

Mandatory and Prolonged Detention Violates Prohibition against Arbitrary Detention

Shams & Ors v Australia, HRC, UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (11 September 2007)

In a decision regarding mandatory immigration detention, the UN Human Rights Committee has elucidated its jurisprudence on the content and application of art 9 of the *ICCPR*, the right to liberty and security of person and to be free from arbitrary detention.

Facts

The eight authors, all of whom were Iranian nationals, arrived in Australia by boat between October 2000 and April 2001. They were classified as 'unlawful non-citizens' and detained in immigration detention for between 3 and 4 years. All of the authors eventually received either a permanent humanitarian visa or a temporary protection visa.

The authors alleged that their detention, treatment and proposed refoulement constituted violations of various provisions of the *ICCPR*. After considering various legal and factual issues, the Committee found a violation of arts 9(1) and 9(4).

Decision

Article 9(1) of the *ICCPR* relevantly provides that 'No one shall be subject to arbitrary arrest or detention'.

Article 9(4) provides that any person who is arrested or detained must be entitled to challenge the lawfulness of their detention in court and be released without delay if the detention is unlawful.

In relation to art 9(1), the Committee held that, in order to avoid being characterized as 'arbitrary', detention must not continue beyond the period for which it can be appropriately justified. In the present case, the Committee noted that Australia had not advanced grounds particular to the authors which could justify such prolonged detention. In particular, Australia did not demonstrate that there were no less restrictive or invasive means of achieving the ends of preventing 'escape' or appearance at hearings. This is consistent with jurisprudence from the European Court of Human Rights, which establishes that detention can only be justified by 'relevant and sufficient reasons' particular to the individual, and that the state must 'scrupulously examine' and address 'evolving circumstances' in order to legitimise the continued deprivation of liberty of a person: see, eg, *Benjamin and Wilson v United Kingdom* (2003) 36 EHRR 1.

In relation to art 9(4), the Committee held that the lawfulness of detention must be capable of *substantive* and not merely formal or procedural review. It is not enough that detention is merely compliant with domestic law; it must be compatible with the *ICCPR* and proportionate in all the circumstances. The Committee held that art 9(4) requires that a court have the power to order release if the detention is, or in any way becomes, arbitrary or unlawful. The Committee noted that, pursuant to the provisions of the *Migration Act 1958* (Cth) and the decision of the High Court in *Al-Kateb v Godwin* [2004] HCA 37, Australian courts do not have this power of substantive review and release. Again, this is consistent with jurisprudence from the European Court, which has repeatedly held that detained persons must have the ability to 'obtain a review by a court of the lawfulness of their detention both at the time of the initial deprivation of liberty and, where new issues of lawfulness are capable of arising, periodically thereafter': see, eg, *Benjamin and Wilson v United Kingdom* (2003) 36 EHRR 1; *Melnikova v Russia* [2007] ECHR 24552/02 (21 June 2007).

Having regard to the above, the Committee found a violation of arts 9(1) and 9(4) and held that the authors should be paid adequate compensation for their prolonged detention.

Implications for the Victorian Charter

This decision may be relevant to the interpretation and application of s 21 of the *Charter*, which is said in the Explanatory Memorandum to be modelled on art 9 of the *ICCPR*. While the present decision relates to immigration detention, an area of federal law and responsibility, it is clear that s 21 of the *Charter* (as with art 9 of the *ICCPR*) applies to all deprivations of liberty, including in relation to criminal law, remand, preventative detention, juvenile detention, mental illness and compulsory treatments: see, eg, HRC, *General Comment No 8: Right to Liberty and Security of Persons* (1982) [1]. These are all areas of state law and

responsibility that will be subject to the *Charter* and should therefore be regulated and administered having regard to the principles articulated in this and related decisions.

The decision is available at http://www.ohchr.org/tbru/ccpr/Shams_et_al_v_Australia.pdf.

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