

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE HUMAN RIGHTS
COMMITTEE IN COMMUNICATION NO. 1937/2010 (LEGHAEI V AUSTRALIA)**

1. The Australian Government (Australia) presents its compliments to the members of the Human Rights Committee.
2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 1937/2010 (*Leghaei v Australia*) adopted on 26 March 2015. These Views have been published on the website of the Australian Attorney-General's Department.¹ Australia provides the following comments on certain aspects of the Committee's Views.

Articles 17 and 23 – arbitrary interference with the family

3. The Committee found that in 'the absence of any explanation from the State party on the reasons to terminate the author's right to remain except for the general assertion that it was done for "compelling reasons of national security" ... the State Party's procedure lacked due process of law'. The Committee concluded that as Australia's procedures 'lacked due process of law', Australia did not provide Dr Leghaei with 'an adequate and objective justification for the interference in the author's long-settled family life', and that Australia violated the author's rights under article 17, read in conjunction with article 23, of the Covenant.
4. Australia acknowledges its obligations under the International Covenant on Civil and Political Rights (the Covenant) not to subject individuals to arbitrary or unlawful interference with the family. However, the Australian Government respectfully disagrees with the Committee's finding that Australia has violated Dr Leghaei's rights under article 17, read in conjunction with article 23, of the Covenant.

Whether any interference was arbitrary

5. The relevant criteria for assessing whether or not specific interference with the family can be objectively justified to avoid arbitrariness include, on the one hand, the significance of

¹ Human Rights Communications, Australian Attorney-General's Department website:
<http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx#hrcommittee>.

the State party's reasons for the removal of the person and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.²

6. Dr Leghaei was removed from Australia on the basis that he was lawfully assessed as a direct risk to Australia's national security. The limitation of rights for this legitimate objective is expressly provided for in the Covenant (for example, articles 13, 14, 19, 21 and 22). It is not clear why the Committee has not accepted the fact that Dr Leghaei was assessed as a direct risk to Australia's national security as a legitimate reason for any interference with the family in the context of articles 17 and 23.
7. The assessment that Dr Leghaei constituted a risk to national security was carefully weighed against family interests and the best interests of the child by the Minister, in deciding whether to exercise his discretion and grant permanent visas to each of the three family members. The Minister was required to consider, and did consider in each case, the family's circumstances, including the fact that there was a minor child with Australian citizenship, and the length of time spent by members of the family in Australia.³ Permanent visas were granted to the author's wife and children following due consideration of these family circumstances. In the case of Dr Leghaei, these factors ultimately did not outweigh the fact that he had been assessed as a direct risk to Australia's national security. However, the fact that permanent visas were granted to the author's wife and child supports the assertion that the decisions were made with due consideration of the family's circumstances, including the best interests of the child.

Due process of law

8. The Australian Government accepts that the notion of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of law.
9. The Australian Government does not agree that there was a lack of 'due process' in the procedure leading up to Dr Leghaei's removal from Australia. The relevant due process criteria in this case are contained in article 13, which governs the expulsion of aliens. The Australian Government refers to its detailed submissions on how the procedural requirements under article 13 of the Covenant were satisfied. In accordance with

² *Madafferi v Australia*, (11011/2001), 26 July 2004, at paragraph 9.8; *Byahuranga v Denmark* (1222/2003), 1 November 2004, at paragraph 11.7.

³ Under 'Direction No. 41 - Visa refusal and cancellation under section 501' (3 June 2009), which was in effect at the time of the Minister's consideration of the author's case, the Minister was required to consider, amongst other things, the protection of the Australian community, the length of time the person had been living in Australia, the best interests of affected children, the extent of disruption to the person's family and the hardship likely to be experienced by the person or their immediate family members in Australia.

Australian law and article 13 of the Covenant, the Australian Government assessed that the author was a risk to Australia's national security, and that information concerning the grounds for the making of the assessment could not be released to Dr Leghaei for reasons of national security. Determining whether compelling reasons of national security arise is to be determined by the State, which is afforded a very wide discretion.⁴

10. The necessity of withholding the reasons for the adverse assessment against Dr Leghaei from him in order to protect national security was reviewed by Australian courts. The Federal Court of Australia held that Dr Leghaei was accorded procedural fairness to the extent that the interests of national security permitted, including by providing Dr Leghaei's counsel with access to evidence detailing the allegations against him. Dr Leghaei's appeals to the Full Court of the Federal Court and the High Court on grounds concerning procedural fairness were dismissed. The Committee has previously expressed the view that:

...the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.⁵

11. As stated in the Australian Government's submissions, there was nothing to suggest in this case that the Australian courts, the Migration Review Tribunal, or the Minister for Immigration, in reviewing relevant aspects of this matter, have acted improperly. The authors did not contend that this was the case.
12. For the above reasons, the Australian Government does not agree with the Committee's finding that the process for refusing to grant Dr Leghaei a visa 'lacked due process of a law' and, consequently that a breach of article 17, read in conjunction with article 23, of the Covenant occurred.

⁴ *Alzery v Sweden*, 1416/2005, 25 October 2006, [11.10]. See also the Committee's observation that 'it is not for the Committee to test a sovereign State's evaluation of an alien's security rating' in *V. M. R. B. v. Canada*, 236/1987, 18 July 1988, [6.3].

⁵ *Maroufidou v Sweden*, 58/1979, 9 April 1981, [10.1].

Recommendations

13. The Committee has recommended that the Australian Government provide a remedy for breaches of the Covenant, including a meaningful opportunity for Dr Leghaei to challenge the refusal to grant him a permanent visa, compensation and prevention of similar violations in the future.
14. As the Australian Government does not agree with the Committee's finding that a breach of the Covenant has occurred, the Government does not consider it appropriate to implement the recommendations of the Committee.
15. The Australian Government notes that Dr Leghaei has already pursued a range of avenues of domestic review, including before the courts, which have given him a meaningful opportunity to challenge the decision to refuse him a permanent visa in Australia. These avenues have included review by the Inspector General of Intelligence and Security, the Federal Court of Australia, the Full Court of the Federal Court of Australia and the High Court of Australia. Dr Leghaei also sought review of the decision not to grant him a visa as a consequence of the adverse security assessment before the Migration Internal Review Office and the Migration Review Tribunal, and requested the exercise of Ministerial discretion to issue a permanent visa to him. If Dr Leghaei wishes to return to Australia, it remains open to him to make a new application for a visa, bearing in mind that he must meet validity and eligibility criteria for the visa to be granted.
16. The Australian Government avails itself of this opportunity to renew to the Human Rights Committee the assurances of its highest consideration.