held that Mr Shafiq's failure to pursue Full Federal Court and High Court appeals did not prevent the admissibility of claims raised under arts 7 and 10; the Committee finding that a victim need only exhaust domestic remedies which are 'effective' in order for a

complaint to be admissible under the First Optional Protocol to the *ICCPR*. The Committee considered that, given the courts only consider the question of refoulement in the context of obligations arising under the *Migration Act* (and, by extension, the *Refugees Convention*) but not those arising from the *ICCPR*, they could not be said to provide an effective remedy within the meaning of art 2(3) of the Covenant.

Views under Art 9

The Committee, however, found the communication admissible to the extent that issues under art 9(1) and (4) were raised. In this regard, Mr Shafiq alleged a violation of the *ICCPR* on the basis that his mandatory detention is arbitrary, bearing no relation to the circumstances of the case, and is indefinite as the grounds for his detention cannot be reviewed by a court and he has no recourse for legal determination of his refugee status.

In relation to art 9(1), the Committee restated its opinion that remand in immigration detention will be arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought. The Committee further found that open periodical review of detention is required in order to reassess the necessity of detention in light of the circumstances. Therefore, a State party has a continuing responsibility to provide justification throughout the period of detention, and that detention must only continue where the State party can provide appropriate justification in light of changing circumstances.

In the present case, Australia asserted that the 'general experience is that asylum seekers abscond if not retained in custody' constituted appropriate justification for Mr Shafiq's continued detention. The Committee found, however, that as Mr Shafiq had not attempted to abscond over a period amounting to almost seven years, including over a year in an open mental health facility, the 'general experience' was no longer appropriate justification for his detention. In the absence of further appropriate justification in the particular case, Mr Shafiq's mandatory detention was found to be arbitrary within the meaning of art 9(1).

The Committee further took the view that an individual's right under art 9(4) to have his or her detention reviewed by a court must include the possibility of release. Australian courts are, therefore, ineffective in this regard as they are unable to undertake a substantive review of the grounds for detention (the individual's status as a non-citizen) or order release. Although the recently introduced Removal Pending Bridging Visa provides a potential effective remedy for detention, in practical terms it did not remedy the breach as Mr Shafiq was not invited by the Minister to apply. A breach of art 9(4) was accordingly found on the grounds that no effective remedy for the author's detention was available.

Conclusion

The Committee has requested provision of information about the measures taken to provide Mr Shafiq with an effective remedy, including release and appropriate compensation, by 11 February 2007.

The decision is available at:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/32cae9a7f6c3e94ec125723a005826ff?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/32cae9a7f6c3e94ec125723a005826ff?Opendocument)

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