

## NEWS RELEASE



### **Australia's detention of 46 refugees 'cruel and degrading,' UN rights experts find**

GENEVA (22 AUGUST 2013) – Australia's indefinite detention of 46 recognized refugees on security grounds amounted to cruel, inhuman and degrading treatment, inflicting serious psychological harm on them, a UN Committee has found after examining their cases.

The Geneva-based Human Rights Committee said Australia should release the refugees, who have been held for at least two and a half years, and offer them compensation and rehabilitation.

The refugees -- 42 Tamils from Sri Lanka, three Rohingya from Myanmar and a Kuwaiti -- brought their complaints to Human Rights Committee, arguing that they were unable to challenge the legality of their detention in the Australian courts.

They had been recognized as refugees who could not be returned to their home countries but were refused visas to stay in Australia because they were deemed to pose a security risk, and so were held in immigration detention facilities.

The Committee, composed of 18 independent human rights experts, found that the refugees' detention was arbitrary and violated Article 9 of the International Covenant on Civil and Political Rights (ICCPR)\*, which states that no one shall be subjected to arbitrary arrest or detention. The Committee reached its conclusion based principally on the fact that the refugees were not told the reasons for the negative security assessment and so were unable to mount a legal challenge to their indefinite detention.

"The combination of the arbitrary character of (their) detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to (them) and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them," the Committee members wrote in their conclusions adopted on 25 July and made public on Thursday.

This constituted treatment contrary to Article 7 of the ICCPR, under which "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment," they added.

The Human Rights Committee said that Australia is obliged, under Article 2 of the Covenant, to provide all 46 refugees with effective remedy. This includes releasing them under individually appropriate conditions, and offering them rehabilitation and appropriate compensation.

Australia is also under an obligation to take steps to prevent similar violations in the future, the Human Rights Committee concluded.

The Human Rights Committee monitors implementation of the ICCPR by States parties. It considered this case under the First Optional Protocol to the Covenant which gives the Committee competence to examine individual complaints.

### **BACKGROUND:**

Most of the refugees arrived in Australian territorial waters between March 2009 and December 2010 and were first disembarked at Christmas Island. Five were rescued at sea and initially disembarked in Indonesia before arriving at Christmas Island. At the time of their submission to the Committee, they were being held at several detention centres, including Scherger Immigration Detention Centre in Queensland; Villawood Immigration Residential Housing in Sydney; Melbourne Immigration Transit Accommodation; Darwin Immigration Centre; Maribyrnong Immigration Detention Centre in Victoria and Christmas Island.

In their complaints, lodged in 2011 and 2012, the refugees argued that, as they were not informed of the reasons for their security assessment, they were unable to identify any possible legal errors which could allow them to apply for a judicial review in the Australian courts.

The Australian authorities argued that all the claims were inadmissible. They also said solutions were being explored, including resettlement or the safe return to the refugees' countries of origin if the risk of harm no longer existed. However, it was not appropriate for individuals with an adverse security assessment to live in the Australian community while solutions were sought. Providing people with the classified details would also undermine the security assessment process and compromise Australia's security.

Since the complaints were lodged, seven of the refugees -- a mother and her son, who was born in 2007, and a family of five -- have now been granted visas and released from immigration detention into the Australian community.

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## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Communication No. 2094/2011

#### Views adopted by the Committee at its 108th session (8 – 26 July 2013)

<i>Submitted by:</i>	F.K.A.G. et al. (represented by counsel, Ben Saul)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Australia
<i>Date of communication:</i>	28 August 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 6 September 2011 (not issued in document form)
<i>Date of adoption of Views:</i>	26 July 2013
<i>Subject matter:</i>	Indefinite detention of persons in immigration facilities.
<i>Substantive issues:</i>	Right to liberty; right to protection from inhuman treatment; right to family life; right of children to protection.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; inadmissibility <i>ratione materiae</i> ; lack of substantiation.
<i>Articles of the Covenant:</i>	7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; 17, paragraph 1; 23, paragraph 1; and 24, paragraph 1.
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (b).

## 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 (108<sup>th</sup> session)**

concerning

#### **Communication No. 2094/2011\***

*Submitted by:* F.K.A.G. et al. (represented by counsel, Ben Saul)

*Alleged victims:* The authors

*State party:* Australia

*Date of communication:* 28 August 2011 (initial submission)

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

*Meeting on 26 July 2013,*

*Having concluded* its consideration of communication No. 2094/2011, submitted to the Human Rights Committee 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 authors of the communication and the State party,

*Adopts* the following:

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

1.1 The authors of the communication are 37 persons held in Australian immigration facilities. They are all Sri Lankan citizens of Tamil ethnicity except one author who is Myanmarese citizen of Rohingya ethnicity. They claim violations of their rights under articles 7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; 17, paragraph 1; 23, paragraph 1; and 24, paragraph 1. The authors are represented by counsel.

1.2 On 4 July, 16 and 29 November 2012, following information received from counsel<sup>1</sup>, the Special Rapporteur on New Communications and Interim Measures, acting on

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\* 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 Kaelin, 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.  
The text of an individual opinion by Committee member Sir Nigel Rodley is appended to the present Views.

<sup>1</sup> See paragraph 2.7.

behalf of the Committee, requested the State party to adopt all necessary measures to ensure the physical and mental well-being of the authors, protect them from the risk of self-harm and provide them with support necessary to alleviate the high level of anxiety resulting from prolonged detention, so as to avoid irreparable damage to them. The Special Rapporteur also requested the State party to carry out an independent psychiatric examination of two of the authors.<sup>2</sup>

### **The facts as presented by the authors**

2.1 31 of the authors, including two children, entered Australian territorial waters by various boats between March 2009 and March 2010. They were apprehended at sea and were first disembarked at Christmas Island, which forms part of Australian territory. They were taken to immigration detention facilities, under section 189 (3) of Migration Act 1958, according to which Australian authorities must detain a person who is an “unlawful non-citizen” in an “excised offshore place”. They did not have valid visas to enter Australia. One of the authors<sup>3</sup> is a minor child born in detention in Australia.

2.2 Five of the authors (cases number 13, 14, 15, 22 and 34) were brought to Australia after having been rescued at sea by Australian customs vessel Oceanic Viking which disembarked them in Indonesia. Australia then agreed with Indonesia that it would receive them into Australia on 29 December 2009 on ‘special purpose’ visas. Upon arrival at Christmas Island by plane their visas expired and they became ‘unlawful non-citizens’ in the ‘migration zone’ who did not enter at an ‘excised offshore place’. They were entitled to apply for protection visas and were placed in immigration detention pending a permanent resolution of their status.

2.3 The authors were subsequently transferred to a range of immigration detention facilities. The authors belonging to the group of 31 were later recognised by the Department of Immigration and Citizenship (DIAC) as refugees for whom return to their countries of origin was unsafe. The five of the Oceanic Viking were recognised as refugees by UNHCR but sought to apply for permanent protection in Australia.

2.4 All adult authors were subsequently refused visas to remain in the State party following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). None of the authors were provided with a statement of reasons for these adverse security assessments. The three children were granted protection visas.

2.5 The authors are unable to challenge the merits of their security assessment.<sup>4</sup> The only avenue available to them is a review before the federal courts for “jurisdictional error” (error of law), which may include the denial of procedural fairness. However, such review is not a merits review of the factual and evidentiary basis of the ASIO decision. Since the grounds of ASIO’s assessments have not been disclosed, the authors have no way of determining whether there exist any jurisdictional errors.

2.6 As they have been refused a visa, all the authors are kept in detention for the purpose of removal, under section 198 of the Migration Act. However, they do not wish to return voluntarily to their countries of nationality and the State party has not informed them of any intention to remove them to their countries of origin. Nor has the State party informed them

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<sup>2</sup> Authors 29 and 30

<sup>3</sup> Author No. 16

<sup>4</sup> The letters received by the authors regarding the outcome of their security assessment indicate that they “do not have a right to seek merits review of the ASIO assessment. This is because under the *Australian Security Intelligence Organisation Act 1979*, only certain categories of persons are able to seek merits review of a security assessment and you do not come within any of those categories”.

that any third country has agreed to accept them, or that active negotiations for such purpose are under way. No third country is obliged to admit them. It is also highly improbable that any third country would accept them when they have been assessed by Australia as a risk to security.

2.7 In subsequent letters counsel informed the Committee about the escalating risk to the mental and physical health of the authors in detention. Thus, in May 2012, K.N. (author No. 11) took an overdose of anti-depressant medication and had to be hospitalized. On 6 May 2012, S. Y. (author No. 34) was found attempting to self-harm with an electrical power cable. K.S. (author No. 27) attempted suicide on 8 November 2012. His actions were prompted by his concern about the treatment of his brother, P.S. (author No. 29), who is mentally ill and is not getting adequate treatment. K.T. (author No. 30) attempted suicide on 15 and 24 November 2012.<sup>5</sup>

### **The complaint**

3.1 The authors claim that their detention violates article 9, paragraphs 1, 2 and 4; article 7; article 10, paragraph 1; article 17, paragraph 1; article 23, paragraph 1; and article 24, paragraph 1 of the Covenant.

#### *Article 9, paragraph 1*

3.2 The authors' detention is arbitrary or unlawful under article 9, paragraph 1, in two separate phases: first, before Australia's decision to refuse them refugee protection and second, after Australia's refusal decision and pending their removal from Australia.

3.3 The State party did not provide any lawful, individualized justification for detaining the authors upon their arrival to determine whether each of them presented a risk of absconding, lack of cooperation, or posed a prima facie security threat. All were automatically detained merely because they were 'unlawful non-citizens' in an 'excised offshore place'. The statutory framework does not permit an individual assessment of the substantive necessity of detention.

3.4 In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.

3.5 As to the post-refusal stage, the mere assertion by the executive that a person poses a security risk cannot satisfy the requirements of article 9.<sup>6</sup> The secret basis of the security

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<sup>5</sup> See para. 1.2 above. On 26 February 2013, in response to the Committee's concerns, the State party provided information about the application to the authors concerned of various policies, which include a Psychological Support Program, educational and recreational activities and the assignment of a Personal Officer to meet regularly with them and help with any queries.

<sup>6</sup> The authors provide a sample of letter received from DIAC informing them about the security assessment outcome. The substantive part of the letter indicates: "ASIO assesses [*name of author*] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979. ASIO therefore recommends that any application for a visa by [*name of author*] be refused".

Section 4 of the Act defines "security" as:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

assessment renders it impossible to evaluate the justification for detention. It also constitutes a denial of due process of law. It can only be assumed that the assessments relate to their suspected conduct prior to their entry to Australia. However, if the State party possesses good evidence to suspect that any of the authors has committed a crime in the context of the armed conflict in Sri Lanka, or by association with an organisation such as the LTTE, such crimes can be prosecuted under Australian law. Furthermore, any prior activities of the authors in Sri Lanka cannot easily establish that the authors present a relevant risk to the Australian community. The provenance of information about them may also be unreliable, particularly if the Australian authorities have relied upon intelligence provided by the Sri Lankan Government.

3.6 The State party has not utilised any alternative means to detention, or demonstrated that such means would be inadequate or inappropriate in meeting security concerns. Furthermore, Australian law does not provide any legally enforceable mechanism for the periodic review of the grounds of detention or a maximum period of detention. Detention simply persists until a person receives a visa or is removed from Australia. In similar cases, the Australian High Court has confirmed the validity of indefinite immigration detention.

3.7 Australia's security assessment operates as an additional, unilateral ground for excluding refugees which is not authorised under the Refugee Convention. Refugees can only be excluded from protection if they are suspected of committing the serious conduct specified under Article 1F, or pose risks under article 33(2) of the Convention, and not where they fall within the wide meaning of 'security' under Australian law. Their detention cannot be justified under international refugee law once neither Article 1F nor Article 33(2) applies.

*Article 9, paragraph 2*

3.8 None of the authors were informed by the authorities of the substantive reasons for their detention. At most, they were made aware that they were detained because they were 'offshore entry persons' and 'unlawful non-citizens' liable to detention under the Migration Act.

*Article 9, paragraph 4*

3.9 The detention cannot be challenged under Australian law and no court has jurisdiction to assess its necessity, including by reference to risk factors pertaining to individual authors. The Migration Act requires the mandatory detention of offshore entry persons and does not provide for individualized assessments.<sup>3.10</sup> The Australian courts can only conduct a purely formal review of whether the authors are offshore entry persons, whether they have been granted a visa or not, or whether they are being held pending removal to another country. While the courts can review administrative decisions on limited legal grounds of 'jurisdictional error', including denial of procedural fairness, such review does not concern the substantive necessity of detention.

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- (ii) sabotage;
  - (iii) politically motivate violence;
  - (iv) promotion of communal violence;
  - (v) attacks on Australia's defence system; or
  - (vi) acts of foreign interference;
- whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia's territorial and border integrity from serious threats; and
  - (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).
- See also para. 6.4 below.

3.11 Since the reasons for the adverse security assessments were not disclosed, it is impossible for the authors to identify whether any errors of law were made by ASIO. Furthermore, the courts have accepted that they lack the expertise to evaluate security information, and their review of the evidence in such cases remains largely formal and ineffective. Even if the authors could commence judicial review proceedings, ASIO could claim 'public interest immunity' to preclude the authors from challenging any adverse security evidence in court, as ASIO has done in other Federal Court cases involving adverse security assessments concerning non-citizens.

*Articles 7 and 10, paragraph 1*

3.12 The combined arbitrary character of their detention, its protracted and/or indefinite duration and the difficult conditions in the detention facilities are cumulatively inflicting serious, irreversible psychological harm upon the authors, contrary to articles 7 and 10, paragraph 1 of the Covenant. The difficult conditions of detention include inadequate physical and mental health services; exposure to unrest and violence and punitive legal treatment; risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others. No domestic remedies, including constitutional remedies, are available in this regard.

3.13 Different institutions, including the Australian Human Rights Commission and medical bodies have expressed serious concerns in connection with the mental health of persons detained in immigration facilities. The impact of detention on the authors' mental health is exacerbated by the physical conditions of the detention facilities. The Australian Human Rights Commission has expressed concern, for instance, at the extremely restrictive environment at Villawood IDC and at Darwin NIDC, with the use of extensive high wire fencing and surveillance. Christmas Island IDC was similarly described as prisonlike. The Commission has also expressed concern about the possibly excessive use of force in detention facilities and about inadequate mental and physical health care services.

*Articles 17, paragraph 1; 23, paragraph 1; and 24, paragraph 1*

3.14 The five members of the R. family (cases Nos. 13 to 17) claim that their protracted detention constitutes also a violation of articles 17, paragraph 1; 23, paragraph 1; and 24, paragraph 1, as it interferes with family life and is not compatible with the State party's obligation to protect the family and children. The family are housed in a separate facility at Villawood, the Sydney Immigration Residential Housing (IRH). The detention of the children is not justified. Given their age (1, 4 and 7 years old at the time of submission), they pose no security, health or absconding risks. While the residential housing facility at Villawood is preferable to the main detention compound, it is still a closed facility from which children and their families are not free to come and go. According to mental health professionals, the detention of infants and children have immediate, and are likely to have longer-term, effects on their development and their psychological and emotional health.

3.15 All five authors were extensively assessed by a psychiatrist in a report of 1 November 2010 which was provided to the Minister for Immigration and Citizenship. The report indicates that Mrs. R. is seriously depressed and would fulfil standard criteria for major depressive disorder. She also has some features of post-traumatic stress disorder. Her depressive state can be appropriately understood in terms of the severe stressors they have experienced since their detention and the uncertainty about what would happen to them. The three year old son may be abnormally sad and anxious and could be malnourished. His normal development has been seriously disrupted. All three children might have difficulties in the future if they continue to live in detention, with restraints on friendships when not at school, on contact with extended family and on extra-curricular activities at school.



3.16 Their detention constitutes an interference in family life because it disrupts the ordinary family interactions, freedoms and relationships, including the ability to determine its own place of residence, living conditions, choice of co-habitants, family activities outside the home, relationships in the community etc. This interference is not justified by any legitimate aim, because their protracted detention violates articles 9, 7 and 10 of the Covenant.

3.17 Author No. 20, S.S., is separated by detention at Villawood, since August 2011, from his wife and minor child, who are living in the community in Sidney. Their separation is causing serious stress and anxiety for the family, including the uncertainty about the prospects of family reunification in circumstances where detention is indefinite and non-reviewable. Such harmful interference to the family cannot be adequately mitigated by periodic visitation of the author by his family. The wife finds it extremely difficult integrating into the Australian community without her husband and suffers on going stress related health problems as a result. The author's wife and child are housed a significant distance from the facilities where the author is detained, making their daily visits onerous, time consuming and expensive. Where the author's detention is unlawful, there is no lawful justification for the interference in family life caused by it and the State party is responsible for the violation of articles 17, 23, paragraph 1 and 24, paragraph 1 of the Covenant.<sup>7</sup>

3.18 For the reasons indicated above, there is no binding domestic remedy available to the authors to prevent the arbitrary interference in their family life or to compel the protection of their families or children in the manner required by articles 23, paragraph 1 and 24, paragraph 1.

#### *Remedies sought*

3.19 The State party should, inter alia, acknowledge the violations of the Covenant, grant the authors immediate release, apologize to them and provide them with adequate compensation, including for the mental distress and psychological suffering. Where the State party believes it is necessary to detain the authors, it should provide an individual assessment of the necessity of detaining each author; consider less invasive alternatives to detention and provide a procedure for the periodic independent review of the necessity of continued detention; and provide for the effective judicial review of the necessity of detention.

3.20 In terms of the guarantees of non-repetition, Australian law should be amended to: eliminate mandatory detention; require an individual assessment of the necessity of detention; inform detainees of the substantive reasons for their detention; require periodic independent review of the necessity of detention; require consideration of less invasive alternatives to detention; provide for substantive and effective judicial review of detention and of adverse security assessments; and take measures for the more effective protection of family and children's rights.

#### **State party's observations on admissibility**

4.1 On 5 December 2012, the State party argued that all the claims are inadmissible. It stated that on 15 October 2012 the Government announced that it would appoint an independent reviewer to review adverse security assessments issued in relation to asylum seekers owed protection obligations who are in immigration detention. The reviewer will examine all materials used by ASIO (including any new material referred to ASIO by the

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<sup>7</sup> In one of the submissions to the Committee it is indicated that this family had been speaking seriously of committing a mutual "suicide pact" because of the acute stress resulting from his protracted detention and his separation from his family.

affected individual) and report his/her findings to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. The reviewer will also conduct periodic review of adverse security assessments every 12 months. Both the initial and periodic review mechanisms will be made available to the authors of the communication, thus providing them with access to an open and accountable decision-making process in relation to security assessments.

4.2 Given that the authors have been found to be refugees they are owed protection obligations under international law and cannot be *refouled* to their countries of origin. The Government is exploring solutions for them, including resettlement in a third country or safe return to their country of origin when the risk of harm no longer exists or when reliable and effective assurances can be received from the home country. However, it is not appropriate for individuals who have an adverse security assessment to live in the community while such solutions are sought.

*Non exhaustion of domestic remedies*

4.3 With reference to articles 7; 9, paragraphs 1 and 4; 10, paragraph 1; 17, paragraph 1; 23, paragraph 1; and 24, paragraph 1, the authors have not exhausted domestic remedies. It was open to each of the authors to seek judicial review of the decision regarding detention in the Federal Court or High Court of Australia and, as part of the proceedings for judicial review, seek information regarding the basis for the security assessment. The authors have not sought such review, with the exception of Mr P.S. (author No. 29), who made an application to the High Court, but subsequently settled with the Australian Government and discontinued his case, and Mr Y.R. (author 16) who commenced litigation in the High Court in May 2012 challenging his adverse security assessment and the legality of his detention.<sup>8</sup> The High Court will consider whether procedural fairness was afforded to Mr Y.R. in the issuing of an adverse security assessment; whether section 189 of the Migration Act authorises his detention and whether it is inherent in the separation of powers in the Constitution that long term detention of a person is only lawful if ordered by a Court. There is no date for the judgment as yet. The outcome of a successful application for judicial review of the adverse security assessment could be the reconsideration by ASIO.

4.4 The recent M47 case further demonstrates that there are domestic remedies still available to the authors. This case was brought by a person who arrived in Australia as part of the Oceanic Viking group. The High Court considered the reasons for the adverse security assessment which ASIO provided to plaintiff M47 and the opportunity he had been given to address the critical issues upon which the security assessment decision was based. The High Court found that ASIO provided procedural fairness to plaintiff M47 based on the circumstances of his particular case. However, it found a regulation made under the Migration Act invalid to the extent that it applied a criterion which prevented the grant of a protection visa to a refugee if that refugee was the subject of an adverse security assessment. The effect is that the refusal to grant Plaintiff M47 a protection visa was not made according to law and DIAC would need to reconsider his application for a protection visa. The Court found Plaintiff M47's continuing detention was valid for the purpose of determining his application for a protection visa. The M47 judgement is capable of applying to those authors who arrived on the Ocean Viking (were they to make protection visa applications, which they have not done to date). However, it does not affect those authors who are "offshore entry persons" under the Migration Act, as they are subject to a bar on making valid visa applications under section 46A of the Migration Act.

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<sup>8</sup> Plaintiff S 138 v. Director-General of Security v. Ors (S138).

4.5 The State party disagrees with the authors contention that judicial review proceedings are not worth pursuing as Australian courts are limited to conducting a review on the limited grounds of 'jurisdictional error' and are not able to review the substantive merits of the necessity of detention. The fact that the M47 case was brought before the High Court and directly challenged the lawfulness of detention of persons in the authors' circumstances underlines the fact that an effective remedy is still available to the authors in the same circumstances.

4.6 The child authors (authors 14, 15 and 16), through their parents, have failed to make use of all administrative avenues that offer them a reasonable prospect of redress.

*Inadmissibility ratione materiae*

4.7 Any claims in the communication based on the Refugee Convention are inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

4.8 Claims under article 9, paragraph 2 are also inadmissible *ratione materiae*, as the authors were not 'arrested'. The term 'arrest' should be understood as referring to the act of seizing a person, in connection with the commission or alleged commission of a criminal offence, and taking that person into custody. The ordinary meaning of the term 'arrest' does not extend to the placing of an asylum seeker into administrative detention for the purposes of undertaking health, security and identity checks.

*Lack of substantiation*

4.9 Claims under articles 7 and 10, paragraph 1 should be declared inadmissible for lack of substantiation. The authors made general submissions about the conditions of detention. However, they have provided no evidence indicating that the treatment of each or any author in detention has risen to a level of humiliation or debasement beyond the fact of detention itself in their own particular circumstances.

**Author's comments on the State party's observations on admissibility**

5.1 On 21 February 2013, the authors provided comments on the State party's observations on admissibility.

5.2 The authors reject the contention that domestic remedies have not been exhausted. Formal legal rights to judicial review of both detention and adverse security assessments exist, but the review is practically ineffective and/or too narrow in scope to protect ICCPR rights. As regards review of detention, the courts may test whether a detainee is an 'offshore entry person', but have no power to consider the substantive necessity of detention. Further, High Court's jurisprudence<sup>9</sup> has established that indefinite immigration detention is lawful in domestic law. Under the requirement of exhaustion of domestic remedies authors cannot be expected to contest recent and final jurisprudence of the High Court. As regards judicial review of adverse security assessments, the authors do not adequately know the reasons or evidence sustaining their assessments, and so are unable to identify legal errors that would constitute a reviewable ground. Commencing speculative proceedings is considered an abuse of court process.

5.3 There are also practical considerations impeding judicial review, namely it is expensive for refugees who are in detention, lack any income and are not entitled to legal aid. As for the M47 case, the ability of that refugee to commence proceedings shows only

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<sup>9</sup> *Al-Kateb v. Godwin* (2004)

that this particular person could identify legal errors, as a greater degree of disclosure of information was provided to him than to the authors in the present communication.

5.4 Furthermore, the M47 case concerned a refugee from the Oceanic Viking who lawfully entered Australia on a special purpose visa. His situation is thus different from that of the majority of authors in the present communication, who entered Australia unlawfully by boat and are by law ineligible to apply for a protection visa. At most, the High Court ruling may apply to the five authors from the Oceanic Viking. Still, the High Court upheld the lawfulness of plaintiff M47's continuing detention. The legal basis of it simply switched from detention pending removal to detention pending the (valid) remaking of his security assessment and a reconsideration of his protection visa application. This demonstrates that the Courts are not empowered to release the authors from detention otherwise than on narrow technical grounds.

5.5 Regarding the child authors, they have the right to live in the community. However, this does not render their claims inadmissible. It is in their best interest both not to be separated from their parents and not to reside in detention. Any national security threat posed by the parents (which they deny) could be addressed by applying security measures to the parents in the community, such as surveillance, reporting, assurances, GPS tracker bracelets or restrictions on communication and residency.

5.6 Concerning the admissibility of allegations regarding violations of the Refugee Convention, the authors are not requesting the Committee to find direct or autonomous breaches of this Convention. Rather, they request the Committee to interpret article 9, paragraph 1 in accordance with refugee law, which should be considered as *lex specialis* here.

5.7 As for the objection that article 9, paragraph 2 is confined to situations of criminal arrest the authors contend that this provision shares in the protective purpose of article 9 to prevent arbitrary arrest or detention, not just criminal arrest or detention.

5.8 The authors have submitted sufficient information for purposes of admissibility regarding claims under articles 7 and 10 and can submit more. Each author is willing to provide personal statements detailing their experience of detention and impacts upon them. Further psychiatric reports for various authors are also available upon request.

5.9 With respect to the appointment of an independent reviewer of adverse security assessments, the authors consider this as an improvement, however, it remains procedurally inadequate. First, the reviewer's findings are not binding but only recommendations to ASIO. Secondly, there remains no minimum content of disclosure in all cases, limiting a refugee's ability to effectively respond. In a given case, ASIO may still determine that it is not possible to disclose any meaningful reasons to a person and this will also prevent disclosure by the reviewer. Refugees thus may lawfully continue to receive no notice of allegations prior to decisions being made.

#### **State party's observations on the merits**

6.1 On 5 December 2012 the State party argued that the claims are without merit for the following reasons.

##### *Article 9, paragraph 1*

6.2 The authors are unlawful non-citizens detained under the Migration Act. Their detention is therefore lawful. The High Court of Australia has found the pertinent provisions of the Migration Act to be constitutionally valid. Asylum seekers are placed in immigration detention if they are: (1) unauthorised arrivals, for management of health, identity and security risks to the community; (2) unlawful non-citizens who present

unacceptable risks to the community; and (3) unlawful non-citizens who repeatedly refuse to comply with their visa conditions.

6.3 The length and conditions of detention, including the appropriateness of both the accommodation and the services provided, are subject to regular review. Detention is not limited by established timeframes but depends on individualised assessments of risks to the community. These assessments are completed as expeditiously as possible. The determining factor is not the length of the detention but whether the grounds for the detention are justifiable.

6.4 ASIO has individually assessed each adult author and determined, in application of the ASIO Act,<sup>10</sup> that granting a permanent visa to them would be a risk for one or more of the following reasons:

- Posing security threats to Australia and Australians, including politically-motivated violence, promoting community violence, or threats to Australia's territorial and border integrity;
- Providing a safe haven for any organisation(s) to which they belong to conduct attacks against their government either in Australia or overseas, and/or;
- Potentially providing a safe haven for individuals or terrorist organisations to engage in terrorist activities and terrorist financing within Australia.

6.5 Providing people with the classified details underpinning adverse assessments would undermine the security assessment process and compromise Australia's security. It would also put ASIO sources at risk and erode the capabilities on which ASIO relies to fulfil its responsibilities.

6.6 The detention of the adult authors is a proportionate response to the security risk they have been individually found to pose. As for the three child authors, their best interests have been considered, including residence in the community. In circumstances where the family has decided to stay together in detention facilities, the children have been provided with appropriate and supportive services and facilities. They live in Immigration Residential Housing and are free to attend school, outings and other organised activities in order for them to live with as limited restriction and as consistently with their status as lawful non-citizens as practicable, while solutions for the family are explored.

6.7 The lawfulness of decisions made under the ASIO Act is subject to judicial review. In addition, the Inspector-General of Intelligence and Security (IGIS) may inquire into the legality, propriety, effectiveness and appropriateness of ASIO in its work relating to the security assessment of non-citizens.

*Article 9, paragraph 2*

6.8 If the Committee concludes that the authors were 'arrested' for the purposes of article 9, paragraph 2, the State party submits that this provision has not been breached. As it is the usual practice, all authors arriving at Christmas Island were provided with a detailed explanation of the reasons for their detention, as set out in a detention notice written in English. The text of the notice was read out by a government official with the assistance of interpreters from the relevant language groups.

6.9 The Ocean Viking authors were advised that they had not met the security requirements for the grant of a visa to settle in Australia permanently and were therefore required to be detained while resettlement solutions were considered. The other authors

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<sup>10</sup> *Australian Security Intelligence Organisation Act 1979*, section 4.

were told that they were detained because they were suspected of being unlawful non-citizens. When DIAC received advice from ASIO about the adverse security assessments, the authors were informed accordingly and explained that, as a result, they were not eligible for a permanent visa.

*Article 9, paragraph 4*

6.10 As set out above, the authors have access to judicial review of the legality of their detention, and a court may order their release if the detention does not comply with the law. Although section 494AA of the Migration Act bars certain legal proceedings relating to offshore entry persons, the section specifically indicates that it does not affect the High Court's constitutional jurisdiction.

6.11 Judicial review of adverse security assessments provides an important opportunity for courts to consider the release of information by ASIO to affected individuals. A party to the judicial review proceeding may seek access to any information, subject to relevance and to a successful claim for public interest immunity.

*Articles 7 and 10, paragraph 1*

6.12 The system of immigration detention and the treatment of the authors in detention do not give rise to severe physical or mental suffering of the degree required to constitute treatment contrary to these provisions. Further, the system of mandatory immigration detention of unauthorised arrivals is not arbitrary *per se* and the individual detention of each of the authors is also not arbitrary as it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The fact of protracted detention is not in and of itself sufficient to amount to treatment in violation of these articles.

6.13 The State party refutes the allegations that the conditions of detention amount to inhuman or degrading treatment. The authors have been placed in the form of accommodation assessed to be most appropriate to their circumstances. 11 authors are in Immigration Detention Centres, 20 in Immigration Residential Housing and six in Immigration Transit Accommodation. These facilities are all operated by Serco, a private contractor, who is obliged to ensure that people in detention are treated equitably and fairly, with dignity and respect. The actions and behaviour of Serco staff are underpinned by a Code of Conduct. Serco also has in place policies and procedures which focus on the wellbeing of people in detention.

6.14 All persons are subject to regular placement reviews in respect of the conditions of detention. Regular reviews have occurred in each of the authors' cases. Immigration detention is also subject to regular scrutiny from external and independent agencies such as the Australian Human Rights Commission, UNHCR and the Minister's Council on Asylum Seekers and Detention.

6.15 The State party recognises that persons in immigration detention, particularly irregular maritime arrivals who have been subjected to torture and trauma or have pre-existing mental health issues, may be vulnerable to mental health deterioration, self-harming behaviour and suicide. Events such as the refusal of a visa application, uncertainty around one's immigration status and time in detention can place additional stress on these persons. For this reason, these persons have access to health care and mental support services appropriate to their individual circumstances, and qualified health professionals conduct regular health assessments.

6.16 All immigration detention facilities, including those in which the authors reside, have on site primary health care services of a standard generally comparable to the health care available to the Australian community and take into account the diverse and potentially

complex health care needs of these persons. When required specialist medical treatment is not available on-site, they are referred to off-site specialists.

6.17 Contrary to the assertions made by the authors, the physical conditions of detention are adequate and subject to continual improvement and individuals are given sufficient opportunity to participate in recreational activities. From time to time, incidents involving unrest or violence have occurred, for which Serco has extensive policies in place. The authors have not indicated any incidents of unrest or violence which they have personally witnessed. Restraints are only used by Serco as a last resort and strict limits apply to the level of force that may be deployed.

6.18 The Committee cannot conclude that the authors have been personally subjected to treatment in breach of articles 7 and 10, paragraph 1 in the absence of specific allegations regarding each particular author.

*Articles 17, paragraph 1, 23, paragraph 1 and 24, paragraph 1*

6.19 There has been no interference with the R. family given that the family has not been separated. Furthermore, the protection in article 17 does not extend to interference with 'family life'. Should the Committee disagree, the State party submits that there has been no interference in the present case. The family has been provided with access to support, facilities and activities sufficient to ensure as minimal a disruption to family life as possible. Since 10 August 2010, the family is housed in Villawood Immigration Residential Housing, which provides private, family-style accommodation within a community setting. The facility contains four duplex houses, each of which has three bedrooms, two bathrooms, a kitchen, living and dining areas and a garage area that can be used for visits. A common area contains grassy space and a small garden, children's playground equipment, a basketball half-court and a small undercover recreation area. When the family arrived there they were subject to certain restrictions due to the security risks Mr and Ms R. were assessed as posing. These restrictions were eliminated afterwards and the family is able to freely associate with others residing in the facilities, receive visitors and participate in offsite activities.

6.20 Should the Committee conclude that the detention amounts to interference with the family, the State party submits that the interference is not unlawful or arbitrary. The degree of hardship experienced by the family is outweighed by the need to protect Australia's national security interests.

6.21 The State party submits that it has not interfered with the 'family life' of Mr. S. either. His wife and child live close enough to be able to make daily visits to him and he is able to visit his wife and child at their home on four hour visits every Saturday. Furthermore, the decision to live separately was made by the family itself. Should the Committee form the view that the separation of the author from his family amounts to interference with the family, the interference is not unlawful or arbitrary, as is proportionate to Australia's legitimate aim of protecting its national security interests.

6.22 For the same reasons, the claims under article 23, paragraph 1 are also without merit. The requirement of protection is subject to reasonable measures taken to control immigration, consistent with the State Party's right to control the entry, residence and expulsion of aliens, and to protect national security. The State party has programs and policies to support families in immigration detention, including through qualified family support personnel, medical staff, counsellors and welfare officers.

6.23 As for the claims with respect to article 24, paragraph 1, they are also without merit. The R. family has a number of family members residing in Sydney, the same city in which Villawood is located. The children therefore have the option of residing with members of their extended family, while remaining in proximity to their parents. They remain in

detention facilities due to the decision of their parents. By providing the children with the option of residing in the community the State party has fulfilled its obligations under article 24, paragraph 1.

6.24 Should the Committee not accept the above argument, the State party submits that the circumstances of the R. children's detention does not amount to a violation of article 24, paragraph 1. The State party has taken into account the best interests of the R. children as a primary consideration by providing adequate protective measures to them. They are holders of a protection visa, are eligible for access to the same health services as those available to Australian citizens, attend school and have been allowed to take part in all activities organised by their school.

6.25 As for the S. family, the provision of a number of accommodation options to the family, including options which have enabled Mr S.'s child to maintain a close relationship with his father, live in the community and attend school and other activities, shows that the State party has taken into consideration the best interests of this child.

#### *Remedies*

6.26 Given that the authors' rights under the Covenant have not been violated, none of the remedies sought by them should be recommended by the Committee. It would not be appropriate for the Committee to recommend that the adult authors be released, given the risk that they are judged to be for national security, and in light of the recent appointment of an independent reviewer. If the Committee concludes that Australia has breached particular rights, the State party requests that remedies other than release be recommended.

#### *Allegations of self-harm*

6.27 With respect to the allegations of self-harm referred to in para 2.7, on 6 August 2012 the State party informed the Committee that the two authors (11 and 34) had received treatment and support in relation to their physical and mental health issues. The Australian Government had recently responded to a Commission investigation into the details of the authors. All authors had also undergone mandatory reporting to the Ombudsman regarding their continued immigration detention. The State party endeavours to ensure that all people in immigration detention are: provided with an adequate level of support in respect of their mental and physical health needs; accommodated in an environment that helps reduce risks of self-harm; and provided with the support necessary to reduce and manage anxiety resulting from prolonged detention.

#### **Author's comments on the State party's observations on merits**

7.1 On 23 February 2013, the authors provided comments on the State party's observations on merits, reiterating prior arguments and adding the following.

#### *Article 9, paragraph 1*

7.2 Their detention is unlawful. Legality under this provision must be interpreted not only with respect to domestic law but also with respect to international law, including the Covenant. Detention on security grounds is unlawful under article 9, paragraph 1 because the domestic procedures for review are manifestly inadequate.

7.3 Mandatory detention upon arrival is arbitrary. This is particularly so where the duration of detention between their arrival and receipt of their adverse security assessments was so protracted (between 14 months and two years). The State party has not explained the need for this delay.



7.4 The State party makes no attempt to demonstrate that it considered alternatives to detention in each individual case, or explain why particular alternatives are unsuitable. It has provided no evidence regarding its efforts to resettle the authors in a third country.

7.5 Regarding the unavailability or ineffectiveness of the review of detention, the authors argue that IGIS only enjoys a power of recommendation and cannot provide an effective remedy in the form of a legally enforceable right to have an adverse security assessment overturned.

*Article 9, paragraph 2*

7.6 The detention notice received by the authors upon arrival does not set out why each author is individually considered to be a risk, thus necessitating detention, whether for reasons of identity, security, health or absconding. Similarly, the DIAC letters informing authors about ASIO's assessment do not identify the security reasons for their detention. The State party has not provided any evidence that each of the authors in fact received the written detention notice on arrival in Australia or that every author at Christmas Island was notified in a language he/she could understand.

*Article 9, paragraph 4*

7.7 If the author's detention is found by the Committee to be unlawful under article 9, paragraph 1, for not being necessary or proportionate, article 9, paragraph 4 will also be violated, as the Australian courts lack power to review the necessity of detention. As regards High Court review, the Court decides only about 100 cases per year, as Australia's highest court of appeal and constitutional review. It is unrealistic to suggest that judicial review is effectively available to the authors when the High Court's case load is so small, many thousands of offshore entry persons are detained each year and the jurisdiction of other federal courts is excluded. Furthermore, preparing an application to the High Court requires extensive resources and legal representation which are simply not available to them.

*Articles 7 and 10, paragraph 1*

7.8 A number of Australian independent institutions have repeatedly criticised the inadequacy of the conditions in all immigration detention centres and mental health impacts. The continuing deterioration of the mental health of detainees is evidence that the health measures taken by Australia are incapable of ensuring the detainees' safety where protracted detention itself is a medically untreatable cause of harm. The following facts affect the determination whether the authors' detention is inhumane or degrading: (a) the authors are refugees entitled to special protection, where detention should be a last resort and for the shortest possible time; (b) most of the authors were traumatized by the experience of fleeing Sri Lanka; (c) some of the authors have been diagnosed with mental illnesses and cannot be effectively treated so long as they remain in detention; (d) some of the authors are children who are especially vulnerable.

7.9 If the Committee is unable to find violations of article 7 because of insufficient evidence, it is still open to the Committee to find violation of article 10, paragraph 1 because the authors, as a group, have experienced similarly ill-treatment in their circumstances of indefinite detention under adverse physical and health conditions.

*Articles 17, paragraph 1, 23, paragraph 1 and 24, paragraph 1*

7.10 The unlawful and/or arbitrary detention of the parents constitutes a failure to pay due regard to the best interest of the children, who are then forced to choose between two

alternatives neither of which is in their best interest: separation from their parents or residing in detention with them.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

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

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

8.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies have not been exhausted. The State party contends that the five authors belonging to the Ocean Viking's group, as they are entitled to apply for protection visas, could have sought judicial review before the High Court. However, the Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors' claims regarding their prolonged and potentially indefinite detention, even if they were not subject to the same indefinite detention regime as the other authors. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention during the lengthy proceedings involved. Moreover, the Committee notes that in the High Court's decision of 5 October 2012 in the M47 case, the Court upheld the continuing mandatory detention of an Ocean Viking refugee. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted, and that for these authors the communication is admissible with reference to article 5, paragraph 2 (b) of the Optional Protocol.

8.4 All of the other authors who are offshore entry persons and are barred from making visa applications, except two, did not seek judicial review of the decision regarding their detention and the basis for their security assessment. Of these two, one author made an application to the High Court but later discontinued his case, and the application of the second one is still pending. However, the Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors' claims regarding their detention. The possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention does not suffice to indicate the present availability of an effective remedy. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention. Moreover, it is also relevant for these authors that the High Court's decision in the M47 case upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted, and that for these other authors the communication is admissible with reference to article 5, paragraph 2 (b) of the Optional Protocol.

8.5 The Committee also notes the State party's argument that the authors' claim under article 9, paragraph 2 should be declared inadmissible *ratione materiae* as this provision is limited to arrest of persons in connection with the commission of criminal offences. However, the Committee considers that the term "arrest" in the context of this provision means the initiation of a deprivation of liberty regardless of whether it occurs in criminal or

administrative proceedings and that individuals have a right to notice of reasons for any arrest.<sup>11</sup> Accordingly, the Committee considers that this claim is not inadmissible *ratione materiae* or on other grounds and should be examined on its merits.

8.6 Regarding the claims under articles 7 and/or 10, paragraph 1 of the Covenant, the Committee considers that they have been sufficiently substantiated for purposes of admissibility and declares them admissible.

8.7 Concerning the claims of authors belonging to the R family that their detention constitutes a violation of articles 17, paragraph 1 and 23, paragraph 1, as well as article 24, paragraph 1, with respect to their three children, the Committee notes that the family has been given the possibility to stay together, has been provided with special residential housing and that educational, recreational and other programs, including outside the facility are provided, in particular to the children. Notwithstanding the difficulties that living in detention entails, the Committee considers that, in the circumstances, the authors' claims have been insufficiently substantiated and declares them inadmissible under article 2 of the Optional Protocol.<sup>12</sup> As for author S.S. claims under the same articles, given the arrangements made by the State party to facilitate the contacts between Mr. S.S. and his wife and child living in the community, the Committee also considers that, in the circumstances, the author's claims have been insufficiently substantiated for purposes of admissibility.

8.8 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under articles 7; 9, paragraphs 1, 2 and 4; and 10, paragraph 1.

#### *Consideration of the merits*

9.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

#### Claims under article 9, paragraph 1

9.2 The authors claim that their mandatory detention upon arrival and its continuous and indefinite character for security reasons is unlawful and arbitrary, thus constituting a violation of article 9, paragraph 1 of the Covenant. They claim that their detention is disproportionate to the security risk that they are said to pose and that domestic procedures for its review are manifestly inadequate. The State party argues that the adult authors are unlawful non-citizens who are being detained in application of the Migration Act and the ASIO Act; that their detention is therefore lawful and constitutionally valid, as previously declared by the High Court; and that it is also a proportionate response to the security risk they have been found to pose.

9.3 The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.<sup>13</sup> Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the

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<sup>11</sup> See General Comment No. 8, paras. 1 and 4; communications Nos. 1460/2006, *Yklymova v. Turkmenistan*, Views adopted on 20 July 2009, para. 7.2; 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994, para. 6.5.

<sup>12</sup> Communication No. 1050/2002, *D. and E. v. Australia*, Views adopted on 11 July 2006, paragraph 6.3.

<sup>13</sup> See communications Nos. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005 para. 5.1; 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

9.4 The Committee observes that the authors have been kept in immigration detention since 2009-2010, first under mandatory detention upon arrival and then as a result of adverse security assessments. The basis of detention of the Ocean Viking authors may have changed after the October 2012 decision of the High Court ruled that the ASIO regime was inapplicable, but the other authors remain in indefinite detention on security grounds. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors have been kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention. For all these reasons, the Committee concludes that the detention of both groups of authors is arbitrary and contrary to article 9, paragraph 1, of the Covenant. This conclusion extends to the three minor children, as their situation, irrespective of their legal status as lawful non-citizens, cannot be disassociated from that of their parents.

#### Claims under article 9, paragraph 2

9.5 The authors claim that, individually considered, they were not informed by the authorities of the substantive reasons for their detention, neither upon arrival nor after the assessment made by ASIO. The State party argues that, upon arrival, most of the authors were provided with a detention notice explaining that they were suspected of being unlawful non-citizens and that later on each of them were informed of ASIO's security assessment by letter. The Committee first observes that article 9, paragraph 2 requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest, and that this requirement is not limited to arrest in connection with criminal charges.<sup>14</sup> The Committee considers that, as far as their initial detention is concerned, the information provided to the authors is sufficient to meet the requirements of article 9, paragraph 2. For those authors who later received an adverse security assessment, this assessment represented a subsequent phase in their migration processing, and did not amount to a new arrest implicating article 9, paragraph 2, but rather must be considered in relation to article 9, paragraph 1. However, for the five authors in the Ocean Viking group, a prior security

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<sup>14</sup> See note [11] above.

assessment provided the basis for their initial detention. In this regard the Committee considers that one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint. Given the vague and too general justification provided by the State party as to the reasons for not providing the authors with specific information about the basis for the negative security assessments, the Committee concludes that, for these five authors, there has been a violation of article 9, paragraph 2 of the Covenant.

#### Claims under article 9, paragraph 4

9.6 Regarding the offshore entry authors' claim that their detention cannot be challenged under Australian law and that no court has jurisdiction to assess the substantive necessity of their detention, the Committee notes the State party's argument that the authors can seek judicial review before the High Court of the legality of their detention and the adverse security assessment before the High Court. In view of the High Court's 2004 precedent in *Al-Kateb v. Godwin* declaring the lawfulness of indefinite immigration detention and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar situations, the Committee is not convinced that it is open to the Court to review the justification of the authors' detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.<sup>15</sup> Accordingly, the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4.

9.7 Regarding the Ocean Viking authors, the High Court's decision of 5 October 2012 in the M47 case made it clear that judicial review before the High Court did provide a means for challenging the legality of detention on the basis of ASIO security assessments regardless of the individual facts. Nonetheless, the High Court's decision demonstrates that successful claimants would be remitted to the mandatory detention regime pending the resolution of their applications for a protection visa. The Committee therefore concludes that, during the relevant period, the Ocean Viking authors have also been subject to violations of article 9, paragraph 4.

#### Claims under articles 7 and 10, paragraph 1

9.8 The Committee takes note of the authors' claims under articles 7 and 10, paragraph 1 and the information submitted by the State party in this regard, including on the health care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on grounds that the person cannot even be apprised of, can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that the combination of the arbitrary character of the

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<sup>15</sup> Communications No. 1014/2001, *Baban et al. v. Australia*, Views adopted on 6 August 2003, paragraph 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, paragraph 9.4; Nos. 1255 et al, *Shams et al. v. Australia*, Views adopted on 20 July 2007, paragraph 7.3.

authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding the Committee will not examine the same claims under article 10, paragraph 1 of the Covenant.

10. 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 State party has violated the authors' rights under articles 7, and 9, paragraphs 1, and 4 of the Covenant. The State party also violated article 9, paragraph 2 with respect to five authors.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including release under individually appropriate conditions, rehabilitation and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its Migration legislation to ensure its conformity with the requirements of articles 7 and 9, paragraphs 1, 2, and 4 of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in the State party.

[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.]

## Annex

### Names of authors and places of detention

1. Mr. F.K.A.G. (Scherger IDC)
2. Mr. T.A. (Scherger IDC)
3. Mr. S.B. (Villawood IDC)
4. Mr. V.E. (Christmas Island IDC)
5. Mr. S.G. (Scherger IDC)
6. Mr. S.G. (Darwin IDC)
7. Mr. T.K. (Christmas Island IDC)
8. Mr. S.K. (Villawood IDC, Blaxland)
9. Mr. S.M. (Villawood IDC)
10. Mr. N.M. (Darwin IDC)
11. Mr. K.N.(Maribyrnong IDC)
12. Mr. J.P.(Curtin IDC)
13. Ms. S.R.(Villawood IDC)
14. Master A.R.(Villawood IDC)
15. Miss A.R.(Villawood IDC)
16. Master V.R.(Villawood IDC)
17. Mr. Y.R. (Villawood IDC)
18. Mr. R.R. (Scherger IDC)
19. Mr. K.S. (Curtin IDC)
20. Mr. S.S. (Villawood IDC, Fowler)
21. Mr. D.S. (Maribyrnong IDC)
22. Mr. S.S. (Maribyrnong IDC)
23. Mr. N.S. (Villawood IDC, Fowler)
24. Mr. M.S. (Villawood IDC, Fowler)
25. Mr. N.S. (Villawood IDC)
26. Mr. N.S. (Villawood IDC, Fowler)
27. Mr. K.S. (Villawood IDC, Blaxland)
28. Mr. T.S. (Villawood IDC, Fowler)
29. Mr. P.S. (Villawood IDC, Fowler)
30. Mr. K.T. (Maribyrnong IDC)
31. Mr. S.T.(Villawood IDC, Blaxland)

32. Mr. M.T. (Scherger IDC)
33. Mr. V.V. (Scherger IDC)
34. Mr. S.Y. (Maribyrnong IDC)
35. Mr. S.S. (Curtin IDC)
36. Mr. S.B. (Scherger IDC)
37. Mr. S.S. (Darwin IDC).



## Appendix

### Individual opinion by Committee member, Sir Nigel Rodley

I refer to my separate opinion in *C v Australia*.<sup>1</sup> I consider the finding of a violation of article 9, paragraph 4, circular and superfluous, since the lack of legal safeguards to challenge the detention is part of and arguably central to the above finding of a violation of article 9, paragraph 1. I also remain unconvinced that the protection of article 9, paragraph 4, requiring the ability to challenge the lawfulness of a detention extends far beyond, if at all, a challenge to lawfulness under national law. Unlawfulness under international law is precisely the province of article 9, paragraph 1.

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

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<sup>1</sup> See communication No. 900/1999; *C. v. Australia*, Views adopted on 28 October 2002; individual opinion of Committee member Sir Nigel Rodley.

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### Human Rights Committee

#### Communication No. 2136/2012

##### Views adopted by the Committee at its 108th session (8 – 26 July 2013)

<i>Submitted by:</i>	M.M.M. et al. (represented by counsel, Ben Saul)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Australia
<i>Date of communication:</i>	20 February 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 12 March 2012 (not issued in document form)
<i>Date of adoption of Views:</i>	25 July 2013
<i>Subject matter:</i>	Indefinite detention of persons in immigration facilities.
<i>Substantive issues:</i>	Right to liberty; right to protection from inhuman treatment.
<i>Procedural issues:</i>	Exhaustion of domestic remedies; inadmissibility <i>ratione materiae</i> ; lack of substantiation.
<i>Articles of the Covenant:</i>	7, 10, paragraph 1; 9, paragraphs 1, 2 and 4.
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (b).

## 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 (108<sup>th</sup> session)**

concerning

#### **Communication No. 2136/2012\***

*Submitted by:* M.M.M. et al. (represented by counsel, Ben Saul)

*Alleged victims:* The authors

*State party:* Australia

*Date of communication:* 20 February 2012 (initial submission)

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

*Meeting on 25 July 2013,*

*Having concluded* its consideration of communication No. 2136/2012, submitted to the Human Rights Committee 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 authors of the communication and the State party,

*Adopts* the following:

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

1. The authors of the communication are nine persons held in Australian immigration facilities. Two of them (M.M.M., born in 1983; and R.R., born in 1974) are Myanmarese citizens of Rohingya ethnicity. Six of them (K.P., born in 1975; I.M.F., born in 1978; N.V., born in 1978; M. S., born in 1974; M.J., born in 1971; and R.J., born in 2007) are Sri Lankan citizens of Tamil ethnicity. One author (A.A.K.B.B.A., born in 1993) is a Kuwaiti citizen of Bedouin ethnicity. They claim violations of their rights under articles 7 and/or 10 paragraph 1; and 9, paragraphs 1, 2 and 4. The authors are represented by counsel.

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\* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kaelin, 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.  
The text of an individual opinion by Committee member Sir Nigel Rodley is appended to the present Views.

**The facts as presented by the authors**

2.1 The authors entered Australian territorial waters by various boats between October 2009 and December 2010, for the purpose of claiming protection as refugees in Australia. They were first disembarked at Christmas Island, which forms part of Australian territory. They did not have valid visas to enter Australia and were placed under immigration detention facilities upon their arrival, under section 189 (3) of Migration Act 1958, according to which Australian authorities must detain a person who is an “unlawful non-citizen” in an “excised offshore place”. Section 189 governs the detention of those who enter Australia without authorisation under migration law. At the time of submission of the communication to the Committee four of them were held at Scherger IDC<sup>1</sup>, four at Villawood IRH<sup>2</sup> and one at Melbourne ITA<sup>3</sup>.

2.2 The authors were *prima facie* recognised by the Department of Immigration and Citizenship (DIAC) as refugees for whom return to their countries of origin was unsafe. However, they were subsequently refused visas to remain in the State party following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). None of the authors were provided with a statement of reasons by ASIO or DIAC for the adverse security assessments made against them. All relevant evidence substantiating the assessments has not been disclosed to them by ASIO or DIAC.

2.3 The authors are unable to challenge the merits of their security assessment.<sup>4</sup> In particular, under Section 36 of the ASIO Act, review by the Administrative Appeals Tribunal is denied to persons who are not citizens or holders of either a valid permanent visa or a special visa. Further, because the authors are offshore entry persons, they are not entitled to seek merits review in the Refugee Review Tribunal. This Tribunal only has power to review a decision to refuse to grant a protection. Further, ASIO issues adverse security assessments after the offshore determination process has been completed. There is therefore no offshore process in which the merits of the adverse security assessments themselves can be reviewed as part of the asylum determination process.

2.4 The only avenue available to them is a review before the federal courts for “jurisdictional error” (error of law), which may include the denial of procedural fairness. However, such review is not a merits review of the factual and evidentiary basis of the ASIO decision. Further, in security cases involving ASIO, the federal courts accept that the content of procedural fairness owed to an affected person can be heavily restricted. Since the grounds of ASIO’s assessments have not been disclosed, the authors have no way of determining whether there exist any jurisdictional errors.

2.5 As they have been refused a visa, all the authors are kept in detention for the purpose of removal, under section 198 of the Migration Act. However, they do not wish to return voluntarily to their countries of nationality and the State party has not informed them of any intention to remove them to those countries. Nor has the State party informed them that any third country has agreed to accept them, or that active negotiations for such purpose are under way, or of any timeframes for any speculative negotiations with other potential countries.

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<sup>1</sup> Authors K.P., I.M.F., N.V. and M.S..

<sup>2</sup> Authors R.R., A.A.K.B.B.A., M.J. and her son.

<sup>3</sup> Author M.M.M..

<sup>4</sup> The letters received by the authors regarding the outcome of their security assessment indicate that they “do not have a right to seek merits review of the ASIO assessment. This is because under the *Australian Security Intelligence Organisation Act 1979*, only certain categories of persons are able to seek merits review of a security assessment and you do not come within any of those categories”.

2.6 The authors claim that no domestic remedies are available to them, as there is no statutory basis for challenging the substantive necessity of detention. Where the authors' conditions of detention are authorised by domestic law, there is no basis under Australian law to challenge inhumane or undignified treatment inflicted by that valid law, in circumstances where the powers conferred by the law are not exceeded.

### **The complaint**

3.1 The authors claim that their detention violates article 9, paragraphs 1, 2 and 4. It also violates article 7 and/or article 10, paragraph 1 of the Covenant.

#### *Article 9, paragraph 1*

3.2 The authors' detention is arbitrary or unlawful under article 9, paragraph 1, in two separate phases: first, before Australia's decision to refuse them refugee protection and second, after Australia's refusal decision and pending their removal from Australia.

3.3 The State party did not provide any lawful, individualized justification for detaining the authors upon their arrival to determine whether each of them presented a risk of absconding, lack of cooperation, or posed a prima facie security threat to Australia. All were automatically detained merely because they were 'unlawful non-citizens' in an 'excised offshore place'. The statutory framework does not permit an individual assessment of the substantive necessity of detention. The authors were never provided with any statement of reasons, or disclosed relevant information or evidence, to substantiate any suspicion that they posed security risks which warranted detention pending further investigation and final decision. Moreover, the State party did not provide any procedure for such disclosure to the authors.

3.4 In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals ; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.

3.5 As to the post-refusal stage, the mere assertion by the executive that a person poses a security risk as to justify detention cannot satisfy the requirements of article 9.<sup>5</sup> The secret basis of the security assessment renders it impossible to evaluate the justification for

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<sup>5</sup> The authors provide a sample of letter received from DIAC informing them about the security assessment outcome. The substantive part of the letter indicates: "ASIO assesses [*name of author*] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979. ASIO therefore recommends that any application for a visa by [*name of author*] be refused". Section 4 of the Act defines "security" as:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
  - (i) espionage;
  - (ii) sabotage;
  - (iii) politically motivated violence;
  - (iv) promotion of communal violence;
  - (v) attacks on Australia's defence system; or
  - (vi) acts of foreign interference;whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia's territorial and border integrity from serious threats; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

detention. It also constitutes a denial of due process of law. It can only be assumed that the assessments relate to their suspected conduct prior to their entry to Australia. However, if the State party possesses good evidence to suspect that any of the authors has committed a crime in the context of the armed conflict in Sri Lanka, or by association with an organisation such as the LTTE, such crimes can be prosecuted under Australian law. Furthermore, any prior activities of the authors in Sri Lanka cannot easily establish that the authors present a relevant risk to the Australian community. The provenance of information about them may also be unreliable, particularly if the Australian authorities have relied upon intelligence provided by the Sri Lankan Government.

3.6 The State party has not utilised any alternative means to detention, or demonstrated that such means would be inadequate or inappropriate in meeting security concerns. Furthermore, Australian law does not provide any legally enforceable mechanism for the periodic review of the grounds of detention or a maximum period of detention. Detention simply persists until a person receives a visa or is removed from Australia. In similar cases the Australian High Court has confirmed the validity of indefinite immigration detention.

3.7 Australia has not provided any evidence or substantiation that the authors are such an 'extremely serious threat' as to necessitate their removal from Australia to protect the community, or that less invasive means for protecting the community are unavailable. If Australia intends to expel the authors to a third country, it would also need to demonstrate that such country is safe and that there is no risk of 'chain *refoulement*' to the country of origin.

3.8 The duration of the authors' detention has not been subject to periodic review by the State party of the continuing existence of any personal grounds justifying their detention. There is no legally enforceable mechanism for the periodic review of the grounds of detention and the law does not specify any maximum individual period of detention.

3.9 Australia's security assessment operates as an additional, unilateral ground for excluding refugees which is not authorised under the Refugee Convention and exceeds what is permitted by it. Refugees can only be excluded from protection if they are suspected of committing the serious conduct specified under Article 1F, or pose risks under article 33(2) of the Convention, and not where they fall within the wide meaning of 'security' under Australian law. Their detention cannot be justified under international refugee law once their refugee status has been recognised and neither Article 1F nor Article 33(2) applies.

*Article 9, paragraph 2*

3.10 None of the authors were informed by the authorities of the substantive reasons for their detention. At most, they were made aware that they were detained because they were 'offshore entry persons' and 'unlawful non-citizens' liable to detention under the Migration Act.

*Article 9, paragraph 4*

3.11 The detention cannot be challenged under Australian law and no court has jurisdiction to assess its necessity, including by reference to risk factors pertaining to individual authors. The Migration Act requires the mandatory detention of offshore entry persons and does not provide for individualized assessments of the necessity of detaining particular individuals on legitimate grounds. There is thus no statutory basis for challenging the substantive necessity of detention. The only determination processes available to them (the Refugee Status Assessment and the Independent Merits Review) are limited to a consideration of their asylum claims.

3.12 The Australian courts can only conduct a purely formal review of whether the authors are offshore entry persons, whether they have been granted a visa or not, or whether they are being held pending removal to another country. While the courts can review administrative decisions on limited legal grounds of ‘jurisdictional error’, including denial of procedural fairness, such review does not concern the substantive necessity of detention.

3.13 Since the reasons for the adverse security assessments were not disclosed, it is impossible for the authors to identify any errors of law made by ASIO. Furthermore, the courts have accepted that they lack the expertise to evaluate security information and their review of the evidence in such cases remains largely formal and ineffective. Even if the authors could commence judicial review proceedings, ASIO could claim ‘public interest immunity’ to preclude the authors from challenging any adverse security evidence in court, as ASIO has done in other Federal Court cases involving adverse security assessments concerning non-citizens.

*Article 7 and/or article 10, paragraph 1*

3.14 The combined arbitrary character of their detention, its protracted and/or indefinite duration and the difficult conditions in the facilities where they are being held are cumulatively inflicting serious, irreversible psychological harm upon the authors, contrary to articles 7 and/or 10, paragraph 1 of the Covenant. The difficult conditions of detention include inadequate physical and mental health services; exposure to unrest and violence and punitive legal treatment; risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others. No domestic remedies, including constitutional remedies, are available in this regard.

3.15 Different institutions, including the Australian Human Rights Commission and medical bodies have expressed serious concerns in connection with the mental health of persons detained in immigration facilities. Thus, in 2010, one of the largest studies, involving over 700 detainees found a ‘clear association’ between time in detention and rates of mental illness, with especially poor mental health in those detained for more than two years.<sup>6</sup> Another 2010 study found that psychological difficulties persisted even after release and included a sense of insecurity and injustice; difficulties with relationships; profound changes to view of self; depression and demoralisation; concentration and memory disturbances; persistent anxiety; and high rates of depression, anxiety, PTSD and low quality of life.<sup>7</sup>

3.16 The impact of detention on the authors’ mental health is exacerbated by the physical conditions of the detention facilities, and are evidenced by a large number of incidents of self-harm. For instance, DIAC reported 1,100 incidents of threatened or actual self-harm in 2010-11.

3.17 The Australian Human Rights Commission has expressed concern, *inter alia*, at the extremely restrictive environment at Villawood IDC, with the use of extensive high wire fencing and surveillance. Christmas Island IDC was similarly described as prisonlike. The Commission has also expressed concern about the possibly excessive use of force in detention facilities and about inadequate mental and physical health care services. Thus, the Commission heard complaints about the distressing use of restraints, such as handcuffs, on

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<sup>6</sup> Green and Eagar, ‘The health of people in Australian immigration detention centres’ (2010) 192 *Medical Journal of Australia*. Also, Silove, Austin and Steel, ‘No Refuge from Terror: The impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia’ (2007) 44 *Transcultural Psychiatry*. These studies are contained on file.

<sup>7</sup> Coffey et al., ‘The meaning and mental health consequences of long-term immigration detention for people seeking asylum’ (2010) 70 *Social Science & Medicine*, also contained on file.

detainees travelling to medical appointments from Villawood, or where restraints were not removed when a detainee needed to use the toilet. Health care centres were found to suffer from insufficient staffing, with impacts on the quality and timeliness of health care. There was a high level of prescription of psychotropic medications at Villawood, including antipsychotics and antidepressants given as sedatives for sleeplessness. Arrangements for preventing or responding to self-harm were also inadequate at Villawood.

3.18 Unrest, protests and violence by detainees is a symptom of the acute frustration and mental distress felt by many detainees. In April 2011, for instance, there were protests by detainees at Villawood, with some detainees occupying the roof of a building for many days.

#### *Remedies sought*

3.19 With respect to claims under article 9, the State party should acknowledge the violations of the Covenant, grant the authors immediate release, apologize to them and provide them with adequate compensation, including for the mental distress and psychological suffering. Where the State party believes it is necessary to detain the authors in future, it should provide an individual assessment of the necessity of detaining each author; consider less invasive alternative to detention as part of such assessment; reasonably inform the authors of the substantive reasons for their detention, beyond a purely formal assertion that they fall within the terms of a particular legal category; provide a procedure for the periodic independent review of the necessity of continuing to detain any author; and provide for the effective judicial review of the necessity of detention.

3.20 Concerning the claims under articles 7 and/or 10, paragraph 1, the State party should acknowledge that the circumstances of the authors detention are inhumane or degrading and apologise to the authors for that; provide adequate compensation for their inhumane treatment, including for the mental distress and psychological suffering experienced by them.

3.21 In terms of the guarantees of non-repetition, Australian law should be amended to: eliminate mandatory detention; require an individual assessment of the necessity of detention; inform detainees of the substantive reasons for their detention; require periodic independent review of the necessity of detention; require consideration of less invasive alternatives to detention; and provide for substantive and effective judicial review of detention and of adverse security assessments.

#### **State party's observations on admissibility**

4.1 On 5 December 2012, the State party contested the admissibility of the communication and argued that all the claims are inadmissible. It stated that on 15 October 2012 the Government announced that it would appoint an independent reviewer to review adverse security assessments issued in relation to asylum seekers owed protection obligations who are in immigration detention. The reviewer will examine all materials used by ASIO (including any new material referred to ASIO by the affected individual) and report his/her findings to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. The reviewer will also conduct periodic review of adverse security assessments every 12 months. Both the initial and periodic review mechanisms will be made available to the authors of the communication, thus providing them with access to an open and accountable decision-making process in relation to security assessments.

4.2 Given that the authors have been found to be refugees they are owed protection obligations under international law and cannot be *refouled* to their countries of origin. The Australian Government is exploring solutions for them, including resettlement in a third



country or safe return to their country of origin when the risk of harm no longer exists or when reliable and effective assurances can be received from the home country. However, it is not appropriate for individuals who have an adverse security assessment to live in the Australian community while such solutions are sought.

*Non exhaustion of domestic remedies*

4.3 With reference to articles 7; 9, paragraphs 1 and 4; and 10, paragraph 1, the authors have not exhausted domestic remedies.

4.4 First, the child author Master R.J. is residing in immigration detention with his mother, M.J., who is the subject of an adverse security assessment. On 21 August 2012, the Minister for Immigration and Citizenship decided to lift the application bar and allow Master R.J. to lodge an application for a protection visa and he did so on 1 November 2012. The application is being assessed. If Master R.J. is granted a visa, he will be a lawful non-citizen and therefore eligible to be released from detention. He could then be placed with relatives or in other community arrangements if his mother wished for him to live in the community. Both merits and judicial review are available of a decision to refuse to grant a protection visa, if that were to be the outcome of Master R.J.'s current application.

4.5 Secondly, it was open to all authors to seek judicial review of their adverse security assessments and immigration detention in the Federal Court or High Court of Australia and, as part of the proceedings for judicial review, seek information regarding the basis for the security assessment. The authors have not sought such review. Mr. A.K.B.B.A. commenced proceedings in the Federal Court of Australia claiming that the Government had a duty to avert the risk of harm by transferring him to a less restrictive form of detention, or even devise a form of detention that allowed him to reside in the community. On 4 June 2012, the Court rejected the claim that such duty existed and found that the author had failed to establish that any of the alternative forms of detention proposed by the author would improve his mental health in a material way. The author filed an appeal to the Full Court of the Federal Court. A decision is still pending.

4.6 In *Al-Kateb v. Godwin* (2004), the High Court held by a narrow majority that the indefinite detention of a failed applicant for a protection visa who could not be deported was authorised by the Migration Act. This finding is currently being challenged before the High Court in the case of *Plaintiff S138 v. Director-General of Security v. Ors (S138)*. Plaintiff S138 commenced litigation in the High Court in May 2012 challenging his adverse security assessment and the legality of his detention. The High Court will consider a range of issues, including: (a) Whether the continued detention of Plaintiff S138 is lawful and supported by the Migration Act. As part of this claim, the Court has been asked to consider the lawfulness of detention for the purpose of removal to a safe third country where there is no immediate prospect of such removal; and (b) whether the detention of the plaintiff is unconstitutional. The plaintiff has argued that it is inherent in the separation of powers in the Constitution that long term detention of a person is only lawful if ordered by a Court.

4.7 This case is relevant to the communication because, if Plaintiff S138 is successful in the High Court, it could provide an effective remedy to the alleged violations raised by the authors under articles 7; 9, paragraphs 1 and 4; and 10, paragraph 1. A finding by the High Court in favour of the Plaintiff could potentially result in the release from detention of the authors affected by the judgement.

4.8 In a recent case the High Court considered the reasons for the adverse security assessment which ASIO had provided to plaintiff M47. The Court held that the refusal to grant Plaintiff M47 a protection visa was not made according to law because a regulation which prevented the grant of a protection visa to a refugee subject to an adverse security assessment was invalid. Therefore, DIAC would need to reconsider his application for a

protection visa. The Court found the Plaintiff's continuing detention valid for the purpose of determining his application for a protection visa.

4.9 The State party disagrees with the authors contention that judicial review proceedings are not worth pursuing as Australian courts are limited to conducting a review on the limited grounds of 'jurisdictional error' and are not able to review the substantive merits of the necessity of detention. The State party maintains that it is possible to challenge before the High Court the lawfulness of detention of persons in the authors' circumstances.

#### *Inadmissibility ratione materiae*

4.10 With reference to article 9, paragraph 1, the State party disputes the admissibility of any claims relating to the Refugees Convention in the communication. Such claims are inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

4.11 Claims under article 9, paragraph 2 are also inadmissible *ratione materiae*, as the authors were not 'arrested'. The term 'arrest' should be understood as referring to the act of seizing a person, in connection with the commission or alleged commission of a criminal offence, and taking that person into custody. The ordinary meaning of the term 'arrest' does not extend to the placing of an asylum seeker into administrative detention for the purposes of undertaking health, security and identity checks.

#### *Lack of substantiation*

4.12 Claims under articles 7 and 10, paragraph 1 should be declared inadmissible for lack of substantiation. The authors made general submissions about the conditions of detention. However, they have provided no evidence indicating that the treatment of each or any author in detention has risen to a level of humiliation or debasement beyond the fact of detention itself in their own particular circumstances.

#### **Authors' comments on the State party's observations on admissibility**

5.1 On 23 February 2013, the authors provided comments on the State party's observations on admissibility.

5.2 The authors reject the State party's contentions regarding exhaustion of domestic remedies. Formal legal rights to judicial review of both detention and adverse security assessments exist, but the review is practically ineffective and/or too narrow in scope to protect ICCPR rights. As regards review of detention, the courts may test whether a detainee is an 'offshore entry person', but have no power to consider the substantive necessity of detention. Further, High Court's binding precedent in the *Al Kateb* case has established that indefinite immigration detention is lawful in domestic law. As regards adverse security assessments, to commence judicial review proceedings an author must first identify a reviewable ground of legal error in the administrative decision. Precisely because the authors do not adequately know the reasons or evidence sustaining their adverse security assessments, they are unable to identify legal errors. Commencing speculative proceedings is considered an abuse of court process.

5.3 Regarding the M47 case mentioned by the State party, the High Court's decision does not apply to the authors in the present communication, who are unlawful offshore entry persons. The plaintiff in M47 was a refugee who had lawfully entered Australia and applied for a protection visa. Furthermore, the High Court upheld the lawfulness of his detention pending the remaking of his security assessment.

5.4 There are also practical considerations impeding judicial review, namely it is expensive for refugees who are in detention, lack any income and are not entitled to legal

aid. In a few rare cases, detained refugees with adverse security assessments have sought judicial review because they were able to identify possible legal errors. There is no minimum degree of disclosure that must always be given to an affected person in ASIO decisions.

5.5 Under the requirement of exhaustion of domestic remedies authors cannot be expected to contest recent and final jurisprudence of the High Court of Australia (namely, the *Al Kateb* decision). Such requirement would make it impossible for the author of any communication to exhaust domestic remedies, for a State could simply demand that the author must first contest settled legal precedents of the State's highest court.

5.6 Regarding the proceedings pending in the case of the child author, while the grant of a protection visa would allow him to be released from detention, such grant does not retrospectively cure the unlawfulness of his detention between his arrival in Australia and the grant of the visa, or provide compensation for that period of unlawful detention. As already indicated, there is no legal basis to effectively challenge the lawfulness of his current detention because an indiscriminate policy of mandatory detention applies and cannot be reviewed by the courts other than on the purely formal ground whether a person entered Australia without a visa. As such, exhausting the administrative remedy invoked by Australia would not provide an effective remedy for the ICCPR violation.

5.7 Concerning the State party's objection to admissibility of allegations regarding violations of the Refugee Convention, the authors argue that they are not requesting the Committee to find direct or autonomous breaches of this Convention. Rather, they request the Committee to interpret article 9, paragraph 1 in accordance with refugee law which, in this particular communication, should be considered as *lex specialis*.

5.8 As for the State party's objections that article 9, paragraph 2 is confined to situations of criminal arrest the authors contend that this provision shares in the protective purpose of article 9 to prevent arbitrary arrest or detention, not just criminal arrest or detention. It would make little sense to require a State only to give reasons for arresting suspected criminals but to permit the State free reign to administratively detain a person without explanation or notice.

5.9 The authors have submitted sufficient information for purposes of admissibility regarding claims under articles 7 and 10, and can submit more. Where reports examine certain conditions in detention which apply in the same or comparable way to all detainees, it is open to the Committee to reasonably infer that the objectively established conditions of detention must necessarily impact on an affected class of detainees at large. If the general standards, facilities and services in detention are inadequate, they will necessarily be inadequate for all those who are detained there. Each author is willing to provide personal statements detailing their experience of detention and impacts upon them. Further psychiatric reports for various authors are also available upon request.

5.10 With respect to the appointment of an independent reviewer of adverse security assessments, the authors consider this as an improvement, however, it remains procedurally inadequate. First, the reviewer's findings are not binding but only recommendations to ASIO. Secondly, there remains no minimum content of disclosure in all cases, limiting a refugee's ability to effectively respond. In a given case, ASIO may still determine that it is not possible to disclose any meaningful reasons to a person and this will also prevent disclosure by the reviewer. Refugees thus may lawfully continue to receive no notice of allegations prior to decisions being made.

#### **State party's observations on the merits**

6.1 On 5 December 2012 the State party argued that the authors' claims are without merit for the following reasons.

*Article 9, paragraph 1*

6.2 The authors are unlawful non-citizens detained under Sections 189 and 199 of the Migration Act. Their detention is therefore lawful. The High Court of Australia has found the pertinent provisions of the Migration Act to be constitutionally valid. Asylum seekers are placed in immigration detention if they fall within one of these categories: (1) unauthorised arrivals for management of health, identity and security risks to the community; (2) unlawful non-citizens who present unacceptable risks to the community; and (3) unlawful non-citizens who repeatedly refuse to comply with their visa conditions.

6.3 The length and conditions of detention, including the appropriateness of both the accommodation and the services provided, are subject to regular review. Detention is not limited by established timeframes but is dependent on individualised assessments of risks to the community. These risk assessments are completed by Government agencies as expeditiously as possible. The determining factor is not the length of the detention but whether the grounds for the detention are justifiable.

6.4 ASIO has individually assessed each adult author and determined, in application of the ASIO Act,<sup>8</sup> that granting a permanent visa to them would be a risk for one or more of the following reasons:

- Posing security threats to Australia and Australians, including politically-motivated violence, promoting community violence, or threats to Australia's territorial and border integrity;
- Providing a safe haven for any organisation(s) to which they belong to conduct attacks against their government either in Australia or overseas, and/or;
- Potentially providing a safe haven for individuals or terrorist organisations to engage in terrorist activities and terrorist financing within Australia.

6.5 Providing people with the classified details underpinning adverse assessments would undermine the security assessment process and compromise Australia's security. It would also put ASIO sources at risk and erode the capabilities on which ASIO relies to fulfil its responsibilities.

6.6 The detention of the adult authors is a proportionate response to the security risk they have been individually found to pose. As for the child author, Master R.J., his interests have been considered, in all decisions relating to his immigration detention placements and in a manner consistent with its obligations under the Covenant. As indicated above, he has been provided with the option of applying for a protection visa. He has also been provided with appropriate and supportive services and facilities in detention. In particular, he lives in Immigration Residential Housing, which is designed to provide a comfortable environment where children can continue to develop while they reside with their families in detention. He is free to attend outings and other organised activities in order to best permit him to live with as limited restriction and as consistently with his status as a minor unlawful non-citizen as practicable.

6.7 The lawfulness of decisions made under the ASIO Act is subject to judicial review. In addition, the Inspector-General of Intelligence and Security (IGIS) may inquire into the legality, propriety, effectiveness and appropriateness of ASIO in its work relating to the security assessment of non-citizens.

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<sup>8</sup> *Australian Security Intelligence Organisation Act 1979*, section 4.

*Article 9, paragraph 2*

6.8 If the Committee concludes that the authors were ‘arrested’ for the purposes of article 9, paragraph 2, the State party submits that this provision has not been breached. As it is the usual practice, all authors arriving at Christmas Island were provided with a detailed explanation of the reasons for their detention, as set out in a detention notice written in English. The text of the notice was read out by a government official with the assistance of interpreters from the relevant language groups.

*Article 9, paragraph 4*

6.9 As set out above, the authors have access to judicial review of the legality of their detention, and a court may order their release if the detention does not comply with the law. In *Al-Kateb v. Godwin*, the High Court of Australia held that indefinite administrative immigration detention is within the power of the Parliament when it is for the purposes of assessing claims of non-citizens to remain in Australia and for the purposes of effecting their removal if they have no lawful right to remain, even where their removal is not reasonably foreseeable. The requirement in the Migration Act to remove ‘unlawful non-citizens’ ‘as soon as reasonably practicable’ was held not to imply a time limit on detention.

6.10 The State party rejects the authors’ allegation that the law expressly prohibits proceedings being brought in the courts relating to the status of a person as an ‘offshore entry person’, or the lawfulness of the detention of an ‘offshore entry person’. Although section 494AA of the Migration Act sets a bar on certain legal proceedings relating to offshore entry persons, the section specifically indicates that the provision does not affect the High Court’s constitutional jurisdiction.

6.11 Judicial review of adverse security assessments provides an important opportunity for courts to consider the release of information by ASIO to affected individuals. As part of the judicial review of adverse security assessments, a party to a proceeding may seek access to any information, subject to relevance and to a successful claim for public interest immunity.

*Articles 7 and 10, paragraph 1*

6.12 Should the Committee believe that the authors have provided enough information to permit a consideration of the merits of their claims under these provisions, the State party submits that their allegations are without merit. First of all, the system of immigration detention and the treatment of the authors in detention do not give rise to severe physical or mental suffering of the degree required to constitute treatment contrary to these provisions. Secondly, the system of mandatory immigration detention of unauthorised arrivals is not arbitrary *per se* and the individual detention of each of the authors is also not arbitrary as it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. Thirdly, the fact of protracted detention is not in and of itself sufficient to amount to treatment in violation of these articles.

6.13 The State party refutes the allegations that the conditions of detention amount to inhuman or degrading treatment. The authors have been placed in the form of accommodation assessed to be most appropriate to their circumstances. Six authors are in Immigration Residential Housing, two are in Immigration Transit Accommodation and one is in an Immigration detention Centre. These facilities are all operated by Serco, a private contractor, who is obliged to ensure that people in detention are treated equitably and fairly, with dignity and respect. The actions and behaviour of Serco staff are underpinned by a Code of Conduct. Serco also has in place policies and procedures which focus on the wellbeing of people in detention.

6.14 All persons in immigration detention are subject to regular placement reviews in respect of the conditions of detention. Regular reviews have occurred in each of the authors' cases. Immigration detention is also subject to regular scrutiny from external and independent agencies such as the Australian Human Rights Commission, UNHCR and the Minister's Council on Asylum Seekers and Detention.

6.15 The State party recognises that persons in immigration detention, particularly irregular maritime arrivals who have been subjected to torture and trauma or have pre-existing mental health issues, may be vulnerable to mental health deterioration, self-harming behaviour and suicide. Events such as the refusal of a visa application, uncertainty around one's immigration status and time in detention can place additional stress on these persons. For this reason, these persons have access to health care and mental support services appropriate to their individual circumstances, and qualified health professionals conduct regular health assessments.

6.16 All people entering immigration detention have a mental health screening within 72 hours of their arrival in order to identify signs of mental illness and any previous exposure to torture and trauma. Additionally, they are regularly medically assessed, so emerging health concerns and mental health issues can be identified. Irrespective of these periodic assessments, in situations where concerns are raised about a person's mental health, the individual will be referred for a prompt assessment.

6.17 All immigration detention facilities, including those in which the authors reside, have on site primary health care services of a standard generally comparable to the health care available to the Australian community and take into account the diverse and potentially complex health care needs of these persons. When required specialist medical treatment is not available on-site, they are referred to off-site specialists.

6.18 In August 2010 the Government implemented three new mental health policies relating to persons in immigration detention facilities: Mental Health Screening for People in Immigration Detention; Identification and Support for People in Immigration Detention who are Survivors of Torture and Trauma; and the Psychological Support Program for the Prevention of Self-Harm in Immigration Detention.

6.19 A number of the authors have received specific treatment and support in relation to their physical and mental health issues. Mr. M.M.M., Mr. N.V., Mr. A. K.B.B.A. and Mr. I.M.F. have, *inter alia*, been regularly reviewed by the mental health team and were placed on the Psychological Support Programme when concerns of self-harm were raised. Mr. R.R., Mr. A.K.B.B.A. and Mr. K.P. have, *inter alia*, ongoing counselling with the mental health team and supportive counselling to treat Post-Traumatic Stress Disorder. Ms. M.J. has ongoing counselling with the mental health team. Ongoing counselling is also provided to Master R.J. to treat early signs of depressive symptoms.

6.20 Contrary to the assertions made by the authors, the physical conditions of detention are adequate and subject to continual improvement and individuals are given sufficient opportunity to participate in recreational activities. From time to time, incidents involving unrest or violence have occurred, for which Serco has extensive policies in place. The authors have not indicated any incidents of unrest or violence which they have personally witnessed. Restraints are only used by Serco as a last resort and strict limits apply to the level of force that may be deployed.

6.21 The Committee cannot conclude that the authors have been personally subjected to treatment in breach of articles 7 and 10, paragraph 1 in the absence of specific allegations regarding each particular author.

*Remedies*

6.22 Given that the authors' rights under the Covenant have not been violated, none of the remedies sought by them should be recommended by the Committee. It would not be appropriate for the Committee to recommend that the adult authors be released, given the risk that they are judged to be for national security, and in light of the recent appointment of an independent reviewer. If the Committee concludes that Australia has breached particular rights, the State party requests that remedies other than release be recommended.

**Author's comments on the State party's observations on merits**

7.1 On 23 February 2013, the authors provided the following comments on the State party's observations on merits.

*Article 9, paragraph 1*

7.2 The authors contest the State party's argument that their detention is lawful. The legality under this provision must be interpreted not only with respect to domestic law but rather to such law as applies to a given jurisdiction, which comprises both domestic and international law, including the Covenant. Detention on security grounds is unlawful under article 9, paragraph 1 because the domestic procedures for review are manifestly inadequate, as there is: no right to reasons or minimum disclosure of evidence which would enable an affected person to effectively exercise any right to seek review; no independent decision maker of the primary decision, but rather ASIO acting as secret investigator, judge and jury; no binding periodic review by the primary decision-maker; no binding merits review; and practically unavailable or ineffective judicial review in which disclosure of even a summary of the security case against a person cannot be compelled.

7.3 The authors maintain that mandatory detention upon arrival is arbitrary. This is particularly so where the duration of detention between their arrival and receipt of their adverse security assessments was so protracted (between 13 months and two years). The State party has not explained the need for this period to be so long.

7.4 The State party makes no attempt to demonstrate that it considered alternatives to detention in each individual case, or explain why particular alternatives are unsuitable given the degree of risk posed by each person. It has provided no evidence regarding its efforts to resettle the authors elsewhere, and specifically, how many countries have been approached to take each of them, how many countries have refused to accept them, or how regularly such requests are made.

7.5 Regarding the unavailability or ineffectiveness of the review of detention, the authors argue that IGIS only enjoys a power of recommendation and cannot provide an effective remedy in the form of a legally enforceable right to have an adverse security assessment overturned.

7.6 As for the detention of the child author, he submits that it is in his best interest both not to reside in detention at all and not to be separated from his mother. It is feasible for Australia to respect his best interests by allowing his mother to reside with him in the community and thus preserving family unity and ordinary family life, as required by articles 17, paragraph 1; 23, paragraph 1; and 24 of the Covenant, which he invokes here. The author claims that his detention is arbitrary because it is not justified by any necessity and is disproportionate. Australia does not claim that he is a security risk or that he is a risk of absconding or presents any other threat to Australia. Any national security threat posed by his mother (which she does not admit) can be protected by the application of various security measures to her in the community, such as surveillance, reporting, assurances, GPS tracker bracelet, etc.

*Article 9, paragraph 2*

7.7 The detention notice received by the authors upon arrival does not set out why each author is individually considered to be a risk, thus necessitating detention, whether for reasons of identity, security, health or absconding. Similarly, the DIAC letters informing authors about ASIO's assessment do not identify the security reasons for their detention. The State party has not provided any evidence that each of the authors in fact received the written detention notice on arrival in Australia or that every author at Christmas Island was notified in a language he/she could understand. The State party relies upon the existence of a practice or policy to that effect in general, without proof that such policies were followed in the authors' cases.

*Article 9, paragraph 4*

7.8 If the authors' detention is found by the Committee to be unlawful under article 9, paragraph 1, for not being necessary or proportionate, article 9, paragraph 4 will also be violated, as the Australian courts lack power to review the necessity of detention. As regards High Court review, the Court decides only about 100 cases per year, as Australia's highest court of appeal and constitutional review. It is unrealistic to suggest that judicial review is effectively available to the authors when the High Court's case load is so small, many thousands of offshore entry persons are detained each year and the jurisdiction of other federal courts is excluded. Furthermore, preparing an application to the High Court requires extensive resources and legal representation which are simply not available to them.

7.9 Regarding the judicial review of security assessments, when ASIO believes disclosure of information would prejudice national security, the courts will not overturn those assessments. In various other security cases, the courts have not compelled to produce information assessed by ASIO as prejudicial to security.

*Articles 7 and 10, paragraph 1*

7.10 A number of Australian independent institutions have repeatedly criticised the inadequacy of the conditions in all immigration detention centres and mental health impacts. For instance, since the registration of the communication, the Commonwealth Ombudsman, who has a statutory mandate to periodically review protracted cases of detention, stated that protracted detention contributes to mental harm and is incompatible with the effective treatment of mental illness. He has also criticised the inadequacy of mental health services in detention. The continuing deterioration of the mental health of detainees is evidence that the health measures taken by Australia are incapable of ensuring the detainees' safety where protracted detention itself is a medically untreatable cause of harm.

7.11 The authors provide copy of a letter from the Director of the Centre for Developmental Psychiatry & Psychology dated 12 August 2012, in which it is indicated that the treatment provided in the detention centres is limited and will not be able to reverse the detainees' condition. Detention centres are not psychiatric facilities and are not designed or staffed to manage severe mental illness and disturbance. Appropriate care can only be provided in the community mental health system.

7.12 The following facts affect the determination whether the authors' detention is inhumane or degrading: (a) the authors are refugees entitled to special protection, where detention should be a last resort and for the shortest possible time; (b) most of the authors were traumatized by the experience of fleeing from or immediately after the conflict in northern Sri Lanka in 2009; (c) some of the authors have been diagnosed with mental



illnesses and cannot be effectively treated so long as they remain in detention; (d) one of the authors is a child who is especially vulnerable.

7.13 If the Committee is unable to find violations of article 7 because of insufficient evidence, it is still open to the Committee to find violation of article 10, paragraph 1 because the authors, as a group, have experienced similarly ill-treatment in their circumstances of indefinite detention under adverse physical and health conditions.

#### *Remedies*

7.14 The authors disagree with the State party's position in this respect and reiterate their initial requests.

#### **Additional observations of the State party**

8.1 On 27 June 2013, the State party submitted that authors Ms. M.J. and her son, Master R.J., had recently been granted Protection visas and released from immigration detention into the Australian community. On 21 August 2012, the Minister for Immigration and Citizenship decided to lift the visa application bar and allow Master R.J. to lodge an application for a Protection visa.<sup>9</sup> He was granted a Protection visa on 8 February 2013. However, as per his mother consent, he remained in immigration detention with her. Regarding Ms. M.J., a new, non-prejudicial security assessment was recently issued following the conclusion of a further security assessment process which yielded relevant new information. As a result, she was released and now resides in the Australian community with her son.

8.2 As demonstrated in this case, ASIO only gives an adverse security assessment to persons found to be owed Protection obligations when it would be inconsistent with Australia's security for the person to be granted a visa. Any decision to issue an adverse security assessment is based on the information available at the time and new security assessments can and will be issued when new relevant information comes to light.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

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

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies have not been exhausted, as the authors did not seek judicial review of the decision regarding their detention and the basis for their security assessment. The State party adds in this respect that the High Court precedent in *Al-Kateb v. Godwin*, stating that indefinite detention of an applicant who could not be deported was authorized by the Migration Act, is currently being challenged before the High Court by an applicant who is in the same situation as the authors in the present communication and that a decision is still pending. However, the Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors'

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<sup>9</sup> See para. 4.4.

claims regarding their detention. The possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention does not suffice to indicate the present availability of an effective remedy. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention. Moreover, the Committee notes that in the High Court's decision of 5 October 2012 in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted and that the communication is admissible with reference to article 5, paragraph 2 (b) of the Optional Protocol.

9.4. Regarding authors M.J. and R.J., the Committee notes the State party's information dated 27 June 2013 that they had recently been granted protection visas and released from detention (para. 8.1 above). Hence, the Committee's above conclusion applies only in connection with the period of time prior to their release.

9.5. The Committee also notes the State party's argument that the authors' claim under article 9, paragraph 2 should be declared inadmissible *ratione materiae* as this provision is limited to arrest of persons in connection with the commission of criminal offences. However, the Committee considers that the term "arrest" in the context of this provision means the initiation of a deprivation of liberty regardless of whether it occurs in criminal or administrative proceedings and that individuals have a right to notice of reasons for any arrest.<sup>10</sup> Accordingly, the Committee considers that this claim is not inadmissible *ratione materiae* or on other grounds and should be examined on its merits.

9.6. Regarding the claims under articles 7 and 10, paragraph 1 of the Covenant, the Committee considers that they have been sufficiently substantiated for purposes of admissibility and declares them admissible.

9.7. The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under articles 7; 9, paragraphs 1, 2 and 4; and 10, paragraph 1.

#### *Consideration of the merits*

10.1. The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

#### *Claims under article 9, paragraph 1*

10.2. The authors claim that their mandatory detention upon arrival and its continuous and indefinite character for security reasons is unlawful and arbitrary, thus constituting a violation of article 9, paragraph 1 of the Covenant. They claim that their detention is disproportionate to the security risk that they are said to pose and that domestic procedures for its review are manifestly inadequate. The State party argues that the adult authors are unlawful non-citizens who are being detained in application of the Migration Act and the ASIO Act; that their detention is therefore lawful and constitutionally valid, as previously declared by the High Court; and that it is also a proportionate response to the security risk they have been found to pose.

10.3. The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of

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<sup>10</sup> See General Comment No. 8, paras. 1 and 4; communications Nos. 1460/2006, *Yklymova v. Turkmenistan*, Views adopted on 20 July 2009, para. 7.2; 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994, para. 6.5.

inappropriateness, injustice, lack of predictability, and due process of law.<sup>11</sup> Detention in the course of proceedings for the control of immigration is not *per se* arbitrary, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time. Asylum-seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties, or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

10.4 The Committee observes that the authors have been kept in immigration detention since 2009-2010, first under mandatory detention upon arrival and then as a result of adverse security assessments. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention. For all these reasons, the Committee concludes that the detention of authors M.M.M., R.R., K.P., I.M. F., N.V., M.S. and A.A.K. B.B.A. is arbitrary and contrary to article 9, paragraph 1, of the Covenant. This conclusion extends to authors M.J. and her minor son R. J., in connection with the period of time prior to their release.

*Claims under article 9, paragraph 2*

10.5 The authors claim that, individually considered, they were not informed by the authorities of the substantive reasons for their detention, neither upon arrival nor after the assessment made by ASIO. The State party argues that, upon arrival, all authors were provided with a detention notice explaining that they were suspected of being unlawful non-citizens and that later on, each of them were informed of ASIO's security assessment by letter. The Committee first observes that article 9, paragraph 2 requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest, and that this requirement is not limited to arrest in connection with criminal charges.<sup>12</sup> The Committee considers that, as far as their initial detention is concerned, the information provided to the authors is sufficient to meet the requirements of article 9, paragraph 2. Moreover, the adverse security assessment they later received represents a subsequent phase in their migration processing and did not amount to a new arrest implicating article 9, paragraph 2,

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<sup>11</sup> See Communications Nos. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005 para. 5.1; 305/1988, *Van Alphen v. The Netherlands*, Views adopted on 23 July 1990, para. 5.8.

<sup>12</sup> See note 10 above.

but rather must be considered in relation to article 9, paragraph 1. The Committee therefore concludes that there has been no violation of article 9, paragraph 2 of the Covenant.

*Claims under article 9, paragraph 4*

10.6 Regarding the author's claim that their detention cannot be challenged under Australian law and that no court has jurisdiction to assess the substantive necessity of their detention, the Committee notes the State party's argument that the authors can seek judicial review before the High Court of the legality of their detention and the adverse security assessment. In view of the High Court's 2004 precedent in *Al-Kateb v. Godwin* declaring the lawfulness of indefinite immigration detention, and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar more recent situations, the Committee is not convinced that it is open to the Court to review the justification of the authors' detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision of 5 October 2012 in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4 is not limited to mere compliance of the detention with domestic law, but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.<sup>13</sup> Accordingly, the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4.

*Claims under articles 7 and 10, paragraph 1*

10.7 . The Committee takes note of the authors' claims under articles 7 and 10 paragraph 1 and the information submitted by the State party in this regard, including on the health care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on grounds that the person cannot even be apprised of, can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding the Committee will not examine the same claims under article 10, paragraph 1 of the Covenant.

11. 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 State party has violated the authors' rights under articles 7, and 9, paragraphs 1 and 4 of the Covenant.

12. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide all authors with an effective remedy, including release under individually appropriate conditions for those authors still in detention, rehabilitation and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its

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<sup>13</sup> Communications No. 1014/2001, *Baban et al. v. Australia*, Views adopted on 6 August 2003, paragraph 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, paragraph 9.4; Nos. 1255 et al, *Shams et al. v. Australia*, Views adopted on 20 July 2007, paragraph 7.3.

Migration legislation to ensure its conformity with the requirements of articles 7 and 9, paragraphs 1 and 4 of the Covenant.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in the State party.

[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

### Individual opinion by Committee member, Sir Nigel Rodley

I refer to my separate opinion in *C v Australia*.<sup>1</sup> I consider the finding of a violation of article 9, paragraph 4, circular and superfluous, since the lack of legal safeguards to challenge the detention is part of and arguably central to the above finding of a violation of article 9, paragraph 1. I also remain unconvinced that the protection of article 9, paragraph 4, requiring the ability to challenge the lawfulness of a detention extends far beyond, if at all, a challenge to lawfulness under national law. Unlawfulness under international law is precisely the province of article 9, paragraph 1.

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

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<sup>1</sup> See communication No. 900/1999; *C. v. Australia*, Views adopted on 28 October 2002; individual opinion of Committee member Sir Nigel Rodley.