UNITED
NATIONS

CCPR

International Covenant
on Civil
and Political Rights

Distr.
RESTRICTED*

CCPR/C/61/D/706/1996
4 December 1997

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Sixty-first session
20 October - 7 November 1997

VIEWS

Communication No. 706/1996

Submitted by:	Mrs. G. T.
Victim:	The author's husband, T.
State party:	Australia
Date of communication:	10 May 1996 (initial submission)
Date of adoption of Views:	4 November 1997

On 4 November 1997, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 706/1996. The text of the Views is appended to the present document.

[ANNEX]

---

* Made public by decision of the Human Rights Committee.

ANNEX*

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights
- Sixty-first session -

concerning

Communication No. 706/1996** ***

Submitted by: Mrs. G. T.

Victim: The author's husband, T.

State party: Australia

Date of communication: 10 May 1996 (initial submission)

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

Meeting on 4 November 1997,

Having concluded its consideration of communication No. 706/1996 submitted to the Human Rights Committee by Mrs. G. T. on behalf of her husband, T., under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

---

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk, Mr. Maxwell Yalden and Mr. Abdallah Zakhia.

** Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the case.

*** The texts of two individual opinions signed by three Committee members are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mrs. G. T., an Australian citizen, residing in Castlemaine, Victoria. She submits the communication on behalf of her husband, T., a Malaysian citizen born in 1962, currently in Australia under threat of deportation. She claims that her husband's deportation to Malaysia would violate his right to life.

Facts as submitted

2.1 T. was convicted in Australia for importing around 240 grams of heroin from Malaysia into Australia in 1992, and was sentenced to six years' imprisonment. On 15 June 1993, while in prison, T. sought refugee status, which was rejected on 10 August 1993. An application for review was refused by the Refugee Tribunal on 6 July 1994, which considered that there was a real chance that T. would face the imposition of the death penalty by the Malaysian authorities, but that this did not constitute persecution in terms of the Refugee Convention.

2.2 Following his release on parole, on 25 October 1995, T. applied for a protection visa, under section 417 of the Migration Act. This visa was refused. At the time of submission of the communication, this refusal was before the Australian Federal Court.

2.3 The author married T. on 21 January 1996. He became the stepfather of her sons. She states that if her husband is extradited to Malaysia, he will be charged there again under the Dangerous Drugs Act, section 39B of which provides for the mandatory death penalty for trafficking drugs.

2.4 At the time of the communication, T. was in Australia on a "bridging visa E", which expired on 9 June 1996. The author feared that her husband would be deported after the expiry of this visa, as she expected the Federal Court to confirm his deportation.

The complaint

3.1 The author claims that her husband's deportation to Malaysia, where there is a real chance that he will face the death penalty, will violate Australia's duty to protect his right to life. In this context, the author notes that Australia itself has abolished the death penalty.

3.2 In support of her claim, the author refers to a letter from the Australian Office of Amnesty International, dated 25 March 1996 and addressed to the Minister for Immigration and Ethnic Affairs. In the letter, AI opposes the forcible return of T., as it believes that he will face the death penalty in Malaysia as a result of his conviction in Australia. In this context, AI notes that a person found to have been in possession of more than 15 grams of heroin faces a mandatory death sentence in Malaysia.

3.3 The author further states that the Dangerous Drugs Act provides for elimination of bail, so that persons awaiting trial are always kept in detention. She further states that there is a delay of up to four or five years for the initial trial, and three of four years for an appeal. She therefore argues that her husband would also likely spend seven to nine years in prison before being executed.

3.4 She further states that an amendment to the law, now also provides for the mandatory whipping for everyone convicted under the Dangerous Drugs Act, although it is not clear whether this is also applied in capital punishment cases.

3.5 It is further submitted that persons suspected of drug offences can be detained for up to two years in preventative detention without a possibility of recourse to the courts. She argues that this would be in violation of the right not to be arbitrarily detained.

3.6 The author also claims that the investigation in her husband's case would not be fair, and that he will not receive a fair trial, because of his ethnicity and his lack of full understanding of Malay, in violation of his right to equality before the law.

3.7 The author concludes that by returning her husband to Malaysia, Australia will violate its fundamental duty of protection, and will cause a trauma for her and her sons.

Committee's rule 86 request

4.1 On 17 June 1996, the Committee, acting through its Special rapporteur for New Communications, requested the State party not to deport T. to Malaysia or to any country where he would likely face the death sentence.

4.2 On 3 June 1997, the State party requested the Committee to lift its request under rule 86. In this context, it referred to assurances which it had received from the Malaysian Government that "any Malaysian national who had committed and being sentenced overseas on the charge of any offence committed overseas will not be prosecuted upon his return to Malaysia for a charge or charges relating to his offence committed overseas. As such, the question of double jeopardy will not arise. Nevertheless, a Malaysian national may be charged by the Malaysian authorities due to other offences that he might had committed in Malaysia." The State party added that the contents of the Malaysian assurances had been brought to the attention of T. by letter of 30 May 1995, who replied by letter of 7 June 1995 that the information was "very comforting and reassuring".

State party's observations on admissibility and merits

5.1 The State party requests the Committee to examine admissibility and merits of the communication simultaneously. The State party has identified the

issues raised by the author in her communication as issues under articles 2, 6, 7, 9, 14 and 26 of the Covenant.

5.2 The State party explains that T.'s application to the Federal Court was finalised on 11 March 1997, when he withdrew his application in the light of the Court's recent ruling in a similar case. Following T.'s further application under section 417 of the Migration Act 1958, which allows the Minister to grant persons the right to stay in Australia for humanitarian reasons, he has been granted a further bridging visa until 11 July 1997. Should his request not have been considered by that date, he would be eligible for an extension of the visa.

5.3 As to article 2, the State party argues that the rights under this provision are accessory in nature and linked to the other specific rights enshrined in the Covenant. It recalls the Committee's interpretation of a State party's obligations under article 2, paragraph 1, pursuant to which if a State party takes a decision concerning a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant[1]. It notes however that the Committee's jurisprudence has been applied so far to cases concerning extradition, whereas the author's case raises the issue of the "necessary and foreseeable consequence" test 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: it cannot be said that a retrial for drug trafficking offences is certain or the purpose of returning T. to Malaysia.

5.4 In the State party's opinion, a narrow construction of the "necessary and foreseeable consequences" test allows for an interpretation of the Covenant which balances the principle of State party responsibility embodied in article 2 (as interpreted by the Committee) and the right of a State party to exercise its discretion as to whom it grants a right of entry. To the State party, this interpretative approach retains the integrity of the Covenant and avoids a misuse of the Optional Protocol by individuals who entered Australia for the purpose of committing a crime and who do not have valid refugee claims.

5.5 Regarding article 6, the State party recalls the Committee's jurisprudence as set out in the Views on communication No. 539/1993[2] and notes that while article 6 of the Covenant does not prohibit the imposition of the death penalty, Australia has, by accession to the Second Optional Protocol to

---

[1] See Views on communications Nos. 469/1991 (Ch. Ng v. Canada), adopted on 5 November 1993, paragraph 6.2; and 470/1991 (J. Kindler v. Canada), Views adopted 30 July 1993.

[2] Communication No. 539/1993 (Keith Cox v. Canada), Views adopted 31 October 1994, paragraph 16.1.

the Covenant, undertaken an obligation not to execute anyone within its jurisdiction and to abolish capital punishment. The State party argues that the author has failed to substantiate her allegation that it would be a necessary and foreseeable consequence of her husband's mandatory removal from Australia that his rights under article 6 of the International Covenant on Civil and Political Rights and article 1, paragraph 1, of the Second Optional Protocol will be violated; this aspect of the case should be declared inadmissible under article 2 of the Protocol, or dismissed as being without merits.

5.6 According to the State party, the mere allegation that T. would be liable under the Dangerous Drugs Act 1952, upon his return to Malaysia, is insufficient to substantiate the claim that there is a real risk that he will be charged, prosecuted and sentenced to death. The State party notes that expulsion is distinguishable from extradition in that the very purpose of extradition is to return a person for prosecution or to serve a sentence, whereas no such necessary connection exists between expulsion and possible prosecution.

5.7 The State party submits that the author has failed to provide any evidence that T. will be prosecuted, or is likely to be prosecuted, on his return to Malaysia. The State party refers to the assurances given by Malaysia (see paragraph 4.1) and argues that a written assurance from a receiving State should be accepted as conclusive evidence that there is no necessary and foreseeable risk of a violation. The State party submits that further inquiries confirm that there is no risk to T. of prosecution. In this context, it refers to information from the Australian Mission in Kuala Lumpur that: "The Royal Malaysian Police have orally confirmed to us that they do not institute criminal proceedings for trafficking in drugs against a person returned to Malaysia - that is for exporting narcotics - and to our knowledge this has never occurred nor do any of our interlocutors consider it ever likely to occur. We have no reason to doubt that Malaysia will continue to abide by the principles governing double jeopardy as it has in the past." The State party adds that in three previous cases concerning persons convicted and sentenced for drug trafficking offences in Australia, it sought advice on whether that person might be subject to charges in Malaysia relating to the drug trafficking offence. On each occasion, the information confirmed that such a risk would not arise. The State party has no evidence that a person in similar circumstances as T. has been charged and executed on return to Malaysia.

5.8 As regards the author's reliance on the Refugee Review Tribunal's opinion that there is a real chance that her husband would be charged under the Dangerous Drugs Act, the State party explains that in the Tribunal's jurisprudence a "real chance" is one that is "not remote" regardless of whether it is less or more than 50 per cent. This approach is consistent with the objects of the Refugee Convention and reflects the practical evidential difficulty of proving a refugee claim but, according to the State party, it does not suffice for the purposes of proving a violation of the Covenant. In

this context, the State party argues that it would be incorrect to interpret the Covenant either by reference to interpretations of domestic law or by reference to the requirements of the Refugee Convention. The State party argues that the "necessary and foreseeable consequence" test places a higher burden on a complainant than that of "real chance". According to the State party, under the Covenant the individual is required to demonstrate that a prospective violation can be foreseen and is inevitable and that there is a clear causal link between the decision of the expelling State and the future violation by the receiving State.

5.9 In respect to the claim that T. is likely to be subject to corporal punishment or extended periods on death row when sentenced under Malaysian law, the State party refers to its arguments in relation to article 6 of the Covenant and argues that no real risk exists that he will be prosecuted under the Dangerous Drugs Act.

5.10 Alternatively, the State party submits that the author has provided insufficient evidence that T., if he would be prosecuted and convicted, is at risk of being subjected to caning or to a unreasonable period of detention on death row. In this context, the State party refers to information received from its Mission in Kuala Lumpur regarding the detention on death row that "it is the considered view of our interlocutors that there is nothing notably inhumane or unusually harsh about the conditions of those placed in Malaysia's death row". The State party contends that the author offers insufficient evidence that T., in the particular circumstances of his case, is personally at risk of caning or being held for an unreasonable length of time on death row.

5.11 As regards article 9 of the Covenant, the State party accepts that the Dangerous Drugs (Special Preventative Measures) Act 1985 provides for preventative detention of persons suspected of involvement in drug trafficking. It also accepts that the Act provides for the detention of such a person for up to two years for the purposes of questioning and the investigation of offences. The State party further acknowledges that it is likely that T. will be questioned on return to Malaysia in connection with the offences for which he was convicted in Australia. It argues however that the mere questioning of an individual on return to his country of nationality in relation to his conviction by another State does not of itself amount to a necessary and foreseeable breach of his Covenant rights.

5.12 According to information received by the Australian Mission in Kuala Lumpur, a Malaysian national convicted of drug trafficking offences overseas would probably be put on a watch-list. The deportee would be met on arrival at the airport by members of the Anti-Narcotics Branch of the Malaysian Police. He would be interviewed to gain insight into his role and, if the police determined that he had limited involvement in trafficking of the drug, was not a member of a criminal syndicate and has little intelligence to offer, preventative detention could well not occur. The State party emphasizes that preventative detention is not automatic and depends on the circumstances of

each individual case. In the case of T., he had never been sentenced for a drug offence before, and he has claimed that he is not part of a drug network and that he did not know the contents of the bag containing heroin. In those circumstances, it is not likely according to the State party that he would be kept in preventative detention. Moreover, the Act provides for restriction orders as an alternative to detention. In view of all this, the State party argues that detention in violation of article 9 is not a necessary and foreseeable consequence of Australia's decision to return T. to Malaysia.

5.13 The State party argues that its obligation in relation to future violations of human rights by another State arises only in cases involving a potential violation of the most fundamental human rights and does not arise in relation to allegations under article 14, paragraph 3. It recalls that the Committee's jurisprudence so far has been confined to cases where the alleged victim faced extradition and where the claims related to violations of articles 6 and 7. In this context, it refers to the jurisprudence of the European Court of Human Rights in the case of Soering v. United Kingdom, where the Court, while finding a violation of article 3 of the European Convention, stated in respect of article 6 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. In the instant case, the author claims that T. will not get a fair trial because of his Chinese ethnicity, since he cannot read or write English and is not fluent in Malay. Information provided by the Australian Mission in Kuala Lumpur shows that an accused would have access to proper legal representation and to interpretation services, as well as to legal aid. The State party argues therefore that there is no real risk that T.'s rights under article 14 would be violated.

5.14 As regards the author's claim that her husband would be subject to discrimination on the ground of his Chinese ethnicity, the State party argues that this claim should be declared inadmissible for failure of substantiation or should be dismissed as unmeritorious. In this respect, the State party refers to its arguments relating to articles 6 and 14, as well as to the decision of the Refugee Review Tribunal in T.'s case, where the Tribunal found that his lack of fluency would not preclude a fair interrogation by the police, and that there was no evidence that the death penalty was disproportionately applied to Chinese compared to members of other ethnic groups.

Author's comments on the State party's observations

6.1 By submission of 4 October 1997, the author requests the Committee to maintain its request to the State party not to return T. to Malaysia. She notes the assurances given by the Malaysian Government, that a Malaysian national will not be prosecuted for crimes which he committed in another country, but points out that it is also said that he may be charged with offences committed under Malaysian law. She contends that, since it is obvious that the drugs found in her husband's possession when he came off the plane

were obtained in Malaysia, it is clear that he committed a criminal offence in Malaysia under section 37 of the Dangerous Drugs Act, which provides for the mandatory death penalty for trafficking drugs. Section 37(d) of the same Act provides that any person who is found to have had drugs in his custody or under his control shall be deemed to have known the nature of such drug. She concludes that the so-called assurances from the Malaysian Government do not preclude the possibility that her husband will be prosecuted upon return.

6.2 As to her husband's letter of reply to the assurances, the author explains that this letter was written by another inmate in prison, and that her husband signed the letter thinking it was a thank you letter in general terms. In this context, she explains that her husband's knowledge of English is limited and that he cannot write or read it.

6.3 The author reiterates that a "real chance" exists that her husband's rights under the Covenant will be violated upon his return to Malaysia, in particular his right to life. She claims that Australia has a duty under the Covenant to prevent the violation of Covenant rights by allowing her husband to stay in the country. In this context, she states that in 1994, the Australian Federal Government offered T. protection in exchange for assistance in disclosing involvement of federal officers in tampering with imported drugs. However, he declined the offer fearing that his life would be endangered in Australia as well, if he would cooperate. The author suggests that the Government at that time tried to make her husband cooperate knowing that he would face danger in Malaysia and making use of his fear in this respect.

6.4 The author acknowledges that her husband's expulsion does not have as its purpose his handing over to stand trial. However, she states that it is beyond doubt that the Malaysian Government will take action against her husband for the drugs that he had in his possession in Malaysia, and that by making this possible through expelling him, Australia will become an accessory to the violation of her husband's Covenant rights in Malaysia.

6.5 The author acknowledges that Australia has an interest in promoting the security of its society, but states that her husband has already served the sentence the courts imposed upon him, that he has been reformed, that he has no more dealings with drugs, that he has been working for a year and that he is striving for forgiveness of his past wrongs. He wishes to start a new life and to raise a family. The author does not question Australia's right to decide to whom it grants entry, but according to her, Australia's duty to protect life must prevail.

6.6 As regards the risk of prosecution under the Dangerous Drugs Act, the author recalls that the death penalty is mandatory in Malaysia for trafficking in drugs. She submits that her husband's family have made inquiries and found that his name is placed on the Malaysian computers for arrest. It is said that T.'s mother fears for his life and has even come to Australia to persuade him not to return to Malaysia. The author argues that even if there were only a

remote chance of prosecution, this would constitute a real risk. In this context, she notes that the State party has not provided conclusive evidence that her husband will not be arrested in Malaysia for exporting drugs, therefore her husband has a well-founded fear that he will be arrested and prosecuted under the Dangerous Drugs Act. Since it is not possible to predict the outcome of such prosecution, a real risk exists that the death penalty will be imposed.

6.7 As regards the information gathered by the Australian Mission in Kuala Lumpur, the author notes that there is no written proof of these assurances, and that the only written assurances do not exclude prosecution for exporting drugs. The author requests the Committee to give full consideration to even a remote chance of prosecution rather than a foreseeable consequence. The author refers to the Committee's jurisprudence that the words of the Covenant have a meaning separate from that of the national legal system and states that this is the reason why she submitted her husband's case. Since the Australian legal system has failed to protect his life, she expects the Committee to uphold her husband's right to life.

Issues and proceedings before the Committee

7.1 The Committee appreciates that the State party has, although challenging the admissibility of the author's claims, also provided information and observations on the merits of the allegations. This enables the Committee to consider both the admissibility and the merits of the present case, pursuant to rule 94, paragraph 1, of the Committee's rules of procedure.

7.2 Pursuant to rule 94, paragraph 2, of the rules of procedure, the Committee shall not decide on the merits of a communication without having considered the applicability of any of the grounds of admissibility referred to in the Optional Protocol.

7.3 The author has claimed that her husband would face unequal treatment because of his ethnic background and his poor knowledge of Malay, and that this would render the trial against him unfair. The Committee notes that the author has failed to provide sufficient substantiation of her claim, for purposes of admissibility. This part of the communication is thus inadmissible under article 2 of the Optional Protocol.

7.4 As regards the author's claim that the deportation of her husband would violate the rights to family life protected under articles 17 and 23 of the Covenant, the Committee finds that this claim is not sufficiently substantiated for purposes of admissibility and thus inadmissible under article 2 of the Optional Protocol.

7.5 The Committee considers that no obstacles to the admissibility of the author's remaining claims exist and proceeds with an examination of the merits of the case.

8.1 What is at issue in this case is whether by deporting T. to Malaysia, 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. Relevant for the consideration of this issue is the State party's obligation, under article 2, paragraph 1, of the Covenant, to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant. The right to life is the most fundamental of these rights.

8.2 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.

8.3 The Committee observes that article 6, paragraphs 1 and 2 read together, allows the imposition of the death penalty for the most serious crimes, but that the Second Optional Protocol, to which Australia is a party, provides that no one within the jurisdiction of a State party shall be executed and that the State party shall take all necessary measures to abolish the death penalty in its jurisdiction. The provisions of the Second Optional Protocol are to be considered as additional provisions to the Covenant.

8.4 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 Australian Government is deporting T. from its territory because he has no entitlement to remain in Australia; Malaysia has not requested T.'s return. Although the Committee considers that the "assurances" given by the Malaysian Government do not as such preclude the possibility of T.'s prosecution for exporting or possessing drugs, nothing in the information before the Committee points to any intention on the part of Malaysian authorities to prosecute T. The State party itself has made investigations into the possibility of the imposition of the death sentence for T. and has been informed that in similar cases no prosecution has occurred. In the circumstances, it cannot be concluded that it is a foreseeable and necessary consequence of T.'s deportation that he will be tried, convicted and sentenced to death.

8.5 The Committee therefore concludes 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.

8.6 In assessing whether the author could be exposed to a real risk of a violation of article 7 of the Covenant, because he might be subjected to caning, considerations similar to those detailed above in paragraph 8.4 apply. The information before the Committee does not indicate that any treatment in violation of article 7 of the Covenant is the foreseeable and necessary consequence of T.'s deportation from Australia. The Committee concludes that

Australia would not violate its obligations under article 7 of the Covenant if it deports T. to Malaysia.

8.7 With regard to the possible preventative detention of T. under the Dangerous Drugs (Special Preventative Measures) Act 1985, the Committee notes that it is likely that T. will be detained for questioning upon his return to Malaysia. According to the State party, however, preventative detention is not automatic and is not likely to occur in the instant case, taking into account T.'s limited knowledge of the trafficking in which he was involved. The author has not challenged this information, and only relies on the existence of the law in claiming that there is a risk that her husband may be subject to preventative detention. In the circumstances, the Committee cannot conclude that T.'s deportation to Malaysia would amount to a violation by Australia of his rights under article 9 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a violation by Australia of any of the provisions of the Covenant.

[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.]

APPENDIX

A. Individual opinion by Committee member Martin Scheinin *(dissenting)*

To my regret I have had to disagree with the Committee's decision to deal jointly with the admissibility and merits of the present case. This possibility, provided for by the Committee's rules of procedure, should not in my opinion be resorted to in every case. In relation to the present communication, in which the author did not specify the Covenant articles she invoked, the merger of admissibility and merits has meant that the State party has in fact had the possibility to determine, in its rejoinder, the substantive issues to be dealt with by the Committee.

In my opinion the communication raises more issues under the Covenant than those to which the State party replied. In particular, this is true for the protection of family life under article 17 and article 23, paragraph 1. The State party has failed to address the issue of whether the reasons justifying the deportation of a person who has fully served his criminal sentence and who has already been able to re-establish his family life are weighty enough to legitimize the adverse consequences for the family life of the person and his closest ones. In my opinion, the Committee should have taken a separate decision declaring the case admissible and asking the State party to again comment on the merits of the case, at least in relation to articles 17 and 23.

As far as the remaining aspects of the case are concerned, I wish to emphasize that several factors distinguish the present case from the Committee's previous decision in A.R.J. v. Australia (communication No. 692/1996). I refer to the dissenting opinion by Mr. Klein and Mr. Kretzmer and find that Australia would violate its obligations under article 7 of the Covenant, the prohibition of torture or cruel, inhuman or degrading treatment, if the decision to deport Mr. T. to Malaysia were to be implemented.

M. Scheinin [signed]

[Original: English]

B. Individual opinion by Committee members Eckart Klein and David Kretzmer *(dissenting)*

1. The question in this communication is whether the author's husband T will be subject to a real risk of the death penalty if the State party deports him to Malaysia. In assessing whether such a risk has been established two factors have to be considered:

(a) Does the law in Malaysia provide the death penalty for an act committed by T.?

(b) If the answer to a. is positive, what are the chances that the law will be enforced if T. returns to Malaysia?

2. The author has presented evidence to the Committee that a person found to have been in possession of more than 15 grams of heroin faces a mandatory death sentence in Malaysia. This evidence was not contradicted by the State party. As T. was convicted of importing 240 grams of heroin from Malaysia into Australia it has been clearly established that under Malaysian law he is subject to a mandatory death sentence. This clearly distinguishes this communication from communication No. 692/1996, decided by the Committee in July 1997, since in that communication there was clear evidence that the maximum sentence in Iran for trafficking the amount of cannabis the author was convicted of possessing in Australia was five years' imprisonment (see para. 6.12 of Committee's Views). The argument of the author in that case was that the death penalty would be imposed, even though it was not provided for under Iranian law. The argument in the present case is that the Malaysian authorities will apply their law under which the death penalty is mandatory.

3. We cannot accept the approach inherent in the Committee's statement that "nothing in the information before the Committee points to any intention on the part of the Malaysian authorities to prosecute T." (para. 8.4). As the death penalty is mandatory for the offence committed by T. in Malaysia, we must assume that this penalty will be imposed in Malaysia. The question is not whether an intention of the Malaysian authorities to prosecute T. has been proved, but whether strong evidence has been provided to refute the assumption that Malaysian law will be applied. The answer is negative.

4. The assurances provided to the State party by the Malaysian authorities and mentioned in para. 4.2 of the Committee's Views clearly leave open the door to charge T. for an offence committed in Malaysia. We cannot ascribe much weight to the oral confirmation of the Royal Malaysian Police, mentioned in para. 5.7 of the Committee's Views, that they do not institute criminal proceedings for trafficking in drugs against a person returned to Malaysia. The assessment of the Australian Mission in Kuala Lumpur, which received this oral confirmation, was that "Malaysia will continue to abide by the principles of double jeopardy as it has in the past." However, the question of double jeopardy would arise only if Malaysia were to prosecute T. for acts which constituted the crimes for which he was convicted in Australia. It would not arise if the Malaysian authorities were to prosecute T. for possession of drugs in Malaysia or for exporting drugs from that country. As these acts carry a mandatory death sentence under Malaysian law something stronger than a vague oral confirmation is required to refute the assumption that the Malaysian authorities will indeed enforce their law.

5. In communication No. 692/1996 evidence was provided by the State party that other embassies in Iran, one of which handles a high volume of asylum cases, had informed the State party's embassy that no individuals who had been deported to Iran after serving a prison sentence in another country for drug offences were subject to rearrest and retrial. As opposed to this positive

evidence that persons in a similar situation to the deportee had not in fact been charged in Iran, the evidence presented by the State party in the present communication is negative: the State party knows of no cases in which a person in similar circumstances to T. has been charged and executed on return to Malaysia. (para. 5.7 of the Committee's Views). Like the oral confirmation mentioned above this evidence is insufficient to refute the assumption that Malaysian law will be applied in T.'s case.

6. In the light of the above we are forced to conclude that there is a real risk that T. will face a death sentence if he is deported to Malaysia. We are therefore of the opinion that by deporting T. the State party would violate its obligation to ensure his right to life under article 6 of the Covenant.

E. Klein [signed]
D. Kretzmer [signed]

[Original: English]
