



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

Communication No. 2049/2011, CCPR/C/108/D/2094/2011

Country: Australia

Region: Oceania

Year: 2013

Court: United Nations Human Rights Committee United Nations Human Rights Committee

Health Topics: Child and adolescent health, Health care and health services, Mental health, Prisons

Human Rights: Freedom from torture and cruel, inhuman or degrading treatment, Right to due process/fair trial, Right to liberty and security of person

Facts

The authors, 37 Sri Lankan citizens held in Australian immigration detention facilities, alleged that the actions of the Australian government regarding their detention violated Articles 7, 9, 10, 17, 23, and 24 of the International Covenant on Civil and Political Rights (the “Covenant”).

At the time of the submission, all of the authors were being held in immigration detention facilities run by the Australian government. Thirty-one of the applicants entered Australian territorial waters by boat, were apprehended at sea, and were sent to detention facilities for processing, where one of the authors was born. This was in compliance with Australia’s Migration Act of 1958 as they did not have valid visas to enter Australia. Five of the authors were brought to Australia after having been rescued by an Australian customs vessel after they departed from Indonesia (the “Oceanic Viking Five”). Australia agreed with Indonesia that it would receive them on special purpose visas. When they arrived, however, their visas expired and they were excised to an offshore location in detention as required under the Migration Act of 1958. The authors were transferred to various detention facilities. The Australian government recognized the thirty-one as refugees and acknowledged that they could not return to their home country. The Oceanic Viking Five were recognized as refugees by the UNHCR, but sought to apply for permanent protection in Australia. All thirty-four of the adult authors were subsequently denied visas to remain in Australia following adverse security assessments by the Australian Security Intelligence Organization (the “ASIO”). The three children were granted protection visas.

The authors were unable to question the merits of the security assessments as they were not provided the grounds for the negative findings and also the domestic courts lacked jurisdiction to conduct review on the merits. The authors remained in detention for the purpose of removal, but there was no evidence that they were going to be returned to their home countries or that the government of Australia was working to organize placement in third party countries. At the time of the submission to the Committee, the government had appointed an independent reviewer to address the security assessments. The authors alleged that this was insufficient relief.

The authors alleged that the prolonged detention resulted in escalating risks to their physical and mental health. One author took an overdose of anti-depressant medication and had to go to hospital. Another attempted self-harm with an electrical cable. Two attempted suicide. One of the suicide attempts was by a detainee who was concerned that his brother, who was also a detainee and suffered from mental illness, was not receiving adequate medical treatment. The government claimed that detention centers offered medical care comparable to that available to the general public, including mental health support services, and therefore there was not a violation based on medical grounds.

The authors alleged violations of the following provisions in the Covenant:

Article 7: for torture, inhuman or degrading treatment or punishment

Article 9, paragraph 1: for their arbitrary detention

Article 9, paragraph 2: for failure to inform the authors for the reason for their arrest with individual justifications

Article 9, paragraph 4: for failure to provide an avenue for the detainees to take proceedings before a court

Article 10, paragraph 1: for failure to treat the detainees humanely and with respect for human dignity

Article 17, paragraph 1: for arbitrary or unlawful interference with family life

Article 23, paragraph 1: for failure to protect the family structure

Article 24, paragraph 1: for failure to provide the three children with measures of protection

Decision and Reasoning

The Committee held that the State violated the authors' rights with regards to Article 7 and Article 9, paragraphs 1 and 4 of the Covenant. With regards to the Oceanic Viking Five, the Committee also found a violation of Article 9, paragraph 2.

With regards to Article 7, the Committee found a violation with regards to all authors. On the basis of the finding, the Committee did not address the conditions of detention under Article 10. The Committee reasoned that although the government provided access to medical treatment in detention facilities, these services were insufficient to rectify the negative impacts of prolonged detention on the mental states of the authors. The combination of the arbitrary detention, lack of awareness of future proceedings, and lack of information and procedural rights provided to the authors was cumulatively inflicting serious psychological harm. This harm was a violation of the prohibition on torture and inhuman or degrading treatment or punishment.

With regards to Article 9, paragraph 1, the Committee found that the detention of the authors was arbitrary as it was not justified by the State as "reasonable, necessary and proportionate in light of the circumstances." Fulfilling this requirement requires, after a brief initial period to document entry, particular individualized reasons justifying detention.

With regards to Article 9, paragraph 2, the Committee found that the information provided to the Oceanic Viking Five regarding the reasons for their arrest was insufficient. The Committee did not apply the violation to the other authors as at the time of their initial arrest, when they arrived without visas, the information regarding the reason for their detention was sufficient to satisfy the requirements even though it was not individually tailored.

With regards to Article 9, paragraph 4, the Committee found a violation with regards to all authors as it was clear that the detention could not be challenged on the merits in the Australian judicial system.

Decision Excerpts

9.3 Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

9.8 [T]hese services do not take away from the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on the grounds that the person cannot even be appraised of, can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that 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 are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant.