

C. v. Australia, Communication No. 900/1999, U.N. Doc. CCPR/C/76/D/900/1999 (2002).

HUMAN RIGHTS COMMITTEE

Seventy-sixth session

VIEWS

Communication No. 900/1999

Submitted by: Mr. C. [name withheld] (represented by counsel, Mr. Nicholas Poynder)

Alleged victim: The author

State party: Australia

Date of communication: 23 November 1999 (initial submission)

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

Meeting on 28 October 2002,

Having concluded its consideration of communication No. 900/1999, submitted to the Human Rights Committee on behalf of Mr. C. 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. The author of the communication, initially dated 23 November 1999, is Mr. C.,⁽¹⁾ an Iranian national, born 15 January 1960, currently imprisoned at Port Phillip Prison, Melbourne. He claims to be a victim of violations by Australia of articles 7 and 9,⁽²⁾ in conjunction with article 2, paragraph 1, of the Covenant. He is represented by counsel.

1.2 Following submission of the communication to the Human Rights Committee on 23 November 1999, a request for interim measures, pursuant to Rule 86 of the Committee's Rules of Procedure, was transmitted on 2 December 1999 requesting the State party to stay the author's deportation whilst his case was before the Committee.

The facts as presented

2.1 The author, who has close family ties in Australia (3) but none in Iran, was lawfully in Australia from 2 February 1990 to 8 August 1990 and left thereafter. On 22 July 1992, the author returned to Australia with a Visitor's Visa but no return air ticket, and was detained, as a "non-citizen" without an entry permit, in immigration detention under (then) s.89 Migration Act 1958 pending removal ("the first detention").

(a) First application for refugee status and subsequent proceedings

2.2 On 23 July 1992, he made an application for refugee status, on the basis of a well-founded fear of religious persecution in Iran as an Assyrian Christian. On 8 September 1992, a delegate for the Minister of Immigration and Multicultural Affairs refused the application. On 26 May 1993, the Refugee Status Review Committee upheld the refusal, and the author appealed against this refusal to the Federal Court.(4).

(b) Application to the Minister for interim release and subsequent proceedings

2.3 Meanwhile, in June 1993, the author applied to the Minister for Immigration for interim release from detention pending the decision of the Federal Court on his refugee application. On 23 August 1993, the Minister's delegate rejected the application, observing that there was no power under s.89 Migration Act to release a person unless the person was removed from Australia or granted an entry permit. On 10 November 1993, the Federal Court rejected the author's application for judicial review of the Minister's decision, confirming that no residual/discretionary power existed in s.89 Migration Act, either expressly or by implication, enabling release of a person detained thereunder. On 15 June 1994, the Full Court of the Federal Court dismissed the author's further appeal. It rejected inter alia an argument that article 9, paragraph 1, of the Covenant favoured an interpretation of s.89 which authorized only a minimum period of detention, and implied, where necessary, a power of release from custody pending the determination of an application for refugee status.

(c) Release on mental health grounds and second application for refugee status

2.4 On 18 August 1993, the author was psychologically assessed (5). The assessment followed "some concern for his emotional and physical health following a lengthy incarceration". The author, who had attempted to commit suicide by electrocution, repeated his intent to commit suicide and exhibited "extreme scores on all the depression scales". He had been prescribed tranquilizers in August 1992 and from March to June 1993. The psychologist, observing "coarse tremor", considered his paranoia "not unexpected". She saw "many indications of the toll that twelve months of imprisonment has had upon him", finding him "actively suicidal" and "a serious danger to himself". He could not accept the visits of his family, having developed "a sense of persecution at the center and believ[ing] that they speak loudly to hurt him". She considered "if he were free he would be able to regain a sense of sanity".

2.5 On 15 February 1994, the author's deteriorating psychiatric condition was again assessed (6). The expert recommended "further psychiatric assessment and treatment on an urgent basis", which would unlikely be of benefit in continued detention. The author "need[ed] some respite from these conditions [of detention] urgently", and an assessment of appropriate external

arrangements "should be explored as a matter of urgency" to avoid "a risk of self harm or behavioural disturbance if urgent steps are not taken". On 18 June 1994, at the request of detention center staff, the same expert reassessed the author (7). He found significant deterioration, with an increased sense of being watched and persecuted and "clear-cut delusional beliefs". As previously, there was significant depression, with the expert considering that the author had deteriorated to "a frank delusional disorder with depressive symptoms in addition". He clearly required anti-psychotic medication and possibly anti-depressants subsequently. As his condition was "substantially due to the prolonged stress of remaining in detention", the expert recommended release and external treatment. He warned however that "there is no guarantee that his symptomatology will resolve rapidly even if he were released and he would require expert psychiatric care in the wake of release to monitor this recovery process".

2.6 On 10 August 1994, pursuant to s.11 Migration Act, the author was released from detention into his family's custody on the basis of special (mental) health needs. At this point, the author was behaving delusionally and was undergoing psychiatric treatment. On 29 August 1994, the author again applied for refugee status, which was granted on 8 February 1995 in view of the author's experiences in Iran as an Assyrian Christian, along with the deteriorating situation of that religious minority in Iran. Weight was also attached to "marked deterioration in his psychiatric status over the protracted period of his detention and diagnosis of delusional disorder, paranoid psychosis and depression requiring pharmaceutical and psychotherapeutic intervention", which would heighten adverse reaction by the Iranian authorities and the extremity of the author's reaction. On 16 March 1995, he was granted the corresponding protection visa in recognition of his refugee status.

(d) The criminal incidents and subsequent criminal proceedings

2.7 On 20 May 1995, the author, mentally deluded and armed with knives, broke into the home of a friend and relative by marriage, Ms. A, and hid in a cupboard. On 17 August 1995, he pleaded guilty to charges of being unlawfully on premises and intentionally damaging property, and received a non-custodial community-based order and psychiatric treatment. On 1 November 1995, the author returned to Ms. A's home, damaging property and threatening to kill her, and was arrested. On 18 January 1996, the author made further threats to kill Ms. A by telephone, and was again arrested and detained in custody. As a result of the latter two incidents, on 10 May 1996, the author was convicted in the Victoria County Court of aggravated burglary and threats to kill, and was sentenced cumulatively to a term of 3½ years imprisonment (with 18 months before parole). The author did not appeal the sentence.

(e) Deportation order and subsequent substantive review proceedings

2.8 On 16 December 1996, the author was interviewed by a delegate of the Minister with a view to possible deportation as a non-citizen, being in Australia less than 10 years, who had committed a crime and been sentenced to at least a year in prison. On 21 October 1996, the author underwent a psychiatric assessment at the request of the Minister's delegate (8). The assessment, noting that no previous illness was apparent and that his morbid-origin persecutory beliefs developed in detention, found "little doubt that there was a direct causal relationship between the offence for which he is currently incarcerated and the persecutory beliefs that he held on account of his [paranoid schizophrenic] illness". It found, as a result of treatment, a

decreasing risk of future acts based on his illness, but an ongoing need for careful psychiatric supervision. On 24 January 1997, the author underwent a further psychiatric assessment coming to similar conclusions (9). On 8 April 1997, the Minister ordered the author deported on this basis.

2.9 On 24 April 1997, the author appealed the deportation order to the Administrative Appeals Tribunal (AAT). On 28 July 1997 (10) and 1 August 1997, (11) the author underwent further psychiatric assessments. On 26 September 1997, the AAT dismissed the author's appeal, while appearing to accept that the author's mental ill health was caused by his protracted immigration detention (12). On 11 November 1997, the psychiatrist treating the author during his criminal sentence interceded proprio motu before the Minister on the author's behalf (13). On 29 July 1998, the author succeeded on appeal to the Federal Court of Australia, on the basis that his mental disturbance and personal circumstances had not sufficiently been taken into account in assessing whether the author's offence of threatening to kill was a "particularly serious crime", which, under article 33 of the Convention on the Status of Refugees 1951 ("the Convention"), could justify refoulement. The case was accordingly remitted to the AAT. In March 1998, treatment of the author with a particular drug (Clorazil) was commenced, which contributed to dramatic improvements in the author's condition.

2.10 On 26 October 1998, the AAT, differently constituted, again affirmed the deportation decision after rehearing. The AAT found that, while he could suffer a recurrence of his delusional behaviour in Iran which given his ethnicity and religion could lead to a loss of freedom, this would not be "on account of" his race or religion. Accordingly, he fell outside the provisions of the Convention. It also found that, while the author remained under control when he took appropriate medication, (14) he believed he was not ill and that there was a real chance he would cease his medication. While it found a "lack of certainty" that the author would be able to obtain Clorazil in Iran, it made no findings on the standard of Iranian health care facilities. However, it considered that the author was at grave risk of not seeking out appropriate treatment generally, and in particular Clorazil, without which his psychotic delusions would return. It considered that there was no evidence of back-up treatment in Iran should the author fail to take his medication, and that the likelihood of a recurrence of illness was greater in Iran than Australia. It made no finding on the cause of the author's mental illness.

2.11 On 23 November 1998, the author again appealed the AAT's decision to the Federal Court. On 4 December 1998, the author was granted parole from his criminal conviction under strict conditions, (15) but remained in immigration detention pending the appeal against the AAT's decision. On 15 January 1999, the Federal Court, by expedited hearing, again allowed the author's appeal against the AAT's decision. It found that the AAT had improperly construed the protection of article 33 of the Convention, (16) and moreover that it had again failed to properly consider the mitigating circumstances constituted by the author's state of mind at the time of commission of the offences. The Court remitted the case to the AAT for urgent hearing, and accordingly denied the author's accompanying motion for interim release. On 5 February 1999, the Minister appealed the Federal Court's decision to the Full Court of the Federal Court ("the Full Court"). On 20 July 1999, the Full Court allowed the Minister's appeal against the judgement of 15 February 1999, holding that the AAT's findings in "an extremely difficult case", while "debatable", had been open to it on the evidence and had properly balanced the competing factors. (17). The Court noted that "while [his] illness can be controlled by medication available in Australia [Clorazil], the medication is probably not available in Iran". Accordingly, the effect of the decision was that

the deportation order stood. On 5 August 1999, the author applied to the High Court for special leave to appeal against the Full Court decision. On 11 February 2000, the application for special leave was dismissed.

(f) The applications to the Minister and subsequent proceedings

2.12 On 19 January 1999, following the Federal Court's second decision in the author's favour against the AAT, and later in February and March, the author applied to the Minister for revocation of the deportation order and for release from immigration detention, supplying a substantial body of medical opinion in support.

2.13 On 11 and 18 March 1999, the Minister decided that he would not order the author's release and that he would remain in detention. On 29 March 1999, the author applied to the Federal Court for judicial review of the Minister's decision. On 8 April 1999, the author sought interim relief pending the decision of the Federal Court on the main 29 March application. On 20 April 1999, the Federal Court dismissed the application by the author for review of the Minister's decision not to release him. The Court considered that, while there was a serious question as to whether the Minister had taken into account an irrelevant consideration when making his decision, the balance of convenience favoured refusal of the order given the imminence of appeal to the Full Court on the AAT's decision. On 19 May 1999, the Minister supplied his reasons for declining the author's release. He assessed, relying in part upon the AAT decisions which had been vacated on appeal, the possibility of the author's re-offending as significantly high and concluded that the author constituted a continuing danger to the community and to his victim. On 15 October 1999, the Minister responded to requests of 6 and 22 September 1999, and 15 October 1999, for revocation of the deportation order and/or interim release pending final determination of his case. He refused the request for interim release, and stated that he was continuing to assess the request for revocation of the deportation order. In December 2000, the Minister declined, following further requests for intervention, to release the author (18).

The complaint

3.1 The author contends that he has suffered a violation of his rights under article 7 in dual fashion. Firstly, he was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration, (19) and this had been accepted by the AAT and the courts. The author contends that he was initially imprisoned without any evidence of a risk of abscondment or other danger to the community. He could have been released into the community with commonly utilized bail conditions such as a bond or surety, or residential and/or reporting requirements. The author also alleges that his current detention is in breach of article 7 (20).

3.2 Secondly, the author argues a violation of article 7 by Australia in that his proposed deportation to Iran would expose him to a real risk of a violation of his Covenant rights, at least of article 7 and possibly also article 9, by Iran. He refers in this connection to the Committee's jurisprudence that if a State party removes a person within its jurisdiction, and the necessary and

foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the Covenant (21). He considers that the Minister's delegate found that the author had a well-founded fear of persecution in Iran because of his religion and because his psychological state may bring him to the notice of the authorities which could lead to the deprivation of his liberty under such conditions as to constitute persecution. Far from being overturned in subsequent proceedings, the AAT in fact affirmed this position. Moreover, the author argues that the pattern of conduct shown by Iran supports the conclusion that he will be exposed to a violation of his Covenant rights in the event of deportation (22).

3.3 The author further claims that his prolonged detention in Australia upon arrival breaches articles 9, paragraphs 1 and 4, of the Covenant, as he was detained upon arrival under the mandatory (non-discretionary) provisions of (then) s.89 Migration Act. Those provisions do not provide for any review of detention, either by judicial or administrative means. The author considers his case to fall within the principles laid down by the Committee in its Views in *A v. Australia*, (23) in which the Committee held that detention, even of an illegal immigrant, which was neither reviewed periodically nor otherwise justified in the particular case violated article 9, paragraph 1, and that the absence of real judicial review including the possibility of release violated article 9, paragraph 4. The author emphasizes that, as in *A's* case, there was no justification for his prolonged detention, and that the present legislation had the same effect of depriving him of the ability to make an effective judicial application for review of detention. For these violations of article 9, the author seeks adequate compensation for his detention under article 2, paragraph 3. The author also maintains that his current detention is in violation of article 9 (24).

The State party's submissions on admissibility and merits

4.1 By submissions of 1 March 2001, the State responded on both the admissibility and the merits of the author's claims.

4.2 As to the admissibility of the claims made under article 7, the State party argues that most of the claims are inadmissible. In respect of the first claim that the prolonged detention violated article 7, the State party considers that the claim is unsubstantiated, that it is beyond the scope of article 7, and that domestic remedies have not been exhausted. The author has not advanced any evidence of acts or practices by the State party rising beyond the mere condition of detention that would have rendered his detention particularly harsh or reprehensible. The only evidence submitted is that the author developed paranoid schizophrenia while in detention, whereas no evidence is submitted that his mental illness was caused by being subjected to any maltreatment of the type prohibited by article 7. Secondly, as the complaint is, in truth, an attack on the author's detention per se rather than on a reprehensible treatment or aspect of detention, it falls outside the scope of article 7 as previously determined by the Committee. Thirdly, the State party considers that the author has not exhausted domestic remedies. He could either file a complaint with the Human Rights and Equal Opportunity Commission (HREOC), which tables reports in Parliament, or to the Commonwealth Ombudsman, who could recommend remedies, including compensation.

4.3 In respect of that part of the second portion of the claim under article 7 that invokes the State

party's responsibility for a subsequent violation in Iran of the author's rights under article 9, the State party argues that this falls outside the scope of article 7. The State party contends that the prohibition on refoulement under article 7 is limited to risks of torture or cruel, inhuman or degrading treatment or punishment. This prohibition does not extend to violations of article 9 as detention per se is not a violation of article 7 (25). Further the Committee has never stated that article 9 has a comparable non-refoulement obligation attached to it. The State party interprets ARJ v. Australia (26) for the proposition that due process guarantees are not within the ambit of the prohibition on non-refoulement, and argues that by analogy, neither would potential violations of article 9.

4.4 As to the admissibility of the claims made under article 9, the State party does not contest the admissibility of the claim made under article 9, paragraph 1, but considers the claim under article 9, paragraph 4, inadmissible for failure to exhaust domestic remedies and want of substantiation. The State party contends that the author's initial period of detention was considered and declared lawful by both a single judge, and on appeal, a Full Court, of the Federal Court. At no stage during his initial or subsequent detention did the author seek habeas corpus or invoke the High Court's original jurisdiction to seek a writ of mandamus or other remedy. The State party recalls that mere doubts about the effectiveness of remedies does not relieve the claimant from the requirement to pursue them (27). The State party also argues that the author's claim is simply an allegation that there was no way that he could apply to be released from detention, either administratively or by a court. He has not advanced any evidence of how article 9, paragraph 4, had been violated, and, as stated above, he did in fact challenge the lawfulness of his detention on several occasions. The claim is accordingly unsubstantiated.

4.5 As to the merits of the claims, the State party considers all of them to be unfounded.

4.6 As to the first portion of the claim under article 7 (related to the author's detention), the State party notes that, while the Committee has not drawn sharp distinctions between the elements of article 7, it has nevertheless drawn broad categories. It observes that torture relates to deliberate treatment intended to cause suffering of a particularly high intensity and cruelty for a certain purpose (28). Cruel or inhuman treatment or punishment refers to acts (primarily in detention) which must attain a minimum level of severity, but which do not constitute torture (29). "Degrading" treatment or punishment is the 'weakest' level of violation of article 7, in which the severity of suffering is less important than the level of humiliation or debasement to the victim (30).

4.7 Accordingly, it is clear that while particularly harsh conditions of detention may constitute a violation of article 7 (whether the suffering is physical or psychological), detention, in and of itself, is not a violation of article 7. In Vuolanne v. Finland, the Committee expressed the view that "for punishment to be degrading, the humiliation or debasement must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty" (31). Similarly, the Committee has consistently expressed the view that, even prolonged periods of detention on "death row" do not violate article 7 (32). For detention to violate article 7 there must be some element of reprehensibility in the treatment of detainees.

4.8 Assessing the general conditions of immigration detention in the light of these standards, the State party emphasizes that to ensure the well-being of all persons in immigration detention, it has instituted Immigration Detention Standards that govern the living conditions of detainees within its detention facilities and specify the distinctive nature of services that are required in an immigration detention environment. These standards address protection of the privacy of

detainees; health care and safety; spiritual, social, educational and recreational activities; interpreters; and training of detention centre staff in cultural diversity and the like. The State party submits that conditions at the MIDC are humane and such as to ensure the comfort of residents while they are awaiting the outcome of their visa applications.

4.9 Turning to the author's particular situation, at no time during his detention did he make a complaint to DIMA, the Commonwealth Ombudsman, the Human Rights and Equal Opportunity Commission or the United Nations High Commissioner for Refugees, the possibilities of which were well advertised. The author was at all times treated humanely at the MIDC, and his physical and mental integrity and well-being were afforded particularly high priority, over and above the level of ordinary care, by MIDC staff. For example, following his complaints about noise levels, MIDC staff reduced the volume level on the announcement system and reduced the number of times the system was used during the day. Further, when he complained of being unable to sleep because of noise in the dormitory area, alternative sleeping arrangements were offered to him. Similarly, prior to his actual release into family care, MIDC staff arranged for him to be taken out to his family on a fortnightly basis so that he could have a meal with them and get a break from the routine of the IDC. Eventually, on 10 August 1994, the author was released on an ongoing basis into the care of his family when it became apparent that his psychological state warranted this measure. Further, at all times he was provided with adequate and professional medical attention.

4.10 Turning to the development of the author's paranoid schizophrenia, the State party contends that there is a convincing body of literature indicating that a predisposition for schizophrenia is genetically determined (33). Thus, while it is deeply unfortunate that the author's schizophrenic symptoms developed while in detention, he is likely to have been predisposed to develop the condition, and the development of this condition does not necessarily reflect the conditions under which he was detained. While acknowledging that any deprivation of liberty may cause some psychological stress, such emotional stress does not amount to cruel, inhuman or degrading treatment (and certainly does not constitute a punishment). In any case, medical evidence indicates that the development of schizophrenia is not linked to the experience of a "gross stressor".

4.11 As to the second portion of claims under article 7 (concerning future violations of his rights in Iran in the case of a deportation), the State party accepts that it is under a limited obligation not to expose the author to violations of his rights under the Covenant by returning him to Iran (34). It submits, however, that this obligation does not extend to all rights in the Covenant, but is limited to only the most fundamental rights relating to the physical and mental integrity of the person (35). From the Committee's jurisprudence, the State party understands that this obligation has only been considered in relation to the threat of execution (art. 6) (36) and torture (art. 7) upon return, and accordingly it submits that this obligation is limited to these two rights under article 6 and article 7. In relation to article 7, the prohibition must plainly relate to the substance of that article, and can therefore only encompass the risk of torture and, possibly, cruel, inhuman or degrading treatment or punishment. The State party considers that the Committee has itself stated that the prohibition under article 7 does not extend, for example, to due process guarantees under article 14 (37). It adds that it is well established that the risk of a violation of article 7 must be real in the sense that the risk of a violation must be the necessary and foreseeable consequence of a person's return (38).

4.12 Turning to the case at hand, the State party rejects the author's contention that it is a

necessary and foreseeable consequence of his return to Iran that he will be subjected to torture or cruel, inhuman or degrading treatment or punishment for three reasons.

4.13 Firstly, the recognition of the author's refugee status was based on many considerations other than the risk of an article 7 violation. The State party contends that the granting of refugee status was made on the basis that he might suffer "persecution" in the event of return. The State party submits that "persecution" may be understood as persistent harassment by, or with the knowledge of, authorities (39). The core meaning of "persecution" readily includes the deprivation of life or physical freedom, but also encompasses such harassment as denial of access to employment, to the professions or education, and restriction of the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship or freedom of movement (40). Factors such as discrimination experienced in employment, education and housing, difficulties in practising his religion and the deteriorating human rights situation in Iran at the time were considered in granting the author's application. Persecution is, thus, a much broader concept than that encompassed by article 7 of the ICCPR, and refugee recognition should not lead the Committee to the conclusion that it is a necessary and foreseeable consequence of the author's return to Iran that he would be subjected to article 7 violations.

4.14 Secondly, the State party contends that the reports of Dr. C. Rubinstein on the human rights situation in Iran, (41) upon which the author relies, misrepresent the realities. The State party argues that the human rights situation in Iran has much improved in recent years following the election of a reformist president and government, and refers to the United Nations High Commissioner for Human Rights statement in April 2000 welcoming the report by the Special Representative of the Commission on the improving human rights situation in Iran (42). There are indications that relations between the Iranian Government and the Assyrian Christians are improving substantially (43).

4.15 The State party argues that it seems that official interference with Christian religious activities is limited to those Christian faiths that proselytize and Muslim individuals who abandon Islam to become Christians, asserting that Assyrian Christians do not actively engage in conversions and, in fact, tend to discourage Muslims from joining their faith. According to information from the State party's Mission in Iran, this means that they are subject to far less scrutiny and harassment than members of other Christian and minority faiths may be. To the State party's Government's knowledge, the arrests, attacks and killings of Christians referred to in Dr. Rubenstein's reports represent isolated incidents and are related not to Assyrians, but to evangelistic Christians and apostates.

4.16 The State party's Mission in Iran further advised that Assyrian Christians, if they abide by the laws of the land, are able to lead normal and undisturbed lives. They have not been singled out for discrimination by the Iranian Government for some time. Further, it is clear from the State party's information that Assyrian Christians have never been subjected to the same level of harassment as other minority religions. Assyrian Christians have largely been allowed to carry out their religious activities without interference. There are also strong indications that Assyrian Christians have recently been able to strengthen their political situation. President Khatami has met specifically with the Assyrian Christian Representative of the Majlis (Parliament), Mr. Shamshoon Maqsdpour, who has also been able to bring about changes to Iranian law so as to eliminate any statutory discrimination in the employment of Christians.

4.17 The State party also understands that in 1999 the Islamic Human Rights Commission, which is affiliated with Iran's judiciary, commenced work on upgrading the rights of religious minorities

in Iran. This effort should be seen in conjunction with the commitment made recently by the Iranian Government to promote respect for the rule of laws, including the elimination of arbitrary arrest and detention, and to bring the legal and penitentiary system into line with international standards (44).

4.18 The State party concedes however that the author and his family were subjected to some harassment by the "pasdahs" (vigilante youths) in Iran. On one occasion, he was detained by pasdahs, questioned in relation to the contents of certain cassette tapes found in his car, and released within 48 hours after having suffered some blows to his face. On a second occasion, his family was detained by pasdahs for approximately 24 hours for having served alcohol at a party. They were released without any physical harm. The State party argues that these events occurred some years ago, and there is no indication that the pasdahs specifically targeted the author or his family. These two incidents do not represent a personal persecution of the author, who is not a high profile Assyrian Christian.

4.19 The Australian Government submits that the real situation of an Assyrian Christian in Iran is far more benign than that described by Dr. Rubenstein. In most cases, Assyrian Christians are able to practise their religion and to live normal lives without harassment by Iranian authorities. Although they may be subject to some continuing discrimination in the field of housing, education and employment, there are strong signs of growing effort on the Iranian Government's behalf to settle differences with Assyrian Christians specifically, and to improve the human rights situation in Iran generally.

4.20 Thirdly, in relation to the potential effects of the author's psychiatric condition, the State party understands from its Mission in Iran that Iranian medical authorities have a good understanding of mental illnesses, that appropriate and comprehensive care is available in Iran both at home and in hospital for persons suffering from mental illnesses (including paranoid schizophrenia). Nor is there any requirement in the hospital admission process for a person to advise of their religion, or any evidence that Assyrian Christians have less than full access to psychiatric facilities. To the State party's knowledge, there is no precedent of persons being arbitrarily detained or subjected to article 7 violations simply on account of their mental illnesses.

4.21 The State party submits that it has taken all possible steps to educate the author about the nature of his condition, so as to promote his ongoing adherence to treatment, and would provide him with all necessary medical documentation for him to receive continued medical attention once he returns to Iran. The assertion that he would not pursue medical treatment upon return to Iran is conjecture, and the author has at all times cooperated with his treatment in Australia. As such, it cannot be stated with any certainty that it is a necessary consequence of his return to Iran that he will cease treatment. Even if he did choose to discontinue his medication, it is not a necessary consequence that he would act in such a way to risk torture or cruel, inhuman or degrading treatment or punishment. The nature of paranoid schizophrenia is such that any violent or bizarre behaviour is linked directly to the sufferer's delusions. Therefore, paranoid schizophrenics do not display globally and consistently aggressive or extraordinary behaviours. Any such behaviour is limited to the object of their delusional thoughts. In the author's case, such behaviour has been limited to very specific persons, and his records do not indicate a history of generalized aggressive or hysterical behaviour towards officials or in official settings. Therefore, the State party does not consider that it is a necessary consequence of the author returning to Iran that he will have an adverse reaction to Iranian authorities.

4.22 As to the author's claims under article 9, the State party also considers them unfounded. It clarifies at the outset that the "initial detention" ran, as a matter of law, from his detention on arrival until the issuance of the protection visa in March 1995, even though as a practical matter he was exceptionally released into his family's care in August 1994, for a person remains by law detained until removed or granted permission to remain in Australia. As to the "current detention" pending execution of a deportation order, detention is not mandatory and an individual can be released at the Minister's discretion.

4.23 Concerning the complaint under article 9, paragraph 1, the State party argues that the prohibition against the deprivation of liberty is not absolute (45). While a detention must be lawful in terms of the domestic legal order, it contends that in determining the further element of arbitrariness in a particular case key elements are whether the circumstances under which a person is detained are "reasonable" and "necessary" in all of the circumstances or otherwise arbitrary in that the detention is inappropriate, unjust or unpredictable. It emphasizes that the Committee's jurisprudence of the Committee does not suggest that detention of unauthorized arrivals or detention for a particular length of time could be considered arbitrary per se, (46) rather the determining factor is not the length of the detention but whether the grounds for the detention are reasonable, necessary, proportionate, appropriate and justifiable in the particular case.

4.24 Turning to the particular case, the State party argues that the author's detention was and is lawful, and reasonable and necessary in all of the circumstances. It is, according to the State party, also clearly distinguishable on the facts from the case of *A v. Australia*.

4.25 As to the initial detention, he was detained by law, under the s.89 Migration Act 1958. This detention was twice judicially confirmed. As to arbitrariness, both the provisions of the Migration Act under which the author was detained, as well as the individual circumstances of his case, justified his necessary and reasonable detention.

4.26 The State party underscores that mandatory immigration detention is an exceptional measure primarily reserved for people who arrive in Australia without authorization (47). It is necessary to ensure that persons entering Australia are entitled to do so, and to ensure that the integrity of the migration system is upheld. The detention of unauthorized arrivals ensures that they do not enter Australia before their claims have been properly assessed and found to justify entry. It also provides officials with effective access to those persons in order to investigate and process their claims without delay, and if those claims are unwarranted, to remove such persons as soon as possible. The State party argues that the detention of unauthorized arrivals is consistent with fundamental rights of sovereignty, including the right of States to control the entry of persons into its territory. As the State party has no system of identity cards or the like for access to social services, it is more difficult to detect, monitor and apprehend illegal immigrants in the community, compared with countries where such a system is in place (48).

4.27 The State party's experience has been that unless detention is strictly controlled, there is a strong likelihood that people will escape and abscond into the community. In some cases, some unauthorized arrivals who had been held in unfenced migrant hostels with a reporting requirement had absconded. It had also been difficult to gain the cooperation of the local ethnic communities to locate such persons (49). As such, it was reasonably suspected that if people were not detained, but rather released in the interim into the community, there would be a strong incentive for them not to adhere to the conditions of release and to disappear into the community. The State party repeats that all applications to enter or remain are thoroughly

considered, on a case-by-case basis, and that therefore its policy of detaining unauthorized arrivals is reasonable, (50) proportionate and necessary in all of the circumstances. As such, the provisions under which the author was detained, while requiring mandatory detention, were not arbitrary, as they were justifiable and proportionate on the grounds outlined above.

4.28 In addition, the individual factors of the author's detention also indicate the absence of arbitrariness. He arrived with a visitor's visa but no return airline ticket, and when questioned at the airport a number of false statements on his visa application form were detected. These included the assertion that his mother and father were living in Iran, when in fact his father was dead and his mother was living in Australia and had applied for refugee status. He also stated that he had \$5,000 in funds for his visit, but arrived with no funds and lied in the interview about this matter. He had also purchased a return ticket for the purposes of gaining his visa, but had cashed it in when the visa was granted. As such, it was reasonably suspected that if allowed to enter Australia, he would become an illegal entrant. The detention was accordingly necessary to prevent abscondment, it was not disproportionate to the end sought, and it was not unpredictable, given that the relevant detention provisions had been in force for some time and were published.

4.29 The State party also considers that there were further reasons for the continued detention, pending the assessment of the refugee claim. It was not expected that the processing of the claim would be unduly prolonged so as to warrant his release from detention. The processing and review applications were dealt with expeditiously by both the primary decision maker and the review body, with the author held in detention for just over two years. The original application was processed in less than two months, and the first review of the decision took approximately six weeks. The total time taken from the filing of the first application on 23 July 1992 to the completion of the initial processing and several administrative reviews of the first application for refugee status was less than one year.

4.30 The State party argues that, once it became clear that continued detention was not conducive to the treatment of the author's mental illness, he was released into the care of his family. As such, while detention was mandatory, it was not arbitrary, with the policy underlying the detention provisions flexible enough to provide for release in exceptional circumstances. Therefore, it cannot be said that there were no grounds upon which a person could apply to be released from detention, either administratively, or by a court.

4.31 The State party, while disagreeing with the Committee's Views in *A v. Australia*, notes significant factual differences with that case. Firstly, the length of detention was significantly less (some 26 months rather than 4 years). Secondly, the time taken to process the initial application was significantly less (under 6 weeks rather than 77 weeks). Thirdly, in this case, there is no suggestion that the period and conditions of detention prevented the author from gaining access to legal representation or visits from his family. Finally, he was actually released from the usual places of detention into the care and custody of family members pursuant to an exercise of Executive discretion.

4.32 As to the current detention, the author has been lawfully held in immigration detention, pursuant to ss.253 and 254 Migration Act 1958, since he was granted parole from his prison sentence on 4 December 1998. Rather than being arbitrary, it is necessary and reasonable in all of the circumstances, and proportionate to the end sought of ensuring he does not abscond pending his deportation and of protecting the Australian community. After appeals were exhausted, the State party stayed the deportation in response to the Committee's rule 86 request

pending finalization of this matter. Moreover, the State party submits that it is reasonable to suspect that the author would breach his release conditions and abscond if released.

4.33 The State party notes that its Minister for Immigration personally considered the justification for continued detention on several occasions, and his 11 March 1999 decision not to release the author from detention was reviewed by the Federal Court and found justified. The Minister's reasons for decision clearly indicate that it was not arbitrary. All of the factors relevant to the case were considered in reaching the decision not to grant release, on the basis that there was a significantly high possibility that the author would re-offend and that he constituted a continuing danger to the community and in particular to his victim, Ms. A.

4.34 As to the claim under article 9, paragraph 4, the State party notes that this requires a person to be able to test the lawfulness of detention. The State party rejects the suggestion by the Committee in *A v. Australia* that "lawfulness" in this provision was not limited to compliance with domestic law and must be consistent with article 9, paragraph 1, and other provisions of the Covenant. It contends there is nothing in the terms or structure of the Covenant, or in the travaux préparatoires or the Committee's General Comments, that supports such an approach.

4.35 The State party identifies the various mechanisms in its law to test the legality of detention, (51) and states that it was open to the author at all times to pursue these mechanisms. It repeats that, in relation to the first detention, the author never directly applied to the courts for review of his detention, but applied to the Minister for interim release pending the outcome of his appeal against the denial of refugee status. The Minister's rejection of the application was twice upheld in court. As to the current detention, while he has sought interim release, at no time has he directly challenged the lawfulness of his detention. As to the current detention, the State party notes that the author has on several occasions unsuccessfully sought release from the Minister and the Federal Court. The fact that the courts did not rule in his favour is not proof of a violation of article 9, paragraph 4. In any event, he did not seek to exercise avenues available to him to directly challenge the detention. The State party refers to *Stephens v. Jamaica* (52) for the proposition that a failure to take advantage of an available remedy of, for example, habeas corpus is not evidence of a breach of article 9, paragraph 4.

Comments by the author on the State party's submissions

5.1 By submission of 16 May 2001, the author responded to the State party's submissions.

5.2 As to the State party's submissions on available domestic remedies, the author points to the Committee's jurisprudence that such remedies may be taken to refer to judicial remedies, especially in cases of serious violations of human rights, (53) such as arbitrary and prolonged detention. In any case, there is no obligation to pursue remedies that are neither enforceable nor effective, (54) and neither a complaint to HREOC or the Ombudsman produces a binding order upon the State (55). As to the ability to pursue a habeas corpus claim in the High Court, such an act would be futile given that the High Court has upheld the validity of mandatory detention laws (56).

5.3 In response to the State party's claim that there is no evidence that a breach of article 7 caused the author's mental illness, the author refers to the series of expert assessments of the author over an extended period, provided with the communication, along with a new assessment,

unanimously drawing a specific causal link between detention and the psychiatric illness (57). The author criticizes the State party's reliance on generalized psychiatric literature for the opposite proposition that the author's mental harm arose from predisposition rather than prolonged detention, and invites the Committee to prefer the specific assessments of the author. The author submits that the submissions by the State party on living standards at MIDC are not relevant, for the claim of breach of article 7 is the detention of the author for a prolonged period where it well knew that this was causing severe psychological trauma. From at least 19 August 1993, the State party's authorities knew of this trauma, and the act of continuing to hold him in light of that knowledge, provides the "element of reprehensibility" under article 7.

5.4 As to the claim of a violation of article 7 in the event of a return to Iran, the author notes that it was clear that the form of persecution the Minister's delegate had in mind on 8 February 1995 when approving the refugee claim involved article 7 rights (58). She considered that there was a real chance that he would suffer deprivation of liberty "under such conditions as to constitute persecution under the [Refugee] Convention", which, according to the author, clearly goes beyond detention per se. The author also rejects the State party's supposition that the situation in Iran has improved to the extent that there is no foreseeable risk of a violation of his rights. The Special Representative's report referred to by the State party is far from conclusive on the "improving" human rights situation, noting that "human rights in Iran remains very much a work in progress" and "greater efforts are required". Moreover, the subsequent report of the Special Representative, found that minorities remain "neglected" and that "there is a long way to go in terms of achieving a more forthcoming approach to the concerns of the minorities, both ethnic and religious" (59). The author also asserts that the psychological evidence contradicts the State party's claim that he would not discontinue his medication in the event of a return, or, should he do so, react adversely to the Iranian authorities. The author notes that it is not known whether his medication is available in Iran.

5.5 As to the complaint under article 9, the author contends that *A v. Australia* conclusively established that the policy of mandatory detention violates article 9, paragraphs 1 and 4, and should be followed, for the present case is not factually distinguishable. The author clearly arrived to seek asylum, and did so within 24 hours of arrival. It is fanciful to suggest his detention in the initial period for two years was justified by false statements made about his parents' location and funds he possessed. There was no administrative review of his detention during this period, and efforts at judicial review failed because there is no power to release him from detention. His release from custody on 10 August 1994 due to his deteriorating psychological condition came after two years of non-reviewable detention, as demonstrated by the futility of earlier applications to the Federal Court for review of the decision to detain. As to the continuing detention, there is no justification, for three separate psychiatric reports of March 2000 (provided to the Minister) indicated his risk would pose "no detectable risk", he "has to be regarded as not demonstrating a significant risk to anybody any more", and he poses "no risk to either his former victim or the Australian community" (60). The author also provides a further psychiatric report dated 7 May 2001 that found that he had made a complete recovery for several years, and constituted no threat to the community, either specifically or generally (61).

Supplementary comments by the State party and the author

6.1 By submission of 16 August 2001, the State party reiterates certain earlier submissions and makes further arguments. As to admissibility, the State party rejects the author's interpretation

of *RT v. France* (62) that only judicial remedies need be exhausted, for the decision refers to judicial remedies "in the first place". Other administrative remedies are not excluded, (63) and therefore a complaint to HREOC, for example, is not excluded from the requirement of exhaustion of remedies. Similarly, *Vincente v. Colombia*, (64) according to the State party, only excludes administrative remedies that were not effective from the exhaustion requirement. Similarly, the State party contends that the Committee dispensed with the remedy argued in *Ellis v. Jamaica* (65) (a petition for mercy in a capital case) as being an ineffective remedy, rather than an "unenforceable" one as the author claims. In this case, by contrast, the State party argues its administrative remedies are effective, were not pursued by the author, and thus the requirements of article 5, paragraph 2 (b), of the Optional Protocol have not been met.

6.2 The State party remarks, in response to the author's assertion that an "extra element of reprehensibility" under article 7 was provided in the failure to release him despite knowledge of psychological damage caused by continuing detention, that he was in fact released by the Minister who considered that his mental health needs would benefit from family care.

6.3 The State party further understood the original complaint in terms of article 7 to relate only to the initial detention, but reads the author's subsequent comments (and reference to the 7 May 2001 psychiatric report assessing the author's current condition) as appearing to imply a fresh allegation in respect of the current detention as well. The State party responds that there is nothing to suggest that the current detention is particularly harsh or reprehensible so as to constitute a violation of article 7. It observes that the 7 May 2001 report found the author in good mental health, and did not provide any evidence of acts or practices suggesting that the current detention, per se or through its conditions, raised issues under article 7. Any suggestion that the current detention is causing the author psychological harm and therefore violating article 7 is unsustainable and should be dismissed as unfounded or inadmissible *ratione materiae*.

6.4 Finally, as to the article 9 claim in relation to the original detention, the State party rejects as incorrect the author's characterization that *A v. Australia* "conclusively established that Australia's policy of mandatory detention was in breach of articles 9 (1) and 9 (4)". Rather than commenting on the policy in abstracto, it found that "arbitrariness" was to be determined by the existence of appropriate justification for continued detention in the individual circumstances of the case. Indeed, it stated that it was not per se arbitrary to detain persons seeking asylum.

6.5 By submission of 21 September 2001, the author responded to the State party's additional submissions, also clarifying that the claims under articles 7 and 9 relate to the current as well as the initial detention. As to admissibility, the author maintains that the administrative remedies raised by the State party are not "effective and enforceable" remedies. As any government decision to take action in response to a recommendation of either body is purely executive and discretionary in nature, exhaustion thereof should not be required. (66).

6.6 As to the merits, the author rejects the State party's argument that, as the 7 May 2001 report shows the author in good health, it cannot be said that the prolonged detention has caused him psychological damage. The author observes that the report was directed at determining whether his prior illness caused him to commit the crimes for which he is to be deported, and whether he currently poses any threat to anyone. The first issue was answered affirmatively, the second negatively. In any event, given that the State party accepts the author's current good health, there is no reason why he should be detained further or deported.

6.7 The author goes on to argue that the fact that he does not know whether or when he will be

released, or whether or when he will be deported, on its own amounts to a violation of article 7. It is particularly cruel treatment or punishment as he has completed the prison sentence for his crimes, and because he previously suffered a psychiatric illness in immigration detention in circumstances that he did not know if or when he would be released or deported.

6.8 The author concludes, with reference to international jurisprudence, that mandatory detention of non-nationals for removal, without individual justification, is almost unanimously regarded as a breach of the right to be free from arbitrary and unlawful detention. (67).

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 As to the question of exhaustion of domestic remedies, the Committee notes the State party's argument that the certain administrative remedies (the Commonwealth Ombudsman and HREOC) have not been pursued by the author. The Committee observes that any decision of these bodies, even if they had decided the author's claims in his favour, would only have had recommendatory rather than binding effect, by which the Executive would, at its discretion, have been free to disregard. As such, these remedies cannot be described as ones which would, in terms of the Optional Protocol, be effective.

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for 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 this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party (68). It follows that the State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

7.5 As to the claims relating to the author's proposed deportation to Iran, the Committee notes that with the denial of leave to appeal by the High Court he has exhausted all available domestic remedies in respect of these claims, which are accordingly admissible.

7.6 As to the State party's further arguments that the claims related to the first period of detention and the author's proposed deportation are unsubstantiated, the Committee is of the view, on the material before it, that the author has sufficiently substantiated, for the purposes of

admissibility, that these facts give rise to arguable issues under the Covenant.

7.7 As to the claims related to the second period of detention (detention pending deportation), the Committee notes that, unlike mandatory detention at the border, it lies within the discretion of the Minister whether to direct a person be detained pending deportation. The Committee observes that such a decision, as well as any subsequent refusal by the Minister of a request for release, may be challenged in court by judicial review. Such judicial review proceedings may overturn a decision to detain (or to continue to detain) if manifestly unreasonable, or if relevant factors had not been considered, or if irrelevant factors had been considered, or if the decision was otherwise unlawful. The Committee notes that the Federal Court held, in its decision of 20 April 1999 on the author's urgent application for interim relief pending hearing of his application of 29 March 1999 against the Minister's decision not to release him, that there was a serious question to be tried as to whether the Minister had considered an irrelevant factor, but that in view of the imminent appeal to the Full Court in the deportation proceedings the balance of convenience was against release.

7.8 The Committee notes that the author has supplied no information whether he had (and if not, why he had not) pursued his review application of 29 March 1999 against the Minister's decision, or accepted the Court's invitation to reapply for relief after disposition of the Full Court appeal. Neither has the author explained his apparent failure to pursue review proceedings against the Minister's decisions later on 15 October 1999 and in December 2000 not to release the author. In the circumstances, the author has failed to exhaust domestic remedies in respect of any issues arising in the second period of detention, and his claims under articles 7 and 9 relating to this period are inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

8.1 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.

8.2 As to the claims relating to the first period of detention, 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 (69). In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention (para. 4.28 et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the

court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration constituted a violation of his rights under article 7 of the Covenant.

8.5 As to the author's arguments that his deportation would amount to a violation of article 7, the Committee attaches weight to the fact that the author was originally granted refugee status on the basis of a well-founded fear of persecution as an Assyrian Christian, coupled with the likely consequences of a return of his illness. In the Committee's view, the State party has not established that the current circumstances in the receiving State are such that the grant of refugee status no longer holds validity. The Committee further observes that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of articles 7 and 9, paragraphs 1 and 4, of the Covenant.

10. 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 violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.

11. 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, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen and Mr. Maxwell Yalden. Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

** The texts of individual opinions signed by Committee member Mr. Nigel Rodley, by Committee member Mr. David Kretzmer, and by Committee members Mr. Nisuke Ando, Mr. Eckart Klein and Mr. Maxwell Yalden are appended to the present document.

Individual Opinion of Committee Member Mr. Nigel Rodley

I agree with the Committee's findings in respect of the violations of articles 9, paragraph 1, and 7. Having found a violation of article 9, paragraph 1, however, the Committee unnecessarily also concluded that a violation of article 9, paragraph 4, was involved, using language tending to construe a violation of article 9, paragraph 1, as ipso jure "unlawful" within the meaning of article 9, paragraph 4. In this the Committee followed the trail it blazed in *A v. Australia* (560/1993).

In my view this was too broad a trail. Nor was it justified by the text of the Covenant. "Arbitrary" in article 9, paragraph 1, certainly covers unlawfulness. It is evident from the very notion of arbitrariness and the preparatory work. But I fail to see how the opposite is also true. Nor is there anything in the preparatory work to justify it. Yet this is the approach of *A v. Australia*, seemingly reaffirmed by the Committee in the present case.

It does not follow from this difficulty with the Committee's approach that I necessarily take the view that article 9, paragraph 4, can never be applied in a case in which a person is detained by a State party as long as legal formality is respected. I could, for example, imagine that torture of a detainee could justify the need for recourse to a remedy that would question the continuing legality of the detention.

My present argument is simply that the issue did not need addressing in the present case, especially in the light of the fact that the absence of the possibility of a judicial challenge to the detention forms part of the Committee's reasoning in finding a violation of article 9, paragraph 1.

(Signed): Nigel Rodley

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Individual Opinion of Committee Member Mr. David Kretzmer

The Committee has taken the view that lack of any chance of substantive judicial review is one of the factors that must be taken into account in finding that the author's continued detention was arbitrary, in violation of the author's rights under article 9, paragraph 1, of the Covenant. Like my colleague, Nigel Rodley, I am of the opinion that in these circumstances there was no need to address the question of whether the lack of such review also involved a violation of article 9, paragraph 4.

(Signed): David Kretzmer

[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.]

Individual Opinion of Committee Members Mr. Nisuke Ando, Mr. Eckart Klein and Mr. Maxwell Yalden (Dissenting in Part)

While we agree with the Committee's finding of a violation of article 9, paragraphs 1 and 4, we are not convinced by the finding that article 7 of the Covenant was also violated by the State party.

The Committee found violations of article 7 for two reasons. The first is set out in paragraph 8.4 of the Committee's Views, on the basis of an assessment of the author's prolonged detention after it had become apparent that "there was a conflict between the author's continued detention and his sanity". We find it difficult to follow this reasoning. Although it is true that the author's mental health deteriorated until his release from detention into his family's custody on 10 August 1994, we cannot find a violation of article 7, since such a conclusion would expand the scope of this article too far by arguing that the conflict between the author's continued detention and his sanity could only be solved by his release - and that the State party would otherwise be in violation of the said provision. The circumstances of the case show that the author was psychologically assessed and under permanent observation. The fact that the State party did not immediately order his release, but decided only on the basis of a psychiatric report dated June 1994 unequivocally recommending release and external treatment (see paragraph 2.5) cannot be considered, in our view, to amount to a violation of article 7 of the Covenant.

We likewise hold that the second ground on which the Committee has based its finding of a violation of article 7 (para. 8.5) is not sound. The Committee's assessment is put together on the basis of several arguments, none of which is persuasive, either taken alone or together. We do not believe that the State party failed to support its conclusion that the author, as an Assyrian Christian, would not suffer persecution if deported to Iran. We refer in this regard to paragraphs 4.13 to 4.19 of the Committee's Views. Concerning the argument that the author would not

receive effective medical treatment in Iran, we refer to the State party's submissions set out in paragraphs 4.20 and 4.21 of the Committee's Views. We do not see how these detailed arguments could be so lightly set aside in favour of an article 7 violation as has been done by the majority.

(Signed): Mr. Nisuke Ando

Mr. Eckart Klein

Mr. Maxwell Yalden

[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.]

Notes

1. Name withheld.
2. While the author cited article 10 on the cover page of his communication, the subsequent substantive argument was directed to article 9 (see paragraph 3.3 *infra*), and the Committee accordingly takes the communication to proceed on the latter basis.
3. The author's mother, along with his brother and sister-in-law reside in Australia, while his father is deceased. Another brother resides in Canada.
4. It is unclear from the record whether the author's appeal to the Federal Court on the issue of the rejection of his first application for refugee status was ever heard.
5. "Psychological Report" of Forensic Psychologist Elizabeth Warren, dated 19 August 1993.
6. "Confidential Psychiatry Report" of Dr. Patrick McGorry MB BS, PhD, MRCP (UK), FRANZCP, dated 4 March 1994. In summary, the mental state examination revealed "a very distressed man", on tranquilisers, describing "disturbed behaviour" and "persecutory ideation" with clearly impaired memory and concentration. His mood was of "anxiety tension and dysphoria". The expert considered the author to be suffering from "a mixed anxiety and depressive state", meeting the criteria for "major depressive disorder" with "severe anxiety symptoms". A delusional disorder could not be ruled out.
7. "Confidential Psychiatry Report" of Dr. Patrick McGorry, dated 27 June 1994.
8. Psychiatric Report by Dr. Douglas R Bell, Senior Registrar Psychiatry, Department of Human Services.
9. Confidential Psychiatric Report, dated 29 January 1997, by Prof. Patrick McGorry, Center for Young People's Mental Health. He found: "Prior to his detention there had been no evidence of a psychiatric illness whatsoever and the stress of the detention centre experience and the uncertainty about his future which was extreme given the duration of his detention had precipitated a severe psychotic illness." "[H]e would not have developed this serious psychiatric disorder had he not been placed in extended and indeterminate detention." "[He] has come in contact with the criminal justice system purely as a result of developing a psychiatric illness

which produced delusional beliefs upon which he acted." In light of appropriate medication, his mental state was much improved.

10. Psychological Report, dated 5 August 1997, by Dr. Elizabeth Warren, Healey and Warren Psychologists. The report noted a willingness to comply with treatment regimes and concluded inter alia that "As the period of detention in [MDIC] increased, this man's mental state changed from one of anxiety, depression, suicidal preoccupation and suspiciousness - to one of a frankly psychotic and delusional nature."

11. Confidential Psychiatric Report, dated 5 August 1997, by Prof. Patrick McGorry, University of Melbourne. While finding the author posed, in the light of treatment, a "minimal and acceptable" level of risk, it reiterated that his trauma and morbidity "was originally produced by his prolonged and at that time indeterminate incarceration ... [which] was the key factor to the triggering and onset of his severe mental illness for which he now suffers. This is particularly so since there appears to be no family history of any mental disorder and no other apparent source of vulnerability to such a disorder". On 17 December 1998, the same expert submitted another report finding inter alia that "his original illness was precipitated by his initial detention following arrival in Australia".

12. The Tribunal found: "The evidence is ... incontrovertible that the stress and anxiety of the detention and uncertainty about his future has precipitated the severe psychotic illness. During the protracted period of his immigration detention he suffered a marked deterioration in his mental health. There was no evidence of any mental illness prior to his detention in immigration custody ... [H]e spent more than two years in immigration detention and was released only, it seems, because of his deteriorating mental health." [C] v. Minister for Immigration and Ethnic Affairs [citation deleted].

13. Consultant Psychiatrist Barrie Kenny stated: "The consensus of those of us who have been involved with this man, is that the period of detention itself may have precipitated this delusional disorder that he has obviously suffered from. (We make that assertion on the basis of the complete absence of any prior symptomatology, the fact that he had functioned well in Iran as an Accountant and that when his delusional material is under control, he functions and presents himself very well indeed)."

14. On this point, the AAT was satisfied "that the reason [the author] no longer has delusional thoughts and is thinking more clearly about the current place of people such as [his victim] in his life has been his treatment with the drug Clorazil" and that "the likelihood of [the author] re-offending and so endangering the community, are so small as to be negligible while he remains on Clorazil"; "The drug Clorazil has been successful".

15. The author had actually become eligible for parole in July 1997, but the Parole Board deferred its decision due to the deportation proceedings set in train by the Minister. The Parole Board had before it a Psychiatric Report, dated 16 March 1998, it had requested from Consultant Psychiatrist Barrie Kenny stating inter alia "The fact that he developed this psychotic state, in detention, without a prior relevant history, strongly suggests that his psychotic state may well have been precipitated by the experience of prolonged detention."

16. On this issue, the Court found: "Given the findings of the AAT concerning what would be likely to happen to the applicant on return to Iran and its finding that a return to a psychotic state would be likely to bring him to the attention of the authorities and further, given that because of his ethnicity and religion he may lose his freedom, I find that the AAT's conclusion that the

[author] does not have the protection of article 33 (1) of the Convention so unreasonable that no reasonable tribunal could so conclude. The AAT outlined circumstances where the [author], if returned to Iran, may, as a result of being ill, bring himself to the attention of the authorities and be incarcerated, at least in part as a result of those authorities discovering that he is an Assyrian Christian. It is absurd for the AAT to contend that the [author's] freedom would not thereby be threatened on account of his race and religion. Of course the trigger for the persecution may be his mental state, but once there exists the likelihood of persecution which is in part on account of a Convention based reason it matters little that the triggering of the persecution was a matter which is extraneous to a Convention based reason". [C] v. Minister for Immigration and Multicultural Affairs [citation deleted].

17. The Court accepted, nonetheless, that the author's "illness developed as a result of his detention pending the determination of his application for a protection visa. That application was ultimately determined in his favour. The illness was a significant factor causing [the author] to commit the crimes which gave rise to his liability to deportation". Minister for Immigration and Multicultural Affairs v. [C] [citation deleted].

18. It is not clear whether this was, or included, a decision on the request for revocation of the deportation order still pending from the Minister's deferral of that question on 15 October 1999.

19. See footnotes 5, 6, 7, 8, 9, 10, 11, 13 and 15, *supra*.

20. This is clarified by his subsequent (final) submissions of 21 September 2001. See paragraph 5.3 (with footnote 57), paragraph 6.3 and paragraphs 6.5 to 6.8.

21. ARJ v. Australia (No. 692/1996) and T. v. Australia (No. 706/1996), coupled with General Comment 20 on article 7.

22. In this connection the author supplies reports, dated 14 December 1994, 1 August 1997, and 19 November 1999, by Dr. Colin Rubinstein, Senior Lecturer in Middle East Politics (Monash University) and member of Victorian Ethnic Affairs Commission, detailing "real and effective discrimination against Christians", "effective intimidation", "the fiercest campaign since 1979 against the small Christian minority", including killings of clerics and arrests of apostates and a "gradual eradication of existing churches under legal pretences". The situation for minorities, including Christians, is "clearly degenerating" and "deteriorating rapidly". Accordingly, the author could expect a "high probability of vindictive retaliation" and "real persecution" in the event of his return.

23. No. 560/1993.

24. This is clarified by his subsequent (final) submissions of 21 September 2001. While the initial complaint appears confined to the initial period of detention, the State party's main submissions also address the second detention from the perspective of article 9 (see especially paragraphs 4.22-4.24 and 4.32-4.35).

25. Vuolanne v. Finland No. 265/1987.

26. *Op. cit.*

27. N.S. v. Canada No. 29/1978.

28. McGoldrick, G. (1991), *The Human Rights Committee: Its role in the development of the International Covenant on Civil and Political Rights*, Clarendon Press, Oxford; Nowak M. (1993), *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, Engel, Kehl. Thus, acts

previously found by the Committee to constitute torture include systematic beatings, electroshocks, submersion in a mixture of water, blood and human waste, burns, and simulated executions or amputations. (Grille Motta v. Uruguay No. 11/1977; Burgos v. Uruguay No. 52/1979; Sendic v. Uruguay No. 63/1979; Angel Estrella v. Uruguay No. 74/1980; Herrera Rubio v. Colombia No. 161/1983; and Lafuente v. Bolivia No. 176/1984.)

29. Violations have been found in the following categories of situations: direct assaults on persons, harsh conditions of detention, imposition of extended solitary confinement and inadequate medical and psychiatric treatment for detainees, with examples being administering severe corporal punishments (amputation, castration, sterilization, blinding and so forth), systematic beatings, electroshocks, burns, extended hanging from hand and/or leg chains, standing for great lengths of time, threats, detaining people bound and blindfolded, subjecting detainees to cold, giving detainees little to eat, detaining people incommunicado, as well as aggravated forms of carrying out a death sentence. See Carballal v. Uruguay No. 33/1978; Massiotti v. Uruguay No. 25/1978; Bequio v. Uruguay No. 88/1981; Cariboni v. Uruguay No. 159/1983; and Portorreal v. Dominican Republic No. 188/1984.

30. Such acts include arbitrary detention practices aimed at humiliating prisoners and making them feel insecure (for example, repeated solitary confinement, submission to cold and persistent relocation to a new cell): Conteris v. Uruguay No. 139/1983, and women prisoners hanging naked from handcuffs: Isoriano de Bouton v. Uruguay No. 37/1978 and Arzuaga Gilbao v. Uruguay No. 147/1983.

31. *Op. cit.*, at 9.2.

32. Graham v. Jamaica No. 461/1991; Kindler v. Canada No. 470/1991; Johnson v. Jamaica No. 588/1994; Chaplin v. Jamaica No. 596/1994.

33. Davidson, G.C. and Neale, J.M. (1994), *Abnormal Psychology* (6th ed.), John Wiley & Sons, Brisbane; Gottesman, I.I., McGuffin, P. and Farmer, A.E. (1987), Clinical genetics as "clues" to the real genetics of schizophrenia, *Schizophrenia Bulletin*, 13, 23-47; Dworking, R.H., Lenzenwenger, M.F. and Moldin, S.O. (1987), Genetics and the phenomenology of schizophrenia. In P.D. Harvey and E.F. Walker (Eds.), *Positive and negative symptoms of psychosis*, Elrbaum, Hillsdale, NJ; Gottesman, I.I. and Shields, J. (1972), *Schizophrenia and genetics: A twin study vantage point*, Academic Press, New York; Rosenthal, D. (1970), *Genetic theory and abnormal behaviour*, McGraw-Hill, New York; and Fischer, M. (1971), Psychosis in the off-spring of schizophrenic monozygotic twins and their normal co-twins, *British Journal of Psychiatry*, 118, 43-52.

34. CCPR General Comment 20; 10/04/92, paragraph 9.

35. ARJ v. Australia No. 692/1996.

36. Kindler v. Canada, *op. cit.*, Cox v. Canada No. 539/1993; CCPR General Comment 20, 10/04/92.

37. *Op. cit.*

38. *Ibid.*

39. Hathaway, J.C. (1991), *The law of refugee status*, Butterworths, Toronto; Goodwin-Gill, G.S. (1996), *The refugee in international law* (2nd ed.), Clarendon Paperbacks, Oxford.

40. Goodwin-Gill, G.S. (1996), *The refugee in international law* (2nd ed.), Clarendon Paperbacks, Oxford.

41. See, *supra*, note 22.

42. E/CN.4/2000/35.

43. The State party cites the 17 September 2000 visit of President Khatami to an Assyrian church, stating that he wished to work towards "resolving differences and working towards all Iranians, Muslims or non-Muslims, to live together hand in hand and to benefit from the joys of a decent honourable life" (IRNA, 17 September 2000), the recent praise of an Iranian Archbishop for Iranian officials for safeguarding religious freedoms for ethnic minorities (IRNA, 30 July 2000), and the fact that in 1998 President Khatami was guest of honour at the Assyrian Universal Alliance annual conference.

44. E/CN.4/2000/35.

45. This is confirmed by the travaux préparatoires for the drafting of article 9, paragraph 1, reveal that the drafters explicitly contemplated detention of non-citizens for immigration control as an exception to the general rule that no person shall be deprived of his or her liberty.

46. In *A v. Australia*, *op cit.*, the length of a period of immigration detention was a factor in assessing the detention as arbitrary, for "detention should not continue beyond the period for which the State can provide appropriate justification".

47. Response of the Australian Government, at paragraph 5, to the Views of the Committee in *A v. Australia*.

48. *Ibid.*

49. Submission by the Australian Government on Merits of *A v. Australia*.

50. The High Court has also determined that the mandatory detentions provisions are reasonable in terms of the domestic constitutional order: *Lim v. Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

51. S.75 (v) of the Constitution, and the writ of habeas corpus. It points to the High Court's consideration of the rationale of detention in coming to the conclusion that analogous mandatory detention provisions were constitutional in *Lim v. Minister for Immigration*, *op.cit.*

52. No. 373/1989.

53. *RT v. France* No. 262/1987, and *Vicente v. Colombia* No. 612/1995.

54. *Ellis v. Jamaica* No. 276/1988.

55. The author cites the rejection by the Executive of two recent reports by HREOC finding aspects of the State party's asylum policy in breach of international standards.

56. *Lim v. Australia*, *op.cit.*

57. See note 17 for references to the original reports. The additional psychiatric report, dated 7 May 2001, by Associate Professor Harry Minas, Centre for International Mental Health, found that "While genetic factors are important in conferring a predisposition to the development of such illness, it is very often the case that such an illness is precipitated by extreme stress. The stress of prolonged detention, drawn out legal proceedings, and uncertainty as to his fate would be sufficient to precipitate such an illness in a person with the necessary predisposition." The author was now considered to have been "clinically well for at least two, possibly three, years".

58. *Supra*, at paragraph 2.6.

59. E/CN.4/2001/39.

60. Reports by Prof. McGorry, dated 17 March 2000, Dr. Kenny, 7 March 2000, and Dr. Kulkarni, 10 March 2000.

61 Associate Professor Harry Minas, Centre for International Health, 7 May 2001 (see footnote 57, *supra*).

62. *Op cit*.

63. In *Maille v. France* (689/1996), the communication was held inadmissible for failure to exhaust administrative remedies.

64. *Op cit*.

65. *Op cit*.

66. The author again cites *Ellis v. Jamaica*, *op.cit*.

67. In *Dougoz v. Greece* (Appln. 40907/98, judgement of 6 March 2001), the European Court of Human Rights held that detention conditions of an asylum-seeker, including the inordinate length of detention, amounted to inhuman and degrading treatment. It also found the detention to be arbitrary, and that there was no effective remedy available by which the lawfulness of detention could be challenged. Similarly, in *Saasi v. Secretary of State (Home Department)* (High Court of the United Kingdom, judgement of 7 September 2001), mandatory detention of asylum-seekers without justification in each individual case was found to be arbitrary.

68. *Lim v. Australia* (1992) 176 CLR 1 (HCA).

69. *A v. Australia*, *op. cit.*, at para. 9.4.