



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 – 28 July 2006

VIEWS

Communication No. 1050/2002

<u>Submitted by:</u>	D and E, and their two children (represented by counsel, Nicholas Poynder)
<u>Alleged victim:</u>	The authors
<u>State Party:</u>	Australia
<u>Date of communication:</u>	1 February 2002 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 12 February 2002 (not issued in document form)
<u>Date of adoption of Views:</u>	11 July 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Immigration detention, rights of the child

Procedural issues: None

Substantive issues: Arbitrary detention

Articles of the Covenant: 7, 9(1), 9(4) and 24(1)

Articles of the Optional Protocol: 2, 5(2)(b)

On 11 July 2006, the Human Rights Committee adopted the annexed draft as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1050/2002. The text of the Views is appended to the present document.

[ANNEX]

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

Eighty-seventh session

concerning

Communication No. 1050/2002*

<u>Submitted by:</u>	D and E, and their two children (represented by counsel, Nicholas Poynder)
<u>Alleged victim:</u>	The authors
<u>State Party:</u>	Australia
<u>Date of communication:</u>	1 February 2002 (initial submission)

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

Meeting on 11 July 2006,

Having concluded its consideration of communication No. 1050/2002, submitted to the
Human Rights Committee on behalf of D and E, and their two children 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:

* The following members of the Committee participated in the examination of the present
communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal
Bhagwati, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik
Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael
Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen and Mr. Roman
Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan
Shearer did not participate in the adoption of the present decision.

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

1.1 The authors of the communication are D, born on 15 December 1970, E, born on 1 July 1968, and their two children born on 25 April 1995 and 5 May 1999, all Iranian nationals, currently living in Australia. They claim to be victims of violations of articles 7, 9(1), 9(4) and 24(1) of the International Covenant on Civil and Political Rights. They are represented by counsel, Nicholas Poynder. The Optional Protocol entered into force for Australia on 25 December 1991.

1.2 On 12 February 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 92 of the Committee's Rules of Procedure, requested the State party "to provide information to the Committee, on an urgent basis, of whether the authors are under a real risk of deportation while their communication is being considered by the Committee". It added that it trusts the State party "will not deport the authors before the Committee has received such information and had an opportunity to consider whether the request for interim measures should be granted". By note verbale of 12 April 2002, the State party replied that it was in the process of considering the request for information by the Special Rapporteur on the possibility of whether there is a real risk of removal of the authors from Australia while the Committee considers the communication and announced that it will not remove the authors until the request has been considered.

Facts as presented by the authors

2.1 The authors arrived by boat from Iran, travelling via Pakistan, Malaysia and Indonesia, in November 2000. They arrived in Australia without the required travel documents and were therefore immediately taken into detention under section 189 of the Migration Act 1958 which requires all "unlawful non-citizens" to be placed in immigration detention. They were detained at the Curtin immigration detention centre (near Derby, in Western Australia), with the nearest major city, Perth, being approximately 1,800 kilometres to the south.

2.2 On 12 November 2000, they applied for asylum. The principal asylum applicant was D. She claims that she had been involved in illegal activities in Isfahan, Iran, between 1992 and 2000. She worked for a man involved in making pornographic movies in Isfahan and did the make-up for the women involved. In 1993, she was arrested because there had been women in her hairdressing salon with make-up and dresses they were not allowed to wear. She was interrogated and beaten, then imprisoned for one month. Subsequently, she moved to a village outside Isfahan, where she continued to work for the same man for seven years. During that time, E was repeatedly arrested and questioned regarding his wife, whom he could only see infrequently and secretly. One day in July 2000, one of the security guards from the prison came to the hairdressing salon and recognised D, who then decided to leave Iran.

2.3 On 11 December 2000, a delegate of the Minister for Immigration rejected the authors' asylum application. On 19 February 2001, their application for review of this decision was refused by the Refugee Review Tribunal (RRT). The RRT did not consider that D's fear of being punished upon her return to Iran by reason of her involvement in making pornographic films brought her within the refugee definition contained in the 1951 Convention. While the RRT accepted that the death penalty was applicable in Iran to the creation, duplication and distribution of pornographic films or obscene videos, it considered that persecution would not

take place on account of one of the five reasons enumerated in the refugee definition. In particular, it rejected the possibility that D might be persecuted on account of her membership of a “particular social group” as constituted by “people involved in making pornographic films”.

2.4 Under section 417 of the Migration Act, the Minister for Immigration can exercise his discretion to substitute a decision of the RRT with a more favourable decision if “it is in the public interest to do so”.¹ Requests were made to the Minister to exercise his discretion on 10 July and 10 August 2001. In these requests, D now claimed that she had acted in pornographic movies. The authors were not re-interviewed in relation to their requests, nor were the findings of fact by the RRT disputed by the Minister. On 24 September 2001, the Minister for Immigration decided not to exercise his discretion under section 417.

2.5 In 2003, the Minister referred the case back to the primary decision-maker to re-determine the asylum application. On 2 October 2003, the application was again rejected. On 22 January 2004, the authors were released from detention. On 17 May 2004, their application for review of the second refusal decision was rejected by the RRT. The authors were granted Global Special Humanitarian visas on 13 March 2006.

The complaint

3.1 The authors submit that their prolonged detention is a breach of article 9, paragraphs 1 and 4, of the Covenant, as they were detained upon arrival under the provisions of section 189(1) of the Migration Act. These provisions do not provide for any review of detention, either by judicial or administrative means. They submit that their circumstances are no different in principle to those in the case of *A v. Australia*.² No justification for their detention was ever provided to them. Similarly, while the authors were held under differing provisions than in that case, the effect of the relevant legislation in the present case is the same, to the extent there is no provision for them to be able to make an effective application for review of their detention by a court. They seek compensation for their detention under article 2, paragraph 3.³

3.2 The authors claim that the prolonged detention of the two minor children violates article 24, paragraph 1. Both are young, the eldest was born in 1993, the youngest in 1999. They invoke General Comment No.17/35 of 5 April 1989 in which the Committee states that the Covenant requires “the adoption of special measures to protect children, in addition to the

¹ The Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision, provided by the authors, state that “public interest” factors may arise in a number of circumstances, including where there are circumstances that provide a sound basis for a significant threat to a person’s personal security, human rights or human dignity upon return to their country of origin, where there are circumstances that may bring the State party’s obligations under the Covenant, the Convention on the rights of the child or the Convention against torture and other cruel, inhuman or degrading treatment or punishment into consideration, or where there are unintended but particularly unfair or unreasonable consequences of the legislation.

² Communication No.560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras.9.2 to 9.5.

³ *Ibid.*, para.11.

measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant”. The authors argue that there was no justification provided for the prolonged detention of the children, and that no consideration was given to whether it is in their best interests to have spent over three years in an isolated detention facility. They argue that it is no answer to say that the best interests of the children were served by keeping them with their parents.

3.3 On 11 April 2006, counsel informed the Committee that the authors had obtained a temporary protection visa and that there was thus no need to proceed with the communication in relation to article 7. However, the authors wished to maintain the communication before the Committee in relation to articles 9 and 24 in light of their prior unlawful detention.

State party’s submissions on admissibility and merits and authors’ comments

4.1 By note verbale of 12 April 2002, the State party challenged the admissibility of the communication on the ground that counsel was not authorised by the authors to lodge the communication on their behalf. By letter dated 9 May 2002, counsel provided the written authorisation from the authors to submit the communication on their behalf.

4.2 By note verbale of 23 September 2002, the State party commented on the admissibility and merits of the communication. With regard to the alleged violation of article 9, paragraph 1, it argues that the prohibition against the deprivation of liberty is not absolute since the *travaux préparatoires* show that the drafters explicitly contemplated detention of non-citizens for immigration control as an exception to the general prohibition. Furthermore, it argues that the term “law” refers to law in the domestic legal system and that detention must be not only lawful, but reasonable in all the circumstances.⁴ It recalls that there is no indication in the Committee’s jurisprudence that detention for a particular length of time could be considered arbitrary *per se*. It also recalls that detention of unauthorised arrivals is not arbitrary *per se*, and that the main test is whether the detention is reasonable, proportionate, appropriate and justifiable in all the circumstances.⁵ With regard to the present case, it argues that the claim is without merit. It explains that detention of unauthorised arrivals allows for an assessment of whether the person has a lawful right to remain in the country and for checks to be completed before the person is permitted access to the general community. Detention is thus for administrative, not correctional purposes. The authors were placed in immigration detention in accordance with section 189(1) of the Migration Act. The State party argues that their detention was not arbitrary since their initial detention was proportionate to the objective sought, namely to allow the authorities to process their asylum application and for the Refugee Review Tribunal and Minister to review this decision. It argues further that the circumstances leading to their detention has been subject to review, by both the Refugee Review Tribunal and Minister, but the decision to deny the authors a visa was confirmed and the authors remained in detention, pending their removal from the country. Consequently, the detention of the authors was reasonable and necessary in all the circumstances.

⁴ Communication No.305/1988, *Alphen v. The Netherlands*, Views adopted on 23 July 1990, para.5.8.

⁵ Communication No.560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras.9.2 and 9.3.

4.3 With regard to the alleged violation of article 9, paragraph 4, the State party argues that there is nothing apparent in the Covenant that “lawful” was intended to mean “lawful in international law” or “not arbitrary”. Furthermore, it argues that there is nothing in the Committee’s General Comments or the *travaux préparatoires* that supports the finding that lawfulness in article 9, paragraph 4, extends beyond domestic law. It notes that where the term “lawful” is used in other provisions of the Covenant, for instance articles 9(1), 17(2), 18(3) and 22(2), it clearly refers to domestic law. With regard to the present case, the State party argues that the claim has not been sufficiently substantiated, for purposes of determining admissibility. It recalls that, under domestic law, the authors could have tested the lawfulness of their detention before the High Court or the Federal Court, either by seeking *habeas corpus* or by invoking the original jurisdiction of the High Court under section 75 of the Constitution to obtain an appropriate remedy. Moreover, at the time of the decision to deny a Protection Visa to D, section 476 of the Migration Act allowed her to seek Federal court review of that decision. Any review of the status of the authors as unlawful non-citizens would effectively also determine the legality of their detention and could have resulted in their release from detention. For the State party, the communication does not address the issue of why the authors did not pursue this course of action, nor does it explain why they do not represent effective avenues for the review of the legality of the authors’ detention. In the alternative, it argues that the claim is inadmissible under article 2 and 5(2)(b) of the Optional Protocol, as the authors have not exhausted domestic remedies. It recalls that according to the Committee’s jurisprudence, if a remedy of *habeas corpus* is available, a person who fails to take advantage of this right cannot be said to have been denied the opportunity to have the lawfulness of his or her detention reviewed in court without delay.⁶ In the present case, the authors did not explain their failure to seek a writ of *habeas corpus* or pursue potential remedies under section 75 of the Constitution.

4.4 If the claim under article 9, paragraph 4, is found to be admissible, the State party argues that it is without merit, because the authors could have tested the legality of their detention in the High Court or the Federal Court by seeking *habeas corpus* or other appropriate remedy. It submits that mandatory detention of the authors did not mean that the Court was not able to effectively review their detention and order their release if the detention was unlawful. It reiterates that any review of the status of the authors as unlawful non-citizens would also have determined the legality of their detention. It recalls that it was possible to seek judicial review of the decision of the Refugee Review Tribunal in the Federal Court, but that D did not seek such review because there was no identifiable error of law. The State party submits that the fact that the decision could have been subjected to judicial review meant that the obligation under article 9, paragraph 4, was satisfied in relation to the authors.

4.5 With regard to the alleged violation of article 24, paragraph 1, the State party invokes General Comment 17/35 of 5 April 1989 and argues that State parties have a broad discretion with regard to the particular manner in which they implement their duty of protection towards children. It recalls that section 189 of the Migration Act requires the mandatory detention of all unlawful non-citizens, including children. With regard to the present case, it argues that the claim is without merit, as it has fulfilled its obligation to provide the two children with “such measures of protection as are required” by their status as minors. It explains that the immigration detention standards for children require that social and educational programs

⁶ Communication No.373/1989, *Stephens v. Jamaica*, Views adopted on 18 October 1995, para.9.7.

appropriate to the child's age and abilities be available through the detention facilities. D had indicated that she wished one of her children to attend the local school and was encouraged to assist the child in meeting the minimum entry requirements set by the school. Children can access and utilise a range of services in detention centres, such as television, videos and video games, sporting and playground equipment, and toys and games. Excursions are also organised outside the centres, including trips to local tourist attractions, etc. It also recalls that when a child is admitted to an immigration detention facility with a parent, a centre nurse interviews the child and the parent to determine the special needs of the child. This process of induction may also include interviews by a counsellor or psychologist. Children are provided with necessary medical or other health care, including psychiatric care and referral to specialists, when required. For instance, on 4 April 2002, the Centre Management responded to concerns expressed by D that one of her children had developed a speech impediment, and he was referred to a speech pathologist who had several sessions with him. The Centre Management also responded to the recommendation of the speech pathologist that the child would benefit from sessions with a counsellor or psychologist.

4.6 As to the authors' argument that article 24 should be applied in a similar way to the obligations set out in the Convention on the Rights of the Child, and that detention of the children is not in their best interests, the State party recalls that the obligations under the Convention on the Rights of the Child cannot be the subject of a communication to the Committee. It submits that, when viewed as a whole, the detention of the children is consistent with article 24. Not detaining unlawful non-citizens who travel with children would undermine the legitimate aims of Australia's system of immigration detention. Although children in immigration detention can be released into the community on a Bridging Visa, it will not generally be in the best interests of a child to be separated from their parents or family.

Authors' comments

5. By letter of 12 January 2004, the authors noted that they did not wish to comment on the State party's submissions.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules and procedures, decide whether or not it is admissible under the Optional Protocol of the Covenant.

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

6.3 As to the authors' claims under article 9, the Committee notes that the State party's highest court has determined that mandatory detention provisions are constitutional. Consequently, the Committee observes, as it has done previously, that as the State party's law provides for mandatory detention of unlawful arrivals, a *habeas corpus* application could only test whether the individuals in fact possess that (uncontested) status, rather than whether the individual detention is justified. Accordingly, the proposed remedy has not been shown to

be an effective one, for the purposes of the Optional Protocol. The Committee is thus not precluded under article 5, paragraph 2(b) of the Optional Protocol from considering this part of the communication.⁷

6.4 As to the claim under article 24, the Committee notes the State party's argument that the best interests of the authors' children were best served by being held together with their parents. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of their rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility.

Consideration of the merits

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

7.2 With regard to the claim of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. It observes that the authors were detained in immigration detention for three years and two months. 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 that their detention was justified for such an extended period. It has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by resorting to, for example, the imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for the authors, including two children, for the length of time described above, without any appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.⁸

7.3 In view of the finding of a violation of article 9, paragraph 1, the Committee is of the opinion that it is not necessary to consider other arguments relating to a violation of article 9, paragraph 4.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by the State party of article 9, paragraph 1, of the Covenant.

⁷ See Communication No.900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para.7.4; Communication No.1014/2001, *Baban and Baban v. Australia*, Views adopted on 6 August 2003, para.6.6; and Communication No.1069/2002, *Bakhtiyari and al. v. Australia*, Views adopted on 29 October 2003, para.8.2.

⁸ See Communication No.560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para.9.4; Communication No.900/1999, *C. v. Australia*, Views adopted on 28 October 2002, para.8.2; Communication No.1014/2001, *Baban and Baban v. Australia*, Views adopted on 6 August 2003, para.7.2; and Communication No.1069/2002, *Bakhtiyari and al. v. Australia*, Views adopted on 29 October 2003, para.9.3.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including appropriate compensation. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. 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, that State party has undertaken to ensure all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[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.]
