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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013* **

<i>Submitted by:</i>	F.J. et al. (represented by counsel, Ben Saul)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	Australia
<i>Date of communication:</i>	3 December 2012 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 17 January 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	22 March 2016
<i>Subject matter:</i>	Indefinite detention of persons in migration facilities.
<i>Procedural issues:</i>	Right to liberty; right to protection from inhuman treatment.
<i>Substantive issues:</i>	Exhaustion of domestic remedies; inadmissibility <i>ratione materiae</i> ; lack of substantiation.
<i>Articles of the Covenant:</i>	7, 10, (1); 9, (1), (2) and (4).
<i>Articles of the Optional Protocol:</i>	2; 3; 5, (2) (b).

* Adopted by the Committee at its 116th session (7-31 March 2016).

** The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelic, Duncan Muhumuza Laki, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

1. The authors of the communication are five persons held in Australian immigration facilities. One of the authors, F.J., born in 1978, is an Iranian national of Persian ethnicity. Three of the authors are Sri Lankan nationals of Tamil ethnicity: T. S., born in 1979; C.S., born in 1979; V. N., born in 1978. The remaining author, T.T., born in 1979, is an Afghan national of Hazara ethnicity. They claim violations of their rights under articles 7, 10 (1); and 9 (1), (2) and (4). The authors are represented.

The facts as presented by the authors

2.1 The authors entered the Australian territorial waters by various boats between September 2009 and September 2010, in order to claim protection as refugees in Australia. They were first disembarked at Christmas Island. They did not have valid visas to enter Australia and were placed in immigration detention facilities upon their arrival, under section 189 (3) of Migration Act 1958, according to which Australian authorities must detain a person who is an “unlawful non-citizen” in an “excised offshore place”.¹ At the time of submission of the communication to the Committee Mr. F.J. was held at Melbourne ITA, Mr. C.S. and Mr. T.S. at Port Augusta IRH, Mr. T.T. at Villawood IDC and Mr. V.N. at Christmas Island IDC.

2.2 The authors were prima facie recognised as refugees, by the Department of Immigration and Citizenship (DIAC), for whom return to their countries of origin was unsafe. However, they were subsequently refused visas to remain in the State party, following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). None of the authors were given the reasons for the adverse security assessments made against them.

2.3 The authors are unable to challenge the merits of their security assessment.² In particular, under Section 36 of the Australian Security Intelligence Organisation Act 1979, review by the Administrative Appeals Tribunal is denied to persons who are not citizens or holders of either a valid permanent visa or a special visa. Further, because the authors are offshore entry persons, they are not entitled to seek merits review in the Refugee Review Tribunal. This Tribunal only has power to review a decision refusing to grant protection. Further, ASIO issues adverse security assessments after the offshore determination process has been completed. There is therefore no offshore process in which the merits of the adverse security assessments can be reviewed as part of the asylum determination process.

2.4 The only avenue available to the authors is review before the federal courts for “jurisdictional error” (error of law), which may include the denial of procedural fairness. However, such review is not a merits review of the factual and evidentiary basis of the ASIO decision. Further, in security cases involving ASIO, the federal courts accept that the procedural fairness owed to an affected person can be heavily restricted. Since the grounds for the ASIO’s assessments have not been disclosed, the authors have no way of determining whether there exist any jurisdictional errors.

2.5 As they have been refused a visa, all the authors are kept in detention officially for the purpose of removal under section 198 of the Migration Act. However, they do not wish to return voluntarily to their countries of nationality and the State party has not informed them that any third country has agreed to accept them or that active negotiations for such purpose are either under way or envisaged.

1 □ Section 189 governs the detention of those who enter Australia without authorisation under immigration law.

2 □ The letters received by the authors regarding the outcome of their security assessment indicate that they “do not have a right to seek merits review of the ASIO assessment. This is because under the *Australian Security Intelligence Organisation Act 1979*, only certain categories of persons are able to seek merits review of a security assessment and you do not come within any of those categories”.

2.6 The authors claim that no domestic remedies are available to them, as there is no statutory basis for challenging the substantive necessity of detention. Moreover, where the authors' detention is authorised by domestic law, there is no basis under Australian law to challenge inhumane or undignified treatment inflicted by that valid law, in circumstances where the powers conferred by the law are not exceeded.

The complaint

3.1 The authors claim that their detention violates article 9 (1), (2) and (4), article 7 and article 10 (1).

Article 9 (1)

3.2 The authors consider that their detention is arbitrary or unlawful under article 9 (1), in two separate phases: first, before the decision by Australia to refuse them refugee protection and second, the detention after the refusal decision and pending their removal from Australia.

3.3 The authors argue that the State party did not provide any lawful, individualized justification for detaining the authors upon their arrival, such as to determine whether each of them presented a risk of absconding or lack of cooperation, or posed a prima facie security threat to Australia. All were automatically detained merely because they were "unlawful non-citizens" in an "excised offshore place". The statutory framework applicable to such persons does not permit an individual assessment of the substantive necessity of detention. The authors were never provided with any statement of reasons, and no relevant information or evidence was disclosed to them to substantiate any suspicion that they posed security risks warranting their detention. Moreover, the State party did not provide any avenue for the authors to access such information.

3.4 In the absence of any substantiation by the State party of the need to individually detain each of the authors, it may be inferred that such detention serves other objectives, such as addressing a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.

3.5 As for the post-refusal stage, the mere assertion by the executive that a person poses a security risk that justifies detention cannot satisfy the requirements of article 9.³ The secret basis for the security assessment renders it impossible to evaluate the justification for

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□ The authors provide a sample a template letter received from DIAC informing them about the security assessment outcome. The substantive part of the letter indicates: "ASIO assesses [*name of author*] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979. ASIO therefore recommends that any application for a visa by [*name of author*] be refused". Section 4 of the Act defines "security" as:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- espionage;
- sabotage;
- politically motivated violence;
- promotion of communal violence;
- attacks on Australia's defence system; or
- acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

detention. It also constitutes a denial of due process of law. The authors consider that it can only be assumed that the assessments relate to their suspected conduct prior to their entry to Australia. However, they argue that if the State party possesses good evidence to suspect that any of the Sri Lankan authors has committed a crime in the context of the armed conflict in Sri Lanka, or by association with an organisation such as the Liberation Tigers of Tamil Eelam, such crimes can be prosecuted under Australian law. Furthermore, any prior activities of the authors in Sri Lanka cannot easily establish that the authors present a relevant risk to the Australian community. The provenance of any information about them may also be unreliable, particularly if the Australian authorities have relied upon intelligence provided by the Sri Lankan Government. Likewise any serious crimes committed in the context of involvement with the Taliban (if relevant to the Afghan author) could be prosecuted, as could any terrorism offences, for instance, committed in Iran (if relevant to the Iranian author).

3.6 The State party has not utilised any alternative to detention, or demonstrated that such an alternative would be inadequate or inappropriate in meeting security concerns. Furthermore, Australian law does not provide any legally enforceable mechanism for periodic review of the grounds of detention or a maximum period of detention. Detention simply persists until a person receives a visa or is removed from Australia. In similar cases the Australian High Court has confirmed the validity of indefinite immigration detention.

3.7 Australia has not provided any evidence or substantiation that the authors are such an “extremely serious threat” as to necessitate their removal from Australia to protect the community, or that less invasive means for protecting the community are unavailable. If Australia intends to expel the authors to a third country, it would also need to demonstrate that such a country is safe and that there is no risk of “chain refoulement” to the country of origin.

3.8 The continuing existence of any personal grounds justifying the authors’ detention has not been subject to any review by the State party. No legally enforceable mechanism provides periodic review of the grounds of detention, and the law does not specify any maximum individual period of detention.

3.9 The authors argue that the security assessment in Australia operates as an additional, unilateral ground for excluding refugees which is not authorised under the Convention relating to the Status of Refugees and exceeds what is permitted by it. Refugees can be excluded from protection under the Convention only if they are suspected of committing the serious conduct specified under Article 1F or if they pose risks under article 33 (2), of the Convention, and not merely because they fall within the wide meaning of “security” under Australian law. Their detention cannot be justified under international refugee law once their refugee status has been recognised and neither Article 1F nor Article 33, (2), applies.

Article 9 (2)

3.10 None of the authors were informed by the authorities of the substantive reasons for their detention. At most, they were made aware that they were detained because they were offshore entry persons and unlawful non-citizens liable to detention under the Migration Act. The authors consider that this amounts to a violation of their rights under article 9(2) of the Covenant.

Article 9 (4)

3.11 The detention cannot be challenged under Australian law and no court has jurisdiction to assess its necessity, including by reference to risk factors pertaining to individual authors. The Migration Act requires the mandatory detention of offshore entry

persons and does not provide for individualized assessments of the necessity of detaining particular individuals on legitimate grounds. There is thus no statutory basis for challenging the substantive necessity of detention. The authors consider that the only review processes available to them (Refugee Status Assessment and Independent Merits Review) are limited to a consideration of their asylum claims.

3.12 The Australian courts can only conduct a purely formal review of whether the authors are offshore entry persons, whether they have been granted a visa or not, or whether they are being held pending removal to another country. While the courts can review administrative decisions for the limited legal grounds of jurisdictional error, including denial of procedural fairness, such review does not concern the substantive necessity of detention.

3.13 Since the reasons for the adverse security assessments were not disclosed, it is impossible for the authors to identify any errors of law made by ASIO. Furthermore, the courts have accepted that they lack the expertise to evaluate security information and their review of the evidence in such cases remains largely formal and ineffective. The authors consider that even if they could commence judicial review proceedings, ASIO could claim “public interest immunity” to preclude them from challenging any adverse security evidence in court, as ASIO has done in other Federal Court cases involving adverse security assessments concerning non-citizens.

Articles 7 and 10 (1)

3.14 The authors further argue that the arbitrary character of their detention, its protracted and/or indefinite duration and the difficult conditions in the facilities where they are being held are cumulatively inflicting serious, irreversible psychological harm upon them, contrary to articles 7 and 10(1) of the Covenant. The difficult conditions of detention include inadequate physical and mental health services; exposure to unrest and violence and punitive legal treatment; the risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others. No domestic remedies, including constitutional remedies, are available in this regard.

3.15 Different institutions, including the Australian Human Rights Commission and medical bodies, have expressed serious concerns in connection with the mental health of persons detained in immigration facilities. Thus, in 2010, one of the largest studies, involving over 700 detainees, found a “clear association” between time in detention and rates of mental illness, with especially poor mental health in those detained for more than two years.⁴ Another 2010 study found psychological difficulties with relationships; profound changes to view of self; concentration and memory disturbances; persistent anxiety; and high rates of depression, anxiety and post-traumatic stress disorder.⁵

3.16 The impact of detention on the authors’ mental health is exacerbated by the physical conditions of the detention facilities, and evidenced by a large number of incidents of self-harm. For instance, DIAC reported 1,100 incidents of threatened or actual self-harm in 2010-11.

3.17 The Australian Human Rights Commission has expressed concern, inter alia, at the extremely restrictive environment at Villawood Immigration Detention Centre, with the use of extensive high wire fencing and surveillance. Christmas Island Immigration Detention

4 □ Green and Eagar, ‘The health of people in Australian immigration detention centres’ (2010) 192 *Medical Journal of Australia*. Also Silove, Austin and Steel, ‘No Refuge from Terror: The impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia’ (2007) 44 *Transcultural Psychiatry*. These studies are contained on file.

5 □ Coffey et al., ‘The meaning and mental health consequences of long-term immigration detention for people seeking asylum’ (2010) 70 *Social Science & Medicine*, also contained on file.

Centre was similarly described as prison-like. The Commission has also expressed concern about the possibly excessive use of force in detention facilities and about inadequate mental and physical health care services. The Commission heard complaints about the distressing use of restraints, such as handcuffs, on detainees travelling to medical appointments from Villawood, where restraints were not removed when a detainee needed to use the toilet. Health care centres were found to suffer from insufficient staffing, with impacts on the quality and timeliness of health care. There was a high level of prescription of psychotropic medications at Villawood, including antipsychotics and antidepressants given as sedatives for sleeplessness. Arrangements for preventing or responding to self-harm were also inadequate at Villawood.

3.18 Unrest, protests and violence by detainees is a symptom of the acute frustration and mental distress felt by many detainees. In April 2011, for instance, there were protests by detainees at Villawood with some detainees occupying the roof of a building for many days.

Remedies sought

3.19 With respect to the claims under article 9, the authors request that the State party acknowledge the violations of the Covenant, grant the authors immediate release, apologise to them and provide them with adequate compensation, including for the mental distress and psychological distress that they have suffered. The authors further argue that where the State party believes it is necessary to detain the authors in the future, it should provide an individual assessment of the necessity of detaining each author; consider less invasive alternatives to detention as part of such assessment; reasonably inform the authors of the substantive reasons for their detention beyond a purely formal assertion that they fall within the terms of a particular legal category; provide a procedure for the periodic independent review of the necessity of continuing to detain any author; and provide for the effective judicial review of the necessity of detention.

3.20 Concerning the claims under articles 7 and 10, (1), the authors consider that the State party should acknowledge that the circumstances of the authors' detention are inhumane and degrading and should apologise to the authors for that and provide adequate compensation for their inhumane treatment, including for the mental distress and psychological suffering experienced by them.

3.21 In terms of the guarantees of non-repetition, the authors suggest that the Australian law should be amended to: eliminate mandatory detention; require an individual assessment of the necessity of detention; inform detainees of the substantive reasons for their detention; require periodic independent review of the necessity of detention; require consideration of less invasive alternatives to detention, and provide for substantive and effective judicial review of detention and of adverse security assessments.

State party's observations on admissibility

4.1 On 21 May 2013, the State party contested the admissibility of the communication and argued that all the claims are inadmissible. It stated that the Independent Reviewer of Adverse Security Assessments (Independent Reviewer), established by the Government, has commenced reviewing adverse security assessments issued in relation to asylum seekers owed protection obligations who are in immigration detention, where applications for review were made. The reviewer examines all materials used by ASIO (including any new material referred to ASIO by the affected individual) and reports his/her findings to the Attorney-General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. The reviewer also conducts periodic review of adverse security assessments every 12 months. Both the initial and periodic review mechanisms are available to the authors of the communication, thus providing them with access to an open and accountable decision-making process in relation to security assessments.

4.2 Given that the authors have been found to be refugees, they are owed protection obligations under international law and cannot be returned to their countries of origin. The Australian Government is exploring solutions for them, including resettlement in a third country or safe return to their country of origin when the risk of harm no longer exists or when reliable and effective assurances can be received from the home country. The State party however, considers that it is not appropriate for individuals who have an adverse security assessment to live in the Australian community while such solutions are sought.

Non-exhaustion of domestic remedies

4.3 With reference to articles 7, 9(1) and 4; and 10(1), the state party argues that the authors have not exhausted domestic remedies.

4.4 The State party submits that all authors had the possibility to seek judicial review of their adverse security assessments and immigration detention in the Federal Court or High Court of Australia and, as part of the proceedings for judicial review, to seek information regarding the basis for the security assessment. The authors have not sought such review.

4.5 In *Al-Kateb v. Godwin* (2004), the High Court held by a narrow majority that the indefinite detention of a failed applicant for a protection visa who could not be deported was authorised by the Migration Act. This finding is currently being challenged before the High Court in the case of *Plaintiff S138 v. Director-General of Security v. Ors (S138)*. Plaintiff S138 commenced litigation in the High Court in May 2012 challenging his adverse security assessment and the legality of his detention. The High Court will consider a range of issues, including:

(a) Whether the continued detention of Plaintiff S138 is lawful and supported by the Migration Act. As part of this claim, the Court has been asked to consider the lawfulness of detention for the purpose of removal to a safe third country where there is no immediate prospect of such removal;

(b) Whether the detention of the plaintiff is unconstitutional. The plaintiff argues that it is inherent in the separation of powers in the Constitution that long term detention of a person is only lawful if it is ordered by a Court.

4.6 This case is relevant to this communication because, if Plaintiff S138 is successful in the High Court, it could provide an effective remedy to the alleged violations raised by the authors under articles 7; 9(1) and (4); and 10(1). A finding by the High Court in favour of the plaintiff could potentially result in the release from detention of the authors affected by the judgement.

4.7 In a recent case (*Plaintiff M47/2012 v. Director General of Security and Ors*) the High Court considered the reasons for the adverse security assessment which ASIO had provided to Plaintiff M47. The Court held that the refusal to grant Plaintiff M47 a protection visa was not made according to law because a regulation which prevented the grant of a protection visa to a refugee subject to an adverse security assessment was invalid. Therefore, DIAC would need to reconsider the plaintiff's application for a protection visa. The Court found the Plaintiff's continuing detention valid for the purpose of determining his application for a protection visa.

4.8 The State party disagrees with the authors' contention that judicial review proceedings are not worth pursuing and it maintains that it is possible to challenge before the High Court the lawfulness of detention of persons in the authors' circumstances.

Inadmissibility ratione materiae

4.9 With reference to article 9(1), the State party disputes the admissibility of any claims regarding the Convention relating to the Status of Refugees in the communication. Such

claims are inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

4.10 Claims under article 9(2), are also inadmissible *ratione materiae*, as the authors were not “arrested”. The term “arrest” should be understood as referring to the act of seizing a person in connection with the commission or alleged commission of a criminal offence, and taking that person into custody. The ordinary meaning of the term “arrest” does not extend to the placing of an asylum seeker into administrative detention for the purposes of undertaking health, security and identity checks.

Lack of substantiation

4.11 The State party considers that the authors’ claims under articles 7 and 10(1) should be declared inadmissible for lack of substantiation. It considers that the authors made general submissions about the conditions of detention and did not provide any evidence indicating that the treatment of each or any author in detention has risen to a level of humiliation or debasement beyond the fact of detention itself in their own particular circumstances.

Authors’ comments on the State party’s observations on admissibility

5.1 On 24 September 2013, the authors provided comments on the State party’s observations on admissibility. The authors withdrew their claims in relation to article 9 (2).

5.2 With respect to the appointment of an independent reviewer of adverse security assessments, the authors consider this as an improvement, but that it remains procedurally inadequate. First, the reviewer’s findings are not binding — they are only recommendations to ASIO. Secondly, there remains no minimum content of disclosure in all cases, which limits a refugee’s ability to effectively respond. In a given case, ASIO may still determine that it is not possible to disclose any meaningful reasons to a person and this will also prevent disclosure by the reviewer. Refugees thus may lawfully continue to receive no notice of allegations prior to decisions being made. Further the authors state that the reviewer is not a statutory office holder and has no entrenched legal powers.

5.3 The authors clarify that it was never suggested that Australia referred their names to the Sri Lankan government; rather that Sri Lanka may have provided information on its own initiative to Australia as part of intelligence and law enforcement cooperation between the two countries. In the context of such cooperation, it is reasonable for the authors to infer that Australia may have relied upon some information in making its security decisions and that such information could be highly unreliable or prejudicial against Tamils generally and the LTTE in particular. Further the authors note that the UN Security Council has not listed the LTTE as a terrorist organisation. Australia has unilaterally listed the LTTE under its own terrorist financing regime and such an approach has been criticised by the UN Special Rapporteur as incompatible with international human rights law.⁶

5.4 The authors reject the State party’s contentions regarding exhaustion of domestic remedies. Formal legal rights to judicial review of both detention and adverse security assessments exist, but the review is practically ineffective and/or too narrow in scope to protect Covenant rights. As regards review of detention, the courts may test whether a detainee is an offshore entry person, but they have no power to consider the substantive necessity of detention. Further, the High Court’s binding precedent in the *Al-Kateb* case has established that indefinite immigration detention is lawful under domestic law. As regards adverse security assessments, to commence judicial review proceedings an author must first identify a reviewable ground of legal error in the administrative decision. Precisely because

6 [□] Report to the General Assembly of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 16 August 2006, A/61/267, para. 39.

the authors are not provided with the reasons or evidence sustaining their adverse security assessments, they are unable to identify legal errors. Commencing speculative proceedings is considered an abuse of court process.

5.5 Regarding the *M47* case mentioned by the State party, the authors consider that the decision of the High Court does not apply to their case, in so far as they are unlawful offshore entry persons. The plaintiff in *M47* was a refugee who had lawfully entered Australia and applied for a protection visa. Furthermore, the High Court upheld the lawfulness of his detention pending a new security assessment. The authors emphasise the following points: first the plaintiff in *M47* had been made aware of certain allegations during questioning by ASIO and believed he could identify legal errors. A greater degree of disclosure of information was provided to that refugee than to the authors, some of whom were not interviewed at all by the ASIO and thus were not put on notice of any allegations at all, and some of those who were interviewed were not notified with adequate specificity of the substance of the allegations against them, so as to enable them to effectively respond. Not knowing the essence of the case against them, the authors are unable to determine the basis of ASIO's decisions; thus, they are unable to identify any legal errors and judicial review is not practically or effectively available to them. Second, since 'unlawful' offshore entry persons are ineligible by law to apply for a protection visa, *M47* cannot apply to the authors. Third, in the *M47* case the High Court upheld the lawfulness of the plaintiff's detention pending a new security assessment and a reconsideration of his protection visa application. *M47* thus provides no basis for any of the authors to effectively challenge the lawfulness of their detention in court.

5.6 The authors further argue that there are practical considerations impeding judicial review, namely pursuing review is expensive for refugees who are in detention, lack any income and are not entitled to legal aid. In a few rare cases, detained refugees with adverse security assessments have sought judicial review because they were able to identify possible legal errors. There is no minimum degree of disclosure that must always be given to an affected person in ASIO decisions.

5.7 Regarding the *Plaintiff S138* case, the authors inform the Committee that this case was discontinued with the consent of the parties on 13 June 2013 because the applicants were released from detention. The Court made no decision on the merits. Therefore the challenge to the lawfulness of indefinite detention is no longer before the Court and the earlier decision upholding indefinite detention (*Al-Kateb*) remains the law.

5.8 Concerning the State party's objection to the admissibility of allegations regarding violations of the Convention relating to the Status of Refugees, the authors argue that they are not requesting the Committee to find direct or autonomous breaches of this Convention. Rather, they request that the Committee interpret article 9, paragraph 1, of the Covenant in accordance with refugee law, which, in this particular communication, should be considered as *lex specialis*.

5.9 The authors have submitted sufficient information for purposes of admissibility regarding claims under articles 7 and 10 and can submit more. Where reports examine certain conditions in detention that apply in the same or comparable way to all detainees, it is open to the Committee to reasonably infer that the objectively established conditions of detention must necessarily have an impact on an affected class of detainees at large. If the general standards, facilities and services in detention are inadequate, they will necessarily be inadequate for all those who are detained there. Each author is willing to provide personal statements detailing their experience of detention and impacts upon them. Further psychiatric reports for various authors are also available upon request.

State party's observations on the merits

6.1 On 21 May 2013 the State party argued that the authors' claims are without merit for the following reasons.

Article 9(1)

6.2 The authors are unlawful non-citizens detained under section 189 of the Migration Act. The State party therefore considers that their detention is lawful. The High Court of Australia has found the pertinent provisions of the Migration Act to be constitutionally valid. Asylum seekers are placed in immigration detention if they fall within one of these categories: (a) unauthorized arrivals, for management of health, identity and security risks to the community; (b) unlawful non-citizens who present unacceptable risks to the community; and (c) unlawful non-citizens who repeatedly refuse to comply with their visa conditions.

6.3 The length and conditions of detention, including the appropriateness of both the accommodation and the services provided, are subject to regular review. Detention is not limited by established time frames, but is dependent on individualized assessments of risks to the community. These risk assessments are completed by Government agencies as expeditiously as possible. The determining factor is not the length of the detention but whether the grounds for the detention are justifiable.

6.4 ASIO has individually assessed each author and determined, in application of section 4 of the Australian Security Intelligence Organisation Act, that granting a permanent visa to them would constitute a risk for one or more of the following reasons:

(a) Posing security threats to Australia and Australians, including politically motivated violence, promoting community violence, or threats to the territorial and border integrity of Australia

(b) Providing a safe haven for any organization(s) to which they belong to conduct attacks against their government either in Australia or overseas, and/or

(c) Potentially providing a safe haven for individuals or terrorist organizations to engage in terrorist activities and terrorist financing within Australia.

6.5 Providing people with the classified details underpinning adverse assessments would undermine the security assessment process and compromise the security of Australia. It would also put ASIO sources at risk and erode the capabilities on which ASIO relies to fulfil its responsibilities. The detention of the authors is a proportionate response to the security risk they have been individually found to pose.

6.6 The lawfulness of decisions made under the Australian Security Intelligence Organisation Act is subject to judicial review. In addition, the Inspector-General of Intelligence and Security may inquire into the legality, propriety, effectiveness and appropriateness of ASIO in its work relating to the security assessment of non-citizens. Finally, the authors have access to the annual periodic review of their adverse security assessments by the Independent Reviewer.

Article 9(2)

6.7 If the Committee concludes that the authors were "arrested" for the purposes of article 9(2), the State party submits that this provision has not been breached. As is the usual practice, all authors arriving at Christmas Island were provided with a detailed explanation of the reasons for their detention, as set out in a detention notice written in English. The text of the notice was read out by a government official with the assistance of interpreters from the relevant language groups.

Article 9(4)

6.8 As set out above, the authors have access to judicial review of the legality of their detention, and a court may order their release if the detention does not comply with the law. In *Al-Kateb v. Godwin*, the High Court of Australia held that indefinite administrative immigration detention is within the power of the Parliament when it is for the purposes of assessing claims of non-citizens to remain in Australia and for the purposes of effecting their removal if they have no lawful right to remain, even where their removal is not reasonably foreseeable. The requirement in the Migration Act to remove “unlawful non-citizens” “as soon as reasonably practicable” was held not to imply a time limit on detention. Furthermore, the High Court is currently considering a case [*S138 Case*] which directly challenges the lawfulness of detention.

6.9 The State party rejects the authors’ allegation that the law expressly prohibits proceedings being brought in the courts relating to the status of a person as an offshore entry person, or the lawfulness of the detention of an offshore entry person. Although section 494AA of the Migration Act sets a bar on certain legal proceedings relating to offshore entry persons, the section specifically indicates that the provision does not affect the constitutional jurisdiction of the High Court.

6.10 Judicial review of adverse security assessments provides an important opportunity for courts to consider the release of information by ASIO to affected individuals. As part of the judicial review of adverse security assessments, a party to a proceeding may seek access to any information, subject to relevance and to a successful claim for public interest immunity.

Articles 7 and 10(1)

6.11 Should the Committee believe that the authors have provided enough information to permit a consideration of the merits of their claims under these provisions, the State party submits that their allegations are without merit. First of all, the system of immigration detention and the treatment of the authors in detention do not give rise to severe physical or mental suffering of the degree required to constitute treatment contrary to these provisions. Secondly, the system of mandatory immigration detention of unauthorized arrivals is not arbitrary per se and the individual detention of each of the authors is also not arbitrary as it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. Thirdly, the fact of protracted detention is not in and of itself sufficient to amount to treatment in violation of these articles.

6.12 The State party refutes the allegations that the conditions of detention amount to inhuman or degrading treatment. The authors have been placed in the form of accommodation assessed to be most appropriate to their circumstances. Two authors are in immigration residential housing, one is in immigration transit accommodation and two are in an immigration detention centre. These facilities are all operated by Serco, a private contractor, which is obliged to ensure that people in detention are treated equitably and fairly, with dignity and respect. The actions and behaviour of Serco staff are underpinned by a code of conduct. Serco also has in place policies and procedures which focus on the well-being of people in detention.

6.13 All persons in immigration detention are subject to regular placement reviews in respect of the conditions of detention. Regular reviews have occurred in each of the authors’ cases. Immigration detention is also subject to regular scrutiny from external and independent agencies, such as the Australian Human Rights Commission, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Minister’s Council on Asylum Seekers and Detention.

6.14 The State party recognizes that persons in immigration detention, particularly irregular maritime arrivals who have been subjected to torture and trauma or have pre-existing mental health issues, may be vulnerable to mental health deterioration, self-harming behaviour and suicide. Events such as the refusal of a visa application, uncertainty around one's immigration status and time in detention can place additional stress on these persons. For this reason, these persons have access to health care and mental support services appropriate to their individual circumstances, and qualified health professionals conduct regular health assessments.

6.15 All people entering immigration detention have a mental health screening within 72 hours of their arrival in order to identify signs of mental illness and any previous exposure to torture and trauma. Additionally, they are regularly medically assessed, so emerging health concerns and mental health issues can be identified. Irrespective of these periodic assessments, in situations where concerns are raised about a person's mental health, the individual will be referred for a prompt assessment.

6.16 All immigration detention facilities, including those in which the authors reside, have on-site primary health care services of a standard generally comparable to the health care available to the Australian community and take into account the diverse and potentially complex health care needs of persons detained in such facilities. When required specialist medical treatment is not available on site, detainees are referred to off-site specialists.

6.17 In August 2010 the Government implemented three new mental health policies relating to persons in immigration detention facilities: Mental Health Screening for People in Immigration Detention; Identification and Support of People in Immigration Detention who are Survivors of Torture and Trauma; and the Psychological Support Program for the Prevention of Self-Harm in Immigration Detention.

6.18 A number of the authors have received specific treatment and support in relation to their physical and mental health issues. All of the authors have had physical health issues, such as dental pain or ear infections, which have been treated. Furthermore, all of the authors have been regularly reviewed by the mental health team and have received, inter alia, ongoing counselling with the mental health team and supportive counselling to treat post-traumatic stress disorder. One of the authors has been placed on the Psychological Support Program when concerns of self-harm have been raised and following attempts at self-harm.

6.19 Contrary to the assertions made by the authors, the physical conditions of detention are adequate and subject to continual improvement and individuals are given sufficient opportunity to participate in recreational activities. From time to time, incidents involving unrest or violence have occurred, for which Serco has extensive policies in place. The authors have not indicated any incidents of unrest or violence which they have personally witnessed. Restraints are used by Serco only as a last resort and strict limits apply to the level of force that may be deployed.

6.20 The Committee cannot conclude that the authors have been personally subjected to treatment in breach of articles 7 and 10 (1) in the absence of specific allegations regarding each particular author.

Remedies

6.21 Given that the authors' rights under the Covenant have not been violated, none of the remedies sought by them should be recommended by the Committee. It would not be appropriate for the Committee to recommend that the authors be released, given the risk that they are judged to be a threat for national security, and in the light of the recent appointment of an independent reviewer. If the Committee concludes that Australia has

breached particular rights, the State party requests that remedies other than release be recommended.

Author's comments on the State party's observations on merits

7.1 On 24 September 2013, the authors provided the following comments on the State party's observations on merits.

Article 9(1)

7.2 The authors contest the State party's argument that their detention is lawful. The legality under this provision must be interpreted not only with respect to domestic law, but rather to such law as applies to a given jurisdiction, which comprises both domestic and international law, including the Covenant. Detention on security grounds is unlawful under article 9(1), because the domestic procedures for review are manifestly inadequate. There is, for example, no right to reasons or minimum disclosure of evidence which would enable an affected person to effectively exercise any right to seek review; no independent decision maker of the primary decision, but rather ASIO acting as secret investigator, judge and jury; no binding periodic review by the primary decision maker; no binding merits review; and practically unavailable or ineffective judicial review, in which disclosure of even a summary of the security case against a person cannot be compelled.

7.3 The authors maintain that mandatory detention upon arrival is arbitrary. This is particularly so where the duration of detention between their arrival and receipt of their adverse security assessments was so protracted (between 13 months and two years). The State party has not explained the need for this period to be so long.

7.4 The State party makes no attempt to demonstrate that it considered alternatives to detention in each individual case, or explain why particular alternatives are unsuitable given the degree of risk posed by each person. It has provided no evidence regarding its efforts to resettle the authors elsewhere, and specifically, how many countries have been approached to take each of them, how many countries have refused to accept them, or how regularly such requests are made.

7.5 Regarding the unavailability or ineffectiveness of the review of detention, the authors argue that the Inspector-General of Intelligence and Security enjoys only a power of recommendation and cannot provide an effective remedy in the form of a legally enforceable right to have an adverse security assessment overturned. In addition, the authors note that the Independent Reviewer only enjoys a power of recommendation and has no powers at all to review immigration detention.

Article 9(2)

7.6 The authors withdraw their claims under article 9(2).

Article 9(4)

7.7 If the authors' detention is found by the Committee to be unlawful under article 9(1), for not being necessary or proportionate, article 9(4) will also be violated, as the Australian courts lack power to review the necessity of detention. As regards High Court review, the Court decides only about 100 cases per year, as the highest court of appeal and constitutional review in Australia. It is unrealistic to suggest that judicial review is effectively available to the authors when the case load of the High Court is so small, many thousands of offshore entry persons are detained each year and the jurisdiction of other federal courts is excluded. Furthermore, preparing an application to the High Court requires extensive resources and legal representation which are simply not available to the authors.

7.8 Regarding the judicial review of security assessments, when ASIO believes disclosure of information would prejudice national security, the courts will not overturn those assessments. In various other security cases, the courts have not compelled the disclosure of information assessed by ASIO as prejudicial to security.

Articles 7 and 10(1)

7.9 A number of Australian independent institutions have repeatedly criticized the inadequacy of the conditions in all immigration detention centres and the impact they have on mental health. For instance, since the registration of the communication, the Commonwealth Ombudsman, who has a statutory mandate to periodically review protracted cases of detention, stated that protracted detention contributes to mental harm and is incompatible with the effective treatment of mental illness. He has also criticized the inadequacy of mental health services in detention. The continuing deterioration of the mental health of detainees is evidence that the health measures taken by Australia are insufficient to ensure the detainees' safety where protracted detention itself is a medically untreatable cause of harm.

7.10 The authors provided a copy of a letter from the Director of the Centre for Developmental Psychiatry and Psychology dated 12 August 2012, which indicates that the treatment provided in the detention centres is limited and will not be able to reverse the detainees' condition. Detention centres are not psychiatric facilities and are not designed or staffed to manage severe mental illness and disturbance. Appropriate care can be provided only in the community mental health system.

7.11 The following facts affect the determination of whether the authors' detention is inhumane or degrading: (a) the authors are refugees entitled to special protection, where detention should be a last resort and for the shortest possible time; (b) most of the authors were traumatized by the experience of fleeing from or immediately after the conflict in northern Sri Lanka in 2009; (c) some of the authors have been diagnosed with mental illnesses and cannot be effectively treated so long as they remain in detention.

7.12 If the Committee is unable to find violations of article 7 because of insufficient evidence, it is still open to the Committee to find a violation of article 10(1), because the authors, as a group, have experienced ill-treatment in their circumstances of indefinite detention under adverse physical and health conditions.

Remedies

7.13 The authors disagree with the State party's position in this respect and reiterate their initial requests.

Additional submissions by the parties

8.1 On 13 July 2015, the State party submitted that Mr. V. N. and Mr. C.S., had been released from immigration detention, on 22 December 2014 and 1 July 2015, following a qualified assessment and non-prejudicial assessment.⁷

7 □ The State party provided additional information on the following terms: (a) qualified security assessment is an assessment in which ASIO communicates information relevant to security that is or could be prejudicial to the interests of the individual, but does not make a prejudicial recommendation in relation to taking 'prescribed administrative action; (b) adverse security assessment is an assessment that contains (i) any opinion or advice, or any qualification of any opinion or advice, or any information, that is or could be prejudicial to the interests of the person; and (ii) a recommendation that prescribed administrative action be taken or not be taken in respect of the person, being a recommendation the implementation of which would be prejudicial to the interests of the person; and (c) a non-prejudicial security assessment is furnished when ASIO has no security related concerns.

8.2 On 3 November 2015, the State party submitted that Mr. F.J. and Mr. T.S., had been released from immigration detention on 2 August 2015 and 17 September 2015 respectively.

8.3 On 10 February 2016, the State party submitted that Mr T.T., had been released from immigration detention on 1 December 2015.

8.4 The authors maintain their previous legal submission. As they have been released from detention, they now no longer claim this remedy but maintain their requests in all other respects, including compensation for the period for which they were detained.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies have not been exhausted, as the authors did not seek judicial review of the decision regarding their detention and the basis for their security assessment. The State party adds in this respect that the High Court precedent in *Al-Kateb v. Godwin*, stating that indefinite detention of an applicant who could not be deported was authorized by the Migration Act, is currently being challenged before the High Court by an applicant who is in the same situation as the authors in the present communication and that a decision is still pending. The authors submit that this case has been discontinued by consent of the parties and that accordingly *Al-Kateb* remains the law. The Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors' claims regarding their detention. The possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention does not suffice to indicate the present availability of an effective remedy. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention. Moreover, the Committee notes that in the High Court's decision of 5 October 2012 in the *M47* case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted and that the communication is admissible with reference to article 5, (2) (b), of the Optional Protocol.

9.4 Regarding the authors, the Committee notes the State party's information dated 13 July 2015, November 2015 and 10 February 2016 that they have recently been released from detention (paras. 8.1 and 8.3 above). Hence, the Committee's above conclusion applies only in connection with the period of time prior to their release.

9.5 The Committee further notes that the authors have withdrawn their claims under article 9(2), and therefore will not examine them.

9.6 Regarding the claims under articles 7 and 10 (1) of the Covenant, the Committee considers that they have been sufficiently substantiated for purposes of admissibility and declares them admissible.

9.7 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under articles 7, 9 (1) and (4) and 10 (1).

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided for under article 5 (1), of the Optional Protocol.

Claims under article 9 (1)

10.2 The authors claim that their mandatory detention upon arrival and its continuous and indefinite character for undisclosed security reasons was unlawful and arbitrary, thus constituting a violation of article 9 (1) of the Covenant. They claim that their detention was disproportionate to the security risk that they were said to pose and that domestic procedures for its review were manifestly inadequate. The State party argues that the authors were unlawful non-citizens who were being detained in application of the Migration Act and the Australian Security Intelligence Organisation Act, that their detention was therefore lawful and constitutionally valid, as previously declared by the High Court, and that it was also a proportionate response to the security risk they had been found to pose.

10.3 The Committee recalls that a detention may be authorized by domestic law and nonetheless be arbitrary.⁸ The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.⁹ Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in light of the circumstances and reassessed as it extends in time.¹⁰ Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion. The inability of a State party to carry out the expulsion of an individual does not justify indefinite detention.¹¹

10.4 The Committee observes that the authors were kept in immigration detention from 2009 or 2010 to 2015, first under mandatory detention upon arrival and then as a result of adverse security assessments. Whatever justification there may have been for an initial detention, such as for purposes of ascertaining identity and other issues, the State party has

8 □ General Comment No. 35 – Article 9, para 12.

9 □ See communications No. 1134/2002, Gorji-Dinka v. Cameroon, Views adopted on 17 March 2005, para. 5.1; and No.1875/2009 M.G.C v. Australia. Views adopted on 26 March 2015, para 11.5. See also General Comment No. 35 – Article 9, para 12.

10 □ See communications No. 560/1993, A. v. Australia. Views adopted on 3 April 1997, paras. 9.3-9.4; and No. 1557/2007, Nystrom v. Australia, Views adopted on 18 July 2011, paras. 7.2-7.3. See also General Comment No. 35 – Article 9, para 18.

11 □ See communication No. 2136/2012, M.M.M. v. Australia. Views adopted on 25 July 2013, para 10.3. See also General Comment No. 35 – Article 9, para 18.

not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention was justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the authors were said to represent. Furthermore, the authors were kept in detention in circumstances where they were not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They were also deprived of legal safeguards allowing them to effectively challenge the grounds for their indefinite detention. For all these reasons, the Committee concludes that the detention of the authors was arbitrary and contrary to article 9 (1) of the Covenant.

Claims under article 9 (4)

10.5 Regarding the authors' claim that their detention could not be challenged under Australian law and that no court had jurisdiction to assess the substantive necessity of their detention, the Committee notes the State party's argument that the authors could seek judicial review before the High Court of the legality of their detention and the adverse security assessment. In view of the High Court's 2004 precedent in *Al-Kateb v. Godwin* declaring the lawfulness of indefinite immigration detention, and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar more recent situations, the Committee is not convinced that it is open to the Court to review the justification of the authors' detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision of 5 October 2012 in the *M47* case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9(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(1).¹² Accordingly, the Committee considers that the facts in the present case reveal a violation of article 9(4).

Claims under articles 7 and 10(1)

10.6 The Committee takes note of the authors' claims under articles 7 and 10 (1) and the information submitted by the State party in this regard, including on the health care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention, on grounds that the person cannot even be apprised of, can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that the combination of the arbitrary character and indefinite nature of their protracted detention, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention cumulatively inflicted serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding the Committee will not examine the same claims under article 10(1) of the Covenant.

11. The Human Rights Committee, acting under article 5(4), of the Optional Protocol, is of the view that the State party has violated the authors' rights under articles 7 and 9 (1) and (4) of the Covenant.

¹² □ Communications No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.4; Nos. 1255 et al., *Shams et al. v. Australia*, Views adopted on 20 July 2007, para. 7.3.

12. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, provide the authors with rehabilitation and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should revise its migration legislation to ensure its conformity with the requirements of articles 7 and 9 (1) and (4) of the Covenant.

13. Bearing in mind that, by becoming a 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in the State party.
