ICCPR Case Digest

CCPR/C/112/D/1937/2010

Communication
No. 1937/2010

Submission: 16.04.2010
Adoption: 26.03.2015

Leghaei v. Australia

Refusal of a visa which would disrupt long-settled family life on the grounds of an undisclosed security assessment violated articles 17 and 23

Substantive Issues

- Compelling reason for national security
- Review of expulsion
- Discrimination on the ground of national origin
- Discrimination on the ground of other status
- Arbitrary interference with family

Relevant Articles

- Art. 2
- Art. 13
- Art. 17
- Art. 23
- Art. 24

Violations

- Art. 17 and 23

Facts

The author, an Iranian citizen, came to Australia with a temporary visa in 1994 and received another temporary visa in 1995. In 1996, the author applied for a permanent visa but his application was refused by a delegate of the then Australian Minister for Immigration on the grounds that he was assessed by the Australian Security Intelligence Organisation (ASIO) to be a threat to Australia's national security. The reason why the author was considered to be a risk to national security was not explained. The decision was confirmed by the Migration Internal Review Office for the Department of immigration.

The author initiated proceedings against the ASIO assessment claiming that the assessment was void due to a lack of procedural fairness and also initiated an appeal against the refusal of the visa which was suspended whilst the proceedings against ASIO were conducted.

Proceedings against ASIO

During the first proceedings before the Federal court in 2002, the ASIO solicitors revealed that the security assessment was partially based on two documents ASIO had taken from the authors suitcase without his knowledge, namely a handwritten notebook which the author maintains ASIO "erroneously claims discussed how to fight a jihad" and an email from the author to the Organisation of Culture and Islamic Relations regarding a sum of money borrowed from friends which the author was trying to recover through the Iranian ambassador in Australia to reimburse the organisation. The Federal court recognised ASIO translation of the notebook was flawed.

ASIO took a fresh security assessment in 26 May 2004, during which the author was able to comment but he was not provided with a copy of the assessment or any direct information regarding the content. The author initiated a second set of proceedings against the second assessment in 2004. The Federal Court found that in relation to lawful non-citizen such as the author whose visa would be directly threatened by an adverse security assessment there is a duty to afford "such degree of procedural fairness as the circumstances could bear" but noted that the courts are "ill-equipped to evaluate intelligence," and the obligation to provide a degree of

procedural fieriness will be discharged by evidence of a genuine consideration of the case by the Director-General personally whom Parliament had determined to be trusted to be fair.

The author appealed. The Full federal court recognised that balancing of the conflicting principles of an individual's entitlement to know the adverse case and national security may in some cases produce "the "unsatisfactory" feature that the content of a security assessment is withheld from the person affected" but found no error in the primary judge's reasons. Leave to appeal to the High court was refused.

Appeal against the refusal of a visa

Restarting a procedure opened in 1997, but which had been suspended, the Migration Review Tribunal wrote to the author in 2009 in relation to his application for review of the decision to refuse him a permanent visa, inviting him to comment by 30 October 2009 on the second security assessment by ASIO. The author requested a copy of the assessment but the tribunal responded that it did not have a copy of the assessment. On 19 November 2009, the author provided a detailed submission to the tribunal, noting that neither he nor the tribunal had a copy of the ASIO assessment in question, nor did the author know anything of its content or the evidence upon which it was based. He argued that, in making the security assessment, ASIO had made a mistake.

On 19 February 2010, the tribunal affirmed the original decision not to grant a visa to the author and his remaining two dependants noting it "did not have the power to go behind or to examine the validity of the ASIO assessment." .The author requested the Minister of Immigration to exercise his personal discretionary power to allow the author to remain. On 17 May 2010, the author was notified that the Minister decided to grant a permanent visa for the author's wife and son but not to grant one to himself.

The author claims that his deportation to Iran would constitute a violation of articles 2, 13, 17, 23, 24 and 26 of the Covenant. The legal consequence of the refusal of the author's visa is his deportation to Iran, which would have the practical effect of separating him from his family and his community in Australia.

Committee's View

Consideration of admissibility

The Committee recalls that mere doubts about the effectiveness of the remedies, or in this case about the relevance of such remedies, do not absolve an individual from exhausting available domestic remedies and found the claims under article 2 in conjunction with article 13 and claims under article 26 inadmissible but finds the remaining claim admissible.

Consideration of merits

The Committee, citing the previous case of Madafferi v Australia (communication No 2011/2001, views adopted on 26 July 2004), considers that a decision by the State party that involves the obligatory departure of a father of a family, which includes a minor child, and which would compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family at least in cases such as the present one where substantial changes to long-settled family life would follow. The Committee considers that the refusal of the visa in this case was an interference within the meaning of article 17 of the Covenant.

The Committee must determine whether such interference is arbitrary or unlawful pursuant to article 17 (1). The Committee recalls that the notion of arbitrariness includes "elements of

inappropriateness, injustice, lack of predictability and due process of law" (communication No. 2009/2010 Ilyasov v Kazakhstan, views adopted on 23 July 2014). The Committee notes that disrupting long-settled family life imposes an additional burden on the state party regarding the procedure leading to such disruption. In light of the author's 16 years of lawful residence and long-settled family life in Australia and the absence of any explanation from the State party on the reasons requiring the termination of the author's right to remain except for the general assertion that it was done for "compelling reasons of national security", the Committee finds that the State party's procedure lacked due process of law. The State party has therefore not provided the author an adequate and objective justification for the interference with the author's long-settled family life. The Committee is of the view that the facts before it disclose a violation of article 17, read in conjunction with article 23 of the Covenant with regard to the author and his family.

Having reached this conclusion, the Committee decides not to examine separately the remaining grounds invoked by the author under articles 13 and 24 of the Covenant.

Recommendation

The Human Rights Committee therefore decided the state party is under an obligation to:

a. provide the author with an effective and appropriate remedy, including a meaningful opportunity to challenge the refusal to grant him a permanent visa; and compensation.
b. prevent similar violations in the future.

Deadline to Submit the Report on the Implementation of the Recommendations

180 days from the adoption of the views: 22 September 2015

Partially dissenting opinion of Committee members Sarah Cleveland and Victor Manuel Rodriguez-Rescia

The Committee members consider that the communication contains a solid basis for invoking the circumstances referred to in article 13, and the communication should, as a matter of course, assess the applicability or non-applicability of article 13 of the Covenant and whether or not it was violated in line with the approach adopted in a previous case considered by the Committee (communication No. 1051/2002, Ahani v. Canada; Views adopted on 29 March 2009).

The members take the view that this communication does in fact comprise a violation of article 13 of the Covenant. The invocation of compelling reasons of national security did not exempt the State from the obligation under article 13 to provide the required procedural safeguards. The members consider that the author should have been given the opportunity to comment on the information submitted to the authorities, at least in summary form.