7. Detention of Unauthorised Arrivals

This issue relates to questions 2 and 17 of the List is issues to be taken up in connection with the consideration of the third and fourth reports of Australia

Summary of issue

- Sections 189 and 196 of the *Migration Act 1958* (Cth) require the detention of almost all unauthorised arrivals, regardless of their individual circumstances.
- As such detention is 'lawful' under Australian domestic law, the courts have no power to order the release of these detainees, unless it can be shown that they are not in fact unlawful non-citizens.
- In *A v Australia* (560/93), the HRC found a breach of article 9(1) in a case concerning the prolonged detention of an unauthorised arrival who was detained in Australia for over four years whilst his asylum claim was being reviewed.
- Section 256 of the *Migration Act 1958* (Cth) requires the provision of legal assistance upon request. Section 193 requires all detainees to be notified of their right to make such a request with the exception of those who have arrived unlawfully by boat or plane (that is, without a valid visa).
- Departmental officers have adopted a policy of failing to inform unauthorised arrivals of their legal rights. Legal assistance is not given unless it is specifically 'requested'.[1]
- Legal advisers, including HREOC itself, cannot initiate contact with detainees in 'separation detention' to inform them of their legal rights.

Relevance to the ICCPR

- Article 2(1): Rights of aliens;
- Article 9(1): Liberty of person;
- Article 9(4): Judicial review of detention.
- Article 14: Right to legal assistance

The following section expands on this summary under the following headings:

- Mandatory detention;
- Right to legal advice;
- Judicial review;
- *A v Australia* (560/93);
- The government's response;
- Relevance to ICCPR (an analysis of relevant articles of the Convention).

[1] This departmental policy has been in place since 1994; see Detention Report, 1998, p. 208. See also Australian Report to the HRC, CCPR/C/AUS/98/3, paragraph 496.

Mandatory detention

Sections 189 and 196 of the *Migration Act 1958* (Cth) require the detention of almost all unauthorised arrivals, regardless of their individual circumstances. As such detention is 'lawful' under Australian domestic law, the courts have no power to order the release of these detainees, unless it can be shown that they are not in fact unlawful non-citizens.

Persons detained under sections 189 and 196 may be released from detention if they satisfy the restrictive criteria for bridging visas.[2] The decision to release an unauthorised arrival and award a bridging visa is exercisable upon the personal and non-compellable discretion of the Minister for Immigration. The Minister can be required to make this decision according to law, but cannot be required to exercise the discretion in favour of any particular applicant.[3]

Right to legal advice

Section 256 of the *Migration Act 1958* (Cth) requires the provision of legal assistance upon request. Section 193 requires all detainees to be notified of their right to make such a request with the exception of those who have arrived unlawfully by boat or plane (that is, without a valid visa). In their case the Act does not require the authorities to notify the detainee of the right to make such a request. This view has been confirmed in *Wu Yu Fang and 117 Others v Minister for Immigration and Ethnic Affairs and Anor*.[4] Departmental officers have adopted a policy of failing to inform unauthorised arrivals of their legal rights. Legal assistance is not given unless it is specifically 'requested'.[5]

Compliance with ICCPR articles 9(4) and 14(1) requires that detainees have ready access to independent legal advice and assistance. Ready access is not available if these detainees are required to request them, bearing in mind their lack of knowledge of the existence of legal rights and assistance, and probable lack of English language skills. Similar concerns arise with regard to the requirement that unauthorised arrivals must make clear that they are seeking a protection visa.

Furthermore, legal advisers, including HREOC itself, cannot initiate contact with detainees in 'separation detention' to inform them of their legal rights.

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[2] 'Bridging Visas' are described in the Australian Report, CCPR/C/AUS/98/3, paras. 490-495.

Regarding restrictiveness, note that only two children out of 581 child detainees were awarded a bridging visa between 1994 and 1998, as it has been held that it is more in the child's interests to stay with his/her parents, who are usually not eligible for bridging visas. See Human Rights and Equal Opportunity Commission, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) [hereafter 'Detention Report 1998'], p.22.

[3] See also Australian Third Report to the HRC, CCPR/C/AUS/98/3, paragraph 502.

[4] (1996) 135 ALR 583.

[5] This departmental policy has been in place since 1994; see Detention Report, 1998, p. 208. See also Australian Report to the HRC, CCPR/C/AUS/98/3, paragraph 496.

All boat arrivals are detained in segregated conditions with no access to the outside world until they either engage Australia's protection obligations or, not having done so, are removed from Australia.

A HREOC report summarised the 'incommunicado-like' aspects of separation detention in 1997 as "indeterminate segregation without explanation, being locked in the accommodation block [inside the building] during the period of segregation with little exercise [outside], restricted access to phones and no access to information about the outside world through newspapers and radio".[6] Outside exercise is now permitted, albeit at Port Hedland the exercise are is very confined.

Therefore any denial of legal assistance and denial of the right to make a protection visa application can occur and not be the subject of a complaint to HREOC (or the Ombudsman) because, in some cases, the detainee is held in separation detention continuously until removal from Australia.

Once a detainee has requested legal advice, numerous concerns may be raised about their ability to properly access such advice. For example, the remoteness of the Port Hedland facility severely hampers the Port Hedland detainees' ability to access quality legal advice. HREOC's 1998 report details instances of delays of weeks and months in the actual provision of legal assistance to detainees, as well as instances where legal assistance was simply not provided even upon request.[7] This delay breaches article 10(1). Furthermore, a breach of article 9(4) of the ICCPR has been found by the HRC where there existed a delay of seven days before a person in immigration detention could challenge his detention in a court.[8] Delays of weeks and months in the provision of legal assistance therefore breach article 9(4).[9]

The lack of adequate interpreter services may also effectively deny detainees their right to access legal advice.[10]

Judicial review of detention

In Australia, the Courts are precluded from authorising the release from detention of unlawful non-citizens detained under sections 189 and 196, unless their detention under those sections contravenes domestic law.[11] Such detention will only contravene domestic law where the person detained is not in fact an illegal alien. The Courts have no authority to order the release of illegal aliens on the grounds that their detention is arbitrary or unreasonable or contrary to article 9(1).

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6 Detention Report 1998, page 137.

7 Detention Report 1998, pp. 210-217.

8 *Torres v Finland* (291/88) at paragraph 7.2.

9 See para. 43 above on how legal assistance is a necessary prerequisite to exercise of rights under article 9(4).

10 See Australian Third Report to the HRC, CCPR/C/AUS/98/3, paragraph 497, stating that an interpreter 'must provide complete information to the detainee and set out his or her rights'. This is misleading, as it does not apply to those in 'separation detention' at Port Hedland.

11 This is the effect of the decision in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 110 ALR 97.

This situation clearly contravenes article 9(4), as interpreted in *A v Australia*. Indeed, Australia has done nothing to redress this violation in *A*, contrary to article 2(3) of the ICCPR.

A v Australia (560/93)

In *A v Australia* (560/93), the HRC dealt with a communication concerning the prolonged detention of an unauthorised arrival who was detained in Australia for over four years whilst his asylum claim was being reviewed. The HRC found a breach of article 9(1) in that case in the following terms.

> **¶ 9.2** … [T]he Committee recalls that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context. The State party however, seeks to justify the author's detention by the fact that he entered Australia unlawfully and by the perceived incentive for the applicant to abscond if left in liberty.
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> **¶ 9.4** The Committee observes … that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period. Without such factors detention may be considered arbitrary, even if entry was illegal. In the instant case, the State party has not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years, during which he was shifted around between different detention centres. The Committee therefore concludes that the author's detention for a period of over four years was arbitrary within the meaning of article 9, paragraph 1.

The HRC's decision confirms that the prolonged detention of unlawful aliens may occur. However, such detention must involve an individual consideration of the necessity to detain that alien.

The government's response

Despite the *A* decision, Australian law has not been amended to ensure that an individual consideration of the necessity to detain an alien takes place in every case. Without such individual consideration, the blanket detention of virtually all unauthorised entrants is disproportionate and 'arbitrary' contrary to article 9(1).

In *A v Australia* (560/93), the government argued that the Australian regime complied with article 9(4), as aliens in A's situation were permitted to challenge the 'lawfulness' of their detention under domestic law. The fact that A's challenge had no feasible hope of success, as his detention was self-evidently lawful, was irrelevant. The HRC disagreed, and took a broader, more purposive approach to interpretation of article 9(4). At paragraph 9.5, the HRC stated:

> The Committee observes that the author could, in principle, have applied to the court for review of the grounds of his detention before the enactment of the Migration Amendment Act of 5 May 1992; after that date, the domestic courts retained that power with a view to ordering the release of a person if they found the detention to be unlawful under Australian law. In effect, however, the courts' control and power to order the release of an individual was limited to an assessment of whether this individual was a "designated person" within the meaning of the Migration Amendment Act. If the criteria for such determination were met, the courts had no power to review the continued detention of an individual and to order his/her release. In the Committee's opinion, court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law. While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effects, real and not merely formal. By stipulating that the court must have the power to order release "if the detention is not lawful', article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant. …

It must be noted that the length of detention in Immigration Detention Centres has been greatly reduced.[12] However, this is largely due to the adoption by Australia of measures which effectively reduce the rights of asylum seekers to seek legal advice, which itself may breach the ICCPR.

Furthermore, we draw the HRC's attention to Parliamentary statements regarding the reasons for the detention of unlawful arrivals.[13] Two former Ministers for Immigration have admitted that the detention policy is designed to 'deter' unauthorised arrival. Deterrence in this context is an 'arbitrary' reason for detention, as it gives rise to disproportionate and unnecessary detentions.

Relevance to ICCPR (an analysis of relevant articles of the Convention)

Article 2(1): ICCPR rights of Aliens

Under article 2(1), States parties are obliged to guarantee ICCPR rights to all persons within their jurisdiction, without discrimination. Therefore, even unlawful aliens are entitled to protection of their ICCPR rights. Certainly, some rights are denied to unlawful aliens, such as article 25 political rights (confined to citizens), and rights under articles 12 and 13. However, in General Comment 15 at paragraph 7, the HRC confirms that unlawful aliens are entitled to enjoyment of most ICCPR rights, including those under articles 7, 9, 10 and 24.

[12] See Australian Third Report to the HRC, CCPR/C/AUS/98/3, paragraph 498-500.

[13] See Detention Report 1998, pp. 45-46.

Article 9(1): Liberty of the Person

Article 9(1) of the ICCPR states that 'no one shall be subjected to arbitrary … detention.' This right extends to all deprivations of liberty, 'whether in criminal cases, or in other cases such as … immigration control.'[14]

In *Van Alphen v Netherlands* (305/88), the HRC described the concept of 'arbitrary detention' in the following manner at paragraph 5.8:

> The drafting history of article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with against the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to a lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime. (emphasis added)

The Committee has expressed concern over the extended detention of immigrants in a number of Concluding Comments. For example, in their 1998 Comments on Japan, the HRC expressed concern that asylum-seekers were held for 'periods of up to six months and, in some cases, even up to two years'.[15] Regarding Switzerland, the Committee seemed to adopt an even stricter approach, at paragraph 15:[16]

> The Committee notes with concern that [Swiss law] permits the administrative detention of foreign nationals without a temporary or permanent residence permit, including asylum-seekers and minors over the age of 15, for three months while the decision on the right of temporary residence is being prepared, and for a further six months, and even one year with the agreement of the judicial authority, pending expulsion. The Committee notes that these time-limits are considerably in excess of what is necessary, particularly in the case of detention pending expulsion …

These Concluding Comments indicate that the extended detention of illegal aliens by Australia is likely to breach article 9(1).

Article 9(4): Right to Judicial Review of Detention

Article 9(4) of the ICCPR provides that:

> Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

This requires that all detainees have an opportunity to challenge their detention in a court of law. The HRC has clearly linked access to legal representation with enjoyment of the right in article 9(4). In practice, it is very difficult for people to

[14] General Comment 8, paragraph 1.

[15] (1998) UN doc. CCPR/C/79/Add. 102, paragraph 19; see also Concluding Comments on the UK (Hong Kong) (1995) UN doc. CCPR/C/79/Add.57, paragraph 17; Concluding Comments on the UK, (1995) UN doc. CCPR/C/79/Add.55, paragraph 16; Concluding Comments on the USA, (1995) UN doc. CCPR/C/79/Add. 50, paragraphs 18 and 33; Concluding Comments on Sweden (1995) UN doc. CCPR/C/79/Add. 58, paragraph 15.

[16] (1996) UN doc. CCPR/C/79/Add. 70.

challenge their detention without legal representation. In *Berry v Jamaica* (330/88), the HRC stated at paragraph 11.1:

> In respect of the allegations pertaining to article 9, paragraphs 3 and 4, the State party has not contested that the author was detained for two and a half months before he was brought before a judge or judicial officer authorized to decide on the lawfulness of his detention. Instead, the State party has confined itself to the contention that, during his detention, the author could have applied to the courts for a writ of habeas corpus. The Committee notes, however, the author's claim, which remains unchallenged, that throughout this period he had no access to legal representation. The Committee considers that a delay of over two months violates the requirement, in article 9, paragraph 3, that anyone arrested on a criminal charge shall be brought 'promptly' before a judge or other officer authorized by law to exercise judicial power. In the circumstances, the Committee concludes that the author's right under article 9, paragraph 4, was also violated, since he was not, in due time, afforded the opportunity to obtain, on his own initiative, a decision by a court on the lawfulness of his detention.

The incommunicado-like aspects of the detention of separation detainees at Port Hedland, Woomera and Curtin renders it effectively impossible to pursue ICCPR legal rights, such as the right to challenge detention under article 9(4). For example, in *Hammel v Madagascar* (155/83), incommunicado detention for three days, during which time it was impossible for the author to access a court to challenge his detention, was held to breach article 9(4).

Article 14: Right to legal assistance

The HRC has confirmed on numerous occasions that incommunicado detention breaches article 14(3)(b) as it renders access to legal assistance impossible.[17] One can extrapolate that a similar rule could apply regarding access to civil rather than criminal justice under article 14(1).

De facto inability to access courts also breaches article 14(1), if a detainee should wish to pursue a 'suit at law', including a habeas corpus application.[18]

[17] See, eg, *Drescher Caldas v Uruguay* (43/79)

[18] See *Bahamonde v Equatorial Guinea* (468/91), paragraph 9.4.