



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October – 3 November 2006

VIEWS

Communication No. 1324/2004

<u>Submitted by:</u>	Danyal Shafiq (represented by counsel, the Refugee Advocacy Service of South Australia Inc)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Australia
<u>Date of communication:</u>	5 November 2004 (initial communication)
<u>Document references:</u>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 8 November 2004 (not issued in document form)
<u>Date of adoption of Views:</u>	31 October 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Detention of unlawful non-citizen, deportation, risk of torture upon return to the country of origin

Procedural issues: non-exhaustion of domestic remedies

Substantive issues: arbitrary detention, review of the lawfulness of detention

Articles of the Covenant: Article 7; article 9, paragraphs 1 and 4; and article 10, paragraph 1

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

On 31 October 2006 the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1324/2004.

[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-eighth session

concerning

Communication No. 1324/2004*

<u>Submitted by:</u>	Danyal Shafiq (represented by counsel, the Refugee Advocacy Service of South Australia Inc)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Australia
<u>Date of communication:</u>	5 November 2004 (initial communication)

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

Meeting on 31 October 2006,

Having concluded its consideration of communication No. 1324/2004, submitted to the Human Rights Committee on behalf of Danyal Shafiq 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 author of the communication, and the State party,

Adopts the following:

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

1.1 The author of the communication is Danyal Shafiq, a Bangladeshi national born in 1972, currently detained at the Glenside Campus of the Royal Adelaide Hospital, awaiting deportation

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, 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 adoption of the Committee's decision.

from Australia to Bangladesh. He claims to be a victim of violations by Australia¹ of article 7; article 9; and article 10, paragraph 1, of the International Covenant on Civil and Political Rights. He is represented by counsel, the Refugee Advocacy Service of South Australia Inc.

1.2 On 8 November 2004, the Special Rapporteur on New Communications and Interim Measures requested the State party not to deport the author before it had informed the Committee of its plans concerning the apprehended deportation of the author, specifically, whether the author was subject to removal in the near future and, if so, whether the State party planned to deport him to Bangladesh and what measures would be taken to ensure that the author would not be under a risk of irreparable harm, if deported to Bangladesh.

Facts as submitted by the author

2.1 In January 1987, at the age of 15, the author, who was raised at an orphanage in Bangladesh, looked for work and was unwittingly recruited into an illegal political organization, the Sharbahara Party. He was asked to deliver documents to Party activists across Bangladesh. He was unaware of the violent and subversive activities of the Party and believed he was delivering information about the welfare activities of the Party. He later became aware that he was delivering information regarding people to be killed and extortion operations by Sharbahara activists. In 1992 he started working on the Indian border, which he later realised involved smuggling of arms and drugs. When he raised concerns with his recruiter, he was told that the only way he could leave the party was as a dead person. He was also told and believed that if he went to the police he would be killed, either by the police torturing him for information or by Sharbahara activists.

2.2 In 1995, the party split into two. In 1996, the author, who did not wish to be involved in the Party's activities anymore, decided to leave Bangladesh. He arrived in Australia by boat in September 1999 and has been in detention as an "unlawful non citizen" since then. He is effectively a stateless person, as he has no birth or citizenship records from Bangladesh, which might prove his nationality. The Bangladesh mission to Australia denied that he is a citizen of Bangladesh, having no record of his birth or citizenship.

2.3 On 28 February 2000, the author filed an application for a protection visa (refugee status), which was denied on 21 June 2000. His application for merits review to the Administrative Appeals Tribunal (AAT) was rejected on 1 June 2001, because there were "serious reasons for considering that the applicant had committed a serious non-political crime outside Australia prior to his admission to Australia, within the meaning and for the purposes of para. (b) of art 1F of the Refugees Convention"². It concluded that the provisions of that Convention did not apply to him and that he was not a person to whom Australia had protection obligations under the Convention. The author appealed for legal review before the Federal Court, which denied his appeal on 19 June 2002. On 31 March 2004, the author applied for consideration on compassionate grounds. Under section 417 of

¹ The Covenant and the Optional Protocol entered into force for Australia respectively on 13 November 1980 and 25 December 1991.

² Article 1F(b) of the Convention relating to the Status of Refugees (Refugees Convention) stipulates that: "The provisions of this Convention shall not apply to any person with respect to whom there are

the Migration Act 1958, the Minister for Immigration, Multiculturalism and Indigenous Affairs can exercise his or her discretion and grant a protection visa on humanitarian grounds. On 14 May 2004, she refused to exercise this discretion.

The complaint

3.1 The author alleges a violation to article 9, paragraphs 1 and 4, because he has been held in arbitrary and indefinite mandatory detention since his arrival in Australia in September 1999. He refers to the case of *A v. Australia*³, and claims that his detention is arbitrary in that it bears no relation to the circumstances of the case. The author's detention is indefinite and continues while he is present in Australia or until a favourable decision is made regarding his refugee status. He has no recourse to a court for legal determination of his refugee status. Australian courts can merely remit any administrative decisions on asylum claims back to the decision maker on grounds of legal error. While the lawfulness of his detention may be decided by a court, the grounds for his detention (refugee status) cannot be reviewed by a court. Further, as a stateless person, he is detained indefinitely until and unless a favourable decision is made granting him asylum or a humanitarian visa.

3.2 If deported to Bangladesh, he would be at risk of being imprisoned, tortured and subject to cruel and inhuman treatment by the police or by members of Sharbahara, in violation of article 7 of the Covenant. Bangladeshi authorities would be interested in the reasons for his forcible return. According to Amnesty International reports, members of Sharbahara, more than others, who surrender to police or are caught or arrested face long prison terms, risk being killed, and are at risk of torture. The author fears possible elimination by Sharbahara agents within the police. The author submits various reports⁴, from 1999 to 2004, to corroborate his claim that torture is widespread in Bangladesh. In addition to his fear of the police, the author fears reprisals from members of Sharbahara. The death threat he received from Sharbahara members would materialise.

3.3 The author claims a violation of article 10 of the Covenant if returned to Bangladesh. He refers to the Standard Minimum Rules for the Treatment of Prisoners, and fears that he would be imprisoned in inhuman conditions because of the poor state of Bangladeshi prisons.

3.4 The author acknowledged that at the time of submission of his communication, he had not exhausted domestic remedies. After the Federal Court's denial to review the decision to refuse his request for asylum, he could have applied for an extension of time and leave to appeal from the Federal Court decision before the Full Federal Court. Leave to appeal and extension of time are not assured, as it depends on there being strong reasons why the extension should be granted, good reasons for the failure to appeal within time, and a good chance of success of the appeal. The author claims that this avenue is discretionary and that his deportation to Bangladesh is not necessarily constrained by the pursuit of this remedy.

The State party's observations

serious reasons for considering that: (...) (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

³ Communication No.560/1993, Views adopted on 3 April 1997, para.9.2 and 9.4.

⁴ These include reports from Amnesty International, Human Rights Watch and the US Department of State

4.1 On 21 October 2005, the State party commented on admissibility and merits of the communication. It refers to the Committee's jurisprudence that mere doubt as to the effectiveness of domestic remedies or the prospect of the financial costs involved does not absolve a complainant from pursuing such remedies.⁵ It further recalls that ignorance of the existence of a remedy or of the conditions for its invocation does not constitute an excuse for failure to exhaust domestic remedies.

4.2 With regards to the claim under article 7, the State party submits that this part of the communication is inadmissible for failure to exhaust domestic remedies. The State party indicates that these remedies may not be available to him now because of statutory limitations. It refers to the Committee's jurisprudence in *N.S. v Canada*,⁶ where it held that a failure to exhaust a remedy in time means that available domestic remedies have not been exhausted.

4.3 The Federal Court reviewed the decision of the Administrative Appeals Tribunal (AAT) to affirm the primary delegate's decision that the author was subject to the exclusion clause of the Refugees Convention and found no legal error. The author then appealed the Federal Court's decision to the Full Federal Court. However, he withdrew from that litigation before the matter was heard by that Court. He could have maintained his appeal to the Full Bench of the Federal Court. If the Full Federal Court had found in his favour, it would have remitted his case to the AAT for reconsideration. If the author had continued with his appeal and the Full Federal Court had not found in his favour, then he could have sought special leave to appeal from that decision to the High Court. He has not pursued the available Full Federal Court and High Court remedies. Nor has he offered *prima facie* evidence that these remedies are ineffective or that an application for review would inevitably be dismissed, for example, because of clear legal precedent. The State party submits that available remedies could remedy the alleged potential breach of article 7.

4.4 Alternatively, the State party submits that the communication provides insufficient evidence of the author's allegations regarding a potential breach of article 7. For the purposes of article 2 of the Optional Protocol, a 'claim' is not just an allegation, but an allegation supported by certain substantiating evidence.⁷ The communication fails to establish that the author would be subjected to torture or to cruel, inhuman or degrading treatment or punishment upon returning to Bangladesh. The reports cited by him provide general information on the situation in Bangladesh and do not establish that the author would personally be at risk. For the State party, there is a particular onus on the author in *refoulement* cases to substantiate and convincingly demonstrate a *prima facie* case. Evidence assumes greater importance in *refoulement* cases, which by their very nature are concerned with events outside the State party's immediate knowledge and control. The State party submits that the communication fails to substantiate, for purposes of admissibility, the allegation that Australia would breach article 7 if the author is removed to Bangladesh.

4.5 The State party submits that the allegations concerning article 7 are without merit. It refers to the Committee's jurisprudence that, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that this person's rights under the

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

⁶ Communication No. 26/1978, *N.S. v. Canada*, Decision on admissibility adopted on 28 July 1978.

⁷ Report of the Human Rights Committee to the 49th Session of the United Nations General Assembly of 1994, UN Doc. A/49/40 Vol.1, p. 67.

Covenant will be violated in another jurisdiction, the State party itself may violate the Covenant⁸, and that the Committee has equated a ‘necessary and foreseeable’ consequence with ‘a real risk’.⁹ There is no evidence to support the conclusion that it is a necessary and foreseeable consequence of removal that the author would face a real risk of violation of his rights under article 7.

4.6 The State party recalls that the AAT did not accept the author’s evidence that he was told by Sharbahara party members that he would be killed if he questioned their illegal activities or if he did not continue to participate in those activities¹⁰, and considered that he could have left the party had he wanted to. The delegate of the Minister reached a similar conclusion when determining the author’s asylum claim in 2000. He expressed the view that as the author had been absent from Bangladesh for four years, the potential for risk against him was minimised.¹¹ Given the time lapse of almost nine years, it cannot be accepted that it is *highly likely* that the author would be killed by Sharbahara party members upon returning to Bangladesh.¹²

4.7 On the author’s similar allegations of risk of ill-treatment by the police, the State party submits that the reports cited in support of the allegation of potential mistreatment at the hands of the Bangladesh police force do not sufficiently substantiate this claim. The reports suggest, *inter alia*, that the police force in Bangladesh employs torture during arrests and interrogations and continues to practice torture in custody and extra-judicial executions. The reports suggest that Sharbahara members may be at risk of imprisonment and mistreatment by police, particularly if they surrender to police. However, these reports provide only general information on the police force and treatment of prisoners by police in Bangladesh and do not bear sufficient relevance to the author’s personal circumstances to establish that he would be at any real risk of harm if removed to Bangladesh. The likelihood that the author will be identified by police as a Sharbahara party member must therefore be greatly reduced.

4.8 On the claim under article 9, paragraph 1, of arbitrary indefinite mandatory detention since the author’s arrival in Australia, the State party submits that he has failed to substantiate his claims, for purposes of admissibility, because his allegation amounts to a general statement. The author does not provide any further information, such as information relating to the dates and length of time spent in detention, the means by which he has attempted to challenge his detention or how the detention is in any way arbitrary and amounted to a breach of article 9, paragraph 1. The author further claims that there is no “consideration of release”. This claim is plainly wrong. Unlawful non-citizens who arrive in Australia are placed in detention, but can apply for one of many visas. If they are granted a visa, they are released from detention. There may also be other grounds for release

⁸ Communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para.6.2.

⁹ Communication No. 469/1991, *Ng v. Canada*, para. 14.1; and Communication No. 692/1996, *ARJ v Australia*, Views adopted on 28 July 1996, para.6.13

¹⁰ Decision and Reasons for Decision of the Administrative Appeals Tribunal, 1 June 2001, W2000/231, para. 46.

¹¹ Protection Visa Decision Record, 21 June 2000, p. 3

¹² The State party refers to the Committee against Torture’s view in *H.A.D. v. Switzerland*, where it noted that the period of time between the alleged infliction of ill treatment by the complainant’s State of origin and consideration of the communication by the Committee (15 years) indicated that the complainant did not face a current risk of torture if returned. (*H.A.D. v Switzerland*, Communication number 126/1999, para. 8.6.)

from detention. Since the author was detained, the Migration Act and Regulations have been amended to give the Minister the non-delegable and non-compellable power to:

- Grant a visa to any immigration detainee, whether the detainee has applied for it or not.
- Detain an unlawful non-citizen in a form of community detention, referred to as a “residence determination”.
- Invite a detainee who cannot be removed in the foreseeable future to apply for a new class of Bridging Visa, known as a “Removal Pending Bridging Visa” (RPBV).

These powers are exercised personally by the Minister on a case-by-case basis, taking into account the situation of each individual detainee. Additionally, the author can cooperate at any time to assist in his travel back to Bangladesh. There are therefore a number of ways by which he could be released from detention, and his detention cannot be described as “arbitrary”.

4.9 Subsidiarily, the State party challenges the merits of the allegation on the ground that at no stage was the detention of the author unlawful or arbitrary. On the contrary, detention was reasonable and necessary in the circumstances and could not be said to be inappropriate, unjust or unpredictable. The author’s detention was in accordance with procedures established by the Migration Act and was lawful. The author entered Australia in the context of an unauthorised boat arrival. His detention resulted from his status as an unlawful non-citizen under section 189 of the Migration Act and continued while he chose to challenge the decision that he was not a person to whom Australia owed protection obligations.

4.10 The State party contends that the author’s detention was not arbitrary and that the key elements in determining whether detention is arbitrary are whether the circumstances under which a person is detained are ‘reasonable’ and ‘necessary’ in all of the circumstances.¹³ Further, detention will not be arbitrary if it is demonstrated to be proportional to the end that is sought. In *A. v. Australia*¹⁴, the Committee stated that the detention of asylum seekers is not arbitrary *per se*. The main test in relation to whether detention for immigration control is arbitrary is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. The State party argues that the determining factor is not the length of the detention but whether the grounds for the detention are justifiable. In every respect, the author’s detention was necessary and reasonable to achieve the purposes of Australia’s immigration policy and the Migration Act.

4.11 It has been the experience of the State party that unless unauthorised persons are detained, there is a strong likelihood that they will escape and abscond into the community.¹⁵ It is reasonably suspected that if people are released into the community pending the finalisation of their applications

¹³ See Communication No. 305/1988, *Alphen v. The Netherlands*, Views adopted on 23 July 1990, para.5.8.

¹⁴ Communication No. 560/1993, *A v. Australia*, Views adopted on 3 April 1997, para. 9.2 and 9.3.

¹⁵ In the past, the Australian Government has held some unauthorised arrivals in unfenced migrant hostels. A number of these unauthorised arrivals breached their reporting requirements and absconded. It proved difficult to gain the co-operation of the local communities to locate such persons.

rather than being detained, there would be a strong incentive for them not to adhere to the conditions of their release and to disappear into the community and remain in Australia unlawfully.

4.12 According to the State party, the factors surrounding the detention of the author indicate that detention was justifiable and appropriate and was not arbitrary. He arrived in Australia without a valid visa. Immigration officers were required to detain him pursuant to section 189 (1) of the Migration Act, as he was an unlawful non-citizen. He was detained while his asylum claim was assessed as he remained an unlawful non-citizen. He remained in detention while choosing to pursue avenues for further review and litigation of the decision not to grant him a protection visa. The author is free to leave Australia at any time, thus obtaining his release.

4.13 The State party concludes that the detention of the author is proportionate to the ends sought, namely, to allow his application for a Protection Visa and his appeals to be properly considered. His detention is also necessary as part of the broader policy of ensuring the integrity of Australia's right to control entry into Australia.

4.14 On the author's claim under article 9, paragraph 4, the State party submits that, while the ground for his detention, namely, his failure to obtain refugee status, cannot be reviewed and determined by any Australian Court, the lawfulness of his detention may be open to review, with the result that the communication is inadmissible *ratione materiae* for failure to reveal any evidence of a violation of any of the rights under the Covenant and also fails to substantiate the claim. The State Party further contends that, while Article 9, paragraph 4, guarantees to persons deprived of their liberty the right to have the lawfulness of their detention determined by a court, the author is not denying that he could challenge the lawfulness of his detention, but rather challenged the method of review of the unfavourable decision regarding his protection visa claim. This claim is therefore incompatible with the scope of article 9, paragraph 4.

4.15 The author was detained pursuant to the Migration Act as an unlawful non-citizen. The refusal of a visa to the author could be reviewed both administratively and judicially. Review tribunals in Australia are set up as inquisitorial, non-adversarial bodies to investigate the merits of a person's claim. They are quicker, more efficient, cheaper and more informal than court processes. A review tribunal considers the application for a protection visa afresh, taking into consideration all materials available to the primary decision-maker and any new or additional material. A tribunal can take a different view of the facts and can make different findings on the credibility of an applicant.

4.16 Once an applicant has exhausted administrative review, judicial review is available to consider the legality of the visa refusal or visa cancellation decision. Judicial review does not look at the merits of the decision, but rather, whether it was made in accordance with the law. The Court can consider a range of issues, including whether there was a fair hearing, whether the decision-maker correctly interpreted and applied the relevant law, and whether the decision-maker was unbiased. If the Court finds a legal error of this kind, it remits the matter to the decision-maker for reconsideration.

4.17 The State party notes that the author had extensive review of the decision not to grant him a protection visa before the AAT, the Federal Court and before the Minister. As noted above, he could have pursued his appeal options before the Full Federal Court and the High Court. On the merits of this claim, the State party contends that there is no evidence of how the court system does not provide the author with a remedy.

4.18 On the claim under article 10, the State party contends that this should be found inadmissible as incompatible *ratione materiae* with the provisions of the Covenant. Although it accepts that it is under a limited obligation not to expose the author to a violation of his fundamental rights under the Covenant by returning him to Bangladesh, it argues that the *non-refoulement* obligation is confined to only the most fundamental rights relating to the physical and mental integrity of the person reflected in articles 6 and 7 of the Covenant. From its survey of the Committee's jurisprudence, the State party understands that the Committee has only considered this obligation to apply to the threat of execution under article 6¹⁶ and torture and cruel, inhuman or degrading treatment under article 7 upon return. The Committee does not appear to have found a *non-refoulement* obligation derived from articles other than articles 6 and 7. The State party therefore submits that the author's allegations under article 10 should be dismissed on the ground that they are incompatible with the provisions of the Covenant.

Authors' comments

5.1 On 1 February 2006, the author commented on the State party's observations. He explains that the reason why he withdrew his appeal to the Full Federal Court was that he was legally advised that such an appeal would be futile, and that it would delay the Minister's consideration of his request for a humanitarian visa under section 501J of the Migration Act. He was made aware by his legal adviser of the Minister for Immigration's widely known practice of refusing to consider the exercise of her discretionary power to grant humanitarian visas whilst court proceedings remain pending. He submits that his actions to cease wasting court resources and to fast track a decision under the only power that could see his release from immigration detention was sound. He claims that these circumstances amount to special circumstances which absolve him from exhausting domestic remedies at his disposal. He further claims that he would have had to seek leave to reopen his appeal, the time-limit having expired, and that counsel was unable to identify a single error of law which may have given rise to a successful appeal.

5.2 With regard to the State party's argument that the claims under article 7 are unsubstantiated, the author submits a report prepared by Amnesty International specifically related to former Sharbahara party members, which outlines the present and real risk or torture, in the Bangladeshi prison system, of former members of Sharbahara. The report finally states that "Amnesty International is concerned about the safety of former Sharbahara Party members being returned to Bangladesh. They might risk facing human rights violations from various actors, ranging from former associates, security forces, armed Islamic groups to other communal elements."

5.3 Counsel provides copies of submissions made to the Minister in July, October and November 2005, making a further request for humanitarian intervention, under section 501J of the Migration Act, and invoking Amnesty International's new report. She claims that the author's mental and physical health is very poor and that, if he is returned to Bangladesh, he would die from lack of access to insulin, as he is a diabetic and requires insulin twice a day.

5.4 The author claims that he is likely to be imprisoned if returned to Bangladesh, as a failed asylum seeker. He would be easily identified by Bangladeshi officials, which is buttressed by the fact

¹⁶ Communication No. 470/1991, *Kindler v. Canada*; and Communication No. 539/1993, *Cox v. Canada*.

that the State party communicated with Bangladesh in efforts to deport him in November 2004 and because of his status as a former Sharbahara member.

5.5 Alternatively, if he were able to avoid imprisonment in Bangladesh, in addition to the danger he would face if he were discovered by a member of Sharbahara, his access to life saving medication as a diabetic would be hampered by his need to maintain a low profile to avoid former Sharbahara associates and by lack of access to affordable drugs.

5.6 With respect to the State party's comments on article 9, paragraph 1, counsel notes that the author has been detained for six years and four months since the start of his detention in September 1999. The author has become mentally ill because of his ongoing immigration detention, which resulted in his committal to a mental institution in Adelaide¹⁷. In January 2006, the Guardianship Board of South Australia gave the Public Advocate of South Australia control over the author's living arrangements for three years, on the basis that his health or safety would be at risk due to his mental incapacity if power to make decisions regarding his own autonomy were not removed from him. Psychiatric experts have concluded that prolonged immigration detention has caused psychiatric illness to the author and recommended that he be allowed to live in the community to improve his mental health.

5.7 The author reiterates that he is unable to apply for a visa to be released from immigration detention. The recently introduced Removal Pending Bridging Visa (RPBV) is only available on an invitation to apply from the Minister of Immigration. The author's mental health has been adversely affected in June 2005, when he was one of very few long term detainees not invited to apply for a RPBV.

5.8 On the issue of arbitrariness, the author refers to the case of *A. v. Australia*¹⁸ where the Committee noted that "arbitrariness" must not be equated with "against the law" but must be interpreted more broadly to include such elements as inappropriateness and injustice. In that case, the Committee found that the author's detention for a period of over four years was arbitrary.

5.9 The author claims that the State party has not provided adequate justification for his lengthy detention, including its allegation of a high risk of absconding. He has been at Glenside Campus in Adelaide since July 2005, which is not fenced, and from where patients could easily leave. Despite the ease with which he could have absconded, he has not done so. There is no risk that he will abscond, because he wants a right to stay in Australia. He claims that his treatment is particularly cruel given that most other long term detainees have been released, and that the State party has stated nothing exceptional about his case to justify such lengthy detention.

5.10 In relation to article 9, paragraph 4, the author refers to the case of *Bakhtiyari v. Australia*¹⁹, and contends that judicial review of his detention would be restricted to a formal assessment of whether he was a "non-citizen" without an entry permit. There is no judicial mechanism to review the justification of his detention in substantive terms.

Issues and proceedings before the Committee

¹⁷ Glenside Campus of the Royal Adelaide Hospital.

¹⁸ Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para.9.2.

¹⁹ Communication No.1069/2002, *Bakhtiyari v. Australia*, Views adopted on 6 November 2003.

Consideration of Admissibility

6.1 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 communication is admissible under the Optional Protocol.

6.2 With respect to the author's claim under article 9, paragraph 1, the Committee notes the State party's contention that the author has failed to substantiate his claim. The Committee considers that the author, who has provided considerable details about the length of his mandatory immigration detention and its effect on his mental health, has sufficiently substantiated this claim, for purposes of admissibility.

6.3 The State party contends that the claim under article 9, paragraph 4, is incompatible *ratione materiae* with the provisions of the Covenant. The Committee notes that the author's detention is based on the statutory ground that he is an unlawful non-citizen. It further notes that the author was placed in mandatory immigration detention pursuant to Section 189 of the Migration Act, and that his detention was an automatic consequence of his status as an unlawful non-citizen. The only effective challenge to his detention would be a challenge to his status as a non-citizen, i.e. to the ground on which he was detained, as opposed to a challenge of the lawfulness of his detention. The Committee concludes that the author's claim falls within the scope of article 9, paragraph 4, and declares it admissible.

6.4 The Committee has noted the State party's challenge to the admissibility of the author's claim under article 7 for non-exhaustion of domestic remedies, because he withdrew his appeal to the Full Bench of the Federal Court, and the author's contention that this remedy was not an effective one. The Committee notes that a review by the Full Bench of the Federal Court in the author's case would only have related to the granting of a protection visa with regard to the 1951 Refugee Convention. However neither the AAT nor the Federal Court examined the author's case in the light of the State party's obligations under the Covenant and the author's risk of torture if returned to Bangladesh. On appeal, the Full Bench of the Federal Court would have considered the issue from the same perspective of the 1951 Convention. The Committee does not consider that this would have constituted an effective remedy for the author in relation to his claims under article 7.

6.5 However, the Committee also notes that the author has filed a request for a visa on humanitarian grounds under section 501J of the Migration Act. According to information before the Committee, the "Guidelines on Ministerial Powers under sections (...) 501J of the Migration Act" spell out the circumstances in which the Minister may exercise his or her public interest powers to substitute for a decision of a review tribunal, including the AAT, a decision which is more favourable to the visa applicant. Factors to be taken into account include:

"circumstances that may bring Australia's obligations as a signatory to the International Covenant on Civil and Political Rights into consideration. For example:

- A non-refoulement obligation arises if the person would, as a necessary and foreseeable consequence of their removal or deportation from Australia, face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture and cruel, inhuman or degrading treatment or punishment) of the ICCPR, or face the death penalty

(...)

- Issues relating to Article 23.1 of the ICCPR are raised (...).”

As of today, the author’s request for a humanitarian visa under article 501J of the Migration Act remains pending. While the Committee notes that the Minister’s power is a discretionary one, in the particular circumstances of the author’s case, which falls under the exclusion clause of article 1F of the 1951 Refugee Convention, it cannot be excluded that the exercise of this prerogative could in principle provide the author with an effective remedy. The Committee accordingly concludes that this claim is, at this stage, inadmissible. In addition, the Committee considers that the author’s claim under article 10 on the conditions of detention in Bangladesh is related to that under article 7 and also finds it inadmissible at this stage.

6.6 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under article 9, paragraphs 1 and 4.

Consideration of Merits

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

7.2 In respect of the author’s claim under article 9, paragraph 1, that he was held in arbitrary and indefinite detention, the Committee recalls its jurisprudence that the notion of “arbitrariness” must not be equated with “against the law” but be interpreted more broadly to include such elements as inappropriateness and injustice. In this regard, the Committee recalls that the important guarantee contained in Article 9 is applicable to all deprivations of liberty, whether in criminal cases or other cases such as, for example, mental illness, drug addiction, educational purposes, immigration control, etc²⁰. Thus remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding or interference with evidence²¹. It recalls that every decision to keep a person in detention should be open to periodical review, in order to reassess the necessity of detention and detention should not continue beyond the period for which a State party can provide appropriate justification²².

7.3 In the present case, the State party has provided as justification for the author’s detention its general experience that asylum seekers abscond if not retained in custody. The Committee notes that the author was placed in an institution as a result of his mental illness, which has been found to be the consequence of his prolonged detention which, by then, had lasted for some 6 years. From the time of his placement in an open institution in July 2005 until the present time, he has not attempted to abscond. The State party has not provided any other justification, in relation to the author’s particular case, which would justify his continued detention for a period of over seven years as at present. The additional fact that the author has become mentally ill during this period should have been a sufficient ground for a prompt and substantive review of his detention. The Committee thus

²⁰ See paragraph 1 of General Comment No.8 on Article 9.

²¹ Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para.9.2.

²² Communication No.1069/2002, *Bakhtiyari v. Australia*, Views adopted on 6 November 2003, para.9.2.

concludes that the author's mandatory immigration detention, for a period of over seven years, was arbitrary within the meaning of article 9, paragraph 1.

7.4 With respect to the author's claim under article 9, paragraph 4, the Committee notes the State party's contention that the law and policy have changed since the consideration of *A v. Australia*, and that the Minister now has a non-delegable and non-compellable power with respect to new grounds for release. While the Committee welcomes this amendment, it regrets that the author was not part of the detainees who were "invited" to apply for a RPBV. It notes furthermore that the amendment does not provide for judicial review of the grounds and circumstances of detention. The Committee has taken note that the State party did not accept its views in *A. v. Australia*. It considers, however, that the principles applied in that case remain applicable to the present case. Indeed, the Australian courts' control and power to order the release of an individual remain limited to a formal determination whether this individual is an unlawful non-citizen within the narrow confines of the Migration Act. If the criteria for such determination are met, the courts have no power to review any substantive grounds for the continued detention of an individual and to order his or her release. The Committee recalls that court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere formal compliance of the detention with domestic law governing the detention²³. The Committee concludes that the author's right under article 9, paragraph 4, to have his detention reviewed by a court, was violated.

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including release and appropriate compensation.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognised 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 recognised 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.

[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.]

²³ Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para.9.5.