

**International Covenant on
Civil and Political Rights**Distr.: General
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Human Rights Committee**Communication No. 1897/2009****Decision adopted by the Committee at its 108th session
(8-26 July 2013)**

<i>Submitted by:</i>	S.Y.L. (represented by Kon Karapanagiotidis, Asylum Resource Centre)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Australia
<i>Date of communication:</i>	28 August 2009 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 28 August 2009 (not issued in document form)
<i>Date of adoption of decision:</i>	24 July 2013
<i>Subject matter:</i>	Expulsion to a country where the person fears persecution and having no access to adequate medical care
<i>Substantive issue:</i>	Right to protection from cruel, inhuman or degrading treatment or punishment
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; non-substantiation; incompatibility with the Covenant
<i>Article of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	2; 3; and 5, paragraph 2 (b)



Annex

Decision of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (108th session)

concerning

Communication No. 1897/2009*

Submitted by: S.Y.L. (represented by Kon Karapanagiotidis of the Asylum Resource Centre)

Alleged victim: The author

State party: Australia

Date of communication: 29 August 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2013,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is S.Y.L., a Timor-Leste citizen born in 1939. He claims to be a victim of a violation by the State party of article 7 of the Covenant. He is represented by counsel.¹

1.2 Pursuant to rule 97 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to expel the author while the communication was being examined.

The facts as submitted by the author

2.1 In April 2006, during the conflict between the army and the police in Timor-Leste, the author, his wife and two sons fled to Australia, fearing for their safety. The author has six children, six grandchildren, three great-grandchildren, five brothers and two sisters, who are all Australian citizens and live in Australia.² They financially supported the author and his family while they were still living in Timor-Leste. The author, his wife and two sons arrived in Australia on Sponsored Family Visitor visas.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabian Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

¹ The Optional Protocol entered into force for the State party on 26 December 1991.

² In 2004, the author, his wife and two sons had previously visited them on a tourist visa for one month.

2.2 On 19 July 2006, the author applied for a protection visa to the Department of Immigration and Citizenship (DIAC) due to fear of persecution based on his Chinese origin and the violence that was occurring in Timor-Leste. On 3 October 2006, the DIAC refused the author's application, holding that he had not substantiated his claim of a well-founded fear of persecution. On 4 January 2007, the Refugee Review Tribunal (RRT) upheld the decision of the DIAC, but recognized that there were some humanitarian considerations in relation to the author's application. On 15 April 2008, the Minister of Immigration refused the author's application for humanitarian intervention under the Migration Act. The author had claimed that his deportation would result in irreparable harm, as he and his wife and two sons relied on family support from one of their daughters, who live in Australia. He also invoked serious health problems, including tuberculosis. On 14 July 2008, the Minister of Immigration refused the author's second application seeking humanitarian intervention. On 17 June 2009, the Minister of Immigration refused the author's third application seeking humanitarian intervention on the basis of his and his wife's deteriorating health. On 12 August 2009, the DIAC notified the author, his wife and two sons of their obligation to depart Australia by 27 August 2009 or face detention.

2.3 While in Australia, the author received treatment for his deteriorating health, including diabetes, gout, high blood pressure and tuberculosis.

The complaint

3.1 The author considers that by returning him to Timor-Leste the State party would violate his rights under article 7 of the Covenant, as his deportation would amount to cruel, inhuman and degrading treatment. The author is elderly and needs the family support and immediate medical care and assistance provided in Australia.

3.2 The author needs constant medical attention and there is no comparable treatment available in Timor-Leste. Medical facilities in Timor-Leste are limited and basic medicines are available only in limited quantities. The author refers to a medical certificate dated 6 December 2006 signed by Dr. Erica Peters, consultant physician at the Western Hospital in Victoria, stating that the author suffers from tuberculosis and that his complex medical needs would not be met in Timor-Leste. The author also refers to a medical certificate of 26 February 2009 by Dr. Karen Winter from the Asylum Seeker Resource Centre (ASRC) Health Clinic in Victoria confirming the previous statement that the author would be at risk if returned to Timor-Leste due to inadequate medical services. A similar certificate by Dr. Karen Winter, also dated 26 February 2009, mentions that the author's wife suffers from cardiovascular problems which would not be adequately dealt with in Timor-Leste. The author submits that their deportation would deny them their right to health, which they could not receive anywhere else.

State party's observations on admissibility and merits

4.1 On 13 October 2010, the State party provided observations on the admissibility and merits of the communication. The State party notes that, in his asylum claim, the author stated that he left Timor-Leste to escape violence arising from the conflict between security forces in the country and that there was ongoing social instability, with local security forces unable to provide protection. The author also stated that, if returned, his two sons would be in constant fear of local martial arts gangs and he himself might be targeted because of his Chinese ethnic origin. He also mentioned that he had been traumatized by years of invasion by Japan (1940s), Indonesia (1975), by the Santa Cruz massacre in Dili in 1991 and the turmoil that arose following the independence of Timor-Leste in 1999.

4.2 On 19 July 2006, the author applied for a protection visa on the basis that he feared persecution if he were to be returned to Timor-Leste. The protection visa application was refused by the Department of Immigration and Citizenship on 3 October 2006. The author

sought review of this decision by the Refugee Review Tribunal (RRT), which affirmed the Department's decision. The author was entitled to seek judicial review of the RRT decision; however he did not do so. The State party therefore considers that he has not exhausted domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol.

4.3 The State party contends that the author's claims are unsubstantiated or, in the alternative, without merit. In October 2008, the State party undertook inquiries into the ability of a resident in Aileu Province (the author's home province) with serious mobility problems to receive medication for Type 2 diabetes, high blood pressure, tuberculosis and gout from local clinics or dispensaries without needing to travel to Dili. The inquiries disclosed that, although the standard of health care available to residents of Timor-Leste is below that available in Australia, the medication for the conditions the author suffers from could be accessed locally at the health clinic by a resident of the Aileu area provided the relevant conditions had been diagnosed and the appropriate medications had been prescribed. It would not normally be required for that person to travel to Dili to obtain the medications for those conditions. The Australian Department of Immigration and Citizenship's Health Operations Centre (HOC) assessed the author's medical reports and advised that, while the author and his wife do suffer from several chronic illnesses, these are currently controlled and may be treated in Timor-Leste. Further inquiries by the State party in 2009 disclosed that the medications required by the author and his wife are available in Dili and usually in the Aileu province, although at times there could be supply problems depending on transport or government funding. The HOC report confirms that the author and his wife will require regular medical review of their conditions and that there are doctors capable of managing their conditions in the author's home province.

4.4 The State party refers to the jurisprudence of the Committee against Torture in *G.R.B v. Sweden*, where it found that the aggravation of the author's state of health which would possibly be caused by her deportation would not amount to the type of cruel, inhuman or degrading treatment envisaged in article 16 of the Convention against Torture.³ By the same reasoning, the State party submits that neither the exacerbation of the author's circumstances nor the circumstances of the medical system in Timor-Leste alleged by the author amount to torture, cruel, inhuman or degrading treatment or punishment. Similarly, in *D. v. United Kingdom*,⁴ the European Court of Human Rights found that there had been a violation of article 3 of the European Convention of Human Rights due only to the exceptional circumstances of the applicant, including the critical stage of his illness (HIV/AIDS), the fact that he had only one family member and that he could not be guaranteed a hospital bed in his home country that could offer care to AIDS patients. The author's situation in the present case can be distinguished from that of *D. v. United Kingdom* in that neither the author nor his wife suffers from a terminal illness and that it has been shown that he and his wife will be able to be treated for their conditions in Timor-Leste.

Author's comments on the State party's observations

5.1 On 20 December 2010 the author submitted his comments on the State party's observations. He recalls that on 25 October 2007 he sought review at the Refugee Review Tribunal (RRT). Although the latter upheld the decision not to grant a protection visa, it accepted that some experiences suffered in Timor-Leste would have been devastating for the family. It concluded that its role was limited to determining whether the author satisfied the criteria for the grant of a protection visa. A consideration of his circumstances on

³ CAT communication No. 83/1997, *G.R.B v. Sweden*, Views adopted on 15 May 1998, para. 6.7.

⁴ European Court of Human Rights, *D. v. United Kingdom*, Application No. 30240/96, Judgment of 2 May 1997.

humanitarian grounds was a matter solely within the Minister's discretion. Therefore, on 31 January 2007, the author applied to the Minister of Immigration under section 417 of the Migration Act for humanitarian intervention. The basis was hardship in the event of a return to Timor-Leste and the importance of maintaining the family unit. The author mentioned that he and his wife reside with, and are being financially supported by, their daughter Sonya and her husband. Close links exist between the family members. The author mentioned his advanced age and dire health condition. On 15 April 2008, the Minister refused to intervene, without giving reasons for his decision.

5.2 On 6 June 2008, the author applied to the Minister for a second time, seeking humanitarian intervention under section 417 of the Migration Act. The application was rejected on 14 June 2008 with no reasons provided. On 5 May 2009, the author made a third application on the grounds of the deteriorating health of both himself and his wife. The author had also recently been diagnosed with kidney disease. On 17 June 2009, the Minister refused to intervene.

5.3 The author considers that he has exhausted domestic remedies, as the RRT itself stated that a consideration of the author's circumstances was solely within the competence of the Minister. The author made three unsuccessful applications for ministerial intervention. No right of appeal exists to challenge an exercise of the Minister's discretion.

5.4 The author considers that, in view of the exacerbation of his medical condition that he would experience upon return to Timor-Leste, the implementation of the decision to remove him from Australia would constitute inhuman treatment in violation of article 7 of the Covenant. During their stay in Australia, the author and his wife have been diagnosed with chronic and debilitating diseases which were either not diagnosed or not effectively treated in Timor-Leste. Despite the progress the author has shown in responding positively to medical treatment, his continuous illness and advanced age place him at serious risk of worsening illness and premature death if he were returned to Timor-Leste.

5.5 The author's mobility remains permanently impaired, with a laboured and unsteady gait and inability to walk long distances. He remains a high-risk category for stroke and renal failure and his diabetes is likely to progress, requiring insulin injections in the future. More recent medical reports demonstrate the ongoing need for regular specialist review, monitoring blood tests and change/adjustment of medication. In a letter from Dr. Andrew McDonald,⁵ serious concerns were raised regarding the likelihood of a rapid decline in the author's health upon return to Timor-Leste. The difficulty lies with the possible unavailability of access to ongoing specialist care; quality of health care; continuous supply of multiple medications; lack of guidelines for the management of chronic diseases; poor management of chronic conditions; and high risk of infectious diseases. Dr. McDonald's analysis is supported by a report from the World Health Organization which states that health care delivery in Timor-Leste suffers from a severe shortage of human resources. In 2004, there were 79 physicians, 1,795 nurses/midwives and 14 pharmaceutical personnel, who provided health-care services to the whole population. Dr. McDonald states that if the author is returned to Timor-Leste his health status would be likely to decline rapidly and result in his death within one to two years, as he would not be able to access and obtain the continuing and regular specialist review, investigations, pharmacological treatment, monitoring and care he requires.

5.6 The author notes that the State party refers to the case-law of the European Court of Human Rights in *D. v. the United Kingdom*, where the Court found that the removal to Saint Kitts and Nevis of an applicant who was suffering from HIV/AIDS would further

⁵ Letter dated 17 December 2009.

reduce his already limited life expectancy and would subject him to acute mental and physical suffering. The author contends that, in referring to such case-law, the State party has failed to recognize important similarities which would support a determination to the effect that exceptional circumstances exist in the author's case. The State party's assertion fails to take into account that the author's health is likely to deteriorate if he were to rely on medical treatment in Timor-Leste. Moreover, the author has only one child residing in Timor-Leste, who is not in a position to sustain the author and his wife and take care of their medical condition. The overwhelming majority of the siblings live in Australia and, during the time the author and his wife have been living there, they have heavily relied on their support.

Additional information from both parties

6.1 On 1 July 2011, the State party submits that the author's claims regarding access to medical care and the exacerbation of his medical condition are not in relation to rights contained in the Covenant and are therefore inadmissible pursuant to article 3 of the Optional Protocol.

6.2 None of the information provided by the author suggests that there is a risk of irreparable harm as referred to in the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant.⁶ As previously mentioned, the State party has conducted inquiries into access to medical treatment in Timor-Leste for the author's condition. All these inquiries disclosed that the author would be able to access medical services and treatment for his conditions. There is no information provided by the author to suggest that his condition and the condition of his wife are terminal in nature or that they will become so by their being returned to Timor-Leste. In the medical report submitted by the author dated 17 December 2009, his doctor states that his health status would be likely to decline rapidly and result in his death within one to two years. However, there is no compelling evidence to suggest that as a necessary and foreseeable consequence of his return to Timor-Leste the author will be unable to access medical care to the extent that it constitutes cruel or inhuman treatment under article 7.

6.3 A pre-existing condition that may possibly be exacerbated by a person's removal does not amount to inhuman treatment under article 7. This is the conclusion reached by the Committee against Torture in *G.R.B v. Sweden*. In *D. v. the United Kingdom*, the European Court of Human Rights rejected the applicant's argument that there would be a direct causal link between his expulsion and his accelerated death such as to give rise to a violation of the right to life. Moreover, the Court stated that the exacerbation of the applicant's conditions stemmed not from factors for which the Government could be held responsible, but from his own fatal illness in conjunction with the lack of medical treatment in the receiving country. The Court only found that, in view of the exceptional circumstances, removal would amount to inhuman treatment. There are significant factual differences between the author's circumstances and the exceptional circumstances in *D. v. United Kingdom*. The author's illness does not require the same level of treatment and support as the terminal situation of the applicant in *D. v. United Kingdom*. According to the author's own submission, all his conditions may be treated with oral medication.

7.1 On 7 September 2011, the author submits that, contrary to the State party's assertion, his serious health condition relates wholly to article 7 of the Covenant. On the merits, he considers that the State party's analysis of *D. v. United Kingdom* fails to take into

⁶ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

account the likely consequences of the author's debilitating and chronic illnesses if he were to be removed and forced to rely on medical treatment in Timor-Leste. Furthermore, the State party's submission fails to take into account Dr. McDonald's prediction that the author's health would be likely to result in his death within one to two years if he were returned to Timor-Leste. The European Court's conclusion that article 3 of the European Convention would be violated did not rely solely on the applicant's exceptional circumstances but on the lack of a guarantee that medical care would be provided to the applicant and the lack of moral or social support. The aforementioned factors are analogous to those in his case, given the lack of availability of adequate medical care in Timor-Leste and the fact that the author and his wife currently rely on their Australian daughters' financial, moral and health support in Australia.

7.2 The State party has drawn a comparison between his situation and the situation of the complainant in the decision of the Committee against Torture in *G.R.B v. Sweden*. However, the two cases are different. The claim of G.R.B. was based on her fear of torture (article 3 of the Convention against Torture) whereas the author's claim is related to the fact that his removal would constitute inhuman treatment under article 7 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee notes the State party's argument that the author has failed to exhaust domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol, as he did not appeal the decision of the Refugee Review Tribunal. The Committee notes the author's reply, according to which a consideration of his circumstances on humanitarian grounds was a matter solely within the Minister's discretion and that no right of appeal exists to challenge the exercise of the Minister's discretion. The Committee notes that the author's statement has not been challenged by the State party. As the only claim before the Committee concerns the violation of the author's rights under article 7 in connection with the deterioration of his health in case of return to Timor-Leste, the Committee considers that domestic remedies have been exhausted.

8.4 Regarding the author's claim that his return to Timor-Leste will exacerbate his health condition to an extent that amounts to inhuman treatment, the Committee notes the author's reference to a medical report dated 2009, according to which his health status would be likely to decline rapidly in Timor-Leste and result in his death within one to two years, as he would not be able to access the continuing and regular specialist review, investigations, pharmacological treatment, monitoring and care he requires. The Committee also notes the State party's argument that the Australian Department of Immigration and Citizenship's Health Operations Centre (HOC) assessed the author's medical reports and advised that, while the author and his wife do suffer from several chronic illnesses, these are currently controlled and may be treated in Timor-Leste; and that further inquiries by the State party in 2009 disclosed that the medications required by the author and his wife are available in Dili and usually in Aileu Province although at times there could be supply problems, depending on transport or government funding. The Committee observes that the medical reports provided by the author, dated 2009 for the most recent, make assertions on the unavailability of adequate health care for the author in Timor-Leste without supporting

those assertions with concrete data concerning the specific situation of the author. The Committee further notes that the author has not presented any reasons as to why it would be unreasonable for him to live in a location in Timor-Leste where adequate health care would be more available than in the Aileu province, nor has the Committee received information indicating an acute condition that would make the author's return to Timor-Leste an immediate threat to his health. In light of the information before it, the Committee considers that the author has not sufficiently substantiated that the possible aggravation of his state of health as a result of his deportation would reach the threshold of inhuman treatment within the meaning of article 7 of the Covenant.

9. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
