



M.M.M. v. Australia

Communication No. 2136/2012, CCPR/C/108/D/2136/2012

Country: Australia

Region: Oceania

Year: 2013

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

Health Topics: 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, nine persons held in Australian immigration detention facilities, alleged violations of various articles (named below) of the International Covenant on Civil and Political Rights (the "Covenant").

The authors had different backgrounds. Two were Myanmar citizens, six were Sri Lankan citizens, and one was a Kuwaiti citizen. They all entered Australian territorial waters on various boats between 2009 and 2010. None of them had valid visas to enter Australia and they were therefore placed in immigration detention facilities. The authors were all recognized by the Australian authorities as "refugees for whom return to their countries of origin was unsafe." Despite this classification, they were denied visas for residence in Australia based on negative security assessments by the Australian Security Intelligence Organization. The justifications and evidence related to the negative assessments were not conveyed to the authors.

The authors alleged that there was no effective domestic review process available to address the merits of the negative security assessments or the ongoing nature of their detention in immigration detention facilities. As of the time of the application, the State had not expressed either an intent to return them to their country of origin or any efforts to negotiate with a third country to accept them. The duration of their detention seemed indefinite. The authors also alleged that the detention caused irreversible psychological harm and that the conditions of detention provided inadequate physical and mental health services.

Specifically, the authors alleged violations of the following provisions in the Covenant:

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 7: for torture, inhuman or degrading treatment or punishment

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

Decision and Reasoning

The Committee held that the case was admissible and found violations of the authors' rights under articles 7 and 9, paragraphs 1 and 4, of the Covenant.

With regards to article 7, the Court found that there was a violation as the detention constituted torture, inhuman or degrading treatment or punishment. While the government presented evidence that the detention facilities provided mental and physical health services, the Court found that these services could not offset the negative impacts of ongoing detention for an indefinite duration. The Court expressed particular concern over the impact on the mental health of the authors and referenced medical reports suggesting a deterioration of mental condition. As the Court found a violation under article 7, it did not independently address the allegation of violations under article 10.

With regards to article 9, paragraph 1, the Committee found a violation based on the arbitrariness of the detention. While the Committee noted that detention in immigration proceedings is not per se arbitrary, "detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time." As the Australian authorities failed to comply with these requirements, there

was a violation.

With regards to article 9, paragraph 2, the Committee found that there was not a violation. Arrest includes detention situations such as those in the present case. The initial arrest was upon entry to Australian territory and the Committee found that the generic detention notice provided at that time was sufficient explanation to the authors for that detention. The detention after the negative security assessment did not involve a separate arrest and therefore it was not for the Committee to determine where there was sufficient explanation to the authors at that time.

With regards to article 9, paragraph 4, the Committee found a violation based on the lack of effective review mechanisms in the Australian judicial system. While the government presented a couple of avenues for review, the Court was not convinced they would provide adequate substantive review.

Decision Excerpts

10.3 The Committee recalls that the notion of "arbitrariness" is not to be equated with "against" and must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law. Detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. 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.

10.7 The Committee takes note of the authors' claims under articles 7 and 10 paragraph 1 and the information submitted by the State party in this regard, including on the health care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on 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.

12. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide all authors with an effective remedy, including release under individually appropriate conditions for those authors still in detention, rehabilitation and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its Migration legislation to ensure its conformity with the requirements of articles 7 and 9, paragraphs 1 and 4 of the Covenant.