

## CHILDREN'S RIGHTS - REFUGEES

### III. JURISPRUDENCE

#### ICCPR

*Jalloh v. The Netherlands* (794/1998), ICCPR, A/57/40 vol. II (26 March 2002) 144 (CCPR/C/74/D/794/1998) at paras. 2.1-2.4, 8.2, 8.3 and 9.

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2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.<sup>1/</sup>

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.<sup>2/</sup> His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.<sup>3/</sup> On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

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2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.<sup>4/</sup>

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8.2 With regard to the author's claim that his rights under article 9 have been violated, the Committee notes that his detention was lawful under Dutch law, section 26 of the Aliens Act. The Committee further notes that the author had his detention reviewed by the courts on two occasions, once twelve days after the beginning of his detention, and again two months later. On both occasions, the Court found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. The question remains therefore as to whether his detention was arbitrary. Recalling its previous jurisprudence<sup>6/</sup> the Committee notes that "arbitrariness" must be interpreted more broadly than "against the law" to include elements of unreasonableness. Considering the author's flight from the open facility at which he was accommodated from the time of his arrival for around 11 months, the Committee considers that it was not unreasonable to have detained the author for a limited time until the administrative procedure relating to his case was completed. Once a reasonable prospect of expelling him no longer existed his detention was terminated. In the circumstances, the Committee finds that the author's detention was not arbitrary and thus not in violation of article 9 of the Covenant.

8.3 The author has raised a further claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes

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that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

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9. The Human Rights Committee...is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

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### Notes

1/ On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

2/ It appears that the Aliens Department attempted to contact the author on 9 August 1996 but he had already fled.

3/ No further details on the type of detention facility or on the specific conditions of his detention have been provided.

4/ This information was provided by counsel after the initial submission to the Human Rights Committee.

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6/ *Van Alpen v. The Netherlands*, Case no. 305/1988, Views adopted on 23 July 1990, *Suárez de Guerrero*, Case no. 45/1979, Views adopted on 31 March 1982.

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*Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003)301 (CCPR/C/79/D/1069/2002) at paras. 2.1-2.3, 2.5-2.8, 2.10, 2.12, 2.14, 9.3, 9.5-9.7, 10 and 11.

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2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22

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October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ("RRT") dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

2.3 Some time after July 2001, Mr. Bakhtiyari found out from an Hazara detainee who had been released from the Woomera detention facility that his wife and children had arrived in Australia and were being held at Woomera. On 6 August 2001, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department"), as a matter of standard procedure following an unsuccessful appeal to the RRT, assessed the case in the light of the Minister's public interest guidelines,<sup>1/</sup> which include consideration of international obligations, including the Covenant. It was decided that Mrs. Bakhtiyari and the children did not meet the test of the guidelines. In October 2001, Mrs. Bakhtiyari applied to the Minister for Immigration requesting that he exercise his discretion under s.417 of the *Migration Act* to substitute, in the public interest, a more favourable decision for that of the RRT, on the basis of the family relationship with Mr. Bakhtiyari.

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2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the *Migration Act*. The application sought to require the Minister to grant a visa to Mrs. Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ("the

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Department") issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration Act*, but was informed that such matters were generally not referred to the Minister while litigation was underway.

2.7 On 11 June 2002, the High Court granted an Order Nisi in respect of the application of Mrs. Bakhtiyari and her children, finding an arguable case to have been established. On 27 June 2002, some 30 detainees, amongst them the eldest sons of Mrs. Bakhtiyari, Almadar and Mentazer, escaped from the Woomera facility. On 16 July 2002, Mrs. Bakhtiyari again made a request to the Minister under s.417 of the *Migration Act*, but was again informed that such matters were generally not referred to the Minister while litigation was under way. On 18 July 2002, the two boys who had escaped gave themselves up at the British Consulate in Melbourne, Australia, and sought asylum. The request was refused and they were returned to the Woomera facility.

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the *Family Law Act 1975* 2/ for the release of the boys from detention and for them to be made available for examination by a psychologist.

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2.10 On 9 October 2002, the Family Court (Dawe J) dismissed the application made to it, finding it had no jurisdiction to make orders in respect of children in immigration detention. On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

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2.12 On 4 February 2003, the High Court, by a majority of five justices against two, refused the application of Mrs. Bakhtiyari and her children to be granted a protection visa on account of Mr. Bakhtiyari's status. The Court found that as the Minister was under no obligation to make a new decision, no object would be served in setting aside his decision, and in any event it was not tainted by illegality, impropriety or jurisdictional error. Likewise, the RRT's decision on their appeal was not tainted by any jurisdictional error.

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2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted

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for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

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9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, 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 immigration policies by, for example, 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 Mrs. Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

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9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to

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the Minister under section 417 of the *Migration Act*, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtiyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end

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with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

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### Notes

1/ The Guidelines, provided by the authors, provide 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 or 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/ Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

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*For dissenting opinion in this context, see Bakhtiyari v. Australia (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at Individual Opinion by Sir Nigel Rodley, 319.*