F.K.A.G et al. vs. Australia

Facts

The authors are 36 Sri Lankans citizens of Tamil ethnicity and one Myanmarese citizen of Rohingya ethnicity who were recognized as refugees for whom it is dangerous to return to their country of origin. Three of them are children.

Most of them were apprehended in Australian territorial waters and transferred to immigration detention facilities where they were held as ‘unlawful non-citizens’. However, five of the authors were rescued at sea by an Australian customs vessel and entered Australia on ‘special purpose’ visas, which expired on their arrival, after which they were detained as ‘unlawful non-citizens’. All the authors were recognised as refugees and the three children were granted protection visas allowing them to remain in Australia. All of the adults were refused visas to remain in Australia following adverse security assessments. They were not informed of the reasons for these negative security assessments and are unable to challenge them. The only available review would be for ‘jurisdictional error’ and without knowledge of the bases of the decisions this cannot be shown. As they have been refused the right to remain in Australia, the authors have been held in detention awaiting removal. They are unwilling to return voluntarily to their countries of origin and the State has not informed them of an intention to return them. The State has not informed the authors that a third country is willing to accept them nor that it is negotiating with other States towards this end. In any case, no third country is obliged to admit them and States are unlikely to choose to do so due to the negative security assessments by Australia.

The authors consequently complained that they were not informed of the substantive reasons for their detention (Art. 9 § 2), which was unjustified and therefore arbitrary (Art. 9 § 1) both prior to the decision to refuse them protection in Australia and after that decision. The initial detention was not based on an individual assessment, but on the practice of detaining all ‘unlawful non-citizens’, while the second was based on the assertion by the executive that they represent a security risk. Insofar as this risk relates to activities before they entered Australia it is unclear that they accurately reflect the risk the authors might pose to the Australian community. In any case, if it has reliable evidence that the authors have committed crimes, the State party could exercise jurisdiction and try them. Furthermore, the impossibility of challenging the security assessments violates Art. 9 § 4. In addition, their indefinite detention is inflicting serious and irreversible psychological harm on the authors (Art. 7 and 10 § 1), as demonstrated by the fact that some of the detainees have made suicide attempts while in detention. Finally, the three child authors and their parents as well as one other author (who has been separated from his wife and child as a result of his detention) claim that this detention has interfered with their family life (Art. 17 § 1, Art. 23 § 1 and Art. 24 § 1).

State party’s observations on the admissibility and merits: The State party argued that the Communication was inadmissible because of the non-exhaustion of domestic remedies as the authors (with the exception of two individuals) had not sought judicial review of the decision to detain them before the Federal Court or High Court of Australia. The recent M47 case, brought by an individual in a similar situation, demonstrated the effectiveness of this remedy as the High Court had reviewed the reasons for the adverse security decision and had declared invalid regulations which prevented a refugee who received a negative security decision from receiving a

Keywords

- Arbitrary detention
- Conditions of detention
- Rights of detainees
- Torture, ill-treatment

Relevant Provisions

- Article 7
- Article 9 §1
- Article 9 §2
- Article 9 §4
- Article 10 §1

Violated Provisions

- Article 7
- Article 9 §1
- Article 9 §2
- Article 9 §4

Author vs State (represented/not represented by counsel)
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Counsel, Ben Saul)

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Van Alphen v. The Netherlands, 23 July 1990. It concluded that the indefinite detention of the authors was arbitrary because the State party had not demonstrated, on an individual basis, the reasons for it. In addition, the State did not show that other, less intrusive measures could not be used. The Committee recalled that “individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion”.

Art. 9 §2: The Committee found that the State party did not violate this provision with regard to most of the refugees to whom it gave the necessary information concerning the reasons for their detention on their arrival at the immigration facilities; the adverse security assessments were only a second phase in the migration process. However, in the case of the five authors who arrived with ‘special purpose’ visa, this obligation was not fulfilled by the State because their initial detention was for security reasons and they were not provided with adequate information on the basis of these assessments.

Art. 9 §4: The Committee considered that the State party had also violated Article 9 §4 because the judicial review available to the authors did not appear to offer the possibility of release if the detention was in violation of the ICCPR, despite being legitimate under Australian domestic law (No. 1014/2001 Baban et al. v. Australia, 6 August 2003; No. 1069/2002 Bakhtyari v. Australia, 29 October 2003; No. 1255, 1256, 1259, 1260, 1266, 1268, 1270 & 1288/2004 Shams et al. v. Australia, 20 July 2007). The Committee also noted that the High Court’s established jurisprudence upholding the lawfulness of indefinite immigration detention and the mandatory detention of refugees undermines the argument that these procedures provide an effective means of challenging detention.

Art. 7 and Art. 10 §1: The Committee considered that the State party was in violation of Art. 7 because the combination of “the arbitrary character of the authors’ detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention” inflicted serious psychological harm on the authors. In the light of this finding, the Committee thought it unnecessary to analyse the claims under Art. 10 §1 separately.

Conclusions

The Committee found violations of Arts. 7 and 9 §1 and 9 §4 with respect to all the authors. It also found a violation of Art. 9 §2 with regard to 5 of the authors. Consequently, the Committee asked the State to provide the authors with an effective remedy, including liberation under appropriate conditions, rehabilitation and compensation. It also emphasised that the State has an obligation to modify its law, in particular its Migration legislation, in order to prevent similar violations of the ICCPR in future. The State party should send information on how it has complied with the Committee’s view in 180 days.

Dissent/Concurrence

Sir Nigel Rodley, referring to his separate opinion in a previous case (No. 900/1999 C v. Australia, 28 October 2002), considered circular and superfluous the finding of a violation under Art. 9 §4 since the violation of the Art. 9 §1 reflects the lack of legal safeguards to challenge the detention. He was also unconvinced that Art. 9 §4 extends beyond the mere right to challenge lawfulness under national law.