



**International covenant
on civil and political
rights**

Distr.
RESTRICTED*

CCPR/C/90/D/1255,1256,1259,
1260,1266,1268,1270&1288/2004
11 September 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE

Ninetieth session

9 - 27 July 2007

VIEWS

Communications Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004

<u>Submitted by:</u>	Saed Shams (1255/2004), Kooresh Atvan (1256/2004), Shahin Shahrooei (1259/2004), Payam Saadat (1260/2004), Behrouz Ramezani (1266/2004), Behzad Boostani (1268/2004), Meharn Behrooz (1270/2004), Amin Houvedar Sefed (1288/2004) (All represented by Refugee Advocacy Service of South Australia)
<u>Alleged victims:</u>	The authors
<u>State Party:</u>	Australia
<u>Date of communications:</u>	9 February 2004 (1255/2004), 9 February 2004 (1256/2004), 15 February 2004 (1259/2004), 9 February 2004 (1260/2004), 12 March 2004 (1266/2004), 9 February 2004 (1268/2004), 9 February 2004 (1270/2004) and 25 May 2004 (1288/2004) (initial submissions)
<u>Document references:</u>	Special Rapporteur's rule 92/97 decision, transmitted to the State party on 5 March 2004 (1255, 1256, 1259, 1260/2004), 15 March 2004 (1266/2004), 18 March 2004 (1268/2004) and 17 March 2004 (1270/2004) (not issued in document form). Special Rapporteur's rule 97 decision, transmitted to the State party on 25 May 2004 (1288/2004)
<u>Date of adoption of Views:</u>	20 July 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Arbitrary/mandatory detention and failure to review lawfulness of detention; Inhuman and degrading treatment in detention

Procedural issue: Inadmissibility on the grounds of non-exhaustion and non-substantiation

Substantive issues: Arbitrary detention, mandatory asylum detention, no review of lawfulness of detention, inhuman and degrading treatment

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

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

On 20 July 2007, 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 communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004.

[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

Ninetieth session

concerning

Communications Nos. 1255,1256,1259,1260,1266,1268,1270,1288/2004**

<u>Submitted by:</u>	Saed Shams (1255/2004), Kooresh Atvan (1256/2004), Shahin Shahrooei (1259/2004), Payam Saadat (1260/2004), Behrouz Ramezani (1266/2004), Behzad Boostani (1268/2004), Meharn Behrooz (1270/2004), Amin Houvedar Sefed (1288/2004) (All represented by Refugee Advocacy Service of South Australia)
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The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 July 2007,

Having concluded its consideration of communication Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, submitted to the Human Rights Committee on behalf of Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

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.

The text of an individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Behrooz, Amin Houvedar Sefed 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 authors of the communication are Messrs. Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz, Amin Houvedar Sefed, all Iranian nationals currently residing in Australia. They claim to be victims of violations by Australia of articles 7; 9; paragraphs 1 and 4; and 10, paragraph 1, of the International Covenant on Civil and Political Rights¹. All are represented by the Refugee Advocacy Service of South Australia Inc.

1.2 Between 5 and 18 March 2004, with respect to the authors' requests for interim measures under rule 86 of the rules of procedure, the Rapporteur for New Communications and Interim Measures requested the State party to inform it, as to whether the authors would be the subjects of removal prior to the last day of the following Committee session (2 April 2004). On 5 April 2004, having received no response to this request, the Rapporteur decided not to issue rule 86 requests in any of these cases, but left the requests pending subject to receiving further information from the State party and the authors. No further information was provided by any of the parties.

1.3 On 20 July 2007, during the 90th session of the Human Rights Committee, the Committee decided to join the consideration of these eight communications.

Factual background²

2.1 Between October 2000 and April 2001, the authors arrived in Australia from Iran by boat. As they were considered "unlawful non-citizens", all of them were detained under section 189 (1) of the Migration Act 1958³, and all were remanded in detention until receipt of a visa to remain in Australia. Upon arrival, each of the authors applied to the Department of Immigration and Multicultural and Indigenous Affairs for protection visas. They all subsequently appealed against the denial of protection visas to the Refugee Review Tribunal, which decided against them. They

¹ The authors had previously also claimed violations of articles 7, 18, paragraph 1, 19, paragraph 1, 26 and 27, with respect to their return to Iran but in light of the receipt of temporary protection/humanitarian visas, these claims were withdrawn (see below - authors' comments).

² To reduce the size of the draft and since the claims relating to the authors' return to Iran were subsequently withdrawn by them, the domestic procedural and judicial steps taken by them prior to receiving their visas as well as claims relating to their fear of return to Iran have not been included.

³ This section provides that, "If an officer knows or reasonably suspects that a person in the migration zone (other than an excised offshore place) is an unlawful non-citizen, the officer must detain the person".

appealed the negative decisions of the Refugee Review Tribunal to the Federal Court which also found against them and from there they appealed to the Full Federal Court. Some of the authors also applied for special leave to appeal to the High Court, against the decision of the Full Court of the Federal Court. Following a period of between three and, in some cases, over four years of detention, all authors received either a permanent humanitarian visa or a temporary protection visa (TPVs). The authors provided the following information on their conditions of and treatment in detention.

2.2 On 3 November 2000, Mr. Saed Shams arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 7 June 2005. While he was detained at the Curtin Detention Center, he was involved in a demonstration by the prisoners over conditions at the center. He was arrested and charged with property damage. He spent 14 months in the Perth penitentiary before being cleared of the charge by a Magistrate. While detained at Baxter Immigration Detention Center, he was placed in isolation for one week after he complained about the condition of his shower and bathroom. His complaint led to a dispute with two guards during which he alleged that his head was forced into a mirror and he received cuts and abrasions. It is alleged that his mental health seriously deteriorated during his time in detention. He became severely depressed and regularly took medication. He saw a doctor on several occasions and told him/her that he frequently harmed himself and felt unable to control his impulses.⁴ On various occasions he was denied access to visitors, regular exercise and recreation time, as well as privacy when detained in “isolation”.

2.3 On 20 December 2000, Mr. Kooresh Atvan arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 18 August 2005. He alleges that he did not have immediate access to a lawyer and was detained “incommunicado”. On 20 April 2001, Mr. Shahin Shahrooei arrived in Australia. He was detained in several immigration detention centres prior to receiving a permanent humanitarian visa on 1 September 2005. He alleges that he was detained “incommunicado”. While in detention he suffered psychological harm and distress. He was psychologically evaluated on 2 November 2001, after stating that he suffered from serious depression and had attempted self harm. He alleges that his request for an alternative interpreter was denied. He argues that his testimony was not believed and that he was misinterpreted in his interviews, due to the interpreter’s bias against him.

2.4 On 22 December 2000, Mr. Payam Saadat arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 27 April 2005. During a fire at Woomera Detention Centre in late 2002 and early 2003, much of the documentation pertaining to his case was allegedly destroyed. He alleges that he was detained “incommunicado”, without access to a lawyer. On 23 December 2000, Mr. Behrouz Ramezani arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 14 April 2005. He claims that he was detained “incommunicado”, and was refused immediate access to a lawyer.

2.5 In November 2000, Mr. Behzad Boostani arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 20 July 2005. He

⁴ No corroborating reports medical or otherwise were provided.

alleges that he was denied access to visitors, medication, telephone calls, physical exercise and legal advice and was subjected to “solitary confinement” on various occasions, where he reportedly made several suicide attempts. At Curtin Detention Centre, he was treated by a psychologist for depression. He also alleges that he was detained “incommunicado”, with out access to a lawyer.

2.6 On January 2001, Mr. Meharn Behrooz arrived in Australia. He was detained in several immigration detention centres prior to receiving a temporary protection visa on 6 December 2004. He alleges that he was kept in “solitary confinement” and, on several occasions was denied a lawyer, access to visitors, telephone calls, hot showers, privacy, regular exercise and recreation. He also alleges that he was detained “incommunicado” and that he was sprayed with capsicum spray, handcuffed and beaten, as a result of which he suffered psychological harm and distress. On 12 October 2000, Mr. Houvedar Sefed arrived in Australia and remained in immigration detention until receipt of a permanent humanitarian visa on 9 September 2005.

The Complaints

3.1 The following seven complainants, namely Messrs. Atvan, Behrooz, Boostani, Ramezani, Saadat, Shahrooei and Shams, claim that the mandatory nature of their detention amounts to torture or cruel, inhuman or degrading treatment or punishment, in violation of article 7.

3.2 The following six complainants allege that their “ general treatment” during detention violated article 7: Messrs. Atvan; Behrooz; Boostani; Ramezani; Saadat; and Shams. Of these, the following complainants also claim violations of article 7 with respect to the following specific claims of mistreatment: (a) detention in isolation (Messrs. Behrooz, Boostani, and Shams); (b) denial of access to visitors (Messrs. Behrooz, Boostani, and Shams); (c) denial of usual and regular exercise and recreation time (Messrs. Behrooz, and Shams); (d) denial of privacy when detained in isolation: (Messrs. Behrooz, and Shams); (e) denial of access to legal advice (Mr. Boostani); and (f) denial of medication (Mr. Boostani).

3.3 The following four complainants make further allegations with regard to their general treatment in detention but do not invoke any specific articles of the Covenant: Messrs. Behrooz; Boostani; Shahrooei; and Shams. Mr. Behrooz claims a violation of his rights under the Covenant with respect to the fact that he was sprayed with capsicum spray, handcuffed, beaten and that he suffered physical assault while detained in immigration detention. Messrs. Behrooz, Boostani, Shahrooei and Shams all claim violations of their rights on account of the psychological harm and distress they suffered in detention, in some cases leading to depression and attempted suicide.

3.4 The following seven complainants allege that their treatment in general in immigration detention in Australia violated article 10, paragraph 1: Messrs. Atvan; Behrooz; Boostani; Ramezani; Saadat; Shahrooei; Shams.⁵

3.5 The following seven complainants allege that their “incommunicado” detention violated article 10, paragraph 1: Messrs. Atvan; Behrooz; Boostani; Ramezani; Saadat; Shahrooei; Shams.

⁵ The authors provide no further explanation of this claim.

Some allege that the denial of immediate access to a lawyer or access to an alternative interpreter while held incommunicado also violated article 10, paragraph 1.

3.6 All complainants allege that their detention was arbitrary and in violation of article 9, paragraph 1. According to section 189 (1) of the Migration Act 1958, detainees cannot be released from detention under any circumstances. They invoke the Committee's Views in *A. v. Australia*⁶ and *C. v. Australia*⁷.

3.7 All complainants allege that the lawfulness of their detention was not open to review, in violation of article 9, paragraph 4. They claim that there is no provision which would have allowed them to be released from detention either administratively or by a court and there was no justification for their prolonged detention. There was no assessment of whether there are any risk factors which would tend to favour their prolonged detention such as health or public safety factors; nor any assessment of whether they were at risk of absconding.

The State party's submission on admissibility and merits

4.1 On 4 January 2006, the State party responded to the admissibility and merits of all the communications jointly. On the facts and by way of update, the State party submitted that two of the authors (Mr. Houvedar Sefed and Mr. Shahrooei) had been granted permanent humanitarian visas by the Minister, exercising her powers under section 417. As to the remaining six authors, after being allowed to lodge new visa applications by the Minister under section 48B, all were granted temporary protection visas (TPVs). The State party submits that a TPV usually allows for three years of temporary residence in Australia for non-citizens who arrived unlawfully in the State party and who are found to be owed protection obligations under the criteria set out in the 1951 Convention on the Status of Refugees and its 1967 Protocol, as well as relevant legislation. TPV holders wishing to seek further protection in Australia can lodge a second application for protection at any time after their TPV was granted and before it expires.

4.2 On admissibility, the State party rejects the authors' claim that their detention was mandatory and in violation of article 7, as inadmissible for lack of substantiation, or alternatively, incompatibility with the Covenant. The complainants have not substantiated the claim that the mandatory nature of their detention itself, as distinct from their actual treatment in detention or the conditions of detention, caused them humiliation or physical or mental suffering of a level severe enough to constitute a breach of article 7, or that it extends beyond elements arising from the mere fact of detention itself. The State party argues that article 7 cannot be construed as including a right against mandatory asylum detention.

4.3 The State party submits that the claims relating to the general treatment of the authors in detention are inadmissible for non-exhaustion of domestic remedies and/or non-substantiation. It provides a detailed list and explanation of the domestic remedies available: a complaint to the immigration detention services provider; a complaint to the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA); a complaint to the Commonwealth Ombudsman; a complaint to the HREOC under the Human Rights and Equal Opportunity Commission Act 1986 (Cth); and civil and criminal remedies. According to the State party, most of the

⁶ *Communication no. 560/1993*, Views adopted on 3 April 1997.

⁷ *Communication no. 900/1999*, Views adopted on 28 October 2002.

complainants failed to avail themselves of any or all of these remedies. Mr. Shams lodged a complaint with the Australasian Correctional Management (ACM), who referred his complaint about the use of force by Detention Services Officers (DSO) to the Australian Federal Police (AFP). The police subsequently declined to investigate the case as there was insufficient evidence. He also lodged a complaint with the Ombudsman. Mr Boostani lodged a complaint with DIMIA, but did not take other steps to exhaust domestic remedies in relation to his other claims⁸. In the State party's view, all the communications, except that of Mr. Shams, should be declared inadmissible for non-exhaustion of domestic remedies.

4.4 In addition, the State party submits that most of the authors' allegations are made by way of general statement with no further information provided in their support. For example, Mr. Behrooz, Mr. Boostani, and Mr Shams, all allege that their treatment in detention breached article 7 by virtue of their being subject to all or some of the following: detention in isolation and denial of privacy, access to visitors, and regular exercise and recreation time. However, they do not provide further information, such as information relating to the dates and length of time spent in isolation, the circumstances surrounding the use of such detention, or the conditions of incommunicado detention to indicate that this practice in any way amounted to a breach of article 7. Mr. Behrooz does not provide any information in support of his general allegation to have been handcuffed and beaten. He has given no explanation of the circumstances surrounding these allegations. Messrs. Behrooz, Boostani, Shahrooei and Shams, all fail to provide any information in support of their general claims to have suffered psychological harm and distress in immigration detention. The State party applies the same arguments to the claims under article 10, paragraph 1, relating to their treatment in detention and alleged incommunicado detention.

4.5 On the merits, and in relation to the general treatment in detention, the State party sets out the Immigration Detention Standards developed by DIMIA in consultation with the Commonwealth Ombudsman's Office and HREOC, which describes the treatment of detainees in immigration detention in Australia. Section 5 (1) of the Migration Act permits immigration officers to take such action and use such force as is reasonably necessary to take a person into or keep a person in immigration detention. The State party denies that detainees in immigration detention facilities are held in isolation or solitary confinement. Observation rooms known as Management Support Units (MSU) are used to monitor detainees who may pose an immediate threat to themselves, to others, to the facility itself or to the security of the facility. Detainees are monitored at set intervals, as appropriate to the circumstances of a particular case, including through the use of closed circuit television cameras. Transfers to a MSU are regularly assessed and reviewed by professionals. Whilst accommodated in a MSU, a detainee's access to telephones, visitors, television and personal belongings may be temporarily suspended depending on a number of factors, including potential self-harm, mental health and well-being and the good order and security of the facility. Such detainees have access to a shower cubicle with hot and cold running water, a toilet, and a washing basin. The rooms contain a bed with a mattress, pillow, pillow case, sheets and a mattress protector. Detainees also have access to the MSU recreation room and an outside courtyard area for exercise or to smoke. Dependent on the detainee's individual management plan, he or she can interact with other detainees housed in the MSU in the outside courtyard area.

⁸ The outcome, if any, of this complaint is not provided.

4.6 The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) works closely with experienced health professionals, including mental health professionals, to ensure that the health care needs of all detainees are appropriately met. The health care needs of each detainee are identified by qualified medical personnel as soon as possible after a person is placed in detention. Medical treatment is available 24 hours a day, seven days a week with ready access to doctors and registered nurses. Detainees have access to psychological/ psychiatric services, trauma counselling and dental services. Where necessary, they are referred to external advice and/or treatment. Where a person is held in immigration detention, DIMIA has an obligation under Section 256 of the Migration Act, to facilitate that person's obtaining legal advice or taking legal proceedings in relation to his or her immigration detention. When held in immigration detention detainees may communicate with their legal representatives, the Ombudsman and HREOC at all times, including in a MSU. Upon receiving a request by a detainee for access to legal advice, DIMIA makes every effort to facilitate the visit. Access may be in person or by telephone. DIMIA provides reasonable access to interview rooms and video-conferencing facilities, subject to availability.

4.7 As to the claims of Mr Atvan, Mr Ramezani, and Mr Saadat that the manner in which they were treated in detention violates article 7, the State party submits that no further elaboration is provided by the authors and that an extensive search of Departmental records has provided no evidence of harsh treatment upon arrival or in detention. Mr Shahrooei does not provide any evidence indicating that he suffered any psychological difficulties as alleged or that these difficulties were caused by being subjected to mistreatment contrary to article 7. The evidence indicates that Messrs Behrooz, Boostani and Shams were relocated to a MSU on a number of occasions. They were only detained there on a temporary basis, to ensure their own safety and to ensure the security of the detention facility and the safety of detainees and detention centre personnel. The measure was certainly not intended to inflict any physical or mental suffering on them. There is no evidence to suggest that this measure, or the alleged deprivations (lack of privacy, access to visitors, and regular exercise and recreation time) suffered by Messrs Behrooz and Shams as a result, amounted to 'torture' or to 'cruel, inhuman or degrading treatment or punishment'. Nor does the evidence do not support Mr. Behrooz's allegation that he was sprayed with capsicum spray and beaten. There is no evidence either of Mr Boostani's claim that he was denied access to legal advice, or of Mr Shams' claim that he suffered psychological harm and distress of sufficient gravity to justify the conclusion that article 7 had been breached.

4.8 The State party contests the allegation that some of the authors were detained "incommunicado", which it understands as the "complete isolation from the outside world such that not even the closest relatives know where the person is located"⁹. Upon arriving in Australia, unlawful non-citizens are placed in separation detention to ensure the integrity of its visa assessment process. Subject to DIMIA's approval, detainees in separation detention may communicate by letter or fax to an overseas address to confirm their safe arrival in Australia. These detainees do not, except with DIMIA's approval: have contact with detainees who are not held in separation detention; receive personal visits; have access to telephones or faxes for communicating with members of the community; or have access to incoming mail. However, visits and communication between detainees in separation detention and DIMIA, the Immigration Detention Advisory Group (IDAG), Commonwealth Ombudsman, the United

⁹ Nowak, ICCPR Commentary, 2nd ed. p.187.

Nations High Commission for Refugees, the Australian Red Cross, consular personnel or HREOC is possible, in accordance with the standards applied to other detainees. They have access to the full range of detention facilities and services, including food, health, welfare and recreation.

4.9 Detainees remain in separation detention for no longer than 28 days, save for exceptional circumstances. Once an initial assessment has been made and it has been determined whether a detainee attracts the State party's obligations under the Refugees Convention, the detainee is removed to general detention with other detainees whose claims have been assessed. The Immigration Detention Standards ensure that detainees in general detention have access to telephones, faxes and mail, to enable them to maintain a reasonable level of contact with relatives, friends, and with diplomatic and consular representatives of the country to which they belong and with their legal representatives. They can receive personal visits from such persons. Visits by the Commonwealth Ombudsman, HREOC, the Australian Red Cross and other organisations or groups as determined by DIMIA are also facilitated either at the request of the detainee or of the organisation. On the issue of interpretation, the State party submits that there is no evidence, either in the material provided in Mr Shahrooei's communication or divulged by searches of the government's own records, that he complained about regarding his interpreter at the time or that he was denied access to an alternative interpreter, as he alleges.

4.10 As to the claims of a violation of article 9, paragraph 1, for unlawful detention, the State party understands that the term 'law' as it is used in this article refers to law in the domestic legal system and that the detention of the complainants occurred in accordance with procedures established by the Migration Act and was therefore lawful. The complainants entered Australia without a valid visa, and their detention resulted directly from their status as unlawful non-citizens, under Section 189 of the Migration Act. 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, as happened with all complainants. The State party denies that their detention was arbitrary. It refers to the Committee's jurisprudence, which has stated that the detention of unauthorised arrivals, including asylum seekers, is not arbitrary *per se*, and that the main test is whether it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances.¹⁰ Further, there is no indication in the Committee's jurisprudence that detention for a particular length of time could be considered *per se* arbitrary. The determining factor is not the length of the detention but whether the grounds for the detention can be justified.

4.11 The State party reiterates that mandatory immigration detention is an exceptional measure reserved for people who arrive in Australia without authorisation. The detention of such persons is necessary to ensure that non-citizens entering Australia are entitled to do so, while also upholding the integrity of Australia's migration system, that they are available for processing of any protection claims and that they are available for removal if found not to have a basis to lawfully remain in Australia. The State party has no system of identity cards or national means of identification or system of registration which is required for access to the labour market, education, social security, financial services and other services, which makes it difficult for the Government to detect, monitor and apprehend illegal immigrants within the community. Various versions of Australia's immigration detention provisions have been considered by the High

¹⁰ *A v Australia*, supra.

Court over the years, including *Chu Kheng Lim v. Minister for Immigration and Ethnic Affairs*, where the Court considered the constitutional validity of the then Section 88 and Part 2, Division 4b of the Migration Act. It held that mandatory detention provisions would be constitutionally valid if they limited detention to, “..what was reasonably capable to being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.”¹¹

4.12 The State party explains that there are mechanisms in the legislation which provide for the release of people from detention in certain circumstances: through a Bridging Visa (Section 73 of the Migration Act) or humanitarian consideration under Section 417. The factors surrounding the detention of each of the complainants indicates that their detention was justifiable and appropriate and was not arbitrary or otherwise in violation of article 9, paragraph 1: they arrived in Australia without valid visas and immigration officers were therefore required to detain them pursuant to Section 189 (1) of the Migration Act; they were detained while their asylum claims were assessed as they remained unlawful non-citizens; several of the detainees did try to escape the detention facilities and therefore posed a risk to themselves and potentially to the community; and as soon as they were granted visas, they were released. Since the complainants were detained, the Migration Act and Regulations have been amended to give the Minister the non-delegable and non-compellable power to do any of the following: 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”; or 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.

4.13 As to the author’s reliance on *A v Australia*¹², the State party notes that the Australian Government did not accept the Committee’s view that the detention of the author in that case was arbitrary. As to the claim that there was a violation of article 9, paragraph 4, as there was no possibility of review of the lawfulness of their detention, the State party submits that this does not mean that a court must be able to order the release of a detainee even if detention is lawful. A court must be able to consider the detention and must have the real and effective power to order the detainee’s release if the detention is *unlawful*, which it understands to refer to domestic law. Those in immigration may take proceedings before the High Court under section 75 of the Commonwealth of Australia Constitution Act 1901, to obtain a writ of mandamus or other appropriate remedy. This jurisdiction may also be invoked in the Federal Court. The remedy of *habeas corpus* remains available to persons in detention. The fact that Section 189 (1) of the Migration Act provides for mandatory detention of people such as the complainants does not prevent the court from ordering their release if they are found not to be lawfully detained. The State party distinguishes the present cases from the facts in *A. v. Australia* in that the present

¹¹ (1992) 176 CLR 1 at 33 per Brennan, Deane, and Dawson JJ. Also in *Al-Kateb v Godwin, Keenan & Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] HCA 37; (2004) 208 ALR 124 at 34 per McHigh J; at 226 per Hayne J, the High Court held that sections 189, 196 and 198 of the Migration Act validly authorise the immigration detention of an unlawful non-citizen who is liable for removal while efforts to remove the person continue

¹² *Supra*.

authors had access to judicial review and the author's application in *A. v. Australia* was assessed under the Migration Amendment Act, whereas the law has now changed under the Migration Act.

The authors' comments on the State party's submission

5.1 By letter received on 11 July 2006, the authors confirm that they have been allowed to remain in the State party and for this reason they withdraw their claims relating to their removal to Iran, but they maintain their other claims. They reiterate that the detention of asylum seekers is mandatory, that there is no discretion to consider the reasonableness of detention in individual cases, that asylum seekers are excluded from every avenue of judicial review, including the final resort of a writ of habeus corpus. They point to domestic jurisprudence to support this claim¹³. They submit that the prolonged and indefinite nature of detention without any proper review procedure breaches the Covenant. In each case, detention was in excess of between three and in most cases over four years, without any foreseeable prospect of release. The anxiety caused to the complainants by the nature of their detention resulted in humiliation and physical and mental suffering. Now that the authors have been found to be refugees, the anguish created as a result of detention is evident.

5.2 As to the State party's interpretation of the concept of "lawful detention" in article 9, paragraph 1 (see para. 4.10), the authors submit that if it only referred to domestic law, there would be no need for the Committee ever to determine "lawfulness" and the most unjust laws of States could go unchallenged. In the authors' view, the length of time in detention was not proportionate and appropriate, and the methods used by the State party to determine refugee status were obviously flawed causing the authors great anguish.

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 rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant. 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.

6.2 The Committee notes that, in light of the granting of temporary protection visas or humanitarian visas since the registration of these communications, all authors have withdrawn their claims relating to the fear of torture in the event of their return to Iran. All of the other claims are maintained. As to the claim that the mandatory nature of the authors' detention itself violates article 7, the Committee finds that the authors have failed to substantiate that their

¹³ Australian High Court decision in "Al -Kateb", and the Federal Court of Australia decision in *Falee v. Minister for Immigration, Multicultural & Indigenous Affairs* [2004] FCA 1681. In this latter case, Tamberlin J made the following comments on the High Court decision in *Al -Kateb*, "the Court decided that ss 189, 196 and 198 of the Migration Act 1958 (Cth) required Mr. Al -Kateb to be kept in immigration detention until removed from Australia. The Court considered that the wording of these provisions was unambiguous, and that they could not be read subject to any purpose or limitation such as that they should not affect fundamental human rights."

detention *per se*, as distinct from their treatment in detention, amounted to torture or to cruel, inhuman or degrading treatment or punishment within the meaning of article 7. Thus, this claim is inadmissible under article 2 of the Optional Protocol.

6.3 The Committee notes the authors' claims, under articles 7 and 10, paragraph 1 of the Covenant, of inhuman and degrading treatment in detention, including alleged denial of medication, assault and incommunicado detention, which in some cases allegedly led to psychological difficulties. In the Committee's view, incommunicado detention is the denial of a detainee's access to the outside world. It does not accept the State party's view that it additionally requires that the outside world must also be kept in ignorance of a detainee's whereabouts (para. 4.8). The Committee notes the State party's argument that, apart from Mr. Shams, none of the authors in question have exhausted domestic remedies. It notes that the authors have failed to contest this argument and thus finds that, except in the case of Mr. Shams, their claims relating to their general treatment in detention are inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol. As to Mr. Shams, the Committee notes that the author has failed to contest the very detailed arguments and information provided by the State party on the substance of his claims and has made no further attempts to corroborate his initial claims. For these reasons, the Committee finds that the claims relating to Mr. Sham's treatment in detention are inadmissible for non-substantiation, under article 2 of the Optional Protocol.

6.4 The Committee notes that the State party has not contested the admissibility of the claim relating to the alleged arbitrary nature of the authors' detention, under article 9, paragraph 1, and thus finds this claim admissible.

6.5 The Committee notes that although the State party has not specifically contested the admissibility of the claim relating to the right to review the lawfulness of the authors' detention (article 9, paragraph 4), it refers to the possibility of seeking judicial review of detention by way of a writ of habeas corpus in the High Court, without stating whether any of the authors filed such an application. In any event, the Committee notes that the legislation under which the authors were detained provides for mandatory detention until either a permit is granted or a person is removed from the State party's territory. The Committee observes that the only power of review vested in the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in all cases, rather than to assess whether there are substantive grounds which justify detention in the circumstances of each case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory detention regimes on the basis of the policy factors advanced by the State party¹⁴. The Committee reiterates its jurisprudence¹⁵ and accordingly decides that the State party has failed to demonstrate that there were available domestic remedies that the authors could have exhausted with respect to their claims about their detention, and these claims are therefore admissible.

¹⁴ *Lim v. Australia*, supra

¹⁵ *C. v. Australia*, supra

Consideration of the merits

7.1 The Human Rights Committee has examined the present communication in the light of all the information placed before it by the parties, as it is required to do under article 5, paragraph 1, of the Optional Protocol to the Covenant.

7.2 As to the claim that the authors were arbitrarily detained, in terms of article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.¹⁶ In the present case, the authors' detention as unlawful non-citizens continued, in mandatory terms, until they were granted visas. The Committee notes that humanitarian or temporary protection visas were granted in each case after at least three but in most cases after over four years in detention. While the State party has advanced general reasons to justify the authors' detention, apart from the statement that some of them, without stating who, attempted to escape, the Committee observes that the State party has not advanced grounds particular to the authors' cases which would justify their continued detention for such prolonged periods. In particular, the State party has not demonstrated that, in the light of each authors' particular circumstances, there were no less invasive means of achieving the same ends. While welcoming the amendments to the Migration Act and Regulations relating to the detention procedure, outlined by the State party above, the Committee notes that these amendments were made since the authors' detention and were not available to the authors when they were detained. For these reasons, the Committee concludes that the authors' detention for a period of between three and over four years without any chance of substantive judicial review was arbitrary within the meaning of article 9, paragraph 1.

7.3 As to the authors' claims of a violation of article 9, paragraph 4, the Committee observes that the court review available to the authors was confined purely to a formal assessment of whether they were unlawful "non-citizen[s]" without an entry permit. It observes that there was no discretion for a court to review their detention on any substantive grounds for its continued justification. The Committee recalls its jurisprudence¹⁷ that any 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 compliance of the detention with domestic law. While domestic legal systems may establish differing methods for ensuring court review of administrative detention, what is decisive for the purposes of article 9, paragraph 4, is that such review is, in its effect, real and not purely formal. By stipulating that the court must have the power to order release, "if the detention is not lawful", article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or with any relevant provisions of the Covenant. In the authors' cases, the Committee considers that the inability of the judiciary to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, concludes that the facts as found by the Committee reveal a breach by Australia of article 9, paragraphs 1 and 4, and article 2, paragraph 3, of the Covenant.

¹⁶ *A v. Australia, C v. Australia*, supra.

¹⁷ *A v. Australia, C v. Australia*, supra.

9. Under article 2, paragraph 3, of the Covenant, the authors are entitled to an effective remedy. In the Committee's opinion, this should include adequate compensation for the length of the detention to which each of the authors was subjected.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and 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 its 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.]

APPENDIX**Individual Opinion of Committee Member Ms. Ruth Wedgwood**

States are entitled to enforce their immigration laws in an effective and proportionate manner. Each of the authors in these cases entered Australia without lawful visas. Each was denied a protection visa by the Australian Department of Immigration on its initial review. Each took appeals through three or four levels of administrative and judicial review, and ultimately, each was granted either a permanent humanitarian visa or a temporary protection visa. The legislature of the state party (at the time of these cases) required the detention of unsuccessful visa applicants during the appellate process, on the claim that it was otherwise difficult to obtain the voluntary appearance of unsuccessful applicants in immigration proceedings that might result in their deportation.

On this record, I cannot join the views of the Committee concerning the application of Article 9, namely, the Committee's conclusion that the detention of the authors was *per se* "arbitrary" and "unlawful" within the meaning of Article 9(1) and 9(4) of the Covenant. Each had access to the courts to challenge the underlying basis for his detention, in particular, the finding that he was an unlawful entrant. The state party has argued that its legislature concluded there were particular difficulties in enforcing immigration laws against unsuccessful applicants in a national community that chose to avoid such measures as national identity cards or official registration for access to social services and employment. Since the time of these cases, Australia has changed its law to permit the Minister for Immigration to grant a form of "community detention" that is less onerous.

Nonetheless, the state party must be aware that it is not a happy circumstance to see that persons who were ultimately awarded the state's protection against a forced return to Iran had to wait three to four years in a detention facility before that protection was awarded.

[Signed] Ruth Wedgwood

[Done 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.]
