Expulsion by Australia for reasons of national security violated the right to protection of the family

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The Human Rights Committee determined that Australia violated its obligations under the International Covenant on Civil and Political Rights in connection with its decision to deny an individual permanent resident rights

Leghaei and others v. Australia (1937/2010)

Summary

In March 2015, the Human Rights Committee was asked to consider whether Australia had violated its obligations under the International Covenant on Civil and Political Rights in connection with its decision to deny an individual permanent resident rights.

The communication was submitted by a Iranian national on behalf of himself and his family under the Optional Protocol to the Covenant.

Background

The author, Mansour Leghaei, first came to Australia in 1994 on a short-stay business visa. In 1995, he was granted a religious worker visa that allowed him to work as a Muslim religious leader. On 1 November 1996, the author applied for a permanent visa. The author's wife and children were included in the application as his dependents. Three of his four children are Australian citizens.

On 25 August 1997, the Ministry of Immigration refused to grant the author's visa application on the basis that he had been assessed by the Australian Security Intelligence Organisation (***ASIO***) as a threat to national security. On 17 October 1997, the Ministry's decision was affirmed by the Migration Internal Review Office. Neither decision provided specific reasons for the refusal.

On 7 November 1997, the author applied to the Migration Review Tribunal for a review of the Ministry's decision. On 13 March 2002, the ASIO restated its view that the author was a direct risk to national security. On 14 March 2002, the Minister for Immigration issued a "conclusive certificate" under the Migration Act, which the Minister is entitled to issue where it is contrary to the national interest to undertake a review or change the decision. On 17 April 2002, the Migration Review Tribunal ceased its review. On 29 April 2002, the Minister issued a further conclusive certificate.

On 10 May 2002, the author commenced proceedings in the Federal Court against the Minister for Immigration and the ASIO, seeking to set aside the conclusive certificates and the ASIO security assessment for lack of procedural fairness. In these proceedings, the ASIO relied on two documents allegedly obtained from the author's suitcase without his knowledge at Sydney Airport. The first document was a handwritten notebook in the Persian language which "discussed how to fight a jihad". The second document was an e-mail from the author to the Organization of Culture and Islamic Relations regarding reimbursement of a sum of 4,000 Australian dollars to the organization. The ASIO could not provide a copy of the original email and relied only on its own English language translation of the email.

On 21 July 2004, the author commenced new proceedings in the Federal Court. In 2005, the Federal Court dismissed the proceedings by written decision. In 2007, the Federal Court dismissed the appeal and the High Court refused special leave to appeal.

On 19 February 2010, the Migration Review Tribunal affirmed the original decision not to grant a visa to the author and his two dependents.

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Finally, the author petitioned the Minister for Immigration to exercise his discretionary power.

On 16 April 2010, the author filed this communication with the Committee under the Optional Protocol to the Covenant. The author claimed that his deportation to Iran would constitute a violation of his and his family's rights to: (i) freedom from discrimination, (ii) procedural fairness during expulsion proceedings, (iii) freedom from arbitrary interference with the family, (iv) protection of the family, (v) special measures of protection with respect to minor children, and (vi) equality before the law (under articles 2, 13, 17, 23, 24 and 26 of the Covenant respectively).

On 17 May 2010, the Minister for Immigration decided to grant the author's wife and son visas for permanent residency but not to grant a visa to the author. The Minister's decision was not subject to appeal.

The Committee's decision

The Committee first considered Australia's objection to the admissibility of the author's complaint on the ground that author had not exhausted local remedies. The Committee disagreed with Australia's arguments that the author could have brought a complaint under section 10 of the Racial Discrimination Act as the author would not have recourse to such remedy after his expulsion to Iran. The Committee concluded that it was precluded from considering the author's allegations under article 2 read in conjunction with article 13 and under article 26, as the author had failed to exhaust domestic remedies for the purposes of article 5(2)(b) of the Optional Protocol. However, the Committee declared the communication admissible to the extent that it raised issues under articles 13, 17, 23 and 24 of the Covenant.

On the merits, the Committee noted the author's allegation that Australia's refusal to grant the author a visa constituted arbitrary interference with his family life under articles 17 and 23 by obliging him to leave the country. With respect to whether such interference with his family life was arbitrary or unlawful pursuant to article 17(1) of the Covenant, the Committee recalled that the notion of arbitrariness included inappropriateness, injustice and a lack of predictability or of due process of law. The Committee noted that author was never formally provided with the reasons for the refusal to grant him the visa, except for the general explanation that he was a threat to national security. The procedure had therefore lacked due process of law.

In view of the above, the Committee concluded that Australia had violated the author's rights under article 17 of the Covenant, read in conjunction with article 23 of the Covenant and had also violated the rights of his family under those provisions. Having reached this conclusion, the Committee decided not to examine separately the remaining grounds invoked by the author under articles 13 and 24 of the Covenant.

In accordance with article 2(3) of the Covenant, the Committee observed that Australia was under an obligation to provide the author with an effective remedy, including compensation and a meaningful opportunity to challenge the refusal to grant him a permanent visa. The Committee also held that Australia should take steps to prevent similar violations in the future.

Australia must now submit its written response within six months of the Committee's decision, including information on the action taken in the light of the Committee's recommendations, and ensure that the Committee's decision is published widely.

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