



## International Covenant on Civil and Political Rights

Distr.: General  
28 October 2013

Original: English

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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 victim:</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>Procedural issues:</i>	Exhaustion of domestic remedies; inadmissibility <i>ratione materiae</i> ; lack of substantiation
<i>Substantive issues:</i>	Right to liberty; right to protection from inhuman treatment
<i>Articles of the Covenant:</i>	Articles 7, 10 (para. 1) and 9 (paras. 1, 2 and 4)
<i>Articles of the Optional Protocol:</i>	Articles 2, 3 and 5 (para. 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 (108th session)**

concerning

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

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

*Alleged victim:* 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 on behalf of M.M.M. et al. 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 (Mr. M.M.M., born in 1983, and Mr. R.R., born in 1974) are citizens of Myanmar of Rohingya ethnicity. Six of them (Mr. K.P., born in 1975; Mr. I.M.F., born in 1978; Mr. N.V., born in 1978; Mr. M.S., born in 1974; Ms. M.J., born in 1971; and R.J., born in 2007) are Sri Lankan citizens of Tamil ethnicity. One author (Mr. 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 (para. 1) and article 9 (paras. 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 Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Víctor Manuel Rodríguez Rescia, Mr. Fabián 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 submitted 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 is part of Australian territory. They did not have valid visas to enter Australia and were placed in 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 authorization under migration law. At the time of submission of the communication to the Committee, four of the authors were being held at the Scherger Immigration Detention Centre,<sup>1</sup> four at Villawood Immigration Residential Housing<sup>2</sup> and one at the Melbourne Immigration Transit Accommodation.<sup>3</sup>

2.2 The authors were recognized *prima facie* 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. No relevant evidence substantiating the assessments has 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 Australian Security Intelligence Organisation Act 1979, 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 has power only 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 the authors 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 the assessments made by ASIO 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 being 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

<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 R.J. (the son of M.J.).

<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”.

purpose are under way, or of any time frames for any speculative negotiations with other potential countries.

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 authorized 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, of the Covenant. It also violates article 7 and/or article 10, paragraph 1.

#### *Article 9, paragraph 1*

3.2 The authors' detention is arbitrary or unlawful under article 9, paragraph 1, in two separate phases: first, before the decision by Australia to refuse them refugee protection and second, after the 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 or 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, nor was relevant information or evidence disclosed to them, to substantiate any suspicion that they posed security risks that warranted detention pending further investigation and the 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: the addressing of 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 sufficient to justify detention cannot satisfy the requirements of article 9.<sup>5</sup> The

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<sup>5</sup> The letters received from DIAC informing the authors about the security assessment outcome indicate: "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

secret basis of the security 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 organization such as the Liberation Tigers of Tamil Eelam, 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 Government of Sri Lanka.

3.6 The State party has not utilized 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 High Court of Australia 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 The security assessment by Australia operates as an additional, unilateral ground for excluding refugees which is not authorized under the Convention relating to the Status of Refugees and exceeds what is permitted by it. Refugees can be excluded from protection only if they are suspected of committing the serious conduct specified under article 1F, or pose risks under article 33, paragraph 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 recognized and neither article 1F nor article 33, paragraph 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

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(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).

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 (refugee status assessment and 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.

*Articles 7 and/or 10 (para. 1)*

3.14 In combination, the 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 (para. 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; the 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. 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 demoralization; concentration and memory disturbances; persistent anxiety; and high rates of depression, anxiety, post-traumatic stress disorder 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 evidenced by a large number of incidents of self-harm. For instance, DIAC reported 1,100 incidents of threatened or actual self-harm in 2010-2011.

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<sup>6</sup> See Janet Green and Kathy Eagar, “The health of people in Australian immigration detention centres”, *Medical Journal of Australia*, vol. 192, No. 2. See also D. Silove, P. Austin and Z. Steel, “No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia”, *Transcultural Psychiatry*, vol. 44, No. 3. These studies are contained on file.

<sup>7</sup> Guy Coffey et al., “The meaning and mental health consequences of long-term immigration detention for people seeking asylum”, *Social Science & Medicine*, vol. 70, No. 12, also contained on file.

3.17 The Australian Human Rights Commission has expressed concern, inter alia, at the extremely restrictive environment at Villawood Immigration Detention Centre, with the use of extensive high wire fencing and surveillance. Christmas Island Immigration Detention Centre was similarly described as prison-like. 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. The Commission heard complaints about the distressing use of restraints, such as handcuffs, on detainees travelling to medical appointments from Villawood, and about situations in which 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 are symptoms 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 alternatives 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 (para. 1), the State party should acknowledge that the circumstances of the authors' detention are inhumane or degrading and apologize to the authors for that, and 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 had 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 or 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 a 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 returned to their countries of origin. The Government of Australia 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 (paras. 1 and 4) and 10 (para. 1), the authors have not exhausted domestic remedies.

4.4 First, the child author 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 R.J. to lodge an application for a protection visa, and he did so on 1 November 2012. The application is being assessed. If 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. If R.J.'s current application for a protection visa were to be rejected, both a merits review and a judicial review of that decision would be available.

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. 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 authorized by the Migration Act. This finding is currently being challenged before the High Court in the case of *Plaintiff S138/2012 v. Director-General of Security and Ors.* 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;

(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 lawful only 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 (paras. 1 and 4) and 10 (para. 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 (*Plaintiff M47/2012 v. Director General of Security and Ors*) 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 that prevented the granting of a protection visa to a refugee subject to an adverse security assessment was invalid. Therefore, DIAC would need to reconsider the plaintiff's 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 Convention relating to the Status of Refugees 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 (para. 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 Covenant 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, the 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 are not adequately provided with 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 decision of the High Court 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 a new 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 a 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 granting of a protection visa would allow him to be released from detention, such granting does not retrospectively cure the unlawfulness of his detention between his arrival in Australia and the granting 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 of 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 violation of the Covenant.

5.7 Concerning the State party's objection to the admissibility of allegations regarding violations of the Convention relating to the Status of Refugees, 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, of the Covenant 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 to give reasons only 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 that 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 have an 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 — they are only recommendations to ASIO. Secondly, there remains no minimum content of disclosure in all cases, which limits 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: (a) unauthorized arrivals, for management of health, identity and security risks to the community; (b) unlawful non-citizens who present unacceptable risks to the community; and (c) 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 time frames, but is dependent on individualized 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 section 4 of the Australian Security Intelligence Organisation Act, that granting a permanent visa to them would constitute 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 the territorial and border integrity of Australia
- Providing a safe haven for any organization(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 organizations 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 the security of Australia. 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, R.J., his interests have been considered in all decisions relating to his immigration detention placements and in a manner consistent with the State party's 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 organized 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 Australian Security Intelligence Organisation Act is subject to judicial review. In addition, the Inspector-General of Intelligence and Security 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 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 constitutional jurisdiction of the High Court.

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 (para. 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 unauthorized 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, which 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 well-being 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, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Minister's Council on Asylum Seekers and Detention.

6.15 The State party recognizes 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 persons detained in such facilities. When required specialist medical treatment is not available on site, detainees 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 of 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. M.M.M., N.V., A.A.K.B.B.A. and I.M.F. have, inter alia, been regularly reviewed by the mental health team and were placed under the psychological support programme when concerns of self-harm were raised. R.R., A.A.K.B.B.A. and K.P. have, inter alia, ongoing counselling with the mental health team and supportive counselling to treat post-traumatic stress disorder. M.J. has ongoing counselling with the mental health team. Ongoing counselling is also provided to 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 used by Serco only 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 (para. 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 the 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 the Inspector-General of Intelligence and Security enjoys only 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 (para. 1), 23 (para. 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, that he poses a risk of absconding or that he 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 or use of a GPS tracker bracelet.

*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 the ASIO 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 or 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 the highest court of appeal and constitutional review in Australia. It is unrealistic to suggest that judicial review is effectively available to the authors when the case load of the High Court 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 the disclosure of information assessed by ASIO as prejudicial to security.

*Articles 7 and 10 (para. 1)*

7.10 A number of Australian independent institutions have repeatedly criticized the inadequacy of the conditions in all immigration detention centres and the impact they have on mental health. 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 criticized 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 insufficient to ensure the detainees' safety where protracted detention itself is a medically untreatable cause of harm.

7.11 The authors provided a copy of a letter from the Director of the Centre for Developmental Psychiatry and 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 be provided only in the community mental health system.

7.12 The following facts affect the determination of 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 a violation of article 10, paragraph 1, because the authors, as a group, have experienced 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 M.J. and her son, 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 R.J. to lodge an application for a protection visa.<sup>8</sup> He was granted a protection visa on 8 February 2013. However, as per his mother's consent, he remained in immigration detention with her. Regarding 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 issues an adverse security assessment only for persons found to be owed protection obligations when it would be inconsistent with the security of Australia 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.

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<sup>8</sup> See para. 4.4 above.



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' 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>9</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 (para. 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 (paras. 1, 2 and 4) and 10 (para. 1).

#### *Consideration of the merits*

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

<sup>9</sup> See general comment No. 8 (1982) on the right to liberty and security of persons (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40)*, annex V), paras. 1 and 4; communications No. 1460/2006, *Yklymova v. Turkmenistan*, Views adopted on 20 July 2009, para. 7.2; and No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994, para. 6.5.

*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 Australian Security Intelligence Organisation 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 inappropriateness, injustice, lack of predictability and due process of law.<sup>10</sup> Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in the 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 or 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.

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<sup>10</sup> See communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.1; and No. 305/1988, *van Alphen v. Netherlands*, Views adopted on 23 July 1990, para. 5.8.

*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 the ASIO 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>11</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, 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 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. 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>12</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 (para. 1)*

10.7 The Committee takes note of the authors' claims under articles 7 and 10 (para. 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'

<sup>11</sup> See footnote 9 above.

<sup>12</sup> Communications No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.4; Nos. 1255 et al., *Shams et al. v. Australia*, Views adopted on 20 July 2007, para. 7.3.

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 (paras. 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 migration legislation to ensure its conformity with the requirements of articles 7 and 9 (paras. 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>a</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>a</sup> See communication No. 900/1999; *C. v. Australia*, Views adopted on 28 October 2002, individual opinion of Committee member Sir Nigel Rodley.