

**Mr. Omar Sharif Baban v. Australia, Communication No. 1014/2001,  
U.N. Doc. CCPR/C/78/D/1014/2001 (2003).**

HUMAN RIGHTS COMMITTEE

Seventy-eighth session

**VIEWS**

**Communication No. 1014/2001**

**Submitted by:** Mr. Omar Sharif Baban (represented by counsel, Mr. Nicholas Poynder)

**Alleged victims:** The author and his son, Bawan Heman Baban

**State party:** Australia

**Date of communication:** 19 December 2000 (initial submission)

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

**Meeting on** 6 August 2003,

**Having concluded** its consideration of communication No. 1014/2001, submitted to the Human Rights Committee by Omar Sharif Baban under the Optional Protocol to the International Covenant on Civil and Political Rights,

**Having taken into account** all written information made available to it by the author of the communication, and the State party,

**Adopts** the following:

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

1.1 The author of the communication is Omar Sharif Baban, born on 3 May 1976 and an Iraqi national of Kurdish ethnicity. He brings the communication on his own behalf and that of his son Bawan Heman Baban, born on 3 November 1997 and also an Iraqi national of Kurdish ethnicity. The author and his son were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia. (1) The author claims that they are victims of violations by Australia of articles 7, 9, paragraph 1, 10, paragraph 1, 19 and 24, paragraph 1, of the Covenant. The author is represented by counsel.

1.2 On 20 September 2001, the Human Rights Committee, acting through its Special Rapporteur on New Communications, requested the State party pursuant to rule 86 of its Rules of Procedure not to expel the author and his son to Iraq, should the High Court reject the author's application scheduled for hearing on 12 October 2001, and whilst the case was before the Committee.

The facts as submitted

2.1 The author contends that, in Iraq, he was an active member of the Patriotic Union of

Kurdistan (PUK), had been threatened by the Kurdistan Democratic Party (KDP), and had been the target of an Iraqi Mukhabarat agent sent to carry out assassinations in Northern Iraq.

2.2 On 15 June 1999, the author and his son arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. On 28 June 1999, they applied for refugee status. On 7 July 1999, the author was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA).

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

2.4 On 24 July 2000, the author, along with other detainees, participated in a hunger strike in a recreation room at Villawood Detention Centre, Sydney. On 26 July 2000, the hunger strikers were allegedly cut off from power and contact with the outside world. Allegedly drugged bottled water was supplied. Guards were alleged to have forcibly deprived the hunger strikers of sleep by making noise. On 27 July 2000, the hunger strikers (and the author's son) were forcibly removed and transferred to another detention centre in Port Hedland, Western Australia. At Port Hedland, the author and his son were detained in an isolation cell without window or toilet. On the fifth day of his detention in isolation (his son was regularly fed from the day after arrival), the author discontinued his hunger strike, and, eight days later, he was removed from the cell. During the period of isolation, the author contends that access to his legal adviser was denied. On 15 August 2000, the author and his son were returned to the Villawood detention centre in Sydney to attend their hearing in the Full Federal Court.

2.5 On 21 September 2000, the Full Court of the Federal Court dismissed the authors' further appeal against the Federal Court's decision. The same day, the authors lodged an application for special leave to appeal in the High Court of Australia.

2.6 In June 2001, the author and his son escaped from Villawood Detention Centre. Their current precise whereabouts are unknown. On 16 July 2001, the Registry of the High Court of Australia listed the author's case for hearing on 12 October 2001. On 15 October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

### The complaint

3.1 The author alleges that his treatment while on hunger strike, his forced removal, the failure to provide his son with food upon arrival at Port Hedland and his incommunicado detention there for 13 days violated article 7. Secondly, the author alleges that his and his son's deportation to Iraq would necessarily and foreseeably expose him to torture or "serious mistreatment" due to his past in that country, and give rise to a violation of article 7 by the State party. (2) He further refers to a variety of reports for the proposition that there is a consistent pattern of gross, flagrant or mass violations of human rights in Iraq. (3)

3.2 The author contends that mandatory detention upon arrival and inability for courts or administrative authorities to order his release is, as found by the Committee A v Australia, (4) a violation of article 9, paragraphs 1 and 4. The author observes that no justification for the prolonged detention has been advanced by the State party.

3.3 The author also alleges that his incommunicado detention for thirteen days and his general treatment in detention amount to a violation of article 10, paragraph 1. He cites, in support, the Committee's prior jurisprudence (5) and General Comment 21 on the rights of detainees, observations of the UN Special Rapporteurs on Torture and States of Emergency, (6) and international minimum standards concerning treatment of detainees. (7)

3.4 The author alleges that his hunger strike was a legitimate expression of his right to protest, and that his treatment at Villawood and forced removal to Port Hedland violated his rights under article 19. The action taken was not justified by any reference to national security or public order, health or morals.

3.5 The author further alleges that his son's detention and treatment is in breach of his right under article 24, paragraph 1, which should be interpreted taking into account the obligations set out in the Convention on the Rights of the Child. No consideration has been given to his best interests and/or to release. According to the author, it is fallacious to argue that his best interests are served by keeping him with his father, as his father's prolonged detention was unjustified and both individuals could have been released pending determination of their asylum claims.

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 26 March 2002, the State party contests the admissibility and the merits of the communication, arguing, as a preliminary issue, that the author's counsel has no standing to act. It argues that due to the long delay between provision of the authority and lodging of the communication, coupled with the abscondment of the author and his son, it is not apparent that the author's counsel has on-going authority to continue with the communication on their behalf.

4.2 As to the author's claim under article 7 concerning expulsion to Iraq, the State party observes that the author's appeal to the High Court concerning his asylum claim stands adjourned until their whereabouts have been determined, and that thus available and effective remedies remain to be exhausted. The State party also submits there is no victim – prior to the author's abscondment, it had taken no steps towards removal, and, as the author and his son have now absconded, the issue of removal is purely hypothetical at the present time. The State party further contends that this claim is inadmissible for lack of substantiation.

4.3 Concerning the claim under articles 7 and 10 concerning mistreatment and conditions of detention, the State party argues that there are a number of civil actions which could be pursued in court, where the allegations made (denied by the State party) would have to be proven on the balance of probabilities. These include an action in negligence against the Commonwealth, for misfeasance in public office, for battery and assault. Additionally, a criminal complaint for unlawful assault could be made to the police. Furthermore, the author could complain to the Commonwealth Ombudsman, who is empowered to make recommendations, and to DIMA concerning treatment in detention. The State party also points out that the author has lodged a complaint with the Human Rights and Equal Opportunity Commission (HREOC), which has not yet been resolved. It also argues that these claims are insufficiently substantiated, as, for example, no witness statements or details of detainees or staff who could provide evidence are supplied in substantiation of the allegation.

4.4 As to the author's claims under article 9, the State party argues that the adjournment of the High Court hearing means that remedies are still available. Moreover, habeas corpus/mandamus proceedings remain available in the High Court to test the lawfulness of detention. The State party also argues that these claims are unsubstantiated, as the author has

in fact accessed its courts, which have the power to determine legality of detention.

4.5 The State party argues that the claim under article 19 is incompatible with the Covenant, as a hunger strike is not expression through a 'media' protected by article 19, paragraph 2, nor was it contemplated by the Covenant's drafters. It is not in the same class as oral, written, print or artistic media, which is the context of the provision. To the State party, this allegation is also insufficiently substantiated, and for the reasons advanced in respect of articles 7 and 10 concerning mistreatment in detention, domestic remedies remain available.

4.6 Concerning the claim under article 24, the State party notes that the author, as parent/guardian, had standing to pursue remedies on behalf of his son. A number of remedies were available to vindicate his son's rights – a HREOC complaint has been lodged, but not yet concluded; a complaint to DIMA about his treatment in detention; a complaint to the Commonwealth Ombudsman; and/or habeas corpus/mandamus action in the High Court of Australia challenging his detention.

4.7 On the merits, the State party denies that any of the claims disclose a violation of the Covenant. As to the claim of mistreatment contrary to articles 7 and 10, the State party observes that a report into the incident found that power to the recreation room at Villawood was turned off at 9am, after threats of self-harm by electrocution. Power remained on elsewhere and detainees were free to leave the room at any time. The State party submits that the cessation of power for a short period (less than a day) was necessary for the detainees' safety and thus not contrary to article 7. The report also states, contrary to what was alleged, that water supply was maintained at all times. The State party denies that the author or anyone else was drugged – the report found no evidence of this or indeed that any bottled water was supplied.

4.8 Concerning the allegation of denial of contact with the outside world, the State party points out that access to the recreation room was suspended in the afternoon of 24 July 2000 for security reasons. On 25 July 2000, further on-site and telephone contact was suspended throughout the centre. These measures were in place for a short period and necessary in the circumstances, while the detainees could leave at any time. This accordingly does not amount to incommunicado detention where a detainee is totally cut off from the outside world. The State party denies that guards engaged in forcible sleep deprivation, with an investigation finding no evidence (such as detainees' or officers' statements) to support such a claim.

4.9 As to handcuffing upon removal from the centre, the State party observes from DIMA's response to HREOC's inquiry that the hunger strikers were detained and removed from the recreation room peacefully and without force or incident. The author was minimally restrained (that is, he had sufficient movement to assist his son) with plastic wrist restraints as a precautionary measure, as he was classified as a high-risk detainee with known behavioural problems. The restraint was used for a short period during transfer and was for the safety of involved detainees and officers. After take-off, the restraints were removed. At no point during the transfer were restraints (apart from seatbelts) used on the author's son or any other minor.

4.10 The State party denies any alleged failure to provide the author's son with food upon arrival at Port Hedland, the State party, observing that the detainees arrived at 1440 hours on 29 July 2000 and were issued with meals at 1840 that evening. Food was delivered to the block where the author was located. He and others refused to leave their rooms, so meals were placed in their room so they could eat if they chose to. Milk was available to adults and children. Lunch and refreshments were also provided to all passengers in-flight when the author and his son were transferred from Sydney to Port Hedland.

4.11 As to the alleged incommunicado detention at Port Hedland, the State party observes that apart from the first night (29 July 2000) when detainees were confined to rooms for individual discussions and security assessments, all detainees were free to move around the block, including the common room and external exercise yard. The author made four phone calls from Port Hedland, and declined an offer to make a further call on 11 August 2000. He made no request to talk to his lawyer or friends. The State party rejects the proposition that he was placed in an isolation cell – his room was in a standard detention block with 12 rooms each on two levels. Each level has central toilet facilities and a common room with a sink, fridge, microwave oven and television. Each room has natural light and can accommodate four persons, and the author and his son were in one such room. All detainees were free to move around the building, including the common room and external exercise yard. It follows from all of the above that the author has not established any acts or omissions of a severity rising to the threshold that would raise issues, in the light of the Committee's jurisprudence, under articles 7 or 10, paragraph 1.

4.12 As to the claim under article 7 concerning the author's removal to Iraq, the State party argues that the obligation of non-refoulement does not extend to all Covenant rights, but is limited to the most fundamental rights relating to the physical and mental integrity of a person. It argues that the author and his son would not be at risk of torture or similar treatment by removal to Iraq, and that no Iraqis have been removed there from Australia to date. As their whereabouts are not known, there is no proposal at this stage to do so, and in the event they are located, a decision will be made at that time. Even if their removal was proposed, the State party rejects that a necessary and foreseeable consequence would be torture or analogous treatment in Iraq. It notes that other countries, for example the Netherlands, have successfully returned persons to northern (Kurdish-controlled) territories in Iraq without risk. The IOM also provides assistance with the voluntary return of detainees to these areas. The RRT, on the facts, did not accept that the author was at any specific risk, either as an alleged PUK member or as an illegal emigrant, and the Committee is invited to give due weight to this body's finding.

4.13 Regarding article 9, paragraph 1, the State party argues that detention of the author and his son was reasonable and necessary in all the circumstances, and was not inappropriate, unjust or unpredictable. The State party observes that the detention was lawful under the Migration Act. As to arbitrariness, the State party argues that mandatory immigration detention is necessary to ensure that non-citizens entering Australia are entitled to do so and to uphold the integrity of its immigration system. Detention ensures that persons do not enter until their claims are properly processed, and provides effective access to such persons in order promptly to investigate and process their claims. Moreover, the State party has no system of general registration or identification which is required for access to the labour market or social or public services – thus it is difficult to monitor illegal immigrants within the community.

4.14 The State party's experience has been that unless detention is strictly controlled, there is a strong likelihood of abscondment. Previous detention of unauthorized arrivals in unfenced migrant hostels with a reporting requirement resulted in abscondment, with co-operation of local ethnic communities proving difficult. Accordingly, it is reasonable to suspect that if people were released into the community pending finalization of applications, there would be a strong incentive to disappear unlawfully into the community. The State party points out that the High Court of Australia has upheld the constitutionality of the immigration detention provisions, finding that they were not punitive, but reasonably capable of being seen as necessary for purposes of deportation or of enabling an entry application to be made and considered. (8) It also notes that provision exists for release in exceptional circumstances.

4.15 According to the State party, the individual circumstances of the case show that the detention was justifiable and appropriate. Upon arrival, the author claimed ignorance of all details concerning his documentation and travel, suggesting a lack of co-operation and a need for further investigation. If allowed to enter, the author and his son would be unlawful immigrants. They were initially detained for processing asylum claims, were (and remain) free to leave Australia at any time, and remained in detention as they themselves chose to pursue review and appeal possibilities. Their detention was proportionate to the ends sought, that is, to allow consideration of the author's claims and appeals, and to ensure the integrity of Australia's right to control entry.

4.16 The State party argues that the facts of the case are distinguishable from the situation in *A v Australia*, (9) which, in any event, the State party contends was wrongly decided. In this case, the length of detention prior to abscondment (21 months) was significantly less than the four years at issue in A's case. The author's application for a protection visa was processed within 15 days, compared to the 77 weeks in A's case. The State party argues that, due to the author's abscondment, there is not currently any detention that can be deemed arbitrary, and the Committee should not condone a breach of Australian law.

4.17 As to the claim under article 9, paragraph 4, the State party observes that the Federal Court had jurisdiction in the present case to review the refusal of a protection visa. As the decision in relation to the protection visa led to the continuing detention of the author and his son, the State party submits that the ability to access the Federal Court (as the author did) satisfied the requirements of article 9, paragraph 4. In addition, habeas corpus/mandamus review is available in the High Court to test legality of detention.

4.18 As to the claim under article 19, the State party submits that no evidence has been provided for how the author's transfer to Port Hedland violated his right to hold opinions and to freedom of expression. At all times, he was able to exercise these rights, and did so, for example by signing a memorandum of protest to the Prime Minister on 14 July 2000. If the Committee were to consider a hunger strike as a 'media' of expression protected by article 19, paragraph 2, (which the State party rejects), the State party submits that this was not restricted by removal, nor was removal designed as a form of punishment. Indeed, the author's wish to continue his hunger strike at Port Hedland was respected.

4.19 The State party observes that the hunger strike and barricading of the Villawood recreation room was a very serious incident, with some detainees preventing others requiring medical assistance from seeing medical staff and preventing some from leaving the recreation room. The incident threatened the health and long-term well-being of several detainees including a diabetic, a pregnant woman and very young children, and removal of those involved to other facilities was therefore a matter of safety. The State party refers to its submissions above that at Port Hedland, the author was able to move about and contact the outside world. It submits that confining the detainees to their rooms for a security assessment overnight did not interfere with the author's rights under article 19.

4.20 If the Committee were to consider that the author's removal interfered with his rights under article 19, paragraph 2, the State party submits that, in any event, the measure was justified under article 19, paragraph 3. The removal was lawful under regulations governing the operation of centres and supervision of detainees. The measure was further required to respect the rights of other detainees (see preceding paragraph), to maintain the good order and security of the facility, and to protect the safety and security of visitors (intelligence reports indicated other detainees were going to join the demonstration using violence).

4.21 As to the claim under article 24, the State party explains that its immigration detention standards take the health, safety and welfare of children into particular consideration. Social,

recreational and educational programmes tailored to each child's needs are supplied. External excursions are organized. Specialist medical care is provided as required. Upon a child's admission, a child's needs in areas such as education programs, religious studies and recreational activities are elaborated in close consultation with parents. Provision for contact with family members abroad is arranged wherever possible, and care is taken to locate children in a facility where one or more adults can take a care and mentoring role. There are arrangements for children to be released into the community on bridging visas, where appropriate care and welfare arrangements can be made. The best interests of the child are individually assessed in determining eligibility for this program. All these services are subject to administrative (such as by the Government's Immigration Detention Advisory Group) and judicial review, as well as parliamentary scrutiny and accountability.

4.22 As to the particular circumstances of the author's son, it was assessed that his best interest was to have him co-located with his father, as he has no other family in Australia. He only remained in detention while his father's status was being determined, and while his father subsequently appealed. The decision to remove the detainees from the recreation room was motivated by concern for the health of children in particular, and, for their safety, children were removed first. Staff cared for the author's son during the transfer to Port Hedland, where he was housed with his father in a standard block near other families. That centre's counselor visited his accommodation area several times, organizing games and activities for children. The State party submits that these measures satisfy its obligations under article 24.

#### Counsel's comments on the State party's submissions

5.1 By letter of 10 February 2003, the author's counsel responded to the State party's submissions, arguing, as to standing, that the State party is challenging his retainer to represent the authors. He refers to common law authority for the proposition that a lawyer has authority to act as the general agent of a client in all matters which may reasonably be expected to arise for decision in a case. The onus of proof lies on the (State) party seeking to establish the absence of a retainer. Under common law, a retainer is evidenced by producing a copy of the signed retainer, which counsel recalls he attached to the original communication.

5.2 Counsel provides a copy of a sworn affidavit, dated 10 February 2003, that (i) after the author's escape from detention, he received a phone call from him, (ii) in November 2001, he had a discussion about the author with a member of the Iraqi community; and (iii) as a result of these discussions, he is satisfied that he has ongoing authority to proceed with the communication.

5.3 As to the admissibility of the claim under article 7 concerning mistreatment, counsel refers to the Committee's jurisprudence that a complaint to HREOC or the Commonwealth Ombudsman are not effective domestic remedies, for the purposes of the Optional Protocol, as remedies indicated by these bodies are not enforceable and have no binding effect. (10) A complaint to DIMIA would be of similar effect. Civil action would not be an effective remedy, as the most that could be achieved would be an award of damages, rather than recognizing a breach of a human right, the purpose of the communication. Criminal sanctions would not have provided an effective remedy to the author, but could only have led to punishment of the perpetrators. In any event, no criminal charges were laid and no criminal investigations conducted.

5.4 As to the claim under article 7 concerning the author's removal to Iraq, counsel contends that if and when the author and his son are taken into custody, an obligation to remove them will arise under the Migration Act, and, as Iraqi citizens, the only place that they could be removed to would be Iraq. Counsel assumes that the current situation for Kurds in Iraq is

well-known to the Committee, and serious violations of their Covenant rights would be a necessary and foreseeable consequence of removal.

5.5 As to article 9, counsel refers to a variety of reports criticizing the State party's mandatory detention policy. (11) Counsel also argues that the Committee's decision in *A v Australia*, (12) followed in *C v Australia*, (13) conclusively established that the regime breaches article 9, paragraphs 1 and 4. The present case is not factually distinguishable from either of these two previous cases, if anything the detention of a minor makes it a more serious situation, and therefore the principles the Committee has already established should be applied.

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 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 As to the State party's rejection of counsel's standing to proceed with his handling of the communication, the Committee is of the view that an authorization duly provided in advance of the communication confers, in the ordinary course, sufficient authority on counsel to see a communication through to its conclusion. In the present case, the Committee does not consider that the length of time before the communication was in fact filed and registered, or subsequent circumstances, can negate the inference that counsel was, and remains, duly authorized.

6.4 As to the author's claim under article 7 concerning possible deportation to Iraq, the Committee notes that after his abscondment, the High Court adjourned his application appealing against the RRT decision until his whereabouts are determined. It follows that, at the present time, there remain domestic remedies available in respect of this claim. This claim is accordingly inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

6.5 Concerning the claims of mistreatment under articles 7 and 10 in relation to the treatment of the author and his son at Villawood, their removal to Port Hedland and the treatment there, the Committee notes the State party's responses to the issues raised, including the results of the investigations undertaken, and that these conclusions have not been disputed by the authors. In the circumstances, accordingly, the Committee is of the view that the authors have failed to substantiate, for purposes of admissibility, their claims in respect of these issues. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

6.6 As to the author's claims under article 9, the Committee notes that the State party's highest court has determined that mandatory detention provisions are constitutional. The Committee observes, with reference to its earlier jurisprudence, that as a result, the only result of habeas corpus proceedings in the High Court or any other court would be to confirm that the mandatory detention provisions applied to the author as an unauthorized arrival. Accordingly, no effective remedies remain available to the author to challenge his detention in terms of article 9, and these claims are accordingly admissible.

6.7 Concerning the author's claims under article 19, the Committee, even assuming for the sake of argument that a hunger strike may be subsumed under the right to freedom and expression protected by that article, considers that in the light of the concerns invoked by the



State party about the health and safety of detainees, including young children, and other persons, steps lawfully taken to remove the hunger strikers from a location giving rise to these concerns may properly be understood to fall within the legitimate restrictions provided for in article 19, paragraph 3. It follows that the author has not substantiated, for the purposes of admissibility, his claim of a violation of his rights under article 19 of the Covenant.

6.8 As to the claim under article 24, the Committee notes the State party's argument that in the absence of other family in Australia, the best interests of the author's infant son were best served by being located together with his father. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of his rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility. Insofar as the claim under article 24 concerns his subjection to the mandatory detention regime, the Committee considers this issue is most appropriately dealt with in the context of article 9, together with his father's admissible claim under that head.

#### Consideration of the merits

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

7.2 As to the claims under article 9, 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. (14) 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. 4.15 et seq.), the Committee observes that the State party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia (para. 4.12). 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. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1. (15) In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.

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

and his son.

9. 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, including compensation.

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

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Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued 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. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

\*\* The text of two individual opinions signed by Committee members Sir Nigel Rodley and Ms. Ruth Wedgwood are appended to the present document.

#### Notes

1. See, however, paragraph 2.6.

2. The author refers to the Committee's decisions in *ARJ v Australia* Case No 692/1996, Views adopted on 11 August 1997, and *T v Australia* Case No 706/1996, Views adopted on 4 November 1997.

3. Situation of Human Rights in Iraq, Report submitted by the Special Rapporteur in accordance with Commission on Human Rights resolution 1998/65 (E/CN.4/1999/37, 26 February 1999, at paras 82-83; Human Rights Watch World Report 2000 available at [www.hrw.org/hrw/wr2k1/mideast/iraq.html#government](http://www.hrw.org/hrw/wr2k1/mideast/iraq.html#government) and [#kurdistan](http://www.hrw.org/hrw/wr2k1/mideast/iraq.html#kurdistan).

4. Case No 560/1993, Views adopted on 3 April 1997.

5. The authors refer to *Arzuada Gilboa v Uruguay* Case No 147/1983, Views adopted on 2 November 1985, where the Committee found a violation of article 10, paragraph 1, following a fifteen day period of incommunicado detention.

6. The authors point out that the Special Rapporteur on Torture has observed that incommunicado detention "should not exceed seven days" (E/CN.41/1986/15), while the Special Rapporteur on States of Emergency has called for the right of "habeas corpus or other prompt or effective remedy" to be treated as non-suspendible (cited in Marks, S. "Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights", (1995) 15 Oxford Journal of Legal Studies 69, at 82-83.

7. The authors observe Third Committee of the General Assembly made express reference to the Standard Minimum Rules for the Treatment of Prisoners (1957) when dealing in 1958 with article 10 in draft. The Committee has considered these Rules relevant to article 10 in both its General Comment 21 and in its consideration of States parties' periodic reports under

the Covenant.

8. *Chu Kheng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.

9. *Op.cit.*

10. *C v Australia* Case No 900/1999, Views adopted on 28 October 2002.

11. Human Rights and Equal Opportunity Commissions "Those who've come across the seas: Detention of unauthorized arrivals" available at [www.hreoc.gov.au/pdf/human\\_rights/asylum\\_seekers/h5\\_2\\_2.pdf](http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf); United States State Department Country Reports on Human Rights Practices for 2000 (February 2001) available at [www.state.gov/g/drl/rls/hrrpt/2000/eap/index.cfm?docid=673](http://www.state.gov/g/drl/rls/hrrpt/2000/eap/index.cfm?docid=673); Human Rights Watch Special Report Refugees, Asylum Seekers and Internally Displaced Persons available at [www.hrw.org/wr2k1/special/refugees.2html](http://www.hrw.org/wr2k1/special/refugees.2html); Amnesty International AnnualReport 2000; and Steel, Z., Moilica.R. "Detention of asylum seekers: assault on health, human rights and social development" *The Lancet* Vol 357, 5 May 2001, at 1436.

12. *Op.cit.*

13. *Op.cit.*

14. *A v Australia and C v Australia*, *op. cit.*

15. *Ibid.*

Individual Opinion of Committee Member Sir Nigel Rodley

(dissenting in part)

For the reasons I gave in my separate opinion in *C. v. Australia* (Case No. 900/1999, Views adopted on 28 October 2002), I concur with the Committee's finding of a violation of article 9, paragraph 1, but not with its finding of a violation of article 9, paragraph 4.

[signed]

Nigel Rodley

[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 Member Ms. Ruth Wedgwood

(dissenting)

I am unable to agree with the Committee's supposition that any legislative standards requiring the detention of any class of unlawful entrants and limiting a court's discretion during the pendency of immigration proceedings must per se violate article 9 of the Covenant. The guarantee of article 9 against arbitrary detention, in the Committee's view, requires not simply that a person must have access to court review, but that the standards for the court's evaluation must be unfettered. The legislature's own factual conclusions about the success or failure of policies of supervised release or problems of non-reporting by particular classes of unlawful entrants do not, apparently, merit weight.

This same logic could be deployed to challenge any mandatory penal sentences in criminal cases, since there too a court is limited to evaluating facts without discretion to alter the consequences that flow from those facts.

While article 9, paragraphs 1 and 4, of the Covenant may well require reference to substantive

standards beyond domestic law -- i.e., an action could be arbitrary under the Covenant even though it complies with domestic law -- nonetheless there is no grounding in the Covenant to dictate that courts must be the repository of all policy judgments and standard-setting in difficult areas such as unlawful immigration. And it is certainly ironic to excuse the complainant under the Optional Protocol from his failure to exhaust domestic appellate remedies, and then to fault the state party for the absence of independent judicial decision. (a) Of course, the complainant's special leave to appeal to the Australian High Court has been held in abeyance since he became a fugitive from the Australian immigration authorities. (b)

In deciding whether his prior detention was arbitrary, one should note that Australia adjudicated the merits of his immigration claim with considerable dispatch. He arrived in Australia without any travel documents or any account of his itinerary, and filed an application for political asylum based on a claimed "well-founded fear of persecution" two weeks later. Australia assessed and denied his claim within another two weeks (i.e., within one month of his arrival in the country). His appeal to the Refugee Review Tribunal was decided within another two months, and four days later, the ministry concerned with immigration matters acted upon (and denied) his application for the exercise of discretion on humanitarian grounds. It was the author's decision to pursue three further avenues of judicial appeal in Federal Court and the Australian High Court, that prolonged the final disposition of his case beyond a period of three months, and even there, the author's appeals to both the Federal Court and the Full Court of the Federal Court were decided within another year. The author decided to seek special leave to appeal to the Australian High Court, and the case was listed for hearing, and adjourned only because the author had absconded.

The author does not argue that Australia's substantive denial of his asylum claim was arbitrary nor does he challenge the minister's denial of humanitarian relief. Rather he argues that his detention as an asylum applicant was arbitrary and unreasonable because in his individual case, conditions of supervised release might have sufficed to prevent his flight, and a court should have had a chance to assess the matter. This claim may seem audacious from someone who has later fled. But in any event, the parliament of Australia could reasonably have concluded that illegal entrants who have received a administrative or lower court denials of their asylum claims are not thereafter likely to report for possible deportation after appeals are exhausted. This competence of the parliament does not preclude some limit, under the Covenant, on the ultimate length of time that unsuccessful asylum-seekers can be detained, where there is no possibility of their return to another country. Nor does it preclude some reasonable time limit on the decision of appeals, where the applicant is detained. But the author of this communication does not present such facts.

We may wish that the world had no borders, and that the conditions which give rise to legitimate asylum claims no longer existed. But especially in the present time we must recognize as well that states have a right to control entry into their own countries, and may use reasonable legislative judgments to that end.

[signed]

Ruth Wedgwood

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Foot-notes

a. We should not presume what the courts of the State party might decide in a particular case. A court's interpretation of parliamentary intent may be informed by Covenant norms, and the

permissible inference that parliament would have wished to comply with the State party's treaty obligations. Accord *Young v. Australia*, Case No. 941/2000, Views adopted on 6 August 2003 (concurring opinion of R. Wedgwood).

b. The author's claim seeking discretionary release might be deemed moot as well, due to his escape from custody.