Casenotes, Commentaries and Recent Developments

Human rights issues for Australia at the United Nations – Australia's non-refoulement obligations under the Torture Convention and the ICCPR

Jane Hearn* and Kate Eastman**

Introduction

At the time the last issue of this journal went for publication there had been a total of 29 communications lodged against Australia, 24 with the Human Rights Committee, three with the Race Discrimination Committee and two with the Torture Committee.[1]

In the intervening period an additional five cases have been registered bringing the total to 34. One additional case has been lodged with the Race Discrimination Committee[2] involving alleged discrimination in the termination of an employment contract. A further four cases have been lodged with the Torture Committee.[3]

---

* Jane Hearn BA LLB Dip Soc Wel is a senior government lawyer in the International Human Right section of the Public International Law Branch of the Federal Attorney-General's Department. The views expressed in this article are those of the author and are not intended to represent the views of the Australian Government.

** Kate Eastman is a barrister and part-time lecturer in civil liberties law at the University of Technology, Sydney.

1 Australia became a party to the *International Covenant on Civil and Political Rights* on 13 August 1980 and acceded to the First Optional Protocol on 25 September 1991. In the last issue of this journal Australia's date of ratification was incorrectly printed as 13 August 1990. The Protocol came into force Australia on 25 December 1991. Australia lodged declarations with the United Nations on 28 January 1993 accepting the complaints procedures under Article 14 in the Convention on the *Elimination of all Forms of Racial Discrimination* and Article 22 the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* . These declarations took effect immediately.

2 CERD communication No 12/1998 (Discrimination employment).

3 *Haridas v Australia* Communication No 102/1998, *NP v Australia* Communication No 106/1998, *Elmi v Australia* Communication No 120/1998, new Communications Nos 136/1999,138/1999,139/1999.

The complainants in all four cases allege violations by Australia of its non-refoulement obligation under Article 3 of the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (The Torture Convention).

In addition to these existing mechanisms there are now prospects for a fourth committee to consider individual petitions in relation to the rights of women. On 10 March 1999, the Commission on the Status of Women settled a draft Optional Protocol to the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).[4] The draft Optional Protocol to CEDAW will be considered by the General Assembly later this year and if adopted by the General Assembly will come into operation three months after the 10th State ratifies the Optional Protocol. The Optional Protocol will provide a mechanism for individual and group petitions to the CEDAW Committee.[5] It will also establish a special inquiry procedure like Article 20 of the Torture Convention. The Optional Protocol to CEDAW will be a significant development in protecting the rights of women. We will report on the developments in future issues.[6]

Status of Communications

Before turning to a discussion of the cases an update of the current status of communications is summarised below.

Human Rights Committee

There are seven communications at the admissibility stage[7] and one pending a decision on the merits.[8] Of the 16 final decisions by the Committee so far 11 have been held inadmissible.[9] In two communications the Committee's final views on the

4 UN Doc E/CN.6/1999/WG/L.2

5 Article 2 provides that individuals and groups of individuals may petition the Committee.

6 For further information about the Optional Protocol to CEDAW see <www.un.org/womenwatch/daw/cedaw/protocol/>.

7 ICCPR Communications Nos 681/1996 (criminal law-fair trial and parole); 723/1996 (treatment of a prisoner); 762/1997 (criminal law-delay in prosecution); 772/1997 (migration law-access to lawyers); 776/1997 (migration law-deportation); 802/1998 (right to a fair trial); 832/1998 (discrimination in education on grounds of disability).

8 ICCPR Communication No 545/193 (right to publicly funded representation of appeal in serious criminal matter and parole issues).

9 See (1999) 5(1) AJHR 194 for case notes on first eight cases. The remaining four cases will be dealt with in this article.

merits held that no violation was disclosed. These matters, *GT v Australia* and *ARJ v Australia,* are discussed below.[10] In two other communications the Committee found Australia to be in breach of its obligations under the International Covenant on Civil and Political Rights (ICCPR).[11] *Toonen v Australia* concerned the criminalisation of sodomy under Tasmanian criminal law and *A v Australia*[12] concerned the prolonged detention of an asylum seeker. Both communications have been discussed elsewhere.[13] One matter was discontinued because a remedy was provided.[14]

Race Discrimination Committee

One communication was held inadmissible on the grounds of non-exhaustion of domestic remedies but that matter has been re-registered as a new communication and is being considered again at the admissibility stage.[15] One communication is still awaiting a decision on the merits.[16] A final decision on the merits in *BMS v Australia,* concerning the Australian Medical Council's quota of overseas-trained doctors, held that Australia had not acted in violation of the Convention on the Elimination of Racial Discrimination (CERD).[17]

Torture Committee

The three new cases referred to above[18] are at the admissibility stage but it is likely that admissibility and merit will be joined to expedite the consideration of the cases. In two final decisions on the merits in cases concerning deportation the Committee has found that Australia had acted in violation of Article 3 of the Torture Convention in *Elmi v Australia*[19] but no violation of Article 3 was disclosed

10 ICCPR Communication No 706/1996 (migration law — deportation-merits no violation) and ICCPR Communication No 692/1996 (migration law — deportation — merits no violation).

11 *Toonen v Australia* ICCPR Communication No 488/1992 (criminalisation of sodomy — merits — violation of Article 17).

12 *A v Australia* ICCPR Communication No 560/1993 UN Doc CCPR/C/59/D/560/1993.

13 See (1999) 5(1) AJHR 194 for case notes.

14 *Ramsey v Australia* ICCPR Communication No 655/1995 (residency/citizenship — discontinued).

15 *Barbaro v Australia* CERD Communication No 7/1995 (discrimination in employment held inadmissible — SA)

16 CERD Communication No 6/1995 (racial discrimination in employment — NSW).

17 *BMS v Australia* Communication No 8/1996 (Australian Medical Council quota on the overseas trained doctors).

18 CAT Communication No 136/1 999(migration law — deportation); CAT Communication No 138/1999 (migration law-deportation); CAT Communication No 139/1999 (migration law — deportation).

19 CAT Communication No 120/1998 (migration law — deportation decision on merits).

in *NP v Australia*.[20] One matter was discontinued when the applicant withdrew her complaint.[21]

Non-refoulement obligations under the ICCPR and the Torture Convention

In addition to the non-refoulement obligation under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugees Convention), Australia has accepted the obligation of non-refoulement under both the Torture Convention and the ICCPR. Alleged violations by Australia of its non-refoulement obligations under these two treaties is emerging as a dominant theme in the Optional Protocol and Torture Committee procedures. So in this issue we concentrate on the final decisions by the Human Rights Committee and the Torture Committee in cases concerning the expulsion of people from Australia where it is alleged that returning them to their country of origin will expose them to a real risk of a violation of their human rights. The new cases registered with the Torture Committee referred to above are subject to the confidentiality requirements of the Torture Committee's Rules of Procedure and cannot be publicly analysed until the final decisions in those matters have been published.

Before embarking on that analysis it is worth making some general comments on the nature and scope of Australia's non-refoulement obligations under the Torture Convention and the ICCPR. The following analysis while relatively detailed is not intended to be the definitive analysis on the topic.

The primary objective of the Torture Convention is to prohibit torture and cruel, inhuman and degrading treatment and punishment. Its provisions impose a responsibility upon the State and its public officials to actively prevent torture and other forms of ill treatment. Article 3(1) of the Torture Convention enshrines an absolute and mandatory obligation of non-refoulement. It states that a State party 'shall not, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

As the plain words of the provision indicate the risk of torture must be particular to the individual and there must be 'substantial grounds' for believing he or she would in fact be in danger of being tortured. The Torture Committee's jurisprudence establishes that an applicant must adduce sufficient factual evidence to meet the test

20 CAT Communication No 106/1998 (migration law — deportation decision on merits).

21 *Haridas v Australia* Communication No 102/1998 (migration law — deportation — discontinued).

of 'forseeable, real and personal risk'.[22] An applicant must establish grounds that go beyond mere 'theory or suspicion' that she or he will be in danger of being tortured but that risk needs to be 'highly likely to occur' to satisfy the provision's conditions.[23] In assessing the level of risk the decision maker is required by Article 3(2) to take into account 'all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights'.[24] It has been argued that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the receiving State may be sufficient alone to demonstrate the risk.[25] But the established jurisprudence of the Torture Committee is that even in situations of widespread violations there must be something additional to the personal circumstances of the applicant that demonstrates a real risk of torture to that individual to attract the protection of Article 3.[26]

The types of matters taken into consideration by the Torture Committee in its assessment of risk[27] have included for example, past experiences of torture or other acts of harassment,[28] medical evidence of post traumatic stress disorder,[29] the particular situation in the proposed receiving State at the time the case is being

---

22 See the Committee's General Comment on the implementation of Article 3 of the Convention in the context of Article 22, Annex IX A/53/44, p 52. See also for example Communication No 28/1995, *E A v Switzerland*, 10/11/1997, A/53/44 p 59 para 11.5.

23 Communication No 101/1997, *Halil Haydin v Sweden*, 16/12/98 CAT/C/21/D/101/1997, para 6.5, Communication No 28/1995, *EA v Switzerland*, 10/11/1997, A/53/44 p 59 para 11.3.

24 Article 3 (2) provides that:

> For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

25 Alberta F 'The Concept of Inhuman or Degrading Treatment in International Law and its Application in Asylum Cases' (1998) 10(4) *International Journal of Refugee Law* 655.

26 Communication 13/1993, *Mutomba v Switzerland*, 27 April 1994 para 9.3.

27 The editors wish to acknowledge Libby Bunyan's analysis of relevant considerations under Article 3. See also the Committee's General Comment on the Implementation of Article 3 of the Convention in the context of Article 22, Annex IX A/53/44, p 52. The Comment provides interpretative assistance on key aspects of Article 3 and provides a non-exhaustive list of relevant considerations.

28 Communication No 61/1996, *X, Y & Z v Sweden*, 6 May 1998, para 11.2; Communication No 65/1997, *IAO v Sweden*, 6 May 1998, para 14.3; Communication No 89/1997, *Ali Falakfluki v Sweden*, 8 May 1998, para 6.5;

29 Communication No 61/1996, *X, Y & Z v Sweden*, 6 May 1998, CAT/C/20/D/61/1996, p 9 para 11.2 and Communication No 65/1997, *IAO v Sweden*, 6 May 1998, CAT/C/20/D/65/1997, p 12 para 14.3 as evidence of past torture.

considered,[30] any distinguishing features of the alleged victim, such as ethnicity, family membership or gender, or membership of a political, professional, religious or other social groups targeted by the authorities,[31] any activities the alleged victim may have undertaken outside the State concerned (for example, political activism),[32] the activities of expert refugee and aid agencies in relation to the State concerned and particularly the recommendations of the UNHCR on resettlement,[33] whether the proposed receiving State is a party to the Torture Convention[34] and increased risk because of widespread publicity.[35] The Torture Committee has also indicated that even if a person with past criminal convictions is certain to be arrested and retried for the same offense this is not of itself sufficient in the absence of probative evidence of the likelihood of torture to meet the requirements of Article 3.[36]

The obligation under Article 3 must be interpreted by reference to the definition of torture for the purpose of the Torture Convention under Article 1. Article 1 defines torture as severe pain or suffering intentionally inflicted, consented or acquiesced to by public officials.[37] It follows that the non-refoulement obligation under Article 3 is limited to situations of 'official torture' and, subject to some qualifications, would not apply in circumstances where private individuals are the offenders. Nor does Article 3

---

30 Communication No 89/1997, *Ali Falakflaki v Sweden*, 8 May 1998, para 6.6; Communication No 90/1997, *ALN v Switzerland*, 19 May 1998, para 8.6.

31 Communication No 61/1996, *X, Y & Z v Sweden*, 6 May 1998, para 11.3; Communication No 65/1997, *I.A.O. v Sweden*, 6 May 1998, para. 14.5; Communication No 89/1997, *Ali Falakflaki v Sweden*, 8 May 1998, para 6.5; Communication No 57/1996 *PQL v Canada*, A/53/44 p 60 para 10.4

32 Communication No 61/1996, *X, Y & Z v Sweden*, 6 May 1998, para 11.4; Communication No 65/1997, *IAO v Sweden*, 6 May 1998, para 14.4;

33 See Communication No 61/1996, *X, Y & Z v Sweden*, 6 May 1998, para 11.5; Communication No 90/1997, *ALN v Switzerland*, 19 May 1998, para 8.6.

34 Communication No 36/1995, *X v The Netherlands*, 17 November 1995, para 11.5.

35 *Mr Sadiq Shek Elmi v Australia* Communication No 120/1998, 14 May 1999, para 6.8.

36 See Communication No 57/1996, *PQL v Canada*, 17 November 1997, A/53/44, p 60, para 10.5.

37 Torture is defined in Article 1 of the Convention as follows:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include painful suffering arising only for, inherent in or incidental to lawful sanctions.

prevent the return of a person to a country where they might suffer cruel, inhuman and unusual treatment or punishment otherwise prohibited by the Torture Convention.[38] Finally, while the torture must be intentionally inflicted it is not limited to positive acts, omissions intended to perpetrate harm will also be caught by the provision.[39]

Despite these limitations the definition of torture in Article 1 is broader and more flexible than first appears. For example, it explicitly includes both physical and mental suffering and therefore covers situations of extreme mental anxiety including for example threats of rape.[40] Further, while the prohibition is directed to State sanctioned torture the responsibility of the State is engaged where a public official(s) has consented or acquiesced to the conduct.[41] It is also appears that Article 3 will apply in situations where effective government has broken down and private actors or non-government organisations (NGOs) are exercising quasi-governmental authority.[42]

Finally, the traditional notion that torture had to be linked to a specific purpose is not entirely correct. It is arguable that torture inflicted for any reason falls within the scope of Article 1.[43] Article 1 uses the phrase 'for such purposes as' and illustrates the purposes for which torture might be perpetrated with a list of examples, such as obtaining a confession or any reason based on discrimination. The list is non-exhaustive and provided the purpose is analogous to those listed the conduct would probably fall within the scope of Article 1.[44]

While the ICCPR contains no comparable provision the Human Rights Committee has implied an obligation of non-refoulement into Article 2(1) of the ICCPR. Article 2(1)

---

38 Although in some rare circumstances it might be arguable that deportation itself constitutes cruel, inhuman or degrading treatment . See the authors' submission in Communication No 83/1997, *GRB. v Sweden*, 15 May 1998, para 3.2. The Committee however did not accept the argument – see para 6.7.

39 Burgers J H and Danelius H *The United Nations Convention against Torture, A handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, 1988) p 117.

40 See Communication No 59/1996, *Encarncion Blanco Abad v Spain*, 19 June 1998, CAT/C/20/D/59/1996

41 This raises the issue of the scope of the term 'acquiesced'. It would include for example, tolerance of torture because of widespread corruption but may not extend to failure by the State to provide protection because of lack of resources although this is not clear and has yet to be developed in the Torture Committee's jurisprudence.

42 *Elmi v Australia*, Communication No 120/1998 para 6.5. See also Burger and Danelius, above, note 39, p 45.

43 This is qualified in Article 1 by an exclusion for suffering that is inherent or incidental to lawful sanctions.

44 The interests of the State should be viewed broadly to encompass any connection between the torture and the discharge of an official function or pursuit of a perceived public interest.

requires a State party to ensure to 'all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant'. Unlike Article 3(1) of the Torture Convention, this provision of the ICCPR is not limited to torture prohibited by Article 7. Article 2(1) is accessory in nature and must be read in conjunction with all of the rights expressed in the ICCPR. A State party which exposes an individual to a real risk of a violation of his or her substantive rights may be acting in violation of the ICCPR. But the exact scope of the obligation under the ICCPR remains unclear at this point.

The test is not entirely dissimilar to that under the Torture Convention and requires the applicant to show the risk of future harm is a 'necessary and foreseeable consequence' of the proposed removal from the State party's territory. To succeed the applicant must adduce sufficient evidence of a link between the return of the person and anticipated violation by the receiving State. The ability of an applicant to prove this connection will vary considerably depending on their individual circumstances. For example, it may be easier to demonstrate risk arising from an extradition as opposed to an expulsion where there is not necessarily a clear intention to prosecute.

There are two key features of non-refoulement under these treaties which should be highlighted. First, unlike Article 33 of the Refugee Convention, the non-refoulement obligation under the ICCPR and Torture Convention is absolute and non-derogable even in times of emergency and applies without distinction to all persons in the Australian territory or under Australia's jurisdiction.[45] It therefore applies regardless of the reason for expulsion (for example, criminal deportation of a permanent resident, removal of a non-national offender on expiration of sentence, extraditions, national security and so on) This raises the potential for conflicts between Australia's international human rights obligations and the objectives of domestic criminal justice and immigration law and policy.

Second, while Article 3 of the Torture Convention is limited to official torture, the scope of the obligation under the ICCPR is, as noted above, potentially as broad as the ICCPR itself. To date the communications which have raised the issue have concerned alleged prospective violations of the right to life, the prohibition on torture and the right to a fair trial and double

45 Article 33.1 of the Refugees Convention prohibits the expulsion or return of a refugee but this obligation is qualified by Article 33.2 which provides that the benefit of the provision may not be claimed by a refugee who is a danger to the security of the country or who having been convicted of a serious criminal offense constitutes a danger to the community.

jeopardy.[46] However, the Human Rights Committee does express the non-refoulement principle in broad terms and has not taken the opportunity to delineate the boundaries of its application. Consequently, while the ICCPR provides no explicit right of asylum the non-refoulement obligation under the ICCPR has potentially greater reach than Article 3 of the Torture Convention or Article 33 the Refugee Convention.

Turning now to the four cases in which these issues have been raised it is worth noting two points. First, that until the final decision in *ARJ v Australia* the non-refoulement obligation under the ICCPR had only been applied in the context of extradition. In *ARJ* the Human Rights Committee applied the non-refoulement obligation in the context of expulsion. Second, in each case the relevant Committee made a request for interim measures that Australia delay carrying out the deportation until the communication had been considered. Australia has complied with all the requests. The issues arising from the use of interim measures by the treaty monitoring bodies will be addressed in the next issue of the journal.

Cases raising the non-refoulement obligation under the ICCPR and Torture Convention

1. *ARJ v Australia* ICCPR Communication No 1996

Facts

ARJ was an Iranian seaman found guilty of importing two kilograms of cannabis resin into Australia in contravention of s 233B(1) of the *Customs Act 1901* (Cth). On completion of his prison sentence ARJ was held in immigration detention pending deportation to Iran. His application for refugee status was rejected by the Department of Immigration and Ethnic Affairs (DIEA) and the Refugee Review Tribunal (RRT). On appeal to the Federal Court of Australia the Court concluded that ARJ had failed to show any error of reasoning of the RRT. The Court rejected his claim to protection under the Refugee Convention on the grounds of social group. Nonetheless, the RRT and the Court considered the risk to which he might be exposed upon return to Iran was a matter of serious concern. The Legal Aid Commission of Western Australia decided that a further appeal to the Full Bench of the Federal Court of Australia would be futile. The Legal Aid Commission made representations to the Minister for Immigration and Ethnic Affairs to exercise his discretion under s 417 of the *Migration Act 1958* (Cth) to allow ARJ to remain in Australia on humanitarian grounds. The Minister declined to do so.

---

46 *Joseph Kindler v Canada* Communication No 470/1991 CCPR/C/48/D/470/1991 para 13.2; *Charles Chitat Ng v Canada* Communication No 469/1991, CCPR/C/49/D/469/1991 para 14.2; *Keith Cox v Canada* Communication No 539/1993 CCPR/C/52/D/539/1993 para 16.1; *ARJ v Australia* Communication No 692/1996.

Having exhausted domestic remedies ARJ submitted a communication under the Optional Protocol to the ICCPR. In summary the major allegations were that Australia would be acting in violation of ARJ's right to the protection of the Covenant (Article 2) on the grounds that he was at serious risk of being subjected to violations of:

- the prohibition on double jeopardy on the grounds that he was at risk of being retried for an offense for which he had already been prosecuted (Article 14.7);
- the right to a fair trial in criminal trials on the grounds that he would be tried in an Islamic Revolutionary Court and be denied legal representation (Article 14.1 and 14.3);
- his right to life because if convicted he would be sentenced to death (Article 6); and
- his right to freedom from torture would be violated on the grounds that whilst in detention he would suffer severe ill treatment (Article 7).

Interim measures

Under Rule 86 of the Human Rights Committee's Rules of Procedure Australia was requested to 'refrain from any action that might result in the forced deportation of the author to a country where he is likely to face the imposition of a capital sentence'. The Attorney-General wrote to the Chairman of the Human Rights Committee seeking a withdrawal of the request on the grounds that ARJ had been convicted of a serious criminal offense and had entered Australia with the express purpose of committing a crime. His application for a protection visa had been given full consideration. The Attorney-General also advised the Human rights Committee that ARJ would remain in immigration detention pending the Committee's final views and it should therefore expedite consideration of the case. The Human Rights Committee declined the Attorney-General's request to withdraw its interim measures request but agreed to schedule the case for its next session and decided both admissibility and merit together.

Views of the Human Rights Committee

Australia argued that ARJ's claims were either inadmissible on the ground of non-substantiation or because he could not be regarded as a victim within the meaning of Article 1 of the Optional Protocol. Alternatively, the claims lack merit. The Human Rights Committee concluded that ARJ's allegations under Article 6,7 and 14(1 and 3) were admissible but found on the merits that no violation was disclosed.

Victim test

The Human Rights Committee declared that for the purpose of admissibility ARJ was a 'victim' within the meaning of Article 1 of the Optional Protocol. Article 1 requires that, to have standing before the Committee, a decision or an act must directly affect an individual. The Human Rights Committee relied on the views of the RRT and the Federal Court of Australia which consider ARJ to be at risk to reach its conclusion.

Reliance on the view of the domestic bodies is worrying because it suggests there needs to be prima facie evidence of a real risk of a violation to meet the victim test. It is a striking contradiction to the approach in *Toonen* in which the mere existence of legislation that criminalised sodomy between consenting adults was sufficient to render Nick Toonen a 'victim' for the purpose of admissibility. This was despite the fact that the law had fallen into disuse and Toonen had never been charged. The decision to deport the particular author should have been sufficient to qualify as a 'direct affect' for the purpose of standing. The question of whether ARJ was facing a real risk of harm following the decision was an issue of substantiation for admissibility and of merit.

Article 2 — Protection of the ICCPR

Australia contested the application of Article 2 in deportation matters and in particular in relation to ARJ arguing that unlike extradition, which is for the purpose of prosecution, retrial for drug trafficking offences is not 'certain or the purpose' of the decision to remove ARJ from Australia. Further, that ARJ's case raised the issue in the context of expulsion of an individual who was convicted of serious drug offences and who has no legal basis for remaining in Australia.

The Human Rights Committee rejected the distinction and applied the general principle to ARJ thereby extending its application to expulsions. The Committee restated the general principle:

> What is at issue in this case is whether by deporting ARJ to Iran, Australia exposes him to a real risk (that is, a necessary and foreseeable consequence) of a violation of his rights under the Covenant. States parties to the Covenant must ensure that they carry out all their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with the Covenant. If a State party deports a person within its territory and subject to its jurisdiction in such circumstances that as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, that State party itself may be in violation of the Covenant.

Article 6 — Right to life

The issue put by ARJ was whether the requirement under Article 6(1) to protect the author's right to life and Article 1(1) of the Second Optional Protocol, not to execute a person in Australia's jurisdiction, prohibited Australia from returning ARJ to Iran where there was a necessary and foreseeable risk of a violation of his right to life.

The Human Rights Committee reasoned that Article 6(1) of the ICCPR must be read together with Article 6(2), which does not prohibit the imposition of the death penalty for the most serious crimes. The Committee did not explore the consequence of Australia's accession to the Second Optional Protocol and the import of Article 1(1) of the Second Optional Protocol.

The Human Rights Committee noted that Australia did not intend to execute ARJ but rather to deport ARJ to Iran, a State that retains capital punishment. Referring to its views on Communication No 539/1993[47] the Committee considered the obligation under Article 6 did not extend so far as to prevent deportation to a country, which retained the death penalty per se and stated that:

> If the author is exposed to a real risk of a violation of Article 6, para 2, in Iran, this would entail a violation by Australia of its obligations under Article 6, para 1.

On the facts the Human Rights Committee dismissed ARJ's claim. The Committee accepted Australia's evidence that the offense of which he was convicted in Australia does not carry the death penalty under Iranian criminal law. The maximum prison sentence for trafficking the two kilograms of cannabis would be five years in Iran, less than in Australia. Iran had shown no intention of arresting and prosecuting ARJ on capital charges, and no arrest warrant against ARJ was outstanding in Iran. Finally, based on inquiries of a number of embassies in Teheran there were no precedents in which an individual in a situation similar to the ARJ had faced capital charges and been sentenced to death. The Committee gave no indication as to what its view may have been if the Iranian Penal Code had provided for the death penalty in these circumstances.

Article 7 — Prohibition against torture

Australia conceded that if ARJ were prosecuted in Iran, he might, under the Iranian Penal Code, be exposed to 20-74 lashes which would raise an issue under Article 7 but argued there is no evidence of any actual intention of Iran to prosecute ARJ. The Committee said that it:

---

47 *Keith Cox v Canada* views adopted 31 October 1994, para 16.1.

> ... does not take lightly the possibility that if retried and re-sentenced in Iran, the author might be exposed to a sentence of between 20 and 74 lashes. But the risk of such treatment must be real, that is, be the necessary and foreseeable consequence of deportation to Iran.

ARJs allegations were dismissed as unmeritous. The Human Rights Committee accepted the detailed evidence provided by Australia on a number of similar deportation cases in which no prosecution was initiated in Iran. The Committee found that it was extremely unlikely that Iranian citizens who have already served sentences for drug-related sentences abroad would be re-tried and re-sentenced. However, the Committee's comments indicate that lashing would constitute a violation of Article 7 and the Committee has raised this issue in its general observations on Iran's Periodic Report under Article 40.

Article 14(7) — Double jeopardy

The Human Rights Committee dismissed ARJ's claim that prosecution in an Islamic Revolutionary Court would violate his right under Article 14(7). Australia relied upon the Committee's existing case law that Article 14(7) does not guarantee *ne bis in idem* with regard to the national jurisdiction of two or more States.[48] The Committee reaffirmed its jurisprudence that Article 14(7) only prohibits double jeopardy with regard to an offense adjudicated in a given State.

Article 14(1) and 14(3) — Minimum guarantee for a fair trial

Australia argued that its obligation in relation to future violations of human rights by another State only arises in cases involving violations of the most fundamental rights and not in relation of possible violations of minimum guarantees for a fair trial. The Human Rights Committee provided no explicit response to Australia's submission simply 'taking note' of Australia's contention. The Committee decided on the facts that ARJ had failed to prove his claim that the Iranian judicial authorities would be likely to violate his right to a fair trial and therefore by implication appears to have rejected Australia's argument.

Australia referred to the jurisprudence of the European Court of Human Rights in the case of *Soering v United Kingdom* [49]in which the Court found a violation of Article 3 of

48 Communication No 204/1986 (*AP v Italy*) declared inadmissible during the 31st session (2 November 1987) para 7.3.

49 (1989) 11 EHRR 439.

the European Convention on Human Rights (torture and non-refoulement) but stated in respect of Article 6 (fair trial) that issues under that provision might only exceptionally be raised by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of due process in the requesting State.[50] Since the Committee had already accepted that the risk of prosecution was extremely low there was no need to address the issue.

2. *GT v Australia* ICCPR Communication No 692/1996

Facts

Mr T, a Malaysian citizen, was convicted and sentenced in Australia to six years imprisonment for the importation of 240 grams of heroin. Upon expiration of his sentence he was subject to the removal provisions of the *Migration Act 1958*. The Department of Immigration and Multicultural Affairs (formerly known as DLEA) rejected Mr T's application for refugee status and an appeal to the RRT was unsuccessful. The RRT considered there was a real risk that Mr T would face the death penalty if prosecuted in Malaysia for drug or drug related offences but this did not constitute persecution under the Refugee Convention. A further appeal to the Federal Court was withdrawn.

In May 1996, GT an Australian citizen, submitted to the Human Rights Committee that her husband's deportation would breach the ICCPR but did not identify any particular provisions. Australia characterised the complaint as raising issues under Articles 6, 7, 14 and 26, however, the Committee also identified issues under Article 17 and 23. The issues before the Committee were whether:

- there was a real risk Mr T would be arrested, tried and convicted in Malaysia for drug offences which attract a mandatory death penalty (Article 6 — right to life);
- Mr T would be arbitrarily detained in Malaysia pursuant to the *Dangerous Drugs (Special Preventative Measures) Act 1985* for a period of up to two years (Article 9(1) — freedom from arbitrary detention);
- that during detention Mr T would be caned or subjected to prolonged periods on death row (Article 7 — freedom from torture);
- Mr T would not receive a fair trial in Malaysia, particularly because he is of

50 That is, the equivalent of Article 14 of the ICCPR.

Chinese ethnicity with limited literacy and limited knowledge of Malay (Article 14 — right to a fair trial, and Article 26 — right to equality and non-discrimination); and

- Mr T's deportation would interfere with his family life (Article 17 — freedom from arbitrary interference with privacy, and Article 23 — right to family life).

Interim measures

The Human Rights Committee issued a Rule 86 or 'interim measures' request, asking the Australian Government not to deport Mr T to a country where he would face the death penalty. Australia argued that the interim measure request should be removed on the grounds that the Malaysian Government had assured Australia that 'any Malaysian national who had committed and being sentenced [sic] overseas on the charge of any offense committed overseas will not be prosecuted upon his return to Malaysia for a charge or charges relating to his offense committed overseas'. The Committee disagreed because it found the limited and specific nature of the assurance was not sufficient to ensure that Mr T was not exposed to possible violation of his rights. However, the Committee did expedite consideration of the case by agreeing to consider the admissibility and the merits of the communication in one session.

Views of the Committee

The majority of the Committee decided that the allegations relating to the fairness of the trial and the right to family life (under Articles 14, 26, 17 and 23) were not substantiated and therefore inadmissible. Committee Member, Mr Scheinin dissented on Articles 17 and 23. In a separate individual opinion he opined that in the absence of submissions from Australia on issues of the rights to family life arising under Articles 17 and 23 the Committee should not have joined admissibility and merits. In his view the Committee should have exercised its power to request further submissions and the failure to do so had given Australia an unfair advantage in setting the parameters of the dispute.

On the merits the majority held that each of the remaining allegations concerning the deportation to face retrial and the death penalty (under Article 6), arbitrary detention (under Article 9) and caning or prolonged periods on death row (under Article 7) there was no evidence to suggest the Mr T faced a 'necessary and foreseeable risk' of a violation of his rights.

Article 6 — Right to life

The Committee noted that Article 6(1) read together with Article 6(2) allows the imposition of the death penalty for the most serious crimes, but the Second Optional Protocol provides that no one within the jurisdiction of a State party shall be executed and the State party shall take all reasonable measures to abolish the death penalty in its jurisdiction. Again, the Committee provided no analysis of the legal consequences of Australia's accession to the Second Optional Protocol and the scope of the obligation under Article 6.

Australia argued that Mr T's liability under the *Dangerous Drugs Act 1952* was insufficient alone to substantiate the claim that there was a real risk he would be charged, prosecuted and sentenced to death. Repeating the submission made in ARJ, Australia argued that the distinction between expulsion and extradition was that the purpose of extradition was for prosecution but there was no necessary connection between expulsion and possible prosecution. Australia argued that under the *ICCPR* an individual is required to demonstrate the anticipated harm is an inevitable consequence of the decision to return. Australia sought to thereby distinguish the 'necessary and foreseeable' test under the ICCPR from 'real chance' applied by the RRT under domestic immigration law.

Without explicitly commenting on Australia's submission the Human Rights Committee appears to have accepted Australia's reasoning and focused its analysis on the intention of the receiving State. The Committee observed that:

> In cases like the present case, a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases.

The majority found there was no evidence before the Committee that the Malaysian authorities had any intention to prosecute Mr T and therefore concluded 'that Australia would not violate T's rights under Article 6 of the Covenant and Article 1 of the Second Optional Protocol if the decision to deport him were to be implemented'. The reference to Article 1 of the Second Optional Protocol is without explanation by the Committee and is rather confusing considering the Committee's approach in *ARJ*.

Members Klein and Kletzmer dissented from the majority. Adopting a presumption in favour of Mr T as their starting point they considered that there was inadequate evidence to rebut the presumption that Mr T was at risk. They reasoned that Mr T was clearly liable under Malaysian law to a mandatory death penalty for possession of 240 grams of heroin. No issue of double jeopardy arose because prosecution for conduct in Malaysia was separate to the issue of re-trial for offences already

prosecuted in Australia and the relevance of the Malaysian formal assurance had been disposed of. They considered Australia's evidence too weak to rebut the presumption that Mr T was at risk of facing the death penalty. Australia had relied upon further unofficial verbal assurances by the Malaysian police and a statement from the Australian Mission that they 'had no knowledge' of prosecutions in similar cases. This was contrasted to the positive and detailed evidence offered in *ARJ's* case.

Article 7 — Prohibition on torture

Similarly, in relation to Article 7, Australia argued that Mr T had provided insufficient evidence that, if prosecuted and convicted, he was at risk of being subjected to caning or unreasonable periods of detention on death row. The Human Rights Committee accepted evidence submitted by Australia from its Mission in Kuala Lumpur on the conditions on death row which argued that there was nothing notably inhumane about the conditions of death row prisoners. Mr Scheinin disagreed with the majority view without explaining his reasons.

Article 9 — Prohibition on arbitrary detention

Australia did not dispute that the *Dangerous Drugs (Special Preventative Measures) Act 1985* provides for preventative detention of people suspected of involvement in drug trafficking. The Act permits detention for up to two years for questioning in the investigation of offences.

The Human Rights Committee accepted Australia's submission that, while it was likely that Mr T would be detained for questioning, preventative detention was not automatic and was unlikely to occur because Mr T had limited knowledge of the trafficking he was involved with, it was his first offense, he was not part of a criminal drug network and had not known the contents of the package containing heroin. Mr T did not challenge Australia's submissions and continued to rely exclusively upon the mere existence of the Act as a basis for the claim that he was at risk. On the balance of evidence before the Human Rights Committee it was not possible for the Committee to conclude that Mr T's deportation to Malaysia would amount to a violation of Article 9 of the ICCPR.

3. *NP v Australia* CAT Communication No 106/1998

Facts

NP, a Sri Lankan of Tamil ethnic origin arrived in Australia seeking asylum. The DIMA rejected his application for a protection visa. The RRT declined his appeal and subsequent appeals were unsuccessful.

Having exhausted domestic remedies NP lodged a communication with the Torture Committee alleging that his imminent deportation to Sri Lanka would violate Article 3 of the Torture Convention. NP was represented in the proceedings by his cousin.

Interim Measures

The Special Rapporteur for New Communications made a request for interim measures under Rule 108 para 9 of the Committee's Rules of Procedure that Australia not remove NP to Sri Lanka while his communication was under consideration by the Committee. The Australian Government complied with the request and NP was held in immigration detention during the Committee's consideration of his case.

Submissions and views of the Committee

NP comes from Maipay in northern Sri Lanka. He argued that he had attracted the attention of the Sri Lankan police, military and pro-government militia groups as a suspected supporter or member of Liberation Tigers of Tamil Eelam (LTTE). He alleged that between 1982 and 1997 he had been detained and tortured on nine separate occasions. On the basis of his past experiences he argued he feared that he would be arrested, tortured and killed by the army if he returns to Sri Lanka. He also argued that he was suffering from post-traumatic stress disorder as a result of these experiences and even mere future detention and interrogation would amount to persecution.

Australia contested both the admissibility and merits of the communication, focusing its arguments on NP's credibility. It was argued that the evidence concerning NP's alleged past ill-treatment was not consistent, detailed or independently corroborated. Of nine alleged instances of ill-treatment, NP described only one in detail and provided no medical evidence of post-traumatic stress disorder which might have affected his ability to provide detail of prior traumatic events. Australia's submission also relied on the RRT finding that it was unable to rely on NP's evidence.

Australia's second line of argument was that, while it recognised that fighting between the LTTE and the Sri Lankan Government continued and that human rights abuses occurred, there were no circumstances personal to NP that constituted substantial grounds for believing that he would be subjected to torture on his return to Sri Lanka. Australia recognised that while NP was a young Tamil male and therefore at greater risk of detention he had no political profile with the Sri Lankan authorities.

The Torture Committee examined the communication in the absence of NP's comments when the time limit for comment under Rule 110, para 4 expired. The Committee explained the aim of its assessment in the following terms:

> is to determine whether the individual concerned would personally risk torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining whether the particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must be adduced to show that the individual concerned would be *personally* at risk.

Similarly, the absence of a consistent pattern of gross violations of human rights does not mean the person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

The Torture Committee stated that it was:

> aware of the serious situation of human rights in Sri Lanka and notes with concern the reports of torture in the country, in particular during pre-trial detention. It is also aware of the fact that Tamils are particular at risk of being detained following controls at checkpoints or search operations ... Although the Committee considers that complete accuracy is seldom to be expected from victims of torture, it notes the important inconsistencies in the author's statements before the Australian authorities. It further notes that the author has not provided the Committee with any arguments, including medical evidence, which could have explained such inconsistencies. Accordingly, the Committee is not persuaded that the author faces a personal and substantial risk of being tortured upon his return to Sri Lanka.

4. *Mr Sadiq Shek Elmi v Australia* CAT Communication No 120/1998

Facts

The Refugee and Immigration Legal Centre Inc submitted a communication on behalf of Mr Elmi, a Somali national from the Shikal clan. Mr Elmi claimed that he feared being subjected to torture if he was forcibly returned to Somalia. His claim was based on two grounds. First, that his family, as members of the Shikal clan, had been the target of several violent attacks by the Hawiye clan in the past. Secondly, that the Hawiye clan controls most of Mogadishu, including the airport. He feared that his clan membership would be immediately ascertained on arrival at Mogadishu and that he would be detained, tortured and summarily executed. Mr Elmi alleged that his planned deportation from Australia to Somalia violated Article 3 of the Torture Convention.

Interim Measures

Under Rule 108, para 9 of the Torture Committee's Rules of Procedure the Committee requested that Australia refrain from returning Mr Elmi to Somalia. Australia complied with the request. Mr Elmi remained in immigration detention pending a decision by the Committee and his detention continues pending a decision by the Minister for Immigration in response to the Torture Committee's final opinion and recommendation not to return Mr Elmi to Somalia.

Parties' submissions

The Australian Government contested the admissibility and merits of Mr Elmi's communication. Australia argued that the communication was inadmissible *ratione materiae* on the ground that Mr Elmi alleged that members of armed Somali clans would subject him to torture. Australia argued that, in the absence of a central government in Somalia, the Torture Convention did not apply because the acts Mr Elmi feared could not have been committed by a public official or a person acting in an official capacity as required by Article 1 of the Torture Convention.

In summary Counsel argued that despite the lack of a central government, certain armed clans in effective control of territories within Somalia are covered by the terms 'public official' or 'other person acting in an official capacity' as required by Article 1 of the Torture Convention. There was evidence that in certain regions the clans exercised a quasi-government authority by, for example, prescribing laws and providing education, health and taxation systems.

Counsel argued that, according to a general principle of international law, human rights supervisory bodies should give affect to the realities of administrative actions in a territory where those actions affect the everyday activities of private citizens. Counsel relied upon *Ahmed v Austria* in which the European Court of Human Rights had decided that a deportation to Somalia would breach Article 3 of the European Convention on Human Rights. In that case the Court stated that 'fighting was going on between a number of clans with each other for control of the country. There was no indication that the dangers to which the applicant would have been exposed had ceased to exist or that any public authority would be able to protect [the applicant]'.[51]

When the Torture Convention was drafted there was agreement by all States to extend the scope of the perpetrator of the act from the 'public official' referred to in

51 *Ahmed v Austria*, case No 71/1995/577/663, 27 November 1996.

the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to include 'other person[s] acting in an official capacity'. This would include persons who, in certain regions or under particular conditions, actually hold and exercise authority over others and whose authority is comparable to government authority.

The Torture Committee determined that the issue of the application of the Torture Convention raised questions of interpretation and should therefore be dealt with on the merits. Having accepted the communication as admissible the Committee then rejected Australia's argument, agreeing with counsel for Elmi that certain of the warring clans were acting in a quasi-governmental way so that the Torture Convention would apply.

In relation to the merits, Australia argued that the author had failed to adduce sufficient evidence that members of the Hawiye and other armed clans in Somalia would subject him to torture, or that the risk alleged was a risk of torture as defined in the Torture Convention. Based on the Committee's previous jurisprudence Australia argued that the relevant test is that a person must show that he or she faces a real, foreseeable and personal risk of being subjected to torture.

Australia acknowledged that Mr Elmi had fled Mogadishu (but not Somalia) after the attacks by the Hawiye clan on his father, brother and sister but submitted that, despite these prior events there is no evidence that the author, at the time of the communication, would face a threat from the Hawiye clan if he were returned to Somalia. Australia argued further that, in the absence of any details or corroborating evidence of his alleged escapes and in the absence of any evidence or allegations that he had previously been tortured it must be concluded that the author remained in Somalia in 'relative safety' throughout the conflict.

Australia also accepted that there has been a consistent pattern of gross, flagrant or mass violations of human rights in Somalia and that, throughout the armed conflict, members of small, unaligned and unarmed clans, like the Shikal, have been more vulnerable to human rights violations than members of the larger clans. Australia submitted however that the general situation in Somalia had improved over the past year. Although the Shikal, including members of the Mr Elmi's family, may have been targeted by the Hawiye in the early stages of the Somali conflict, they now had a harmonious relationship with the Hawiye in Mogadishu and elsewhere, affording a measure of protection to Shikal living there. Consequently, while Mr Elmi may be more vulnerable to attacks as he is a member of an unarmed clan whose members are generally believed to be wealthy, his membership of such a clan is not sufficient to put him at greater risk than other Somali civilians.

In reply counsel argued that the author must establish grounds that go beyond mere 'theory or suspicion' that he will be in danger of being tortured.[52] The primary objective of the Torture Convention is to provide safeguards against torture and the author is not required to prove all his claims[53] and a benefit-of-the-doubt principle may be applied.

Counsel contested Australia's argument that Mr Elmi had been able to live in relative safety and submitted affidavit evidence from the author detailing his personal experience and that of his family from 1990 onwards. Counsel further submitted that the risk to the author was increased by the national and international publicity, which his case had attracted. In addition, the return plan itself increased the risk that Mr Elmi would be identified. It was intended that he would arrive unescorted in North Mogadishu at an airport used only by humanitarian relief organisations, war lords and smugglers and which is controlled by a clan hostile to the Shikal.

Counsel also refuted Australia's implication that there was an agreement between the Shikal and Hawiye clans affording protection to the Shikal and argued that Mr Elmi is a member of a minority clan, which is recognised by major international refugee and human rights organisations as being at particular risk.

Committee's findings

The Torture Committee considered that the past history of acts committed against Mr Elmi's family supported his claim that his family had been particularly targeted by the Hawiye clan. The Committee rejected Australia's submission that the Shikal clan had reached a *modus vivendi* with the Hawiye clan in Mogadishu and concluded that the Shikal clan remains at the mercy of the armed factions. In addition, the widespread publicity his case has attracted, for example, through Amnesty International, meant that if returned to Somali he could be accused of damaging the Hawiye's reputation, thereby making him even more vulnerable. The Committee also noted that gross, flagrant or mass violations of human rights have been committed in Somalia.

Based on the forgoing the Torture Committee concluded that substantial grounds exist for believing that Mr Elmi would be in danger of being subjected to torture if he is returned to Somalia. Accordingly, the Committee requested that Australia

52 Communication No 101/1997, *Halil Haydin v Sweden*, 16/12/98 CAT/C/21/D/101/1997, para 6.5

53 Communication No 34/1995, *Seid Mortesa Aemei v Switzerland*, 29/5/1998 CAT/C/18/D/34/1995, para 9.6.

refrain from forcibly returning Mr Elmi to Somalia, or to any other country where he runs a risk of being expelled or returned to Somalia. The Government has been requested to advise the Torture Committee of its response within 90 days. Mr Elmi remains in immigration detention pending a final decision by the Minister on the Australian Government's response to the views of the Committee. An interim response has advised the Committee that, on 12 August 1999, the Minister for Immigration and Multicultural Affairs decided that it was in the public interest to exercise his powers under s 48B of the *Migration Act 1958* to allow Mr Elmi to make a further application for a protection visa.

The interim response explains that, under s 48B of the Act, the Minister may intervene to allow an applicant to reapply for refugee status if he thinks it is in the public interest to do so. Section 48B is in place to ensure that Australia's obligations under the Refugees Convention are met in circumstances, for example, where:

- new substantive and credible claims or new information have been provided by the applicant; and/or

- there has been a relevant change in circumstances in the applicant's country of nationality.

Australia states that the Minister made the decision to exercise his powers under s 48B as a result of the new issues and information that were raised before the Torture Committee. These issues and information included the publicity the matter had attracted, the country information from Amnesty International which provided greater detail than earlier reports from other sources, and the greater detail given on Mr Elmi's presence in Somalia between 1991-97. As these new issues and information arose after the finalisation of the protection visa process in relation to Mr Elmi, the Minister regarded the s 48B process as the most appropriate course to be taken in relation to this new information. ●