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III. JURISPRUDENCE

ICCPR

· *Perkins v. Jamaica* (733/1997), ICCPR, A/53/40 vol. II (30 July 1998) 205 (CCPR/C/63/D/733/1997) at para. 11.6.

...

11.6 The author has claimed that he was born in September 1976 and under 18 years of age when the crime for which he was convicted was committed, and that the imposition of the death sentence against him is therefore in violation of article 6, paragraph 2, of the Covenant. The Committee notes that the State party has furnished a birth certificate and a school admission record on which the date of birth of Andrew Perkins is recorded as September 1971. Counsel has challenged these documents and argues that they do not relate to the author. He has, however, not provided any document invalidating the State party's assertion that Andrew Perkins was born in 1971. In this connection, the Committee notes that counsel has not challenged the State party's statement that this is the birth certificate that the author himself sent to the Defence Force when applying to enlist therein. The only document indicating the author's date of birth as September 1976 is the application for legal aid, which was filled out by the author himself and, although showing the author's belief at the time, has no probative value. The Committee observes that it is incumbent on the State party to make enquiries if any doubt is raised as to whether the accused in a capital case is a minor. In the instant case, however, the Committee finds that the author was not under 18 years of age at the time of the offence and there is no basis to find a violation of article 6, paragraph 5, of the Covenant.

· *C. Johnson v. Jamaica* (592/1994), ICCPR, A/54/40 vol. II (20 October 1998) 20 (CCPR/C/64/D/592/1994) at paras. 10.3, 10.4, 11 and Individual Opinion (concurring) by David Kretzmer, 29.

...

10.3 With regard to the author's death sentence, the Committee notes that the State party has not challenged the authenticity of the birth certificate presented by the author, and has not refuted that the author was under eighteen years of age when the crime for which he was convicted was committed. As a consequence, the imposition of the death sentence upon the author constituted a violation of article 6, paragraph 5, of the Covenant.

10.4 In the circumstances, since the author of this communication was sentenced to death in violation of article 6 (5) of the Covenant, and the imposition of the death sentence upon him was thus void *ab initio*, his detention on death row constituted a violation of article 7

of the Covenant.

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11. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 6, paragraph 5, 7, and 14, paragraph 3(d), of the Covenant.

Individual Opinion by David Kretzmer

I concur in the view of the Committee that holding the author on death row in this case amounted to cruel and inhuman punishment. However, since the Committee has consistently held in the past that the time on death row does not of itself amount to a violation of article 7, I think is important to set out the grounds for the different result in this case.

The Committee's view that the mere length of time spent on death row by a person sentenced to death does not amount to cruel and inhuman punishment rests on the notion that holding otherwise would imply that a State party could avoid violating the Covenant by executing a condemned person. As the Covenant strongly suggests that abolition of the death penalty is desirable, the Committee could not accept an interpretation of the Covenant the implication of which was that the Covenant would be violated if a State party refrained from executing a person, but not if it executed him.

This view of the Committee obviously holds only when imposing and carrying out the death sentence are not of themselves a violation of the Covenant. The logic behind the view does not apply when the State party would violate the Covenant by imposing and carrying out the death sentence. In such a case the violation involved in imposing the death penalty is compounded by holding the condemned person on death row, during which time he suffers from the anxiety over his pending execution. This detention on death row may certainly amount to cruel and inhuman punishment, especially when that detention lasts longer than necessary for the domestic legal proceedings required to correct the error involved in imposing the death sentence.

In the present case, as the Committee has held in paragraph 10.4, imposition of the death penalty was inconsistent with the State party's obligation under article 6, paragraph 5 of the Covenant. The author subsequently spent almost eight years on death row, before his sentence was commuted to life imprisonment following reclassification of his offence as non-capital. In these circumstances the detention of the author on death row amounted to cruel and inhuman punishment, in violation of article 7 of the Covenant.

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· *D. Thomas v. Jamaica* (800/1998), ICCPR, A/54/40 vol. II (8 April 1999) 276 (CCPR/C/65/D/800/1998) at para. 6.5.

...

6.5 With respect to the non segregation of the author from adult prisoners both at the General Penitentiary and at St. Catherine's District Prison, the Committee once again regrets the State party's lack of cooperation in this matter. The Committee considers that it is incumbent upon the State party where a complaint such as this is submitted to it in respect of a serving prisoner, to verify whether that prisoner is, or has at any relevant stage, been a minor. The Committee notes from the information before it and not refuted by the State party, that the author was born in November 1980, making him seventeen years old when his communication was submitted to the Committee and 15 when he was sentenced. The Committee considers that the State party has failed to discharge its obligations under the Covenant in respect of Damian Thomas, in so far as he has been kept among adult prisoners when still a minor, and consequently, finds that there has been a violation of article 10 paragraphs 2 and 3.

For dissenting opinion in this context, see D. Thomas v. Jamaica (800/1998), ICCPR, A/54/40 vol. II (8 April 1999) 276 (CCPR/C/65/D/800/1998) at Individual Opinion by Hipólito Solari Yrigoyen, 280.

· *Cheban v. The Russian Federation* (790/1997) , ICCPR, A/56/40 vol. II (24 July 2001) 88 at paras. 2.1, 3.3, 7.2 and 7.3.

...

2.1 The authors were convicted on 17 February 1995, by the Moscow City Court, of criminal acts committed on 24 January 1994, consisting of rape of a minor (who was aged 13 at the time of the incident), accompanied by violence and threats, and of acting in concert by prior agreement to commit the crimes. At the time of the offences of which they were convicted, the authors were all aged between 15 and 16 years and were attending a boarding school in Moscow...

...

3.3 The facts as stated by the authors may also imply claims that the State party committed breaches of article 14, paragraph 4, and article 26 of the Covenant. As regards article 14, paragraph 4, the facts as stated by the authors suggest that the court did not take into account the age of the accused. The authors sought on several occasions to invoke article 20 of the Russian Constitution, 1993, which provides that cases in which an accused subject to the death penalty may, at his request, be tried before a jury. Denial of a jury trial

to the authors might also raise an issue under article 26 because of a difference in treatment between them and other accused persons who received a jury trial.

...

7.2 The claim of discrimination made by the authors is that they were denied a jury trial, while a jury trial was granted to some other accused persons in courts of the State party. The Committee notes that while the Covenant contains no provision asserting a right to a jury trial in criminal cases, if such a right is provided under the domestic law of the State party, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds.

7.3 The authors claim that they should have been afforded a trial by jury, afforded to all accused persons liable to the death penalty. The Committee notes, however, that in the present case the authors were juveniles at the time the crimes were committed and thus they were not subject to the death penalty according to domestic legislation.

Notes

1/ The communication contains no direct presentation of the facts by either the authors or counsel.

· *Jalloh v. The Netherlands* (794/1998), ICCPR, A/57/40 vol. II (26 March 2002) 144 (CCPR/C/74/D/794/1998) at paras. 2.1-2.4, 8.3 and 9.

...

2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.1/

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.2/ His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview

with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.3/ On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.4/

...

8.3 The author has raised a further claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation

that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not *per se* a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

Notes

1/ On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

2/ It appears that the Aliens Department attempted to contact the author on 9 August 1996 but he had already fled.

3/ No further details on the type of detention facility or on the specific conditions of his detention have been provided.

4/ This information was provided by counsel after the initial submission to the Human Rights Committee.

· *Baban et al. v. Australia* (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at paras. 1.1, 2.2, 2.3, 2.5, 2.6, 6.8, 7.2 and 9.

1.1 The author of the communication is Omar Sharif Baban, born on 3 May 1976 and an Iraqi national of Kurdish ethnicity. He brings the communication on his own behalf and that of his son Bawan Heman Baban, born on 3 November 1997 and also an Iraqi national of Kurdish ethnicity. The author and his son were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia.1/ The author claims that they are victims of violations by Australia of articles 7, 9, paragraph 1, 10, paragraph 1, 19 and 24, paragraph 1, of the Covenant. The author is represented by counsel.

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2.2 On 15 June 1999, the author and his son arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. On 28 June 1999, they applied for refugee status. On 7 July 1999, the author was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA).

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

...

2.5 On 21 September 2000, the Full Court of the Federal Court dismissed the authors' further appeal against the Federal Court's decision. The same day, the authors lodged an application for special leave to appeal in the High Court of Australia.

2.6 In June 2001, the author and his son escaped from Villawood Detention Centre. Their current precise whereabouts are unknown. On 16 July 2001, the Registry of the High Court of Australia listed the author's case for hearing on 12 October 2001. On 15 October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

...

6.8 As to the claim under article 24, the Committee notes the State party's argument that in the absence of other family in Australia, the best interests of the author's infant son were best served by being located together with his father. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of his rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility. Insofar as the claim under article 24 concerns his subjection to the mandatory detention regime, the Committee considers this issue is most appropriately dealt with in the context of article 9, together with his father's admissible claim under that head.

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7.2 As to the claims under article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.14/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justified the author's continued detention

in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia... In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.15/ In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.

...

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation.

Notes

1/ See, however, paragraph 2.6.

...

14/ *A. v. Australia* [Case No. 560/1993, Views adopted on 3 April 1997] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

15/ Ibid.

For dissenting opinion in this context, see Baban et al. v. Australia (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at Individual Opinion by Ms. Ruth Wedgwood, 344.

· *Baroy v. The Philippines* (1045/2002), ICCPR, A/59/40 vol. II (31October 2003) 518 (CCPR/C/79/D/1045/2002) at paras. 2.1-2.3, 8.3 and 9.

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...
2.1 On 2 March 1998, a woman was raped three times. The author and an (adult) co-accused were thereafter charged with three counts of rape with use of a deadly weapon contrary to article 266A(1), 1/ in conjunction with article 266B(2), 2/ of the Revised Penal Code. It is alleged that on the date of the offence, the author would have been 14 years, 1 month and 14 days old, by virtue of being born on 19 January 1984.

2.2 At trial, the defence introduced the issue of minority through the author, who claimed to have been born in 1982. The trial court instructed the appropriate government agencies to submit evidence on his true age. Three documents were submitted. A Certificate of Live Birth listed the date as 19 January 1984, while a Certificate of Late Registration of Birth showed the date as 19 January 1981, and an Elementary School permanent record as 19 January 1980. The trial court considered, in the light of the author's physical appearance, that the author's true date of birth was 19 January 1980, thus making him over 18 years of age at the time the offence was committed.

2.3 On 20 January 1999, the author and his (adult) co-accused were each convicted of three counts of rape with a deadly weapon and sentenced to death by lethal injection. In imposing the maximum penalty available, the Court considered that there were the aggravating circumstances of night-time and confederation, and no mitigating circumstances. By way of civil liability, each was further sentenced to pay, in respect of each count, PHP50,000 in indemnity, PHP50,000 in moral damages and PHP50,000 in civil damages. On 4 January 2002, the communication was submitted to the Committee.
...
8.3 In spite of this conclusion with respect to the claims under article 6 [finding the claim inadmissible], the Committee observes that sentencing a person to death and placing him or her on death row in circumstances where his or her minority has not been finally determined raises serious issues under articles 10 and 14, as well as potentially under article 7, of the Covenant. The Committee observes, however, with respect to the exhaustion of domestic remedies, that the author has filed a "partial motion for reconsideration", currently pending before the Supreme Court, requesting the Court to reconsider its treatment of his minority in its judgment of 9 May 2002...

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 5, paragraph 2(b), of the Optional Protocol;
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Notes

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1/ This provision defines rape as committed "by a man who shall have carnal knowledge of woman under any of the following circumstances:
a) through force, threat or intimidation; ….".

2/ This provision sets out : "Whenever the rape is committed with a use of a deadly weapon or by two or more persons, the penalty shall be *reclusion perpetua* to death."

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