

## DISSENTING OPINION OF JUDGE CRAWFORD

*Insufficient evidence of real and imminent risk of irreparable prejudice — Statement by the UAE on 5 July 2018 — Qatari citizens resident in the UAE officially permitted to continue to reside in the UAE — Hotline to receive applications by Qataris for entry clearance into the UAE — Evidence that Qataris have been entering the UAE and are being granted permits to do so — Risk of prejudice to rights flowed from the fact that Qataris were outside the UAE — Conditions for the indication of provisional measures not satisfied.*

1. Qatar's Request for provisional measures faces two principal difficulties, one legal, the other evidential. The legal difficulty is that Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) distinguishes on its face between discrimination on grounds of national origin (equated to racial discrimination and prohibited *per se*) and differentiation on grounds of nationality (not prohibited as such). Moreover, that distinction finds its reflection in widespread State practice giving preferences to nationals of some countries over others in matters such as the rights to enter or to reside, entitlement to social security, university fees and many other things, in peace and during armed conflict. *Prima facie* at least, the UAE measures at issue here, deriving from the statement of 5 June 2017, target Qataris on account of their present nationality, not their national origin. This does not mean that collective expulsion of persons of a certain nationality is lawful under international law; it is not. It is simply that it is not apparently covered by the CERD, the only basis for jurisdiction relied on by Qatar.

2. The factual difficulty is that it is not clear from the evidence that the measures announced against Qatari nationals on 5 June 2017 are still in effect, or that any of the measures that are in effect could cause irreparable prejudice to the rights which are the subject of these judicial proceedings.

3. The UAE Ministry of Foreign Affairs and International Cooperation announced in its statement of 5 June 2017 that it was taking "measures that are necessary for safeguarding the interests" of the Gulf Cooperation Council States. One of the measures, announced in paragraph 2 of the statement, was:

"Preventing Qatari nationals from entering the UAE or crossing its points of entry, giving Qatari residents and visitors in the UAE

14 days to leave the country for precautionary security reasons. The UAE nationals are likewise banned from traveling to or staying in Qatar or transiting through its territories.”

4. Unlike the inter-State measures (closure of UAE airspace and sea-ports, etc.) set out in the statement, it appears that no legislative or administrative action was taken to give effect to paragraph 2. The UAE’s Agent stated in oral argument that no Qataris were deported or expelled pursuant to paragraph 2<sup>1</sup>. Qatar did not contradict this statement, although it argued that the statement of 5 June 2017 itself amounted to an “order of expulsion”<sup>2</sup>.

5. However that may be, paragraph 2 stood as a statement of policy and it appears that a significant number of Qataris left the UAE on the strength of the statement. To evidence this departure, Qatar presented a number of reports by national and international human rights organizations. A report by the Office of the United Nations High Commissioner for Human Rights noted that Qataris previously resident in the UAE had left the UAE following the statement of June 2017, leaving behind families, businesses, employment, property and studies<sup>3</sup>. Further reports contain accounts of interviews with Qataris who had similarly left the UAE<sup>4</sup>. Overall the Qatari National Human Rights Committee estimates that it received 1,052 complaints in relation to the impact of the statement of 5 June 2017, in the period to May 2018<sup>5</sup>. Many of these complaints were from individuals in mixed Qatari-Emirati marriages who insisted they were no longer able to live with their family members due to the measures contained in the statement.

6. On 11 June 2017 the Ministry of Interior of the UAE set up a hotline to assist with the “humanitarian circumstances of Emirati-Qatari joint families”, specifically to provide a procedure through which individuals separated from their families could apply for a permit to enter the

<sup>1</sup> CR 2018/13, p. 12, para. 11 (Alnowais).

<sup>2</sup> CR 2018/14, p. 35, para. 19 (Goldsmith).

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) Technical Mission to the State of Qatar, 17-24 November, “Report on the Impact of the Gulf Crisis on Human Rights”, dated December 2017, p. 5 (Application of Qatar, hereinafter “AQ”, Annex 16).

<sup>4</sup> See for example, Human Rights Watch (HRW), “Qatar: Isolation Causing Rights Abuses”, dated 12 July 2017, p. 7 (AQ, Annex 10); Qatar’s National Human Rights Committee (NHRC), “100 Days under the Blockade, Third Report on Human Rights Violations Caused by the Blockade Imposed on the State of Qatar”, dated 30 August 2017, p. 7 (AQ, Annex 12); NHRC, “Six Months of Violations, What Happens Now? The Fourth General Report on the Violations of Human Rights Arising from the Blockade of the State of Qatar”, dated 5 December 2017, p. 7 (AQ, Annex 17).

<sup>5</sup> NHRC, “Fifth General Report, Continuation of Human Rights: A Year of the Blockade Imposed on Qatar”, dated June 2018, p. 13 (AQ, Annex 22).

UAE<sup>6</sup>. The UAE supplied evidence that of 1,390 requests for permits, 1,378 have been approved<sup>7</sup>. Qatar argued that approvals for Qataris to enter the UAE were temporary and needed to be sought for every proposed entry into the UAE<sup>8</sup>. Qatar further described the hotline as a “police security channel” provided by the Abu Dhabi police<sup>9</sup>. In this respect there is evidence that some individuals are wary of contacting the hotline because they are worried that it will be used to identify Qataris who have not returned to Qatar<sup>10</sup>.

7. Of those Qatari nationals who left the UAE, a significant number have returned to the UAE. The UAE’s Agent stated that thousands of applications by Qataris for permits to enter the UAE have been approved, and that Qatari nationals have entered and exited the UAE on over 8,000 occasions, since June 2017<sup>11</sup>.

8. Many of the consequences of the statement of June 2017 (family separation, difficulties in accessing property and courts, access to education and transcripts, and access to medical care) appear to have flowed from the fact that Qataris were located outside the UAE, rather than from deliberate policy — though these consequences were unfortunate and harmful to those concerned.

9. It is not clear from the evidence that individuals are continuing to suffer these consequences in July 2018. Most of the reports by national and international human rights organizations submitted by Qatar relate to the period June to August 2017<sup>12</sup>. While Qatar has provided a recent (fifth) report by its National Human Rights Committee, 896 of the 1,052 complaints received by the Committee in the period June 2017 to May 2018 had already been received by the end of August 2017, according to an earlier (third) report by the Committee<sup>13</sup>. The most recent (fifth) report by Qatar’s National Human Rights Committee reiterates findings

<sup>6</sup> Exhibit 2 of the documents deposited by the UAE, 25 June 2018.

<sup>7</sup> Exhibit 3 of the documents deposited by the UAE, 25 June 2018.

<sup>8</sup> CR 2018/14, p. 37, para. 25 (Goldsmith).

<sup>9</sup> *Ibid.*, p. 36, para. 22 (Goldsmith).

<sup>10</sup> HRW, “Qatar: Isolation Causing Rights Abuses”, p. 6 (AQ, Annex 10).

<sup>11</sup> CR 2018/13, p. 13, paras. 13-14 (Alnowais). The UAE also stated that the number of Qataris living in the UAE now is “about the same as before 5 June 2017”: CR 2018/15, p. 27, para. 6 (Buderi). The UAE Federal Authority for Identity and Citizenship estimated that as at 20 June 2018 there were 2,194 Qataris in the UAE: Exhibit 11, documents deposited by the UAE, 25 June 2018.

<sup>12</sup> Namely, Annexes 5, 6, 8, 10, 11 and 12 of Qatar’s Application.

<sup>13</sup> NHRC, “100 Days under the Blockade, Third Report on Human Rights Violations Caused by the Blockade Imposed on the State of Qatar”, dated 30 August 2017, p. 4 (AQ, Annex 12). Nine hundred and ninety-seven of the total number of complaints had been received by December 2017, according to the Committee’s fourth report, 5 December 2017, p. 5 (AQ, Annex 17).

of earlier reports by other human rights organizations, without specifically identifying cases of forced departures of Qataris from the UAE that occurred in recent months<sup>14</sup>.

10. At the end of the oral hearings, I asked the Parties (*a*) whether the UAE's statement of 5 June 2017, and in particular its paragraph 2, was still in effect and (*b*) whether the UAE had made any further announcement clarifying that Qataris residing in the UAE could elect to stay in the UAE. The UAE responded that the statement had been issued by the Ministry of Foreign Affairs and International Cooperation, which did not have the legislative authority to establish the measures set out in the statement. The UAE maintained therefore that there was no need for an announcement clarifying the entry and residence requirements applicable to Qatari nationals in the UAE<sup>15</sup>.

11. Qatar on the other hand contended that the UAE has failed to disavow the statement of 5 June 2017 and that the policy reflected in the statement continues to have a detrimental effect on Qataris. Qatar maintains that the continuing situation has not been resolved and necessitates the indication of provisional measures<sup>16</sup>.

12. Despite its response to my question, the UAE Ministry of Foreign Affairs and International Cooperation did issue an official statement clarifying to some extent the entry and residence requirements applicable to Qataris in the UAE on 5 July 2018. That statement is publically available on the website of the Ministry and contains the following:

“Since its announcement on June 5, 2017 . . . the UAE has instituted a requirement for all Qatari citizens overseas to obtain prior permission for entry into the UAE. Permission may be granted for a limited-duration period, at the discretion of the UAE government.

The UAE Ministry of Foreign Affairs and International Cooperation wishes to confirm that Qatari citizens already resident in the UAE need not apply for permission to continue residence in the UAE. However, all Qatari citizens resident in the UAE are encouraged to obtain prior permission for re-entry into UAE territory.

All applications for entry clearance may be made through the telephone hotline announced on June 11, 2017.”

13. It is established that the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there

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<sup>14</sup> NHRC, “Fifth General Report, Continuation of Human Rights: A Year of the Blockade Imposed on Qatar”, dated June 2018, pp. 15-16 (AQ, Annex 22).

<sup>15</sup> Response of the UAE to the question of Judge Crawford, 3 July 2018.

<sup>16</sup> Comments of Qatar on the written reply of the UAE, 5 July 2018.

is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision<sup>17</sup>. The power of the Court to indicate provisional measures has as its object to ensure that such prejudice does not occur<sup>18</sup>.

14. The Court accepts that certain rights in question in these proceedings are of such a nature that prejudice to them is capable of causing irreparable harm (Order, para. 67). I do not disagree with this general statement. However, the Court fails to identify any evidence to support the further statement that the situation of Qataris residing in the UAE prior to 5 June 2017 appears to remain vulnerable with regard to their rights under Article 5 of the CERD. Most importantly, the UAE's statement of 5 July 2018 is not mentioned. The UAE's recent statement clarifies the legal position of Qataris living in the UAE, namely that they "need not apply for permission to continue residence in the UAE". The statement further clarifies that Qataris can apply for entry clearance to the UAE via a hotline.

15. The further announcement in the UAE statement of 5 July 2018 that applications for entry clearance may be made via the telephone hotline is supported by evidence that Qataris have entered or exited the UAE more than 8,000 times since June 2017 and that over 1,300 applications via the hotline system to enter the UAE have been granted (see above paras 6-7). This evidence is again not dealt with by the Court.

16. Whilst there can be no doubt that the process for Qatari nationals seeking to enter the UAE has become more difficult, the state of affairs confirmed by the evidence before the Court, including the statement of 5 July 2018, does not warrant a finding that there is a real and imminent risk that irreparable harm will be caused to the rights in dispute before the Court gives its final decision on the merits, unless measures are ordered. The risks that the Court seeks to curb through the provisional measures ordered have been to a large extent removed. The Court cannot ignore developments in this case since the Request for the indication of provisional measures. One role of the Court is the peaceful settlement of disputes and if States are willing to address problems through actions or commitments, that is to be encouraged.

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<sup>17</sup> See among many others, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 136, para. 89, quoting *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1168, para. 83.

<sup>18</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 388, para. 118.

17. In view of the conclusion that there is no risk of irreparable prejudice in this case, it is unnecessary to consider the legal question identified in paragraph 1 of this opinion, viz., whether the UAE's statement of 5 June 2017 plausibly implicates rights under the CERD as invoked by Qatar, which equated national origin with present nationality. Qatar's Request for the indication of provisional measures fails on the facts.

18. Finally, I note that the provisional measures ordered by the Court are in themselves not objectionable. It is clear that the situation of Qataris still residing in the UAE, or wishing to travel to the UAE, became more difficult after 5 June 2017 and I trust that any remaining difficulties will be alleviated by the imposition of these measures by the Court. However, the legal requirements for the indication of provisional measures are binding. In this case, the requirement of irreparable prejudice and urgency is not met.

*(Signed)* James CRAWFORD.

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