Misuse of Sentencing and Risk Reports – Is Preventive Detention Actually Arbitrary Detention?

Human Rights Progress 1998 - 2010:

- *Leitch v. R* [1998] 1 NZLR 420 (CA)
- *Rameka, Harris and Tarawa v New Zealand* 2003
- *Manuel v New Zealand* 2007
- *Dean v New Zealand* 2009
- *M v Germany* ECHR Application No 19359/04 2009
- *Fardon v Australia* May 2010
- *Chief Executive of the Department of Corrections v McCord* June 2010

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Leitch v R [1998]

- Fundamental purpose of sentencing the protection of society
- Threshold expedient for the protection of the public

Post Rameka

A member of the HRC Secretariat, Paul Oertly:

> **It is striking** that in the single case to date where the Committee has found a violation, a full Bench of the Court of Appeal had on an earlier occasion**, in somewhat startling fashion**, simply found it unnecessary to address any challenges based on the Covenant to the preventive detention regime, including precisely the claim of insufficient review prior to the 10 year point of sentence which was later successful before the Committee.

Fifteen Years of Individual Human Rights Complaints to the United Nations: The New Zealand Experience, NZ Yearbook of International Law, Vol 2, 2005, pp1-50, 24.

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Rameka, Harris and Tarawa v New Zealand 2003

Fardon v Australia dissenters note that

"the Committee recalls its jurisprudence establishing that detention for preventive purposes must be justified by compelling reasons and reviewable periodically by an independent body" -

Its previous jurispudence cited was:

- *Rameka v New Zealand*
- *Manuel v New Zealand*
- *Dean v New Zealand*

Rameka involved three preventive detainees and was the first international challenge of the sixteen members of the committee present 7 found a breach the remaining 9 were in 5 group subscribed to 1 of 5 dissenting opinions. 4 said:

" The science underlying the assessment in question is unsound. **How can anyone seriously assert that there is a "20% likelihood" that a person will re-offend?"**

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Manuel v New Zealand 2007

"Assuming arguendo that his arrest on the initial warrant while on parole deprived him of liberty, within the meaning of article 9, paragraph 1, such deprivation must be both lawful and not arbitrary. In contrast to the purely preventive detention at issue in Rameka, the author's recall meant that he resumed a pre-existing sentence. The State party concedes that the recall decision was taken for protective/ preventive purposes given the risk he posed to the public in the future. In order to avoid a characterization of arbitrariness, the State party must demonstrate that recall to detention was not unjustified by the underlying conduct, and that the ensuing detention is regularly reviewed by an independent body."

Rejecting the claim for a murderer's recall for offences of less than two years imprisonment the committee accepted that a recall could "arguendo in certain circumtances be arbitrary under the Convenant."

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Dean v New Zealand 2009

"With regard to his claim that the nature of the preventive detention regime violates articles 7, 9, 10, 14 and 15 of the Covenant, the author acknowledges that this is the same claim as raised in *Rameka v. New Zealand*, but states that he is relying on the individual opinions appended to the Committee's Views and asks the Committee to revisit its decision."

"The Committee recalls that the sentence of preventive detention does not per se amount to a violation of the Covenant, if such detention is justified by compelling reasons that are reviewable by a judicial authority"

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***M v Germany* 2009**

German system of preventive detention and a mental health patient

- Breach of Article 5 of the European Convention ie Arbitrary Detention
- Also Breach of Article 7 Sentence applied retrospectively

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Fardon v Australia May 2010

The concept of feared or predicted dangerousness to the community applicable in the case of past offenders is inherently problematic. It is essentially based on opinion as distinct from factual evidence, even if that evidence consists in the opinion of psychiatric experts. But psychiatry is not an exact science.

The DPSOA, on the one hand, requires the Court to have regard to the opinion of psychiatric experts on future dangerousness but, on the other hand, requires the Court to make a finding of fact of dangerousness. While Courts are free to accept or reject expert opinion and are required to consider all other available relevant evidence, the reality is that the Courts must make a finding of fact on the suspected future behaviour of a past offender which may or may not materialise.

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Fardon v Australia May 2010 (continued)

"To avoid arbitrariness, in these circumstances, the State Party should have demonstrated that the author's rehabilitation could not have been achieved by means less intrusive than continued imprisonment or even detention, particularly as the State Party had a continuing obligation under Article 10 paragraph 3 of the Covenant to adopt meaningful measures for the reformation, if indeed it was needed, of the author throughout the 14 years during which he was in prison."

- Conclusion arbitrary detention
- Article 9 (1)
- Article 10 (3)?

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Chief Executive of the Department of Corrections v McCord **June 2010**

District Court Auckland (under appeal)

- "By his own evidence in that event, Mr Kriek's assessment (giving Mr McCord just two sexual offence convictions) was that the actuarial predicted outcome changes from Mr McCord being considered to be at a high risk of sexual offending to one of being medium/high risk. Over five years, this translated to a 7% risk of reoffending (or a 93% chance of not reoffending) in a sexually relevant way"
- Two year sentence of extended supervision ordered