

Human Rights Committee finds Australia's detention of a foreign national pending deportation to be arbitrary

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The Human Rights Committee finds Australia's detention of a foreign national pending deportation to be in violation of the Convention on the Rights of the Child.



M.G.C. v. Australia (1875/2009)

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 the deportation of a foreign national.

The communication was submitted by a national of the United States of America under the Optional Protocol to the Covenant.

Background

In June 1994, the author of the communication, M.G.C., arrived in Australia on a short-stay tourist visa.

Between 1998 and 2002, the author committed a series of criminal offences including fraudulently claiming income tax credits and opening false bank accounts.

In 1999, the author married an Australian citizen and obtained a spouse visa by virtue of his marriage.

On 13 November 2003, the author pleaded guilty and was convicted in the Queensland District Court of a number of offences involving fraud and dishonesty and was sentenced to a term of imprisonment. Some of his convictions were later set aside on the basis of an error in the indictment.

On 25 August 2004, the author and his wife divorced.

In October 2004, the author was released on parole after serving part of his sentence.

On 1 June 2005, a delegate of the Minister for Immigration and Multicultural and Indigenous Affairs decided that the author did not satisfy the "character test" under section 501 of the Migration Act and cancelled the author's visa.

On 20 July 2005, the author's son was born out of a relationship with another woman, also of Australian citizenship, from whom he is now separated. On 29 May 2006, the Federal Magistrates Court granted the author "contact orders by consent", which allowed him to have contact with his son with the consent of his ex-partner.

On 20 October 2005, the author was placed in immigration detention due to his having become an "unlawful non-citizen" after his visa was cancelled.

On 28 February 2007, the Administrative Appeals Tribunal affirmed the decision to detain the author.

On 20 November 2007, the Federal Court dismissed the author's appeal. On 5 September 2008, a further appeal to the Full Court of the Federal Court was dismissed.

On 19 September 2008, the author applied for a protection visa. On 8 October 2008, this application was refused on the basis that the author did not meet the definition of a refugee.

On 15 October 2008, the author applied to the Refugee Review Tribunal. On 23 December 2008, the Tribunal affirmed the decision to refuse the author a protection visa.

On 27 March 2009, the author's court proceedings were terminated after the author's appeals against the Full Court's judgment were dismissed.

On 3 April 2009, the author made submissions to the Minister for Immigration, requesting that the Minister exercise his discretion under section 417 of the Migration Act to take into consideration the Convention on the Rights of the Child.

On 7 April 2009, the author filed this communication with the Committee under the Optional Protocol to the Covenant. He claimed that Australia had breached his rights to: (i) freedom from arbitrary detention, (ii) due process with respect to his deportation, (iii) equality before the law, (iv) freedom from arbitrary interference with the family, (v) liberty to ensure the religious and moral education of his children in conformity with his convictions, (vi) protection of the family and equality of parental rights, and (vii) special measures of protection for minors (under articles 9, 13, 14, 17, 18, 23 and 24 of the Covenant, respectively). The author also alleged a violation of articles 9 and 27 of the Convention on the Rights of the Child.

On 8 April 2009, the Minister for Immigration declined to consider exercising his section 417 power in the author's case.

On 8 May 2009, the author was removed from Australia.

The Committee's decision

With respect to admissibility, the Committee found that: (i) the author's claims under article 24 were inadmissible *ratione personae*, (ii) the author had failed to substantiate his claims under article 18, and (iii) the author had failed to exhaust domestic remedies in relation to his claims under articles 13 and 14. The Committee also noted that the author had invoked two provisions of the Convention on the Rights of the Child and observed that its competence extended only to monitoring compliance with the Covenant. The Committee declared the communication admissible, however, insofar as it raised issues under articles 9, 17 and 23 of the Covenant.

On the merits, the Committee noted that the author's detention and subsequent removal were carried out in accordance with Australian law. The Committee observed that it should determine whether such detention was nonetheless arbitrary for the purposes of the Covenant.

The Committee recalled that the notion of arbitrariness is not to be equated with "against the law" but 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 was not arbitrary per se, but the detention must be justified as being reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. The Committee considered that Australia had not demonstrated on an individual basis that the author's detention was justified for such an extended period of time. Australia had also not demonstrated that other, less intrusive, measures could not have achieved the same end of ensuring that the author would be available for removal. Furthermore, the author had been deprived of the opportunity to challenge his detention in substantive terms. The Committee recalled its jurisprudence that judicial review of the lawfulness of detention was not limited to mere compliance with domestic law but must also include the possibility of release if the detention is incompatible with the requirements of the Covenant.

The Committee noted the author's allegation that his expulsion constituted an arbitrary interference with his family life under articles 17 and 23. The Committee recalled its General Comment No. 16, whereby the concept of the family is to be interpreted broadly, referring not solely to the family home during cohabitation, but also to the relations in general between parents and child. The Committee considered that Australia's decision to deport the author, with the effect that this could have on his relationship with his son, was therefore to be considered "interference" with the family. The issue, however, was whether such interference had been arbitrary in contravention of articles 17 and 23 of the Covenant. Here, the Committee found that the decision to cancel the author's visa was based on objective and reasonable grounds, namely the author's

substantial criminal record, while taking into account the author's family circumstances. The Committee therefore concluded that the interference with the author's family life had not been arbitrary.

In view of the above, the Committee concluded that Australia had violated article 9 of the Covenant in its detention of the author.

In accordance with article 2(3) of the Covenant, the Committee found that Australia was under an obligation to provide the author with an effective and appropriate remedy, including compensation. Australia was also under an obligation to prevent similar violations in the future, including by reviewing its migration legislation to ensure its conformity with article 9 of the Covenant.

Australia must 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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